Date: 20090204

Docket: T-1426-06

Citation: 2009 FC 118

Vancouver, British-Columbia, February 4, 2009

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

DORIAN VAL BLONDAHL

Respondent

REASONS FOR ORDER AND ORDER

[1] The Attorney General of Canada seeks judicial review of the decision of the Commissioner of Review Tribunals – Canada Pension Plan/Old Age Security (the Commissioner), granting Mr. Blondahl an extension of the 90 day delay provided for at section 82 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Act) to appeal the decision of the Minister confirming the decision to deny his application for disability benefits.

[2] Mr. Blondahl applied for Canada Pension Plan disability benefits on October 22, 2003. This application was denied on March 3, 2004. Pursuant to s. 81 of the Act, Mr. Blondahl made a written

request for reconsideration of his application by the Minister on April 4, 2004. The Minister confirmed the previous decision in a letter dated June 29, 2004.

[3] On May 3, 2006 the Minister received an undated letter from Mr. Blondahl which appears to be, and is treated as, an appeal of the Minister's decision on the reconsideration of the application. Given that, pursuant to s. 82 of the Act, this appeal is before a Review Tribunal, the Minister forwarded this letter to the Office of the Commissioner of the Review Tribunals (the Office of the Commissioner). In a letter dated June 12, 2006, the Office of the Commissioner informed Mr. Blondahl that his letter of appeal was received beyond the 90 day period set out in the Act but that the Commissioner had the discretion to extend this delay and would consider this should Mr. Blondahl provide a detailed explanation as to why his appeal is late.

[4] Mr. Blondahl responded to this request in a letter dated June 19, 2006 in which he chronicles his longstanding depression, pathological anxiety disorder, obsessive-compulsive disorder and stress. In essence, Mr. Blondahl explains that the refusal of his application sent him into "a tailspin" from which only then, with the help of medication, had he emerged sufficiently to pursue his appeal of the Minister's decision. On July 4, 2006, the Commissioner granted the request to extend the appeal deadline, based on Mr. Blondahl's account of his affliction with chronic pathological anxiety disorder.

[5] This file has a somewhat tortuous procedural history. Although it was instituted August 8, 2006 (the Minister was notified of the decision to grant the extension on or about July 6, 2006), the

hearing was delayed for a variety of reasons including orders sought in respect of the adjournment of this and other files, involving similar issues, that is the test to be applied by the Commissioner to determine whether or not an extension of the time should be granted, its duty to provide reasons, etc. The adjournments were pending the determination of an application in *Canada (A.G.) v. Pentney* (file T-645-06), in which the Commissioner was granted intervening status. Although judgment was granted in that file on January 25, 2008 (*Canada (A.G.) v. Pentney*, 2008 FC 96, (2008), 322 F.T.R. 181 (*Pentney*)), the other two remaining files proceeded more quickly than the present one (*Canada (A.G.) v. Schneider*, file T-614-07 and *Canada (A.G.) v. Berhe*, file T-1655-06**)**.

[6] The hearing proceeded *ex parte* given that the respondent, Mr. Blondahl, had failed to file within the time allotted for this, not only in the *Federal Courts Rules*, SOR/98-106 but also in a specific order of Justice Michael Beaudry (*Canada (A.G.) v. Blondahl* (August 29, 2008), Ottawa T-1426-06), his notice of appearance and application record. On the morning of the hearing, Mr. Blondahl's counsel attempted again to file an application record, motion which was strongly opposed by the Attorney General. In the interest of justice, the Court found that it was preferable to proceed immediately, without any further adjournment, on the merits of the application, even if this meant not having the benefit of Mr. Blondahl's submissions.

[7] Given that the memorandum of fact and law of the applicant was drafted well before the hearing and the decisions in the other three cases, it raises issues that have already been determined, such as what test is applicable to a decision of the Commissioner to extend the appeal deadline pursuant to s. 82 of the Act. At the hearing, the arguments focused on the reasonableness of the

decision *per se* as well as the failure of the Commissioner to provide adequate reasons. It was also argued that the Commissioner could not have applied the appropriate test on the facts of this case, given the state of the Certified Record.

[8] Originally, given the value of the decision of Justice Françoix Lemieux in *Pentney* as precedent, the question of whether the Commissioner considered the proper factors in the exercise of his discretion was reviewed on the basis of the correctness standard. More recently, Justice Roger Hughes in *Canada (A.G.) v. Schneider*, 2008 FC 764, (2008), 169 A.C.W.S. (3d) 444 (*Schneider*) indicated that given that the factors have been determined in *Pentney*, the issue now was one of mixed fact and law (the application of the test to the facts) to which the reasonableness standard should be applied. At the hearing, the Attorney General agreed with this position.

[9] With respect to the duty of fairness and the duty to provide adequate reasons, these are matters of procedural fairness reviewed on the standard of correctness. (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 100)

[10] It is important to recapitulate what principles have been established in the three previous cases in order to better situate the arguments of the applicant in this case.

[11] In his affidavit before Justice Lemieux in *Pentney*, cited at para. 18 of that decision, the Commissioner indicated that in considering whether or not to exercise his discretion to extend the

appeal deadline, he turned his mind to the factors which had been identified by Justice Judith A. Snider in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, (2005), 140 A.C.W.S. (3d) 576 (*Gattellaro*) to be taken into account by the Pension Appeals Board in the exercise of their discretion to grant extensions of time. Justice Lemieux found that this four part test disclosed factors which were equally, albeit not exclusively, relevant for consideration by the Commissioner in the determining whether or not to exercise his discretion. Thus, the Commissioner in fact had identified in his mind the appropriate test which he had to apply in the circumstances of that case.

[12] However, Justice Lemieux clarified the way in which the factors set out in this test must be applied: i) they are not to applied conjunctively; ii) the weight assigned to each of the factors will vary in each circumstance, in accordance with a flexible and contextual approach; and, iii) should the Commissioner choose to take into account other factors which he finds relevant, he must say so. The learned judge found that despite having identified the proper test, the Commissioner did not apply it properly in the circumstances of that case and the decision of the Commissioner was quashed, particularly for failing to disclose adequate reasons.

[13] In the second case, *Schneider*, Justice Hughes found that while the Commissioner has the obligation to consider factors such as those set out in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (C.A.)[1] (*Grewal*), he must also "look at the factual circumstances of each case" (para. 5). As for the duty to provide reasons, which is incumbent upon

[1] These factors are the same as the ones mentioned in *Gattellero*.

the Commissioner, he noted that it does not oblige him "to set out detailed reasons and articulate jurisprudence or criteria derived from jurisprudence and provide a detailed review as to the application of all facts to each criteria" (para. 10). As in *Pentney*, Justice Hughes found that the Commissioner had used the correct test. On the facts of this second matter, the decision of the Commissioner was found to be reasonable and the application was dismissed.

[14] As for the third case, *Canada (Attorney General) v. Berhe*, 2008 FC 967, [2008] F.C.J. No. 1201 (QL) (*Berhe*), like his colleagues, Justice Michel M.J. Shore held that the four-prong test discussed in *Pentney* was applied by the Commissioner. In addition, the Commissioner in that instance had before him at the time of his decision a medical opinion regarding the respondent's condition. He found that the Commissioner had based his acceptance on the fact that: i) explanations had been given as to the delay, which was attributed to language barriers and the fact that medical evidence was received at a late date; and, ii) the respondent had an arguable case to be found to have been disabled as of the relevant date.

[15] When rendering his decision in *Pentney*, Justice Lemieux clearly relied heavily on the decision of the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Hogervorst***,** 2007 FCA 41, (2007), 359 N.R. 156 (*Hogervorst*), even though it dealt with the discretion of the Federal Court in similar circumstances. As discussed at the hearing, another decision of the Federal Court of Appeal in a similar context, *Jakutavicius v. Canada (Attorney General)*, 2004 FCA 289, (2004), 327 N.R. 239 (*Jakutavicius*) may be useful to determine the extent to which the Commissioner should provide reasons for his decisions. It is to be noted that

motions for an extension are often dealt with in brief orders by the Federal Court and that the Federal Court of Appeal confirmed that there was generally no need for extensive reasons in such cases. What is important, as noted by the Federal Court of Appeal in *Via Rail Canada Inc. v. Lemonde*, [2001] 2 F.C. 25, (2000), 193 D.L.R. (4th) 357 is that a decision that is subject to judicial review must contain enough to enable the parties to assess their possible grounds of review and for the Court to exercise its jurisdiction.

[16] This means that, as illustrated by *Jakutavicius*, the Commissioner should at minimum adopt the practice of stating the test it applied by simply referring to a decision in which it is articulated, such as *Pentney*. In addition, the Commissioner should state which of the four factors set out in this test he found to be determinative in the exercise of his discretion as well as any other case specific factors he found determinative. As noted by Justice Lemieux in *Pentney*, it will also be open to the Court reviewing the decision to consider recommendations received by the Commissioner from his staff in order to complement the formal reasons contained in his decision communicated to the parties. To require the Commissioner to adopt such practice is perfectly in line with the extent of the duty to provide reasons as described by Justice Hughes in *Schneider* for it does not impose, in the Court's view, an unreasonable administrative burden on the Commissioner and constitutes the bare minimum which is generally necessary in order for the Court to exercise its jurisdiction on judicial review.

[17] Such practice will also be of value and assistance to the often self-represented prospective appellant by sparing him or her sterile speculation in this respect. In the present case, the decision

was the first one made by the Commissioner among those subjected to judicial review and all three of the other cases referred to above pertained to decisions which were made by the Commissioner in the same approximate time period. As mentioned above, (see para. 11) Justice Lemieux found in *Pentney* that the Commissioner had indeed identified and attempted to apply the correct legal test. Justice Hugues in *Schneider* and Justice Shore in *Berhe* equally found this to be the case. In light of this, the Court may reasonably infer that the same test was used by the Commissioner in making the decision presently before the Court as the one used in the decisions reviewed by Justices Lemieux, Hughes and Shore, particularly in light of the reference to a reasonable explanation and the notion of arguable case in the Certified Record. However, in different circumstances, the Commissioner seriously runs the risk of a decision such as the one presently before the Court being set aside on the basis of inadequate reasons.

[18] Turning to another issue, it is now clear, and accepted by the Attorney General, that ultimately, the four pronged test is a measure of fulfilling the underlying consideration, which is to ensure that justice is done between the parties (see *Hogervorst* at para. 33 and *Pentney* at para. 34). As such, an extension may be granted even if one of the factors mentioned in this test is not satisfied.

[19] Nevertheless, the Commissioner cannot simply pay lip service to the test. In that respect, the applicant submits that in order for the Commissioner to be in a position to say that he has applied the test, he must be able to determine which factor(s) must indeed be given more weight in a

particular file. Thus, if the Commissioner has no means whatsoever of considering a potentially relevant factor, it is untenable for him to claim to have applied this test. The Court agrees.

[20] It appears that in this case, the letter of Mr. Blondahl received in May 2006 contained little, if any, information as to the merits of his application or his continuing intention to pursue the appeal of the decision of the Minister. Nevertheless, the letter of the Office of the Commissioner, dated June 12, 2006, simply requires that "[f]or an extension to be considered, I am requesting a detailed explanation from you as to why the appeal letter is late."

[21] Obviously, it is not for a prospective appellant to put evidence before the Commissioner as to any prejudice that would be suffered by the Minister. On the other hand, as these extensions are granted *ex parte*, there is no opportunity for the Minister to present any evidence of a specific prejudice in a given case. This point may not have been raised or properly explained before Justice Hughes in *Schneider*, where he commented, at para. 11, that the Minister only offered legal argument and no evidence as to actual prejudice. Obviously, the Attorney General cannot submit new evidence in his application record that was not before the decision-maker.

[22] However, as noted by Justice Gilles Létourneau in *Hogervorst*, it is for the Commissioner to keep in mind that "a time-limit for the commencement of challenges to administrative decisions is not whimsical." (para. 24). On the contrary, as indicated in *Budisukma Puncak Sendirian Berhad v. Canada*, 2005 FCA 267, (2005), 338 N.R. 75, in a passage cited by Justice Létourneau, at para 24:

> It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense.

[23] As for the existence of a continuing intention to pursue an appeal, such intention at the relevant time will often come to light, as it did here, when a prospective appellant explains why he or she did not in fact appeal earlier.

[24] With respect to the merits of the appeal, the letter received from Mr. Blondahl in May 2006 does not address, as mentioned, the merits of the case in any way and the Office of the Commissioner did not request a copy of the Minister's file (although there is no evidence on file in this respect, the Court was advised by the applicant that the practice of the Commissioner is to request this file only if, and when, an extension has been granted). It is thus most surprising that in such circumstances the letter of June 12, 2006 does not request Mr. Blondahl to provide any details in this respect, or at the very least, that he forward his most relevant medical evidence in support of his appeal. It would therefore be good practice for the Commissioner to ensure that a prospective appellant is requested to comment on the merits of his or her appeal in the request for an extension. Without any evidence as to the merits of a prospective appeal, it can hardly be argued that the Commissioner has really applied the test (whether or not that factor is ultimately found to be determinative).

[25] In this particular case, the lack of evidence probably explains the recommendation to the Commissioner which simply says, "[m]ay also have an arguable case." (emphasis added).

Obviously, in the circumstances, one could not have said more. When one considers the Minister's letter of June 29, 2004, in conjunction with the information contained in the response to the Office of the Commissioner of Mr. Blondahl dated June 19, 2006, the latter contains precious little information that would contradict, in any way, the facts or information on which the decision of the Minister to confirm the denial of the application for benefits was taken. In effect, the problem was not so much the condition of Mr. Blondahl at that time or at any time in 2006 but rather his condition as of 1998.

[26] The Court notes that the comments of Justice Lemieux in *Pentney* at para. 63 with respect to the arguable case may again be explained by the lack of evidence in the Commissioner's file.

[27] That said, this is the last of what one could refer to as the test cases. Although Mr. Blondahl's decision was the very first one to be challenged by the Attorney General, as explained above, for a variety of reasons, it is the very last one to be decided. It is not disputed that Mr. Blondahl may now be unable to work at all and that his physical and mental state may well have deteriorated further since 2006. The applicant had little to say as to how it would be in the interests of justice in the particular circumstances of this case to delay further the final determination of Mr. Blondahl's disability benefits application by sending the matter back to the Commissioner for a new decision on the request for an extension of the delay of appeal.

[28] At this stage, the Court is of the view that the standard by which future decisions of this nature will be assessed has been made very clear to the Commissioner. This being, there is no doubt

that justice would be better served if Mr. Blondahl's appeal was now allowed to proceed without any further delay.

[29] In the circumstances, the Court will simply dismiss the application.

ORDER

THIS COURT ORDERS that the application is dismissed.

"Johanne Gauthier"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Ms. Tania Nolet	FOR THE APPLICANT HRSDC Legal Services Unit
N/A	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ms. Tania Nolet Department of Justice HRSDC Legal Services Unit 333 North River Road 6th Floor, Tower A Ottawa (Ontario) K1A 0L1 Fax: (613) 952-5327	FOR THE APPLICANT HRSDC Legal Services Unit
N/A	FOR THE RESPONDENT