Federal Court  Cour fédérale

Date: 20231206

Docket: T-863-23

Citation: 2023 FC 1648

Vancouver, British Columbia, December 6, 2023

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

LINDA BARTLETT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision (Decision) of the Appeal Division of the Social Security Tribunal of Canada (Appeal Division) to deny the Applicant leave to appeal the decision of the General Division relating to the calculation of the Applicant's survivor's pension.

[2] For the reasons outlined below, the application for judicial review is dismissed.

II. Earlier Proceedings

[3] The self-represented Applicant has advocated on her own behalf over the past two decades for disability and pension benefits she believes she is owed. The Applicant had some success, as reflected in past decisions of the General Division, the Appeal Division, and Federal Court of Appeal. The background to these earlier proceedings is set out in detail in *Bartlett v Canada (Attorney General)*, 2012 FCA 230 and I will not repeat it here. For the purpose of these reasons, only the facts salient to the disposition of the application will be discussed.

[4] The Applicant first applied for a disability pension under the *Canada Pension Plan*, RSC, 1985, c C-8 [*CPP*] in December 1977. Her application was initially denied and the Applicant reapplied in 2001. A disability pension was granted; however, the Minister of Human Resources and Skills Development with responsibility for Service Canada, as the position was then known and will be referred hereinafter as the Minister, denied the Applicant's request for an award of interest or similar compensation on the disability pension benefits. The Applicant challenged the Minister's decision. She ultimately prevailed and was granted a disability pension with retroactive payments going back to 1978.

[5] The Applicant turned 65 in December 2012 and her disability pension was automatically converted to a retirement pension. The Applicant took issue, however, with the Minister's calculations for the conversion of her disability pension to a retirement pension, alleging that the contributory period was calculated wrong. Before the General Division, the Applicant alleged

that the contributory period was 75 months and not 79. She made other arguments about errors in the calculations.

[6] The General Division agreed with the Applicant that her contributory period was 75 months; however, the Appeal Division allowed the Minister's appeal after concluding that the General Division erred by relying on paragraph 44(2)(b) of the *CPP* in its consideration of the contributory period. The Appeal Division confirmed that section 49 dictated the end of a contributory period when calculating a retirement pension.

[7] The Applicant applied to the Federal Court of Appeal for judicial review of the Appeal Division's decision. On September 13, 2018, the Federal Court of Appeal concluded that the Appeal Division reasonably applied section 49 to determine the Applicant's contributory period as 79 months and not 75. The application for judicial review was dismissed: *Bartlett v Canada (Attorney General)*, 2018 FCA 165.

III. Calculation of Survivor's Pension

[8] After her husband passed away in June 2020, the Applicant applied for and was granted a *CPP* survivor's pension.

[9] Dissatisfied with the pension amount, the Applicant sought reconsideration, alleging a calculation error in the amount of her combined survivor's pension and retirement pension. By letter dated December 21, 2020, the Minister confirmed that the Applicant's current combined monthly benefit amount effective January 2021 was $790.25, explaining that the combined

pension was recalculated in accordance with paragraph 58(2)(c) of the *CPP*. The Applicant appealed the Minister's decision to the General Division.

[10] The General Division summarily dismissed the appeal on August 10, 2021. On appeal, the Appeal Division held that the General Division gave insufficient reasons for its conclusions and reached them without grappling with the Applicant's arguments. The appeal was allowed on December 17, 2021 and the matter was sent back to be reconsidered by another member of the General Division.

A. *General Division's Reconsideration Decision*

[11] At the reconsideration hearing before the General Division, the Minister relied on the affidavit of Andrew Williamson, Senior Legislative Officer with the CPP Policy and Legislation of the Department of Employment and Social Development Canada (ESDC) in support of its calculation of the Applicant's retirement pension (Williamson Affidavit). The Applicant argued that her benefits were miscalculated because Mr. Williamson failed to take full account of inflation between 1978, when the Applicant started receiving her CPP disability pension, and 2013, when she began getting her CPP retirement pension. She argued that in calculating the amount of her retirement pension, Mr. Williamson failed to take into account the "escalation factor," and used too low a pension index figure. According to the Applicant, it should have been about double the amount stated in the Williamson Affidavit.

[12] The General Division noted in its decision that the burden of proof was on the Applicant to show that it is more likely than not that there is an error in the Minister's calculations. It

considered in some detail the Applicant's key concerns about the use of the "escalation factor" in the calculation and ultimately rejected them because they were not consistent with the *CPP*. It noted that the Applicant's arguments were based on advice she obtained from a disability lawyer on the radio and calculations made by a Benefits Officer of Service Canada back in 2012 that the General Division found "do not make sense." The General Division concluded that the Applicant had not discharged her burden in demonstrating that the Minister erred in calculating her retirement pension or in calculating the combined retirement and survivor's benefit amounts.

[13] The Applicant sought leave to appeal to the Appeal Division.

B. *Appeal Division's Decision*

[14] The Appeal Division noted that pursuant to section 58.1 of the *Department of Employment and Social Development Act*, SC 2005, c 34 , it can grant permission to appeal a decision of the General Division if the claimant raises an arguable case that the General Division failed to observe a principle of natural justice, acted beyond its powers or refused to exercise those powers, interpreted or applied the law incorrectly, or based its decision on an erroneous finding of fact. Alternatively, the Appeal Division could allow a claimant to appeal if the application provides evidence on appeal that was not before the General Division.

[15] In her application for leave to the Appeal Division, the Applicant argued that a new calculation should be followed because both the documents she relied on previously and the Minister's calculations were wrong. The Appeal Division found that the new calculation relied on an escalation figure that the General Division had already rejected and the Applicant did not

identify any specific error of fact, error of law, or error of fact and law committed by the General Division.

[16] The Appeal Division also concluded that the Applicant did not present any new evidence. Instead, it found that the Applicant was advancing new arguments about how her retirement pension should have been calculated, which did not warrant the Appeal Division's intervention.

[17] By the present application, the Applicant seeks judicial review of the Appeal Division's Decision.

IV. Issues and Standard of Review

[18] The Applicant's arguments can be broken down into two main issues:

1) Did the General Division breach procedural fairness?

2) Did the Appeal Division err in law or in its appreciation of the facts in determining whether an arguable case was raised?

[19] There is no dispute between the parties that the first question is one of procedural fairness and thus attracts a standard of correctness. Therefore, the Court will not show deference and may substitute its view for that of the tribunal (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56).

[20] The second question involves questions of fact and questions of mixed fact and law and attracts a standard of reasonableness. A reasonable decision is one that, taken as a whole, is transparent, intelligible, and justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 15. It must be "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85. The burden is on the party challenging the decision under review to establish its unreasonableness.

V. Analysis

A. *Procedural Fairness*

[21] The Applicant claims in the Notice of Application that the General Division acted unfairly. She states that ESDC emailed 47 pages of evidence to her one week before the hearing held by telephone and 15 pages of evidence after the hearing. In her Memorandum of Fact and Law, the Applicant criticizes the General Division for allowing Mr. Williamson to explain how he calculated the Applicant's retirement pension. According to the Applicant, she had no time to research the material before the hearing.

[22] At the hearing before me, the Applicant stated that she was overwhelmed when she participated at the hearing before the General Division and found it unfair to be served with a 47-page document less than a week before. When questioned, the Applicant conceded that there was no evidence in her affidavit filed in support of the application relating to procedural unfairness or to explain what document was served on her a few days before the hearing. She also confirmed

that she did not raise any concerns about the late service of evidence before the General Division and did not request that the hearing be adjourned to allow her to review the material.

[23] It is a well established principle that "an allegation of a violation of procedural fairness must be raised at the earliest practical opportunity": *Ahousaht First Nation v Canada (Indian Affairs and Northern Development),* 2021 FCA 135 at para 39. The Applicant had the opportunity to argue the issue with the filing of the 47-page document as it was raised by the General Division at the outset of the hearing, but she failed to do so.

[24] The Applicant submits that the Appeal Division should have granted leave on the ground of procedural unfairness; however, I note that her concerns were not clearly explained in her application for leave to appeal to the Appeal Division. All she mentioned was that she received documents on certain dates prior to and after the hearing, without identifying the documents in question or explaining what prejudice she suffered from receiving the documents. In the circumstances, the Appeal Division cannot be faulted for not addressing whether a duty of procedural fairness existed and if it did, whether it had been breached.

[25] The general rule is that new issues that an applicant could have raised before a decision-maker but failed to do so should not be considered by a court on judicial review.

[26] Notwithstanding, given that the Applicant was self-represented in the proceedings below, I have reviewed the record, which is voluminous indeed, to determine whether there is any merit to the Applicant's argument of procedural unfairness. In my view, there is not. In fact, it appears

that it came to ESDC's attention shortly before the hearing that due to issues in combining the PDFs in the Williamson Affidavit, an electronic signature had disappeared from Exhibit "A" of the affidavit. The document emailed to the Applicant was simply a corrected version of the Williamson Affidavit that was resubmitted on June 27, 2022. As there were no substantive changes to the document from when it was submitted by the filing deadline of June 13, 2022, set by the General Division, the Applicant cannot be heard to complain about late service.

B. *Reasonableness of the Decision*

[27] The Applicant asserts that the figures relied on by the Minister in calculating her survivor's pension are wrong. By way of example, the Applicant claims that the Minister used the wrong "escalation factor" in calculating her retirement pension. By "escalation factor," the Applicant appears to be referring to the ratio found in the E/F calculation of the *CPP* under subsection 51(1), where "E" is the pension index amount for the year the Applicant's retirement pension became payable, and "F" is the pension index amount for the year that her disability pension became payable. However, the Applicant did not persuade the General Division that there was anything incorrect about the 3.671 figure calculated by Mr. Williamson using the statutory equation, or that any of the alternative E/F ratio figures that she proposed were correct. Mere disagreement is not a valid basis for judicial review.

[28] It is not open to this Court to calculate the Applicant's retirement pension *de novo*; the issue before the Court is the reasonableness of the Appeal Division's finding that no arguable case was presented by the Applicant: *Huebner v Canada (Attorney General)*, 2023 FCA 230 at para 5.

[29] The Applicant merely repeats on judicial review the arguments that were made and rejected by the Appeal Division that the Minister relied on incorrect figures in calculating her pension and that the General Division erred by relying on the Minister's calculations. She, again, provides her own figures for the calculations, but the authorities upon which she relies are not the *CPP* or official government documents, but rather sources of dubious reliability, such as a website that publishes financial planning information.

[30] The Applicant argues that the Appeal Division glossed over her evidence that establishes errors in the Williamson Affidavit. I disagree. The Williamson Affidavit clearly lays out the applicable provisions, explains why they apply, and sets out the calculations it followed to arrive at the Applicant's pension amounts.

[31] The courts have recognized that the Appeal Division is a specialized tribunal with the expertise to decide issues within the scope of its own appeal jurisdiction and governing statute. The Appeal Division carefully assessed the entirety of the Applicant's arguments and evidence and concluded that the new calculation she presented is based on escalation figures that the General Division properly rejected.

VI. Conclusion

[32] The Appeal Division can only permit appeals on narrow grounds. The Applicant failed to demonstrate that her appeal falls within any of those grounds. Given that the Applicant did not raise an arguable case or present new evidence, it was reasonable for the Appeal Division to deny leave to appeal. The Appeal Division's Decision is transparent, intelligible, and justified.

[33] The Respondent did not request costs; therefore, none will be awarded.

[34] Finally, the style of cause is amended on the Court's own motion with immediate effect by removing the tribunal as a Respondent.

JUDGMENT IN T-836-23

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended, with immediate effect, by removing the Social Security Tribunal of Canada Appeal Division as a Respondent.

2. The application for judicial review is dismissed, without costs.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-863-34
STYLE OF CAUSE:	LINDA BARTLETT v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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Rebekah Ferriss	FOR THE RESPONDENT

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