Federal Court Cour fédérale

Date: 20121031

Docket: T-1989-11

Citation: 2012 FC 1269

Ottawa, Ontario, October 31, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

RODNEY TORRANCE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] It is not accurate to say that "hard cases make bad law." No less an authority than Lord Denning put the matter succinctly:

> If the law should be in danger of doing injustice, then equity should be called in to remedy.
>
> *Re Vandervell's Trusts (No 2)*, [1974] Ch 269, [1974] EWCA Civ 7

Such are the circumstances of this case where the Minister of Human Resources and Skills Development Canada has the equitable remedial power to remedy the refusal to grant Mr. Torrance his Canada Pension Plan Disability Pension [disability pension].

[2] This case turns on the applicability of the remedial provision of s 66(4) of the *Canada Pension Plan*, RSC 1985, c C-8 [the Act].

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.

[3] This is a judicial review of a decision of the Minister's Delegate refusing to award the Applicant a disability pension to which he was otherwise entitled had it not been for administrative errors made in the handling of his disability pension application. The facts of this case are unique and unfortunate.

II. BACKGROUND

[4] Rodney Torrance was 29 years old when he was rendered a quadriplegic due to a fall on August 29, 1998 and has been unable to continue working ever since. At the time of his accident, Mr. Torrance was self-employed as a bike courier on contract to a courier company. He held that position in 1997-98.

[5] In the 1990s up to 1997, the Applicant received employment income from three different employers. As will be seen, his change to self-employment impacted the preparation of his tax returns and the making of CPP contributions.

[6] In November 1998, three months after his severe accident, with the help of family and friends, he made his first disability pension application.

[7] The pension application was denied on December 14, 1998 because records indicated that he had made sufficient CPP contributions in only two years during the period 1993 to 1998. Eligibility for a disability pension required four years of contribution over that period.

[8] At the time of this first application Mr. Torrance had not filed tax returns for 1996, 1997 or 1998. The failure to file meant that important information related to CPP contributions was missing from his departmental file.

[9] Mr. Torrance then wrote to the then Department of Human Resources Development Canada [HRDC] on February 27, 1999 asking that his file be left open until he could file his returns. Mr. Torrance was obviously preoccupied in dealing with his fundamentally changed circumstances.

[10] On March 18, 1999, HRDC acknowledged Mr. Torrance's request to leave his file open. It treated the request as a request for reconsideration and set no time limits for the filing of tax returns or other financial information.

[11] Mr. Torrance filed his 1996 tax return shortly after HRDC's acceptance of his request to leave his file open but did not file 1997 and 1998 tax returns. The explanation given is that while the 1996 filing was relatively easy because it was employment income, 1997 and 1998 were more complicated due to his self-employment. The preparation of those returns required his direct involvement and he was in no condition to undertake that task.

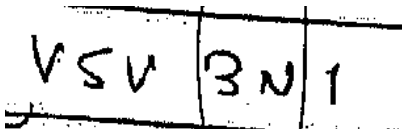
[12] Despite not filing his 1997 or 1998 tax returns, HRDC informed the Applicant on May 17, 1999 that "earnings information up to the year 1997" had been received and only his 1998 Notice of Assessment had to be filed. The information was requested "as soon as possible" but no time for completion was stated.

[13] The subsequent events show that starting with the communication of May 17, 1999, things were going awry on this file.

[14] After Mr. Torrance's accident, he became a resident of the GF Strong Rehabilitation Centre [GF Strong] for treatment and rehabilitation of serious injuries. On June 20, 1999, he moved from that facility into his own apartment. He left his forwarding address with GF Strong but did not specifically advise HRDC of his new address.

[15] HRDC sent a letter on June 30, 1999 to GF Strong setting a 45-day deadline for the filing of the necessary financial information, including reference to 1997 and 1998 tax years. The letter was returned to HRDC. What followed is commendable to those officials at HRDC who pursued the matter but along the way an error crept into the process.

[16] On July 22-23, 1999, HRDC officials attempted to learn Mr. Torrance's new address. In the process they contacted his doctor's office and GF Strong. GF Strong provided the new address and in the handwritten note the letter in the second part of the postal code was written as shown below. It appears to be the correct letter "V" with a little mark downward at the top left corner of the "V".



[17] On July 27, 1999, HRDC wrote to Mr. Torrance to advise that his disability pension application was denied. It gave him 90 days to apply for reconsideration and required his 1998 Notice of Assessment to accompany his reconsideration request.

[18] This July 27 letter was returned to HRDC and was not discovered by Mr. Torrance until 2007 when he reviewed the departmental files. The postal code contained an error. The stylized "V" in the handwritten note of the new address became an "N" in the typed postal code used for the letter.

[19] One need not be a forensic handwriting expert to see how this transposition could easily and inadvertently occur.

[20] It was not until 2006 that Mr. Torrance returned his attention to his disability pension. While all the circumstances related to this delay are not laid out, by 2006 Mr. Torrance had adjusted to his circumstances and he had a care aide who generously volunteered to help him with his tax returns.

[21] Mr. Torrance filed his 1997 and 1998 tax returns in 2006. Those returns demonstrated that Mr. Torrance had sufficient earnings in 1997 and 1998 to be eligible for a disability pension. He made contributions in 1997 on his employment income but he was statutorily prohibited to make CPP contributions for the 1998 tax year.

[22] Subsection 30(5) of the *Canada Pension Plan* provides that where a tax return was filed more than four years after the date required, Mr. Torrance's CPP premiums were deemed to be zero.

30. (5) The amount of any contribution required by this Act to be made by a person for a year in respect of their self-employed earnings for the year is deemed to be zero where	**30.** (5) Lorsque aucune déclaration des gains pour une année provenant du travail qu'une personne exécute pour son propre compte n'a été produite auprès du ministre,

(a) the return of those earnings required by this section to be filed with the Minister is not filed with the Minister before the day that is four years after the day on or before which the return is required by subsection (1) to be filed; and	ainsi que l'exige le présent article, et ce au plus tard quatre ans après la date à laquelle elle est tenue de produire pour l'année en question la déclaration visée au paragraphe (1), le montant de toute cotisation qui, d'après la présente loi, doit être versé par elle pour l'année, à l'égard de semblables gains, est réputé nul sauf si, avant l'expiration de ces quatre ans, le ministre a évalué la cotisation pour l'année à l'égard de ces gains.
(b) the Minister does not assess the contribution before the end of those four years.	

[23] There appears to be no issue that, but for the deeming provision, Mr. Torrance not only qualified but the Court was also advised there were funds in his 1997 tax account that could have been used for CPP contributions in 1998 but these funds were returned to Mr. Torrance.

[24] The Applicant previously challenged the Minister of National Revenue's application of s 30(5). Justice Beaudry in *Torrance v Canada (National Revenue)*, 2008 FC 1083, 335 FTR 164 concluded that the said Minister had no discretion in the application of s 30(5). Justice Beaudry did not address s 66(4) and the decision does not deal with the pertinent issues before this Court.

[25] In October 2010 the Applicant requested relief under s 66(4). This request was denied because there was no erroneous advice or administrative error. The refusal letter, sent by the presently-styled Human Resources and Skills Development Canada [HRSDC], stated:

(a) Mr. Torrance had the responsibility to file his tax returns. It was not HRSDC's responsibility to inform Mr. Torrance of the repercussions of not filing.

(b) There was no administrative error in refusing the application for a disability pension before the expiry of the 45 days stipulated in the June 30, 1999 letter. The information requested was medical in nature and the department had secured that information before the 45 days expired.

There is no mention of the undelivered letters and the effect non-delivery had on Mr. Torrance's rights or more importantly, how delivery of the letters would have permitted Mr. Torrance to protect his pension rights.

III. ISSUE

[26] The issue in this judicial review is whether the Minister's Delegate erred in determining that there was erroneous advice or administrative error which would have permitted the Minister of Human Resources and Skills Development Canada to exercise his remedial jurisdiction under s 66(4).

[27] The Respondent has raised the issue that s 66(4) would not be available to the Applicant because the deeming provisions of s 30(5) cannot be usurped by s 66(4).

IV. ANALYSIS

A. *Standard of Review*

[28] The parties accept that the standard of review for determination of erroneous advice or administrative error is reasonableness. This Court's decision in decisions such as *Manning v Canada (Human Resources Development)*, 2009 FC 523, 2009 CarswellNat 1408 and *Grosvenor v*

Canada (Attorney General), 2011 FC 799, 2011 CarswellNat 2532, confirm that this is the applicable standard of review.

[29] On the question of whether the Minister is able to exercise the remedial powers of s 66(4) in the face of s 30(5) is a legal matter to be determined on a standard of correctness (*Bartlett v Canada (Attorney General)*, 2012 FCA 230, 2012 CarswellNat 3473 [*Bartlett*]).

B. *Subsection 66(4)*

[30] The decision of the Minister's Delegate never specifically dealt with the issue of the mis-addressed communications. The best that can be said is that the matter was tied into the principal findings that a) there was no erroneous advice because HRSDC had no obligation to inform the Applicant of the repercussions of not filing his tax returns, and b) there was no administrative error in deciding to deny benefits before the 45 days referred to in the June 30, 1999 letter had expired.

[31] It is the Respondent's position that the error in addressing the letter denying benefits and giving an opportunity to apply for reconsideration is not HRSDC's responsibility since, according to the benefits application form, Mr. Torrance had the responsibility to inform HRSDC of his new address when he moved out of GF Strong.

[32] The Court of Appeal decision in *Bartlett*, above, is relevant and instructive even though the issue in that case was whether the individual was entitled to interest on her successful claim for pension benefits.

[33] The Court of Appeal at paragraph 52 confirmed that the legislative intent of subsection 66(4) is to provide the Minister with additional powers beyond those available under a reconsideration or appeal so as to remedy denials of benefits resulting from erroneous advice or administrative errors in situations where such errors could not otherwise be adequately remedied under the other provisions of the CPP.

[34] In interpreting and thus applying s 66(4), the Court of Appeal reiterated that the provision must be deemed remedial and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects (paragraph 59).

[35] The Court of Appeal further held that the very purpose of subsection 66(4) is to allow the Minister to take all equitable remedial actions which will ensure that a person who has been denied a benefit as a result of an administrative error is provided with an appropriate remedy (paragraph 60).

[36] In *Scheuneman v Canada (Human Resources Development)*, 2005 FCA 254, 2005 CarswellNat 1879, the Court of Appeal, in upholding the dismissal in a tort claim for administrative error, referred at paragraph 40 to the department's own report on administrative error:

> From a policy perspective, reviewing a case where Administrative Error is alleged is not a question of assigning fault, it is a question of paying a client benefits to which they are entitled. Therefore, the onus is on the department to conduct an investigation and restore whatever entitlement was lost as a consequence of the error.

[37] Against these legal and policy perspectives, it was unreasonable not to acknowledge that the failure to give Mr. Torrance notice of denial of his benefits, an opportunity to file for

reconsideration and to file his 1998 tax return as described in the July 27, 1999 letter, was due to an administrative error by personnel in HRSDC.

[38] Mr. Torrance's culpability in not sending the then-HRDC notice of his change of address is not determinative.

[39] This is a situation of a simple unfortunate error in the transposition of a postal code. It is not a question of negligence by officials versus any on Mr. Torrance's part.

[40] There are consequences which flow from that administrative error. Mr. Torrance was deprived of the opportunity to seek reconsideration and to remedy any filing deficiencies. As a result, he was denied his opportunity for a pension.

[41] Given the actions he has taken to comply with requirements and his intention to obtain a pension in 1999, it is unreasonable speculation (as advanced by the Respondent) that, faced with the July 27, 1999 letter, Mr. Torrance would not have complied with the pension filing requirements.

[42] In a "but for" world, but for the administrative error, Mr. Torrance would have filed his 1998 tax return and s 30(5) would have never come into play.

[43] Therefore, it was unreasonable to conclude that there was no administrative error. I need not address the issue of erroneous advice as Mr. Torrance need only establish one of either erroneous advice or administrative error to come under the remedial powers of s 66(4).

[44] As to the applicability of s 30(5) of the Act, the governing principle is that stated at paragraph 61 of *Bartlett*, above:

> Rather, the subsection [a reference to s 66(4)] gives the Minister broad and unfettered authority to take "appropriate" "remedial action" in order to ensure that the aggrieved person is made whole under the *CPP* as if "the administrative error [had] not been made."

[45] It is no answer and it would defeat the broad remedial purpose of s 66(4) to hold that the phrase "the person would be in under this Act" means that since s 30(5) is in the Act, the Minister's power to remedy is circumscribed by s 30(5).

[46] Therefore, s 30(5) would not operate if Mr. Torrance is to be placed in the position he would have been if the administrative error had not been made.

C. *Remedy*

[47] The Applicant has asked that the Court order the Minister to grant a pension because he is concerned that the Minister is intent on denying him a pension. This fear stems from the last submission made in the Minister's Memorandum of Fact and Law:

> However, in the event the application for judicial review is allowed, the Respondent submits that the appropriate remedy is to remit the matter to a different Minister's delegate for redetermination, although the Applicant will still be denied a disability pension because he did not make sufficient CPP contributions.

[48] As best the Court can determine, this submission is unfortunately worded. The insufficiency of CPP contributions arises because the Respondent claims s 30(5) is operative even in the face of administrative error and the broad power of s 66(4). The Court has dealt with that submission.

[49] The Minister is bound and the Court accepts that the Minister will act in accordance with the broad remedial power found in s 66(4). In *Bartlett*, above, the Court of Appeal described the broad discretion the Minister has in the manner by which the Applicant is placed in the position he would have been had the error not been committed.

> Subsection 66(4) provides the Minister with a large and unfettered authority to take such remedial action as she considers appropriate to place the appellant in the position that she would be under the *CPP* had the administrative error committed in her case not been made. This authority is broad enough to allow the Minister to consider whether, in the circumstances of the appellant, remedial action to compensate for the late payment of the benefits is appropriate or not. In exercising her authority under the subsection, the Minister must act reasonably, but she is nevertheless afforded a large degree of discretion in determining how the appellant could be placed in the position she would have been had the error not been committed (at para 66).

[50] It is not for the Court to give directions on the method of remediation. One could contemplate the possibility that, the 1998 tax returns having already been filed, the Applicant may be required to return any tax refund paid in respect of 1997-98 or to otherwise make up the CPP contribution the 1998 tax return filing may have triggered. Consideration of interest on those moneys could be relevant. There may be better, more equitable or practical means by which remediation can occur.

V. CONCLUSION

[51] For all these reasons, this judicial review will be granted, and the matter remitted to the Minister for reconsideration and the appropriate action under s 66(4).

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, and the matter is to be remitted to the Minister for reconsideration and the appropriate action under s 66(4).

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1989-11
STYLE OF CAUSE:	RODNEY TORRANCE and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 17, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	October 31, 2012

APPEARANCES:

Mr. James L. Thornback	FOR THE APPLICANT
Ms. Kétia Calix	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CAMP FIORANTE MATTHEWS MOGERMAN Barristers & Solicitors Vancouver, British Columbia	FOR THE APPLICANT
MR. MYLES J. KIRVAN Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT