Federal Court of Appeal | Cour d'appel fédérale

Date: 20160527

Docket: A-202-15

Citation: 2016 FCA 158

CORAM: **WEBB J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

ROBERT REINHARDT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on April 26, 2016.

Judgment delivered at Ottawa, Ontario, on May 27, 2016.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: SCOTT J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] In this application for judicial review the applicant has raised issues of procedural fairness based on his alleged legitimate expectation that he would receive a copy of the transcript of the proceedings and the adequacy of the notice of the medical expert called by the Minister of Employment and Social Development (the Minister). The applicant has also raised the issue of the reasonableness of the decision of the Social Security Tribunal (Appeal Division) (the Tribunal).

[2] The decision under review is the decision of the Tribunal dated March 3, 2015. The Tribunal was hearing an appeal from the decision of the Review Tribunal dated December 20, 2011. Before the Tribunal, the applicant sought to introduce documents as new material facts. The Tribunal reviewed each document that the applicant submitted and determined that none of the documents submitted by the applicant constituted new material facts that could not have been discovered at the time of the earlier hearing with the exercise of reasonable diligence. As a result, the Tribunal dismissed the applicant's appeal from the decision of the Review Tribunal.

[3] For the reasons that follow, I would dismiss this application for judicial review.

I. Background

[4] The applicant moved to Canada from Germany in 1975 when he was 15 years old. According to his affidavit (paragraph 6), he is "currently illiterate in the English Language and [requires] assistance from friends to complete and understand documents." He worked for different companies as a general labourer and sustained back injuries on different occasions.

[5] As a result of his back injuries, the applicant applied for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*). His application for this pension was first made on June 22, 2006. Over the years the applicant has brought a number of applications or appeals in relation to his claim that he was disabled, for the purposes of the *CPP*, as of the end of his minimum qualifying period, which was December 31, 2006. He was not successful in obtaining this pension.

[6] In the decision of the Tribunal that is the subject of this judicial review, the applicant was asking the Tribunal to rescind, under section 66 of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the *DESDA*), the decision of the Review Tribunal dated December 20, 2011. The Review Tribunal had denied the applicant's application under subsection 84(2) of the *CPP* to introduce new facts.

[7] Section 66 of the *DESDA* provides that:

66 (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if	**66** (1) Le Tribunal peut annuler ou modifier toute décision qu'il a rendue relativement à une demande particulière :
(a) in the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or	*a*) dans le cas d'une décision visant la *Loi sur l'assurance-emploi*, si des faits nouveaux lui sont présentés ou s'il est convaincu que la décision a été rendue avant que soit connu un fait essentiel ou a été fondée sur une erreur relative à un tel fait;
(*b*) in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.	*b)* dans les autres cas, si des faits nouveaux et essentiels qui, au moment de l'audience, ne pouvaient être connus malgré l'exercice d'une diligence raisonnable lui sont présentés.

[8] In this case, the applicable paragraph is 66(1)(*b)* of the *DESDA* since the decision under review by the Tribunal was a decision under the *CPP*.

[9] By a letter dated August 20, 2014, the applicant's representative was notified that the hearing originally scheduled for September 5, 2014 was postponed to October 30, 2014. On

October 15, 2014 the Minister provided notice that Dr. Baribeau would be testifying as an expert witness and provided a summary of his testimony on October 20, 2014.

[10] At the commencement of the hearing on October 30, 2014, the Tribunal Member indicated that the proceedings were being recorded. At the hearing, the applicant submitted a number of documents as "new material facts". The Minister also called Dr. Baribeau as an expert witness in relation to the question of whether the applicant was suffering from a severe and prolonged disability. The Tribunal noted at paragraph 10 that "[d]espite the hearing going over the time allotted, it proved impossible to complete the hearing as scheduled." It was decided that the parties would make their written submissions on the medical evidence at a later date.

[11] At some point, the Tribunal Member indicated that the transcript would be made available to the parties. However, due to a malfunction, no transcript was available. The member did, however, provide her notes in relation to the testimony of the medical expert (although she did not get his name correct). Following the submissions from the applicant and the Minister, the representative for the applicant asked for and was granted an extension of time to prepare reply submissions. Despite being granted an extension of time, the reply submissions were not submitted within this extended period of time.

[12] In its reasons, the Tribunal first reviewed each document that was submitted and determined that none of the documents that were submitted would qualify as a "new material fact" for the purposes of paragraph 66(1)(*b*) of the *DESDA*. As a result, the Tribunal dismissed the appeal without examining the evidence of Dr. Baribeau.

II. Issues

[13] The applicant has raised the following issues:

a) Did the Tribunal breach its duty of procedural fairness by not supplying the applicant with a copy of the transcript from the hearing?

b) Did the Tribunal breach its duty of procedural fairness by allowing Dr. Baribeau to testify?

c) Was the decision of the Tribunal that none of the documents satisfied the test as set out in paragraph 66(1)(b) of the DESDA unreasonable?

III. Standard of Review

[14] The standard of review for questions of procedural fairness is correctness, with some deference to the particular tribunal (*Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75, at paragraph 81).

[15] The standard of review for any findings of fact by the Tribunal and for the interpretation of the *DESDA* by the Tribunal is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 51 and *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, [2015] 3 F.C.R. 461).

IV. Analysis

A. *Failure to Provide the Transcript*

[16] The applicant submits that he had a legitimate expectation that he would receive a copy of the transcript from the hearing before the Tribunal and the failure to do so resulted in a breach of procedural fairness by the Tribunal. I do not agree with the applicant.

[17] The applicant submitted two affidavits as part of this application for judicial review. One affidavit was that of the applicant and the other of Ronald Jones, his representative at the hearing before the Tribunal.

[18] In the applicant's affidavit, he stated as follows:

> 32. Adjudicator Ross started the hearing by introducing herself and she explained that she would be recording the hearing and explained that she would have a transcript prepared.

[19] Ronald Jones, in his affidavit, described this opening statement as follows:

> 38. Adjudicator Ross started the hearing by introducing herself and she explained that she would be recording the hearing because she explained that she wanted a transcript to prepare her decision.

[20] In this particular case, the applicant is submitting that he is illiterate in English and that he relies on others to explain documents to him. There was no indication in the applicant's memorandum of fact and law that the applicant's representative has any difficulty in understanding documents or statements that were being made in English.

[21] As a result, in my view, the affidavit of the representative (which also provides more details) would be a more accurate indication of what took place at the hearing. This would also be consistent with the fact that both individuals indicate that the statements of the Tribunal member were made at the beginning of the hearing. There was no indication, at that time, that anyone expected the hearing to last longer than the one day. Therefore, the only expectation at the beginning of the hearing was that the hearing was being recorded for the sole benefit of the

Tribunal member. There would not have been any legitimate expectation at that time that any transcript would have been provided to any party.

[22] It should also be noted that the only submissions that were to be made following the completion of the one day hearing were the submissions on the medical evidence. As noted above, the Tribunal member made her decision without examining the medical evidence. As a result, there can be no breach of any duty of procedural fairness in failing to provide a transcript that would only have been used in relation to submissions to be made on evidence which was not relevant to the decision of the Tribunal.

[23] Therefore, in my view, there was no breach of procedural fairness as a result of the failure to provide a transcript of the hearing.

[24] Counsel for the applicant at the hearing of this appeal also argued that the absence of a transcript made it impossible for the applicant to pursue any arguments of bias. Bias is a matter that should not be proposed lightly and is a matter that should only be pursued in cases where there is evidence of such. Speculating on whether or not a transcript might have revealed bias is not a basis to find any breach of procedural fairness for failing to provide a transcript.

B. *Expert Testimony*

[25] With respect to the testimony of Dr. Baribeau, as noted by the Tribunal member, the threshold test under paragraph 66(1)(*b*) of the *DESDA* is whether the applicant has introduced any new material facts that could not have been discovered before the hearing in question with

the exercise of reasonable diligence. Failing to do so would result in no basis upon which a prior decision could be rescinded or amended. Having found that none of the documents produced by the applicant constituted new material facts for the purposes of paragraph 66(1)(*b*) of the *DESDA*, the appeal was dismissed without examining the evidence of Dr. Baribeau. Since the medical evidence of Dr. Baribeau was not relevant in reaching the determination to dismiss the appeal, it is a moot point whether he should or should not have been allowed to testify.

C. *Reasonable Diligence*

[26] With respect to the merits of the decision, the documents that the applicant was submitting as new material facts can be divided into two categories – those documents that did not exist before the earlier hearing and those documents that did exist prior to the earlier hearing.

[27] With respect to the documents that did not exist at the time of the earlier hearing, the applicant notes, in his written submissions, that "there are circumstances where medical evidence post-hearing can be admitted as new facts, where a condition existed at the time of the hearing but was not diagnosed" (paragraph 58). In particular, one of these documents is a report from Dr. Ferguson dated March 18, 2008, which is more than one year after the end of his minimum qualifying period, which ended on December 31, 2006. In that report, Dr. Ferguson notes that the applicant is using a cane but there is no indication of when the applicant started to use a cane. In paragraph 8 of his affidavit, the applicant states he started using a cane in 2008.

[28] In my view, the applicant has failed to establish why it was unreasonable to conclude that this medical report, prepared in 2008, would not be material in relation to a determination of

whether the applicant was suffering from a severe and prolonged disability as of December 31, 2006.

[29] Similarly, the applicant has failed to establish that the Tribunal was unreasonable in concluding that the other documents that did not exist as of the earlier hearing date were not material.

[30] With respect to the documents that did exist prior to the earlier hearing, the applicant's argument is that in determining "reasonable diligence" for the purposes of paragraph 66(1)(*b*) of the *DESDA*, the personal characteristics of the individual should have been taken into account. In the applicant's submissions, he argued that he would have had to receive a document in order to have a friend review it for him and that his illiteracy prevented him from seeking out the additional documents before his earlier hearings.

[31] The determination of whether the applicant has established that a particular document "could not have been discovered at the time of the hearing with the exercise of reasonable diligence" is a question of mixed fact and law. In paragraph 27 of the Tribunal's reasons, the Tribunal addressed the illiteracy of the applicant. The Tribunal concluded with the finding that:

> it is reasonable to infer that at all relevant times, the Appellant was aware he would have to make a case to the CPP and that this would involve providing evidence of his disability, including his medical and/or prescription history if he wished to persuade the Respondent of his eligibility for a CPP disability pension.

[32] The Tribunal found that the applicant's illiteracy did not prevent him from being aware that he would have to make his case and that he would have to produce evidence. The applicant

has not shown why this finding was unreasonable. As a result, the applicant was in the same position as any other litigant who must determine, prior to a hearing, what documents should be produced to establish his or her case and who must exercise reasonable diligence to locate these documents.

[33] As noted, the Tribunal reviewed each document that was submitted by the applicant and provided an explanation of why each one failed to meet the test as set out in paragraph 66(1)(*b*) of the *DESDA*. The onus was on the applicant to establish that the decision of the Tribunal was unreasonable. In my view, the applicant failed to establish that the decision of the Tribunal in relation to any particular document was unreasonable.

V. Conclusion

[34] As a result, I would dismiss the application for judicial review, without costs.

"Wyman W. Webb"

J.A.

“I agree.
A.F. Scott J.A.”

“I agree.
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-202-15
(APPEAL FROM A DECISION OF THE SOCIAL SECURITY TRIBUNAL (APPEAL DIVISION) DATED MARCH 3, 2015 (APPEAL NO. CP 28590)	
STYLE OF CAUSE:	ROBERT REINHARDT v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	APRIL 26, 2016
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	SCOTT J.A. DE MONTIGNY J.A.
DATED:	MAY 27, 2016

APPEARANCES:

Jeanne B. Sumbu	FOR THE APPLICANT
Hasan Junaid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Creighton Shatford Hirbour Amherst, Nova Scotia	FOR THE APPLICANT
William F. Pentney	FOR THE RESPONDENT