

Citation: *E. N. v. Minister of Employment and Social Development*, 2015 SSTAD 480

Date: April 13, 2015

File number: AD-15-3

APPEAL DIVISION

Between:

E. N.

Applicant

and

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

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a *Canada Pension Plan* disability pension in 1995. The Respondent denied his claim initially and after reconsideration. He appealed to the Office of the Commissioner of Review Tribunals. In September 1999 a Review Tribunal dismissed his appeal. On June 14, 2010 the Applicant's doctor wrote to the Office of the Commissioner of Review Tribunals with information regarding the Applicant's mental health. The Office of the Commissioner of Review Tribunals advised the Applicant that this letter would be treated as an application to rescind or amend the 1999 Review Tribunal decision based on new facts. This matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. On December 9, 2014 (the date on the decision of December 9, 2013 is a typographical error), the General Division dismissed the Applicant's application to rescind or amend the 1999 decision on the basis that the claim was statute-barred.

[2] The Applicant sought leave to appeal to the Appeal Division of the Social Security Tribunal. He argued that his claim was not statute-barred as it was filed under section 84(2) of the *Canada Pension Plan* which had an open ended discoverability rule. In addition, he relied on the decision of the Supreme Court of Canada in *M.(K.) v. M.(H.)* [1992] 3 SCR 6 which concluded that a cause of action does not begin to run until a plaintiff is capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and his or her injuries. He also referred to the common law doctrine of special circumstances.

[3] The Respondent submitted that the claim was statute barred by the operation of the *Jobs, Growth and Long-term Prosperity Act* and the *Department of Employment and Social Development Act* so leave to appeal should not be granted.

ANALYSIS

[4] In order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*,

[1999] FCJ No. 1252 (FC). The Federal Court of Appeal has also found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63.

[5] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the *Act* sets out the only grounds of appeal that may be considered to grant leave to appeal a decision of the General Division (this is set out in the Appendix to this decision). Hence, I must decide if the Applicant has presented a ground of appeal under section 58 of the *Act* that has a reasonable chance of success on appeal.

[6] In this case, the Applicant argued that his claim was not statute barred as there was no time restriction to bring the application under section 84(2) of the *Canada Pension Plan* when the application was commenced. That provision was repealed on April 1, 2013 before this matter was heard. In *Alves v. Canada (Attorney General)* 2014 FC 1100 the Federal Court decided clearly that a claimant's rights are to be determined based on the legislation that is in force at the time of the hearing, not when he applied for the pension.

[7] The Appellant also argued that as the new facts that he relied upon to bring the application to rescind and amend the 1999 decision weren't discoverable until 2010, based on the *M.(K.)* decision, no limitation should begin until then. He also referred to the doctrine of special circumstances. If legislation is clear and terminates prior rights, it must be accepted. This, essentially, is the argument made by the Respondent. That, however, is not the end of the inquiry. The common law doctrine of special circumstances may apply to this case. There may also be other legal bases for the Applicant's claim not to be barred by statute such as the doctrine of discoverability. Hence, I am satisfied that the Applicant has presented a ground of appeal that has a reasonable chance of success on appeal.

CONCLUSION

[8] The Application is granted for these reasons.

[9] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) 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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.