Federal Court of Appeal | Cour d'appel fédérale

Date: 20191017

Docket: A-314-18

Citation: 2019 FCA 256

CORAM: **STRATAS J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

JACQUELINE GITTENS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on October 16, 2019.

Judgment delivered at Toronto, Ontario, on October 17, 2019.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LASKIN J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The applicant seeks to quash the decision dated August 10, 2018 of the Social Security Tribunal – Appeal Division. The Appeal Division dismissed her appeal from the decision dated October 23, 2017 of the Social Security Tribunal – General Division.

[2] The applicant asked that her daughter be allowed to make oral submissions on her behalf. With the consent of the respondent, we permitted this. We would like to compliment the daughter, who is not a lawyer, for the high quality of her submissions.

[3] This case is about applying the incapacity provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8. In that statute, Parliament made rules about when benefits can be applied for and what has to be established if someone tries to apply retroactively. Those rules have to be met before benefits are paid.

[4] In a case like this, this Court is not free to do whatever it wants. Like everyone else in our society, this Court is constrained by the rules set out in the laws passed by Parliament.

[5] This Court is also required to give the Appeal Division some respect and some leeway—what the law calls "deference"—when the Appeal Division interprets the legal rules in the *Canada Pension Plan*, makes findings of fact, and applies the legal rules to those findings of fact. In this case, like in many others, this Court's task is to ensure that the Appeal Division had some basis in the evidence to make the findings it did. This Court is not allowed to go through the evidence and make its own findings of fact or to second-guess what the Appeal Division and the General Division have done. This Court is not to redo the job of the Appeal Division and the General Division. Here again, we are constrained.

[6] Given the constraints on the Court, it is important to understand that when this Court says that it has not been persuaded that it should overturn a decision of the Appeal Division, it is not

saying that the medical condition of the person claiming benefits is not as bad as she says, she is not suffering in some way, or the Court does not believe her. It is just that this Court's ability to overturn a decision of the Appeal Division is very limited. Sometimes, benefits are very difficult to get under the rules of the *Canada Pension Plan* but this Court cannot interfere with those rules.

[7] This Court recognizes the dignity and worth of every person before the Court as an individual. Every party deserves respect and due consideration as a full member of Canadian society. Many good people are unsuccessful in this Court and often that is only because of the constraints under which this Court must work.

[8] Unfortunately for the applicant, she has not persuaded me that the Appeal Division made a legal error or was not fair to her in its process. This Court cannot, as a matter of law, overturn the Appeal Division's decision.

[9] The Appeal Division can overturn a decision of the General Division only when a person shows that the General Division made an error of the sort listed under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34. The Appeal Division found no such error. This finding is what we are reviewing in this case, limited, as we are, by all the constraints mentioned above.

[10] I agree with the respondent that there was no breach of procedural fairness by either the Appeal Division or the General Division. The applicant had notice of the teleconference hearing

before the Appeal Division and was given the opportunity to participate. In the Appeal Division, the applicant received an explanation of the nature of the hearing, the legal tests that would be applied, and what the Appeal Division would do following the hearing. The applicant was given an opportunity to participate in the hearing.

[11] The Appeal Division carefully reviewed an audio recording of the hearing before the General Division and considered that hearing fair. I am not persuaded that there is any reason to interfere with it.

[12] In my view, the decision of the Appeal Division is substantively reasonable. It is defensible on the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47. That as far as we can go: a decision that is reasonable in the sense of being defensible on the facts and the law must be upheld. Again, we cannot redo what the General Division and the Appeal Division have done. We can only interfere if there is procedural unfairness or a substantive error that makes the decision indefensible and unacceptable.

[13] The Appeal Division refused to receive certain fresh evidence tendered by the applicant. This is because under the rules set by Parliament, hearings before the Appeal Division are not redos based on updated evidence of the hearings before the General Division. They are instead reviews of General Division decisions based on the same evidence. I see no reviewable error in the Appeal Division refusing to receive the fresh evidence.

[14] Similarly, we have not considered certain new evidence filed in this Court by the applicant. The general legal rule is that a court on judicial review can only consider evidence that was before the administrative decision-maker: see, *e.g.*, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297.

[15] The proper respondent is the Attorney General of Canada. I would amend the style of cause to reflect this. As we explained to the applicant in the hearing, this is only a technical issue and does not affect the Court's assessment of the merits of her application.

[16] The respondent asks that no costs be awarded against the applicant. I agree. Therefore, I would dismiss the application without costs.

"David Stratas"

J.A.

"I agree
J.B. Laskin J.A."

"I agree
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-314-18
APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE SOCIAL SECURITY TRIBUNAL – APPEAL DIVISION DATED AUGUST 10, 2018, TRIBUNAL FILE NUMBER AD-18-41	
STYLE OF CAUSE:	JACQUELINE GITTENS v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	OCTOBER 16, 2019
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	LASKIN J.A. MACTAVISH J.A.
DATED	OCTOBER 17, 2019

APPEARANCES:

Jacqueline Gittens	ON HER OWN BEHALF
Penny Brady	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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