Citation: *D. T. v. Minister of Employment and Social Development*, 2015 SSTAD 1134

Appeal No. AD-15-425

BETWEEN:

D. T.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Summary Dismissal

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: September 25, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision of the General Division dated May 21, 2015, whereby it summarily dismissed her application for greater retroactivity of an Old Age Security ("OAS") pension to January 1, 2001, the month in which she turned 65. The General Division summarily dismissed her appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal on July 3, 2015 (the "Notice of Appeal"). No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* ("DESDA"), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The issues before me are as follows:

1. What is the applicable standard of review when reviewing decisions of the General Division?

2. Did the General Division err in summarily dismissing the Appellant's claim for greater retroactivity of an OAS pension?

3. Did the General Division err in determining the maximum retroactivity of the OAS pension?

FACTUAL OVERVIEW

[4] The Appellant applied for an OAS pension on January 11, 2012. The Respondent allowed the application initially and upon reconsideration, with payments to commence effective February 2011. The Appellant appealed the reconsideration decision to the Office of

the Commissioner of Review Tribunals, seeking greater retroactivity of the OAS pension to January 1, 2001. The Appellant submitted that she is "rightfully entitled to receive payment from January 1, 2001, the year [she] turned 65 – which payments should include the two years prior to [her] turning 18 years of age". From age 16, the Appellant had provincial and federal taxes deducted from her employment earnings. The Appellant also advised that she had not been informed and did not learn that she was eligible for OAS until February 2012 (see Document GT4).

[5] Under section 257 of the *Jobs, Growth and Long-term Prosperity Act*, any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the OCRT transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal.

[6] On March 30, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> *1) The maximum retroactivity of Old Age Security (OAS) pension payments is 11 months before the application for the pension is received [S.8 OAS Act]. The Appellant's application was received January 11, 2012. The application was approved effective February 2011, being the maximum retroactivity of OAS pension payments permitted by the OAS Act.*
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> *2) The Tribunal does not have equitable jurisdiction allowing it to ignore the legislative provision contained in S.8 and use the principle of fairness to grant retroactive benefits in excess of the legislative limit.*

[7] The General Division invited the Appellant to provide detailed written submissions by no later than May 13, 2015, explaining why her appeal had a reasonable chance of success.

[8] On May 21, 2015, the General Division rendered its decision. The General Division relied upon the following provisions, in coming to its decision:

i. Subsection 53(1) of the *Department of Employment and Social* Development *Act*, which states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success;

ii. Section 22 of the *Social Security Tribunal Regulations*, which states that before summarily dismissing an appeal, the General Division must give notice in writing to the appellant and allow the appellant a reasonable amount of time to make submissions;

iii. Subsection 8(2) of the *Old Age Security Act* which sets out when the pension commences; and

iv. Paragraph 5(2)(a) of the *Old Age Security Regulations*, which sets out when the Minister's approval of the application is effective.

[9] The General Division found that the *Old Age Security Act* limits the maximum retroactivity of OAS pension payments to eleven months prior to receipt of an application for an OAS pension, and that in this case, the Appellant was receiving the maximum retroactivity permitted by the *Old Age Security Act* and the *Regulations* thereto.

[10] On July 3, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

SUBMISSIONS

[11] In the Notice of Appeal filed on July 3, 2015, the Appellant submitted that she is entitled to "full benefits dating from January 1, 2001, the year [she] turned 65 and [that] these benefits should include the two years prior to [her] turning 18, when [she] was paying [her] fair share into the system". The Appellant also noted that her health has severely deteriorated and that she has several health problems. The Appellant requested that the General Division reconsider its decision and that the new decision would consider her present circumstances. The Appellant did not cite any legal authorities in support of her submissions.

[12] The Respondent filed written submissions on August 17, 2015. The Respondent submitted that the General Division correctly stated and applied the test as to when it must summarily dismiss an appeal. The Respondent further submitted that the General Division also

correctly stated the law as it relates to the retroactivity of OAS pension payments and reasonably applied it to the facts. The Respondent further submitted that the General Division does not have any equitable jurisdiction to grant retroactive OAS pension payments beyond that permitted by statute. As there was only one possible conclusion for the General Division to draw, the Respondent submitted that the appeal was therefore "bereft of any chance of success" and was properly summarily dismissed.

ISSUE 1: STANDARD OF REVIEW

[13] The Appellant did not address the issue of the standard of review.

[14] The Respondent provided submissions on this issue. The Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. The Respondent submits that for questions of law, the Appeal Division should not show deference to the General Division's decision and should apply a correctness standard.

[15] The Respondent submits that the main issue in this appeal, whether the appeal has a reasonable chance of success, involves a question of mixed fact and law. The Respondent submits that the Appeal Division should review the General Division's decision on a reasonableness standard, but however, it should show no deference to the General Division's statement of the test for summary dismissal and to the General Division's statement of the law with respect to applying section 8 of the *Old Age Security Act.*

[16] I concur with these submissions. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law generally are determined on the correctness standard, while questions of fact and of mixed fact and law are determined on a reasonableness standard. And, when applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome.

[17] The applicable standard of review will depend upon the nature of the alleged errors involved.

[18] Subsection 58(1) of the DESDA sets out the grounds of appeal as follows:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[19] From what I can determine, the Appellant does not dispute any of the factual findings made by the General Division. Rather, she alleges that the General Division erred in law in its interpretation of the *Old Age Security Act*, as to what her entitlements are under the *Act.* As such, I find that a correctness standard applies where the General Division is alleged to have erred in law.

ISSUE 2 – DID THE GENERAL DIVISION ERR IN CHOOSING TO SUMMARILY DISMISS THE APPELLANT'S CLAIM TO GREATER RETROACTIVITY?

[20] Although the Appellant did not question the appropriateness of the summary dismissal procedure, I will address that issue before I assess the decision of the General Division.

[21] The Respondent submits that the first task for the General Division was to identify the law with respect to summary dismissals under section 53 of the DESDA, which it did at paragraph 4 of its decision. The Respondent submits that the decision of the General Division to summarily dismiss the appeal contains no reviewable error to permit the intervention of the Appeal Division and that it is reasonable.

[22] Subsection 53(1) of the DESDA requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. If the General Division either failed to identify the test or misstated the test altogether, this would qualify as an error of law which, under the correctness standard, would require me to conduct my own analysis and

substitute my own view as to the correct outcome: *Dunsmuir* and *Housen v. Nikolaisen*, [2002] S.C.R. 235, 2002 SCC 33 (CanLII) at para. 8.

[23] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 4 and 14 of its decision.

[24] It is insufficient to simply recite the test for a summary dismissal set out in subsection 53(1) of the DESDA, without properly applying it. Having correctly identified the test, the second step required the General Division to apply the law to the facts. If the correct law is applied, the decision to summarily dismiss must be reasonable. This requires an assessment on a reasonableness standard, as it involves a question of mixed fact and law.

[25] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. In *A.P. v. Minister of Employment and Social Development and P.P.*, (August 12, 2015), SSTAD-15-297 (currently unreported), I used the language of "utterly hopeless" and "weak" case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear", then the matter would not be appropriate for a summary dismissal. I determined that a weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it.

[26] The General Division understood this distinction and recognized when a summary dismissal is appropriate. The General Division found that there were no options under the *Old Age Security Act* and the *Regulations* thereto, in determining the maximum retroactivity of OAS pension payments. The General Division also found that it could not use the principles of equity or consider extenuating circumstances to grant more retroactivity than is prescribed by statute.

[27] The General Division considered whether, on the facts before it, the appeal met the high threshold set out under subsection 53(1) of the DESDA. The General Division was unable to find an adequate or factual foundation to support the appeal. As the General Division was

satisfied that the appeal was without any merit, it rightly concluded that the appeal had no reasonable chance of success, and properly summarily dismissed it on that basis.

ISSUE 3: DID THE GENERAL DIVISION ERR IN DETERMINING THE MAXIMUM RETROACTIVITY OF THE OAS PENSION?

[28] The Appellant submits that the General Division erred, as she is entitled to receive full benefits from January 1, 2001, and that the OAS pension should include or give consideration to the fact that she had had taxes deducted from her employment earnings from the time she was 16 years of age. I understand this to mean that she is seeking greater retroactivity, rather than a full as opposed to partial OAS pension. Either way, the Appellant did not cite any legal authorities to support her submissions.

[29] The Respondent submits that the General Division correctly stated the law with respect to retroactivity of OAS pension payments. The Respondent refers to section 8 of the *Old Age Security Act* and to subsection 5(1) and paragraph 5(2)(a) of the *Old Age Security Regulations.*

[30] Section 8 of the *Old Age Security Act* reads:

> Payment of Pension
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> 8.(1) Payment of pension to any person shall commence in the first month after the application therefor has been approved, but where an application is approved after the last day of the month in which it was received, the approval may be effective as of such earlier date, not prior to the day on which the application was received, as may be prescribed by regulation.
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> 8.(2) Notwithstanding subsection (1), where a person who has applied to receive a pension attained the age of sixty-five years before the day on which the application was received, the approval of the application may be effective as of such earlier day, not before the later of
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> (a) a day one year before the day on which the application was received, as may be prescribed by regulation.

[31] Subsection 5.(1) and paragraph 5(2)(a) of the *Old Age Security Regulations* reads:

> Approval of an Application for a Pension
>
> 5.(1) Subject to subsection (2), where the Minister

(a) is satisfied that an applicant is qualified for a pension in accordance with sections 3 to 5 of the Act, and

(b) approves the application after the last day of the month in which it was received,

the Minister's approval shall be effective on the latest of

(c) the day on which the application was received,

(d) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act, and

(e) the date specified in writing by the applicant.

5.(2) Where the Minister is satisfied that an applicant mentioned in subsection (1) attained the age of 65 years before the day on which the application was received, the Minister's approval of the application shall be effective as of the latest of

(a) the day that is one year before the day on which the application was received,

(b) the day on which the applicant attained the age of 65 years;

(c) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act; and

(d) the month immediately before the date specified in writing by the applicant.

[32] The *Old Age Security Act* and the *Regulations* thereto are very specific as to the length of retroactivity of payment of an OAS pension. When an applicant has attained the age of 65 before the day in which the application is received, the approval of the application is effective as of the latest of "the day that is one year before the day on which the application was received". And, in the case of an applicant who attained the age of 65, approval of the application can be effective "as of such earlier day, not before the later of a day one year before the day on which the application was received..." Payment of a pension to any person is to start in the first month after the application has been approved.

[33] The General Division referred to and applied these sections in determining the maximum retroactivity to which the Appellant was entitled under the statute. The General Division properly set this out in its analysis and applied the law to the facts.

[34] Hence, for an application for OAS pension which was received in January 2012, the approval date cannot be earlier than January 2011, a year before "the day that is one year before the day on which the application was received". And, payments could not commence earlier than February 2011, the "month after the application … has been approved".

[35] I am not persuaded that the General Division erred in its interpretation of the *Old Age Security Act* or the *Regulations* thereto. The General Division identified the applicable provisions of the *Old Age Security Act* and the *Regulations* thereto and appropriately applied them to the facts, which were not in dispute between the parties. There is no evidence before me that the General Division failed to follow the *Old Age Security Act* or the *Regulations* thereto, or that it erred in its interpretation of the applicable statute.

[36] Unlike the Canada Pension Plan, which is a contributory plan and the amount of benefits relates to the amount of contributions to the Plan, Old Age Security is a universal plan and benefits are not dependent on contributions or whether any taxes have been paid. It was irrelevant as to whether the Appellant had commenced working at age 14 and had deductions for provincial and federal taxes on employment income after age 16, or that she did not learn of the existence of the Old Age Security pension until 2012. An appellant's health problems are also irrelevant in determining the maximum retroactivity to which one is entitled under the *Old Age Security Act.* The *Old Age Security Act* does not provide for these considerations.

[37] The General Division also properly recognized that it does not have any equitable jurisdiction to grant the relief sought by the Appellant. It was bound to follow the *Old Age Security Act* and the *Regulations* thereto, and was limited to how much retroactivity it could grant.

CONCLUSION

[38] Given the considerations above, the Appeal is dismissed.

Janet Lew
Member, Appeal Division