



[2022] 2 F.C.R. D-30

## PENSIONS

*Related subject: Constitutional Law*

Consolidated applications for judicial review of decisions by Social Security Tribunal, Appeal Division related to limitation of payment of disabled contributor's child benefits (DCCB) under *Canada Pension Plan*, R.S.C., 1985 c. C-8, s. 74(2) — Docket A-198-20: decision (Tribunal File Number: AD-19-45) dismissing applicant's motion to raise new argument related to *Canadian Charter of Rights and Freedoms* (Charter), s. 7; docket A-87-21: decision (2021 SST 117) finding that Social Security Tribunal, General Division made errors of law in concluding that limitation on payment of benefits under s. 74(2) to 11 months prior to application being made for such benefits infringing Charter, s. 15(1); docket A-238-21: decision (2021 SST 412) allowing appeal of Minister of Employment and Social Development (Minister), setting aside decision 2021 SST 117 on basis that applicant not establishing that limitation on payment of benefits under s. 74(2) violated equality rights of her children under Charter, s. 15 — Applicant granted CPP disability benefit in February 1995 — Children (born in 1997, 1999, 2002) entitled to receive DCCB payment — However, applicant not making appropriate DCCB application until January 2013 — S. 74(2) limiting retroactive payment of benefits to 11-month period prior to application being received — Applicant therefore did not receive retroactive payment of DCCB for each child commencing with month after month in which that child was born, but rather only received retroactive payments for each child for 11-month period preceding month in which her application for these benefits received — Applicant appealed to General Division on basis that limitation on retroactive payment of DCCB (retroactivity cap) infringed equality rights of her children under Charter, s. 15(1) — General Division finding that s. 74(2), in so far as limiting maximum retroactivity date for payment of DCCB to 11 months, discriminating against applicant's children — Finding that each of applicant's children entitled to DCCB with effective payment date commencing one month after month during which that child born — Issues whether Appeal Division erred: in dismissing applicant's motion to raise new argument related to Charter, s. 7 (docket A-198-20); in finding that General Division made errors of law (docket A-87-21); in not referring matter back to General Division, in deciding to make decision General Division should have made (docket A-238-21) — Appeal Division found, *inter alia*, that applicant had not raised Charter, s. 7 as issue in her appeal to General Division — Applicant had onus to show that there would be no prejudice to Minister if Charter, s. 7 argument were to proceed — Decision of Appeal Division that applicant failed to satisfy this onus reasonable — Applicant submitting General Division did not commit errors stipulated in *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (Act), s. 58(1), did not commit any error of law — Although General Division recited list of persons who are treated differently from claimant group, there was no explanation or discussion of how retroactivity cap in s. 74(2) creates distinction or difference between any of these identified persons, claimant group — Necessary to find that law creates distinction based on enumerated or analogous ground — Evident that General Division not applying correct legal test as set out in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 — Retroactivity cap not creating any distinction between applicant's children, children of parents who are not disabled — Timing of application for DCCB not enumerated or analogous ground — General Division erred in law as no evidence to support finding of any disproportionate impact of retroactivity cap on applicant's children, in comparison to impact of retroactivity cap on adult applicants for other benefits — Issue related to decision of Appeal Division to not refer matter back to General Division, but rather to render decision that General Division should have made, not whether proceeding before either General Division or

Appeal Division was procedurally fair, but whether Appeal Division had adequate record to render decision that General Division should have made — Applicant not establishing that decision of Appeal Division that she was able to present her case fully was unreasonable — Therefore, Appeal Division having adequate record to make decision that General Division should have made — Applicant also not establishing that Appeal Division erred in making decision that retroactivity cap not infringing Charter s. 15(1) — Applications dismissed.

SMITH V. CANADA (ATTORNEY GENERAL) (A-238-21 (Lead), A-87-21, A-198-20, 2023 FCA 122, Webb J.A., reasons for judgment dated June 1, 2023, 41 pp.)