Date: 20080620

Docket: T-1361-07

Citation: 2008 FC 777

Ottawa, Ontario, June 20, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DANIEL KING

Applicant

and

HER MAJESTY THE QUEEN
(MINISTER OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a determination of a preliminary question of law as established by the Order of Mr. Justice Kelen dated February 22, 2008. The issue arose in the context of a judicial review application concerning the refusal of the Minister to award interest on a disability benefits claim.

Originally the pension claim was denied by the Minister but subsequently granted by the Pensions Appeal Board.

[2] The issue before the Court is whether the initial decision denying the Applicant's entitlement to benefits, subsequently overturned on appeal, was based on "erroneous advice" so as to trigger the Minister's authority under s. 66(4) of the *Canada Pension Plan* (Plan) to take remedial action - in this instance, to award interest on the amount of benefits granted.

[3] The specific question of law set by Justice Kelen to be determined is as follows:

> Does the decision of the Pension Appeals Board [*sic*] that the Applicant is entitled to a disability pension mean that the initial decision of the Minister of Human Resources and Social Development denying him a disability pension was based on "erroneous advice" within the meaning of subsection 66(4) of the *Canada Pension Plan*?

II. BACKGROUND

[4] The detailed facts of this case have been set forth by Justice Kelen in his decision in *King v. Canada*, 2007 FC 272, adjourning the Respondent's motion to strike the original action. The following is a brief summary of those facts.

[5] The Applicant King suffered certain disabling injuries in February 1985, March 1989 and May 1992. The Applicant applied for a disability pension under s. 60(6) of the Plan on May 10, 1996. By letter dated September 12, 1996, Human Resources Development Canada (HRDC) denied

the Applicant's application under s. 60(7) of the Plan because his disability was not "severe and prolonged".

[6] On September 26, 1996, the Applicant requested a reconsideration of his application under s. 81(1)*(b)* of the Plan. That reconsideration was denied by the Minister on the grounds that the Applicant did not fully meet the requirements of the Plan because he was still able to perform other work suitable to his condition.

[7] On December 20, 1996, the Applicant appealed to the Review Tribunal pursuant to s. 82(1) of the Plan. On July 24, 1998, the Review Tribunal also denied the Applicant's claim for the disability benefits on the basis that his disability was not severe and prolonged as required under s. 42(2)*(a)* of the Plan. The Review Tribunal's decision was an affirmation of the decision of the Minister initially and that of the Minister on reconsideration.

[8] On August 12, 1998, the Applicant sought leave to appeal the Review Tribunal's decision to the Pensions Appeal Board (Board). His appeal was allowed on December 13, 2002. The Board granted the Applicant a disability pension on the basis that his injuries were "severe and prolonged". The Applicant subsequently received lump sum benefits for the period from June 1995 to January 2003. The sum represented the aggregate of each of the monthly payments the Applicant would have received had the payments been made in the ordinary course. The Applicant also received a monthly disability pension commencing in February 2003. No interest was paid on the retroactive amounts.

[9] On February 3, 2003, the Applicant, through counsel, wrote to the Minister seeking interest on the retroactive amount of the Applicant's disability benefits. The grounds advanced by the Applicant at that time (namely, absence of legislative authority, inadequate compensation, breach of statutory contract, and breach of statutory duty to make timely payments of benefits) are not relevant to the precise legal question to be determined by the Court in this reference.

[10] The Applicant had commenced actions both in this Court and in the Ontario Superior Court. On March 8, 2007, Justice Kelen adjourned a motion to strike brought by the Respondent in respect of the action in this Court and held the appropriate method of addressing the Applicant's request for interest was described in *Scheuneman v. Canada (Human Resources Development)*, 2005 FCA 254. In essence, the Applicant was to make a request for interest under s. 66(4) of the Plan.

[11] On March 9, 2007, the Applicant made that s. 66(4) request to the Minister to exercise his discretion on the basis that the original denial of pension benefits was the result of either "administrative error" or "erroneous advice".

[12] Section 66(4) reads:

66. (4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied	**66.** (4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :

(a) a benefit, or portion thereof, to which that person would have been entitled under this Act,	*a)* en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(b) a division of unadjusted pensionable earnings under section 55 or 55.1, or	*b)* le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(c) an assignment of a retirement pension under section 65.1,	*c)* la cession d'une pension de retraite conformément à l'article 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

[13] In response, the Department requested that the Applicant provide all the information, evidence and submissions in support of the allegation. The Department clearly directed the Applicant was to establish what erroneous advice or administrative error had occurred.

[14] The Applicant's solicitor then requested a copy of all communications contained in the file relating to the Applicant's request for disability benefits. The Department denied the release of any further information, taking the position that the Applicant had received all information relevant to his claim for benefits during the normal course of the appeal process. This position of the Department seems inconsistent with the position now taken before this Court that exercising of the

Minister's discretion under s. 66(4) of the Plan is a separate process from that of the judicial review and statutory appeal processes under the Plan. It is also difficult to understand how the Applicant was to make out his case without access to the departmental file.

[15] On June 5, 2007, the Applicant again requested all communications relating to the administration of the Applicant's claim as well as any advice that "may have been generated, passed or relied upon during the course of the administration of his claim".

[16] There being no further disclosure, on July 18, 2007, the Department notified the Applicant that the review of his file had been completed and that no evidence of an administrative error or erroneous advice could be found. The salient portions of the letter decision are as follows:

> The departmental review was conducted by a departmental official familiar with adjudication practices and with fourteen years of experience. She conducted a detailed examination of all the documentation contained in Mr. King's file. Each page was thoroughly read and the date of its receipt noted. No irregularities in the adjudication of the file were observed.
>
> Based on all of the above, we have found no evidence of administrative error and/or erroneous advice.

[17] The departmental letter went on to deal with specific submissions by the Applicant, the last sentence being the critical consideration:

> In addition to the departmental review, we have also carefully considered your written submissions in your letters of May 9, 2007 and June 5, 2007. None of the grounds you raise in your letters constitute administrative and/or error [*sic*] erroneous advice as defined in subsection 66(4) of the *CPP*.

> Mr. King obtained CPP disability benefits as a result of the appeals process which ended when the PAB ruled in his favour. The fact that Mr. King's application was denied initially by the Minister and on reconsideration does not constitute administrative error and/or erroneous advice.
>
> (emphasis added)

[18] On November 7, 2007, the Respondent, having filed a motion to strike the application for judicial review as being bereft of any possibility of success, Justice Kelen reserved his decision on the motion until the outcome of this reference.

III. ANALYSIS

[19] The legal question posed is directed to whether the conditions precedent to the Minister's exercise of discretion to grant relief under s. 66(4) exist. The answer does not, as the Minister has argued, fetter the Minister's discretion if the answer to the question is affirmative. In such an event, the Minister must consider what remedy (if any) is appropriate.

[20] To be clear, the Court here is not asked to consider whether "administrative error" occurred. Nor is the Court, at this stage, required to consider whether the Minister's true focus of his s. 66(4) decision was on "administrative error" and whether the issue of "erroneous advice" was ignored. Rather, the Court in this reference must simply construe the meaning of the term "erroneous advice" under s. 66(4).

[21] In considering the term “erroneous advice”, the Court must be guided by s. 12 of the *Interpretation Act* to give the provision such fair and liberal interpretation as best ensures the objects of the legislation.

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	**12.** Tout texte est censé apporter une solution de droit et s’interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[22] The key purpose of the Plan is to pay those citizens under the Plan who are entitled to the benefits provided therein.

[23] The purpose of s. 66(4) is remedial. It is designed to place an applicant in the place he/she would have been but for the specific events of erroneous advice or administrative error. Given this purpose, there is no reason to give the words “erroneous advice” (or “administrative error” for that matter) a limiting, technical or narrow meaning, scope or application.

[24] The word “erroneous” is capable of two meanings in this case. The first meaning is the common meaning of a “mistake” or wrong in the sense of “incorrect”. The second is the legal meaning which includes both mistake and incorrect in the sense of that which is disagreed with by a higher authority. A legal finding of “error of law”, for example, can mean mistaken by virtue of missing a precedent or it can mean something with which a supervisory body disagrees. The first meaning connotes a sense of culpability; the second connotes disagreement or legally incorrect.

Given the remedial nature of s. 66(4), both meanings can be accommodated in the interpretation and application of the section.

[25] The term “advice” is relatively straightforward, meaning an opinion as to what can or should be done or was done. The more relevant consideration is whether the “advice” covered is providing advice to a member of the public only or whether it concerns internal “advice” within the department and especially advice to the Minister or delegate decision maker.

[26] The Respondent argues that the provision only covers advice given to a member of the public. While the provision includes this type of advice, there is nothing in the legislation nor in the specific provision which would indicate such a limitation.

[27] The Respondent concedes that if a citizen received advice over the telephone that he was not entitled to a pension or was given wrong information about filing times, the result of which was a loss of rights to a pension, such an event would be subject to s. 66(4). However, the Respondent says that if the Minister receives wrong advice, the effect of which is to deny a person their pension entitlement, there is no recourse to s. 66(4).

[28] In light of the purpose of s. 66(4) to place a person in the same position as he or she would have been absent erroneous advice, there is no good reason for the Respondent’s narrow view of “erroneous advice”. If erroneous advice from the department causes the loss, it falls within the

scope of s. 66(4), whether it was communicated directly to a citizen or acted upon with the department.

[29] The Respondent further argues that there is no "advice" since what occurs is a decision of a Minister (or his delegate) who acts on his/her own. A review of the legislative scheme suggests otherwise.

[30] Considering the test laid out in *Canada (Minister of National Revenue – M.N.R.) v. Coopers and Lybrand Ltd.*, [1979] 1 S.C.R. 495, dealing with whether a function is administrative or quasi-judicial (a distinction of lesser importance in modern administrative law), the function of departmental staff to obtain and analyse the information supporting a pension claim is administrative. This is so even for the role of the medical adjudicator who would play a critical role in the decision issued by the Minister.

[31] Under s. 60(6) of the Plan, the application for pension benefits is made to the Minister.

60. (6) An application for a benefit shall be made to the Minister in prescribed manner and at the prescribed location.	**60.** (6) Une demande de prestation doit être présentée au ministre en la manière et à l'endroit prescrits.

[32] Section 60(7) requires the Minister to consider the application for pension benefits and to notify an applicant in writing of his decision.

60. (7) The Minister shall forthwith on receiving an application for a benefit consider it and may approve payment of the benefit and determine the amount thereof payable under this Act or may determine that no benefit is payable, and he shall thereupon in writing notify the applicant of his decision.	**60.** (7) Le ministre examine, dès qu'il la reçoit, toute demande de prestation; il peut en approuver le paiement et en déterminer le montant payable aux termes de la présente loi, ou il peut arrêter qu'aucune prestation n'est payable et avise dès lors par écrit le requérant de sa décision.

[33] The fact that certain aspects of the decision are delegated does not alter the legal responsibility for the Minister to make the decision to award or deny pension benefits. In law, the Minister does so, but in fact it is done on the advice received from the department, including that of his delegate. That is the pattern which was followed in this case.

[34] This analysis that in law it is the Minister who acts on advice is confirmed by the Court of Appeal's decision in *Whitton v. Canada (Attorney General)*, 2002 FCA 46. In that case, the department reached the conclusion that Whitton had been receiving his mother's pension benefits (despite the fact that she had died) and cashed the pension cheques for himself. As a result, the department suspended Whitton's own old age benefits until the department investigated the pension cheque issue. The purpose of the suspension of the old age security benefits was to establish set-off of those suspended payments against Whitton's illegal receipt of his deceased mother's pension benefits. In the end, however, the department was unable to support its claim of wrongful conduct by Whitton.

[35] Throughout the Whitton saga, the actions were taken by departmental officials. However, this fact did not prevent the Court of Appeal from concluding that it was the Minister who had the obligation to pay Whitton the pension and that it was the Minister, acting on erroneous advice, who had suspended the pension benefits.

[36] The Court of Appeal went on to conclude in paragraph 37 that the Minister should be satisfied that as a result of the "erroneous advice" to the effect that Whitton had been appropriating his mother's pension cheques, Whitton had been denied his pension benefits. The Court of Appeal grounded the Minister's obligation to place Whitton in the same position he would have been in but for the suspension on s. 32 of the *Old Age Security Act*. That section is virtually identical to s. 66(4) of the Plan.

[37] The Court of Appeal characterised the error also as "administrative error" but I see nothing in that finding which undermines the conclusion that the Minister was acting on advice. The advice that Whitton was acting improperly, given by the department to the Minister, was erroneous and resulted in the suspension of pension benefits.

[38] Applying the reasoning of the Court of Appeal in *Whitton* to this case, the Minister denied King his pension benefits on the "advice" that his injuries were not "severe and prolonged". As held by the Pensions Appeal Board, that conclusion was erroneous. It was erroneous, at the very least, under the second meaning discussed at paragraph 24 of these reasons. It is also erroneous in the sense of being factually incorrect.

[39] The fact that an intermediate review body (the Tribunal) reached a similar conclusion to that of the Minister does not lessen the fact that there was error in the advice to the Minister which was to the detriment of King. What is at issue is the existence of erroneous advice which resulted in the Minister's decision, not the merits of other review processes.

[40] Having concluded here that there was erroneous advice which was evident from the Pensions Appeal Board's decision does not necessarily mean that every time the Minister loses a Pensions Appeal Board case, there has been either erroneous advice or administrative error in the Minister's initial decision. An appeal can be a *de novo* review and along the whole of the appeal process, there may be new facts, or alternatively old facts seen in a new context, which would not mean that the original advice, at the time it occurred, was erroneous. The determinative facts before the Pensions Appeal Board may be different than those upon which advice was based.

[41] However, the record in this case is that the facts before the Minister as to "severe and prolonged" injury are essentially the same as before the Pensions Appeal Board. Therefore, the advice was erroneous.

IV. CONCLUSION

[42] Considering the purpose of the provision, the plain meaning given and the relevant precedent regarding a similar provision, in respect of the question:

> Does the decision of the Pension Appeals Board [*sic*] that the Applicant is entitled to a disability pension mean that the initial decision of the Minister of Human Resources and Social Development denying him a disability pension was based on "erroneous advice" within the meaning of subsection 66(4) of the *Canada Pension Plan*?

the answer is: AFFIRMATIVE.

[43] Costs of this matter should be left to Justice Kelen or the judge hearing the judicial review, as may be appropriate.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the answer to the question of law:

> Does the decision of the Pension Appeals Board [*sic*] that the Applicant is entitled to a disability pension mean that the initial decision of the Minister of Human Resources and Social Development denying him a disability pension was based on "erroneous advice" within the meaning of subsection 66(4) of the *Canada Pension Plan*?

is AFFIRMATIVE. Costs of this matter should be left to Justice Kelen or the judge hearing the judicial review, as may be appropriate.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Frank Provenzano Mr. Peter Sengbusch	FOR THE APPLICANT
Mr. Joel Robichaud Mr. Jacques-Michel Cyr	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MR. FRANK PROVENZANO Barrister & Solicitor Sault Ste. Marie, Ontario	FOR THE APPLICANT
MR. PETER SENGBUSCH Barrister & Solicitor London, Ontario	
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT