Date: 20070705

Docket: P-1-07

Citation: 2007 FC 703

Ottawa, Ontario, July 5, 2007

PRESENT: The Honourable Mr. Justice Martineau, Deputy Assessor

BETWEEN:

MJ FARM LTD.

Appellant

and

THE MINISTER OF AGRICULTURE AND AGRI-FOOD CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application made by the respondent requesting an order summarily dismissing the present appeal, which was filed under section 56 of the *Health of Animals Act*, S.C. 1990, c. 21 (the Act) on December 21, 2006, on the grounds that it was filed well out of time and that there are no "special reasons" to extend the usual three-month time limit.

[2] The appellant raises Silkie chickens (growers and breeders) in Abbotsford, B.C. It is run and operated by Mr. John Giesbrecht. On March 11, 2004, due to the detection of Avian Influenza in

poultry farms in the Fraser Valley, the Minister of Agriculture and Agri-Food (the Minister) declared the establishment of a control area. Accordingly, on May 4, 2004, the Minister required that the appellant's stock be destroyed, pursuant to subsection 48(1) of the Act. Shortly thereafter, all of the appellant's breeding stock was euthanized.

[3] On or about May 11, 2004, the appellant applied for compensation of his stock pursuant to paragraph 51(1)(*a*) of the Act. He submitted a valuation that claimed a total of $116,929.55, which included the amount of $70,072.26 for the breeders. This valuation made by the appellant was based on the cost of production of the stock and assumed retention of some of the breeder chick eggs, not yet hatched, and a hatch rate of 60-70% (an assumption which proved later to be in error). While the appellant was awarded $48,813.42 for the silky breeder stock, overall the appellant was awarded compensation of $114,218.48 on July 21, 2004.

[4] Mr. Giesbrecht sent a letter of appeal with respect to the compensation award on or about December 21, 2006. On January 11, 2007, the Honourable Allan Lutfy, Assessor, ordered that the letter be filed as a notice of appeal pursuant to section 56 of the Act. On March 14, 2007, the respondent filed an application requesting that the Assessor grant an order striking out the appellant's appeal on the grounds that the appeal was filed outside the three month limitation period fixed by subsection 56(2) of the Act.

[5] Pursuant to section 56 of the Act, a person who is dissatisfied with the Minister's disposition of their claim under the Act may bring an appeal to the Assessor. The only grounds of appeal are

that the failure to award compensation is unreasonable or that the amount awarded is unreasonable. Subsection 56(2) provides the time limit for bringing the appeal:

(2) An appeal shall be brought within three months after the claimant receives notification of the Minister's disposition of the claim, or within such longer period as the Assessor may in any case for special reasons allow.	(2) L'appel doit être interjeté dans les trois mois suivant la notification à l'intéressé de la décision ministérielle contestée ou dans le délai plus long que l'évaluateur peut exceptionnellement accorder.

[6] In the case at bar, it is agreed by both parties that the appellant is well outside the three-month period provided for in section 56 of the Act. However, the appellant contends that there are "special reasons" for allowing the appeal at this time. Specifically, the appellant relies on the decision *Donaldson v. Canada (The Minister of Agriculture and Agri-Food Canada)*, 2006 FC 842, rendered on June 30, 2006. In that decision, the Assessor (Justice Michael Kelen) allowed an appeal filed by Mr. Donaldson who, according to the appellant, is the only other Silkie breeder in the Fraser Valley. Mr. Donaldson had taken issue with the amount awarded in compensation for his Silkie breeders, which had been destroyed in 2004. Specifically, he claimed that the amount awarded was less than the market value of the stock. As there is no commercial market available to establish value by use of comparables (the Silkie breeders are not traded on the open market), the Assessor noted that the replacement cost or cost of production was the proper method of determining the market value of the Silkie breeders. In the decision, based on the evidence submitted by the parties, the Assessor found that the respondent had failed to distinguish between Silkie meat stock birds (the growers) and breeding stock birds (the breeders). Accordingly, the Assessor allowed the appeal,

finding that the amount of compensation paid “was based upon a fundamental misunderstanding by the respondent with respect to the market value of Silkie breeders” (para. 22).

[7] The Act does not define the term “special reasons” which is used at subsection 56(2) of the Act in relation to the power given to the Assessor to extend the time period for filing an appeal where an appeal is not brought within the three-month limitation period. Nor was any jurisprudence found by the Assessor that defines this term under the Act. The *Pesticide Residue Compensation Act*, R.S.C. 1985, c. P-10 (subsection 15(2)), as well as subsection 40(2) of the *Plant Protection Act*, S.C. 1990, c. 22 also contain provisions that are almost identical and that also use the term “special reasons”. However, neither of these statutes contains a definition of “special reasons”. Nor was any jurisprudence found by the Assessor or tendered by the parties that interpreted these terms under those latter statutes.

[8] That being said, by analogy, the parties have referred the Assessor to decisions rendered by the Federal Court with respect to the criteria regarding extensions for filing applications for judicial review under paragraph 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The principles which apply to cases of this nature have been set out by the Federal Court of Appeal in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (F.C.A.). The relevant factors may include any or all of the following: (a) the merits of the application; (b) whether the applicant has had a continuing intention to bring the application; (c) the reason for the delay; and (d) whether the responding party has suffered any prejudice because of the delay. In this regard, there is no need for an applicant who is seeking an extension of time to demonstrate "special reasons"

(*Maple Lodge Farm Ltd. v. Canada (Minister of National Revenue)*, [1997] F.C.J. No. 288 at para. 9 (T.D.)(QL)).

[9] The Assessor has also been referred by counsel to cases that were decided by judges of the Federal Court, sitting as umpires under the *Employment Insurance Act*, S.C. 1996, c. 23. More particularly, under subsection 114(1) of the latter statute, a claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may appeal to the board of referees in the prescribed manner at any time within 30 days after the day on which a decision is communicated to them or such further time as the Commission may in any particular case for "special reasons" allow. The jurisprudence has established that "special reasons" include compassionate reasons or circumstances which are beyond the claimant's control. However, ignorance of the appeal process, forgetfulness, or simple negligence does not constitute "special reasons" (*Sharon J. Collins*, CUB 61940A). Furthermore, in *William L. Roulston*, CUB 19019, Cullen J. reviewed case law to the effect that a change in jurisprudence does not constitute "special reasons." In support of this proposition, see also CUB 17581 and CUB 17741.

[10] The appellant argues that the rendering of the decision in *Donaldson* in June 2006 constitutes a "special reason" that warrants an appeal being allowed today. Since the assessment process has been corrected by the respondent for Mr. Donaldson's operation, but not for the appellant, this creates an injustice that must be remedied by allowing the appellant to pursue the present appeal. The appellant also contends that at the time he was offered compensation, he was unrepresented and that the respondent had made assurances that they had arrived at the appropriate

amount with due diligence. The appellant also believed at the time that it would be able to salvage some of the eggs, from which it could hatch replacement breeder stock. However, it was ultimately unable to salvage the majority of its eggs. In his affidavit, Mr. Giesbrecht states that he found out about the *Donaldson* decision on September 21, 2006. Immediately thereafter, with the help of a consultant, he recalculated his compensation using the method of calculation described in the *Donaldson* case, and wrote a letter of appeal on December 21, 2006.

[11] In my view, there are no “special reasons” that warrant extending the period for filing the notice of appeal in the present case. "Special reasons" for a delay in launching an appeal under subsection 56(2) of the Act certainly include compassionate reasons or circumstances which are beyond an appellant's control. However, simple negligence or ignorance of the law cannot be accepted as "special reasons". I agree with the respondent that a change in jurisprudence or in the law is not in itself a “special reason” that would justify the late filing of an appeal. The fact that the appellant would have a better case in 2006, based on the *Donaldson* decision, is simply not enough to overcome the unreasonable delay to file the appeal.

[12] That being said, I doubt that *Donaldson* has introduced a fundamental change in the law as urged by the appellant's counsel. As noted by my colleague Justice Kelen in that case at paragraph 19:

> As other assessors have decided under the *Health of Animals Act*, when there is no commercial market available to establish value by use of comparables, then the depreciated replacement value method is reasonable for estimating the market value of an animal that is destroyed. See *Ferme Avicole Héva Inc. v. Canada (Minister of*

> *Agriculture)* (1998), 203 F.T.R. 218 per Tremblay-Lamer J., Assessor, at paragraphs 31 and 32.

[13] A close reading of the Assessor's analysis in *Donaldson* shows that the reasons for allowing a greater compensation than that awarded by the respondent are fact-driven. The Assessor noted in *Donaldson* that "[t]he witnesses for the appellant were credible and experienced". On the other hand, the Assessor found that "[t]he witnesses for the respondent did not provide any credible evidence regarding the proper market value of the Silkie breeders" (para 22).

[14] In the case at bar, the appellant was already claiming in 2004 compensation based on the cost of production or replacement value of the lost stock (which he had evaluated at $70,072.26, a figure that had been revised by 2006 to $108,836.31). In the present case, the appellant has not satisfied the Assessor that he was unable to file a notice of appeal within the three-month period provided for in the Act. This is what Mr. Donaldson, the owner of Bradner Farms, had done in 2004. The evidence demonstrates that the appellant was aware of its right to appeal as of April 15, 2004. The appellant waited until December 21, 2006, to file its appeal. (This is some three months after he allegedly found out about the *Donaldson* decision on September 21, 2006.)

[15] Mr. Giesbrecht has not raised in his affidavit any compassionate reasons or illness, or any impossibility to act or any circumstances that were beyond his control. The fact that the appellant had no reason to suspect in 2004 that what the representatives of the respondent had told him was incorrect is not a "special reason". Moreover, the appellant was not diligent and certainly did not demonstrate a continuous intention to pursue its appeal and I find the fact that the appellant was unrepresented by counsel in 2004 is not a reasonable explanation for the delay of nearly two and a

half years that have elapsed since the appellant received notification of the Minister's disposition of its claim.

[16] The present application to strike shall be allowed. Accordingly, it is appropriate to summarily dismiss the present appeal. Costs shall be in favour of the respondent.

ORDER

THE ASSESSOR ORDERS that the application to strike made by the respondent be allowed.

Accordingly, the appeal is summarily dismissed. Costs are in favour of the respondent.

"Luc Martineau"
Deputy Assessor

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	P-1-07
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APPEARANCES:

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