Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *K. V. v. Minister of Employment and Social Development*, 2016 SSTADIS 481

Tribunal File Number: AD-16-948

BETWEEN:

K. V.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: December 11, 2016

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal (SST) dated October 19, 2016. The GD had earlier conducted a hearing by way written of questions and answers and determined that the Applicant was not eligible for payment of an Old Age Security (OAS) pension earlier than September 2010.

[2] On January 20, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division (AD) of the SST. Following a request for further information from the AD, the Applicant perfected his application for leave on January 24, 2016, within the required 90-day time limit. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

BACKGROUND

[3] The Applicant was born in January 1941 and reached the age of 65 in January 2006. He applied for an OAS pension on August 25, 2011 and was approved at a partial rate of 35/40, effective September 2010.

[4] In a letter dated April 16, 2012, the Applicant asked the Respondent to reconsider its decision and begin payment of his OAS pension retroactive to the month he turned 65. He explained that he had not applied for the OAS pension sooner because he was living abroad and understood from information he had read online that if he waited until age 70 to apply, he would receive a higher monthly pension. He later learned that the information he had relied upon was specific to the Canada Pension Plan retirement pension and not to the OAS pension.

[5] The Respondent maintained the effective date of payment at September 2010, explaining that the law permitted it to pay retroactive benefits no more than 11 months from the date of application. In May 2013, the Applicant appealed this decision to the GD.

THE LAW

Old Age Security Act

[6] Under section 3 of the *Old Age Security Act* (OAS Act), in order to receive a full OAS pension, a person must have resided in Canada for at least 40 or more years after his 18th birthday. To receive a partial pension, a person must have lived in Canada for at least ten years following his or her 18th birthday.

[7] Subsection 8(1) of the OAS Act states that an OAS pension is payable one month after an application has been approved. Subsection 8(2) specifies an exception for an applicant who is over the age of 65 when the application is made, permitting approval of the application effective as of the later of: (i) one year before the date on which the application was received and (ii) the date the applicant turned 65.

Department of Employment and Social Development Act

[8] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the AD may only be brought if leave to appeal is granted and the AD must either grant or refuse leave to appeal.

[9] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[10] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

[11] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[12] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

[13] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[14] In his application requesting leave to appeal, the Applicant made the following submissions:

- The GD based its decision on incorrect information or an erroneous finding of fact that it made in a perverse or capricious manner by ignoring the Prime Minister's announcement, at the 2012 World Economic Forum, of changes to the age requirements for OAS. The Applicant alleges these changes, which included giving Canadians the right to defer their OAS pension until age 70, would have given him the option to refund OAS payments already received and submit a new application for enhanced benefits.
- The GD failed to observe a principle of natural justice by neglecting to advise the Applicant that he could wait to apply for the OAS pension at age 70 or older. Had he waited to apply ten months later than he did, he would have been eligible for a 36- percent increase in his pension benefits.

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[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

- In its decision, the GD falsely wrote: "The Respondent reconsidered and decided to maintain the original effective date of payment of September 2010." In fact, the Applicant was never given an option to delay his application, after the new age requirement became effective for 10 months, and apply for a larger pension. In two responses to the April 16, 2012 reconsider letter, the GD denied this change was coming, although it knew, or should have known, about it and advised the Applicant accordingly.

ANALYSIS

[15] Having reviewed the Applicant's submissions in conjunction with the GD's decision and the underlying evidence, I see no arguable case on any of the grounds raised.

[16] According to the Applicant, the GD misrepresented events, ignored the law and offered poor guidance, but I see no basis for any of these allegations. In my view, the GD correctly applied section 8 of the OAS Act in determining the Applicant was entitled to retroactive benefits of no more than 11 months prior to the date of application. The Applicant objected to the GD's statement that the Respondent had reconsidered and decided to maintain its original payment date of September 2010, but this finding appears to do no more than accurately reflect the record, specifically the contents of the Service Canada letter dated February 20, 2013.

[17] The Applicant's submissions lead me to suspect that he has confused the GD for the Respondent, but whatever the case, I see nothing in the GD's decision or in its communications prior to that decision, to suggest the GD gave the Applicant advice about how to manage his OAS application. The Applicant is correct that changes were introduced in 2012 to permit Canadians to defer OAS applications as late as age 70 in exchange for a higher monthly pension amount. However, under section 7.1 of the OAS Act, those changes came into effect on July 1, 2013 and would have had no bearing on persons, such as the Applicant, who had already applied for, and began receiving, the OAS pension. Contrary to the suggestion of the Applicant, there is no provision that permits an OAS pensioner to cancel his or her pension, receive a refund and then reapply later.

[18] Outside of these unfounded allegations, the Applicant has not identified how, in coming to its decision, the GD failed to observe a principle of natural justice, committed an error in law

or made an erroneous finding of fact. Although the Applicant may feel the law is unfair, the GD was bound to follow it to the letter and could only exercise such jurisdiction as granted by its enabling statute. Support for this position is found in *Canada (MHRD) v. Tucker*,[3] among many other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

CONCLUSION

[19] As the Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success, the application is refused.

Member, Appeal Division

[3] *Canada (Minister of Human Resources Development) v. Tucker,* 2003 FCA 278