

Federal Court



Cour fédérale

**Date: 20190919**

**Docket: T-1945-18**

**Citation: 2019 FC 1189**

**Ottawa, Ontario, September 19, 2019**

**PRESENT: Mr. Justice Boswell**

**BETWEEN:**

**DONALD LEE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Donald Lee, has applied for judicial review of a decision of the Appeal Division of the Social Security Tribunal of Canada [SST]. The Appeal Division denied Mr. Lee leave to appeal a decision of the General Division of the SST because the appeal had no reasonable chance of success.

[2] Mr. Lee asked the SST to find that the Minister of Employment and Social Development should relieve him from repayment of disability pension payments paid under the *Canada*

*Pension Plan*, RSC 1985, c C-8 [*CPP*]. The General Division determined that the SST lacked jurisdiction to do so under the provisions of the *CPP*. The Appeal Division found the General Division had no power to interfere with the Minister's decision denying Mr. Lee's request for relief from repayment because of an alleged administrative error.

[3] Mr. Lee represents himself in this proceeding. He asks the Court to make various declarations and grant other relief, including setting aside the Minister's determination that he was ineligible for disability benefits after the end of April 2002 because he had returned to work in January 2002.

I. Background

[4] Mr. Lee stopped working in July 1999 due to health complications related to HIV-AIDS. He applied for a disability pension under the *CPP* in June 2000. The Minister granted the application in November 2001.

[5] Mr. Lee returned to work in January 2002, initially for a three-month trial period, but failed to report this to the Minister. He received disability pension payments for more than a decade before the Minister suspended the payments in December 2012 and commenced a review of Mr. Lee's file.

[6] As part of the review, Mr. Lee explained in a letter dated January 18, 2013, that he was unaware the monthly *CPP* payment comprised two pensions: a survivorship pension, which he started to receive in 1999 after the death of his same-sex partner, and a disability pension. In the

letter, Mr. Lee stated his belief that the payments were for only the survivorship benefit; he also noted that he did not understand why the Canada Revenue Agency and Service Canada failed to flag his file for review despite his income tax returns being reassessed on several occasions after he started receiving the disability pension.

[7] Upon completion of the review of Mr. Lee's file, Service Canada informed him in a letter dated August 7, 2014, that he was not eligible for a disability benefit after the end of April 2002 because he had returned to work in January 2002, and that he owed the Canada Pension Plan some \$92,000. Mr. Lee requested that this decision be reconsidered, asking for relief based on administrative error as contemplated by paragraph 66(3) (d) of the *CPP*. Service Canada responded to Mr. Lee's request for relief in a letter dated July 6, 2016, in which it denied Mr. Lee's allegation of administrative error and stated that if he disagreed with the decision, he could seek judicial review at the Federal Court. (Although Mr. Lee filed an application for judicial review in August 2016, he subsequently discontinued the application).

[8] In January 2017, Mr. Lee appealed the decision to terminate his disability pension before the General Division of the SST. The General Division denied the appeal in June 2018 because the Minister had established that Mr. Lee had ceased to be disabled within the meaning of the *CPP*. The General Division acknowledged Mr. Lee's allegation of administrative error but found it had no authority to remedy the situation in his favour or reduce the overpayment burden on him in light of his declining health.

[9] Mr. Lee sought leave to appeal the General Division's decision to the Appeal Division of the SST in September 2018. In his application for leave, he argued that the General Division erred in law by finding it did not have jurisdiction to remedy administrative errors.

## II. The Appeal Division's Decision

[10] In a decision dated October 10, 2018, the Appeal Division refused Mr. Lee's application for leave to appeal the General Division's decision.

[11] The Appeal Division focused on two issues: (1) whether there was an arguable case that the General Division committed an error of law by concluding it had no power to remedy administrative errors; and (2) whether the General Division overlooked or misconstrued relevant evidence.

[12] The Appeal Division noted that it had to determine whether the General Division committed one or more errors as set out in subsection 58(1) of *the Department of Employment and Social Development Act, SC 2005, c 34 [DESDA]*. This subsection provides that 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.

[13] The Appeal Division further noted that the test at the leave stage was whether there was any arguable ground upon which the appeal might succeed.

[14] The Appeal Division found there was no arguable case that the General Division had committed an error of law by concluding it had no power to remedy administrative errors. Although the General Division had incorrectly referenced subsection 66(4) of the *CPP* rather than paragraph 66(3) (d) in making this conclusion, the Appeal Division relied upon *Canada (Attorney General) v Leer*, 2012 FC 932 at paras 18 and 19, in determining that this error was immaterial because the General Division would have come to the same conclusion regardless of whether it had referred to either subsection.

[15] The Appeal Division noted that not all of the Minister's decisions under the *CPP* can be appealed to the SST, and that decisions relating to erroneous advice or administrative error under paragraph 66(3) (d) and subsection 66(4) of the *CPP* fall into the category of decisions that the SST has no power to review. The Appeal Division observed that the July 6, 2016 letter Service Canada sent to Mr. Lee, finding that there was no administrative error, informed him that he could apply for judicial review at the Federal Court.

[16] The Appeal Division further noted that Federal Court decisions have instructed the SST to consider not only an applicant's written materials but also whether the General Division might have misconstrued or failed to properly account for any of the evidence. The Appeal Division concluded that the General Division had neither overlooked nor misconstrued relevant evidence. For the Appeal Division, the question within the General Division's jurisdiction was whether the

Minister had shown that Mr. Lee had ceased to be disabled within the meaning of the *CPP* by the end of April 2002. In the Appeal Division's view, there was little controversy on this point.

[17] The Appeal Division concluded its reasons by noting that, like Mr. Lee, it too had trouble understanding how the situation continued for so long without anyone flagging Mr. Lee's file for review; nevertheless, it found his appeal had no reasonable chance of success and refused the application for leave to appeal.

### III. Analysis

[18] This application for judicial review raises one main issue: that is, was it reasonable for the Appeal Division to refuse Mr. Lee's application for leave to appeal because it had no reasonable chance of success?

#### A. *Standard of Review*

[19] The applicable standard of review in respect of the Appeal Division's decision to deny leave to appeal is reasonableness (*Andrews v Canada (Attorney General)*, 2018 FC 606 at para 17).

[20] The reasonableness standard tasks the Court with reviewing an administrative decision for the existence of justification, transparency, and intelligibility within the decision-making process, and determining 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). Those criteria are met if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

B. *The Decision was Reasonable*

[21] Mr. Lee does not identify any error in the Appeal Division's decision in his memorandum of fact and law; nor did he do so at the hearing of this matter. He claims that Service Canada made an administrative error and that he should be relieved of a portion of the payment owing under paragraph 66(3) (d) of the *CPP*. His arguments focus on Service Canada's letter dated July 6, 2016, rather than on the Appeal Division's decision. This is evident in his application for judicial review where the following relief is requested [sic]:

- a. Declaratory relief that the Decision was unreasonable and incorrect, and was due to an administrative error on behalf of CPP;
- b. Declaratory relief that the entire amount (\$92,083.04) to repay given that the amount is a significant sum and that the situation should not have been continued for so long (12 years) without the file being flagged for review.
- c. Declaratory relief from securing the entire amount (\$92,083.04), given the reduced life span and decreased income (as the Applicant is going on Long Term Disability) in the shorten life span would likely be unreasonable and unachievable; however, the likelihood of securing a settlement in part is more reasonable.
- d. Due to compassionate reasons and leniency due to declining health due to HIV and self-representation of this Judicial Review and appeal, decreased life expectancy and decreased income (as applicant is going on Long Term Disability), that a settlement in part be granted and be more reasonable.

[22] Subsection 58(2) of the *DESDA* provides that leave to appeal will be refused “if the Appeal Division is satisfied that the appeal has no reasonable chance of success”. In *Osaj v Canada*, 2016 FC 115 at para 12, the Court held that “having a reasonable chance of success in this context means having some arguable ground upon which the proposed appeal might succeed”. An applicant has the burden of demonstrating to the Appeal Division that the appeal possesses a reasonable chance of success (*Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 31). The Appeal Division referenced both of these cases and reasonably applied the appropriate test to determine whether leave should be granted.

[23] The Appeal Division’s decision was reasonable because the *CPP* does not grant the General Division jurisdiction to review the Minister’s decisions concerning administrative errors or the remission of repayments (*Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278 at paras 10 to 13). The Appeal Division explicitly relied upon the Federal Court of Appeal’s decision in *Pincombe v Canada (Attorney General)*, [1995] FCJ No 1320, in concluding that the SST lacks jurisdiction to review the Minister’s decisions concerning erroneous advice or administrative error under subsections 66(3) and 66(4) of the *CPP*.

[24] It also was reasonable for the Appeal Division to review the documentary record to satisfy itself that the General Division had neither overlooked nor misconstrued relevant evidence in determining Mr. Lee ceased to be disabled, within the meaning of the *CPP*, by the end of April 2002.



[25] Although Mr. Lee has consistently argued that he should be granted relief under paragraph 66(3)(d) of the *CPP* due to an administrative error, it was noted during the hearing of this matter that, in light of his circumstances, repayment of the disability pension payments may amount to undue hardship under paragraph 66(3)(c). This issue, however, is beyond the purview of this judicial review application and what the SST is empowered to consider.

#### IV. Conclusion

[26] In short, the Appeal Division's reasons for refusing Mr. Lee's application for leave to appeal the General Division's decision are intelligible, transparent, and justifiable, and its decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law. This application for judicial review is, therefore, dismissed.

[27] The Respondent has requested under Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, that the Court amend the style of cause in its decision, naming the Attorney General of Canada as the proper respondent in this matter. The style of cause will be so amended, with immediate effect.

[28] The Respondent confirmed at the hearing of this matter that he did not seek costs and, accordingly, there will be no order as to costs.

**JUDGMENT in T-1945-18**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is dismissed; the style of cause is amended, with immediate effect, to name the Attorney General of Canada as the respondent in lieu of the Minister of Employment and Social Development; and there is no order as to costs.

“Keith M. Boswell”

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Judge

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

**DOCKET:** T-1945-18

**STYLE OF CAUSE:** DONALD LEE v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 10, 2019

**REASONS FOR JUDGMENT  
AND JUDGMENT:** BOSWELL J.

**DATED:** SEPTEMBER 19, 2019

**APPEARANCES:**

Donald Lee

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Marcus Dirnberger

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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FOR THE RESPONDENT