Date: 20080409

Docket: T-2293-06

Citation: 2008 FC 462

Halifax, Nova Scotia, April 9, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

JOHN STEVEN DECKER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On June 16, 2006, the Canada Pension Plan Review Tribunal (Review Tribunal) dismissed Mr. Decker's request to re-open its earlier decision which had denied him disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. Mr. Decker had asked the Review Tribunal to re-open its earlier decision because he submitted that new facts relevant to his medical condition existed. Mr. Decker brings this application for judicial review of the negative decision of the Review Tribunal.

[2] After Mr. Decker commenced this application for judicial review, the Federal Court of Appeal issued its reasons in *Mazzotta v. Canada (Attorney General)*, (2007), 286 D.L.R. (4th) 163 (F.C.A.). In *Mazzotta*, the Court of Appeal reversed an existing line of jurisprudence that had sent litigants to the Federal Court to judicially review decisions of the Review Tribunal about whether to rescind or vary earlier decisions on the basis of new facts. Instead, the Court of Appeal directed that such decisions be appealed to the Pension Appeals Board. I am bound by the decision of the Court of Appeal and so, as I explained to the parties, I must dismiss this application for judicial review.

[3] Notwithstanding that the application must be dismissed, I hope that the following observations will be helpful to Mr. Decker.

PROCEEDURAL MATTER

[4] Mr. Decker is a self-represented litigant. He has been assisted in his dealings under the *Canada Pension Plan* by his brother. On the basis of the decision of the Federal Court of Appeal in *Scheuneman v. Canada (Attorney General)*, [2003] F.C.J. No. 1736 (C.A.) (QL), and the prior authority cited there by the Court of Appeal, I found the present circumstances to be sufficiently exceptional so that the interests of justice required allowing Mr. Decker's brother to address the Court on his behalf.

THE FACTS

[5] On April 11, 1999, Mr. Decker fractured his neck in a trampoline accident. At the time of the accident, Mr. Decker was 33-years-old and had worked seasonally for approximately 18 years as

a carpenter in the construction industry. While working, Mr. Decker contributed to the *Canada Pension Plan*.

[6] On May 27, 1999, Mr. Decker applied for disability benefits under the *Canada Pension Plan*.

[7] On July 8, 1999, the then Minister of Human Resources Development Canada (now the Minister of Human Resources and Social Development) denied Mr. Decker's application. Based on the information in Mr. Decker's file, the Minister found that his condition was not "prolonged" and therefore he was ineligible for disability benefits under the *Canada Pension Plan.*

[8] On October 1, 1999, Mr. Decker submitted a request for reconsideration.

[9] On January 10, 2000, the Minister denied Mr. Decker's request for reconsideration, noting that he did not meet all of the requirements of the *Canada Pension Plan*.

[10] On February 21, 2000, Mr. Decker appealed the decision of the Minister to the Review Tribunal. The appeal was heard on October 4, 2000, but Mr. Decker failed to attend. On November 7, 2000, after reviewing the available medical evidence, the Review Tribunal rendered a decision based on the written record before it. The Review Tribunal concluded that Mr. Decker's condition did not meet the definition of disability as set forth in the *Canada Pension Plan.* Accordingly, Mr.

Decker's appeal was dismissed. Mr. Decker did not appeal this decision to the Pension Appeals Board.

[11] On March 11, 2002, Mr. Decker made a second application for disability benefits under the *Canada Pension Plan*. His application was again denied on October 22, 2002.

[12] On November 13, 2002, Mr. Decker sought reconsideration of the decision. His request was dismissed. Mr. Decker again appealed to the Review Tribunal but later sought, and was granted, an adjournment. That appeal remains outstanding.

[13] On February 3, 2006, Mr. Decker applied to the Review Tribunal seeking to have its first, November 7, 2000, decision re-opened pursuant to subsection 84(2) of the *Canada Pension Plan*. Mr. Decker provided three sets of documents, which were said to constitute "new facts". They were:

i. medical records from Aberdeen Hospital, dated from March 4, 2003, to July 27, 2005, including CT scans, laboratory reports, and emergency room reports;
ii. a report from neurosurgeon Dr. Clarke, dated September 1, 2005; and
iii. two reports from neurologist Dr. Kumar, dated March 12, 2002, and September 27, 2002.

[14] On May 2, 2006, the Review Tribunal rendered its decision on Mr. Decker's application pursuant to subsection 84(2) of the *Canada Pension Plan*. On June 16, 2006, the Review Tribunal denied Mr. Decker's application on the basis that he had presented no "new facts." In this regard, the test for the existence of "new facts" is a two step test. The Review Tribunal apparently found that the additional information was not discoverable with the exercise of reasonable diligence. This is the first step of the test. However, the Review Tribunal found that the information was not material. This is the second step of the test. Because that latter step was not met, the Review Tribunal denied Mr. Decker's application. That decision is the subject of this application for judicial review.

THE LEGISLATION

[15] Three subsections of the *Canada Pension Plan* are relevant to this application.

[16] Subsection 84(2) of the *Canada Pension Plan* allows the Review Tribunal, on new facts, to rescind or amend a decision that has already been made. As relevant to this matter, subsection 84(2) states:

> 84(2) … a Review Tribunal … may, … on new facts, rescind or amend a decision under this Act given by … the Review Tribunal ….

[17] Subsection 83(1) of the *Canada Pension Plan* deals with appeals to the Pension Appeals Board. As relevant to this matter, subsection 83(1) provides:

> 83. (1) A party … if dissatisfied with a decision of a Review Tribunal made … under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party

> … or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may … allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.

[18] Subsection 83(11) of the *Canada Pension Plan* sets out the powers of the Pension Appeals Board on appeals from decisions of the Review Tribunal. Again, as relevant to this preceding, subsection 83(11) provides:

> 83 (11) The Pension Appeals Board may confirm or vary a decision of a Review Tribunal under … subsection 84(2) and may take any action in relation thereto that might have been taken by the Review Tribunal under … subsection 84(2) ….

THE MAZZOTTA DECISION

[19] The Court of Appeal in *Mazzotta* held that the Pension Appeals Board, pursuant to subsection 83(1) of the *Canada Pension Plan*, possesses the power to review a decision rendered by a Review Tribunal pursuant to subsection 84(2). See: *Mazzotta* at paragraphs 29-32, 34, 43, and 54. In other words, under the current, and the then existing, legislation, the decision of the Review Tribunal in this case ought to have been appealed to the Pension Appeals Board.

[20] However, as noted above, prior to the decision in *Mazzotta*, the Court of Appeal itself had taken the view that the proper forum for review was this Court. See, for example, *Oliveira v. Canada (Minister of Human resources Development)* (2004) 320 N.R. 168 (F.C.A.). The decision in *Mazzotta* was not released until after Mr. Decker had commenced this application so he cannot be expected to have known that his recourse lay with the Pension Appeals Board and not the Court. This is particularly so where the Attorney General did not raise the decision in *Mazzotta* in this

proceeding, notwithstanding that the decision was rendered before the Attorney General filed its responding memorandum of fact and law. It was the Court that asked the parties, by a direction issued the week prior to the hearing of this application, to address the *Mazzotta* decision.

[21] In response, counsel for the Attorney General submits that the Court has held in numerous cases that there is a presumption in the law against retroactivity. The Attorney General submits that Mr. Decker sought the appropriate remedy at the time and that the *Mazzotta* decision cannot serve as a basis to return the matter to the Pension Appeals Board for leave to appeal. I respectfully disagree.

[22] In support of her submission, counsel for the Attorney General relies upon the decision of *Jhajj v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 369 (T.D.).

[23] In *Jhajj*, the applicant was found not to be a Convention refugee. The applicant sought leave to commence an application for judicial review of that decision. The Court denied the leave application. The applicant then sought to have the Court reconsider its decision on the basis that the Federal Court of Appeal had released a relevant decision one week after the application for leave was dismissed. While the Court acknowledged that, had the decision of the Court of Appeal been decided (and brought to its attention) prior to the dismissal of the leave application, it may have reached a different conclusion, the Court nonetheless decided not to reconsider its earlier decision refusing leave. The Court held that to permit reconsideration of a final decision on the basis of

subsequently decided jurisprudence would introduce unacceptable uncertainty into the law and offend the general principle of *res judicata*.

[24] With respect, the decision in *Jhajj* has no application in this case. Unlike in *Jhajj*, the Court has not made a final decision on this application for judicial review and so *res judicata* is not a relevant consideration. The decision in *Mazzotta* cannot be described as "subsequent jurisprudence" that would have the retroactive effect of disturbing a previous decision of the Court.

[25] The Attorney General is effectively advocating that the Court on judicial review should ignore jurisprudence arising after the date that the impugned administrative decision was made. To cite one obvious example, if the interpretation of the Attorney General is accepted, the Court would not be permitted to apply the decision of the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, 2008 SCC 8, in this case because, in doing so, the Court would be giving that decision retrospective effect. This is not a proper interpretation of the decision in *Jhajj*.

[26] While the Attorney General also relies on paragraph 22 of the decision in *Gallant v. Roman Catholic Episcopal Corp*., (2001), 200 D.L.R. (4th) 643 (Nfld. C.A.), that excerpt does not appear to support his position. Paragraph 22 reads:

> There is no reason to vary from the long established principle respecting restatements of the common law. When a court overrules an earlier statement of the law, unless its application is limited by that court, the law as restated applies to all cases subsequently coming before the courts even though the cause of action might have arisen before the restatement. [emphasis added]

[27] By analogy to judicial review, the law as restated applies to all cases subsequently coming before the courts even though the decision subject to review may have been made before the restatement. The Attorney General appears to suggest that the phrase "all cases subsequently coming before the courts" refers to cases initiated after the restatement. In my view, that phrase actually refers to all cases heard and decided after the restatement. Otherwise, the incorrect statement of the law would continue to apply to all cases initiated but not yet heard and decided by the court. This cannot be the case.

[28] To the extent that the Attorney General suggests that the "proper remedy" for Mr. Decker at the time of the Review Tribunal's decision was to file an application for judicial review in this Court, it is worth noting that subsection 83(1) of the *Canada Pension Plan*, which also existed at the time of the Review Tribunal's decision, expressly provided that the "proper remedy" from a decision under subsection 84(2) of the *Canada Pension Plan* was an appeal to the Pension Appeals Board. The Court of Appeal in *Mazzotta* corrected the misapprehension that had existed about this provision.

[29] The Court of Appeal's decision in *Mazzotta* impacts upon the decision of the Review Tribunal in this case in a second manner. In *Mazzotta*, the Court of Appeal affirmed that the proper legal test for establishing whether new facts are material, so as to fall within subsection 84(2) of the *Canada Pension Plan*, is whether "the proposed new facts may reasonably be expected to affect the outcome" of the initial decision. See: *Mazzotta* at paragraph 37. At paragraphs 9 and 44 of its reasons, the Court of Appeal found that, in the case before it, the Pension Appeals Board had

correctly found that the Review Tribunal applied the wrong test for materiality. The incorrect test applied by the Review Tribunal in that case was whether "there was a reasonable possibility as opposed to probability that [the new evidence] could lead the Tribunal to change its original decision."

[30] In the present case, the Review Tribunal, in assessing the documents provided by Mr. Decker, applied the following test for materiality:

> However, the Review Tribunal finds that the additional material filed … [does] not meet the materiality test in this matter. There are no new facts proposed in any of these reports that may reasonably be expected to affect the outcome of the case, and do not create a reasonable possibility that it could lead the Review Tribunal to change its original Decision. These reports are not material, even taking a broad and generous view of materiality. [emphasis added]

[31] The foregoing excerpt from the reasons of the Review Tribunal indicates, in my view, that there was confusion as to the applicable legal test. The Review Tribunal concluded that the materials could not "reasonably be expected to affect the outcome of the case" – a correct application of the test for materiality – and also that the materials did not create "a reasonable possibility that it could lead the Review Tribunal to change its original Decision" – an incorrect statement of the test for materiality. As stated above, the Federal Court of Appeal in *Mazzotta* was unconvinced that the related qualifier "reasonable", when applied to the word "possibility", was sufficient "to lift the test out of the realm of possibility." See: *Mazzotta* at paragraph 44. In this case, it is difficult to be certain that the Review Tribunal was guided by the correct legal test of materiality when it assessed the materials that Mr. Decker had presented. That, however, is no longer an issue for this Court to determine.

MR. DECKER'S CURRENT SITUATION

[32] Almost two years have passed since the decision of the Review Tribunal was made. Mr. Decker is now out of time to appeal the decision of the Review Tribunal to the Pensions Appeals Board.

[33] Mr. Decker is, however, entitled under subsection 83(1) of the *Canada Pension Plan* to apply for an extension of time to bring an application for leave to appeal. In view of all of the circumstances set out in these reasons, I am confident that the Attorney General would give serious consideration to consenting to an extension of time.

[34] However, the Attorney General might well oppose the merits of the leave application. The new information Mr. Decker seeks to rely upon may not be material. Just because the Review Tribunal may have blurred the proper test at law, this does not mean that the same conclusion would not be reached if the correct test was applied. This is because it is not easy to establish new facts that were not reasonably discoverable but may reasonably be expected to affect the outcome of the case. Mr. Decker will also have to deal with jurisprudence such as *Vaillancourt v. Canada (Minister of Human Resources)* [2007] F.C.J. No. 905 (QL) which, at paragraph 28, suggests that Mr. Decker must not only show that the information he wishes to rely upon would not have been previously discoverable with reasonable diligence, but he must also show that the new information was in existence at the time of the original hearing.

[35] Alternatively, Mr. Decker might choose to pursue his outstanding appeal to the Review Tribunal in respect of his second application for disability benefits. The Attorney General has not suggested that there is any impediment to so proceeding.

[36] These are not easy issues. I strongly urge Mr. Decker to seek legal advice from a lawyer knowledgeable about this area of law about which option should be pursued. This is not to suggest that Mr. Decker and his brother can not advocate his case before pension authorities. Rather, it is meant to encourage them to seek professional advice about what is their best course of conduct.

CONCLUSION

[37] For these reasons, a judgement must issue dismissing the application for judicial review on the ground that the proper remedy was to appeal the decision of the Review Tribunal to the Pension Appeals Board.

[38] In the circumstances, very appropriately in my view, the Attorney General did not seek costs. No costs will be awarded.

[39] Counsel for the Attorney General is thanked for the professional manner in which she provided advice about the *Canada Pension Plan* process to Mr. Decker and his brother.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed without costs.

"Eleanor R. Dawson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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