

Docket: 2009-7(EI)APP

BETWEEN:

WILLIAM BERGER,

Applicant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Application heard on common evidence with the application of
William Berger (2009-8(CPP)APP)
on July 13, 2009, at Sydney, Nova Scotia

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Applicant: Clara Gray
Counsel for the Respondent: Devon E. Peavoy

JUDGMENT

The application made by the Applicant to extend the time within which to file an appeal to this Court from the decision rendered under the *Employment Insurance Act* is dismissed.

Signed at Ottawa, Canada, this 10th day of September, 2009.

“Wyman W. Webb”

Webb J.

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Counsel for the Respondent: Devon E. Peavoy

JUDGMENT

The application made by the Applicant to extend the time within which to file an appeal to this Court from the decision rendered under the *Canada Pension Plan* is dismissed.

Signed at Ottawa, Canada, this 10th day of September, 2009.

“Wyman W. Webb”

Webb J.

Citation: 2009TCC448
Date: 20090910
Dockets: 2009-7(EI)APP
2009-8(CPP)APP

BETWEEN:

WILLIAM BERGER,

Applicant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Applicant made an application to extend the time within which he may appeal to this Court from a decision rendered under the *Employment Insurance Act* and under the *Canada Pension Plan*. The decision from which the Applicant wishes to appeal was made on October 30, 2007 and mailed to him on that day. The application to this Court to extend the time for filing an appeal was not made until November 12, 2008.

[2] Subsection 28 (1) of the *Canada Pension Plan* provides as follows:

28. (1) A person affected by a decision on an appeal to the Minister under section 27 or 27.1, or the person's representative, may, within 90 days after the decision is communicated to the person, or within any longer time that the Tax Court of Canada on application made to it within 90 days after the expiration of those 90 days allows, appeal from the decision to that Court in accordance with the *Tax Court of Canada Act* and the applicable rules of court made thereunder.

[3] Subsection 103(1) of the *Employment Insurance Act* provides as follows:

103. (1) The Commission or a person affected by a decision on an appeal to the Minister under section 91 or 92 may appeal from the decision to the Tax Court of Canada in accordance with the *Tax Court of Canada Act* and the applicable rules of court made thereunder within 90 days after the decision is communicated to the Commission or the person, or within such longer time as the Court allows on application made to it within 90 days after the expiration of those 90 days.

[4] Both subsections provide that an appeal to this Court must be filed within 90 days after the decision is communicated to the Applicant or an application to extend the time within which an appeal may be commenced must be made within 90 days after the expiration the first 90 day period. The Applicant did not file a notice of appeal within 90 days of the date that the decision was communicated to him. Nor did he make the application to extend the time to appeal within the 90 day period ending thereafter. The application to extend the time within which he could appeal to this Court was made more than one year after the decision was rendered and communicated to the Applicant.

[5] Counsel for the Applicant argued that, notwithstanding the provisions of these statutes, it would be just and equitable for the Applicant to be permitted to pursue his appeal to this Court. The Applicant was not well in the fall of 2007 and in early 2008 his bowel and his bladder ruptured. He spent a considerable amount of time in the hospital. However, neither the *Canada Pension Plan* nor the *Employment Insurance Act* have a provision that is similar to section 3 of the *Limitation of Actions Act* (Nova Scotia), which would permit the court to disallow a defence based on a time limitation, if it would be equitable to do so having regard to the considerations as set out in subsection 3(2) of that statute.

[6] It seems to me that both the *Canada Pension Plan* and the *Employment Insurance Act* are clear that if the appeal is not commenced within the 90 day period after the decision is communicated to the person or an application to extend the time to appeal is not made within the 90 day period ending immediately thereafter, then the Applicant does not have the right to appeal to this Court.

[7] This Court was formed by an Act of Parliament, the *Tax Court of Canada Act*. Section 12 of this *Act* provides that:

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part

IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.

(emphasis added)

[8] It seems to me that the jurisdiction of this Court to hear appeals from decisions rendered under the *Employment Insurance Act* or the *Canada Pension Plan* is limited to situations in which an appeal is provided for in these statutes. These statutes only provide for an appeal to this Court if the appeal is filed within the 90 day period following the date that the decision is communicated to the person or an application to extend the time to appeal is made within the 90 day period immediately following this appeal period. Since the Applicant has not complied with these provisions this Court does not have the jurisdiction to hear this appeal.

[9] In *Pervais v. The Queen*, (1996) 192 N.R. 269 Justice Strayer of the Federal Court of Appeal confirmed that:

1 We are all of the view that this application for judicial review must be dismissed. The only right of appeal from a decision of the Minister with respect to insurability of employment is that provided in subsection 70(1) of the *Unemployment Insurance Act*. That right to appeal is conditioned on the appeal being filed within 90 days of communication of the Minister's decision, or within such further time allowed by the Tax Court on an application made within those 90 days. No such application was made in this case and this appeal was filed 92 days after communication of the Minister's decision.

2 While rule 27 of the Tax Court Rules for Unemployment Insurance appeals, made under the authority of the Tax Court Act, permits that Court to dispense with compliance with any rule, this clearly does not authorize the Court to alter the statutory conditions for appeal in subsection 70(1) of the *Unemployment Insurance Act*.

[10] In *Lamarre v. Minister of National Revenue*, (1998) 233 N.R. 156, Justice Marceau, of the Federal Court of Appeal noted that:

2 There is no question, ever since this Court's decision in *Vaillancourt*,¹ that the 90-day time limit set by subsection 70(1) of the *Unemployment Insurance Act*² for an appeal from a decision of the Minister is a strict time limit which the Tax Court of Canada is unable to extend. [The footnote references were inserted by Justice Marceau and can be found at the end of the reported decision of the Federal Court of Appeal.]

[11] As a result, the applications by the Applicant to extend the time within which to file an appeal to this Court from the decisions rendered under the *Canada Pension Plan* and the *Employment Insurance Act* are dismissed.

Signed at Ottawa, Canada, this 10th day of September, 2009.

“Wyman W. Webb”

Webb J.

CITATION: 2009TCC448
COURT FILE NOS.: 2009-7(EI)APP and 2009-8(CPP)
STYLE OF CAUSE: William Berger v. M.N.R.
PLACE OF HEARING: Sydney, Nova Scotia
DATE OF HEARING: July 13, 2009
REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT: September 10, 2009

APPEARANCES:

Agent for the Applicant: Clara Gray
Counsel for the Respondent: Devon E. Peavoy

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