Federal Court of Appeal | Cour d'appel fédérale

Date: 20190521

Docket: A-111-18

Citation: 2019 FCA 158

CORAM: **NEAR J.A.**
RENNIE J.A.
LOCKE J.A.

BETWEEN:

CHRISTIAN TOLKSDORF

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on May 16, 2019
(via teleconference call with appellant in Surrey, British Columbia)

Judgment delivered at Ottawa, Ontario, on May 21, 2019.

REASONS FOR JUDGMENT BY: LOCKE J.A.

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

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REASONS FOR JUDGMENT

LOCKE J.A.

[1] This is an appeal from an Order of the Federal Court (per Martineau J.) dated March 6, 2018 (T-1697-17) which summarily dismissed Christian Tolksdorf's (the appellant's) application for judicial review. The subject of that judicial review application was a decision by the Social Security Tribunal – Appeal Division (SST-AD) refusing leave to appeal a decision of the Social Security Tribunal – General Division (SST-GD).

[2] The SST-GD decision refused to alter the denial of the appellant's request for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 [*CPP*]. The appellant had claimed that he qualified for a disability pension on the basis of a severe and prolonged disability resulting from severe spinal pain as well as overwhelming anxiety and depression, including phobias and fear of common places. The SST-GD was not convinced that the appellant's disability was "severe" as defined in subparagraph 42(2)(a)(*i*) of the CPP: "a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation." The SST-GD acknowledged that the appellant faces challenges participating in the workforce, but found the evidence insufficient to conclude that he could not perform some type of job. Specifically, the SST-GD stated as follows:

> [32] The difficulty here is that very little is being done to treat the Appellant. This indicates either a lack of severity, or a failure on his part to seek out and participate in reasonable treatment options. He has tried a variety of medications and is unhappy with them because of their side-effects. However, he visits his family doctor rarely. Whatever psychotherapy he has received has been from his family doctor rather than a specialist, and there is no evidence that he has received any treatment of this type at least since September 2011. He has not been referred to a psychiatrist or to group therapy.
>
> [33] There is nothing in Dr. Dang's clinical notes to indicate that more intensive treatment is required, and that the Appellant is unable to access it because of his condition or for other reasons beyond his control. Dr. Dang has not stated that the Appellant needs to see him more often. While Dr. Dang's report gave the Appellant's diagnosis, it did not indicate that the Appellant was disabled from working because of it, nor did Dr. Dang describe impairments that would necessarily preclude the Appellant from pursuing some type of substantially gainful occupation. Indeed, he was able to work for almost a year after his anxiety grew worse, and there is no evidence that he stopped working because of his health.

[3] Before the SST-AD, the appellant sought leave to appeal the SST-GD's decision. The SST-AD refused leave, finding that the appellant had failed to explain how, in his view, the SST-

GD had erred in rendering its decision. The SST-AD examined the record and concluded that the SST-GD had not overlooked or misconstrued any of the evidence.

[4] The appellant then commenced his application for judicial review of the SST-AD's decision before the Federal Court. On review of the appellant's notice of application, the respondent formed the view that it was insufficient and irregular in that it failed to comply with the requirement of Rule 301(*e*) of the *Federal Courts Rules*, SOR/98-106, to set out "a complete and concise statement of the grounds intended to be argued." The respondent moved for an Order requiring the appellant to provide an amended notice of application. Prothonotary Mandy Aylen granted the respondent's motion, ordering that the appellant "serve and file an amended Notice of Application that sets out a complete and concise statement of the grounds for judicial review that the [appellant] intends to argue at the hearing of the application." The prothonotary's Order was not appealed and is not in dispute in the present appeal.

[5] The appellant filed an amended notice of application, but the respondent took the position that it remained deficient. This time, the respondent moved to strike (summarily dismiss) the application. It is the Order granting that motion that is the subject of the present appeal. That Order found that both notices of application were deficient, and concluded that "it would not be in the best interest of justice to allow the application to proceed further" since the appellant had been allowed full opportunity to correct the deficiencies.

[6] The decision of a judge to grant or refuse a motion to strike is discretionary. This Court will defer to such a decision on appeal in the absence of an error of law, a misapprehension of

the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice: *Canadian Imperial Bank of Commerce v. Canada*, 2013 FCA 122 at para. 5; *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 at para. 15.

[7] Though the judge's analysis was brief, I am satisfied that he did not err. In my view, the summary dismissal of the application for judicial review before the Federal Court was justified on the basis that the application for judicial review was so clearly improper as to be bereft of any chance of success: see *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para. 47; *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.).

[8] The appellant's failure to comply with the *Federal Courts Rules* gave the judge the discretion to dismiss the application: see Rule 59(*c*). More importantly, the appellant has failed to indicate any basis on which he might reasonably expect to succeed in an appeal from the decision of the SST-GD. Without such a basis, the decision of the SST-AD refusing leave to appeal appears to be reasonable, and the application for judicial review appears to be bound to fail. My own review of the documents on record, including the extract from the SST-GD's decision quoted in paragraph 2 above, has not revealed any basis to expect otherwise. In my view, the application for judicial review was indeed bound to fail.

[9] I would dismiss the present appeal. Since the respondent does not seek costs, none will be awarded.

"George R. Locke"
J.A.

“I agree.
D. G. Near J.A.”

“I agree.
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-111-18
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MARTINEAU DATED MARCH 6, 2018 (DOCKET NUMBER T-1697-17))	
STYLE OF CAUSE:	CHRISTIAN TOLKSDORF v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 16, 2019
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	NEAR J.A. RENNIE J.A.
DATED:	MAY 21, 2019

APPEARANCES:

CHRISTIAN TOLKSDORF	FOR THE APPELLANT SELF REPRESENTED
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