

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190329

Docket: A-167-18

Citation: 2019 FCA 60

**CORAM: DAWSON J.A.
WEBB J.A.
NEAR J.A.**

BETWEEN:

DARLA-JEAN O'ROURKE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on March 27, 2019.

Judgment delivered at Ottawa, Ontario, on March 29, 2019.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**WEBB J.A.
NEAR J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190329

Docket: A-167-18

Citation: 2019 FCA 60

**CORAM: DAWSON J.A.
WEBB J.A.
NEAR J.A.**

BETWEEN:

DARLA-JEAN O'ROURKE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant applied for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan). She was found to be disabled with Post-Traumatic Stress Disorder and was granted disability benefits with the maximum allowable period of retroactivity – 15 months (pursuant to paragraph 42(2)(b) of the Plan).

[2] The appellant then applied unsuccessfully for additional retroactive benefits on the ground that she was incapable of applying earlier for benefits. Subsections 60(8) and (9) of the Plan permit the responsible minister to deem an application to have been made earlier if the period of incapacity was continuous and if the incapacity resulted in an applicant being incapable of forming or expressing an intention to make an earlier application.

[3] The appellant appealed from the negative decision to the General Division of the Social Security Tribunal of Canada. The General Division dismissed the appellant's appeal on the basis that she had failed to establish that she was incapable of forming or expressing the intention to make an earlier application.

[4] The appellant sought leave to appeal the decision of the General Division to the Appeal Division of the Social Security Tribunal. The Appeal Division refused to grant leave as it found that the appellant had not presented an arguable case on any ground of appeal.

[5] The appellant then sought judicial review in the Federal Court of the Appeal Division's decision denying leave. For reasons cited as 2018 FC 498, the Federal Court dismissed the application for judicial review. The Federal Court found the Appeal Division's conclusion that an appeal from the General Division had no reasonable chance of success was reasonable.

[6] The appellant now appeals to this Court from the judgment of the Federal Court.

[7] On this appeal the Court has a limited mandate: it must consider whether the Federal Court selected the correct standard of review and applied it properly.

[8] In its decision dismissing the application for judicial review, the Federal Court correctly selected the reasonableness standard of review.

[9] As to the application of the standard of review, leave to appeal a decision of the General Division may be granted only when an appellant satisfies the Appeal Division that the proposed appeal has a reasonable chance of success on one of the three grounds of appeal set out in subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (Act). These grounds are: a breach of natural justice or jurisdiction; an error of law; or, a decision based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. Leave is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success (subsection 58(2) of the Act).

[10] The Federal Court correctly directed itself to this test, noting that the appellant was required to demonstrate to the Appeal Division that the General Division had erred in fact or law when it found that she was not “incapable for [*sic*] forming or expressing the intention to make an application” at an earlier point in time.

[11] The Federal Court then reviewed the reasons of the Appeal Division finding, at paragraph 20 of its reasons, that the Appeal Division had applied the correct test for granting leave. The Court went on to review the evidentiary findings of the Appeal Division and to conclude that the

Appeal Division had made no reviewable error in refusing to grant leave to appeal. I agree, and reach this conclusion substantially for the reasons given by the Federal Court.

[12] On this appeal the appellant seeks an order of payment, including interest. This Court has no jurisdiction to order payment or interest. The sole issue properly before us is the refusal of the Appeal Division to grant leave, and the Plan is a statutory benefit plan which does not provide for the payment of interest.

[13] The Court acknowledges that the appellant is disabled and has great sympathy for the struggles she has faced. However, for the above reasons I would dismiss the appeal. Costs are not sought by the respondent and so I would not award costs.

“Eleanor R. Dawson”

J.A.

“I agree.
Wyman W. Webb J.A.”

“I agree.
D. G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-167-18

STYLE OF CAUSE: DARLA-JEAN O'ROURKE v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: MARCH 27, 2019

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

DATED: MARCH 29, 2019

APPEARANCES:

Darla-Jean O'Rourke FOR THE APPELLANT
ON HER OWN BEHALF

John Unrau FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin FOR THE RESPONDENT
Deputy Attorney General of Canada