Date: 20080131

Docket: A-181-07

Citation: 2008 FCA 38

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
PELLETIER J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BILL JAGPAL

Respondent

Heard at Vancouver, British Columbia, on January 23, 2008.

Judgment delivered at Ottawa, Ontario, on January 31, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: SEXTON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] This application for judicial review raises two questions. First, whether there was a breach of procedural fairness in not giving the Minister of Human Resources and Social Development Canada (Minister) the opportunity to be heard on an application under subsection 84(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan) to rescind a decision of the Pension Appeals Board (Board).

[2] Second, whether the integrated process envisaged by subsection 84(2) of the Plan can be split into two hearings, one dealing with the issue of new facts, the other with the question of whether the new facts warrant a rescinding of the Board's earlier decision.

[3] Before giving a summary of the facts, I reproduce relevant provisions of the Plan as well as of the *Pension Appeals Board Rules of Procedure (Benefits)*, C.R.C. c. 390 (Rules):

The Plan

83. (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the Old Age Security Act, or under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.	**83.** (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 — autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la Loi sur la sécurité de la vieillesse — ou du paragraphe 84(2), ou, sous réserve des règlements, quiconque de sa part, de même que le ministre, peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long qu'autorise le président ou le vice-président de la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.
(2) The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.	(2) Sans délai suivant la réception d'une demande d'interjeter un appel auprès de la Commission d'appel des pensions, le président ou le vice-président de la Commission doit soit accorder, soit refuser cette permission.

(2.1) The Chairman or Vice-Chairman of the Pension Appeals Board may designate any member or temporary member of the Pension Appeals Board to exercise the powers or perform the duties referred to in subsection (1) or (2).

(2.1) Le président ou le vice-président de la Commission d'appel des pensions peut désigner un membre ou membre suppléant de celle-ci pour l'exercice des pouvoirs et fonctions visés aux paragraphes (1) ou (2).

(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.

(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.

(4) Where leave to appeal is granted, the application for leave to appeal thereupon becomes the notice of appeal, and shall be deemed to have been filed at the time the application for leave to appeal was filed.

(4) Dans les cas où l'autorisation d'interjeter appel est accordée, la demande d'autorisation d'interjeter appel est assimilée à un avis d'appel et celui-ci est réputé avoir été déposé au moment où la demande d'autorisation a été déposée.

(5) …

(5) […]

(6) An appeal to the Pension Appeals Board shall be heard by either one, three or five members of the Board, whichever number the Chairman of the Board directs, and where the appeal is heard by three or five members of the Board, the decision of the majority is a decision of the Board.

(6) Les appels interjetés auprès de la Commission d'appel des pensions sont, selon ce qu'ordonne le président de la Commission, entendus par, soit un membre, soit trois membres, soit encore cinq membres de la Commission et, lorsqu'ils le sont par trois ou cinq membres, la décision de la majorité des membres emporte décision de la Commission.

84. (1) …

84. (1) […]

(2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

[Emphasis added]

The Rules

APPLICATION	APPLICATION
3. These Rules apply to appeals brought pursuant to section 83 of the Act.	**3.** Les présentes règles régissent les appels interjetés en vertu de l'article 83 de la Loi.
DISPOSITION OF APPLICATIONS	RÈGLEMENT DES DEMANDES
7. An application under section 4 or 5 shall be disposed of ex parte, unless the Chairman or Vice-Chairman otherwise directs.	**7.** Il est statué ex parte sur les demandes visées aux articles 4 ou 5, à moins que le président ou le vice-président n'en décide autrement.

[4] It is not necessary to reproduce sections 4 and 5. Suffice it to say that section 5 of the Rules deals with requests for extension of time to seek leave to appeal a decision of a Review Tribunal. Section 4 refers to applications for leave to appeal to the Board under section 83 of the Plan.

The Facts and the applicant's submissions

[5] In a decision dated November 29, 2006, a member of the Board ruled that the respondent had submitted new facts under subsection 84(2) of the Plan. In his view, these facts were sufficient to make an arguable case to re-open a previous decision of the Board, dated February 22, 2005, by which the Board had dismissed the respondent's appeal from a decision of a Review Tribunal. The Board's decision was confirmed by our Court in January 2006: see *Jagpal v. Attorney General of Canada*, 2006 FCA 26.

[6] The applicant challenges, by way of judicial review pursuant to section 28 of the *Federal Courts Act*, the member's decision. The member dealt *ex parte* with the respondent's application pursuant to subsection 84(2). The applicant complains of a breach of procedural fairness. He submits that he was deprived of the opportunity to make submissions, present evidence or be heard in response to the respondent's application.

[7] The applicant also contends that the member could not treat a subsection 84(2) application as if it were an application for leave to appeal and decide it *ex parte*.

Whether the impugned decision is a decision of the Board or a decision of a member of the Board

[8] It is not clear if the decision under attack before us is a decision of the Board or a decision of a member of the Board. The decision itself, signed by a member of the Board, provides no indication one way or the other.

[9] We obtain no assistance from the Rules since there are no Rules governing subsection 84(2) applications. As it appears from Rule 3, the Rules, including *ex parte* hearings, apply only to appeals to the Board pursuant to section 83 of the Plan.

[10] The record before us does not indicate whether this is a new practice established by the Board or whether the process followed in this case is an isolated incident.

[11] We have no indication as to the statutory basis, if any, upon which the member of the Board proceeded as he did.

[12] The question is not purely theoretical. If the decision rendered was a decision of a member of the Board as opposed to a decision of the Board, then we are without jurisdiction to entertain the applicant's application for judicial review. Such application must be brought before the Federal Court of Canada pursuant to section 18.1 of the *Federal Courts Act*.

[13] Moreover, if this decision on the issue of new facts is a decision of a single member of the Board as opposed to a decision of the Board, the question is whether the Board is bound by that decision when it is called upon to determine whether these new facts justify a rescission of the decision.

[14] As I read subsection 84(2), it is clear to me that the jurisdiction to rescind or amend a Board's decision is conferred upon the Board itself, not upon a member of the Board.

[15] In *MacIsaac v. The Minister of Employment and Immigration*, Appeal CP 2938, August 12, 1994, at page 10, the Board expressed the view that subsection 84(2) applications "would have to be made to the Board that heard the matter in the first instance". While this may not always be possible, it is certainly a sound and efficient practice. It is one that this Court follows on a motion, pursuant to Rule 399(2) of the *Federal Courts Rules*, to set aside a decision that it has rendered.

[16] In conclusion, I can only assume that the Board complied with the Plan and that the November 29, 2006 decision by the member was a decision by the Board which is subject to judicial review by this Court.

Whether there was a breach of procedural fairness

[17] On February 1, 2006, the respondent wrote to “whom it may concern” at “Social Development Canada”: see respondent’s record, at pages 2 and 3. The letter was handwritten. The respondent indicated in it that he was in possession of new facts and that he wanted a reconsideration of his claim under subsection 84(2) of the Plan.

[18] In the material that he sent to the Minister on February 1, 2006, the respondent also included a new application for the disability benefit. This created confusion. A representative of the Minister contacted the respondent by phone in June 2006 to clarify the latter’s intentions.

[19] The respondent confirmed that his intention was to seek a rescission of the Board’s earlier decision pursuant to subsection 84(2). Of course, the Minister could not grant the remedy sought by the respondent. However, in order to assist the respondent who was self-represented, the Minister’s representative told the respondent that he would forward to the Board the respondent’s letter of February 1, 2006 along with the material that the respondent was to fax him in the coming days: see respondent’s record, exhibit A attached to the affidavit of Jennifer Allan.

[20] The Minister sent the material to the Board and waited for a subsection 84(2) application in due form to be served on him and filed with the Board.

[21] The first and only news that the Minister received from the Board was that it had processed the respondent's demand and concluded that it was satisfied that there were "sufficient new facts to make an arguable case to re-open the decision of the Board".

[22] The Minister was never informed that the Board was going to make a determination as to the legal character of the facts submitted by the respondent on the basis of the letter received. Nor was the Minister given the opportunity to make submissions in this respect: see applicant's record, volume 1, at page 8, paragraph 12 of the affidavit of Wendy Lystiuk.

[23] In order to come to the conclusion that the facts submitted by the respondent were new facts, the Board had to decide that the facts were not discoverable, with due diligence, prior to the first hearing. In addition, the Board had to rule that these facts were material, that is to say, that they may reasonably be expected to affect the outcome of the case.

[24] These were the events surrounding the decision of the Board. I will now address the allegation of a breach of procedural fairness.

[25] The respondent's application pursuant to subsection 84(2) was a demand to re-open and rescind a final and binding decision of the Board, which had been affirmed by this Court: see *Jagpal v. Attorney General of Canada*, *supra*.

[26] The applicant was at all times a party to all the proceedings instituted by the respondent to obtain a disability pension. Surely, procedural fairness required that the applicant be given an opportunity to be heard on an issue as serious as the rescission of a final decision.

[27] Subsection 84(2) provides for an exceptional recourse. It makes an exception to the finality principle which characterizes judicial or quasi-judicial decisions. The provision ought to be interpreted in a manner which ensures procedural fairness to the parties who were either bound by, or entitled to rely upon, the final decision now under a new attack.

[28] In *Adamo v. Canada (Minister of Human Resources Development)*, 2006 FCA 156, a Review Tribunal proceeded to rescind an earlier decision on the basis that there were new facts, without informing the parties of its intention to do so. Writing for a unanimous Court, Noël J.A. wrote at paragraphs 36 and 37:

> 36. However, before disposing of the matter on this basis, it was incumbent upon the Review Tribunal to advise the parties that it was considering the grant of a remedy pursuant to subsection 84(2) and to invite submissions as to whether this remedy was available. It could not dispose of the matter pursuant to subsection 84(2) without giving the parties the occasion to be heard on the issues which arise under that provision.
>
> 37. Having regard to this failure by the Review Tribunal to allow the parties to be heard, the PAB correctly held that the decision could not stand.

[29] In the public interest, the Government is responsible for the implementation of final and binding decisions rendered by the Board. It has a legitimate expectation of being heard on new proceedings challenging the finality of earlier decisions rendered pursuant to proceedings to which it was a party. As this Court said in *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, at paragraph 47, in addition to ensuring fairness, hearing the applicant would increase the likelihood of a more enlightened decision as well as promote the credibility of the Board itself.

[30] In an earlier decision, the Board asserted that the remedy provided by subsection 84(2) is discretionary and that the discretion should be exercised in favour of re-opening a hearing only in the most exceptional circumstances: see *MacIsaac v. The Minister of Employment and Immigration*, *supra*. At the very least, this is an indication that the Board sees, as it should, a subsection 84(2) application as a serious matter. I am astonished that an application to rescind a final and binding decision could be decided, as it was in this case, without the Government, which represents the public interest in these proceedings and manages the public purse, being given the opportunity to oppose and be heard.

[31] The failure of the Board to inform the applicant and invite submissions from him on the respondent’s application to rescind a Board’s decision pursuant to subsection 84(2) of the Plan resulted in a breach of procedural fairness.

Whether the Board could split the integrated process envisaged by subsection 84(2) into two hearings

[32] On a subsection 84(2) application, the Board is required to determine two issues: whether there are new facts submitted by the person who brings the application, and whether these new facts are of sufficient force to justify rescinding or amending the earlier decision.

[33] These two issues are inextricably linked and decided on the basis of the same evidence. Usually, they are decided at the same time by the same panel of the Board. This makes sense in terms of efficiency as well as fairness to the parties who do not have to attend two hearings. I am at a loss here to understand why the hearing of the subsection 84(2) application was split into two hearings: the one under review at which the Board decided the issue of "new facts", and the other, still to come, at which the Board will decide whether the new facts justify rescinding the earlier decision.

[34] I should stress that the determination of whether the facts now submitted amount to new facts within the meaning of subsection 84(2) is not a mere formality or, as counsel for the respondent put it, a mere threshold. It is a key issue upon which the jurisdiction of the Board to rescind its earlier decision depends. If no new facts are found, the decision cannot be rescinded.

[35] In addition to a loss of efficiency, the split of the process entails undesirable consequences. There is, first, the possibility of inconsistent decisions if, at the second stage of the process, the Board is not bound by the earlier determination that the proffered evidence is evidence of new facts.

[36] Second, the bifurcation of the process is conducive to unwarranted delays prejudicial to a disability claimant. This case is a vivid example of that since the determination by the Board of the second issue, i.e. whether the decision should be rescinded and the claimant entitled to benefits, was suspended while the decision on "new facts" was challenged before this Court.

[37] For these reasons, I would allow the application for judicial review, set aside the decision of the Board dated November 29, 2006 and refer the matter back to the Board for a new hearing of the respondent's application pursuant to subsection 84(2) of the Plan, to be held by a differently constituted panel in accordance with these reasons for judgment. No order as to costs was sought by the applicant.

"Gilles Létourneau"

J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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