Federal Court  Cour fédérale

Date: 20090520

Docket: T-791-06

Citation: 2009 FC 523

Ottawa, Ontario, May 20, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DR. ROBERT MANNING

Applicant

and

HUMAN RESOURCES DEVELOPMENT CANADA, SERVICE CANADA and THE ATTORNEY GENERAL FOR CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c.F-7. Dr. Robert Manning, the Applicant, seeks judicial review of a decision dated April 5, 2006, of Katherine Hitchcock, the Minister's Delegate denying his application for retroactivity of disability benefits to the time of his disablement in 1993.

BACKGROUND

[2] Dr. Robert Manning applied for disability benefits under the Canada Pension Plan (CPP) in August 2005. The application was approved and he received the maximum amount of retroactivity, 15 months as per s. 43(2) of the *Canada Pension Plan Act*, R.S.C. 1985, c. C-8 (the Act). However, the Applicant believes the retroactivity should be to the date of his disablement.

[3] Dr. Manning was a medical doctor practicing in the City of St. Catharines, Ontario. On or about April 16, 1993, the Applicant suffered a stroke. As a result, he became disabled and was unable to manage his own affairs. At the time of his stroke, the Applicant was involved in a divorce proceeding and had no one to assist him with his financial affairs. The Applicant remarried in April 1995. The Applicant's new spouse, Dr. Malaguti-Manning, also a medical doctor, has assisted many of her patients in their application for disability benefits under the *Canada Pension Plan Act*, R.S.C. 1985, c. C-8 (the Act).

[4] In late April 1995, the Applicant's spouse telephoned the CPP's toll free information line. She did not ask for, nor document, the name of the call center representative who was providing the information. Her recollection is that the Call Centre Agent had the voice of a mature woman. The Applicant's spouse claims that she was advised by the representative that there was no point applying for the CPP disability since any amounts received would have to be repaid to the Applicant's private insurance company whose disability policy payouts had been used to pay for the Applicant's living expenses since his 1993 stroke. The Applicant's spouse also claims that she was

informed that the Applicant would not receive any additional monies as that amount would be offset by the Applicant's private insurance plan.

[5] The Applicant's spouse claims that she relied on the erroneous information provided to her, therefore did not complete the application for disability benefits on behalf of her husband. On July 25, 2005, Dr. Malaguti-Manning requested her accountant make further inquires on the Applicant's behalf. The accountant, who noted the identification of the call centre agent, was informed that the Applicant should have applied and received CPP disability benefits commencing in 1993. She was further informed that if the application for benefits was made in 1995, Dr. Manning's benefits would not have "shrunk" due to having zero contributions during the last 12 years of his disability.

[6] Dr. Malaguti-Manning then submitted an application for retroactive disability on behalf of the Applicant. On October 24, 2005, Human Resources and Development Canada (HRDC) requested further information regarding the Applicant's claim that he was given erroneous advice. On November 14, 2005, the Applicant responded by re-iterating her initial claim.

[7] On April 5, 2006, Service Canada denied the Applicant's claim for retroactive benefits.

DECISION UNDER REVIEW

[8] The decision under review includes:

i. the letter by the Minister's Delegate dated April 5, 2006; and

ii. the erroneous advice investigation report (the Investigation Report)

The letter indicated that Mr. Manning was not entitled to retroactive benefits to 1993; rather, he would be eligible for benefits retroactive to May 2004. The Investigation was a standard form report, documenting the investigation taken by the Minister's Delegate.

[9] The Minister's Delegate outlines the series of events to the date of the letter. She restates the position and evidence of Dr. Malaguti-Manning that was considered for her decision.

[10] The letter stated that an erroneous advice investigation was undertaken as a result of Dr. Malaguti-Manning's August 24, 2005 application for retroactive benefits. During the investigation further information was requested from Dr. Malaguti-Manning on October 25, 2005. The reply was received on November 21, 2005.

[11] The Minister's Delegates stated:

> Based on the information on file and normal office procedures at the time, it has been determined that erroneous advice from a departmental official has not occurred.

[12] The Minister's Delegate then explains the next step in the application: the file was to be forwarded for medical adjudication. The letter states that for payment purposes benefits will only be available from May 2004; 15 months prior to the application.

[13] The final paragraph is further information for the Applicant if he disagrees with the decision, and steps for recourse.

[14] The Investigation Report outlines the background of the case, an analysis of the evidence and the conclusion that the Minister was not satisfied pursuant to subsection 66(4) of the Act that erroneous advice had been given to the Applicant.

[15] In her analysis, The Minister's Delegate determined that there were no records of the alleged telephone call made on behalf of the Applicant in 1995. She also reviewed the training manuals and guidelines for the time period in question and determined that there was nothing to suggest that Call Centre Agents would have been trained to provide the type of advice the Applicant's spouse had allegedly received. The Minister's Delegate held that on the contrary, Call Centre Agents were told to inform callers that they should be contacting their own insurer.

ISSUES

[16] The issues under review are:

i. Was the decision of the Minister's Delegate that no erroneous advice was given reasonable?

ii. Did the Minister's Delegate breach the procedural fairness rights of the Applicant by not providing sufficient reasons in her decision?

[17] Two further interrelated issues, submitted by the Applicant, which this court does not have the jurisdiction to adjudicate:

i. Did the Respondents and their agents provide erroneous information or advice to the Applicant's spouse to his detriment; and

ii. If erroneous information and/or advice was provided to the Applicant's spouse, is the Applicant entitled to receive disability benefits dating back to April 1995?

[18] In my view, the issue in this case is:

a. Did the Minister commit a reviewable error in determining that no erroneous advice/administrative error had occurred?

LEGISLATION

[19] Subsection 66(4) of the Act provides:

Where person denied benefit due to departmental error, etc.	Refus d'une prestation en raison d'une erreur administrative
66.(4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied	66.(4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
(*a*) a benefit, or portion thereof, to which that person would have been entitled under this Act,	*a*) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(*b*) a division of unadjusted pensionable earnings under section 55 or 55.1, or	*b*) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(*c*) an assignment of a retirement pension under section 65.1,	*c*) la cession d'une pension de retraite conformément à l'article 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se

> retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

STANDARD OF REVIEW

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 62, the Supreme Court of Canada stated that the first of two steps in conducting an analysis for standard of review is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."

[21] In *Lee v. Canada (Attorney General)*, 2007 FC 758, Madam Justice Hansen found that the applicable standard of review for a finding that there was no erroneous advice given or administrative error was patent unreasonableness.

[22] Madam Justice Snider, in *Kissoon v. Canada (Minister of Human Development)*, 2004 FC 24, found that in making a ruling under subsection 66(4) of the Act, the Minister is making a discretionary decision, and as such the standard of review is patent unreasonableness. Furthermore, she states at para. 5:

> A finding of erroneous advice or administrative error is one of fact, which also signals to a court that deference should be accorded to the Minister. Evidence should not be reweighed nor findings tampered with merely because this Court would have come to a different conclusion. (Suresh, supra at 24-25)

[23] In *Dunsmuir* the SCC found that there are only two standards of review: correctness and reasonableness. As such, I find that the existing jurisprudence has already determined the

appropriate standard of review. The decision was a discretionary decision, based on facts and therefore is reviewable on a reasonableness standard.

[24] The second issue is the right to procedural fairness. If the conduct challenged involves a breach of procedural fairness, then no assessment of an appropriate standard of review is required: *Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11, at para. 74. A breach of procedural fairness will result in setting aside of the administrative decision makers decision.

ANALYSIS

[25] The initial call was made in April 1995. Dr. Malaguti-Manning does not recall the exact date, nor the name of the agent she spoke with, the region to which the call was made or the Call Centre to which the call was routed. The Minister's Delegate, in arriving at her decision, checked the CPP mainframe to attempt to identify the date the call came in and where it was routed but was unable to make such a determination. Although not contacting all of the possible Call Centers where a call could have been routed, she did review all of the policy and training manuals and determined based on such material that Call Centre Agents were instructed to inform callers with requests like those of the Applicant that they should contact their private insurer.

[26] In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 52, the Supreme Court of Canada described a patently unreasonable error as follows:

> Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney*

> *General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed [page270] that no amount of curial deference can justify letting it stand.

[27] In *Leskiw v. Canada (Attorney General)*, 2003 FCT 582 at para. 23, this Court held that given that the applicant in that case did not identify who gave him the allegedly erroneous advice, other than to say it was two different female client services agents of the HRDC office, as well as the contradiction in the applicant's recollection of the advice that he allegedly received, it was not patently unreasonable for the Minister's delegate to conclude that the applicant did not receive erroneous advice.

[28] In *Kissoon v. Canada (Minister of Human Development Resources)*, 2004 FC 24, at para. 10; aff'd 2004 FCA 384), Justice Snider held:

> The Respondent would have made a reviewable error if the decision was made without regard to the evidence before it or on the basis of evidence that was not before it. In this case, I can see not such error [sic]. The Minister considered all of the evidence before her and found that it did not establish that an error had been made. In other words, after weighing all of the evidence, the Minister found that it did not establish, on a balance of probabilities, that Mr. Kissoon had submitted an application for children's benefits prior to November 29, 2001.

Was the decision of the Minister's Delegate that no erroneous advice was given reasonable?

[29] The Applicant submits that the decision of the Minister's Delegate is not reasonable because there is little or no justification for the outcome of the decision. The decision lacks analysis of the relevant facts, evidence or law, and there is no transparency in the decision making process.

[30] The Applicant asserts that the fact that the Respondent's agents were cognizant of the private insurance companies. This could have affected the information they provided to the Applicant's spouse, namely, the information that any monies received by CPP would be deducted from the amounts being paid by the private insurance company.

[31] The Applicant believes that the Minister's Delegate committed a reviewable error by not conducting a complete and full investigation of the other CPP offices in Ontario. The Minister's Delegate investigated the Chatham office, where she was employed and had trained telephone agents during the time in question.

[32] The Applicant submits that a number of factors must be considered:

a. Dr. Malaguti-Manning received erroneous advice with respect to Dr. Manning's disability entitlement
b. There was no evidence on record that could lead to a finding that Dr. Malaguti-Manning was not provided with erroneous advice.
c. The Respondent believes that it is unlikely that Dr. Malaguti-Manning received erroneous advice.
d. It is possible that an agent would advise Dr. Malaguti-Manning not to apply for the disability benefit because the agents were advised of private insurance policies and the agreements with the Government.
e. There was more than one call centre that the Minister's Delegate did not investigate.

f. There is information in the tip sheets and the manuals that refer to an agreement between private insurance companies and the Government.

[33] The Applicant asserts that based on the above noted points, the agents may have told Dr. Malaguti-Manning that there was no point in applying because that amount would be deducted from the amount paid by the private insurance company. The points referred to above were iterated by Mr. Justice Campbell in *Barnes v. Canada (Minister of Human Resources Development*), 2004 FC 985, at para. 8; he listed the essential features in reviewing the decision for error.

[34] The Respondent submits that the decision of the Minister's Delegate was reasonable. The Applicant did not establish that the Respondent gave erroneous advice. The decision was based on the available evidence from the investigation undertaken by the Minister's Delegate and the information provided by the Applicant. The Applicant was not able to provide a specific date of the phone call, the CPP agent's name, nor the office Dr. Malaguti-Manning called.

[35] The Minister's Delegate was unable to find any record of the phone call, and her review of the materials and training in place at that time indicated that it was highly unlikely that the alleged advice would have been given. In cross-examination the Minister's Delegate stated: if that type of information was given it "would contravene all of the instructions … that our agents receive."

[36] The Respondent submits that based on the following factors the decision of the Minister's Delegate is clearly reasonable:

a. there were no particulars given regarding the agent's name who allegedly gave the erroneous advice;
b. there was no written evidence to support the Applicant's allegation that advice was given;
c. Dr. Malaguti-Manning is a medical doctor with experience in assisting patients with applications for disability benefits, yet made no record of the conversation and took no additional steps to confirm the advice given;
d. there was no electronic record of the telephone call;
e. the checklist states that an application kit is sent to a client if they do not have one;
f. the training material instructs agents to provide information but to leave the decision as to whether or not to apply to the client;
g. the material instructs agents to refer questions regarding private insurance schemes to those companies;
h. the existing practice is that no agent is to provide advice regarding private insurance schemes; and
i. the advice allegedly given to the Applicant would have gone against the specific instructions given to the agents.

[37] The burden of proof is on the Applicant. The Applicant asserts that information in the form of advice was given, and was relied upon to his detriment. In asserting that erroneous advice was given the Applicant is required to prove on a balance of probabilities that the advice was given: *Graceffa v. Canada (Minister of Social Development)*, 2006 FC 1513, at para. 1

[38] Subsection 66(4) of the Act states that the Minister ought to be satisfied that a certain state of facts exists. The section gives the Minister wide discretion with regard to any remedial action and to an informal determination of the facts.

[39] Dr. Malaguti-Manning has provided affidavit evidence that is very general evidence. There was no evidence of the telephone call; no receiving agent identified; no date of the call; no phone number called; and no specific details of the advice she received. The evidence, the telephone agent's advice, as to why the Applicant did not apply in 1995 for the disability benefits is not the most definitive although there is some support in that the information was relied upon since the Applicant's wife did not apply for the benefit.

[40] The investigation revealed that there were no records of calls that long ago. The Minister's Delegate provided evidence including: the tip sheets; counselling checklist; procedures in place at that time; and manuals that telephone agents were provided with.

[41] All the evidence the Investigator produced was balanced against the evidence provided by Dr. Malaguti-Manning; then the Minister must determine on a balance of probabilities whether erroneous advice was given. The Minister concluded that balance weighed in the Respondent's favour. The Minister found that it was more likely that no erroneous advice was given.

[42] I find that the Minister's decision is reasonable given that it is one of the justifiable findings based on the evidence.

Did the Minister's Delegate breach the procedural fairness rights of the Applicant by not providing sufficient reasons in her decision?

[43] The Applicant argues that the Minister's Delegate did not provide adequate reasons because she did not provide an analysis of the facts or the evidence. Furthermore, the Applicant argues that the Minister's Delegate did not explain how she arrived at her decision, and the legal grounds upon which her decision was based.

[44] The Respondent submits that the letter dated April 5, 2006 and the Investigation Report are adequate reasons for the decision. The letter explained that the investigation was conducted; the policy, procedures and training material were reviewed, and based on the file and normal office procedures at that time, the alleged erroneous advice had not occurred.

[45] In *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, at para. 44, the Supreme Court of Canada explained that the sufficiency of reasons needs to be necessarily flexible. Furthermore, it noted that the courts must consider the day-to-day realities of the administrative agencies and the ways in which the principles of procedural fairness can be assured.

[46] Similarly, recently Justice Lemieux, in *Canada (Attorney General) v. Pentney*, 2008 FC 96, held that even though a letter did not contain reasons, the corresponding record contained reasons for the decision which fulfilled the reasons requirement.

[47] The Applicant's procedural fairness rights were not breached. Although the letter and Investigator's Report were extensive, I find that together, they serve as sufficient reasons to satisfy the requirement.

CONCLUSION

[48] The Applicant has mis-framed his analysis. The issue is not whether it was possible that erroneous advice had been given. Rather, did the facts satisfy the Minister that erroneous advice had been given.

[49] Dr. Malaguti-Manning has claimed on behalf of the Applicant that she received erroneous advice from the CPP Department. There is no evidence of the telephone call: no receiving agent; no date of the call; no phone number called; and no specific details of the advice given. The Minister's Delegate investigated and, in the absence of any record of telephone calls, decided on the basis of the evidence available including: the tip sheets; counselling checklist; procedures in place at that time; and telephone agents' manuals.

[50] The investigation occurred eleven years after the alleged dissemination of information. In my opinion, the Minister's Delegate took all reasonable steps to conduct her investigation. Her decision is supported by the evidence and is in accordance with reason. The Minister's letter and the investigation report provide adequate, if sparse, reasons given the paucity of information available due to the significant passage of time.

[51] This application for judicial review does not succeed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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