Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. G. v. Minister of Employment and Social Development*, 2016 SSTADIS 315

Tribunal File Number: AD-16-130

BETWEEN:

J. G.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

LEAVE TO APPEAL DECISION BY: Hazelyn Ross

DATE OF DECISION: August 15, 2016

Canada

REASONS AND DECISION

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] On May 10, 2012, the Applicant applied for a disability pension under the *Canada Pension Plan*, (CPP). This was his second application for a disability pension. He had previously applied on October 10, 2007 and had been denied on the basis that he did not have sufficient contributions to the CPP as of the end of his minimum qualifying period, (MQP), of December 31, 2008. On October 1, 2009 a Review Tribunal issued its decision upholding the denial. (GT1-136 to GT1-150)

[3] The Applicant sought leave to appeal from the Review Tribunal decision. However, the Pension Appeals Board refused his application on the basis that he had not presented any additional, medical evidence but merely reiterated his position that he is not capable of working. (GT1-132)

[4] The Respondent denied the second application of May 2012 because it found that the Applicant had not made additional contributions to the CPP after December 2008. Therefore, his situation remained unchanged. The Respondent concluded that, as a Review Tribunal decision is final for the time an applicant makes sufficient contributions to the CPP, and as the Applicant was denied leave to appeal the decision, it was final and binding upon him. (GT1-69)

[5] The Applicant asked the Respondent to reconsider its decision. (GT1-68) When it upheld the denial, he appealed to the Tribunal. On October 13, 2015 the General Division issued its decision in the appeal. The General Division determined that *res judicata* applied to the case: the Applicant was not eligible for a CPP disability pension.

[6] The Applicant applies for leave to appeal, (the Application), the decision of the General Division.

REASONS FOR THE APPLICATION

[7] Counsel for the Applicant takes issue with the application of the principle of *res judicata* to the Applicant's case. Relying on dicta in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at paragraph 76, Counsel requested leave to appeal on the issue of whether residual discretion should be applied to the issue of *res judicata* in the General Division decision.

ISSUE

[8] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE LAW

[9] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act), govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[10] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[11] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[12] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, which are:-

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.

[13] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal.

ANALYSIS

Does the Applicant's reasons for appeal fall within the stated grounds of appeal?

[14] Counsel for the Applicant takes issue with the General Division applying the principle of *res judicata* to the Applicant's appeal; and with its conclusion that the Review Tribunal's decision is final and binding upon the Applicant. This raises questions of whether the General Division erred in law.

Does the doctrine of *res judicata* apply to the appeal or did the General Division err in law?

[15] The General Division's analysis is short. Nonetheless, it provides a rational basis for the decision, namely, that as the Applicant's minimum qualifying period, (MQP), remained the same since the Review Tribunal issued its decision in October 2009, and since that decision was final and binding upon the Applicant, the principle of *res judicata* applies. Therefore, the appeal could not be allowed.

[16] In *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb, [1965] 2 All E.R. 4 at pages 8 to 9,* Lord Denning, M.R. Lord Denning, M.R. offered this straightforward expression of the doctrine of *res judicata.* :

> "If one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. *Transit in rem judicata*… The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party

> can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances."

[17] Richie, J., would cite the dicta of Lord Denning in *Town of Grandview v. Doering [1976] 2 S.C.R. 621.* In relation to the administrative law context, the rule enunciated by Lord Denning in *Fidelitas* was formulated by Dickson J. in in *Angle v. Minister of National Revenue, [1975] 2* S.C.R. *248* as pre-conditions to the determination of whether an issue is estopped: (issue estoppel). Dickinson, J. set out the pre-conditions for issue estoppel as follows:

> (1) the same question has been decided;
> (2) the judicial decision which is said to create the estoppel was final; and
> (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies…

[18] However, as the Supreme Court of Canada, (SCC), would later clarify in *Danlyuk,* deciding whether or not *res judicata* applies is not simply a mechanical application of the three pre-conditions Richie, J. identified in *Town of Grandview*. The SCC stated that the overriding concern is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.

[19] The SCC outlined a number of factors that should be considered when exercising the discretion not to apply issue estoppel. The factors are not exhaustive. They include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the expertise of the administrative decision-maker, the circumstances giving rise to the prior administrative proceeding , and any potential injustice.

[20] Thus, for example where special circumstances are found to exist, issue estoppel and, therefore, *res judicata* will not apply even though the three preconditions set out by Dickinson, J. are met. Special circumstances include fraud or misconduct in the previous proceedings. Special circumstances also exist where there is decisive new evidence that was not capable of disclosure through the exercise of due diligence at the earlier proceedings.

[21] In *Town of Grandview,* Richie, J. noted the positive burden on appellants to provide new evidence to support their claims that *res judicata* ought not to apply to their second action, stating, "the burden lay upon the respondent to allege that the new fact could not have been ascertained by reasonable diligence at the time when the first action was commenced before he could invoke it to expose the applicant to relitigation."

[22] In the instant Application, Counsel for the applicant argues that the General Division ought not to have applied *res judicata* to end the Applicant's appeal as to do so resulted in an injustice to him.

[23] The General Division found the following facts to apply:-

1. The Applicant's MQP was December 2008.
2. His first application for CPP disability pension was made on October 10, 2007.
3. A Review Tribunal decision was made on October 1, 2009.
4. The Pension Appeals Board refused leave to appeal in regard to this decision.
5. The Review Tribunal decision was final.
6. The Applicant made a second application for a disability pension on May 10, 2012. The Respondent denied his application because he did not meet the criteria in subsection 44 (b) in that, he did not have sufficient contributions to the CPP.

[24] In his second application, the Applicant stated that his last day worked was March 20, 2006 (GT1-123). Clearly, his MQP remains unchanged. Counsel for the Applicant submits that he did not make any additional contributions to the CPP after December 2008 because his doctors told him he could not work. (AD1A-8) prevented him from working. She argued that the General Division should not have restricted its analysis to the strict, legal context alone but should have considered the Applicant's circumstances and exercised its "residual discretion" in favour of the Applicant. She argued that it was an error of law for the General Division not to consider what she termed "the discretionary factors".

[25] For the following reasons, the Appeal Division is not persuaded by the arguments of Counsel for the Applicant.

[26] First, the Tribunal is a creature of statute with the jurisdiction delineated and limited by its governing statute, the DESD Act. In *Tracey*, the Federal Court was at pains to describe the ambit of the Tribunal's jurisdiction on deciding leave to appeals. While Tracey is a decision given in the context of an application to the Appeal Division, its principles in respect of jurisdiction apply equally to the General Division. Nowhere in the DESD Act is the General Division given the jurisdiction to apply discretion. It is clear from the provisions of section 58 of the DESD Act that the General Division decisions must confirm with the stated grounds of appeal. There is no question of discretion.

[27] Secondly, in his submissions to the General Division the Applicant relied largely on the submissions he made in his application of 2007. These have already been considered by the Review Tribunal, namely that his physical and mental health issues render him incapable of pursuing any substantially gainful occupation. In its decision the Review Tribunal considered both the Applicant psychiatric conditions as well as his pain conditions. The fact that his pain may have worsened since the end of his MQP does not allow the General Division to find him disabled, where his MQP remains the same. Thus, there are no special circumstances as anticipated by *Danyluk* in the Applicant's case and, therefore, no rational basis for the General Division to exercise "residual discretion", if indeed, it had jurisdiction to do so.

Binding Nature of Review Tribunal Decisions

[28] The former section 84 of the CPP, which was in force at the time the Applicant made his first application for a disability pension, provided that decisions of a Review Tribunal are binding save for certain exceptions. The section states:

> **84.** Authority to determine questions of law and fact – **(1)** A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to
> (a) whether any benefit is payable to a person,
> (b) the amount of such benefit
> and the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.

[29] As the Pension Appeals Board had refused the Applicant leave to appeal the Review Tribunal decision, it meant that the proceedings came to a halt and the decision of the Review Tribunal became entrenched, i.e. final and binding upon the Applicant. As the Review Tribunal found in its decision that the Applicant did not meet the criteria for severe and prolonged disability on or before December 2008, he would have to establish a new MQP, if he is to be successful in any subsequent application for a CPP disability benefit. This he was unable to do before the General Division.

[30] In the circumstances of the case, the Appeal Division finds that the General Division did not err in finding that the three criteria for *res judicata* had been met. The parties were the same; the subject matter of the litigation was the same; and a final decision had been rendered in regard to the subject matter, namely that the Applicant was not eligible for a CPP disability pension.

CONCLUSION

[31] Counsel for the Applicant submitted that the General Division erred in law when it dismissed the Applicant's appeal because it concluded that the doctrine of res judicata applied. On the basis of the foregoing analysis, the Appeal Division is not satisfied that the submissions disclose grounds that have a reasonable chance of success on appeal.

[32] The Application is refused.

Hazelyn Ross
Member, Appeal Division