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

Citation: *E. E. v. Minister of Employment and Social Development*, 2017 SSTADIS 397

Tribunal File Number: AD-16-708

BETWEEN:

E. E.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 8, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the General Division decision dated May 8, 2016, which found that the suspension of his Old Age Security pension while he was incarcerated did not infringe upon his constitutional rights under the *Canadian Charter of Rights and Freedoms* (Charter).

[2] The Applicant submits that the General Division misapprehended the nature of his appeal and, accordingly, failed to address the central issue that he had raised, namely, that subsection 5(3) of the *Old Age Security Act*, R.S.C. 1985, c. O-9 has no retrospective applicability to those like him who were already sentenced when the subsection came into operation. He does not otherwise openly challenge the constitutional bases upon which the General Division dismissed his appeal.

FACTUAL BACKGROUND

[3] The following facts are relevant for the purposes of this application:

a. The Applicant was born in September 1946.

b. The Applicant was convicted of fraud over $5,000 and began serving his sentence on October 2, 2008, and, after a period of day parole, was reincarcerated on January 14, 2010 (GT1-16 and 17).

c. Section 3 of the *Eliminating Entitlements for Prisoners Act*, S.C. 2010, c. 22, amended section 5 of the *Old Age Security Act*, by adding subsection (3). The *Eliminating Entitlements for Prisoners Act* received royal assent on December 15, 2010.

d. The Applicant applied for an Old Age Security pension and the Guaranteed Income Supplement in January 2011. He turned 65 in September 2011,

making him eligible to receive an Old Age Security pension. The Applicant began receiving an Old Age Security pension in October 2011.

e. In January 2012, the Respondent learned that the Applicant remained incarcerated. It determined that subsection 5(3) of the *Old Age Security Act* applied, such that it suspended Old Age Security pension payments effective October 2011, resulting in an overpayment.

f. The Applicant requested reconsideration of the suspension of his Old Age Security pension. The Respondent maintained its decision to suspend benefits, ultimately resulting in an appeal to the General Division. He filed a Notice of Appeal on Constitutional Grounds, alleging that subsection 5(3) of the *Old Age Security Act* violated his section 7 and paragraph 11(*h*) rights under the Charter.

g. The Applicant was statutorily released in February 2013 and the Respondent reinstated his pension, but it was suspended again in July 2013 when his statutory release was revoked. He remained incarcerated until October 1, 2014 (GT20-2).

h. The Applicant proceeded with his appeal before the General Division on January 26 and 27, 2016. The Applicant's final submissions, dated July 25, 2015, can be found at GT34 and his list of authorities, dated December 29, 2015, can be found at GT50.

i. The General Division dismissed the appeal on May 8, 2016, and the Applicant now seeks leave to appeal the General Division's decision.

[4] Section 3 of the *Eliminating Entitlements for Prisoners Act* amended subsection 5(3) of the *Old Age Security Act* by adding the following:

Incarcerated persons

(3) No pension may be paid in respect of a period of incarceration — exclusive of the first month of that period — to a person who is subject to a sentence of imprisonment

(a) that is to be served in a penitentiary by virtue of any Act of Parliament; or

(b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered into an agreement under section 33.1 for the administration of this paragraph.

ISSUE

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

GROUNDS OF APPEAL

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

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

(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.

[7] The Applicant submits that the General Division erred under each of these grounds.

[8] I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance

of success before I can grant leave to appeal. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[9] The Applicant argues that the General Division "was not alive to the issue of prospectivity or retrospectivity of the impugned section of the [*Old Age Security Act*] or he put a lid on this issue in order to make the Government win." The Applicant claims that there were several documents, including legal authorities that establish the doctrine against retrospectivity, which the member failed to refer to in his decision. He is of the position that subsection 5(3) of the *Old Age Security Act* did not apply to him in October 2011 (or in October 2013, when his statutory release was revoked), because the legislation came into effect after he had already been sentenced.

[10] At the outset of the hearing before the General Division, the Applicant made a preliminary application for summary judgment in his favour. The General Division set out the Applicant's supporting arguments in this regard. The member wrote that the Applicant argued that he should be granted summary judgment "on the basis that subsection 5(3) of the OASA does not apply retrospectively to him," irrespective of any alleged Charter violations. The General Division was certainly alive to the issue, but found that it was an inappropriate basis for a summary disposition, having determined that the Applicant's arguments against retrospectivity were closely intertwined with his Charter arguments and should be heard against that backdrop. Further, the General Division determined that it did not have any jurisdiction to consider the retrospectivity issue independent of any Charter considerations, on the basis of section 20 of the *Social Security Tribunal Regulations* (Regulations). At paragraph 18 of its decision, the General Division wrote: "The Tribunal can adjudicate the validity, applicability, or operability of subsection 5(3) of the [*Old Age Security Act*], but only in the context of a properly presented constitutional issue. Section 20 of the Tribunal Regulations, found in the Constitutional Issues section of the Regulations, makes this plain."

[11] Yet, section 20 of the Regulations does not set out the scope of the Social Security Tribunal's authority, unlike subsection 64(1) of the DESDA, which enables the Tribunal to

decide any questions of law or fact that are necessary for the disposition of any applications made under the DESDA.

[12] The Respondent concedes that there may be an arguable case, i.e. that the appeal may have a reasonable chance of success, if the Applicant can point to an issue that the General Division failed to address: *Canada (Attorney General) v. Carroll*, 2011 FC 1092, at para. 14, and *Canada (Attorney General) v. Zakaria*, 2011 FC 136, at paras. 36 to 38. The Respondent argues however that, in this case, the General Division did not err. The Respondent claims that, as the Applicant has challenged the constitutional validity of subsection 5(3) of the *Old Age Security Act*, the General Division could not simply disregard the constitutional challenge and instead consider the Applicant's other arguments that the subsection did not apply to him. The Respondent further claims that the only vehicle by which a claimant can challenge any provisions of the legislation administered by the Social Security Tribunal, such as the *Old Age Security Act*, is by way of a constitutional challenge.

[13] That being said, the Respondent notes that the General Division had indeed considered the Applicant's submissions against retrospectivity, in the context of the constitutional challenge. At paragraph 76 of its decision, the General Division wrote that the subsection "is prospective in nature and that it does not have retroactive effect. It does not reach into the past; it does not affect the [Applicant's] ability to qualify for benefits. Rather it affected when payment would occur." The Respondent further notes that, at paragraph 85, the General Division rejected the Applicant's assertion that his expectation to receive an Old Age Security pension while incarcerated had been frustrated, as it found that the subsection came into effect in January 2011, before the Applicant became eligible to receive the pension in October 2011.

[14] I agree with the General Division's findings that subsection 5(3) of the *Old Age Security Act* does not have any retroactive application. I see no evidence that subsection 5(3) was ever applied retroactively in the Applicant's case. Had the Respondent applied the subsection retroactively, it would have meant that any pension payments made prior to January 2011 (when the subsection came into force) would have been effectively suspended.

Yet, that obviously did not and could not have occurred, as the Applicant became eligible for the Old Age Security pension in only October 2011, well after subsection 5(3) of the *Old Age Security Act* came into effect.

[15] However, the Applicant maintains that the subsection does not apply in his case because it is not retrospective and it came into effect when he had already been sentenced (and, for that matter, was already incarcerated).

[16] In his "Final" written submissions before the General Division (GT34), the Applicant characterized the issue of retrospectivity as one involving a matter of "double jeopardy" in the context of the Charter. He wrote:

> *12.* . . . The Court [in *Whaling*] ruled that retrospective changes to matters related to sentence might constitute punishment violating Section 11(h) of the *Charter.*
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> 13. Double Jeopardy applies to sanctions imposed after sentence (see British Columbia Court of Appeal 2012 BCCA 435, justices [*sic*] Levine, D. Smith, and Groberman).
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> 14. In my respectful submission, the recent decisions of the Supreme Court of Canada and the British Columbia Court of Appeal pushed the limits of the "punishment" concept as the 2 Courts revisited the principles that defined the scope of s. 11(h). Both Courts ruled against the retrospective changes to matters related to sentence.

[17] In his letter dated December 29, 2015, the Applicant wrote, "The impugned section of the *Old Age Security Act* does not apply retrospectively. This is the long and short of this appeal." The Applicant then listed several authorities, all of which he claimed addressed the retrospectivity issue.

[18] The Applicant relied on *Matejka (Re)*, 1984 CanLII 755 (BCCA), where, at paragraph 10, MacFarlane J.A. reviewed E.A. Driedger, Q.C.'s article, "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar. Rev. 264, at pages 268 to 269. It is useful to reproduce E.A. Driedger's summary of the difference between retroactive and retrospective statutes:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences for *the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.
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> . . .
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> For retrospectivity the question is: Is there anything in the statute to indicate that the consequences of a prior event are changed, not for time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later.

[19] The B.C. Court of Appeal determined that if the legislative provisions under review were to be given a retrospective effect, "it must be clear, from its terms or by necessary implication, that the enactment was intended as one that 'creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.'"

[20] The Applicant also relied on *R. v. Clarke*, [2014] 1 SCR 612, where Abella J., on behalf of the Court, wrote, in the context of sentencing legislation:

> [10] It is true that new sentencing legislation should be presumed not to apply retrospectively (*R. v. Dineley*, 2012 SCC 58 (CanLII), [2012] 3 S.C.R. 272). The presumption can be displaced, however, by a clear legislative direction that a provision is to apply retrospectively. The requirement for clarity, as Deschamps J. noted in *Dineley*, ensures that
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> > the cases in which legislation has retrospective effect must be exceptional … New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that is to apply retrospectively . . . . [para 10]

[21] The Applicant also relied on *Thibault Estate (Re)*, 2009 NSSC 4. There, the Probate Court of Nova Scotia cited *Muise v. Nova Scotia (Workers' Compensation Board)*, 1998 CanLII 2307 (NS CA), [1998] NSJ 182 (QL), which had reviewed the principles of statutory construction relating to the retrospective application of a legislative amendment. The Nova Scotia Court of Appeal quoted extensively from *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1997] 1 SCR 271, at pages 279 and 282.

[22] The Applicant noted that the Nova Scotia Court of Appeal cited *Gustavson* again, in *Hayward v. Hayward*, 2011 NSCA 118. The Applicant's letter of December 29, 2015 indicates that he relied on paragraphs 20, 22, 23, 24, 47, 49 and 151 of the *Hayward* decision. At paragraph 22, the Court also cited *R. v. Nova Scotia Pharmaceutical Society*, [1991] N.S.J. No. 169, noting that the Court had considered the jurisprudence and academic commentary on retrospectivity. The Court wrote:

> **[54]** ... Professor Driedger stated in his article **Statutes: Retroactive – Retrospective Reflections** (1978), 56 Can. Bar Rev. 264, at p. 264:
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> > "One of the most difficult problems in the process of statutory construction is the application of the presumption against the retrospective operation of statutes."
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> [55] Professor Driedger distinguishes between a statute which will operate retroactively and one which will operate retrospectively. In his text, **Construction of Statutes** (Second Edition, Butterworths 1983), he explains the distinction at p. 186:
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> > "A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways; either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative with respect to past transactions as of a past time, as, for example, the **Act of Indemnity** considered in **Phillips v. Eyre.** A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment. ...

> "A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. ... A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future.
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> . . .
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> [56] At p. 197, Professor Driedger comments that the presumption against retroactivity applies to both types of statutes but that the test to determine retroactivity or retrospectivity is different.
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> "For retroactivity the question is: is there anything in the statute to indicate that it must be deemed to be the law as of a time prior to its enactment? For retrospectivity the question is: is there anything in the statute to indicate that the consequences of a prior event are changed, not for a time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later?
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> "But not all retrospective statutes attract the presumption; only those, to use the words of Sedgwick, that
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> > 'create a new obligation, or impose a new duty or attach a new disability in respect to transactions or considerations already passed.'
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> "In brief, the presumption applies only to prejudicial statutes; not beneficial ones. Thus, there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption." [Emphasis in original]

[23] Although the Applicant's final written submissions (GT34) may not have fully set out his position against the retrospective application of subsection 5(3) of the *Old Age Security*, it is evident from the Applicant's letter dated December 29, 2015 and from his list of authorities that his appeal had evolved, such that he indicated that the "long and short of

[his] appeal" was the issue of whether subsection 5(3) of the *Old Age Security Act* applied retrospectively.

[24] Noting that he had cited numerous legal authorities, the General Division set out the Applicant's position on this issue, at paragraphs 69 and 70. The member wrote:

> [70] Moreover, [the Applicant] submitted that subsection 5(3) should not apply to him based on the presumption against retrospective operation of legislation absent a clear legislative intent. In the absence of explicit retrospective effect, legislation has prospective force only. He contended that subsection 5(3) does not comply with these principles because it does not expressly state it will apply retrospectively to periods before December 2010 (specifically: when his sentence was handed down in October 2008). The Appellant suggested that had his sentencing judge known that he would lose OAS benefits while incarcerated, the judge may have handed down a lesser sentence. The punitive effect of subsection 5(3) in the Appellant's case was the loss of an estimated $42,000 worth of benefits, which became an added condition to his sentence after his sentence was handed to him.

[25] Notwithstanding the fact that it had set out the Applicant's submissions on the issue of retroactivity, it is not readily apparent that the General Division addressed whether subsection 5(3) of the *Old Age Security Act* should have had any retrospective application in the Applicant's case. I do not see, for instance, that the General Division discussed any of the jurisprudence or expert commentary that the Applicant relied upon on this issue. If anything, the General Division seemingly dismissed the retrospectivity issue altogether, given that it perceived the ultimate issue as being whether the subsection carried "true penal consequences" and amounted to an additional punitive measure contrary to paragraph 11(*h*) of the Charter. At paragraph 92, it wrote that the subsection does not carry true penal consequences or a punitive character that would engage paragraph 11(*h*) of the Charter "whether it is retrospective or not."

[26] Although the Respondent argues that the Applicant is precluded from challenging the applicability of subsection 5(3) of the *Old Age Security Act*, as challenges to any provisions of the *Old Age Security Act* necessarily encompass a constitutional challenge, I am unaware of any authorities to this effect. The Respondent relies on the General Division's findings at paragraph 18 that section 20 of the Regulations stipulates that the

Tribunal can adjudicate the applicability of subsection 5(3) of the *Old Age Security Act* "but only in the context of a properly presented constitutional issue." However, section 20 of the Regulations does not confer any jurisdiction on the Tribunal as it deals with procedural matters, unlike, as I have indicated above, section 64 of the DESDA, which empowers the Tribunal to decide any questions of law or fact that are necessary for the disposition of any application made under the DESDA.

[27] Given the above considerations, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[28] The application for leave to appeal is granted, although this decision is, of course, not determinative of whether the appeal itself will succeed.

[29] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may (a) file submissions with the Appeal Division or (b) file a notice with the Appeal Division stating that they have no submissions to file.

Janet Lew
Member, Appeal Division