Federal Court of Appeal | Cour d'appel fédérale

Date: 20220916

Docket: A-88-21

Citation: 2022 FCA 157

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

DAVID SIBBALD

Applicant

and

ATTORNEY GENERAL OF CANADA and LYNNE SIBBALD

Respondents

Heard by online video conference hosted by the registry

on September 8, 2022.

Judgment delivered at Ottawa, Ontario, on September 16, 2022.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: RENNIE J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] The applicant, Mr. David Sibbald, brings this application for judicial review of the decision of the Appeal Division of the Social Security Tribunal (the Appeal Division) in *LS v. Minister of Employment and Social Development and DS*, 2021 SST 75. The Appeal Division

reversed the decision of the General Division of the Social Security Tribunal (the General Division) in *DS v. Minister of Employment and Social Development and LS*, 2020 SST 821 and assigned the disabled contributor's child's benefit (the benefit) payable under paragraph 44(1)(*e*) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the CPP) to Mr. Sibbald's former spouse, Ms. Lynn Sibbald.

II. Background

[2] The benefit at issue in this application is a flat-rate monthly benefit paid to a child of a person receiving CPP disability benefits. The benefit belongs to the child, not the parent. However, the benefit cannot be paid directly to a child who is under 18 years of age.

[3] The child in question was under 18 years of age at the relevant time. His parents physically separated in December 2017 when his mother, Ms. Sibbald, left the family home. The child remained in the family home with his father, Mr. Sibbald, on a full-time basis after his mother left. Prior to the separation, when the family unit was intact, Ms. Sibbald received the benefit on the child's behalf because she is the disabled contributor.

[4] Section 75 of the CPP applies to situations where a benefit is payable to a child of a disabled contributor and the child has not reached 18 years of age. In cases where the child is living apart from the disabled contributor, this section provides that the payment shall be made to the person having custody and control of the child. The terms "custody and control" are not defined in the CPP.

[5] In this case, once the parties physically separated, the question to be determined was which parent should receive the benefit on behalf of the child, that is, which parent had custody and control of the child.

[6] After the separation, in November 2018, Ms. Sibbald advised the Minister of Employment and Social Development (the Minister), by telephone, that the child was living with his father who had custody and control.

[7] In December 2018, Mr. Sibbald applied for the benefit on behalf of the child, and the Minister granted payment starting in December 2018.

[8] Mr. Sibbald asked the Minister to reconsider her decision, so that the payment of the benefit would start retroactively from January 2018, the actual period at which time the child resided solely with him.

[9] On May 17, 2019, Ms. Sibbald completed a questionnaire provided to her by the Minister, wherein she answered "yes" to the question: "Is [the child] in the custody and control of his father on a full time basis?" In the same questionnaire, Ms. Sibbald wrote that she left the family home in December 2017, and that "the [child] is with his father 100% and we visit when possible" (Respondent's Record, Volume I, p. 313).

[10] On May 30, 2019, the Minister wrote to Mr. Sibbald and, on May 31, 2019, wrote to Ms. Sibbald, and provided her reconsideration decision.

[11] In reconsideration of her decision, the Minister reversed her position and, applying the August 2018 "Policy Direction for Payment of the *Canada Pension Plan*'s Disabled Contributor's Child Benefit" (the Policy), determined that the benefit should be payable to Ms. Sibbald because she is the disabled contributor. The Minister's position was that, in accordance with the Policy, in the case of a child under 18 years of age and living apart from the disabled contributor, the benefit should be payable to the disabled contributor as long as they had "any relationship with the child, no matter how minimal" (Respondent's Record, Volume 1, p. 324).

[12] Mr. Sibbald appealed the Minister's decision to the General Division.

[13] The General Division held a hearing by teleconference and heard testimony from both parents. It also reviewed the documentation submitted by the parents, including the questionnaire filled out by Ms. Sibbald and the telephone logs recording statements made by Ms. Sibbald to the Minister in November 2018 advising that she was not the primary care giver of the child since she left the family home.

[14] Before the General Division, Mr. Sibbald testified that the child lived with him full time and never spent a night with Ms. Sibbald since she left the family home. The General Division heard that Mr. Sibbald provided the child with the use of his car and arranged for transportation to extracurricular activities. Mr. Sibbald advised that he was financially responsible for providing all of the child's daily needs, food and shelter. Mr. Sibbald also took the child to all of his medical and dental appointments. In addition to Mr. Sibbald's testimony, letters from the child's

dentist, doctor and school were submitted confirming that Mr. Sibbald was the contact person for the child and that the address used for the child was the family residence. Finally, Mr. Sibbald testified that he received no financial support for the child from Ms. Sibbald.

[15] The General Division heard from Ms. Sibbald that she spoke to the child regularly and saw him when he was able to spare time for her. She stated that she did not sign any forms on the child's behalf.

[16] The General Division determined that it was not bound by the Policy, but rather was bound by section 75 of the CPP.

[17] The General Division considered all of the evidence and found on a balance of probabilities that Mr. Sibbald had "custody and control" of the child in accordance with section 75 of the CPP, and awarded payment of the benefit to him on behalf of the child, effective January 2018.

III. Appeal Division Decision

[18] Ms. Sibbald applied informally, by email, to the Appeal Division, seeking leave to appeal the General Division decision, on the grounds that the General Division had based its decision on an erroneous finding of fact, pursuant to paragraph 58(1)(*c*) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the *DESD*). The Appeal Division granted leave on this basis.

[19] At the hearing before it, the Appeal Division did not hear new testimony but considered a new document, an Order from the Ontario Superior Court of Justice, Family Court, setting out the child support and parenting arrangements for the child. The Appeal Division also considered the documents filed with the General Division and listened to the audio recordings and the parties' oral submissions before the General Division.

[20] In coming to its decision, the Appeal Division made the following findings.

[21] First, the Appeal Division found that it could consider the Order as fresh evidence because it confirmed the oral evidence of the parties and was not in dispute. Specifically, the Appeal Division found that the parties had joint custody of the child (Appeal Division Decision at para. 20).

[22] Next, the Appeal Division found that the General Division was wrong when it held that Ms. Sibbald did not see the child regularly after the separation because Ms. Sibbald testified that, more recently, she saw the child regularly for coffee and to walk her dog (Appeal Division Decision at para. 21).

[23] Next, the Appeal Division found that it was wrong for the General Division to make a general statement that Ms. Sibbald did not know what was going on in the child's life. The Appeal Division pointed to Ms. Sibbald's testimony that she assists the child in making decisions, for example, when the child phoned her when he was involved in a situation where the police was called (Appeal Division Decision at paras. 22–23).

[24] According to the Appeal Division, these examples of "factual errors" supported the mother's legal position that she was involved in the caring for and making decisions for the child (Appeal Division Decision at para. 24).

[25] For these reasons, the Appeal Division found that the General Division's finding of fact that the father had custody and control of the child was wrong, as this finding implies that Ms. Sibbald did not (Appeal Division Decision at para. 25).

[26] The Appeal Division allowed the appeal. It found that the General Division had based its decision on an "important factual error". Correcting the error, the Appeal Division found both Mr. Sibbald and Ms. Sibbald had custody and control of the child at the relevant time. According to the Appeal Division, by operation of the law, the benefit should be payable to Ms. Sibbald as she was the disabled contributor (Appeal Division Decision at para. 8).

IV. The Role of the Appeal Division and the Standard of Review

[27] The role of the Appeal Division is constrained pursuant to subsection 58(1) of the DESD. "[The Appeal Division] can only intervene if the General Division 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, [or without regard for the material before it]. It cannot step in for the sole reason that it would have weighed the evidence differently": *Uvaliyev v. Canada (Attorney General)*, 2021 FCA 222, 338 A.C.W.S. (3d) 295 at para. 7.

[28] On judicial review, the role of this Court is therefore to determine whether the Appeal Division came to a reasonable decision, in light of these constraints: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 23, 83, 86 [*Vavilov*]; *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6, 313 A.C.W.S. (3d) 563 at para. 34. In other words, the question for this Court is whether the Appeal Division could reasonably conclude that 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.

[29] At paragraph 41 of *Walls v. Canada (Attorney General)*, 2022 FCA 47, 2022 A.C.W.S. 742, this Court recently clarified the meaning of the terms found in paragraph 58(1)(*c*) of the DESD as follows:

> [A] perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence […] [T]he notion of "perversity" has been interpreted as "willfully going contrary to the evidence". The notion of "capriciousness" or of the factual findings being made without regard to the evidence would include "circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings".

[30] Having regard to the standard of review and the Appeal Division's application of the factors set out in paragraph 58(1)(*c*) of the DESD, I am of the view that the Appeal Division Decision is unreasonable, for the following reasons.

V. Analysis

A. *The test on the admissibility of fresh evidence*

[31] As a preliminary matter, I will briefly discuss the admissibility of the fresh evidence that was before the Appeal Division.

[32] A copy of the Order of the Ontario Superior Court of Justice, Family Court, dated July 16, 2019, was submitted to the Appeal Division but was not before the General Division. The Order provides that the parties have joint custody of the child. It further specifies that the child's primary residence is with Mr. Sibbald and that Ms. Sibbald shall have access to the child in accordance with the child's views and wishes. The Order also specifies that Ms. Sibbald is not required to pay child support because of her level of income and the fact that the spousal support payable by the respondent takes into account that he is supporting the child financially.

[33] The Order was granted one year prior to the hearing before General Division. The administrative decision-maker was aware of its existence through the parties' testimony, but neither party provided a copy of it. The General Division indicated during the hearing that it could not consider the Order if it was not submitted, but advised that either party could submit the Order if they wanted to. They did not.

[34] The Appeal Division accepted the Order as new evidence.

[35] At paragraph 13 of *Gittens v. Canada (Attorney General)*, 2019 FCA 256, 311 A.C.W.S. (3d) 211, this Court has held that "hearings before the Appeal Division are not redos based on updated evidence of the hearings before the General Division. They are instead reviews of General Division decisions based on the same evidence".

[36] The general rule regarding the admissibility of evidence on judicial review was explained by this Court at paragraph 19 of *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 NR 297 [*Access Copyright*] which reads as follows:

> … the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court.

[37] In *Access Copyright*, this Court enumerated three, potentially non-exhaustive, exceptions to the general rule: (1) general background information, (2) to bring procedural defects to the attention of the court, and (3) to highlight the complete absence of evidence. The Court also highlighted that these exceptions "exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker" (*Access Copyright* at para. 20).

[38] *Access Copyright* was relied upon in *Sharma v. Canada (Attorney General)*, 2018 FCA 48, 288 A.C.W.S. (3d) 790 at paragraph 9 [*Sharma*]. However, in *Sharma*, the question was whether this Court, not whether the Appeal Division, should consider new evidence.

[39] When determining whether fresh evidence should be admitted before it, the Appeal Division should be guided by the same principles enumerated in *Access Copyright*. The Appeal Division is not the fact-finder. That is the role of the General Division. There may be circumstances when the Appeal Division would allow fresh evidence, if it assists in providing background information or, perhaps exceptionally, in cases where both parties have agreed that an important document should be considered. Determinations of this nature are case-specific and should be left to the Appeal Division.

[40] These principles are not new to the Appeal Division. I am aware of the Appeal Division having recently applied these principles to new evidence (see, for example, *RK v. Canada Employment Insurance Commission*, 2020 SST 1024; *KD v. Minister of Employment and Social Development*, 2020 SST 631 and *HZ v. Minister of Employment and Social Development*, 2020 SST 550).

[41] In the review before us, Mr. Sibbald does not agree that the Order should have been admitted and considered by the Appeal Division. He says that he was not allowed the opportunity to provide further evidence regarding the Order, the parenting arrangements and child support arrangements. He also argues that the new evidence does not provide general background information. Accordingly, he submits that allowing this fresh evidence was unfair and prejudicial to his position. I agree.

[42] The Order provided to the Appeal Division does not fall under the general background information exception and therefore should not have been admitted as evidence.

B. *The Appeal Division is re-weighing the evidence*

[43] The General Division was obligated to apply section 75 of the CPP to the question before it. It had to decide which parent had custody and control of the child and should therefore be paid the benefit on behalf of the child. As the fact-finder, the General Division needed to consider the oral testimony, the documents and the submissions of both parties in order to determine which parent had custody and control of the child.

[44] I have reviewed the record that was before the General Division. It cannot be said that the errors found by the Appeal Division set out in paragraphs 22 to 24 above were factual findings that went contrary to the evidence. Rather, the General Division's findings were made with regard to the evidence before it. Indeed, there was more than sufficient evidence to rationally support a finding that Mr. Sibbald had custody and control of the child effective January 2018. This is apparent from my recitation of the testimony and evidence of the parties found in paragraphs 14 and 15 above.

[45] Likewise, the General Division did not omit or ignore any important evidence. The General Division appropriately considered all of the evidence from both Mr. Sibbald and Ms. Sibbald, including the documents submitted by them and their oral submissions. The General Division weighed that evidence, having regard to the meaning of the term "custody", and was aided by the definition of custody found in case law rendered under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) [the *Divorce Act*] : *Abbott v. Abbott*, 2001 BCSC 323, 89 BCLR (3d) 68. It also considered a useful decision from the Pension Appeals Board, which addressed a

similar question of parental responsibility: *Minister of Human Resources Development v. Warren* (10 December 2001), CP 14995 (PAB). The General Division found, on a balance of probabilities, that Mr. Sibbald had custody and control of the child.

[46] The arguments advanced by Ms. Sibbald about the General Division's factual findings, as accepted by the Appeal Division, went to the weight given to the evidence and asked that it be fully reconsidered. The General Division, when rendering its decision, is not required to refer to each and every piece of evidence before it, but is presumed to have reviewed and considered the totality of the evidence. The General Division is tasked with evaluating and weighing the evidence. It can either accept or reject factual assertions, based on whether it found the evidence credible or persuasive. The General Division determines whether it is convinced, on a balance of probabilities, that one party's evidence outweighs the evidence of the party who opposes it. The General Division then provides written reasons outlining its factual findings and its application of those findings to the legal question before it. That is exactly what the General Division did here.

[47] In the case before us, the Appeal Division essentially reweighed the evidence that was before the General Division, considered new evidence, and substituted its view of the probative value of the evidence for that of the General Division. That is unreasonable.

C. *The Policy is not binding*

[48] I would like to add a few words about the Policy. The General Division was correct when it found that it was not bound by the departmental policies of the Minister (General Division Decision at para. 9). The Policy cannot supersede the CPP.

[49] The Policy directs that, in circumstances where a child is under 18 years of age and does not reside with the disabled contributor, the benefit must be paid to the disabled contributor if "the disabled contributor shares custody of a child, no matter how minimal".

[50] The Policy is inconsistent with section 75 of the CPP; section 75 of the CPP does not use the wording "minimal" custody. Indeed, section 75 of the CPP requires the decision-maker to conduct an enquiry as to which person has custody and control of the child. It is necessary for the decision-maker to make factual findings based on documentary and, possibly, oral evidence to determine who has custody and control of the child.

[51] During his oral submissions before this Court, Mr. Sibbald referred to two decisions from the Social Security Tribunal that support his arguments. These decisions were rendered after the Appeal Division Decision under review (*KM v. Minister of Employment and Social Development*, 2021 SST 693 [*KM*] and *MM v. KM and Minister of Employment and Social Development*, 2022 SST 575 [*MM*]). *KM* is the decision of the General Division, and *MM* is the decision of the Appeal Division in the same case. In my view, the approach taken in these two decisions is helpful. Both decisions provide a reasonable analysis of the question of which parent

should receive the benefit on behalf of the child in circumstances where the minor child is not residing with the disabled contributor. Both decisions are thorough and well written and reasonably apply section 75 of the CPP.

VI. Guidance

[52] Mindful of my role as a reviewing judge and the deference this Court owes to administrative decision-makers, I find it may still be useful to provide some guidance to both the General Division, as the administrative fact-finder and decision-maker, and the Appeal Division, as the administrative tribunal tasked with determining whether it should intervene in the General Division's decision.

[53] The *Canada Pension Plan Regulations*, C.R.C., c. 385 [CPP Regulations] set out the information that must be provided to the Minister, if requested, upon the application for the disabled contributor's child benefit. This information requires the disabled contributor to provide evidence that they have more than a minimal amount of custody and control of the child.

[54] In particular, the CPP Regulations provide a detailed list of the information and evidence the person who is applying for the benefit on behalf of the child must furnish to the Minister. Subsection 52(i) of the CPP Regulations requires information regarding whether a dependent child of the disabled contributor:

A. is their child;

B. is their legally adopted child;

C. was legally or in fact in their custody and control;

D. is in the custody and control of the disabled contributor;

E. is living apart from the disabled contributor; or

F. is or was maintained by the disabled contributor.

[55] This list is not exhaustive. In addition, subsection 52(n) of the CPP Regulations allows the Minister to request "such additional documents, statement or records that are in the possession of the applicant […] or are obtainable by [them] that will assist the Minister in ascertaining the accuracy of the information and evidence referred to in [section 52 of the CPP Regulations]."

[56] If a matter winds its way from the Minister to the General Division, it may be useful for the General Division, as the administrative decision-maker, to request additional documents from the person making the application. For example, further information could include copies of income tax returns to determine who is claiming the child as a dependent for the child tax benefit. More importantly, copies of any orders or agreements related to the child's parenting arrangements and child support arrangements should be provided. Such orders or agreements should become part of the overall evidence to be assessed along with the evidence from the parties with respect to who is, in fact, raising the child. There may be cases where the order or agreement has been overtaken by events and the child's circumstances may have changed. The

parties may in fact have worked things out between themselves over time in a manner that is different from the order or agreement, particularly as children got older.

[57] While not determinative on their own, these documents should form part of the evidentiary record before the decision-maker.

[58] Finally, as of March 1, 2021, the term "custody" found in the *Divorce Act* has changed to "decision-making responsibility". The term "decision-making responsibility" means the responsibility to make major decisions about how to raise and care for the child. Examples of major decisions affecting a child are those touching upon education, medical care, religion and enrolment in significant extracurricular activities. The term "access" has changed to "parenting time". "Parenting orders" now replace orders for custody and access under the *Divorce Act.* Despite the significant amendments made to the *Divorce Act* in 2021, orders using the terms "custody" and "access" remain in effect, for example orders pronounced prior to the amendments and orders that fall under provincial legislation. Notwithstanding these amendments, the CPP continues to use the terms "custody and control".

VII. Conclusion

[59] It was unreasonable for the Appeal Division to interfere with the General Division's factual findings in this case. It was unreasonable for the Appeal Division to have considered fresh evidence, to reweigh the evidence before the General Division and substitute its findings for those of the General Division. That is not the role of the Appeal Division.

VIII. Remedy

[60] For these reasons, I would allow the application, without costs, and set aside the Appeal Division Decision.

[61] In my view, sending this matter back to the Appeal Division for a re-determination would continue to delay the payment of benefits intended for the child, who now is well over 18 years of age. It is true that courts should generally respect Parliament's intention to entrust matters to administrative decision-makers: *Vavilov* at para. 142. However, the matter before us was restricted to a question of fact under paragraph 58(1)(*c*) of the DESD, and the General Division had the opportunity to hear the parties and weigh the evidence. Considering the delay and in fairness to the child in question, I would exercise my discretion to decline to remit the matter to the Appeal Division for redetermination, leaving the decision of the General Division in place: *Blue v. Canada (Attorney General)* 2021 FCA 211, 337 A.C.W.S. (3d) 534 at paras. 49–51.

"Marianne Rivoalen"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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