Federal Court of Appeal | Cour d'appel fédérale

Date: 20200114

Docket: A-246-18

Citation: 2020 FCA 8

CORAM: **NADON J.A.**
PELLETIER J.A.
DE MONTIGNY J.A.

BETWEEN:

EMILIA TOTH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 14, 2020.
Judgment delivered from the Bench at Toronto, Ontario, on January 14, 2020.

REASONS FOR JUDGMENT OF THE COURT BY: PELLETIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20200114

Docket: A-246-18

Citation: 2020 FCA 8

CORAM: **NADON J.A.**
PELLETIER J.A.
DE MONTIGNY J.A.

BETWEEN:

EMILIA TOTH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 14, 2020).

PELLETIER JA.

[1] Ms Toth brings an application for judicial review of the decision of the Social Security Tribunal – Appeal Division dismissing her appeal from the decision of the Social Security Tribunal – General Division. The General Division decided that Ms Toth was not disabled within the meaning of the *Canada Pension Plan*, R.S.C. 1985 c. C-8. Ms Toth was granted leave to

appeal on April 5, 2018 on the basis that her allegation that the General Division had erred in fact when it failed to consider the effect of Ms Toth's mental illness on her capacity regularly to pursue any substantially gainful employment "may have a reasonable chance of success": Respondent's Record at p. 64.

[2] The *Social Security Tribunal Regulations*, SOR/2013-60, s. 42, provide that an appellant to the Appeal Division may, with 45 days of leave to appeal being granted, file submissions with the Appeal Division or file a notice that they have no submissions to file.

[3] On May 10, 2018, within this 45-day period, counsel for the Attorney General wrote to the Social Security Tribunal to say that it was the Minister's position that the appeal should be allowed and the matter remitted to the General Division on the basis that the latter had erred in fact in dismissing Ms Toth's evidence regarding her mental illness without considering its impact on her capacity to regularly pursue any substantial gainful employment.

[4] On May 28, the Social Security Tribunal, on behalf of the Appeal Division, wrote to the parties and requested the following:

> Leave to appeal was granted in this matter some time ago. The Claimant did not file any submissions after leave to appeal was granted. The Minister's representative wrote to the Tribunal and stated that the General Division had erred in law by failing to consider the claimant's mental illness and its impact on her capacity to work. It suggested that the matter be referred back to the General Division for a new hearing before a different General Division member.
>
> The Minister is asked to explain why the Appeal Division should not give the decision that the General Division should have given in this case and why the matter should be reconsidered by a different General Division Member.
>
> The Claimant's counsel is asked to set out what remedy she wishes the Appeal Division to give and why.

> The Appeal Division would be willing to hold a settlement teleconference if the parties would find this beneficial.

[5] Ms Toth responded to the Appeal Division's inquiry on June 11, 2018 indicating that, in light of counsel's concession that the General Division erred, there was no need to refer the matter back to the General Division and that the Appeal Division should render the decision that the General Division should have rendered which was that Ms. Toth should be found to be disabled. In the event that counsel for the Attorney General did not agree that the Appeal Division should render the decision that the General Division should have rendered, then Ms Toth indicated that she would welcome the opportunity to participate in a settlement conference to facilitate resolution of the matter.

[6] Counsel for the Minister replied on June 14, 2018 to say that the matter should be remitted to the General Division so that the latter could reweigh the evidence on the record in a *de novo* hearing. Counsel suggested that this was consistent with the General Division's role as the trier of fact. Counsel's letter did not refer to the possibility of a settlement conference. On June 26, 2018, the Appeal Division decided the appeal in writing and dismissed Ms Toth's appeal.

[7] We are of the view that in the particular circumstances of this case, the application for judicial review should be allowed and the matter should be returned to the Appeal Division for reconsideration after having given the parties the opportunity to make submissions.

[8] In all of the circumstances, we find that the manner in which this matter unfolded unfairly deprived Ms Toth of the opportunity to make full submissions on the merits of her appeal. The concession by counsel for the Attorney General did not bind the Appeal Division which was free to decide the appeal on the merits notwithstanding that concession. Similarly, the Appeal Division's inquiry as to the parties' position on remedies did not prevent the Appeal Division from deciding the question on the merits. However, in light of counsel's letter and its own inquiry, it did require the Appeal Division to advise the parties that it proposed to decide the matter on the merits and to allow them to make such submissions as they were inclined to make in the time frame which it considered appropriate.

[9] The failure to provide this guidance in this case put Ms Toth is an unfortunate position as she could not know whether, notwithstanding counsel's concession, she should exercise her right to make submissions with the 45-day period set out in the *Regulations*. Given the precarious economic status of most disability pension claimants, they should not have to decide between incurring unnecessary costs or foregoing their right to be fully heard.

[10] This is not to suggest that counsel for the Minister should avoid making appropriate concessions for fear of creating procedural uncertainty. Similarly, the Appeal Division is always free to canvas the views of the parties without tying its own hands as to its future course of action. All that is required is that applicants be advised and given a reasonable opportunity to make submissions if matters do not proceed as initially contemplated.

[11] The application for judicial review will be allowed without costs, the decision of the Social Security Tribunal – Appeal Division (the Appeal Division) dated June 26, 2018 will be set aside, and the matter returned to the Appeal Division for reconsideration after having provided the parties the opportunity to make further submissions in such form and within such time frame as the Appeal Division may allow.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-246-18
STYLE OF CAUSE:	EMILIA TOTH v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	JANUARY 14, 2020
REASONS FOR JUDGMENT OF THE COURT BY:	NADON J.A. PELLETIER J.A. DE MONTIGNY J.A.
DELIVERED FROM THE BENCH BY:	PELLETIER J.A.

APPEARANCES:

Alexandra Victoros Bozena Kordasiewicz	FOR THE APPLICANT
John Unrau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dietrich Law Office Kitchener, Ontario	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT