Citation: *J. C. v. Minister of Employment and Social Development,* 2015 SSTAD 243

Appeal No: AD-15-29

BETWEEN:

J. C.

Appellant

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 23, 2015

INTRODUCTION & GENERAL OVERVIEW

[1] This decision relates solely to the decision of the General Division on the Applicant's first application to rescind or amend filed with the Review Tribunal on November 26, 2012. (There is a second decision which relates to the Applicant's second application to rescind or amend filed with the Social Security Tribunal on April 24, 2013, filed under appeal number AD-15-30.)

[2] The Applicant seeks leave to appeal the decision of the General Division dated October 22, 2014. The General Division dismissed her application to rescind or amend the decision of a Review Tribunal dated November 22, 2011, on the ground that the application was statute-barred under section 66 of the *Department of Employment and Social Development Act* ("DESDA"). The General Division therefore found it unnecessary to determine whether the information submitted by the Applicant constituted "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. To succeed on this leave application, the Applicant must show that the appeal has a reasonable chance of success.

ISSUE

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

HISTORY OF PROCEEDINGS

[4] The Applicant applied for disability benefits on February 9, 2010. Although a Review Tribunal found her disability to be severe, ultimately it dismissed her appeal for disability benefits on the basis that her disability could not be considered prolonged. The decision of the Review Tribunal was communicated to the Applicant on January 5, 2012. The Applicant did not appeal the decision of the Review Tribunal to the Pension Appeals Board.

[5] On November 26, 2012, the Applicant filed an application with the Office of Commissioner of Review Tribunals to re-open the decision of the Review Tribunal, pursuant to subsection 84(2) of the *Canada Pension Plan*, since repealed (the "First Application to rescind or amend"). The Applicant filed a medical report dated August 21, 2012 from her family physician Dr. Forsberg.

[6] The Applicant explained that she had not previously submitted the letter from her family physician to the Review Tribunal as Dr. Forsberg had been unable until then to give any evidence regarding the prolonged nature of the Applicant's disability. It was only recently that her family physician had formed the opinion that treatment options were unsuccessful and that her condition therefore was prolonged. The Applicant submits that she has attained maximal medical improvement.

[7] A Canada Pension Plan Review Tribunal did not decide the First Application to rescind or amend filed on November 26, 2012, and hence, the First Application was transferred to the Social Security Tribunal (the "Tribunal"). Under subsection 261(1) of the *Jobs, Growth and Long-Term Prosperity Act* ("JGLPA"), if no decision had been made before April 1, 2013, in respect of a request made under subsection 84(2) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229, it is deemed to be an application made on April 1, 2013 under section 66 of the DESDA and is deemed to relate to a decision made, as the case may be, by the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal.

[8] 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.

[9] On April 24, 2013, the Applicant filed a second application to rescind or amend, this time with the Social Security Tribunal (the "Second Application to rescind or amend"). She again included Dr. Forsberg's medical report dated August 21, 2012.

[10] On July 30, 2014, the Applicant provided a copy of a medical record dated October 11, 2012 from her psychiatrist Dr. Helen Campbell. There was also a note from her medical social worker Lynn Simonson that an update would be forthcoming.

[11] On September 10, 2014, the Tribunal sent a letter to the parties, advising them that they could file additional documents or submissions, or, within 30 days, could give notice that they had nothing further to file. The parties had no further submissions.

[12] On September 25, 2014, the Applicant provided a second copy of a medical record dated October 11, 2012 from her psychiatrist Dr. Helen Campbell, and medical record dated August 21, 2012 of Dr. Forsberg. (The Applicant indicated that she had previously submitted the documentation but was resubmitting them "due to the letter dated September 10, 2014 stating that the letter dated July 11, 2014 was sent in error".) The Applicant also provided a copy of a medical record dated August 14, 2014 of Dr. Forsberg and letter dated August 25, 2014 from Ms. Simonson. The Applicant noted that she would be submitting additional documentation from her psychiatrist in October 2014. She asked that the Tribunal contact her if, "this information will be too late to support [her] case".

[13] On October 17, 2014, the Applicant provided a copy of a medical record dated October 16, 2014 from her psychiatrist Dr. Campbell.

[14] The General Division proceeded on the written record without a hearing. The General Division dismissed both the First and Second Applications to rescind or amend the decision of the Review Tribunal, on the grounds that the applications were statute-barred under section 66 of the DESDA and effectively, therefore had not been made within the prescribed statutory time limit. The General Division did not determine whether the additional medical records qualified as "new facts" and whether then, based on all of the evidence, the Applicant could be found disabled under the *Canada Pension Plan* on or before her minimum qualifying period.

SUBMISSIONS

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

(a) Refused to exercise its jurisdiction, when it failed to consider the merits of the Applicant's application to rescind or amend;

(b) Failed to observe a principle of natural justice when it did not provide the Applicant with an opportunity to present arguments on the jurisdictional issue;

(c) Erred in law in incorrectly interpreting the deeming provisions set out in subsection 261(1) of the *Jobs, Growth and Long-Term Prosperity Act* ("JGLPA"); and

(d) Erred in law in incorrectly interpreting the time limit provisions in subsection 66(2) of the *Department of Employment and Social Development Act* ("DESDA").

ANALYSIS

[16] 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). In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[17] Subsection 58(1) of the DESDA 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.

[18] 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 Refusal to Exercise Jurisdiction

[19] The General Division decided that it did not have jurisdiction to determine the merits of the First Application to rescind or amend, as it found the First Application to be statute-barred.

[20] If the First Application to rescind or amend was indeed statute-barred, it would have been appropriate for the General Division to decline to assess the First Application to rescind or amend. On this issue alone, I would have found there to be no reasonable chance of success.

[21] However, this issue is closely intertwined with the issue as to whether the General Division improperly determined that the First Application was statute-barred. If the General Division erred in determining that the First Application to rescind or amend was statute-barred, the General Division then should have proceeded to assess the First Application to rescind or amend. I will need to determine therefore whether there is any basis to the allegation that the First Application to rescind or amend may not have been statute-barred.

b. Allegation of Breach of Natural Justice

[22] The Representative for the Applicant (the "Representative") submits that the General Division failed to observe a principle of natural justice in ensuring a fair hearing. In particular, the Representative submits that the General Division should have provided the Applicant – who was unrepresented at the time -- with an opportunity to address the limitation issue, which ultimately became the basis for the General Division's decision. In

essence, the Applicant submits not only that she should have been provided with an opportunity to address the issue, but should have been notified that it would form the basis upon which the General Division would dismiss the First Application to rescind or amend.

[23] I am unable to determine whether the Tribunal notified the parties to file any documents or to make any submission addressing the requirements under section 66 of the DESDA. It may be that the parties, or certainly the Applicant, were unaware that the issue would arise, given that she had filed her First Application to rescind or amend months before section 66 came into effect. There may have been a breach of the principles of natural justice, if the parties were denied or not provided with an opportunity to address a material issue, which ultimately resulted in the dismissal of a claim, but this submission goes beyond that, in essentially requiring that the Tribunal or General Division notify a party of the issues. The Applicant has not persuaded me that the law requires an administrative body to do just that, but there may be an arguable case on the issue as to whether the Applicant should have been notified of an issue which arose subsequent to the filing of her First Application to rescind or amend and which effectively led to the dismissal of her application.

c. Allegation of Errors of Law

[24] The Representative for the Applicant submits that the General Division erred in law in determining that the First Application to rescind or amend is statute-barred.

[25] The Representative submits that the General Division failed to properly consider the entire context, the scheme and object of the JGLPA and the DESDA, and the intention of Parliament. The Representative submits that Parliament intended to transfer jurisdiction of unresolved applications to the Social Security Tribunal, and that the General Division therefore erred in interpreting subsection 66(2) as a statutory bar to all applications to rescind or amend decisions which were communicated to an applicant before April 1, 2012. The Representative submits that this interpretation by the General Division leads to a result that is "exceptionally unlikely", when the delay is beyond the control of an applicant. The Representative submits that interpreting the JGLPA as a statutory bar attributes to

Parliament an intention to arbitrarily deny an applicant from having her claim heard, despite properly filing an application in accordance with the governing law at the time.

[26] The Representative submits that the General Division erred in its interpretation of section 66 of the DESDA, and that its interpretation violates the presumption against retroactivity and absurdity and that it interferes with vested rights. The Representative quoted the Supreme Court of Canada in *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530, 2005 S.C.C. 73 at para. 32, which urged caution in adopting too literal an approach to interpreting legislation, and encouraged considering the "entire context" of a provision to determine if it is reasonably capable of multiple interpretations.

[27] The Representative also relies on *Canada (Attorney General) v. Lavery* (1991), 76 D.L.R. (4th) 97 (BCCA), where the B.C. Court of Appeal affirmed the importance of preserving vested rights, unless it were seen to be absolutely necessary to extinguish them. In this particular instance, the Representative notes that neither the JGLPA nor the DESDA explicitly extinguished any existing applications to rescind or amend. The Representative submits that the present case is distinguishable from the *Shahid (aka Tabingo) v. Minister of Citizenship and Immigration*, 2014 F.C.A. 191 decision upon which the General Division relied in finding the First Application to rescind or amend to be statute-barred. The Representative notes that section 87.4(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27, used the language "terminated" to retroactively revoke vested rights. The Representative further submits that section 87.4(1) also "clearly sets out the class of affected persons, the affected timeline and the conditions upon which termination occurs". The Representative submits that in the case of the JGLPA, the revocation of vested rights only emerges as a legal issue when combining two distinct statutes, neither of which point to the April 1, 2012 date nor expressly note an intent to revoke any vested right of any applicant.

[28] The Representative urges that statutes ought to be interpreted in such a manner as to avoid absurd results, even if it should mean modifying the meaning of the ordinary language. The Representative also urges us to resolve any ambiguity in favour of the Applicant, and if necessary, by interpreting the legislation in a "broad and generous

manner", as this would be consistent with the Supreme Court of Canada's approach in *Rizzo & Rizzo Shoes Ltd. (Re),* (1998] 1 S.C.R. 27 at para 21, and with section 12 of the federal *Interpretation Act,* which states that, "every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[29] 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 First Application to rescind or amend is statute-barred and as a direct consequence, may have erred then in failing to consider her First Application to rescind or amend on the merits.

[30] The primary issues for the parties to address on appeal include the following:

(a) Was the General Division required to give notice to the Applicant of an issue which was decisive of the final outcome?

(b) Is the First Application indeed statute-barred by sections 261(1) of the JGLPA and section 66(2) of the DESDA?

(c) Do any of the following documents which were filed after the First Application form part of the First Application?

(i) Medical record dated October 11, 2012 of Dr. Helen Campbell, psychiatrist;

(ii) Medical record dated August 14, 2014 of Dr. Forsberg, family physician;

(iii) Letter dated August 25, 2014 from Ms. Simonson, medical social worker; and

(iv) Medical record dated October 16, 2014 from Dr. Campbell.

(d) If the First Application is not statute-barred, which documents can the Appeal Division consider in support of the First Application to rescind or amend?

(e) Does the document or documents filed in support of the First Application to rescind or amend qualify as "material new facts"?

(f) If the answer to 30 (e) above is "yes", does the document or documents establish that the Applicant was disabled as defined by the *Canada Pension Plan?*

[31] I invite the parties to make submissions also in respect of the mode of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers) and the appropriateness for such.

CONCLUSION

[32] The application for leave is granted.

[33] 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