Federal Court Cour fédérale

Date: 20190130

Docket: T-1146-18

Citation: 2019 FC 113

Ottawa, Ontario, January 30, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MARCEL BROCHU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Marcel Brochu [the "Applicant"] in respect of a May 7, 2018 decision ["Decision"] of the Social Security Tribunal of Canada Appeal Division ["Appeal Division"] that denied the Applicant leave to appeal a General Division decision that held that the Applicant was not eligible for a Canada Pension Plan ["CPP"] disability pension.

II. Background

[2] The sole issue before this Court concerns the General Division hearing proceeding by way of teleconference rather than in-person or via videoconferencing. The Applicant argues that this format resulted in a breach of procedural fairness, and that the Appeal Division erred by finding that the Applicant's ground for appealing the General Division decision did not meet the test for leave to appeal.

[3] The Applicant is in his mid-50's and lives with his son in Hilliardton, Ontario. Hilliardton is north of North Bay, Ontario, and south of Timmons, Ontario.

[4] The Applicant's most recent position he operated was as a landlord, realtor, and home renovator. At his peak, the Applicant says he owned 15 properties, had 17 tenants, and did his own maintenance.

[5] In 2014, the Applicant applied for a disability pension under the *Canada Pension Plan* (R.S.C., 1985, c. C-8), as he tendered that he was unable to work due to the cumulative effects of his injuries and medical conditions. A separate Workers' Compensation proceeding forms part of the record.

[6] The Respondent refused the application initially and on reconsideration.

[7] The Applicant appealed this finding to the Social Security Tribunal. The General Division hearing was heard by teleconference. On November 11, 2017, the General Division found that the Applicant was not eligible for a CPP disability pension.

[8] The Applicant had been represented by Felicia Scott. However, she did not appear at the General Division hearing.

[9] The Applicant appealed the General Division decision and on May 7, 2018, the Appeal Division released their Decision denying the Applicant leave to appeal. The Appeal Division concluded that the appeal has no reasonable chance of success.

III. Issue

A. Was the Appeal Division's Decision to dismiss the application for leave to appeal from the General Division decision a reviewable error?

IV. Standard of review

[22] In *Garvey v Canada (Attorney General)*, 2018 FCA 118, Justice Gleason wrote for the Court in examining the case of an applicant seeking to set aside the decision of the SST-Appeal Division. Justice Gleason affirmed that the Appeal Division's decision may be set aside only if it is unreasonable, "that being the applicable standard of review to be applied by this Court as was held in Atkinson v. Canada (Attorney General), 2014 FCA 187 (CanLII) at paras. 24-32". The Applicant agrees that the Federal Court's standard of review should be reasonableness, as per *Dunsmuir v New Brunswick*, 2008 SCC 9.

[23] However, the Applicant argued that in assessing whether leave to appeal should be granted, the Appeal Division should have applied the standard of correctness as to whether the General Division breached procedural fairness by conducting the hearing via teleconference. The Applicant argues that the Appeal Division erred when they applied reasonableness to the issue of whether the General Division should proceed by way of teleconference.

[24] This argument is not relevant to the question of the standard of review that is before this Court, but rather is an argument that goes to the merits, and will be dealt with in the analysis portion of the decision.

A. *Style of Cause*

[25] The Style of Cause will be amended by replacing "MESDC" with "The Attorney General of Canada". Pursuant to Rule 303(1) of the *Federal Court Rules*, SOR/98-106 ["*FCR*"], the only properly responding party named should be the Attorney General of Canada.

V. Analysis

A. *The Law*

[14] To proceed with an appeal at the Appeal Division, the Applicant must first obtain leave.

[15] Under section 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*], the only grounds of appeal are that:

> **(a)** the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> **(b)** the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> **(c)** the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[16] The Appeal Division criteria to grant leave is set out in the *DESDA* at section 58(2):

> Criteria
>
> (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has **no reasonable chance of success**.
>
> [Emphasis added]

[17] The Applicant sought leave on a number of grounds at the Appeal Division level, but brought this application for judicial review on only one ground. The Applicant argues that the Appeal Division erred in finding that there was no reasonable chance of success that it was procedurally unfair for the General Division hearing to be heard by teleconference, rather than by videoconference or by an in-person hearing.

[18] By way of background, section 21 of the *Social Security Tribunal Regulations*, SOR/2013-60 ["*Social Security Tribunal Regulations*"] sets out what formats the General Division can utilize for a hearing :

> Notice of hearing
>
> 21 If a notice of hearing is sent by the Tribunal under these Regulations, the tribunal may hold the hearing by way of
>
> (a) written questions and answers;
>
> (b) teleconference, videoconference or other means of telecommunication; or
>
> (c) the personal appearance of the parties.

[19] The Appeal Division examined the reasons given by the General Division in determining the merits of the argument regarding the General Division hearing proceeding by way of teleconference. The Appeal Division:

- Rejected the Applicant's argument that the hearing should have been conducted via an in-person hearing. The Applicant had argued that because the credibility assessment was such an important factor in the decision, an in-person hearing was the best forum for such an assessment.
- Found that contrary to the Applicant's position, "… a person's demeanour evidence is just one of many factors that can be used as part of a credibility assessment". The Appeal Division noted that using demeanour evidence can be a "troublesome guide at best".
- Held that the format of a hearing is a highly discretionary decision, and one where the General Division members are entitled to make the choice about format. The Appeal Division held that this decision is not one that should be interfered with lightly.

- Reasoned that the Applicant should have made any concerns about breaches of natural justice at the earliest opportunity. The Appeal Division further found that the Applicant in this case made no objection to the forum of the hearing via teleconference, despite having two months' notice in advance. Further, the Appeal Division found that there were no allegations by the Applicant that there were any technical or other problems "…during the hearing that interfered with his ability to present his case".

[20] In the Hearing Information form, dated July 21, 2017, completed by the Applicant, the following question is posed, "Are there are forms of hearings in which you could not participate?" Listed below the question were potential answers for formats that the Applicant could have indicated comfort or discomfort with:

- Written questions and answers;
- Videoconferencing at a service Canada centre;
- Teleconference; or
- Personal appearance at a Service Canada centre.

[21] The Applicant did not express he could not participate in a teleconference. Nor did he say any of the other forms of hearings were his preference.

[22] The General Division selected teleconference and informed the Applicant and his representative the reasons they selected that format in the Notice of Hearing dated August 28, 2017. Those reasons were repeated in the General Division's decision.

[23] The General Division's reasons for selecting a teleconference as the method for the hearing was:

A. Videoconferencing is not available within a reasonable distance of the area where the Applicant lives.
B. There are gaps in the information in the file and/or a need for clarification.
C. This method of proceeding respects the requirement under the *Social Section Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[24] The Applicant did not indicate at that stage that any of the proposed formats for the hearing were unacceptable.

[25] The transcript of the General Division decision shows that the General Division, at the start of the hearing, confirmed how the hearing was being conducted and that it was being recorded. I reviewed the transcript and it is clear that the Applicant did not complain that the matter was proceeding by teleconference. There are also no technical issues evident on the transcript nor alleged by the Applicant then or now.

[26] Notwithstanding the above, the Applicant argued before the Appeal Division and before me that in a case such as this one, the General Division was procedurally unfair in having a teleconference hearing because the credibility of the Applicant was a central part of the General Division's decision. Further he argued because credibility was so critical, the General Division could not have made such a determination on credibility without video or an in-person hearing.

The Applicant said that the assessment of a person's demeanor in this situation would be not the only factor, but it would have been an essential one.

[27] I disagree with the Applicant that the Appeal Division made an error in denying leave to appeal. I am not persuaded by the Applicant's broad comments about demeanour evidence. Firstly, the Applicant does not even consider or raise good law on demeanour evidence, as set out in *R v NS*, 2012 SCC 72, and in other cases. More importantly, the Applicant's concern about demeanour evidence and credibility is beside the point; it misses the fact that this Court has affirmed that the General Division is entitled to make determinations about how it holds its hearings.

[28] Further, there was no evidence that the Applicant would have presented anything differently had he been in an in-person hearing or in a videoconference. I find that the General Division made its decision on the evidence before it, the medical records, and the actual words spoken by the Applicant.

[29] Finally, even though the General Division hearing was set for 90 minutes, the hearing ended up lasting 2 hours and 24 minutes. It cannot be said that the Applicant was not accorded all procedural fairness and allowed to fully present his case.

[30] In recent jurisprudence, this Court has looked at this exact issue, and held that there was no obligation for the General Division to provide for an in-person hearing. In *Parchment v Canada (Attorney General)*, 2017 FC 354, Justice McDonald was presiding over a matter where

the applicant sought judicial review from a decision of the Appeal Division. The applicant in that case contended that the General Division should have granted him an in-person hearing, and that the Appeal Division failed to acknowledge this error (para 17). Justice McDonald held:

> [18] The Appeal Division considered this issue, but determined that Mr. Parchment's procedural fairness rights were not breached when the General Division hearing was held by teleconference, rather than in person. He did not show that he was disadvantaged by the fact he gave his testimony via teleconference. Further, it was within the discretion of the General Division to decide on the format of the hearing (section 21 of the *Social Security Tribunal Regulations,* SOR/2013-60). The General Division opted to hold the hearing by teleconference, as they determined it was the most expedient manner to proceed considering previous adjournments and the late submissions of a large volume of documents.

[31] The argument that the Appeal Division was to use correctness standard to determine if leave should be granted is flawed as it is a statutory standard found in section 58(2) of the *DESDA* (see above). The Applicant's suggestion that the Decision is flawed because the Appeal Division does not clearly set out the standard of review it used is not persuasive. The Appeal Division reasons set out the test quite clearly in the "Legal Framework" discussion of the Decision of how reviewable errors are to be handled. The Appeal Division looked at the issue as an alleged breach of procedural fairness and treated it as such, whether they set out the exact test or not. The Appeal Division, then, as per section 58 (2) of the *DESDA*, considered whether that ground had a reasonable chance of success and found it did not.

[32] I therefore find that the Appeal Division committed no reviewable error and I will therefore dismiss this application.

VI. Costs

[33] The Applicant sought lump sum costs in the amount inclusive of fees and disbursements of $5000.00 plus HST. The Respondent did not seek costs.

JUDGMENT in T-1146-18

THIS COURT'S JUDGMENT is that:

1. The Style of Cause is amended to reflect that the Respondent should be "The Attorney General of Canada";

2. The application is dismissed; and

3. No costs are ordered.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1146-18
STYLE OF CAUSE:	MARCEL BROCHU v MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 16, 2019
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	JANUARY 30, 2019

APPEARANCES:

H.P. Yehuda Levinson	FOR THE APPLICANT
John Unrau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levinson & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT