

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110513

Docket: A-317-10

Citation: 2011 FCA 165

Present: SHARLOW J.A.

BETWEEN:

GREG MCMEEKIN

Applicant

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 13, 2011.

REASONS FOR ORDER BY:

SHARLOW J.A.

Federal Court
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REASONS FOR ORDER

SHARLOW J.A.

[1] Before me is a motion by applicant Greg McMeekin, filed April 29, 2011, seeking a number of orders, which I summarize as follows:

- a) an order compelling the respondent, the Minister of Human Resources and Skills Development, to pay costs of \$4,000 related to his previous notice of motion;
- b) an order declaring the Minister to be in default of the order of Justice Trudel dated April 7, 2011 because, contrary to that order, the Minister's written examination questions

were not served by April 15, 2011, and compelling the Minister to pay costs and damages of \$40,000 caused by extended delays and hardship relating to that default;

- c) an order compelling the Minister to pay the costs of this motion of \$6,000;
- d) an order compelling the Minister to disclose all information about Mr. McMeekin, including all of his *Canada Pension Plan* files, all medical files, all documents presented to Justice Desmarais in relation to the August 13, 2010 order of the Pension Appeals Board, and complete case files;
- e) an order granting Mr. McMeekin summary judgment in this application because of unreasonable delay, abuse of process, abuse of privilege and abuse of the *Canadian Charter of Rights and Freedoms*;
- f) an order awarding Mr. McMeekin \$500,000 for the hardship brought on by unreasonable delays and abuse, \$4000 for travel and accommodations to file a response to the Minister's motion, and \$6000 for travel and accommodations to file this motion;
- g) an order awarding Mr. McMeekin \$10 million damages;
- h) an order compelling the Minister to introduce legislation to assist deaf people to receive disability pensions without further determination;
- i) an order sealing all of Mr. McMeekin's medical records and documents related to this proceeding;

- j) an order requiring Mr. McMeekin to be paid disability benefits retroactive to February 6, 1996;
- k) an order compelling the Minister to pay \$40,000 in costs for travel and medical expenses relating to these proceedings from 2003;
- l) if Mr. McMeekin is required to answer the Minister's questions despite being served late, an order that the questions be dealt with at an oral hearing in Edmonton.

[2] Mr. McMeekin has asked for an oral hearing of his motions. Unlike the Federal Court, the Federal Court of Appeal does not schedule specific days for hearing motions. The usual practice in this Court is to deal with all motions on the basis of written submissions under Rule 369 of the *Federal Courts Rules*. The moving party or a respondent is entitled to request an oral hearing, but such a request is granted only in cases of urgency or other special circumstances. The record before me discloses nothing to justify an oral hearing of Mr. McMeekin's motions. Therefore, it will be dealt with on the basis of the documents submitted.

[3] The Minister has not filed a responding motion record. Instead, counsel for the Minister has submitted to the Court a letter dated May 5, 2011 (a copy of which has apparently been sent to Mr. McMeekin) bearing the caption "Request for Directions".

[4] The directions sought by the Minister could and should have been brought by motion and I do not propose to address them, with one exception. The Minister has asked for the appointment of

a case manager. This is the Minister's second such request. As outlined in more detail below, Justice Trudel determined only last month that case management is not required in this case. In my view, nothing has happened to justify a renewal of the Minister's request, or a reversal of Justice Trudel's decision on that point. The Minister's request for case management will be denied.

[5] The Minister's May 5, 2011 letter contains a number of submissions that in effect are responses to the motions of Mr. McMeekin in his motion record. All of these could and should have been made in a respondent's motion record. Despite this irregularity of form, I will treat the May 5, 2011 letter as the submissions made by the Minister in response to Mr. McMeekin's motions. I note that Mr. McMeekin has done the same, because by letter to the Court dated May 6, 2011, he has replied to the May 5, 2011 letter.

Background

[6] In order to put this matter in context, it is useful to consider some of the history of this matter. Mr. McMeekin lives in Hay River, NWT. He applied in June of 2006 for a disability pension under the *Canada Pension Plan*, on the basis that he is unable to work because of nerve deafness. His application was denied by the Minister.

[7] Mr. McMeekin appealed the Minister's decision to the Review Tribunal. According to the reasons for decision of the Review Tribunal, it was agreed that Mr. McMeekin's "minimum qualifying period" (MPQ) ended in December of 2002. On that basis, the Review Tribunal considered the main issue to be whether the evidence established that, as of December of 2002, it

was more likely than not that Mr. McMeekin had a disability as of that date that met the statutory test of disability. The Review Tribunal determined that the evidence was not sufficient to establish the requisite degree of disability as of that time. Therefore, in a decision dated March 26, 2008, the Review Tribunal dismissed Mr. McMeekin's appeal.

[8] Mr. McMeekin applied to the Pension Appeals Board for leave to appeal the decision of the Review Tribunal. Leave was granted by letter dated August 5, 2008. A hearing of the Pension Appeals Board was convened in Edmonton on September 3, 2009.

[9] At that hearing, the Minister filed a motion alleging that Mr. McMeekin had refused to comply with section 68 of the *Canada Pension Plan Regulations*, which requires a claimant for a disability pension to provide information and submit to a medical examination if requested by the Minister. The Minister was seeking an order dismissing Mr. McMeekin's appeal, or alternatively an order requiring Mr. McMeekin to comply with section 68, and deferring the hearing of his appeal until he had complied. In response to that motion, Mr. McMeekin explained the facts from his point of view, alleging among other things that the Minister had failed to cooperate with Mr. McMeekin when he made himself available for a medical examination. In any event, Mr. McMeekin ultimately agreed to submit to a medical examination. The Minister's motion was granted, and the hearing of the Pension Appeals Board was adjourned.

[10] The hearing of the Pension Appeals Board was rescheduled for September 1, 2010 in Edmonton. However, on August 12, 2010, counsel for the Minister wrote to the Registrar of the Pension Appeals Board, sending a copy Mr. McMeekin. The letter reads as follows:

We are writing to you with respect to the above noted appeal which is scheduled to proceed to hearing on Wednesday, September 1st, 2010.

Please be advised that the Minister's position in this matter is that the Appellant became disabled within the meaning of the Canada Pension Plan as of December 2002. Pursuant to paragraph 44(1)(b)(ii) of the CPP the earliest he can be deemed disabled is March 2005 based on the date of his application for benefits. As such, and pursuant to section 69 of the Plan he is entitled to benefits commencing in July 2005.

We can further advise that the Minister will not be calling any witnesses.

[11] This letter concedes the main point decided by the Review Tribunal against Mr. McMeekin, i.e., whether he had a severe and prolonged disability as of December of 2002.

[12] The August 12, 2010 letter also indicates that Mr. McMeekin's entitlement to a disability pension would begin as of July of 2005. The Minister's position seems to be that, by virtue of the combined operation of subparagraph 44(1)(b)(ii) and section 69 of the *Canada Pension Plan*, Mr. McMeekin's entitlement to retroactive benefits is limited to the 12 months immediately preceding his application in June of 2006. Whether this is correct in law is a question that may be determined in this application.

[13] On August 20, 2010, apparently in response to the August 12, 2010 letter, Justice Desmarais, a member of the Pension Appeals Board, issued an order reading as follows:

Further to a letter received August 13, 2010 from Allan Matte, Counsel for the Minister, it was brought to the Board's attention that their position in this matter is that the Appellant became disabled within the meaning of the Canada Pension Plan (CPP) as of December 2002.

Pursuant to subparagraph 44(12)(b)(ii) of the CPP the earliest the Appellant can be deemed disabled is March 2005 based on the date of his application for benefits and pursuant to section 69 of the CPP he is entitled to benefits commencing in July of 2005.

There is no reasonable explanation for any further delay and in the absence of no [sic] prejudice to the Appellant, I am prepared to find this matter settled and finalized in favour of the Appellant receiving a disability benefit.

It is also desirable that there be finality to proceedings under the Canada Pension Plan. This Board has no further jurisdiction, as the Minister's Consent to Judgment offers the Appellant the maximum allowable under section 44(1)(b)(ii).

IT IS ORDERED *in camera* that the appeal be granted, and, that the previously scheduled hearing of this matter be cancelled.

[14] On September 10, 2010, Mr. McMeekin filed an application for judicial review of this order, seeking numerous remedies, including an order entitling him to a disability pension for a further retroactive period. Mr. McMeekin alleges among other things that the procedure followed by Justice Desmarais in allowing his appeal in secret, without giving him an opportunity to be heard, was a denial of procedural fairness. As I understand Mr. McMeekin's position, he would have made submissions, if allowed to do so, on the appropriate period for retroactive disability benefits, and he would have sought other relief from the Minister.

[15] Mr. McMeekin has apparently served the Minister with an affidavit in support of his application for judicial review, as he was required to do. The Minister wishes to cross-examine Mr. McMeekin on his affidavit.

[16] On March 3, 2011, the Minister moved for an order extending the time for serving written examination questions, compelling Mr. McMeekin to answer the questions, and dismissing this proceeding, Mr. McMeekin responded by submitting a response and counter motion. The Crown, alleging a number of deficiencies in Mr. McMeekin's material, sent a letter to the Court requesting directions and the appointment of a case manager.

[17] The questions that the Minister originally wished to have Mr. McMeekin answer were included in the motion record. They are as follows:

1. Your name is Greg McMeekin?
2. You reside at [address]?
3. You commenced the proceedings in Federal Court of Appeal A-317-10?
4. You swore the affidavit entitled "Affidavit of Greg McMeekin" dated October 8, 2010?
5. Do you agree that in paragraph 2 of your affidavit you allege that a private in camera meeting took place between Allan Matte, Counsel for HRSDC and Justice Robert C. Desmarais on August 20, 2010?
6. Are you aware that Allan Matte swears in his affidavit at paragraph 15 that no such meeting took place between himself and Justice Desmarais?
7. Do you agree that you have provided no evidence to substantiate your allegation that such meeting took place between Allan Matte and Justice Desmarais?
8. In paragraph 2 of your affidavit you allege that Justice Desmarais "upon request from Allan Matte" handed down the August 20, 2010 order (at Exhibit A, p. 5-6 of Allan Matte's Affidavit)?

9. Do you agree that the letter from Mr. Matte to the Pension Appeals Board, dated August 12, 2010 (Exhibit A, p. 238 of Allan Matte's Affidavit), indicated the Minister's change in position with respect to your application for CPP Disability benefits, namely, that the Minister considered you disabled within the meaning of the CPP as of December 2002?
10. Do you agree that the letter from Mr. Matte to the Pension Appeals Board, dated August 12, 2010 (Exhibit A, p. 238 of Allan Matte's Affidavit), also indicated that the Minister would be calling no witnesses at the upcoming hearing?
11. Do you agree that Mr. Matte's letter to the Pension Appeals Board, dated August 12, 2010 (Exhibit A, p. 238 of Allan Matte's Affidavit), is therefore indicative of his presumption that the PAB hearing would be going ahead as scheduled, as he indicated that the Minister would be calling no witnesses at the upcoming hearing?
12. Do you agree that the letter from Mr. Matte to the Pension Appeals Board, dated August 12, 2010 (Exhibit A, p. 238 of Allan Matte's Affidavit) did not request an Order from the Pension Appeals Board?
13. Do you agree that you have provided no evidence to substantiate your allegation that Justice Desmarais' Order was requested by Mr. Matte?
14. Do you agree that Mr. Matte's letter to the Pension Appeals Board dated August 12, 2010 (Exhibit A, p. 238 of Allan Matte's Affidavit) did not disclose that a settlement offer had been made to you?
15. Do you agree that it was you who disclosed to the Pension Appeals Board that a settlement offer had been made to you by the Minister?
16. Do you agree that it was you who disclosed to the Pension Appeals Board that you rejected the Minister's settlement offer?
17. Do you agree that you disclosed to the Pension Appeals Board in a letter dated December 23, 2009 (Exhibit A of Trevor Bark's affidavit and Exhibit E of the Applicant's Affidavit) that a settlement offer had been made to you by the Minister and that you rejected it?
18. Do you agree that you disclosed to the Pension Appeals Board in a letter dated February 26, 2010 (Exhibit B of Trevor Bark's affidavit) that a settlement offer had been made to you by the Minister and that you rejected it?

19. Do you agree that you disclosed to the Pension Appeals Board in an undated letter entitled “Letter of Response to Mr. Stevenson’s December 15, 2009 offer” (Exhibit A of Trevor Bark’s Affidavit and Exhibit E of the Applicant’s Affidavit) that a settlement offer had been made to you by the Minister and that you rejected it?
20. Do you agree that in your affidavit you question Justice Desmarais’ ability to remain impartial and independent?
21. Do you agree that in your affidavit you allege that Justice Desmarais is biased?
22. Do you agree that you have presented no evidence to substantiate the allegations in your affidavit against Justice Desmarais?
23. Do you agree that the Pension Appeals Board has no jurisdiction to award you monetary damages?
24. Do you agree that the Pension Appeals Board has no jurisdiction to award you interest on monies claimed by you?
25. Do you agree that the Pension Appeals Board has no jurisdiction to award you reimbursement for medical costs?
26. Do you agree that the Pension Appeals Board has no jurisdiction to award you retroactive benefit payments back to the date you were born?
27. Do you agree that the Pension Appeals Board has no jurisdiction to order a review by the Law Society of Upper Canada?
28. Do you agree that the Pension Appeals Board has no jurisdiction to order a review by the Canadian Judicial Council?
29. Do you agree that the Pension Appeals Board has no jurisdiction to order an amendment to the *Canada Pension Plan*?
30. Do you agree that you did not raise a challenge under the *Canadian Charter of Rights and Freedoms* before the Pension Appeals Board?
31. Do you agree that as an applicant for CPP Disability benefits, you have the onus to present any medical records you would like to be considered by the decision maker?
32. Do you agree that there is no obligation on the Minister to arrange for an independent medical examination (IME)?

33. Do you agree that the Order of Justice Desmarais dated August 20, 2010 (at Exhibit A, p. 5-6 of Allan Matte's Affidavit) means that you have been awarded CPP Disability benefits?
34. Do you agree that the Order of Justice Desmarais dated August 20, 2010 (at Exhibit A, p. 5-6 of Allan Matte's Affidavit) awards you the maximum retroactive payment permissible under the CPP?
35. Do you agree that the Pension Appeals Board had no jurisdiction to award you anything further?

[18] The motions and cross motions were dealt with by Justice Trudel on April 7, 2011. She concluded that the Minister acted reasonably in requiring answers to these questions although she suggested, without requiring, that questions 6, 7, 9 to 14, 22 to 32 and 35 be removed as argumentative or relating to questions of law.

[19] By order dated April 7, 2011, Justice Trudel required the Minister to serve Mr. McMeekin again with its list of questions before April 15, 2011, and required Mr. McMeekin to serve and file his affidavit responding to the questions no later than May 16, 2011, failing which his application could be dismissed without further delay. Mr. McMeekin's motion and counter motion were dismissed, and the Minister's request for case management was also dismissed. Justice Trudel provided the parties with a memorandum explaining her order.

The present motions of Mr. McMeekin

[20] Mr. McMeekin alleges in his notice of motion that the Minister failed to serve its list of questions by April 15, 2011. In his affidavit, he says that he did not receive them before April 20, 2011. However, he does not deny that he received them and I infer that he has received them.

[21] The Minister's letter of May 5, 2011 says that the list of questions was amended in accordance with Justice Trudel's suggestions. Appended to the Minister's letter is a copy of the affidavit of Kathleen Gates sworn May 3, 2011, stating that the questions were given to Canada Post for priority delivery on April 8, 2011 (which was a Friday) and that according to the tracking records of the postal authorities, they were delivered to Mr. McMeekin at his address in Hay River on April 15, 2011 (the following Friday).

[22] According to Rule 140, the Minister was entitled to serve the questions on Mr. McMeekin in one of a number of ways. One permissible way was to send it by mail to Mr. McMeekin's address for service pursuant to Rule 140(1)(b). That is the method chosen by the Minister. It was not mailed by ordinary mail or registered mail, but by priority post. There is no rule stipulating an effective date of service for documents sent by priority post. However, as a practical matter, it is reasonable to infer that something sent by priority post and actually delivered on April 15, 2011 would have been received by the addressee on that date, or at least within the 10 days stipulated by Rule 141(1) for the effective date of service by ordinary mail. I infer, therefore, that Mr. McMeekin was effectively served on Friday, April 15, 2011, or if not, then no later than Monday, April 18, 2011.

[23] This leaves it uncertain as to whether or not Mr. McMeekin was served within the time stipulated by the order of Justice Trudel. However, even if he did not receive the questions by April 15, 2011, the stipulated date, he probably received them no later than 3 days after that date. I acknowledge Mr. McMeekin's consistent complaints about the many years of delay that followed his initial 2006 application for a disability pension, but there is no evidence that Mr. McMeekin would have been prejudiced by a few days delay in receiving the questions that the Minister is entitled to have answered.

[24] In the circumstances, I will extend the time within which Mr. McMeekin must serve and file his affidavit in response to the Minister's questions. His original deadline was May 16, 2011. I will extend it to May 31, 2011. I will also stipulate that if Mr. McMeekin fails to meet this new deadline, his application may be dismissed without further notice.

[25] In my view Mr. McMeekin has not justified any further relief in connection with the service of the Minister's questions, or any of the other orders he is seeking. In particular, I see no need to require that the questions be answered at an oral hearing in Edmonton. Mr. McMeekin has demonstrated his ability to communicate in writing, and to prepare, serve and file an affidavit.

[26] That is sufficient to dispose of Mr. McMeekin's motions, but I have some additional observations.

[27] First, contrary to Mr. McMeekin's apparent understanding, this Court has no jurisdiction, in the context of an application for judicial review of a decision of the Pension Appeals Board, to compel the Minister to pay damages or to introduce legislative amendments. It would be counter productive for Mr. McMeekin to reassert such claims in this proceeding.

[28] Second, this Court has no jurisdiction to require the payment of retroactive disability benefits except in accordance with the *Canada Pension Plan*. Nor does this Court have the jurisdiction to order the payment of retroactive disability payments as compensation for alleged wrongful behaviour on the part of the Minister, Ministerial officials, or counsel for the Minister. Again, it would be counter productive for Mr. McMeekin to reassert such claims in this proceeding.

[29] Third, Mr. McMeekin's various claims for costs, including the costs of travel in connection with these proceedings, are matters that are best dealt with at the conclusion of these judicial proceedings, and not in the context of pre-hearing motions. Costs generally are a matter within the discretion of the panel hearing the application, and are governed by specific provisions in the *Federal Courts Rules* including Tariff B, which would result in an award of costs considerably less than Mr. McMeekin is now claiming. Mr. McMeekin will be entitled to ask for costs in accordance with the *Federal Courts Rules*, and will likely be awarded costs if his application is successful. However he should be aware that the Minister is also entitled to claim costs, and may be awarded costs if this application is dismissed.

[30] Fourth, it is not clear whether this Court has the jurisdiction in this proceeding for an order requiring the production of documents not already on the record, or an order sealing records in the possession of the Minister. Even if such relief is legally possible, it would be an extraordinary remedy that cannot be justified on the basis of the material submitted by Mr. McMeekin.

[31] Fifth, it appears that Mr. McMeekin has to date been travelling from Hay River to Edmonton to file documents in this matter. However, he may be incurring travel costs unnecessarily. The Registry in Edmonton will accept documents for filing when delivered by courier or mail.

[32] Finally, I note that Mr. McMeekin alleges in the affidavit included in his motion record that the Minister or counsel for the Minister acted improperly in influencing Justice Trudel to make her order of April 7, 2011. That allegation is unsupported by any evidence on the record. Mr. McMeekin is advised that it is considered an abuse of the Court's process to make unsubstantiated allegations of improper behaviour in connection with Court proceedings. Such an abuse of process could result in the dismissal of this application.

Summary of conclusions

[33] For the reasons stated above, the motions of Mr. McMeekin will be dismissed. Mr. McMeekin will be ordered to serve and file his affidavit of responses to the Minister's questions by May 31, 2011, failing which this application may be dismissed without further notice. The Minister's request for case management will be denied.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-317-10

STYLE OF CAUSE: Greg McMeekin v. Minister of
Human Resources and Skills
Development

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: SHARLOW J.A.

DATED: May 13, 2011

WRITTEN REPRESENTATIONS BY:

Greg McMeekin

FOR THE APPLICANT
(SELF REPRESENTED)

Dale Noseworthy
Benoit Laframboise
Allen Matte

FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A

FOR THE APPLICANT
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Myles J. Kirvan
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FOR THE RESPONDENT