Federal Court Cour fédérale

Date: 20161122

Docket: T-1306-15

Citation: 2016 FC 1290

Ottawa, Ontario, November 22, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

HASSAN JAMA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision made by the Appeal Division of the Social Security Tribunal [the SST] which refused to grant the Applicant leave to appeal a decision of the General Division of the SST.

I. Background

[2] The Applicant, Hassan Jama, applied for disability benefits under the Canada Pension Plan after being involved in a motor vehicle accident in 2005. He never returned to work at his job as a letter carrier with Canada Post after the accident. His application for disability benefits was rejected for the first time on March 10, 2010, and again on February 6, 2013, because he did not have a severe and prolonged disability that was continuous since December 2007. The Applicant's request for reconsideration of the second rejection was refused in a letter dated July 18, 2013. A week later, the Applicant's counsel sent a letter dated July 25, 2013 to the General Division of the SST [the GD], stating that the letter was "formal notice" of the Applicant's intention to dispute the refusal of his reconsideration request.

[3] In the following year, the Applicant submitted a notice of appeal dated March 4, 2014, in respect of the negative reconsideration decision; this notice of appeal was receipted by the GD on June 4, 2014. However, since the notice did not contain a copy of the reconsideration decision, the GD informed the Applicant that the notice of appeal was improperly filed. On July 23, 2014, the Applicant filed a copy of the reconsideration decision. The Applicant's notice of appeal outlined the reasons why the appeal was filed beyond the 90 day time limit and why the reconsideration decision was incorrect. The Applicant's reasons for why the appeal was not filed within the 90 day time limit as required by paragraph 52(1)(b) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the *DESDA*], were curtly stated as being: "Change of Legal Representative. Unfamiliar with new procedure - Notice of Appeal."

[4] In a decision dated May 12, 2015, the GD refused to grant an extension of time to appeal the reconsideration decision. The GD referred to the criteria to determine whether to allow an extension of time to file an appeal as set out in *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883 at para 9, 140 ACWS (3d) 576 [*Gattellaro*]:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[5] After the GD's decision not to allow an extension of time for his appeal, the Applicant applied for leave to appeal to the Appeal Division of the SST [the AD]. In his application dated June 4, 2015, the Applicant stated that his law firm had followed the old process for filing an appeal as they were not aware until January 2014 of the changes to the appeal process which had been implemented in April 2013. The Applicant also stated that the departure of a lawyer from his law firm caused "a brief impediment in representation at what was a crucial point in learning about the changes to the appeal process." The Applicant further stated that the letter, sent from his law firm on July 25, 2013, demonstrated his intention to appeal and that he would be prejudiced if the appeal was not allowed because "he continues to suffer severe and prolonged disability" preventing him from returning to any form of gainful employment. Although the Applicant did not specifically refer to any of the enumerated grounds of appeal under subsection 58(1) of the *DESDA*, he did state that the GD's decision "fails to reference our letter of July 25, 2013 which demonstrates the clear intention to appeal."

II. The Appeal Division's Decision

[6] In a decision dated July 13, 2015, the AD refused the Applicant's application requesting leave to appeal.

[7] The AD first reviewed its appellate role and discretion to grant leave to appeal, noting that to grant leave it must be satisfied that the appeal has "a reasonable chance of success" or raises "an arguable case." The AD then reviewed the Applicant's submission that the GD had reached its decision in error, having relied on an erroneous finding of fact. The AD noted the Applicant's submission that his continuing intention to pursue the appeal was evidenced by a letter dated July 25, 2013 sent to the GD, but that letter was not considered or even mentioned by the GD. The AD also noted the four criteria from *Gattellaro* and referenced the Federal Court of Appeal decision in *Canada (Attorney General) v Larkman*, 2012 FCA 204, 433 NR 184 [*Larkman*], in support of its statement that: "it is not an all or nothing situation as in some instances different factors will be relevant with the interests of natural justice being the overriding consideration."

[8] The AD found it was not surprising that the GD had found the Applicant's explanation for the delay wanting since the Applicant had not addressed the questions of whether there was an arguable case or prejudice to the other party. As to the GD's finding that the Applicant had not demonstrated a continuing intention to pursue the appeal, the AD stated:

> [12] It is this latter finding that has proved the most contentious. When asked, Counsel for the Applicant provided an Affidavit stating that the letter of July 25, 2013 was sent to the Tribunal by ordinary mail, and that it was not returned. The Tribunal record

> does not contain this letter. Nonetheless, even absent this letter, for the following reasons the Tribunal is not persuaded that an arguable case has been made out.
>
> [13] The full text of the letter states:
>
> > Please be advised that we act for Mr. Jama with regard to his CPP Disability claim. We are in receipt of correspondence dated July 18th 2013 denying our request that the decision to deny Hassan Jama Disability benefits be reconsidered. This correspondence serves as formal notice of Mr. Jama's intention to dispute this decision.
>
> [14] The Tribunal agrees that the letter certainly evidences an intention to pursue the appeal, however, even accepting that the letter of July 25, 2013 was sent to the Tribunal, but somehow not placed before the General Division, the Tribunal finds that it would likely have had little impact on the decision. The letter does little to explain the more than one year delay between the time it was written and the subsequent attempt to file the Notice of Appeal. Nor does the letter explain why, when filed, the Notice of Appeal was missing required information.

[9] The AD rejected the Applicant's argument that a change of counsel resulted in the delay, finding that the Applicant was represented by the same law firm at all material times and any change in individual lawyer was immaterial. The AD also rejected the Applicant's "ignorance of the law" argument concerning changes to the appeal process as being a satisfactory explanation for the delay.

[10] The AD thus found that the GD had not erred in either its application of the case law or its assessment of the appropriateness of granting the application to extend the time for bringing the appeal. The AD concluded by stating that it was not satisfied that the Applicant had raised an arguable case.

III. Issues

[11] In view of the parties' submissions, the issues raised by this application for judicial review may be rephrased and framed as follows:

1. What is the appropriate standard of review?
2. Should the Court consider the "Automatic Acknowledgement" e-mail contained in the Applicant's Record?
3. Was the AD's decision reasonable?

IV. Analysis

A. *Standard of Review*

[12] Recent case law has established that a decision by the AD refusing leave to appeal pursuant to subsection 58(2) of the *DESDA* is to be reviewed on the reasonableness standard. For example, in *Tracey v Canada (Attorney General)*, 2015 FC 1300, [2015] FCJ No 1410, Justice Roussel reviewed the jurisprudence on the standard of review for decisions of the AD refusing a request for leave to appeal and concluded that:

> [21] In my view, the determination of whether an application for leave to appeal has a reasonable chance of success clearly falls within the expertise of the SST-AD, whose ultimate responsibility, if leave is granted, will be to decide the merits of the appeal, which will be reviewable on a standard of reasonableness…
>
> [22] Given that the ultimate decision on appeal is reviewable on a standard of reasonableness, the determination of whether leave to appeal should be granted or denied should also be subject to the same standard of review. Furthermore, I note that in subsection 58(2) of DESDA, Parliament left it to the SST-AD to be "satisfied" that the appeal has a reasonable chance of success. This wording, in my view, further supports the argument that deference should be

> afforded to the SST-AD's determination of whether leave should be granted.

[13] Similarly, in *Canada (Attorney General) v O'Keefe*, 2016 FC 503, [2016] FCJ No 796, Justice Manson noted that:

> [17] The applicable standard of review when reviewing the SST-AD's decision to grant or deny leave to appeal is reasonableness, with substantial deference to the SST-AD (*Canada (Attorney General) v Hines*, 2016 FC 112 at para 28 [*Hines*]; *Canada (Attorney General) v Hoffman*, 2015 FC 1348 at paras 26, 27 [*Hoffman*]; *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 17 [*Tracey*]).

[14] Accordingly, the AD's assessment of the evidence is entitled to deference (see: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*]). The Court should not interfere if the AD's decision is intelligible, transparent, and justifiable, and falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law (*Dunsmuir* at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

[15] Moreover, it is not the function of this Court to substitute its own view of a preferable outcome and it is not up to this Court to reweigh the evidence that was before the AD: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339. The AD's "decision should be approached as an organic whole, without a line-by-line treasure hunt

for error" (see: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458).

B. *Should the Court consider the "Automatic Acknowledgment" e-mail?*

[16] The Respondent raises a preliminary issue concerning an "automatic acknowledgement" e-mail allegedly sent by the SST to the Applicant on March 4, 2014, the same date as the Applicant's notice of appeal. The Respondent says that the Court should not consider this e-mail on judicial review because it was not before the AD and it is not properly authenticated. This e-mail is included in the Applicant's record, not as an exhibit to his affidavit, but as a separate document. It is not contained in the certified tribunal record.

[17] The Respondent argues that the e-mail is inadmissible evidence on this judicial review and cites the decision of the Federal Court of Appeal in *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268, [2016] 3 FCR 19, where Justice Stratas stated:

> [20] Here, we must look at Rules 306-310. But before doing so, we must appreciate that those rules sit alongside a fundamental general principle: facts must be proven by admissible evidence. There are exceptions to this, such as the availability of judicial notice, the presence of legislative provisions speaking to the issue, and an agreed statement of facts (including an agreement that certain documents shall be admissible). Putting those exceptions aside, documents by themselves, not introduced by an affidavit authenticating them, are not admissible evidence. Documents simply stuffed into an application record are not admissible.

[18] There is abundant jurisprudence concerning when additional evidence can be submitted and accepted through an affidavit on judicial review. It is unnecessary to delve into this jurisprudence in the circumstances of this case because the Court is of the view that the

Applicant simply “stuffed” this e-mail into his record. The Court will not consider the e-mail in assessing the reasonableness of the AD’s decision.

C. *Was the AD’s Decision Reasonable?*

[19] The Applicant raises several issues concerning the AD’s assessment of the evidence. First, he says the AD erred by concluding that there was a “more than one year delay” between the Applicant’s July 25, 2013 letter and his subsequent attempt to file the notice of appeal. Second, the Applicant says that the AD unreasonably concluded that this letter did not explain the subsequent delay in filing the notice of appeal or explain why the notice of appeal was missing required information. Furthermore, the Applicant argues that the AD erred by not explaining why the GD never received his legal counsel’s letter dated July 25, 2013 or why his notice of appeal was not received on March 4, 2014. In the Applicant’s view, these errors demonstrate the unreasonableness of the AD’s decision and its failure to adequately consider the Applicant’s intention and efforts to appeal within one year of receiving the reconsideration decision denying him CPP disability benefits.

[20] The Respondent contends that an appeal will only have a reasonable chance of success if it is based on one of the enumerated grounds of appeal stated in subsection 58(1) of the *DESDA*, and that the AD reasonably concluded that the Applicant failed to identify a ground of appeal which had a reasonable chance of success. According to the Respondent, the factors from *Gattellaro* dictate the approach for the AD to determine whether an extension of time is appropriate, but the AD has flexibility in order to achieve justice between the parties. The Respondent further contends that it was reasonable for the AD to determine that, although the

letter dated July 25, 2013, evidenced an intention to pursue the appeal, it would not have impacted the GD's decision because it failed to demonstrate a continuing intention to appeal the reconsideration decision. Finally, in the Respondent's view, the AD's statement that there was a "more than one year delay" between the July 25, 2013 letter and the Applicant's subsequent filing of a notice of appeal is "unfortunate miswording" which is immaterial and inconsequential because the AD did not find that the appeal was barred pursuant to subsection 52(2) of the *DESDA*.

[21] In this case, the AD was tasked with determining whether to grant or refuse the Applicant's application for leave to appeal the GD's decision denying him an extension of time to appeal the reconsideration decision. It refused to grant such leave not only because it found that the GD had not erred, but also because it was not satisfied that the Applicant had raised an arguable case. In making this determination, however, the AD reviewed and relied upon the letter of July 25, 2013, which was not part of the record before the GD and only became part of the record before the AD after it was requested by the SST member assigned to consider the Applicant's request for leave to appeal. Although the AD stated that "the letter certainly evidences an intention to pursue the appeal," it was not reasonable in my view for the AD to then discount and discredit this letter on the basis that it did not explain the delay between the time it was written and the subsequent attempt to file the notice of appeal, or explain why, when filed, the notice of appeal omitted required information. How could this July 2013 letter possibly explain or, for that matter, even contemplate events which transpired months later when the Applicant filed the notice of appeal which was received by the GD in June 2014?

[22] The AD's assessment of the Applicant's continuing intention to appeal the GD's decision and the reconsideration decision is unreasonable because it does not exhibit a contextual understanding of the evidence in this regard (see: *Belo-Alves v Canada (Social Development)*, 2009 FC 413 at para 7, 343 FTR 309). The Applicant has been pursuing and appealing the denial of CPP benefits since the time his first application was rejected in March 2010. Furthermore, the letter of July 25, 2013 clearly shows that the Applicant intended to appeal the reconsideration decision well within the 90 day appeal period set forth in paragraph 52(1) (b) of the *DESDA* and, despite poor legal representation, the notice of appeal ultimately was filed within the one year maximum time limit to bring an appeal contemplated by subsection 52(2) of the *DESDA*.

[23] Lastly, it should be mentioned in closing that the factors noted in *Gattellaro* are not watertight compartments to be assessed mechanically without appropriate regard for whether the granting of an extension of time is in the interests of justice (see: *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 at paras 14-21, 63 NR 106 (CA)). As the Federal Court of Appeal observed in *Larkman* (at para 62):

> The importance of each question [or factor] depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.

V. Conclusion

[24] The AD's assessment of the Applicant's continuing intention to pursue an appeal in respect of the GD's decision and the reconsideration decision was unreasonable. The Applicant's application for judicial review is granted and the matter is returned to the AD for redetermination.

[25] As neither party requested costs, none will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; and there is no order as to costs.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1306-15
STYLE OF CAUSE:	HASSAN JAMA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 27, 2016
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	NOVEMBER 22, 2016

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