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

Citation: *V. F. v. Minister of Employment and Social Development*, 2018 SST 1275

Tribunal File Number: AD-18-414

BETWEEN:

V. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: December 7, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] The Appellant, V. F., is a prisoner in a federal penitentiary who is seeking to restore his Old Age Security (OAS) pension, which the Respondent, the Minister of Employment and Social Development (Minister), cancelled nearly eight years ago. In 2011, the Appellant missed a deadline to ask the Minister to reconsider the cancellation. I have decided that the Social Security Tribunal's General Division did not err when it found that the Appellant lacked a continuing intention to request reconsideration.

BACKGROUND

[3] In January 2011, the Minister informed the Appellant that his OAS pension and Guaranteed Income Supplement (GIS) had been suspended following the enactment of Bill C-31, an amendment to the *Old Age Security Act* (OASA). The Minister advised the Appellant that he could request reconsideration within 90 days if he did not agree with the decision.

[4] On February 23, 2011, the Appellant's wife, M. T., wrote a letter to the Minister noting that her husband's pension and GIS had been cut off. She said that she was enclosing a completed application for OAS benefits to confirm whether the government was telling the truth when it claimed that the new law would not punish families.

[5] An email exchange between two of the Minister's employees dated February 24, 2011, indicates that the Office of the Commissioner of Review Tribunals (OCRT) had requested that the Minister forward the January 7, 2011, letter informing the Appellant that his pension had been suspended. This email exchange suggests that the Appellant had earlier appealed the suspension to the OCRT but had not, as required, provided the OCRT with a copy of the suspension letter. It is not clear from the emails whether the Minister ever sent the requested suspension letter to the OCRT.

[6] In a letter dated June 28, 2011, the Minister refused M. T.'s application for benefits because she was below the minimum ages of eligibility for the OAS pension, the GIS, and the Allowance for the Survivor (Allowance).

[7] On July 14, 2011, the Appellant and M. T. wrote to the Minister indicating their intention to appeal its refusal of their "joint" application for benefits. They noted that, when the government cut off prisoners' benefits, it repeatedly announced that the purpose of the law was not to punish families. It was for this reason, they insisted, that M. T. had filed a joint application, yet she had been refused for an irrelevant reason—her age. If the government were serious about its pledge, they added, M. T. should receive "every penny" to which the Appellant was entitled before the change in law.

[8] On September 11, 2012, the Minister responded to an email from M. T. inquiring about the status of her appeal. The Minister advised her that, in order to be able to file a formal appeal, she was required to first submit an OAS application. M. T. replied by email insisting that she had submitted an OAS application and received a refusal for it. She asked the Minister to take a closer look at her application.

[9] On February 11, 2013, the Appellant wrote to Minister. He said that he had recently come across the acquired rights doctrine, which holds that once a right has been vested, it may not be altered or reduced by subsequent legislation. He asked for an explanation as to why this legal doctrine would not apply to him. The Minister replied in a letter dated March 12, 2013, advising the Appellant that it could not follow up on his request. It directed him to address future questions and comments to the House of Commons.

[10] On March 15, 2013, the Appellant wrote to the OCRT and asked that his letter be considered an official appeal of the Minister's decision dated March 12, 2013. On July 25, 2013, the Appellant wrote to the Minister and asked for a reconsideration of its decision dated March 12, 2013. In a letter dated August 23, 2013, the Minister replied that section 5(3) of the OASA applied to the Appellant, just as it did to any other inmate. The Minister denied that the letter of March 12, 2013, was in any way a "decision" but rather was a reply to the Appellant's request for information.

[11] The Appellant continued to press the Minister, pleading that he had not requested reconsideration earlier because he was unaware of the required procedures and had no legal training. In a letter dated November 5, 2013, the Minister informed the Appellant that it could not accept his request because he did not meet three of the four criteria set out in section 29.1(2) of the *Old Age Security Regulations* (OAS Regulations) to allow an extension of the time limit for reconsideration. On the first criterion, the Minister conceded that allowing an extension in time would not prejudice its interests, but it also found that the Appellant had not:

- disclosed an exceptional medical condition or other extenuating circumstances that would have reasonably explained the 910-day delay;
- demonstrated a continuing intention to seek reconsideration because his first contact with the department came more than two years after the initial decision to suspend benefits; or
- advanced a case that had a reasonable chance of success because the OASA had been amended to bar individuals who had been incarcerated for more than two years from receiving OAS benefits.

[12] On December 9, 2013, the Appellant filed an appeal with the General Division. Among other submissions, he argued that he had always expressed interest in appealing the Minister's decision to suspend his benefits. At the time of suspension, he did not see any way to get his benefits reinstated, so he asked his wife to apply for the Allowance, which she did in 2011.

[13] In a decision dated January 31, 2016, the General Division allowed the Appellant's appeal and sent the matter back to the Minister for redetermination. On December 19, 2016, the Minister informed the Appellant that, having reconsidered his request for an extension of time in accordance with the General Division's decision, it had decided to deny his request for an extension of time because he had not met any of the four criteria to allow an extension of time. In particular, the Minister found that the Appellant had not:

- provided a reasonable explanation for the 910-day delay;
- demonstrated a continuing intention to seek reconsideration for two years after the January 2011 decision;

- advanced a case that had a reasonable chance of success, in view of the amendments to section 5(3) of the OASA and of the non-applicability of the doctrine of acquired rights to this situation; or
- satisfied the Minister that its interests would be unharmed by the lack of certainty and finality caused by such a lengthy delay.

[14] On February 9, 2017, the Appellant appealed the Minister's December 2016 decision to the General Division. In a decision dated April 28, 2018, the General Division again dismissed the Appellant's appeal. The General Division found that, in arriving at its decision, the Minister had ignored relevant factors and thus failed to exercise its discretion judicially. However, the General Division then gave the decision that, in its view, the Minister should have given, dismissing the appeal because the Appellant had not demonstrated a continuing intention to request reconsideration in the two years following February 2011. Since, under section 29.1 of the OAS Regulations, all four factors must be satisfied, it did not consider the other three.

[15] On July 10, 2018, the Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging various errors on the part of the General Division. In a decision dated August 8, 2018, I allowed leave to appeal because I saw a reasonable chance of success for two of the Appellant's arguments.

PRELIMINARY MATTER

[16] In correspondence dated September 18, 2018, the Appellant asked the Appeal Division to provide him with a complete set of the Tribunal's decisions. He alleged that the Tribunal's website and the Canadian Legal Information Institute's database (CanLII) contained only a limited number of General Division decisions that addressed extensions of time to request reconsideration. He said that he required access to jurisprudence in order to prepare his case properly.

[17] On October 24, 2018, I convened a pre-hearing teleconference to hear oral submissions on the extent to which the Appeal Division—or any administrative tribunal—was required to direct claimants to relevant case law or otherwise assist them in their cases.

[18] Having heard from both parties, I decided that the law gave me no authority to comply with the Appellant's request. As I explained during the teleconference, an administrative tribunal is not a court and is purely a creature of its enabling legislation. I could find nothing in the OASA, the *Department of Employment and Social Development Act* (DESDA), or associated regulations that give me the discretionary power to order the publication or release of cases.

[19] Even if I did have such a power, I do not think it would be appropriate to use it in this situation. I am bound by the recent Supreme Court of Canada decision *Pintea v Johns*,[1] which endorses the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons.*[2] This document is a set of guidelines for judges, the courts, and other participants in the justice system to "promote opportunities for all persons to understand and meaningfully present their case, regardless of representation." At its heart is the fourth principle, under the heading "Promoting Equal Justice," which reads in full:

> When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:
>
> (a) explain the process;
>
> (b) inquire whether both parties understand the process and the procedure;
>
> (c) make referrals to agencies able to assist the litigant in the preparation of the case;
>
> (d) provide information about the law and evidentiary requirements;
>
> (e) modify the traditional order of taking evidence; and
>
> (f) question witnesses.

These suggested best practices are discretionary, but they draw a line between explaining applicable law and procedure and taking active steps to help a party prepare their case. While the Tribunal is permitted to set out its understanding of the law to both parties, I think that supplying a particular party with even a pool of precedent cases that are otherwise unavailable to the public goes too far in the direction of advocacy.

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[1] *Pintea v Johns*, 2017 SCC 23.
[2] www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf.

[20] I recognize that the Appellant is incarcerated and may not have access to legal resources that are available to other unrepresented litigants. Still, he is permitted to use the Internet, and thus CanLII, which contains selected General Division decisions and all Appeal Division decisions. The Appellant was under the impression that precedents from the General Division would have supported his appeal, but they do not bind, much less influence, the Appeal Division. In any event, the Appellant's request—for the production of every one of the thousands of decisions that the Tribunal has issued since its inception five years ago—was unrealistic and, given the marginal benefit that it was likely to produce, unwarranted.

SUBMISSIONS

[21] According to section 58 of the DESDA, there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[22] I allowed leave to appeal because I saw an arguable case for two of the Appellant's submissions:

- The General Division based its decision on an erroneous finding of fact when it concluded that the Appellant did not demonstrate a continuing intention to request reconsideration between February 2011 and February 2013. In fact, he helped to prepare his wife's application for the Allowance, which any reasonable person would see was an attempt to restore their financial position to where it was before his OAS pension was suspended. Indeed, the General Division accepted that the Appellant had an "interest" in requesting reconsideration but then found that it was different from having an "intention" to request reconsideration. This was splitting hairs. It should have been obvious that the Appellant wanted to get his benefits back by every legal means possible.
- The General Division failed to observe a principle of natural justice by denying the Appellant an opportunity to testify. The General Division based its decision on a finding that the Appellant failed to demonstrate a continuous intention to request

reconsideration. However, his intention could not have—and should not have—been inferred from only the documentary evidence.

[23] The Minster submits that neither of these submissions can succeed under the grounds of appeal set out in section 58(1) of the DESDA:

- The wording of section 58(1)(c) suggests that the Appeal Division should yield to the General Division on questions of fact. In this case, the General Division reviewed the Appellant's actions during the relevant period between February 2011 and February 2013 and came to a defensible conclusion. The General Division did not make too much of the Appellant's use of "interest" rather than "intention" and merely pointed out the important distinction between the two words.
- Under the *Social Security Tribunal Regulations*, the General Division was entitled to hold the hearing on the record. In this case, the General Division provided the Appellant with an opportunity to make submissions and submit evidence. While the Appellant may have preferred to have an opportunity to testify before the General Division, this, in and of itself, did not amount to a breach of natural justice.

ISSUES

[24] I must decide the following questions:

Issue 1: Did the General Division base its decision on an erroneous finding that the Appellant had failed to demonstrate a continuing intention to request reconsideration between February 2011 and February 2013?

Issue 2: Did the General Division fail to observe a principle of natural justice by denying the Appellant an opportunity to testify?

ANALYSIS

Issue 1: Did the General Division base its decision on an erroneous finding that the Appellant had failed to demonstrate a continuing intention to request reconsideration between February 2011 and February 2013?

[25] The Appellant alleges that the General Division disregarded evidence that he was the driving force behind his wife's application for the GIS and the Allowance in February 2011, as well as her subsequent fruitless attempts, over the following 18 months, to pursue those benefits. He suggests that the General Division should have taken his wife's application as evidence that he, the Appellant, had a continuing intention to seek reconsideration of the Minister's decision to cut off his OAS pension and GIS.

[26] Having heard the parties' submissions and reviewed the documentary record from February 2011 to February 2013, I am not convinced, on balance, that the General Division's findings are in error, according to the applicable standard. Under section 58(1)(c) of the DESDA, a decision may be overturned if it is **based** on an erroneous finding, which itself must have been made in a perverse or capricious manner or without regard for the material before the General Division. The wording of this provision suggests that the General Division is to be afforded a measure of deference on its factual findings, with the Appeal Division intervening only when the General Division commits a material factual error that is not merely unreasonable, but clearly egregious or at odds with the record. According to these criteria, I cannot find that the General Division erred. Even if I accept the Appellant's claim that the General Division ignored evidence that his wife's Allowance application was part and parcel of his attempt to restore their joint financial position to what it was before the implementation of Bill C-31, I do not find that the General Division's error was material; there were still gaps in the evidence suggesting that the Appellant's intention to request reconsideration was not continuous.

[27] For ease of reference, I will summarize the Appellant's and his wife's communications with the Minister during the relevant period in table form:

Date	Sender	Recipient	Description
February 23, 2011	M. T.	Minister	Application for OAS pension, GIS, and Allowance

February 24, 2011 (or earlier)	Appellant	OCRT	Attempt to appeal Minister's decision to suspend OAS benefits to Review Tribunal
June 28, 2011	Minister	M. T.	Letter rejecting application for benefits because M. T. had not reached age 65
July 4, 2011	Appellant	Minister	Telephone call inquiring about status of "joint" application
July 14, 2011	Appellant	Minister	Letter indicating intention to appeal Minister's June 28, 2011, decision
August 28, 2012	M. T.	Minister	Email requesting update on the status of her appeal
September 11, 2012	Minister	M. T.	Letter containing information on how to file a formal appeal
February 11, 2013	Appellant	Minister	Letter raising acquired rights doctrine for the first time

[28] The General Division found that the Appellant may have initially intended to request reconsideration, having misunderstood an appeal to the OCRT to be the next step in the process, but he did not have a continuing intention to do so after February 2011:

> [47] […] [T]he evidence does not support a finding that [the Appellant] had a *continued* intention to request a reconsideration throughout the period from February 2011 to February 11, 2013, a period of about two years. There is evidence that he was assisting his spouse with her application for an Allowance or GIS (the evidence is inconsistent as to what benefit she applied for) but assisting another applicant in their pursuit of a benefit is not the same as having a continued intention to pursue a reconsideration of a decision made on one's own eligibility for a benefit. [emphasis in original]

This passage indicates that the General Division considered the Appellant's involvement in his wife's application but ultimately concluded that it had no bearing on his intention to pursue his own claims. I disagree. I am satisfied that the claims were inextricably connected and that M. T.'s application was, in essence, the couple's joint attempt to "call out" the government on its statement that terminating OAS benefits for prisoners was not intended to hurt their families. I base this finding, not only on the Appellant's many written statements over the course of this proceeding, but on the documentary evidence from 2011: M. T's statement in her letter of February 23, 2011, that her application for benefits was motivated by her husband's loss of his

OAS pension and GIS; the Appellant's phone call on July 4, 2011, inquiring about the status of the "joint" application; and the Appellant's and M. T.'s co-signed letter dated July 14, 2011, seeking to appeal the Minister's rejection of her application.

[29] From what I can determine, the General Division disregarded clear indications that the Appellant was the guiding hand behind his wife's application for OAS benefits and that he meant it to send a message to the Minister and advance his campaign to reinstate his own OAS benefits. I also think that the General Division unfairly seized on the Appellant's July 2015 assertion that he had "always expressed interest appealing [*sic*] Minister's decision"[3] to find that he had admitted to lacking the required "continuing intention" to request reconsideration. I accept the Appellant's claim that, on various occasions,[4] he attempted to adopt the language of section 29.1(1) of the OAS Regulations—although he did not quite succeed because English is his second language.

[30] All that being said, I find that the aforementioned errors were not material to the outcome of the General Division's decision because they pertained to only a brief five-month period in which the Appellant and his wife continued to actively pursue their dual claims. The Appellant may have intended to request reconsideration as of February 2011 and for a few months after, but the evidence shows that his intention did not continue. As shown in the table above, neither the Appellant nor his wife had any contact with the Minister in the 13 months following their joint letter of July 14, 2011. In August and September of 2012, there was a brief exchange of correspondence between M. T. and the Minster, followed by another silent period, this time of five months. These gaps tell me that, from the Appellant's perspective, the matter fell by the wayside for an extended period until its revival with the Appellant's discovery of the acquired rights doctrine.

[31] As noted, factual errors warrant overturning a decision only if the General Division bases its decision on them. I do not think that it would have made any difference to the General Division's reasoning if it had found that there was only a 19-month—as opposed to a 24-month—interruption in the Appellant's intention to request reconsideration; the outcome would, in all likelihood, have been the same.

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[3] See para 49 of General Division decision.
[4] Appellant's letters to the Tribunal dated November 14, 2013, (GD2-56) and July 8, 2015 (GD2-121).

Issue 2: Did the General Division fail to observe a principle of natural justice by denying the Appellant an opportunity to testify?

[32] The Appellant argues that, by holding his hearing on the basis of the existing documentary record, the General Division denied him his right to be heard. I granted leave to appeal because I saw an arguable case that, in determining whether the Appellant had a continuing intention to request reconsideration, the General Division in effect made a finding about the Appellant's credibility and therefore had a duty to hear his testimony.

[33] The General Division's decision was based on a finding that the Appellant failed to demonstrate a continuing intention to request reconsideration between February 2011 and February 2013. The General Division made this finding after examining the documentary record, which included M. T.'s unsuccessful applications for the GIS and Allowance and later correspondence in which the Appellant declared that his wife's efforts to obtain those benefits were evidence of his continuing "interest" in restoring his OAS pension.

[34] Section 21 of the *Social Security Tribunal Regulations* states that the General Division may hold a hearing by one of several methods. Use of the word "may" in the absence of qualifiers or conditions in the text suggests that the General Division has discretion to make this decision. This is not to suggest that the General Division's discretion to make such a decision can be completely divorced from reason. However, the Federal Court of Appeal has confirmed that setting aside a discretionary order requires an appellant to prove that the decision-maker committed a "palpable and overriding error,"[5] and I see nothing like that here.

[35] In *Baker v Canada*,[6] the Supreme Court of Canada held that the concept of procedural fairness is variable and is to be assessed in the specific context of each case. *Baker* listed a number of factors that may be considered in determining what the duty of fairness requires in a particular case, including:

> (i) the nature of the decision being made and the process followed in making it;

[5] *Imperial Manufacturing Group Inc. v Decor Grates Incorporated*, 2015 FCA 100; *Horseman v Horse Lake First Nation*, 2015 FCA 122; *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139.
[6] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

(ii) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

(iii) the importance of the decision to the individual affected;

(iv) the legitimate expectations of the person challenging the decision; and

(v) the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[36] I accept that the issues in this matter are important to the Appellant, but I also place great weight on the nature of the statutory scheme that governs the General Division. The Tribunal was designed to process a large volume of appeals and to provide for the most expeditious and cost-effective resolution of the disputes before it. To accomplish this, Parliament enacted legislation that gives the General Division the discretion to determine how hearings are to be conducted, whether in person, by videoconference, by teleconference, or in writing. According to *Bossé v Canada*,[7] the discretion to decide how each case will be heard should not be unduly fettered.

[37] The Appellant had earlier expressed his preference for an oral hearing before the General Division,[8] but a claimant's desired format, while relevant, does not decide the matter. Although the General Division did not offer any reasons for proceeding as it did, hearing the appeal by way of documentary review was, in my view, a defensible choice under the circumstances. The Appellant submitted his notice of appeal in February 2017, and the Tribunal permitted the parties to submit documents during the following 12 months. The record indicates that the Appellant was able to take advantage of this opportunity, filing material in May 2017 and again in December 2017. Most significantly, the General Division had before it the Appellant's detailed written statement[9] setting out his version of events during the relevant period between 2011 and 2013. In my view, the record before the General Division was sufficient for it to make an informed decision about whether the Appellant had a continuing intention to request reconsideration. I see no indication that the General Division would have been better positioned to decide this issue by holding an oral hearing.

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[7] *Bossé v Canada (Attorney General)*, 2015 FC 1142.
[8] Hearing Information Form dated December 19, 2017, GD8.
[9] GD1-4.

CONCLUSION

[38] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds listed in section 58(1) of the DESDA.

[39] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	November 7, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	V. F., self-represented Christian Malciw, Representative for the Respondent