

Date: 20071203

Docket: A-74-07

Citation: 2007 FCA 383

**CORAM: DESJARDINS J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

PHYLLIS MATHESON

Respondent

Heard at Halifax, N.S., on December 3, 2007.

Judgment delivered from the Bench at Halifax, N.S., on December 3, 2007.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Halifax, N.S., on December 3, 2007)

TRUDEL J.A.

[1] This is an application for judicial review by the Attorney General of Canada (applicant) asking this court to set aside a decision rendered by the Pension Appeals Board (Board) on January 15, 2007. The Board dismissed the application to have a previous Order issued by it amended.

[2] From November 2003 to November 2005, the Minister of Human Resources and Social Development Canada (the Minister) and Ms. Matheson were involved in a litigation concerning Ms. Matheson's eligibility to a disability pension under the *Canada Pension Plan*, R.C.S., 1985, c. C-8.

[3] On October 26, 2005, the parties entered into a consent to judgment by which Ms. Matheson was recognized to be disabled within the meaning of the *Canada Pension Plan* as of January 2003 and to be entitled to benefits as of May 2003. Therefore, the Board issued an Order allowing Ms. Matheson's appeal in accordance with the consent to judgment signed by the parties.

[4] In December 2005, the Minister realized that he had made an error concerning the effective date of payment: that date should have been February 2004 and not May 2003 because of Ms. Matheson's application for credit-splitting in accordance with the *Division of Unadjusted Pensionable Earnings* (DUPE) of the *Canada Pension Plan* in January 2004.

[5] In January 2006, counsel for the Minister sent a letter to Ms. Matheson requesting her to sign an amended consent to judgment reflecting a date of payment of February 2004. She refused. On April 6, 2006, the Minister filed a Notice of Motion with the Board requesting the issuance of an amended Order to that effect.

[6] The Board dismissed the application, and unanimously decided that it was *functus officio*, and without jurisdiction to deal with the matter, concluding that the initial decision of November 2005 reflected the manifest intention of the Board and of the parties.

[7] The applicant submits that the Board “accepted an agreement which cannot be implemented as it is contrary to the provisions of the *Canada Pension Plan* and therefore illegal” (paragraphs 29 and 37 of applicant’s memorandum of fact and law). The applicant adds that the Board’s Order “in itself is a nullity since it was made contrary to the law”. It ensues that the Board should be permitted to reconsider the matter afresh and render a valid decision.

[8] We are of the opinion that the Pension Appeals Board made no error in deciding as it did. It applied the correct standard of review to the question of law in front of it: correctness (*Canada (Minister of Human Development) v. Scott*, 2003 FCA 34).

[9] This case, as presented, does not fall within the exceptions of *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, a leading case dealing with the principle of *functus officio* in the context of administrative tribunals. There was no slip in drawing up the Board's Order; there certainly was no error in expressing the manifest intention of the Board in view of the agreement entered into by the parties (*Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186). This case also fails to meet the test of subsection 84(2) of the *Canada Pension Plan*, that is a case where the Board may, on new facts, rescind or amend its decision.

[10] We question the appropriateness of the recourse chosen by the applicant who sought, from the Board, an amendment to the original Order that homologated the parties’ transaction based on its nullity. We feel that the applicant should have sought the annulment of the agreement in front of

the appropriate forum. Before the parties can start afresh, the impugned agreement must be invalidated. There cannot be a valid agreement if the consent of one or both parties is vitiated.

[11] We cannot ignore that the respondent accepted the applicant's offer. The Board simply endorsed the consent to judgment in conformity with section 19.1 of the *Pension Appeals Board Rules of Procedure (Benefits)*, C.R.C., c. 390. The appeal was allowed within the parameters set up by the parties and within the jurisdiction of the Board.

[12] For these reasons, this application for judicial review will be dismissed without costs.

“Johanne Trudel”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-74-07

**(APPEAL FROM A DECISION OF THE PENSION APPEALS BOARD, DATED
JANUARY 15, 2007.)**

STYLE OF CAUSE: The Attorney General of Canada
Applicant
and
Phyllis Matheson
Respondent

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: December 3, 2007

REASONS FOR JUDGMENT OF THE COURT BY: DESJARDINS J.A.
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TRUDEL J.A.

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

APPEARANCES:

Sandra Gruescu FOR THE APPLICANT
Phyllis Matheson ON HER OWN BEHALF

SOLICITORS OF RECORD:

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