Citation: *A. N. v. Minister of Employment and Social Development,* 2015 SSTAD 280

Appeal No: AD-15-80

BETWEEN:

A. N.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal from an Interlocutory Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Valerie Hazlett Parker

DATE OF DECISION: March 2, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal is refused.

INTRODUCTION

[2] The Applicant applied for an Old Age Security pension and a Guaranteed Income Supplement. The Respondent decided that the Applicant was not entitled to a full Old Age Security Pension and denied his application for the Guaranteed Income Supplement initially and after reconsideration. The Applicant appealed to the Office of the Commissioner of Review Tribunals. Pursuant to the *Jobs, Growth and Long-term Prosperity Act*, the matter was transferred to the General Division of the social Security Tribunal on April 1, 2013.

[3] The General Division initially set this matter for a hearing by teleconference. The Applicant objected to proceeding in this fashion, and insisted that the hearing be in person. The General Division subsequently determined that the hearing would proceed by videoconference.

[4] On November 25, 2014 the Applicant filed an Application to Appeal to the Appeal Division. He sought leave to appeal the General Division's decision regarding the form the hearing would take. The Applicant argued that he was entitled to be heard in person. He also submitted that an in person hearing was necessary due to his hearing loss and restrictions of his dominant hand and arm, that an in person hearing was necessary to demonstrate his need to pursue litigation in the United States of America, and sought permission to provide documents related to this at the hearing. The Appellant relied on a document prepared by the BC Coalition of Peoples with Disabilities to support his arguments, as well as tribunal and court decisions.

[5] The Respondent filed no materials regarding this application.

ANALYSIS

[6] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 55 of this *Act* provides that any decision of the

General Division may be appealed to the Appeal Division. In addition, section 58 sets out the only grounds of appeal that can be considered by the Appeal Division, and that leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success (these sections of the *Act* are set out in the Appendix to this decision).

[7] 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 4, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63.

[8] Therefore, 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.

[9] The Applicant argued that he was entitled to an in person hearing. The *Social Security Tribunal Regulations* provide (section 21) that hearings may be held in writing, by teleconference, by videoconference or other means of telecommunication, or in person. In addition, section 28 of the *Regulations* provides that after all documents are filed with the General Division (or the time to do so has expired) the Income Security Section must make a decision on the basis of the documents and submissions filed, or if it determines that a further hearing is required, send a Notice of Hearing to the parties (see Appendix). On the plain reading of this provision it is clear that there is no entitlement to an in person hearing for any claimant. On this basis, this argument is not a ground of appeal that has a reasonable chance of success on appeal.

[10] The Applicant referred to a publication by the BC Coalition of Peoples with Disabilities to support his arguments. This document is not binding on this Tribunal. In addition, it is a document designed to assist those making disability claims. It does not contain any information that the Applicant did not present himself in support of his claim. Its presentation is not a ground of appeal that has a reasonable chance of success on appeal.

[11] The Applicant also relied on the decision of the Supreme Court of Canada in *Singh v. Minister of Employment and Immigration* ([1986] 1 SCR 177) to support his argument that he was entitled to an in person hearing. Although that case was decided in the context of the Immigration and Refugee Board, I find its reasoning persuasive. In that case, the Court concluded that in the sphere of quasi-judicial decision making there is a duty of fairness owed to parties. This means that parties must know the case against them, and have an opportunity to meet that case and present their case. It does not mean, however, that in each case parties are entitled to an in person hearing. This decision does not assist the Applicant in this case.

[12] The Supreme Court of Canada dealt with the issue of procedural fairness again in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. In that case, the decision stated clearly that a decision that affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness is, however, variable and its content is to be decided in the specific context of each case. This decision then lists a number of factors that may be considered to determine what the duty of fairness requires in a particular case. They include the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute in question, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[13] In applying these factors to this case, I find the following: first, it is clear that a decision of the General Division on the merits of an appeal before it affects privileges of the claimant. A decision on the form that a hearing takes to determine these privileges, by extension, also affects them.

[14] Next, the nature of the decision in question in this case is procedural. The form of the hearing does not change the fact that an Applicant has the opportunity to present his case and answer the case of the Respondent.

[15] I accept that the issues in this matter are important to the Applicant.

[16] I place great weight on the nature of the statutory scheme that governs the Social Security Tribunal. This is a new Tribunal that was designed to provide for the most expeditious and cost effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the Tribunal the discretion to determine how hearings are to be conducted, whether in person, by videoconference or in writing, etc. The discretion to decide how each case will be heard should not be unduly fettered.

[17] Many court cases have discussed the concept of legitimate expectations. It is clear from these decisions that this concept refers to procedural expectations, not substantive ones. In other words, a party to an application before the Social Security Tribunal (SST) can expect certain procedural guarantees, but not a specific outcome to his or her case (see *Baker*, above). Recently, the Federal Court dealt with the issue of legitimate expectations in the context of an appeal before the Appeal Division of the SST in *Alves v. Canada (Attorney General)*, 2014 FC 1100. In that case, the Claimant sought judicial review of a decision of the Appeal Division of the SST. That claimant had appealed a decision to the Pension Appeals Board, which did not hear the case prior to the end of its mandate. The matter was transferred to the Appeal Division of the SST. The SST proceeded with the case on the basis of the legislation as it was before the SST began its work, because of the claimant's legitimate expectations when she filed the appeal. In its decision, the Federal Court stated that the doctrine of legitimate expectations is limited to the rules of procedural fairness. It concluded that the SST erred to proceed in this fashion; the legislation that was in force when the hearing was held should have been applied, not what was in force when the application was filed with the Pension Appeals Board. The parties' legitimate expectations were limited only to procedural matters, not grounds of appeal.

[18] Similarly, in this case, I find that the Applicant's legitimate expectations do not extend to include a right to an in person hearing. This is not contemplated in the *Act* that governs the SST, nor is it contained in the *Regulations*. In addition, the Applicant filed his appeal to the Appeal Division of the SST, not the Pension Appeals Board, which held only in person hearings.

[19] Finally, I must consider the choices of procedure made by the SST. The *Regulations* provide that a Tribunal Member is to determine the form a hearing will take. The *Regulations* do not provide any direction on how that is to be decided. It is a discretionary decision. The decision of the Member in each case is therefore to be given deference. In this case, a Member initially determined that the hearing would proceed by teleconference. After the Applicant objected, this decision was reconsidered and to accommodate the Applicant, the Member who had carriage of the matter determined that the hearing would proceed by videoconference.

[20] Although the Applicant continued to object to this form of hearing, I am not persuaded by his arguments. He has not pointed to any error in law or in fact made by the Member in rendering this decision. He has alleged that he would not be able to present his case fully which could be a breach of natural justice. However, his arguments in this regard refer to the need to be able to be seen by the Tribunal Member, and his physical restrictions that would make a teleconference hearing difficult. By proceeding by videoconference these concerns would be adequately addressed. The Applicant also argued that he had arguments and documents to support his case that would best be presented at the hearing. He provided no reasons why the documents could not be presented prior to the hearing. There is also a question whether the Respondent would be prejudiced if documents were presented at the hearing. The *Regulations* provide a schedule for the disclosure of documents, which can result in documents presented at a hearing not being admitted into evidence. Hence, I find that the arguments presented by the Applicant are not grounds of appeal that have a reasonable chance of success on appeal.

[21] Finally, I note that the Federal Court of Appeal, in the *Szczecka . Ministre de L'Emploi et de L'Immigration du Canada* [1993] F.C.J. No. 934 decided that unless there are special circumstances, there should not be any appeal of an interlocutory judgment. This avoids breaking up cases and resulting delays and expenses, which interferes with the sound administration of justice. In *CHC Global Operations, A Division of CHC Helicopters International Inc. v. Global Helicopter Pilots Association* 2008 FCA 344 the Federal Court of Appeal also clearly stated that justice is better served if the tribunal is allowed to complete its work so that appeals to the Federal Court of Appeal proceed on the basis that all contested

issues can be resolved at one hearing on the basis of a comprehensive record (see also *The President of the Canada Border Services Agency and the Attorney General of Canada v. C.B. Powell Limited* 2010 FCA 61). This reasoning is binding on this Tribunal. On this basis, I also find that this application for leave to appeal of an interlocutory decision of the General Division is premature. It should be brought after the hearing of this matter on its merits, so that the case can be dealt with in the quickest, most efficient and cost effective way possible.

[22] For all of these reasons, the Application is dismissed and leave to appeal is refused.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

55. Any decision of the General Division may be appealed to the Appeal Division by any person who is the subject of the decision and any other prescribed person

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.

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

Social Security Tribunal Regulations

2. These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications…

21. If a notice of hearing is sent by the Tribunal under these Regulations, the Tribunal may hold the hearing by way of

(a) written questions and answers;

(b) teleconference, videoconference or other means of telecommunication; or

(c) the personal appearance of the parties.

28. After every party has filed a notice that they have no documents or submissions to file — or at the end of the applicable period set out in section 27, whichever comes first — the Income Security Section must without delay

(a) make a decision on the basis of the documents and submissions filed; or

(b) if it determines that further hearing is required, send a notice of hearing to the parties