

Federal Court



Cour fédérale

**Date: 20190409**

**Docket: T-1757-18**

**Citation: 2019 FC 429**

**Ottawa, Ontario, April 9, 2019**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**AUSTIN KINSELLA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Mr. Austin Kinsella, seeks judicial review of the decision of the Appeal Division of the Social Security Tribunal [Appeal Division], dated August 14, 2018. The Appeal Division dismissed his appeal of the decision of the General Division of the Social Security Tribunal [General Division] pursuant to section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the *DESDA*]. The General Division had found that Mr. Kinsella's appeal of the denial of disability benefits under the *Canada Pension Plan*, RSC 1985, c C-8 [*CPP*] had no reasonable chance of success.

I. Background

[2] Mr. Kinsella explains that he was diagnosed with chronic kidney disease in 2014.

[3] In 2015, Mr. Kinsella applied for the *CPP* early retirement pension. He began receiving the pension in April 2015.

[4] After being unemployed for a few months, he resumed working full-time in telecommunications from August 2015 to March 2016, performing modified work as a result of his medical condition.

[5] In March 2016, Mr. Kinsella's kidneys failed and he began dialysis. He explains that the type of dialysis is intensive and that he can no longer work. He also had stents implanted to address his heart condition.

[6] Mr. Kinsella applied for a *CPP* disability pension in March 2016. He explains that he was under the impression that he could change his *CPP* retirement pension benefits to disability pension benefits and was willing to refund the retirement pension benefits received to that date. The Minister of Employment and Social Development denied the application for a disability pension and also denied his request for reconsideration of the initial decision.

[7] The letter of decision from the Adjudicator at Service Canada dated November 16, 2016 set out the eligibility requirements and explained:

In your case, you have enough contributions until March 2015. The review of the information shows that you have been in receipt of an early retirement pension since April 2015. CPP legislation does not allow a person to receive both an early retirement pension and disability benefits at the same time. Your medical condition would have had to stop you from working in any job in March 2015, the month prior to starting your early retirement pension.

However, you did not have a disability that was both severe and prolonged as defined under the CPP legislation in March 2015.

[8] The Adjudicator also noted the medical reports that were considered. The Adjudicator acknowledged that Mr. Kinsella started hemodialysis in March 2016 and that this treatment continues. The Adjudicator also acknowledged that he is unable to work.

[9] Mr. Kinsella appealed the reconsideration decision to the General Division. On February 27, 2018, the General Division summarily dismissed the appeal, finding that it had no reasonable chance of success. The General Division found that Mr. Kinsella was not eligible to apply for the *CPP* disability benefit in accordance with the criteria set out in the *CPP*. The General Division noted that a person who begins receiving a *CPP* retirement pension is not eligible to apply for a disability pension unless they are deemed to have become disabled not later than the month prior to the date the retirement pension became payable. The General Division found that Mr. Kinsella did not stop full-time work and was not disabled until March 2016, which was almost a year after he began to receive the *CPP* retirement pension. The General Division noted that Mr. Kinsella acknowledged that he was not disabled until March 2016.

[10] Mr. Kinsella appealed the General Division's decision to the Appeal Division pursuant to subsection 53(3) of the *DESDA*.

II. The Appeal Division Decision under Review

[11] The Appeal Division found that the General Division did not make any error. The Appeal Division found that the General Division had correctly concluded that the appeal had no reasonable chance of success on the evidence before it.

[12] The Appeal Division noted that the *DESDA* provides only three narrow grounds for appeal and that none of the grounds were present.

[13] The Appeal Division decision explained that the General Division correctly stated that in order for a claimant to be able to replace a retirement pension with a disability pension, they must be found to have been disabled before they began to receive the retirement pension. The Appeal Division found that Mr. Kinsella had not been disabled at the relevant time because he continued to work for approximately one year after he began to receive the retirement pension. The Appeal Division also noted the General Division's finding that Mr. Kinsella did not claim to be disabled before he began receiving his *CPP* retirement benefit.

[14] The Appeal Division further stated that the *DESDA* does not give the Social Security Tribunal authority to allow an appeal on compassionate grounds.

[15] As a result, the Appeal Division dismissed the appeal.

### III. The Standard of Review

[16] The issue in this judicial review is whether the Appeal Division erred in dismissing Mr. Kinsella's appeal.

[17] In *Bose v Canada (Attorney General)*, 2018 FCA 220, [2018] FCJ No 1215, the Federal Court of Appeal explained the nature of an appeal to the Appeal Division and the nature of a judicial review to the Court, stating at para 6:

Under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA), the Appeal Division can only intervene in a decision of the General Division where it failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner. The role of this Court, sitting in review of a decision of the Appeal Division, is to determine whether the Appeal Division's consideration and disposition of the factors set forth in subsection 58(1) was reasonable (*Quadir v. Canada (Attorney General)*, 2018 FCA 21; *Cameron v. Canada (Attorney General)*, 2018 FCA 100 at para. 6; *Garvey v. Canada (Attorney General)*, 2018 FCA 118, at paras. 7-8).

[18] On judicial review, the Court considers only the evidence that was before the Appeal Division.

[19] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). The Court does not re-make the decision. Rather, it determines whether the

decision-maker below (in this case the Appeal Division) reached a reasonable decision—i.e., one that is justified on the facts and the law.

[20] The standard of reasonableness is a legal concept which has been interpreted in the jurisprudence. It likely does not reflect what Mr. Kinsella would consider to be fair or reasonable based on his circumstances.

#### IV. The Applicant's Submissions

[21] Mr. Kinsella acknowledges that the Appeal Division does not have authority to allow an appeal based on compassionate grounds but submits that this should be changed. He submits that it is unfair to be denied a disability pension after contributing to *CPP* for many years.

[22] Mr. Kinsella notes that he could not have foreseen that his kidney condition would deteriorate so rapidly after he began to receive a *CPP* retirement pension. He adds that if he had known that being in receipt of *CPP* retirement pension benefits would disqualify him from later receiving disability pension benefits, he would not have applied for the early retirement pension benefits. Mr. Kinsella notes that there was no clear information on the Service Canada website or from anyone to help him navigate the pension benefits regime. He notes that the limited information available on the website suggested that he could convert his retirement pension to a disability pension within the first 15 months of receipt.

[23] Mr. Kinsella acknowledges that he was not disabled when he began to receive his retirement pension. However, in his Application, he emphasized that he continued to work after

he began to receive the retirement pension benefit because he had made a commitment to his employer and because he needed the income. He explained that his kidney condition prevented him from returning to the North West Territories to work on-site and, therefore, he worked from home up until his kidney failure in March 2016.

V. The Respondent's Submissions

[24] The Respondent submits that the Appeal Division did not err in finding that the General Division properly summarily dismissed the appeal, as it did not have a reasonable chance of success. The Appeal Division reasonably found no errors in the General Division's decision, which applied established legal principles to the undisputed facts.

[25] The Respondent submits that subsection 58(1) of the *DESDA* limits the Appeal Division's authority to intervene in a decision of the General Division. The Respondent notes that Mr. Kinsella did not raise any ground of appeal under subsection 58(1). The Respondent submits that humanitarian and compassionate considerations are not a ground of appeal under the *DESDA*.

[26] The Respondent submits that section 66.1 of the *CPP* provides that a person can only cancel a retirement pension in favour of a disability pension if they are deemed disabled before the retirement pension first became payable. The Respondent notes that subsection 42(2) of the *CPP* provides that a person shall be considered disabled if they have a severe and prolonged mental or physical disability. The Respondent submits that severity under the *CPP* is defined by the capacity to work, not by the diagnosis of a disease. The Respondent notes that the Applicant

did not stop full-time employment until he began dialysis in March 2016; therefore, he could not have been deemed disabled earlier than March 2016.

VI. The Appeal Division Did Not Err

[27] The relevant statutory provisions are set out in Annex A.

[28] The Appeal Division's decision is reasonable. The Appeal Division applied the law to the facts and reached the only conclusion that was open to it.

[29] The Appeal Division reasonably found that the General Division did not err in determining that Mr. Kinsella was not eligible for a disability pension. Subsection 58(1) of the *DESDA* sets out the only available grounds of appeal of the General Division's decision.

Subsection 58(1) provides:

58 (1) The only grounds of appeal are that

(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

58 (1) Les seuls moyens d'appel sont les suivants :

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte



or without regard for the material before it.

des éléments portés à sa connaissance.

[30] In other words, the grounds of appeal are limited to: (a) a breach of procedural fairness, which focuses on the process before the decision-maker, such as whether an applicant had an opportunity to participate and make submissions; (b) an error of law, such as the application of incorrect statutory provisions or principles from the case law; and (c) an error of fact, such as ignoring or misunderstanding a relevant fact.

[31] Mr. Kinsella did not raise any of these grounds. Nor do they exist. The General Division did not base its decision on erroneous findings of fact; the facts are not in dispute. Nor did it fail to observe a principle of natural justice (or procedural fairness); Mr. Kinsella had the opportunity to participate in the process and to respond to the submissions of the Respondent. The General Division also did not err in identifying or applying the law.

[32] According to subsection 70(3) of the *CPP*, a person who begins to receive a retirement pension is thereafter ineligible to apply for a disability pension. An exception to this rule is provided in section 66.1, which provides that the applicant may be eligible if they are deemed to have become disabled before the month in which the retirement pension first became payable (*Canada (Attorney General) v Zakaria*, 2011 FC 136 at para 20, [2011] FCJ No 189 (QL) [*Zakaria*]).

[33] Paragraph 42(2)(a) of the *CPP* provides that a person shall be considered disabled only if they have a severe and prolonged mental and physical disability. For the purpose of this

paragraph, a disability is severe if it prevents a person from pursuing any substantially gainful occupation. As the Respondent noted, it is the capacity to work, rather than the diagnosis, that defines the severity of a disability.

[34] The Federal Court of Appeal stated in *Klabouch v Canada (Social Development)*, 2008 FCA 33 at para 14, [2008] FCJ No 106 (QL) [*Klabouch*]:

First, the measure of whether a disability is “severe” is not whether the applicant suffers from severe impairments, but whether his disability “prevents him from earning a living” (see: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703, paragraphs 28 and 29). In other words, it is an applicant’s capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP.

[35] Once Mr. Kinsella received a *CPP* retirement pension, he could only be eligible for a disability pension if he could demonstrate that he had a severe and prolonged disability within the meaning of the *CPP* as of the month before the retirement pension first became payable. This means that he would need to demonstrate that he had this disability by March 31, 2015, since his retirement benefit became payable in April 2015. However, he acknowledges that he was not disabled—as that term is defined in the *CPP* legislation—when he began to receive his retirement pension.

[36] Mr. Kinsella explains that his chronic kidney disease existed well before his total kidney failure. He explains that he continued to work from home to fulfill a commitment to his employer despite his condition. This is not disputed. However, the severity of a disability is not premised upon an applicant’s inability to perform their regular job, but on their inability to perform “any substantially gainful occupation” (*Klabouch*, at para 15; *Zakaria*, at para 25).

Mr. Kinsella was gainfully employed for several months after he began receiving his retirement benefit and he is, therefore, not eligible to apply for a disability pension. Service Canada, the General Division and the Appeal Division did not err in finding that he was gainfully employed until March 2016.

[37] I acknowledge Mr. Kinsella's point that clear information should be provided on the Service Canada website for potential *CPP* applicants regarding the differences in *CPP* retirement pension benefits and disability pension benefits and the impact that receipt of retirement pension benefits may have on disability pension benefits. The information relied on by Mr. Kinsella that suggests that there is a 15 month period to convert the retirement pension may be incomplete as Mr. Kinsella was not aware of the other relevant criteria which must be met for a disability pension.

[38] I appreciate that this is not the outcome that Mr. Kinsella would prefer. The suggestion in the documents from the Appeal Division that an applicant may seek judicial review of the decision in this Court may have offered some false hope. The Court's role, as described above, is very limited. Where there is no error by the Appeal Division, the Court cannot do more than confirm the decision. The Court cannot change the provisions of the statute to address the circumstances of individuals. With respect to Mr. Kinsella's comment regarding the need for compassionate consideration, the Federal Court of Appeal recently stated in *Wilson v Canada (Attorney General)*, 2019 FCA 49 at para 14 that "the law as it stands must be applied and it is beyond the role of this Court to make compassionate rulings". Unfortunately, in the context of

*CPP* decisions made pursuant to the *CPP* legislation there is no jurisdiction for the Court to provide relief that is not provided in the *CPP*.

[39] In conclusion, the Court finds that the Appeal Division did not err; it properly applied the law to the facts before it.

**JUDGMENT in T-1757-18**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. No costs are ordered.

"Catherine M. Kane"

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Judge

## ANNEX A

### Relevant statutory provisions

#### LEGISLATIVE FRAMEWORK

*Canada Pension Plan*, RSC 1985, c C-8

#### **When person deemed disabled**

42 (2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

[...]

#### **Request to cancel benefit**

66.1 (1) A beneficiary may, in prescribed manner and within

#### **Personne déclarée invalide**

(2) Pour l'application de la présente loi :

a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :

(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,

(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[...]

#### **Demande de cessation de prestation**

66.1 (1) Un bénéficiaire peut demander la cessation d'une

the prescribed time interval after payment of a benefit has commenced, request cancellation of that benefit.

prestation s'il le fait de la manière prescrite et, après que le paiement de la prestation a commencé, durant la période de temps prescrite à cet égard.

### **Exception**

(1.1) Subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an applicant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the applicant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable.

### **Exception**

(1.1) Toutefois, le bénéficiaire d'une prestation de retraite ne peut remplacer cette prestation par une prestation d'invalidité si le requérant est réputé être devenu invalide, en vertu de la présente loi ou aux termes d'un régime provincial de pensions, au cours du mois où il a commencé à toucher sa prestation de retraite ou par la suite.

[...]

[...]

### **Effect of receiving a retirement pension**

70(3) A person who commences to receive a retirement pension under this Act or under a provincial pension plan is thereafter ineligible to apply or re-apply, at any time, for a disability pension under this Act, except as provided in section 66.1 or in a substantially similar provision of a provincial pension plan, as the case may be.

### **Effet du versement d'une pension de retraite**

(3) Une personne n'est en aucun cas admissible à demander ou à redemander une pension d'invalidité en application de la présente loi, si elle a commencé à recevoir une pension de retraite conformément à la présente loi ou à un régime provincial de pensions, sauf selon ce qui est prévu à cet égard à l'article 66.1 ou aux termes d'une disposition en substance semblable d'un régime provincial de pensions, selon le cas.

**Cancellation of Benefit**

46.2 (2) If an applicant for a disability pension is in receipt of a retirement pension and they are deemed to have become disabled for the purpose of entitlement to the disability pension before the month in which the retirement pension became payable, the application for the disability pension is deemed to be a request for the cancellation of the retirement pension.

**Cessation de prestation**

(2) Lorsque le requérant ayant demandé une pension d'invalidité reçoit une pension de retraite et qu'il est réputé être devenu invalide afin d'être admissible à la pension d'invalidité avant le mois au cours duquel la pension de retraite est devenue payable, la demande de pension d'invalidité est réputée être une demande de cessation de la pension de retraite.

**Grounds of appeal**

58 (1) The only grounds of appeal are that

(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.

**Moyens d'appel**

58 (1) Les seuls moyens d'appel sont les suivants :

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1757-18

**STYLE OF CAUSE:** AUSTIN KINSELLA V ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MARCH 19, 2019

**JUDGMENT AND REASONS:** KANE J.

**DATED:** APRIL 9, 2019

**APPEARANCES:**

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FOR THE APPLICANT

Matthew Vens

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

None

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