Federal Court  Cour fédérale

Date: 20121203

Docket: T-739-11

Citation: 2012 FC 1406

Ottawa, Ontario, December 3, 2012

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

MYRNA LARMET

Applicant

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Myrna Larmet challenging the majority decision of an Old Age Security Review Tribunal (Tribunal) established under section 82 of the *Canada Pension Plan*, RSC 1985, c C-8. Ms. Larmet contends that the Tribunal erred by refusing to award her Old Age Security (OAS) benefits that would have been payable but for a mistake in her application concerning her date of eligibility. I am told that the amount at issue is approximately $5,000.00.

Background

[2] The material facts are not in dispute. Ms. Larmet applied for OAS benefits in September 2007, well in advance of her eligibility date. She was mistaken about when she would qualify. Instead of requesting benefits at the earliest opportunity (i.e. age 65) she requested that payments commence in January 2009, one year after her actual date of eligibility. This was an honest error based on a belief that OAS was not payable before retirement.

[3] Ms. Larmet began to receive OAS benefits in early 2009. She did not appreciate her mistake until she was advised by her accountant that she was entitled to OAS upon reaching the age of 65 regardless of her employment status. Ms. Larmet and her accountant asked the Minister to correct her application and to pay OAS benefits back to her 65th birthday. The Minister refused. Ms. Larmet appealed to the Tribunal and lost. It is from that decision that this application is brought. Ms. Larmet argues that the Tribunal majority decision was made in error and seeks to set it aside in favour of the dissenting opinion.

The Tribunal Decision

[4] The majority of the Tribunal held that the applicable legislation precluded a claim to the retroactive recovery of OAS benefits. The Tribunal observed that it has no inherent equitable jurisdiction and because there is no provision in the *Old Age Security Act*, RSC 1985, c O-9 (*OAS Act*), or regulations that expressly permits such a retroactive claim after benefits are paid, the Tribunal dismissed the appeal. In reaching this decision the Tribunal relied on subsection 5.1 of the *OAS Act* and subsection 5(1) of the *Old Age Security Regulations*, CRC, c 1246 (*OAS Regulations)*.

Those provisions provide:

Withdrawal of application	Retrait de la demande
5.1 (1) An applicant may withdraw an application for a pension by giving a written notice of their withdrawal to the Minister at any time before payment of the pension commences.	**5.1** (1) Le demandeur peut retirer la demande de pension en avisant le ministre par écrit avant le début du paiement de la pension.
Effect of withdrawal	Effet du retrait
(2) If an application for a pension is withdrawn under subsection (1), the withdrawn application shall not after that time be used for the purpose of determining the applicant's eligibility for a pension.	(2) La demande de pension ainsi retirée ne peut, par la suite, servir à déterminer l'admissibilité du demandeur à une pension.
Approval of an Application for a Pension	**Agrément d´une demande de pension**
5. (1) Subject to subsection (2), where the Minister	**5.** (1) Sous réserve du paragraphe (2), lorsque le ministre :
(a) is satisfied that an applicant is qualified for a pension in accordance with sections 3 to 5 of the Act, and	(a) est convaincu qu'un demandeur est admissible à une pension selon les articles 3 à 5 de la Loi,
(b) approves the application after the last day of the month in which it was received,	(b) agrée la demande après le dernier jour du mois au cours duquel elle a été reçue,
the Minister's approval shall be effective on the latest of	l'agrément prend effet à celle des dates suivantes qui est postérieure aux autres :
(c) the day on which the	(c) la date de réception de la

application was received,	demande,
(d) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act, and	(d) la date à laquelle le demandeur est devenu admissible à une pension selon les articles 3 à 5 de la Loi;
(e) the date specified in writing by the applicant.	(e) la date indiquée par écrit par le demandeur.

The Tribunal's analysis of these provisions is set out in the following brief passage:

> [27] The Tribunal finds that there was a window of opportunity that existed between the application date of September 2007 and December 2008 for the Appellant to change the start date of payments under OASA subsection 5.1(1); however, the Appellant did not exercise this right. The Appellant did not exercise this section of the legislation to adjust her start date for pension receipt as she did not realize until after her pension commenced that she could have received it earlier.

[5] Considerably more attention was paid by the Tribunal to Ms. Larmet's failure to pay appropriate attention to the OAS information sheet and the OAS application, or to seek timely advice that could have alerted her to the problem.

[6] The dissenting opinion relied upon by Ms. Larmet contains the following analysis of the applicable legislation:

> [18] It is a basic rule of legal interpretation that a purposive approach must be utilized when interpreting the legislation involved. In addition, when there is any uncertainty, that uncertainty should be resolved in a manner that is most beneficial to the applicant.
>
> [19] Applying these principles, I am of the view that subsection 5(1) of the regulations is ambiguous. It states that the Minister's approval should be effective on the latest date of either when the application is received, the day on which the applicant

> qualifies, or the date specified in writing by the applicant. It does not state that the date specified in writing by the applicant on her application, and "application form" is defined in the regulations.
>
> [20] The simple fact of the matter is that in the instant case, Ms. Larmet should have qualified in February 2008. She made a good faith mistake, since she was employed, she thought that she would not qualify until January 2009, and this was her initial request in the application submitted in October 2007. She subsequently, in March 2009, discovered her error, and wrote to the Respondent Minister requesting that her eligibility date be changed to her actual eligibility date. This request was made in writing, as were the subsequent requests specified in the letter from Ms. Applebaum and in the statutory declaration.
>
> [21] And while subsection 5.1(2) states that a withdrawn application cannot be used for the purpose of determining the applicant's eligibility, and that an application can only be withdrawn prior to benefits becoming payable, nowhere in the Act or the Regulations does it state that the application shall be used to determine the applicant's eligibility. The warning set out in Field 10 of the application is not reflected or rooted in the law.
>
> [22] The fact remains that this is benevolent legislation, it contemplates having a remedial component, as reflected in section 32, and the Case File contains a notation dated November 2, 2009, from the Minister indicating that the Appellant's application should have been rejected. I am of the view that if the law does not expressly preclude relief being granted to Ms. Larmet, then that relief should be extended to her. Accordingly, I must respectfully dissent from the reasons expressed by the majority of the Tribunal.
>
> **CONCLUSION**
>
> [23] I would allow Ms. Larmet's appeal and order retroactive payments to February 2008.

Issues

[7] What is the appropriate standard of review?

[8] Did the Tribunal err in its analysis of the applicable legislation?

Analysis

[9] While this application turns on an issue of law it concerns the interpretation of the Tribunal's home statute and it must be reviewed on the deferential standard of reasonableness: see *Canadian Human Rights Commission and Mowat v Attorney General of Canada*, 2011 SCC 53 at paras 15-27, [2011] 3 SCR 471 [*Canadian Human Rights Commission*]. According to *Dunsmuir v New Brunswick* , 2008 SCC 9, [2008] 1 SCR 190, "reasonableness" is:

> …a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para 47]

[10] Although there may be more than one reasonable legal interpretation open to a decision-maker, it must still "engage in an interpretive process taking account of the text, context and purpose of the provisions in issue": see *Canadian Human Rights Commission*, above, at para 64.

[11] The majority of the Tribunal interpreted subsection 5.1 of the *OAS Act* and subsection 5(1) of the *OAS Regulations* as precluding an applicant's right to amend an application to vary the commencement date of OAS benefits. The Tribunal concluded that the only opportunity to amend an application in this way is to withdraw the application and to resubmit. But this option is only

available where benefits have not yet been received. In this case Ms. Larmet was in receipt of benefits when she learned of her mistake and, according to the Tribunal, she did not then have the right to withdraw or amend her application. The dissenting Member found that because these statutory provisions do not expressly preclude a right to amend an application, a statutory ambiguity arose. In the face of ambiguity a purposive and contextual analysis was required, leading the dissenting Member to a different conclusion.

[12] Ms. Larmet contends that the Tribunal adopted an unduly narrow construction by holding that subsection 5.1 of the *OAS Act* and subsection 5(1) of the *OAS Regulations* preclude an amendment of the sort she had requested. She says that she was not seeking to withdraw her application for benefits but only to amend the date she had initially specified for the commencement of OAS benefits. She likens her request to any other alteration of her OAS application (eg. date of birth) which presumably would be permitted even after she was in receipt of benefits. Like the dissenting Member, Ms. Larmet says that the legislation does not expressly prohibit an applicant from correcting an error concerning the "date specified in writing" in her OAS application. Therefore her claim to relief did not call upon the Tribunal to ignore the "clear language of Parliament" unlike the situation in *Wegener v Attorney General of Canada*, 2011 FC 137 at para 8, [2001] FCJ no 188.

[13] Ms. Larmet also distinguishes her situation from that described in *Canada v Elser*, 2004 FC 1567, [2004] FCJ no1920, where a claim to more than one year of retroactive OAS benefits was rejected. In that case Justice John O'Keefe held that a time limited retroactive entitlement was clearly expressed in the *OAS Act* and could not be expanded on equitable grounds.

[14] There is arguable merit to Ms. Larmet's criticism of the Tribunal's majority decision. If one views the statutory provisions relied upon by the Tribunal in the context of the full legislative text and in a purposive way the resulting ambiguity is difficult to ignore. It would have been a simple task to draft a provision that expressly excluded a claim to retroactive benefits in circumstances like these. Instead, subsection 8(2) of the *OAS Act* allows an applicant to claim up to one year of retroactive benefits where a late application is made by mistake or otherwise. There is no apparent rationale for treating Ms. Larmet's claim to retroactive benefits differently from a late application on the basis of a similar misunderstanding. Nowhere in the majority decision is this apparent inconsistency addressed.

[15] Although the Tribunal paid considerable attention to Ms. Larmet's failure to inform herself, it is perhaps noteworthy that the OAS information sheet fails to enlighten a reader inasmuch as it confirms an entitlement of up to eleven months of retroactive benefits without any identified distinctions.

[16] It is also of some relevance that the legislative history pertaining to the provisions relied upon by the Tribunal makes no connection to the payment of retroactive benefits. Rather, the rationale for the right to withdraw an application under section 5 of the *OAS Act* is related to a desire to minimize the tax effects of OAS benefits arising from the receipt of unexpected income. Apparently Parliament was concerned that individuals receiving OAS not be pushed into a higher taxation bracket by virtue of the receipt of those benefits. Presumably the same concern was the rationale behind subsection 9.1 of the *OAS Act* which allows a person to suspend the payment of

benefits. One might think that if these provisions were intended to bar retroactive recovery in some situations, to the prejudice of an otherwise entitled applicant, some reference to that purpose would have been made. Nowhere in the majority decision is the legislative history mentioned.

[17] The Tribunal was correct that it enjoys no inherent authority to authorize a benefit that an applicant is not entitled to receive. Notwithstanding this view, the Tribunal seems to have been preoccupied with Ms. Larmet's failure to inform herself about her eligibility date. But if the Tribunal has no equitable authority to provide a remedy in a situation of an obvious mistake, and if the legislation does bar a claim to retroactive benefits, Ms. Larmet's conduct was irrelevant. The Tribunal's apparent reliance on this irrelevant evidence appears to have influenced its decision.

[18] I am not satisfied that the majority decision is reasonable having regard to the Tribunal's failure to consider the statutory interpretation issue it faced in a contextual and purposive way. In the result the decision is set aside. Failing a settlement between the parties the matter is to be re-determined on the merits by a different panel.

[19] Neither party requested costs against the other and no costs are ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed with the matter to be re-determined on the merits by a different panel.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-739-11
STYLE OF CAUSE:	Larmet v MHRSD
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	November 13, 2012
REASONS FOR JUDGMENT:	BARNES J.
DATED:	December 3, 2012

APPEARANCES:

Graham Webb	FOR THE APPLICANT
Carole Vary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Advocacy Centre for the Elderly Toronto, ON	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, ON	FOR THE RESPONDENT