

Federal Court



Cour fédérale

**Date: 20110331**

**Docket: T-1810-10**

**Citation: 2011 FC 398**

**Toronto, Ontario, March 31, 2011**

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

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**RICHARD MONTESANO**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application made by the Attorney General of Canada for judicial review in respect of what purports to be a decision made by a member of the Pension Appeals Board (PAB) dated September 29, 2010. That decision granted leave to the Respondent Richard Montesano to appeal to that Board from a decision of the Review Tribunal Canada Pension Plan/Old Age Security dated June 14, 2010.

[2] The Respondent Mr. Montesano had worked for the Coca Cola Bottling Company as a syrup mixer and odd job man until February 2006, when his employment was terminated. He then sought benefits under the Canada Pension Plan alleging disabilities, including blindness in one eye, and various psychological disorders for which he was receiving prescription medication. He examined by a psychiatrist retained by the Board who provided a report.

[3] By a letter to Mr. Montesano dated August 14, 2008, the Minister of Human Resources and Skills Development Canada stated that it had denied his application for a disability pension. Mr. Montesano requested a re-consideration. That was done. By a letter dated April 3, 2009, the Minister again denied the application. This decision was appealed by Mr. Montesano to the Office of the Commissioner of Review Tribunals. On June 14, 2010, that appeal was dismissed.

[4] At this point, Mr. Montesano submitted a handwritten letter dated June 26, 2010 ( including a copy of submissions made by Human Resources at the Review Tribunal stage)addressed to “To Whom It May Concern” stating:

*Please note that although I have been denied at the C.P.P. Tribunal I am applying to the higher rank of such name as the Pension Appeals Board.*

[5] The record does not show what happened next. The next document in the record is a copy of a letter dated September 29, 2010 addressed to the Director, Medical Expertise Division, Human Resources and Skills Development Canada from the Registrar of the Pension Appeals Board referring to Mr. Montesano and stating:

*SUBJECT: Rick Montesano  
Canada Pension Plan*

*Appeal CP 27319*

*This Board has received an Application for Leave to Appeal the decision of a Review Tribunal held in North York, Ontario on March 4, 2010, for which leave was granted on September 27, 2010, by a member of this Board as required under Section 83 of the Canada Pension Plan.*

*Pursuant to Rule 10(1) of the Rules of Procedure of this Board, enclosed is a copy of the Notice of Appeal dated June 26, 2010 (pp. 1-6). Your attention is drawn to Rule 10(2).*

*If you wish to contest this appeal, would you kindly provide me with the Reply mentioned in Rule 10(3) within 30 days of receipt of this letter.*

[6] This letter is not the decision granting leave to appeal. It simply refers to such a decision made by an unnamed member of the Board on September 27, 2010. The decision itself is nowhere to be found in the record. The identity of the member is not disclosed. Other than the handwritten letter from Mr. Montesano previously referred to, there is nothing in the record to show that Mr. Montesano, or someone acting on his behalf, had made any submissions in respect of a request for leave to appeal. It is appreciated that reasons are only required when leave is denied but nowhere is the decision to grant leave itself recorded. However this Court has on several occasions stated that Reasons are required. This Court shares the frustration felt by Mr. Montesano in dealing with the Board. As one example of the Court's expression that reason be given I cite Justice deMontigny in *Canada (Attorney General) v Causey*, 2007 FC 422 at paragraphs 22 to 25:

[22] *Ms. Causey's application for leave to appeal has not, on its face, disclosed any arguable ground for appeal. The health issues noted in her letter of December 2, 2005, are not stated to have been in existence in December 1994, and are in fact stated to have developed only after the Review Tribunal's decision. Moreover, Ms. Causey's ability to care for her parents throughout the period prior to the appeal indicates she was capable of*

*regularly pursuing substantially gainful employment. That ability would preclude a finding of disability under the CPP.*

[23] *Not only did the Board member not identify an arguable ground of appeal, but he went so far as to say he doubted whether there was an arguable case. Granting leave to appeal in the absence of proper reasons, especially where the Board member questions whether a case is arguable, is an error of law, whatever standard of review is applied: Canada (Minister of Human Resources Development) v. Roy, 2005 FC 1456.*

[24] *I am also of the view that the decision under review must be quashed because the Board failed to provide meaningful reasons. It is true that pursuant to paragraph 83(3) of the CPP, it is only when leave is denied that written reasons must be given. But this Court, following the lead of the Federal Court of Appeal in Canada (Canadian Security Intelligence Service) v. Green, [1993] F.C.J. No. 1369 (F.C.A.) (QL), has found in previous rulings that discretionary decisions must always be supported with reasons: Canada (Minister of Human Resources Development) v. Roy, above, at paragraph 13; Canada (Minister of Human Resources Development) v. Dawdy, 2006 FC 429.*

[25] *It is with much regret that I come to this conclusion. There is no doubt that Ms. Causey has gone through difficult times. Her plight is far from enviable. Not only has her health failed her, but she now finds herself in a most dire situation as a result of caring for her aging parents. But Parliament chose not to grant appeals to the Pension Appeals Board as of right, and the discretion to determine those cases that merit further review must not be exercised by the Board capriciously or arbitrarily. Since neither the law nor the facts of this matter support the Board's decision, this Court is therefore bound to grant the Attorney General's application.*

[7] The Pension Appeals Board Rules of Procedure (Benefits) CRC, c 390 are quite specific as to the procedure to be followed in seeking leave to appeal, including the materials to be submitted.

Rule 4 provides:

*APPLICATION FOR LEAVE TO APPEAL*

*4. An appeal from a decision of a Review Tribunal shall be commenced by serving on the Chairman or Vice-Chairman an application for leave to appeal, which shall be substantially in the form set out in Schedule I and shall contain*

*(a) the date of the decision of the Review Tribunal, the name of the place at which the decision was rendered and the date on which the decision was communicated to the appellant;*

*(b) the full name and postal address of the appellant;*

*(c) the name of an agent or representative, if any, on whom service of documents may be made, and his full postal address;*

*(d) the grounds upon which the appellant relies to obtain leave to appeal; and*

*(e) a statement of the allegations of fact, including any reference to the statutory provisions and constitutional provisions, reasons the appellant intends to submit and documentary evidence the appellant intends to rely on in support of the appeal.*

[8] Nothing in the record indicates that Mr. Montesano followed this procedure or filed any of the required information or was excused from doing so. Rule 7 of the Appeal Board provides that a decision as to granting leave shall be disposed of *ex parte* unless the Chairman or Vice-Chairman otherwise directs. This does not mean that the decision does not need to be recorded in some way. Further, as stated above, the Board should have provided reasons.

[9] The Appeal Board Rules do not provide for an appeal in respect of a decision to grant leave to appeal; however Justice Blanchard of this Court, in *Canada (Attorney General) v Landry*, 2008 FC 810, at paragraphs 20 and 21, determined that such a decision may be judicially reviewed in this Court.

[10] In the present case, Mr. Montesano did not even provide the material required by Rule 4, *supra*, in support of his application for leave to appeal. If the Board excused him from doing so this

should be made of record. It was not. There is nothing on the record other than the letter from the Registrar referred to above, to show what the decision, if any, was to grant leave. There is nothing on the record to show what, if anything, was considered in making the decision. It seems that there may have been an unrecorded decision made by an unknown person on no basis whatsoever.

[11] This present application must be granted. The decision to grant leave to appeal, if it exists, must be set aside. The matter must be sent back for re-determination by a different member, presuming that the member who made the original decision can be identified. Mr. Montesano has been put through far too much in this matter and appeared on his own behalf in front of me. He encountered parking expenses and other expenses for which he should be compensated at \$20.00. He did not want to take this money but Applicant's Counsel, Ms. Noseworthy, at my insistence, not his, paid the \$20.00 to him and she should be compensated by her employer for that.

**JUDGMENT**

**FOR THE REASONS provided:**

**THIS COURT ADJUDGES that:**

1. The application is allowed;
2. The purported decision dated September 27, 2010 in which leave to appeal a decision of the Review Tribunal dated June 14, 2010 was granted, is quashed;
3. The matter is sent back for re-determination by a different member, presuming that the member making the purported decision can be identified; reasons must be given: and
4. The Applicant Mr. Montesano is entitled to disbursements of \$20.00 which has been paid as set out in the Reasons here.

“Roger T. Hughes”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1810-10

**STYLE OF CAUSE:** ATTORNEY GENERAL OF CANADA v.  
RICHARD MONTESANO

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 31, 2011

**REASONS FOR  
JUDGMENT BY:** HUGHES J.

**DATED:** MARCH 31, 2011

**APPEARANCES:**

Renée Darisse  
Dale Noseworthy

FOR THE APPLICANT

Richard Montesano

FOR THE RESPONDENT  
(Self-represented)

**SOLICITORS OF RECORD:**

Myles J. Kirvan  
Deputy Attorney General of Canada  
Toronto, Ontario

FOR THE APPLICANT

N/A

FOR THE RESPONDENT  
(Self-represented)