Federal Court of Appeal  Cour d'appel fédérale

**Date: 20171228**

**Docket: A-429-16**

**Citation: 2017 FCA 251**

**CORAM:** **DAWSON J.A.**
**STRATAS J.A.**
**RENNIE J.A.**

**BETWEEN:**

**MARILYN GARSHOWITZ**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on December 14, 2017.

Judgment delivered at Ottawa, Ontario, on December 28, 2017.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: DAWSON J.A.
RENNIE J.A.

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## REASONS FOR JUDGMENT

**STRATAS J.A.**

[1] The applicant applies for judicial review of the decision dated October 17, 2016 of the Social Security Tribunal – Appeal Division: 2016 SSTADIS 402.

[2] The applicant applied for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. The respondent denied her application on the ground that she did not have a severe and prolonged disability at her minimum qualifying period and continuously thereafter. The applicant appealed to the Social Security Tribunal – General Division.

[3] The General Division proceeded with the appeal by way of a written process. In the end, it dismissed the appeal. The applicant sought leave to appeal this decision to the Social Security Tribunal – Appeal Division.

[4] The Appeal Division granted the applicant leave to appeal and allowed her appeal. It found that there was procedural unfairness because the General Division did not allow the applicant to call witnesses and because the respondent unilaterally redacted relevant medical information preventing the applicant from fully presenting her case to the General Division. The Appeal Division referred the matter back to the General Division for a new hearing before a different member. The record shows that the main issue that remains unresolved and that has to be decided by the General Division is whether the applicant had a severe and prolonged disability at her minimum qualifying period and continuously thereafter.

[5] In this Court, the applicant seeks an order setting aside the decision of the Appeal Division. She suggests that rather than sending her matter back to the General Division for a new hearing, the Appeal Division should have simply granted her the disability benefits she seeks. This submission cannot succeed for two reasons.

[6] First, the Appeal Division's decision to send the matter to the General Division—one based on a discretionary assessment of the evidence before it—is an acceptable and defensible one and, thus, in law, is reasonable and so it must stand: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47. On the facts placed before the Appeal Division, the Appeal Division reasonably assessed that only a hearing in the General Division would allow the applicant to see the evidence relevant to her case and allow her to call the evidence that she says is relevant to her entitlement to benefits. Only then would the General Division be able to examine all of the evidence and determine on the merits whether the applicant is entitled to benefits.

[7] Second, in these circumstances, this Court does not have the legal authority to grant benefits to the applicant. Under the *Canada Pension Plan*, only the Social Security Tribunal is permitted to receive further evidence, assess whether the applicant is disabled within the meaning of the legislation, and, if satisfied, grant the disability benefits the applicant seeks. Except in the most unusual of circumstances, this Court is restricted to reviewing Social Security Tribunal decisions only after the Tribunal has completed these tasks.

[8] This is not a case where the outcome on the merits is certain enough to grant *mandamus* (sometimes called a "directed verdict," a phrase I prefer not to use because it is not a remedy listed under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7). Indeed the Appeal Division has made a reasonable decision to send the matter back to the General Division to receive more evidence. Nor does the evidentiary record support *mandamus* because of severe maladministration: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167. Thus,

the default position applies: the General Division is the merits-decider and only after the merits have been decided can this Court act, and only then in a reviewing role: *Robbins v. Canada (Attorney General)*, 2017 FCA 24 at para. 17, citing *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at para. 23; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paras. 16-19.

[9] The applicant also asks us to uphold her entitlement to benefits under the Ontario Disability Support Program. We do not have the jurisdiction to do so. Under that provincial legislative regime, appeals lie to Ontario's Social Benefits Tribunal and thereafter to the Ontario Divisional Court, not to this Court: *Ontario Disability Support Program Act*, S.O. 1997, c. 25, ss. 23 and 31.

[10] The applicant also asks us to award her damages for alleged abusive conduct and conduct contrary to human rights standards. Here again, this Court lacks jurisdiction. Before us is an application for judicial review. Section 18.1 of the *Federal Courts Act* provides this Court with the ability to grant various forms of administrative law relief but not damages. Human rights complaints must be advanced first to a human rights commission, federal or provincial depending on the circumstances. And damages must be sought by way of action in an appropriate court.

[11] In her memorandum, the applicant raises arguments based on the Charter. They cannot be raised for the first time now. They must first be raised at the administrative level, here the

General Division: *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75 at paras. 42 and 45; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2017 FCA 241 at paras. 48-50. To the extent the Charter is being raised to obtain damages, the objection set out in the preceding paragraph also applies.

[12] In saying these things, I do not wish to be taken to be advising or encouraging the applicant to proceed to the various human rights commissions, tribunals and courts mentioned above; indeed, not every act that causes a person distress or pain gives rise to a right to damages in law and sometimes legal proceedings are not worth the cost and the stress. Before taking any further steps, the applicant should get legal advice from a legal aid or community law clinic. Among other things, legal advice can help the applicant steer away from legal dead-ends that will serve only to worsen her current condition. Legal advice will also underscore that courts are not laws unto themselves: they are bound and constrained by legal rules and limits and they cannot fix every perceived injustice or wrong.

[13] Therefore, for the foregoing reasons, I would dismiss the application for judicial review. Under this proposed disposition, the Appeal Division’s decision to remit this matter to the General Division will remain in place.

[14] I wish to address one other development that arose after the Appeal Division rendered its decision. I need to address it because it affects the issues the General Division will determine when it receives this matter. Also this development is worthy of comment in itself.

[15] In June of this year, the respondent brought a motion for the application to be granted and for a judgment granting *mandamus* (sometimes called a directed verdict) requiring the Appeal Division to grant disability benefits to the applicant. This Court could not grant the motion. It required a satisfactory explanation for the relief sought.

[16] Further, even if a satisfactory explanation were provided, this Court still could not have granted the motion. Two points are worth mentioning.

[17] First, in all cases, courts can act only on the basis of facts proven by admissible evidence and other permissible sources of fact, such as oral testimony, documentary evidence, affidavit evidence, material admitted by statute or statutory deeming provisions, agreed statements, admissions in pleadings, or judicial notice: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 79-80, citing, among other authorities, *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 26-27. And of course courts can only act in accordance with the law. The June motion did not offer any admissible evidence or other permissible sources of fact in support of the relief sought.

[18] Second, a consent dismissal and the discontinuance of an application differ from the allowing of an application on consent. The former is not normally controversial. In the case of a

consent dismissal or a discontinuance of an application, the legal *status quo* is not changing: a binding administrative order that was the subject of the application will remain in place. But allowing an application on consent is controversial. The legal *status quo* is changing: the binding administrative order is now being affected in some way. A reviewing court must be persuaded on the facts and the law before it that it can grant the application and change the legal *status quo*.

[19] There are a number of ways the granting of an application on consent can be done. A respondent to the application can rely upon the existing evidentiary record before the reviewing court, agree that the administrator applied an unreasonable view of law, offer a supporting explanation, and ask that the administrator's decision be set aside. Or the respondent can offer fresh evidence the parties have agreed to admit—an agreed statement of facts could suffice—and explain that on the facts and the law the administrator's order must be set aside and the matter be remitted to the administrator or a *mandamus* order be made. There may be other ways this can be done. In each case, the Court, acting judicially and not as a rubber stamp, must be satisfied on the facts and the law that it should make the requested judgment.

[20] In its decision on the motion in June, the Court was not so satisfied. But the Court made it clear that the respondent could renew its motion to grant judgment. The respondent, however, did not renew it.

[21] Before the hearing in this Court, we issued a direction to the respondent asking whether the respondent was going to ask us to grant judgment allowing the application as it had requested in June. After all, in her written representations in the motion last June, the respondent told the

Court that "[t]he respondent is now satisfied that the applicant is disabled" under the *Plan* and is legally entitled to receive the benefits she seeks. However, the respondent replied to our direction that she intended to oppose the application, seemingly reversing the position she took in June.

[22] We explored this further at the hearing. It turns out that the respondent was concerned about creating an adverse precedent in favour of "directed verdicts." Of course, this is a non-concern. If, on the respondent's view of the facts and the law, the applicant is entitled to benefits, the respondent should favour relief that would bring that about. Further, the grant of any such relief would be restricted to its facts, distinguishable in future cases, and entirely within the respondent's control. If the respondent does not consider a "directed verdict" to be warranted on the facts and the law in a particular case, she can refrain from seeking it.

[23] After some discussion in Court, the respondent formally renewed her position that the applicant is disabled within the meaning of the *Canada Pension Plan*. The respondent confirmed that, following the mandatory rules in the *Plan*, the applicant can receive benefits as of January 2012, the maximum retroactivity permitted by paragraph 42(2)(*b*) based on the applicant's application date of April 29, 2013, with the first payment taking place in May 2012, pursuant to the provisions of the *Canada Pension Plan*.

[24] The Court asked the parties to discuss the matter with a view to seeing if they could agree on the respondent's position. But the parties could not reach an agreement, even after a number of adjournments to allow them to discuss this matter.

[25] Therefore, we proceeded to hear the application on its merits. But we advised the applicant that if, within seven days of the hearing, she advised the Judicial Administrator of her acceptance of the respondent's position, based on the facts and the law before us we would make a judgment directing that result instead of determining the application.

[26] By letter dated December 20, 2017, the applicant did not accept the respondent's position. It appears that, among other things, the applicant does not agree with the respondent's calculation of the level of benefits.

[27] Given that the applicant continues to hotly contest the respondent's position, the complexity of this administrative regime, and the lack of submissions before us concerning the precise amount of the disability benefit payable to the applicant, I propose that the Appeal Division's decision—to remit this matter to the General Division of the Social Security Tribunal—be left in place. This is not a situation where I would cause any end result to be dictated to the General Division through a *mandamus* order.

[28] The General Division should proceed on the basis that the respondent has accepted the position set out in paragraph 23, above. As a result, it will not need to hear witnesses on the issues now resolved by that position. In light of this, it may be that the only meaningful and practical task left for the General Division is to receive submissions from the parties, calculate the amount of benefits to which the applicant is entitled, and make an order.

[29] The respondent does not seek her costs. At first, out of concern that the respondent was reversing its position from the motion in June of this year—which would be an abuse of process—I gave some thought to awarding costs against the respondent. This Court has the power to make such an award: see Rule 400; and see *Air Canada v. Thibodeau*, 2007 FCA 115, 375 N.R. 195 at para. 24 (this Court has "full discretionary power" over costs, one of the purposes of which is to deter litigation misbehaviour and abuse). However, in the end the respondent did not resile from her June position. On reflection, she set aside her unwarranted concern and embraced that position. I also note the applicant's lack of success in this application. Despite that, the respondent, laudably, does not seek her costs. Since the equities are divided, I would propose that each party bear its own costs.

[30] Therefore, I would dismiss the application without costs. Given the applicant's frustration with how her claim for benefits has proceeded to date and the relatively few issues that now remain in light of the respondent's position, I would urge the General Division to proceed with its hearing and determine the matter as quickly as possible.

"David Stratas"
J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Donald J. Rennie J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-429-16 |
| **APPEAL FROM THE DECISION OF THE APPEAL DIVISION OF THE SOCIAL SECURITY TRIBUNAL OF CANADA DATED OCTOBER 17, 2017, TRIBUNAL FILE NUMBER AD-16-582** | |
| **STYLE OF CAUSE:** | MARILYN GARSHOWITZ v. THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | DECEMBER 14, 2017 |
| **REASONS FOR JUDGMENT BY:** | STRATAS J.A. |
| **CONCURRED IN BY:** | DAWSON J.A.<br>RENNIE J.A. |
| **DATED:** | DECEMBER 28, 2017 |

**APPEARANCES:**

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|---|---|
| Marilyn Garshowitz | ON HER OWN BEHALF |
| Sylvie Doire | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Nathalie G. Drouin<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |