Citation: *R. M. v. Minister of Employment and Social Development,* 2015 SSTAD 179

Appeal No. AD-14-471

BETWEEN:

R. M.

Applicant

and

Minister of Employment and Social Development
(formerly known as Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: February 9, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal from the decision of the General Division dated May 20, 2014. The General Division dismissed her application to rescind or amend the decision of the Canada Pension Plan Review Tribunals dated July 9, 2003, on the grounds that the application was statute-barred under section 66 of the *Department of Employment and Social Development Act* ("DESDA"). The General Division also found that, in the alternative, the information submitted by the Applicant did not constitute "new facts" that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. The Applicant seeks leave on a number of grounds. In order to succeed on this leave application, the Applicant must show that the appeal has a reasonable chance of success.

ISSUE

[2] Do any of the grounds of appeal raised by the Applicant have a reasonable chance of success?

HISTORY OF PROCEEDINGS

[3] The Applicant applied for disability benefits on April 11, 2002. A Review Tribunal dismissed her appeal for disability benefits. The Applicant applied for disability benefits a second time, on January 11, 2005. The Review Tribunal dismissed this second application on the basis that it was *res judicata*. The Applicant did not appeal either of the two Review Tribunal decisions to the Pension Appeals Board.

[4] The Applicant filed an application to re-open the decision of the Review Tribunal of April 11, 2002 on October 26, 2006, pursuant to subsection 84(2) of the *Canada Pension Plan*, since repealed. She filed two letters and two medical reports. Counsel for the Applicant explained that these documents had not been submitted to the Review Tribunal, owing to the fact that they did not exist at the time of hearing. Counsel also explained that the additional information showed that she was disabled, as it fully disclosed her disability and was more detailed than previous medical records.

[5] The Canada Pension Plan Review Tribunals did not decide the application to rescind or amend and hence, the application was transferred to the Social Security Tribunal (the "Tribunal"). The Tribunal wrote to the parties in or about April 2013, advising that the matter had been transferred from the Office of the Commissioner of Review Tribunals to the new Social Security Tribunal.

[6] On August 19, 2013, counsel for the Applicant filed a Notice of Readiness and the Appellant's Submissions addressing the "new facts" issue.

[7] The Tribunal sent a letter to the Applicant's counsel on September 16, 2013, advising that parties to the application now had until October 28, 2013 to file documents or submissions that "address the requirements of section 66 of the [DESDA] …"

[8] Counsel for the Respondent prepared submissions in or about October 2013. Counsel for the Respondent submitted that the Applicant's new facts application is out of time and cannot proceed. Counsel for the Respondent also submitted that alternatively, the evidence filed by the Applicant in support of the new facts application does not establish new facts, nor does it support a determination that the Applicant's condition was severe and prolonged as of December 2001 and continuously thereafter.

[9] Counsel for the Applicant filed the Applicant's Response to the Minister's Submission on March 27, 2014. Counsel for the Applicant responded that the Minister's interpretation of section 66 of the DESDA was incorrect and violated principles of statutory interpretation, including the *Interpretation Act*, the presumption against absurdity and the presumption against interfering with rights.

[10] The General Division dismissed the application to rescind or amend the decision of the Canada Pension Plan Review Tribunals dated July 9, 2003, on the grounds that the application was statute-barred under section 66 of the DESDA and effectively, the application therefore had not been made within the prescribed statutory time limit. The General Division also found that, in the alternative, the information submitted by the Applicant did not constitute "new facts" that could not have been discovered at the time of the 2003 hearing before the Review Tribunal with the exercise of reasonable diligence.

SUBMISSIONS

[11] The Applicant seeks leave on the following grounds, that the General Division:

a) Failed to observe a principle of natural justice in ensuring a fair hearing;

b) Erred in law in determining that the application to rescind or amend is statute-barred;

c) Erred in law and in fact in determining that the psychiatric evidence is not a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence; and

d) Erred in fact and in law in failing to find that the new evidence establishes that the Applicant suffered from a severe and prolonged disability as defined in the legislation before the end of her minimum qualifying period of December 31, 2001.

ANALYSIS

[12] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, for leave to be granted, some arguable ground upon which the proposed appeal might succeed is required: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[13] Subsection 58(1) of the *Department of Employment and Social Development Act* states that the only grounds of appeal are the following:

(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.

[14] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

a. Allegation of Breach of Natural Justice

[15] Counsel for the Applicant submits that the General Division failed to observe a principle of natural justice in ensuring a fair hearing. In particular, she submits that the General Division should have provided her with an opportunity to address *Tabingo v. Minister of Citizenship and Immigration,* 201 3 FC 377, first raised by the General Division in its decision, and which she submits ultimately proved to be decisive of the outcome of the proceedings. Counsel submits that neither the Applicant nor Respondent had addressed the *Tabingo* decision in their respective written submissions, oral submissions regarding *Tabingo* had never been made, and *Tabingo* only first arose in the decision of the General Division. Had she been aware that the General Division would be relying on the decision, she would have distinguished it from the DESDA.

[16] In its decision, the General Division quoted *Tabingo*:

> Courts will not interpret legislation in a manner that removes existing rights or entitlements unless Parliament's intention to do is clear. However, when a statute is unambiguous, there is no role for presumptions or interpretive aids, and the courts may not apply any of the interpretive presumptions noted earlier: *Professional Institute of the Public Service of Canada v. Canada (Attorney General),* 2012 SCC 71, paras 95, 159-160; *British Columbia v. Imperial Tobacco Canada Ltd.,* 2005 SCC 49, [2005] 2 SCR 473, para 71; *Gustavson Drilling (1964) Ltd. V. Canada (Minister of National Revenue),* [1977] 1 S.C.R. 271.

[17] Both parties were aware of the limitation issue under section 66 of the DESDA:

a) The Tribunal sent a letter to the Applicant's counsel on September 16, 2013, advising that the parties now had until October 28, 2013 to file

documents or submissions that "address the requirements of section 66 of the [DESDA] …"

b) The Respondent filed submissions dated October 24, 2013, addressing the limitation issue. In the Overview section of the submissions, counsel for the Minister wrote,

1. The position of the Minister is that Ms. R. M. new facts application is out of time and cannot proceed.

2. Recent amendments to the applicable legislation state that a new facts application must be made within one (1) year of the date the previous decision was communicated. …

[18] Counsel for the Minister then proceeded to summarize the limitation issue under the heading "Issues", as being, "Whether the new facts application is statute-barred pursuant to subsection 261(1) of the Jobs, Growth and Long-Term Prosperity Act (JGLPA) and subsection 66(2) of the DESDA". Counsel for the Minister then made submissions addressing the limitation issue. The Tribunal provided counsel for the Applicant with a copy of the Respondent's submissions on November 5, 2013.

[19] Counsel for the Applicant filed submissions on March 27, 2014, addressing the limitation issue. Counsel for the Applicant included a section titled "Presumption against interfering with Rights". She quoted from *Sullivan on the Construction of Statutes,* from pages 476 and 478 and submitted that the presumption applies also to rights of action or appeal:

> "It is presumed that the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects. Legislation designed to curtail the rights that may be enjoyed by citizens or residents is strictly construed."
>
> .... it also applies to defences, privileges and immunities."

[20] I might have been prepared to agree with the general thrust of the Applicant's submissions, that there could be a breach of a principle of natural justice, if a party is denied or not provided with an opportunity to address a material issue, particularly if that

issue could result in the dismissal of a claim. It goes to the maxim: a party should be permitted to address the case against him. However, this is entirely distinct from saying that there is an obligation on a decision-maker to give notice to the parties of the legal authorities which he might reference and which might prove to be persuasive of the ultimate outcome.

[21] Here, the parties were alive to the issues raised by *Tabingo*. Albeit it was in the immigration context, the Federal Court discussed principles of statutory interpretation. It stated that Courts would not interpret legislation "in a manner that removes existing rights or entitlements …" The Applicant here addressed the issue of the presumption against interference with rights. It cannot be said therefore that the Applicant was blind to the issues raised by *Tabingo* and that the Applicant did not have any notice that it could potentially have been an issue for consideration by the General Division, and therefore was deprived of the opportunity to address the purported relevance and application to the proceedings. The Applicant has not satisfied me that there is a reasonable chance of success on this particular issue.

b. Allegation of Error of Law

[22] Counsel for the Applicant submits that the General Division erred in law in determining that the application to rescind or amend is statute-barred. While counsel's submissions on *Tabingo* relate to the allegation of a breach of the principles of natural justice, some of the submissions may pertain to whether there might have been an error of law by the General Division in its interpretation and application to section 66 of the DESDA.

[23] Counsel for the Applicant submits that the General Division erred in its interpretation of section 66 of the DESDA, and that its interpretation is inconsistent and contrary to any notions of reasonableness, fairness and the provisions of the *Interpretation Act*. Counsel for the Applicant submits that the intent of Parliament should be considered in interpreting legislation. She submits that the DESDA and the *Social Security Tribunal Regulations* serve a known objective, that of streamlining and expediting the appeals process and not eliminating existing appeals.

[24] The General Division stated that recent case law indicates that legislation may not be interpreted in a manner that removes existing rights or entitlements, unless the legislature's intention to do so is clear. It appears that the General Division adopted and followed this line of legal authorities, and concluded that subsection 261(1) of the JGLPA is unambiguous and clear in reflecting Parliament's intentions to deem applications made under subsection 84(2) of the *Canada Pension Plan* to be made under section 66 of the DESDA. On this basis, the General Division found that Parliament clearly intended that such applications were to have been made within one year after the day on which a decision is communicated to an appellant.

[25] While subsection 261(1) of the JGLPA clearly deems applications made under subsection 84(2) of the *Canada Pension Plan* to be applications made on April 1, 2013 under section 66 of the DESDA (in which no decisions were made before April 1, 2013), it may be less clear that subsection 261(1) of the JGLPA unambiguously and clearly extinguished any rights that might have accrued under subsection 84(2) of the *Canada Pension Plan*. If it had done so, arguably the legislation would have explicitly set this out by using such language, much like section 87.4 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27, which had been challenged in *Tabingo*. Section 87.4 clearly and unambiguously terminated rights. That section reads,

> 87.4 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of federal skilled workers that was made before February 27, 2008 is terminated if, before March 29, 2012, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to that class. (my emphasis)

[26] Here, the DESDA and JGLPA made no such reference that any specific rights which might have accrued under subsection 84(2) of the *Canada Pension Plan* were terminated or extinguished, and the General Division did not delve further into Parliament's intent in interpreting subsection 66(2) of the DESDA.

[27] Counsel for the Applicant refers to *Sullivan,* which points out that the Supreme Court of Canada has on numerous occasions affirmed that courts may reject an interpretation which would lead to absurdity, in favour of a plausible alternative that avoids the absurdity:

a) *Morgentaler v. The Queen,* [1976] 1 S.C.R. 616 at para. 676, where Dickson J. wrote:

> We must give the sections a reasonable construction and try to make sense and not nonsense in the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.

b) *R. v. McIntosh,* [1995] 1 S.C.R. 686 at para. 81 where McLachlin, J. (as she then was) in her dissenting opinion wrote:

> While I agree with the Chief Justice that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear intention to the contrary, the courts must impute a rational intent to Parliament.

c) *Ontario v. Canadian Pacific Ltd.,* [1995] 2 S.C.R. 1031 at para. 65 where Gonthier J. wrote on behalf of the majority:

> Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results.

[28] *Sullivan* also referred to *Re Rizzo and Rizzo Shoes Ltd.,* where Iacobucci J. wrote that, "It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences".

[29] The General Division did not discuss the Supreme Court of Canada's approach, or why it preferred to follow *Tabingo,* a decision of the Federal Court.

[30] Based on these considerations above, the Applicant has satisfied me that there is a reasonable chance of success that the General Division may have erred in law in determining that the application is statute-barred. However, before leave can be granted,

the Applicant needs to satisfy me also that there is a reasonable chance of success on the issue of whether the General Division may have committed any errors in law or in fact on the "new facts" issue. If the Applicant is unable to satisfy me that there is a reasonable chance of success on the "new facts" issue, this would render any considerations under the limitation issue entirely moot, in which case, I would deny leave altogether.

c. Allegation of Errors in Fact and in Law

[31] Counsel for the Applicant submits that the General Division erred in fact and in law:

a) in determining that the psychiatric evidence is not a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence; and

b) in failing to find that the new evidence establishes that the Applicant suffered from a severe and prolonged disability as defined in the legislation before the end of her minimum qualifying period of December 31, 2001.

[32] Counsel for the Applicant submits that the General Division should have accepted the two medical reports dated August 8, 2011 and December 24, 2012 of Dr. Thomas Read Thompson as establishing "new facts" and in establishing that the Applicant was afflicted with three psychiatric illnesses, that she was disabled from any form of employment due to the severity of her psychiatric symptoms and that she had a poor prognosis at the time of her minimum qualifying period of December 31, 2001. For the most part, it seems that the Applicant's submissions on the "new facts" issue are of the type which would be properly before the General Division. Indeed, her submissions on this issue are the same as those which were filed on August 19, 2013 with the General Division.

[33] Other than in the Applicant's headings, nowhere does she allege any specific errors where the General Division may have erred on the "new facts" issue. The submissions are primarily focused on whether the Applicant meets the discoverability and materiality requirement under subsection 66(1) of the DESDA. The leave application does not contemplate nor permit a reassessment of the claim on its merits, or in this case, a

reassessment as to whether the two medical reports and any other filed documentation meets the "new facts" test, as an applicant is still required to meet the provisions under subsection 58(1) of the DESDA. At the same time, it is not for me at the leave stage to conduct my own assessment and determine whether the reports and any other documentation meet the "new facts" test, as a basis for determining whether leave ought to be denied or granted.

[34] I am prepared to infer from the submissions that counsel for the Applicant intended that the General Division erred in interpreting the scope of *Attorney General of Canada v. Gordon MacRae*, 2008 FCA 82 (CanLII) and *Kent v. Canada (Attorney General),* 2004 FCA 420 (CanLII), in applying the test for "new facts". The Applicant submits that the General Division ought to have applied a "broad and generous approach to the determination of due diligence and materiality", as in *MacRae,* and in *Kent,* at paragraph 35. If the General Division erred in interpreting the scope of the *MacRae* and *Kent*, this may have determined the outcome of the "new facts" consideration.

[35] I do note that the General Division appears to have addressed the Applicant's psychological features at paragraphs 51 and 52 of its decision, and that it distinguished the Applicant's case from *Kent* and *MacRae*. I note also that the General Division concluded that there was no evidence to support Dr. Thompson's conclusions that the symptoms he observed in 2010 and upon which he based his diagnosis, also existed at the Applicant's minimum qualifying period. This alone would seem to undermine any finding that the reports could qualify as "new facts". While I am prepared to grant leave on the grounds that the General Division may have erred in its interpretation and application of the case authorities on the "new facts" issues, counsel for the Applicant will need to show how the General Division might have erred in light of the analysis undertaken by it.

[36] I invite the parties also to make submissions in respect of the mode of hearing and the appropriateness for such.

CONCLUSION

[37] The Application is granted.

[38] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division