Federal Court of Appeal  Cour d'appel fédérale

Date: 20220106

Docket: A-443-19

Citation: 2022 FCA 4

CORAM: **GAUTHIER J.A.**
WOODS J.A.
MONAGHAN J.A.

BETWEEN:

JANET ZEPOTOCZNY BERGER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 4, 2021.

Judgment delivered at Ottawa, Ontario, on January 6, 2022.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: WOODS J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Janet Zepotoczny Berger appeals from a decision of the Federal Court (*Berger v. Canada (Attorney General)*, 2019 FC 780) dismissing her application for judicial review of a decision of the Appeal Division of the Social Security Tribunal (the Appeal Division). In this decision, the Appeal Division denied leave to appeal from the decision of the General Division of the Social Security Tribunal (the General Division) dismissing the appellant's application for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "CPP").

[2] The appellant is a registered nurse. She worked as a nurse until 1999, when she sustained a number of injuries in a transit bus (TTC) accident. The appellant has had other health issues since then, which have left her with physical limitations. In June of 2014, she began to receive a CPP retirement pension.

[3] The appellant made another unsuccessful application for CPP disability benefits in 2005. After seeking a reconsideration, this application was the subject of two unsuccessful appeals and a judicial review (*Berger v. Canada (Attorney General)*, 2009 FC 37) confirming the August 2007 decision of what was then the Pension Appeal Board.

[4] The application at issue in the present appeal is the one that the appellant filed in 2013. It was denied and appealed to the General Division which, after many pre-hearing conferences, issued an interlocutory decision on June 1, 2017 (*Janet Zepotoczny Berger v. Minister of Employment and Social Development*, GP-14-5029). That decision dealt with four issues arising from various allegations or submissions made by the appellant at that stage. These allegations included bias, potential conflict of interest and bullying on the part of the decision-maker, the appellant's failure to comply with paragraph 20(1)(a) of the *Social Security Tribunal Regulations*, SOR/2013-60 (which, as noted at paragraph 48 of the interlocutory decision, impacted the appellant's right to raise constitutional issues at the hearing on the merits), the appellant's claim for breach of privacy, and her unwillingness to be heard by videoconference. The General Division also indicated to the appellant that the period at issue in the appeal before it was from March 21, 2007 until May 31, 2014 (the "window period") (see paragraph 58 of the General Division's interlocutory decision).

[5] The appeal was then heard by the General Division on the merits on September 5, 2017. On November 24, 2017, the General Division concluded in a detailed decision (*J.Z. v. Minister of Employment and Social Development,* 2017 SSTGDIS 210) that the appellant, despite her well-established physical limitations during the window period, was able to transition from working as a registered nurse to a part-time dental anaesthesia assistant. It found that she did not meet the definition of "severe" disability under subsection 42(2) of the CPP because she was able to regularly pursue a substantially gainful occupation during the window period (with her annual gross income varying between $21,650 and $34,348).

[6] In its decision of March 28, 2018, the Appeal Division found that the appellant, who had raised 16 issues before it, had no reasonable chance of success on any of the permitted grounds of appeal set out in subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34. It thus denied her request for leave to appeal the General Division's decision.

[7] The details of the numerous issues raised before the Appeal Division are well identified at paragraph 12 of the Federal Court's reasons for dismissing the appellant's application for judicial review, which I need not repeat.

[8] Before this Court, the appellant made an informal request for leave to file new evidence (letters respectively dated October 17 and 28, 2021). This request was denied. Thus, the matter is to be determined on the basis of the material included in the Appeal Book only. That said, I did consider all of the submissions that could be supported by material already in the Appeal Book to

ensure that I properly understood all of the appellant's arguments. Also, I considered the additional written submissions that the appellant presented at the hearing. This does not mean, however, that I will address all of those in my reasons, for there are simply too many (the remedies listed in the notice of appeal and the arguments in the appellant's memorandum of fact and law) that have nothing to do with what is properly before us in this appeal.

[9] Before proceeding with my review of the issues properly before us, I wish to make some general observations. At the hearing before us, the appellant made it clear that this was "the culmination of a 16-year battle" that she has been fighting in order to obtain the disability benefits to which she argues she should be entitled under the CPP. The appellant clearly disagrees with the policy and the administrative system in place. She claims that the limited definition of severe and prolonged disability under the CPP is not what she or any other Canadian taxpayer understands to be a severe and prolonged disability when they pay their CPP contributions. She believes that she has been the victim of oppression, not only because of the system and all of the delays involved, but also because of disputes with her bank and her landlord, which she feels are related to the fact that she has not been receiving disability benefits as requested since 2005. In the appellant's view, there is also a link between the time that it took for the system to deal with her application and her involvement in litigation with her bank, which had an overlap of at least three years. She believes that this link would need to be investigated to determine whether the administrative decision-makers were trying to favour the bank. To clarify whether there was a problem of misunderstanding the decisions at issue, the appellant was asked why she kept presenting arguments that were dismissed by previous decision-makers, including the Federal Court. She responded that she believed that one day, if she kept repeating them, those

arguments would be properly understood and she would be given the benefits to which she feels she is entitled.

[10] The appellant, who represents herself, is well educated but has no legal training. There is no doubt that she strongly believes in her position, despite the various explanations given in the reasons of the previous decision-makers. But, with the utmost respect for her, after carefully considering everything that she has written and said before us, it appears to me that all of the appellant's arguments have in fact been understood. Unfortunately, they are without legal merit. That is not to say that her life has not been different and difficult as a result of the accident and her other medical issues since 1999, or that her legal disputes with her bank and her landlord have not further impacted her physical and mental wellbeing. It only means that she cannot receive disability benefits under the CPP because she does not meet the requirements applicable to her request thereunder.

[11] Neither the Federal Court nor this Court on judicial review can grant the appellant the benefits that she seeks because of delays in the processing of her application and in concluding the various related proceedings open to her (reconsideration, appeals to the General Division and the Appeal Division, and judicial review). This remedy is simply not available. Nor can this Court otherwise address or even comment on the merits of an Ontario court's decision dealing with the appellant's legal dispute with her bank or on the proceedings before the Landlord and Tenant Board, whether she claims a miscarriage of justice or not. We have no such jurisdiction.

[12] We also cannot deal with the appellant's latest 2019 application for CPP disability benefits, even if it was made before the date of the Federal Court decision under appeal. Nor can we award damages to compensate the appellant's alleged undue pain and suffering, her loss of real estate, or her legal and relocation costs, to name a few, which she argues resulted from everything that she has been through since the beginning of her litigation with her bank.

I. Analysis

[13] The main role of this Court in this appeal is to determine whether the Federal Court chose the appropriate standard of review and applied it correctly to the issues before it (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*]). The standard of reasonableness applied by the Federal Court is not in dispute. However, I believe that correctness should more appropriately apply to the issues of bias and *res judicata* (here, an alleged breach of natural justice) that were before the Appeal Division. But, as our Court essentially steps into the shoes of the reviewing court, I have applied this more stringent standard when reviewing the Appeal Division's finding in respect of bias and *res judicata*. Thus, I will first examine whether the Appeal Division's decision contains any reviewable error and whether the Federal Court erred in dismissing the application for judicial review.

[14] Further, the appellant has raised in this appeal some issues relating to a confidentiality order issued by the Federal Court on June 4, 2019. She also seeks an additional confidentiality order from this Court, as well as an order mandating the General Division to remove from its website the decision that it rendered in her file because it should be confidential. The appellant

alleges that this decision was posted online in contempt of the Federal Court order. I will address these additional issues under a separate heading, for the approach set out in *Agraira* does not apply to them.

A. *Did the Federal Court Err in Dismissing the Application for Judicial Review?*

[15] I do not intend to write extensively on any of the issues relating to whether the Federal Court erred in concluding that there was no reviewable error in the Appeal Division's decision. Having carefully considered the Appeal Division's decision, as well as the General Division's decision, I generally agree with the Federal Court's thoughtful reasons and I have concluded that, whatever standard is applied to the issue of bias, there is simply no reviewable error in the Appeal Division's decision to warrant our intervention. This is so in respect of any other finding of the Appeal Division, which I need not expressly address here.

[16] Like the Federal Court, I do not find it necessary to deal with the constitutional issues listed in the notice of appeal. As mentioned earlier, the appellant failed to properly raise these issues before the General Division, despite being advised on more than one occasion of what she ought to do in that respect well before the interlocutory decision was issued. Such matters cannot now be raised before us.

[17] I note that in her notice of application before the Federal Court, the appellant did not expressly raise any issue in respect of the Appeal Division's determination that there was no reasonable chance of success of her argument in respect of *res judicata* (a matter already decided). This, and the absence of any written submissions, may explain why the Federal Court

did not deal with this argument, even though the Appeal Division considered it in its reasons. For the appellant's benefit, it is appropriate to answer the specific point that she raised before us. The appellant claims that she was not made aware until the hearing on September 5, 2017 that the relevant period before the General Division was between March 21, 2007 and May 31, 2014. As noted at paragraph 4 above and during the hearing before us, the General Division did advise her of this in its interlocutory decision issued on June 1, 2017 (see paragraph 58 of the interlocutory decision). The appellant therefore had the opportunity to prepare her case on that basis for the hearing on September 5, 2017. If the appellant needed more information in this respect, she had ample time to seek it. As it appears from the summary at paragraphs 7–30 of the General Division's interlocutory decision, the appellant knew exactly how to contact the decision-maker in charge of this file.

[18] The principle of *res judicata* was only relevant to explain why the appellant could not ask the General Division to decide again whether she was entitled to any disability benefits during any period dealt with in the final decisions made regarding her 2005 application. The General Division properly applied this general principle to the facts of this case and duly considered whether it ought to exercise its discretion based on exceptional circumstances. The Appeal Division was correct that there was no reasonable chance of success on appeal in this respect, nor was there an obligation on the General Division of its own initiative to explain the details of this doctrine to the appellant before the hearing in this case.

[19] Finally, the appellant cannot rely on her allegation (she confirmed there was no evidence supporting it in the record) that a public servant verbally advised her that she could be entitled to

disability benefits backdated to at least 2012 when she made her 2013 application (the date that she has asked us to consider to calculate her CPP disability benefits at paragraph 23, page 16 of her memorandum of fact and law).

[20] I have little to add to the Federal Court's statements in respect of the allegation of bias or conflict of interest made against the nurses who worked on the appellant's file and the member of the General Division who rendered the decision. The Appeal Division correctly focused on the decision-maker himself, and it was correct in concluding that there was no reasonable chance of success in this respect. There is nothing in this file on which an informed person could reasonably conclude that it is more likely than not that the decision-maker would not decide or act fairly, whether consciously or unconsciously (*Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 at para. 20). As already mentioned, it was not disputed that the appellant had physical impairments and the nurses, who are not decision-makers, had no role in determining whether she was able to regularly pursue a substantially gainful occupation based on the revenues that she earned during the relevant period. The appellant's allegations that there was a reasonable apprehension of bias of the decision-maker because he was a former lawyer who could be friends with the lawyers representing her bank or that he could have worked directly or indirectly for the bank are pure speculation. Also speculative is the appellant's suggestion before us that the overlap between the proceedings involving her bank and the appeals involving her 2013 application raises sufficient concern of conflict of interest or bias. She suggests that, among other things, the government and its servants dealing with her application were aware of her litigation with the bank and likely to favour big banks (seeing that this is where the government places its money to earn interest).

[21] On the core issue in this file, namely, whether the appellant met the requirements of the CPP, the Appeal Division's decision is properly justified and transparent, and the outcome that it reached was open to it on the record before it. The General Division's reasoning was also properly justified and transparent, and there is no error that could justify our Court's intervention in this appeal. The jurisprudence supports the findings of the Appeal Division and the General Division in this respect.

[22] The fact that the legislator defined "severe disability" using criteria that go beyond pure physical and mental impairment is a policy choice. It is clear that, under the CPP, to be severe, a physically or mentally disabled person's disability must prevent them from earning a living. Employability is the yardstick (*Granovsky v. Canada (Minister of Employment and Immigration*), 2000 SCC 28, [2000] 1 S.C.R. 703 at para. 28; *Klabouch v. Canada (Social Development)*, 2008 FCA 33 at para. 14 [*Klabouch*]). The capacity to work and earn a living is not examined in light of what the person would have been able to earn, had it not been for the mental or physical impairment, and it can be fulfilled with less than a full time job (see, for example, *Villani v. Canada (Attorney General)*, 2001 FCA 248; *Klabouch* at para. 15; *Ferreira v. Canada*, 2013 FCA 81; *Connolly v. Canada*, 2014 FCA 294).

[23] The original purpose of the disability benefits under the CPP was only to ensure a minimum level of income to persons who are physically or mentally disabled. Since the coming into force of section 68.1 of the *Canada Pension Plan Regulations*, C.R.C., c. 385 in 2014, the legislator has made it even clearer that this partial income replacement, which is part of a broader system of disability income supports (*Regulations Amending the Canada Pension Plan*

Regulations (Regulatory Impact Analysis Statement), Canada Gazette, Part II, vol. 148, No. 13 (May 29, 2014) at p. 1655), is lower than what the appellant argues should be considered as a substantially gainful occupation. Further, I agree with the Federal Court and the Appeal Division that evidence that the appellant's revenues have diminished after 2014 is irrelevant, considering that the period at issue here ends just before she started receiving her pension benefits under the CPP.

[24] I have already mentioned that we have no jurisdiction to grant the appellant the benefits to which she believes she is entitled because of delays in the final determination of her 2013 application. Still, I wish to make it clear that the appellant seems to be under the misapprehension that the oppression remedy, such as that provided for in section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, or other principles applicable under other legislation (such as workers compensation legislation), or in other contexts (such as claims for interest or motor vehicle accidents), can be extended or somehow applied to support her claim. In her view, if she has been treated unfairly, then she must be entitled to compensation, specifically the payment of benefits to which she is not otherwise entitled under the CPP. This is not so. The Federal Court expressed compassion for the appellant's plight, as did many previous decision-makers who dealt with her case. This does not mean that she was treated unfairly by the system itself (as opposed to the many challenges that she has faced in her life, such as her accident, her various mishaps, and her legal disputes with third parties). This also does not mean that the time that it took for her to navigate the robust adjudicative scheme available to all Canadians under the CPP was oppressive and abusive. It may be unfortunate that it took the appellant five years to receive a final decision (as the Federal Court observed at paragraph 25 of

its reasons). This, however, does not mean that this delay was unreasonable in this particular case. Administrative justice is not perfect. Frankly, not much is these days. Many complain about the health system and other essential services. The fact remains that, while there are enormous demands, there is a finite amount of resources available.

[25] Finally, this passage from the Court of Appeal for Ontario's decision dismissing the appeal of a decision relied upon by the appellant (*Gorecki v. Canada (Attorney General)*, 2006 CanLII 9035 (ON CA), [2006] O.J. No. 1130 at para. 18) is fitting here:

> Fiduciary duty, unjust enrichment, constructive trust, and inherent power to award interest are elastic principles, but they do have limits and they cannot be stretched to remedy each and every claim of 'unfairness', particularly where the alleged unfairness arises by virtue of the precise terms of an Act of Parliament. The comment of Major J. in *Gladstone, supra*, at para. 12 is apposite: "[t]his may seem unfair given that the proceeds in the case at bar were held for a number of years. If so, it is for Parliament to correct it."
>
> [emphasis added]

[26] This may have been said in a different context, but it is certainly applicable to many of the appellant's arguments.

[27] I now turn to the other miscellaneous issues before us.

B. *Confidentiality and Other Orders Requested*

[28] As mentioned, the appellant requests that the Federal Court's confidentiality order of June 4, 2019 (the Order) be extended to protect the confidentiality of all of her medical information in the Federal Court or the Federal Court of Appeal records.

[29] The Order was expressly limited to specific pages of the respondent's record (26 in total), where the Federal Court was satisfied that the pages in question contained sensitive personal information that deserved protection, notwithstanding the public interest in open and accessible court proceedings. In doing so, the Federal Court appears to have granted the motion, which was brought verbally in the course of the hearing, in order to protect the pages in question.

[30] It is my understanding that none of the pages in the Federal Court record that were expressly protected by the Order were included in the Appeal Book before us. In fact, the respondent's record before the Federal Court was not included in the Appeal Book at all. There is therefore no need to extend the Order to this Court's record. However, in her letter to this Court dated October 17, 2021, the appellant submitted that she had previously failed to identify duplicates of those pages in other parts of the respondent's record before the Federal Court. The respondent did not confirm nor deny this fact.

[31] It is evident that the Federal Court's intention was to protect the confidentiality of the information found in the pages expressly listed in its Order. One can therefore reasonably construe that Order as also protecting the confidentiality of duplicate pages found elsewhere in the respondent's record. It is thus important that the Federal Court Registry be advised of this so that it may take the appropriate action. Only the parties can do this, and they should do so promptly.

[32] That said, I have not been persuaded that this Court should issue the broader order that the appellant requests in respect of this Court's record. First, I am not in a position to ascertain

exactly the information to which the appellant could take objection or offense in the future. It is surprising that she did not immediately seek any directions in respect of these documents that she herself filed, given her previous experience with confidentiality orders. Also, and more importantly, most of these documents have been available to the public at the Federal Court Registry for many years (note, however, that I will deal with the new evidence later). In the circumstances, it is not appropriate to issue a confidentiality order protecting such information in this Court's record.

[33] Turning to the appellant's request to extend the Order to protect all of the medical information contained in the Federal Court record, the appellant did not make this request to the Federal Court. We therefore have no jurisdiction on appeal to render the order sought.

[34] With respect to the appellant's request that we reprimand the General Division and order it to remove its decision from its website, I first note that the Order only deals with the confidentiality of the information in the Federal Court record itself—nothing else. As the Federal Court also explained at paragraph 62 of its reasons, in relation to another confidentiality order of the Federal Court issued in 2007, such orders only deal with the way in which the documents in that court file should be handled. Further, as also clearly stated, such orders do not relate to how "those charged with administering the CPP disability benefits scheme [are] to manage their own internal files…".

[35] Furthermore, I simply do not see how this Court or the Federal Court could direct the General Division as to how it should deal with its own decisions and the information in its own files.

[36] Finally, I am prepared to make an order allowing the appellant to withdraw from this Court the documentation that she filed solely in support of her request for leave to file new evidence under Rule 351 of the *Federal Courts Rules*, SOR/98-106. Given that this Court denied the appellant leave and did not rely on that information, I believe that it would be appropriate to grant her this alternative remedy. This order would be expressly limited to the documentation attached to the appellant's letters to this Court dated October 17 and 28, 2021.

II. Conclusion

[37] I would dismiss the appeal without costs, as the respondent has not sought any. An order should be issued granting leave to the appellant to withdraw from this Court's file all documents attached to the letters of October 17 and 28, 2021. The parties should jointly confirm to the Federal Court Registry on or before January 21, 2022, which duplicate pages of the respondent's record before the Federal Court should be kept under seal in that Court's confidential file, in order to give full effect to the Order.

"Johanne Gauthier"
J.A.

"I agree
Judith Woods J.A."

"I agree
K.A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE MACTAVISH DATED JUNE 4, 2019, DOCKET NO. T-858-18

DOCKET:	A-443-19
STYLE OF CAUSE:	JANET ZEPOTOCZNY BERGER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 4, 2021
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	WOODS J.A. MONAGHAN J.A.
DATED:	JANUARY 6, 2022

APPEARANCES:

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