



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *V. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 367

Tribunal File Number: AD-16-605

BETWEEN:

V. F.

Applicant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Hazelyn Ross

Date of Decision: September 16, 2016

REASONS AND DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] This matter arises out of the enactment in December 2010 of the *Eliminating Entitlements for Prisoners Act*, S.C 2010, c. 22, (the EEPA Act). The Applicant is incarcerated in a Federal penitentiary, where he is currently serving a sentence of more than two years. Sometime after the EEPA Act was passed the Applicant was informed that pursuant to that Act and subsection 5(3) of the *Old Age Security Act* (OAS Act), payment of his OAS pension and Guaranteed Income Supplement would be suspended.

[3] By a decision dated January 31, 2016, the General Division of the Tribunal allowed the Applicant's appeal of a decision by the Minister to refuse to extend the time for him to request a reconsideration of its decision to suspend payment of his OAS pension and Guaranteed Income Supplement.

[4] Notwithstanding that the General Division allowed his appeal; the Applicant now applies for leave to appeal, (the Application), from the General Division decision.

GROUNDS OF THE APPLICATION

[5] The Applicant submitted that the General Division erred in law and refused to exercise its jurisdiction in respect of his appeal. He identified three areas where, he submitted, the General Division erred, namely by:-

1. confining its determination to one issue only, namely, whether the Minister had "made the correct decision" with regard to his delay in filing an objection to the cessation of his OAS pension and GIS supplement;

2. failing to adjudicate whether he had an acquired right to receive the OAS pension and GIS supplement and whether the doctrine of acquired rights should prevail over the new provisions in the *OAS Act*; and
3. failing to adjudicate whether the new provisions of the OAS Act breach paragraph 11(b) of the *Canadian Charter of Rights and Freedoms* (Charter).

ISSUE

[6] The submissions of the Applicant raise squarely the question of the scope of the General Division's jurisdiction regarding decisions of the Minister. Under section 54 of the *Department of Employment and Social Development Act*, (DESD Act), the General Division is empowered to "dismiss, confirm, rescind or vary a decision of the Minister or the Commission, in whole or in part or to give the decision that the Minister or the Commission should have given." It also raises the question of whether it is necessary for the General Division to address every issue raised by an appellant once it has decided the appeal in that appellant's favour.

[7] The Federal Court of Appeal has discussed the powers and jurisdiction of the predecessor to the Tribunal, the Office of the Commissioner of Review Tribunals: *Attorney General v. Vinet- Proulx*, 2007 FC 99 (Can LII). In *Canada (Minister of Human Resources Development) v. Dublin Estate*, 2006 FCA 152, the Federal Court of Appeal was of the view that the Review Tribunal did not have jurisdiction to order the Minister to take an action that was not included in the minister's powers set out in section 27.1(2) of the OAS Act. Under this section, the Minister could either confirm or vary its initial decision. The Minister is also empowered to approve payment of a benefit, or to determine that a benefit was or was not payable. The Minister, however, was not empowered to make *ex gratia* payments as had been ordered in *Dublin Estate*.

[8] Section 27.1(2) provides as follows:-

27.1 (1) A person who is dissatisfied with a decision or determination made under this Act that no benefit may be paid to that person, or respecting the amount of any benefit that may be paid to that person, may, within ninety days after the day on which the person is notified in the prescribed manner of the decision or determination, or within such longer period as the Minister may either before or after the expiration of those ninety days

allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

(2) The Minister shall, without delay after receiving a request referred to in subsection (1), reconsider the decision or determination, as the case may be, and may confirm or vary it and may approve payment of a benefit, determine the amount of a benefit or determine that no benefit is payable and shall without delay notify the person who made the request in writing of the Minister's decision and of the reasons for the decision.

[9] Appeal rights in relation to a reconsideration decision are governed by section 28 of the OAS Act, which fixes the Tribunal in the shoes of the former Review Tribunal that had been established under subsection 82(1) of the *Canada Pension Plan*. Prior to April 2013, the former s. 28 of the OAS ACT was similar to the former s. 82(1) of the CPP. These provisions did not give the former Review Tribunal jurisdiction over a decision refusing to extend the time within which to request reconsideration.

[10] The current section 28 of the OAS Act is similar to the current section 82 of the CPP. In both cases, these provisions provides jurisdiction to the Tribunal over a decision refusing to extend the time within which to request reconsideration.

28. (1) A person who makes a request under subsection 27.1(1) and who is dissatisfied with the decision of the Minister in respect of the request, or, subject to the regulations, any person on their behalf, may appeal the decision to then Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, (DESD Act), (1997, c. 40, s. 101; 2012, c. 19, s. 236(1)(g)(iv).)

[11] The Applicant takes issue with the manner and extent to which the General Division reviewed the Ministerial decision that refused to extend the time for him to file a request for reconsideration of its earlier decision.

Did the General Division limit its inquiry to whether the Minister erred in its decision refusing to extend time? And was this limitation an error? Is it counter-productive for the Applicant to assert these claims?

[12] In its decision, the General Division found that the decision whether or not to extend the time for filing a late reconsideration request is discretionary. Relying on *Canada (Attorney General) v. Uppal*, 2008 FCA 388, the General Division noted that the Respondent had a duty to exercise its discretion “judicially and judiciously”. Ultimately, it found that the Respondent had

not done so in the Applicant's case. It returned the matter to the Respondent for redetermination.

[13] The Applicant argues that the General Division decision was incomplete. He argues that it should also have pronounced on whether he had an acquired right to receive the OAS pension and GIS supplement and whether the doctrine of acquired rights should prevail over the new provisions in the OAS Act.

[14] The Appeal Division finds that the jurisdiction of the General Division was limited by subsection 28(1) OAS Act. If the Minister refuses to extend the time for filing a late reconsideration request, the General Division has jurisdiction over an appeal of such decision. If the Minister issues a reconsideration decision, the General Division has jurisdiction over an appeal of such decision. However, in situations where the Minister refuses to extend the time within which a reconsideration decision may be requested and the General Division allows the appeal of such decision, the General Division cannot also consider the substantive issue (which in this case is whether he had an acquired right to receive the OAS pension and GIS supplement and whether the doctrine of acquired rights should prevail over the new provisions in the OAS Act).

[15] Before the General Division can consider such substantive issues, the Minister must: 1) extend the time within which a reconsideration decision may be requested and 2) issue a reconsideration decision. Should the Minister issue a reconsideration decision that confirms the initial decision, the Applicant will then be able to appeal that decision to the General Division. The General Division therefore correctly noted its role, which in the circumstances of the Applicant's case, was to decide whether the Respondent had exercised its discretion properly, that is judicially and judiciously: *Canada v. McLean*, [2001] F.C.J. No. 176 (FCA); *Canada v. Rumbolt*, [2000] F.C.J. No. 1968 (FCA).¹

[16] The Appeal Division is not persuaded that the General Division erred in law by not considering the questions raised by the Applicant, as it is not persuaded that it was within the

¹ It is trite law that an Umpire cannot interfere with the quantum of a penalty unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it (*Canada v. McLean*, [2001] F.C.J. No. 176 (FCA); *Canada v. Rumbolt*, [2000] F.C.J. No. 1968(FCA)).

jurisdiction of the General Division to do so; this being the very questions that the Minister must determine on reconsideration, provided that it grants the extension of time.

Did the General Division err by not considering whether there was a breach of section 11(b) of the Canadian Charter of Rights and Freedoms?

[17] The Applicant also argues that the General Division should have addressed the question of whether the new provisions of the OAS Act breach section 11 of the Charter. Section 11 addresses the right of persons charged with criminal offences and penal matters. Paragraph 11(h) expressly preserves the rights of persons who having been found guilty of and punished for an offence not to be tried or punished a second time for that offence. The Applicant submits that the cessation of his OAS pension and GIS supplement amounts to the imposition of a second punishment.

[18] The General Division does have jurisdiction to address Charter issues: *R v. Conway*, 2010 SCC 22²; but only if those issues are properly before it. Since the Minister has not yet issued a reconsideration decision, the General Division does not have jurisdiction over any of the substantive issues, including the Charter issue.

DECISION

[19] The Applicant appealed from the decision of the General Division that allowed his appeal and returned the matter back to the Respondent so that the request for an extension of time within which to request a reconsideration decision be allowed and the Respondent issues a reconsideration decision. He raised several issues that he stated pointed to the General Division failing to exercise its jurisdiction or committing an error of law. On the basis of the foregoing

² *R v. Conway* S.C.C. recognises that administrative tribunals may have the right to apply the Charter of Rights and Freedoms, provided that a) the Tribunal has the right, either implicit or explicit, to decide questions of law; and b) unless, a legislature has demonstrably intended to withdraw the Charter from the Tribunal's authority, the Tribunal has jurisdiction to grant remedies concerning Charter issues. In *Conway*² the S.C.C. made it clear that a tribunal can grant only such remedies as it is empowered by its enabling statute to provide. Abella, J., writing for the S.C.C., after finding that the Ontario Review Board, ("the Board"), was a court of competent jurisdiction for the purposes of granting remedies under Section 24 of the Canadian Charter of Rights and Freedoms denied Mr. Conway the remedies he was seeking. Abella, J. concluded that:-

[101] "A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway."

analysis, the Appeal Division is not satisfied that the Applicant has raised an arguable case. Furthermore, the Appeal Division is not persuaded that its finding otherwise would have affected the outcome of the General Division decision which, having found in the Applicant's favour, essentially provided the result he wanted.

[20] The Application is refused.

Hazelyn Ross
Member, Appeal Division