Federal Court Cour fédérale

Date: 20090522

Docket: T-1794-07

Citation: 2009 FC 508

Ottawa, Ontario, this 22nd day of May 2009

Present: The Honourable Mr. Justice Pinard

BETWEEN:

CYRIL HILTZ

Applicant

and

HUMAN RESOURCES DEVELOPMENT CANADA
CANADIAN PENSION PLAN DISABILITY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of two letters, dated May 22 and September 17, 2007, respectively, wherein the Minister of Human Resources Development Canada declined to entertain the applicant's request to reopen her decision of January 11, 2000 denying the applicant benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("CPP"). The applicant seeks an order of *mandamus* compelling the Minister to reopen her decision, based on new medical evidence.

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[2] The applicant, Cyril Hiltz, is representing himself on this application. On March 16, 1996, he suffered a work-related injury that left him unable to continue working as an equipment operator.

[3] On November 16, 1999 he applied for disability benefits under the CPP. In a letter dated January 11, 2000 (the "2000 Decision"), Human Resources Development Canada ("HRDC"), on behalf of the Minister, denied his application because his condition was found not to be "serious and prolonged", as required by paragraph 42(2)(*a*), as at the time he applied for benefits he had the ability to "do some form of work, suitable to [his] condition and limitations, on a regular basis". The applicant did not apply for reconsideration, although he was informed of his right to do so in the letter.

[4] Following his injury, the applicant obtained his Certificate in Pharmacy Tech, and worked as a pharmacy technician for Extra Foods from October 12, 2002 until April 10, 2005, when he left because problems with balance made him unable to stand, as well as because of chronic pain and nausea.

[5] Between August 1996 and April 25, 2005, the applicant made 31 visits to fourteen different physicians to obtain advice or treatment for a variety of symptoms, including chronic neck and elbow pain, and episodes of nausea and vertigo. He had a right bicep tear repaired in May 1998, which eased the pain in his elbow. His headaches, nausea and photophobia continued, however.

[6] On April 21, 2005, Dr. Longridge, an otolaryngologist, was the first to determine that the applicant's symptoms of nausea and vertigo were due to damage to his inner ear, sustained when he injured himself in 1996. In his report, Dr. Longridge wrote:

> This patient's posturography is characteristically abnormal for an inner ear balance system dysfunction. Its onset as he started to mobilize following his accident means that probably in some way there has been damage to the inner ear as part of the sudden flicking back of his head with the accident which ruptured his biceps tendon on the right. . . . He is significantly limited by it. . . .

[7] On June 27, 2005, the applicant again applied for disability benefits, and was again denied. In a letter dated September 20, 2005 (the "2005 Decision"), he was informed by HRDC that he was ineligible for benefits because, despite having contributed to the Canada Pension Plan for twenty-five years, he had not, as required by the CPP, contributed in at least four of the last six years.

[8] On October 28, 2005, the applicant requested reconsideration of the 2005 Decision. In a letter dated November 16, 2005 (the "Reconsideration Decision"), HRDC confirmed its decision, and informed the applicant of his right to appeal the decision to the Review Tribunal.

[9] A hearing before the Review Tribunal took place on October 4, 2006. In a decision dated November 24, 2006, the tribunal allowed the appeal. At page 4 of its decision, it wrote the following:

> The Panel, at the outset of the hearing, advised the Appellant that if he were successful in this application he might wish to consider making application to the Minister to reopen his application of 16 November 1999. . . .

At page 12, the tribunal added:

> The Panel does wish to note that its present decision is based, in considerable part, on the report of Dr. Longridge of 21 April 2005. In the event that application is made to reopen the application of November 1999 that report might be considered as new facts as required by subsection 84(2) of the Act.

[10] Pursuant to paragraph 42(2)(*b*) of the CPP, the applicant was deemed by the Review Tribunal disabled as of fifteen months prior to his application, namely March 2004. Because of the statutory four-month waiting period, the applicant therefore could receive disability payments only as of July 2004.

[11] Following the Review Tribunal decision, the applicant wrote to HRDC, requesting reconsideration of its 2000 Decision based on new facts, namely, Dr. Longridge's report. In a letter dated May 22, 2007, HRDC informed the applicant that the Reconsideration Decision was "final" to the department; consequently, as of that date his first (1999) application was "closed" and the Minister no longer had the authority to review the 1999 application under subsection 84(2) of the CPP.

[12] In a further letter dated September 17, 2007, the HRDC, now HRSD (Human Resources and Social Development) clarified that the letter of May 2007 was a courtesy letter informing the applicant that it was without authority to reconsider his 1999 application, and that it did not constitute a decision subject to judicial review.

[13] It is this letter (and its predecessor) that appears to be subject matter of the present review.

* * * * * * * *

[14] This matter raises the following issues:

1. Does the letter from the Minister, dated September 17, 2007 and/or the Minister's previous letter of May 22, 2007, constitute a "decision" within the meaning of section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, such that it can be subject to judicial review by this Court?

2. Was the Minister correct in determining that there is no jurisdiction to entertain the applicant's request to reopen the decision denying his first application for benefits?

3. Was the applicant denied procedural fairness because he was not advised that the failure to pursue the appeal of the decision on the first application would preclude the reopening of such decision once a decision is made on the second application?

[15] Each one of these issues must be analyzed on a standard of correctness. Indeed, the first issue concerns the jurisdiction of this Court, and whether the letter or letters identified by the applicant are properly "decisions" that may be reviewed under subsection 18.1 of the *Federal Courts Act*. The second issue addresses the Minister's statements about her jurisdiction under the CPP, based on the application of *res judicata* or a related principle of "finality". Neither of these issues is within the expertise of the decision-maker; the Court is therefore entitled to undertake a separate analysis and to come to its own conclusions, based on the facts and the law (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraphs 29, 30, 36, and 50). The third issue addresses procedural fairness, and therefore also calls for review on a standard of correctness.

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[16] The following provisions of the CPP are relevant to the present review:

42. (1) …

(2) For the purposes of this Act,

(*a*) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

[…]

42. (1) …

(2) Pour l'application de la présente loi :

a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :

(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,

(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[…]

84. (1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to

(*a*) whether any benefit is payable to a person,

(*b*) the amount of any such benefit,

(*c*) whether any person is eligible for a division of unadjusted pensionable earnings,

(*d*) the amount of that division,

(*e*) whether any person is eligible for an assignment of a contributor's retirement pension, or

84. (1) Un tribunal de révision et la Commission d'appel des pensions ont autorité pour décider des questions de droit ou de fait concernant :

a) la question de savoir si une prestation est payable à une personne;

b) le montant de cette prestation;

c) la question de savoir si une personne est admissible à un partage des gains non ajustés ouvrant droit à pension;

d) le montant de ce partage;

e) la question de savoir si une personne est admissible à bénéficier de la cession de la pension de retraite d'un cotisant;

(*f*) the amount of that assignment,

and the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.

(2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

f) le montant de cette cession.

La décision du tribunal de révision, sauf disposition contraire de la présente loi, ou celle de la Commission d'appel des pensions, sauf contrôle judiciaire dont elle peut faire l'objet aux termes de la Loi sur les Cours fédérales, est définitive et obligatoire pour l'application de la présente loi.

(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

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[17] Assuming, with respect to the first issue, that the Minister's letters constitute a "decision" that can be subject to judicial review by this Court, I am of the view that the second and third issues must be decided in favour of the respondent, for the following reasons.

[18] With respect to the second issue, the respondent argues that the Minister was without jurisdiction to entertain the applicant's request to reopen her 2000 Decision because the matter has been finally determined by the Review Tribunal in its decision of November 2006. At paragraph 35 of its submissions, the respondent writes:

> … the Applicant in the present case is asking the Minister to reopen a decision and reconsider whether or not he was disabled when he last qualified for benefits, namely, in December of 1998. However, this issue has been subsequently determined by a Review Tribunal which

> found him to be disabled at the relevant time and granted him benefits. The Applicant, if dissatisfied, should have attacked this decision directly by requesting a reconsideration and not collaterally by requesting a reopening of this decision after a subsequent decision was made on a subsequent application. To allow the Minister discretion to reopen the first application could give rise to inconsistent decisions. It also violates the principle of finality.

[19] The respondent relies on the Federal Court of Appeal's decision in *Minister of Human Resources Development v. Hogervorst*, 2007 FC 41 ("*Hogervorst*"), as well as this Court's decisions in *Kabatoff v. Minister of Human Resources and Development*, 2007 FC 820 ("*Kabatoff*") and *Dillon v. Attorney General*, 2007 FC 900 ("*Dillon*"), to argue that the applicant's attempt to have the Minister's reopen its earlier decision amounts to a collateral attack on its earlier ruling, based on the Review Tribunal's decision. I agree.

[20] Although the facts in those three cases are somewhat different to the case at hand, the same principles apply. While in *Hogervorst* the applicant was seeking to appeal a previous decision rather than reopen a decision under subsection 84(2) of the CPP, in both cases there is a subsequent decision which is final and binding on all of the parties. As stated in *Hogervorst*, these decisions should be attacked directly and not collaterally. To allow such an attack to proceed violates the principle of finality and leaves open the possibility for inconsistent decisions.

[21] In *Kabatoff*, Justice James W. O'Reilly, relying on *Hogervorst*, stated the following at paragraph 7:

> I agree with Mr. Kabatoff that the statute does not explicitly state that the Minister cannot reconsider a decision if the Review Tribunal has dealt with the same issue. However, I agree with the Minister

> that a sensible reading of the legislation leads to that result. Further, I am persuaded that the Federal Court of Appeal has recently determined that the statute should be read in the manner suggested by the Minister …

[22] In the subsequent decision of *Dillon*, Justice Simon Noël, also relying on *Hogervorst*, expressed the following:

> [19] The applicant argues that under subsection 84(2) of the CPP, the Minister has the discretion to rescind or vary a prior decision based on new facts even if the Review Tribunal is seized with the same question. I agree with the respondent that this argument cannot succeed because it amounts to a collateral attack on a final decision taken in January 1998. …
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> […]
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> … Moreover, there is no authority to order the Minister to reopen any decision relating to the applicant's first application since the Minister has subsequently given a final decision on the applicant's second application, which the applicant has appealed to the Review Tribunal. Consequently, the Minister is *functus officio* with respect to the first application. The decision is *res judicata*. …

[23] As in *Dillon*, there is here a subsequent final and binding decision of the Review Tribunal on the applicant's second application which is binding on the parties. In order to succeed, the applicant must demonstrate that the Minister has the authority to reopen her decision on the first application pursuant to subsection 84(2) of the CPP even though a subsequent final and binding decision has been made on the issue of disability by the Review Tribunal. The case law is clear that no such authority exists.

[24] With respect to the third issue, the applicant argues that he was denied procedural fairness because he should have been advised of the consequences of filing his second application, in which case he may have opted instead to challenge the denial of his first application.

[25] As noted by the respondent, when the applicant reapplied in June of 2005, he had been working as a pharmacy technician since 2002, having stopped work only recently in April of 2005. Most importantly, he indicated in his application that he considered himself no longer able to work as of April 2005. His decision to reapply is therefore entirely reasonable in the circumstances. It was not until the Review Tribunal suggested he ask the Minister to reopen the decision of the Minister of his fist application that the issue was raised. The applicant had the right to file a second application whereas he could have sought a reopening of the first. The Minister quite properly responded to his request to adjudicate his subsequent application. Indeed, in *Dillon*, *supra*, Justice Noël wrote:

> [21] In Mr. Dillon's case, he is asking the Minister to reconsider a 1998 decision even though he did not appeal it and the Review Tribunal has subsequently disposed of the same issue as a follow-up to a second application. The applicant, as is his right filed this second application in 2004, whereas he could have filed a request to reopen the 1998 decision to cancel the benefits. The applicant made a decision to file a second application. By doing so, he chose the procedural avenue to be followed. The respondent reacted to this request. The Minister rendered a decision initially refusing this second application, then after the request was made to reconsider, the Minister granted the benefits retroactively. This decision was appealed to the Review Tribunal on the grounds that the Minister should rescind the 1998 decision and make the payments retroactive to December 1997. The Review Tribunal refused.
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> […]
>
> [25] Finally, Mr. Dillon knew the law particularly after having consulted with the representatives of the CPP and having dealt with them since 1988. This Court has recognized that in administrative law, everybody knows the law and is presumed to understand it. In

> *Dorey v. Canada (Customs and Revenue Agency)*, [2003] F.C.J. No. 1575, 2003 FC 1241, Madame Justice Elizabeth Heneghan stated at paragraph 22:
>
> … It is well-established that persons are deemed to have knowledge of the law. In *Pirotte v. Canada (Unemployment Insurance Commission)*, [1977] 1 F.C. 314, a case involving a claim for unemployment insurance benefits, the Court of Appeal said as follows at page 317:
>
> … It is a fundamental principle that ignorance of law does not excuse failure to comply with a statutory provision. (*Mihm v. Minister of Manpower and Immigration*, [1970] S.C.R. 348 at p. 353.) The principle is sometimes criticized as implying an unreasonable imputation of knowledge but it has long been recognized as essential to the maintenance and operation of the legal order. (See also: *Zündel v. Canada (Canadian Human Rights Commission)* (re Canadian Jewish Congress), [1999] F.C.J. No. 392 at paragraph 17; *McGill v. Canada (Minister of National Revenue – M.N.R.)*, [1985] F.C.J. No. 806 (F.C.A.).)

[26] Finally, it is true that the Review Tribunal raised the issue of new facts and in essence suggested to the applicant that he should apply to the Minister to reopen his previous application pursuant to subsection 84(2) of the CPP, which the applicant did. However, because the Review Tribunal had, at the same time, rendered a final and binding decision on the second application, there was no jurisdiction to consider the applicant's request.

[27] In spite of all the sympathy I have for the applicant, given the particular circumstances of this case, I must conclude that the Minister was correct to advise the applicant as she did in her two letters dated May 22 and September 17, 2007, respectively. The application for judicial review is, therefore, dismissed. However, as requested by the respondent herself, there is no award of costs.

JUDGMENT

The application for judicial review of the two letters dated May 22 and September 7, 2007, respectively, wherein the Minister of Human Resources and Development Canada declined to entertain the applicant's request to reopen her decision of January 11, 2000, denying the applicant benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, is dismissed, without costs.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1794-07
STYLE OF CAUSE:	CYRIL HILTZ v. HUMAN RESOURCES DEVELOPMENT CANADA CANADIAN PENSION PLAN DISABILITY
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 7, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	May 22, 2009

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Mr. Allan Matte	FOR THE RESPONDENT

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