

Federal Court



Cour fédérale

Date: 20170411

Docket: T-62-16

Citation: 2017 FC 358

Ottawa, Ontario, April 11, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JACQUELINE MASON

Applicant

and

**MINISTER OF EMPLOYMENT AND SOCIAL
DEVELOPMENT
(formerly known as MINISTER OF HUMAN
RESOURCES AND SKILLS DEVELOPMENT)**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This case gives legal significance to the phrase “a day late and a dollar short”. Jacqueline Mason [Mason], a self-represented litigant, applied for judicial review of an October 22, 2015 decision of the Appeal Division of the Social Security Tribunal [SST] dismissing her appeal from a decision of the General Division of the SST.

The subject matter of the appeal was a decision of the General Division which summarily dismissed Mason's appeal of the Minister's decision denying her disability benefits under the *Canada Pension Plan*, RSC 1985, c C-8 [CPP].

[1] While touched upon lightly in the earlier proceedings and in the written representations to this Court, it developed through oral argument that a significant issue had not been canvassed in the earlier proceedings or even in this judicial review. That issue is the date on which Mason applied for her disability benefits. It had been taken as a given that the date was September 4, 2013; however, there is now considerable doubt on this point.

II. Background

[2] It is not my intention to address all of the various points raised, but simply to address the point which justifies sending this matter back for redetermination.

[3] The key provision for this purpose is s 42(2) of the CPP, which provides that an application for disability benefits must be made no later than 15 months after becoming disabled.

42 (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

42 (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

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

(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

(Court's underlining)

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;

b) une personne est réputée être devenue ou avoir cessé d'être invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le cas, invalide, mais en aucun cas une personne — notamment le cotisant visé au sous-alinéa 44(1)b(ii) — n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la présentation d'une demande à l'égard de laquelle la détermination a été faite.

(La Cour souligne)

[4] Mason suffered a work related head injury on June 22, 2011. In May 2012, the Applicant turned 60, and she began receiving a CPP retirement pension on June 1, 2012. She then sought to

take advantage of the possibility of converting her CPP pension benefit to CPP disability benefits.

66.1 (1) A beneficiary may, in prescribed manner and within the prescribed time interval after payment of a benefit has commenced, request cancellation of that benefit.

(1.1) Subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an applicant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the applicant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable.

(2) Where a request made under subsection (1) or under a substantially similar provision of a provincial pension plan is granted and the amount of the benefits paid is repaid within the prescribed time or, in the case of a provincial pension plan, the time provided thereunder, that benefit shall be deemed for all purposes of this Act not to have been payable during the period in question.

66.1 (1) Un bénéficiaire peut demander la cessation d'une prestation s'il le fait de la manière prescrite et, après que le paiement de la prestation a commencé, durant la période de temps prescrite à cet égard.

(1.1) Toutefois, le bénéficiaire d'une prestation de retraite ne peut remplacer cette prestation par une prestation d'invalidité si le requérant est réputé être devenu invalide, en vertu de la présente loi ou aux termes d'un régime provincial de pensions, au cours du mois où il a commencé à toucher sa prestation de retraite ou par la suite.

(2) Dans les cas où est acceptée une demande prévue au paragraphe (1) ou aux termes d'une disposition en substance semblable d'un régime provincial de pensions et que le montant de la prestation versée est retourné dans le délai prescrit à cet égard ou dans le délai que prévoit le régime provincial de pensions, la prestation est, pour l'application de la présente loi, réputée ne pas avoir été payable pour la

période concernée.

(Court's underlining)

(La Cour souligne)

[5] The parties agree that the “due date” for Mason’s application was September 1, 2013, being 15 months after her deemed disability month of June 2012. September 1, 2013 was a Sunday and the first business day thereafter was Tuesday, September 3, 2013 – despite a potential date of August 31, 2013 being five full months but nothing turns on the one day difference because the same problem would have occurred.

[6] Mason’s application for disability benefits was opened and stamped by Employment and Social Development Canada [ESDC] on September 4, 2013. There is no evidence as to the date that the application was received at ESDC. Wednesday, September 4, 2013 was the second business day following the Labour Day holiday of September 2, 2013.

[7] Mason’s evidence is that she mailed her application in mid-August 2013 at the local post office in Princeton, a small town in southern British Columbia. She was concerned that the application be made before September because of her doubt as to whether her application was due in August or September.

[8] The Applicant’s application was denied by the Minister initially and on reconsideration. The issue seemed to be the date of deemed disability.

[9] The Applicant appealed the Minister’s reconsideration decision to the General Division of the SST. The General Division determined that the Applicant could not cancel her retirement

pension in favour of disability benefits because she had not made her application until September 4, 2013. The General Division summarily dismissed her claim pursuant to s 53(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34, on the grounds that it had no reasonable chance of success.

[10] Mason then appealed the General Division's decision to the Appeal Division of the SST.

The Appeal Division concluded:

Sadly the Appellant simply did not apply for a disability pension early enough and hence cannot avail herself of subsection 66.1(1) of the *Canada Pension Plan*.

[11] The Applicant's submissions throughout were laced with references to both the federal disability pension plan and the provincial worker's compensation regime.

III. Analysis

[12] The relevant issue is whether the Appeal Division's acceptance of the General Division's conclusion that Mason had not applied for the disability benefits within time was a reasonable decision.

[13] As held in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*], the Appeal Division's findings of fact and its interpretation of its home statute or a statute closely connected with its function is reasonableness as articulated in *Dunsmuir*.

[14] The Court must conclude that the decision is not reasonable because it did not address key relevant considerations. The Court is appreciative of counsel for the Respondent's candor, as an officer of the Court, in acknowledging that there is no evidence of when Mason's application was actually received at ESDC.

[15] The Appeal Division appears to have treated, without articulation of rationale, the opening and stamping of the Applicant's envelope as the receipt of the application. With respect, there is no evidence of the timing of receipt or evidence that the application could not have been in the ESDC mail system before the Labour Day weekend.

[16] The Appeal Division equated this "receipt" to the "making" of Mason's application without considering whether the words are synonymous.

[17] The Appeal Division did not consider that mailing was the method of communication chosen by the government and, having made that choice, whether the delivery to Canada Post as agent for Canada could constitute delivery to ESDC. Nor did the Appeal Division consider Mason's actions and timing in mailing the application in mid-August, well before the due date.

[18] The Appeal Division did not consider the purpose of the legislation, which is in part to pay benefits to those who have paid into the CPP. The meaning of the provision with respect to "making" an application must be considered against the purpose of the provision and the legislation, which is to be given a fair and generous reading.

[19] In finding the Appeal Division's decision unreasonable, the Court recognizes that the Applicant's submissions may not always have been easy to follow or her points easy to discern.

[20] However, this case requires a "re-think" and it will therefore be returned to the SST to make a fresh determination, which will allow Mason to better articulate the relevant circumstances.

IV. Conclusion

[21] Therefore, this judicial review will be granted. The Appeal Division's decision will be quashed. The Court will order that the Applicant's application for disability benefits is to be reconsidered *de novo* by a different official or officials.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The Appeal Division's decision is quashed; and
3. The Applicant's application for disability benefits is to be reconsidered *de novo* by a different official or officials.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-62-16

STYLE OF CAUSE: JACQUELINE MASON v MINISTER OF
EMPLOYMENT AND SOCIAL DEVELOPMENT
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RESOURCES AND SKILLS DEVELOPMENT)

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MARCH 13, 2017

JUDGMENT AND REASONS: PHELAN J.

DATED: APRIL 11, 2017

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