**Date: 20080826**

**Docket: T-1655-06**

**Citation: 2008 FC 967**

**Ottawa, Ontario, August 26, 2008**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**MERHIRET BERHE**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Where a decision-maker has discretion there is no predetermined answer that the official is attempting to discern. When legislation grants an official discretion it is equivalent to the legislation saying: Do what YOU feel is best among the choices I give you. These choices can run from being extremely broad where the statutory power is wholly discretionary and Parliament leaves almost every aspect of the who, what, when, where, and how to the decision-maker to the very narrow where Parliament leaves only a small window of choice.

(Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, rev. ed. (Toronto, 2008) at 5B-2 (Macaulay, Practice and Procedure).

> [2] The underlying consideration, however, which, as it seems to me, must be borne in mind in dealing with any application of this kind, is whether, in the circumstances presented, to do justice between the parties calls for the grant of the extension.

(*Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, 36 A.C.W.S. (2D) 451); reference is also made to ***R. v. Toronto Magistrates, Ex p. Tank Truck Transport Ltd.***, [1960] O.W.N. 549 (C.A.), at pages 549-550)

[3] In the recent Federal Court of Appeal case *Canada* (*Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, 154 A.C.W.S. (3d) 1238, Justice Gilles Létourneau refers to *Grewal*, above, as one that is flexible and that must be geared to ensure that justice is done between the parties.

## II. Introduction

[4] This is an application for judicial review of a decision of the Office of the Commissioner of Review Tribunals (OCRT), designated under section 82 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP), dated August 8, 2006, wherein the Commissioner granted the Respondent's request to appeal the decision of the Minister from the Department of Social Development, dated October 26, 2004.

## III. Facts

[5] The Respondent, Ms. Merhiret Berhe, emigrated to Canada from Ethiopia where she was educated to a level of grade seven. From August 25, 1993 to August 7, 2002, the Respondent worked as a housekeeper.

[6] On March 12, 2004, Ms. Berhe applied for CPP disability benefits. (Applicant's Record, pp. 11-22.)

[7] Ms. Berhe was informed in a letter, dated July 15, 2004, that the Minister had denied her application for disability benefits. (Applicant's Record, pp. 30-32.)

[8] On August 8, 2004, Ms. Berhe requested a reconsideration of the Minister's decision. (Applicant's Record, p. 33.)

[9] On October 26, 2004, Ms. Berhe was again advised that her application for CPP benefits had been denied. (Applicant's Record, pp. 36-38.)

[10] At the time of Ms. Berhe's October 26, 2004 denial no further medical information was available to support an appeal of her claim.

[11] On March 7, 2006, almost a year and a half later, Ms. Berhe's counsel wrote to the OCRT and indicated that he had been consulted by Ms. Berhe to assist with her appeal and that she now wished to appeal the October 26, 2004 decision of the Minister. Enclosed with the letter was a copy of Dr. Nasif Yasin's medical report, dated February 16, 2006. (Applicant's Record, p. 40.)

[12] On April 13, 2006, the OCRT notified Ms. Berhe's counsel that it had received the request to appeal the Minister's decision 413 days after the 90 day period to request an appeal had expired.

The OCRT asked for a detailed explanation for the lateness of the request before the Commissioner would consider exercising the discretion to grant an extension of the 90 day appeal period. (Applicant's Record, p. 48.)

[13] The OCRT wrote again to Ms. Berhe's counsel, on June 2, 2006, requesting an explanation for the lateness of the appeal. The OCRT indicated that Ms. Berhe's file would be closed within 30 days of the date of the letter if an explanation was not provided. (Applicant's Record, p. 49.)

[14] Ms. Berhe's counsel wrote to the OCRT, on June 15, 2006, and explained that the request to appeal was late for two reasons. First, due to the language barrier, Ms. Berhe "was unclear as to the time frame she had to appeal the CPP decision". Second, Ms. Berhe had "no additional medical evidence to send to CPP to support an appeal of her claim" at the time of the initial denial in 2004. Rather, additional medical evidence was not obtained until the receipt of Dr. Yasin's February 16, 2006 medical report. (Applicant's Record, p. 50.)

[15] The OCRT wrote to Ms. Berhe's counsel, on July 20, 2006, to confirm that, based on her contributions to the CPP, she "would need to be found disabled on or before December 2004 to qualify for a disability benefit". The OCRT also requested further details regarding the reasons for the lateness of the appeal and the grounds of the appeal. (Applicant's Record, p. 51.)

[16] Ms. Berhe's counsel explained in a letter to the OCRT, dated July 21, 2006, that he was not retained at the time Ms. Berhe applied for CPP benefits but agreed to look into the denial on

March 2, 2006. He reiterated that Ms. Berhe's delay in pursuing her appeal was due to "a poor understanding of the English language" and "the mechanics of the appeal process". (Applicant's Record, p. 52.)

[17] The Commissioner of the OCRT advised Ms. Berhe's counsel in a letter, dated August 8, 2006, that he had exercised his discretion to extend the appeal deadline and accept Ms. Berhe's appeal. The Commissioner indicated that he had exercised his discretion on the basis of the explanation contained in Ms. Berhe's counsel's letter and specifically on the statement that Ms. Berhe "has a poor understanding of the English language and did not understand the mechanics of the appeal process". (Applicant's Record, p. 53.)

[18] On September 13, 2006, the Applicant brought forward this application for judicial review in respect of the Commissioner's decision to grant the extension for appeal.

IV. Issue

[19] Did the Commissioner err in law when exercising his discretion when he extended the time to appeal the Minister's decision?

V. Analysis

(i) Standard of Review

[20] Justice François J. Lemieux has recently addressed the standard that a reviewing Court should follow in such circumstances. He notes, in *Canada (Attorney General) v. Pentney*, 2008 FC 96, 164 A.C.W.S. (3d) 8:

> [26] The issues in this judicial review center on legal and not on factual points. As noted, they are whether the Commissioner considered the proper factors in the exercise of his discretion to extended time for an appeal to the Review Tribunal; whether and to what extent the Commissioner must provide written reasons for extending time to appeal to the Review Tribunal and whether the Commissioner's decision represents a collateral attack on the Minister's refusal of Mr. Pentney's second disability application.
>
> [27] These are legal points for which the Court does not owe the Commissioner deference; his expertise is not engaged. This Court is not dealing with the merits of his decision but whether his has exercised his discretion by taking into account relevant considerations. The functional and pragmatic analysis points to the standard of review of correctness. This is what the Minister argues and the Commissioner does not disagree. I agree. The Commissioner has to be correct.

[21] Consequently, this Court finds, as Justice Lemieux stated, that the standard of review as to whether a Commissioner has considered the proper factors in the exercise of his discretion to extend time for an appeal to the Review Tribunal is a question of law and should consequently be reviewed on a standard of correctness.(*Spears v. Canada*, 2004 FCA 193, 131 A.C.W.S. (3d) 200 at paras. 9-10; *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, 120 A.C.W.S. (3d) 310 at para. 7.)

(ii) Pertinent Legislation

[22] The CPP enables a person who is dissatisfied with a decision of the Minister to appeal pursuant to subsection 82(1):

| | |
|---|---|
| **Appeal to Review Tribunal** | **Appel au tribunal de révision** |
| **82.** (1) A party who is dissatisfied with a decision of the Minister made under section 81 or subsection 84(2), or a person who is dissatisfied with a decision of the Minister made under subsection 27.1(2) of the *Old Age Security Act*, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal in writing within 90 days, or any longer period that the Commissioner of Review Tribunals may, either before or after the expiration of those 90 days, allow, after the day on which the party was notified in the prescribed manner of the decision or the person was notified in writing of the Minister's decision and of the reasons for it. | **82.** (1) La personne qui se croit lésée par une décision du ministre rendue en application de l'article 81 ou du paragraphe 84(2) ou celle qui se croit lésée par une décision du ministre rendue en application du paragraphe 27.1(2) de la *Loi sur la sécurité de la vieillesse* ou, sous réserve des règlements, quiconque de sa part, peut interjeter appel par écrit auprès d'un tribunal de révision de la décision du ministre soit dans les quatre-vingt-dix jours suivant le jour où la première personne est, de la manière prescrite, avisée de cette décision, ou, selon le cas, suivant le jour où le ministre notifie à la deuxième personne sa décision et ses motifs, soit dans le délai plus long autorisé par le commissaire des tribunaux de révision avant ou après l'expiration des quatre-vingt-dix jours. |
| … | … |
| **Powers of Review Tribunal** | **Pouvoirs du tribunal de révision** |
| (11) A Review Tribunal may confirm or vary a decision of the Minister made under | (11) Un tribunal de révision peut confirmer ou modifier une décision du |

| | |
|---|---|
| section 81 or subsection 84(2) or under subsection 27.1(2) of the *Old Age Security Act* and may take any action in relation to any of those decisions that might have been taken by the Minister under that section or either of those subsections, and the Commissioner of Review Tribunals shall thereupon notify the Minister and the other parties to the appeal of the Review Tribunal's decision and of the reasons for its decision. | ministre prise en vertu de l'article 81 ou du paragraphe 84(2) ou en vertu du paragraphe 27.1(2) de la *Loi sur la sécurité de la vieillesse* et il peut, à cet égard, prendre toute mesure que le ministre aurait pu prendre en application de ces dispositions; le commissaire des tribunaux de révision doit aussitôt donner un avis écrit de la décision du tribunal et des motifs la justifiant au ministre ainsi qu'aux parties à l'appel. |
| (Emphasis added) | (Nous soulignons) |

(iii) Preliminary issue

[23] On judicial review, a Court can only consider the evidence that was before the administrative decision-maker whose decision is being reviewed. Consequently, new evidence cannot be regarded.

[24] The Applicant notes that the medical reports and clinical records of Dr. E.G. Caines, Dr. Wou, Dr. Miki and Dr. Parhar, attached as exhibits "E", "G", "H", "I" and "J" to the affidavit of Shannon Siak, filed by Ms. Berhe, were not before the Commissioner at the time of the impugned decision. Moreover, these reports relate to the merits of Ms. Berhe's application for disability benefits rather than the decision of the Commissioner that is the subject of this judicial review. (*Wood v. Canada (Attorney General)*, [2001] 199 F.T.R. 133, 102 A.C.W.S. (3d) 1091; *Ezerzer v. Canada (Minister of Human Resources Development)*, 2006 FC 812, 295 F.T.R. 213.)

[25] Consequently, this Court considers whether weight can be given to evidence contained in the exhibits listed above due to the considerations as specified.

**Did the Commissioner err in law in granting an extension of time to appeal the Minister's decision?**

[26] Where a decision-maker has discretion there is no predetermined answer that the official is attempting to discern. When legislation grants an official discretion it is equivalent to the legislation saying: Do what YOU feel is best among the choices I give you. These choices can run from being extremely broad where the statutory power is wholly discretionary and Parliament leaves almost every aspect of the who, what, when, where, and how to the decision-maker to the very narrow where Parliament leaves only a small window of choice.

(Macaulay, Practice and Procedure.)

[27] The Applicant bases its argument on the "conjunctive test" originally set out in *Grewal*, above, and summarized in *Canada (Attorney General) v. Hennelly*, [1999] 244 N.R. 399, 89 A.C.W.S. (3d) 376:

> [3] The proper test is whether the applicant has demonstrated
>
> 1. a continuing intention to pursue his or her application;
> 2. that the application has some merit;
> 3. that no prejudice to the respondent arises from the delay; and
> 4. that a reasonable explanation for the delay exists.

(Reference is also made to *Clayton v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1409, 143 A.C.W.S. (3d) 1075.)

[28] The underlying consideration, however, which, as it seems to me, must be borne in mind in dealing with any application of this kind, is whether, in the circumstances presented, to do justice between the parties calls for the grant of the extension…

> One element to be established by the intending appellant in order to obtain leave was that he had a bona fide intention to appeal within the prescribed time: *Smith v. Hunt* (1902), 5 O.L.R. 97, *Can. Wool Co. v. Brampton Knitting Mills*, [1954] O.W.N. 867, *Re Blair & Weston*, [1959] O.W.N. 368. This had been referred to as the basic rule to be observed when dealing with an application for leave to extend the time. However, in both the Smith case and the Blair case the Court proceeded on other grounds as well and it could therefore be stated that the question of bona fide intention while important was but one of the matters to be considered and the cases cited did not in fact conflict with the statements made in other cases that the paramount consideration must always be that justice be done: *Sinclair v. Ridout*, [1955] O.W.N. 635, *Can. Heating & Vent. Co. v. T. Eaton Co.* (1916), 41 O.L.R. 150, Re Irvine (1928), 61 O.L.R. 642, *Kettle v. Jack*, [1947] O.W.N. 267. While these latter cases showed that no precise rules could be laid down as to the exact circumstances which called for the exercise of the discretion of the Court the underlying principle to be extracted from them was that an extension of time appeal should be granted if justice required it…

(*Grewal*, above; reference is also made to *R. v. Toronto Magistrates*, above, at pages 549-550.)

[29] In *Grewal*, above, Justice Louis Marceau, while concurring with Chief Justice Arthur L. Thurlow, commented:

> Only if the ultimate search for justice, in the circumstances of a case, appears to prevail over the necessity of setting the parties' rights to rest, will leave to appeal out of time be granted. Hence the requirement to consider the various factors. In order to properly evaluate the situation and draw a valid conclusion, a balancing of the factors is essential. For example, a compelling explanation for the delay may counterbalance a weak case against judgment, and a strong case may counterbalance a less satisfactory justification for the delay. (Emphasis added.)

[30] In the recent Federal Court of Appeal case *Hogervorst*, above, Justice Létourneau refers to *Grewal*, above, as one that is flexible and that must be geared to ensure that justice is done between the parties.

[31] Justice Lemieux of the Federal Court states the following in reference to the flexibility within *Grewal*, above:

> [35] This flexibility includes assigning an appropriate weight to each factor depending upon the circumstances, the granting of leave even though one of the four standard criteria are not present and the requirement of a fifth factor that is the facts of the particular case. Chief Justice Thurlow, in *Grewal*, above, cautioned it would be wrong to lay down the rules which fetter a discretionary power which Parliament has not fettered.
>
> …
>
> [40] … the Federal Court of Appeal's jurisprudence indicates that the standard four-prong test is not exclusive. A decision maker on an application for an extension of time must consider all other factors relevant to a particular case and assign appropriate weight to each. This suggests a contextualized approach to such an application. Moreover, as noted, the weight to be accorded to each factor will vary in the circumstances…

(*Pentney*, above.)

[32] In the case at bar, the "ultimate search for justice" is a determination whether or not Ms. Berhe has a disability that prevents her from doing any type of work on a regular basis.

[33] According to the reasoning of Justice Marceau, "…a strong case may counterbalance a less satisfactory justification for the delay". (*Grewal*, above.)

[34] In the case at bar, the opinion of Dr. Yasin, a specialist in Physical Medicine and Rehabilitation, which, according to the record, seems to be the only medical opinion before the Review Tribunal, regarding Ms. Berhe's medical condition, was as follows:

> **OPINION**
>
> Ms. Feshaye is suffering from chronic low back pain resulting from disc herniation at L4-L5 and right sacroiliac joint dysfunction.
>
> **PROGNOSIS**
>
> Ms. Feshaye is suffering from chronic lower back pain, she has tried different modalities of treatment including epidural injections with little help to her pain.
>
> Her prognosis for a recovery is poor. Ms. Feshaye will be limited from any functional activities that require prolonged sitting, prolonged standing and weight bearing activities.
>
> I believe that she is totally disabled from any work activities.

(Applicant's Record, Vol. I, pp. 43-44.)

[35] As pointed out in a letter to the OCRT, dated July 21, 2006, Ms. Berhe's medical symptoms, including disc herniation and degenerative disc disease (which led to Dr. Yasin's diagnosis of total disability) were present at the time of the original CPP application; therefore, there is compelling argument that Ms. Berhe was disabled within the meaning of the CPP legislation at the time of her original application. (Applicant's Record, Vol. I, p. 52.)

[36] In his handwritten conclusions, the Commissioner wrote the following:

> 1-8-06 I recommend acceptance based on:
>
> a. Explanations in both June 15 and July 21, 2006 letters (ie language barrier, medical evidence only received in February 2006).
> b. <u>She has an arguable case to be found disabled at her MQP date of Dec. 2004</u>

(Emphasis added.)

[37] Dr. Yassin's report, dated February 16, 2006, was commissioned in furtherance of Ms. Berhe's private disability claim against B.C. Life ξ Casualty Company. Legal counsel was not consulted by Ms. Berhe with respect to the CPP appeal until March 2, 2006. It is reasonable, in these circumstances, to conclude that Ms. Berhe would not have contacted counsel about the CPP appeal after receipt of Dr. Yassin's report unless she had a continuing intention to pursue the appeal. (Applicant's Record, Vol. I.)

[38] Recognizing that discretion must, among other fundamental principles, be exercised on the merits of each case and in good faith, it must consider all relevant considerations and comply with the principles of natural justice and fairness, this Court finds that in it's appreciation of the evidence, the Commissioner has considered the proper factors in the exercise of his discretion to extended time for an appeal to the Review Tribunal and he properly embraced the flexible and contextual approach espoused by the Federal Court of Appeal.

## VI. Conclusion

[39] This Court finds that the Commissioner was entitled in the exercise of his discretion to consider all the facts before him, including the relevant merits of Ms. Berhe's claim on the ultimate issue of total disability based on expert medical opinion.

[40] Based on the foregoing, the application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT ORDERS that** the application for judicial review be dismissed;

"Michel M.J. Shore"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1655-06 |
| **STYLE OF CAUSE:** | ATTORNEY GENERAL OF CANADA<br>v. MERHIRET BERHE |
| **PLACE OF HEARING:** | Vancouver, B.C. |
| **DATE OF HEARING:** | August 14, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | SHORE J. |
| **DATED:** | August 26, 2008 |

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