

Date: 20070129

Docket: T-200-06

Citation: 2007 FC 99

Montréal, Quebec, the 19th day of January 2007

Present: The Honourable Mr. Justice Martineau

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

LISE VINET-PROULX

Respondent

REASONS FOR ORDER AND ORDER

[1] The Attorney General of Canada asks this Court to set aside the decision dated November 9, 2005, of the Office of the Commissioner of Review Tribunals (hereafter the “Review Tribunal”) declaring that Ms. Vinet-Proulx is entitled to Old Age Security benefits from July 2002.

[2] According to the evidence on the record of the Court, Ms. Vinet-Proulx reached the age of 65 years on June 10, 2002. She made an initial application for an old age pension in February or March 2001, by letter. At that time, she was advised by the Department of Human Resources Development (hereafter “the Department”) that her application was premature, since she had not yet reached 65 years of age. In December 2001, she received the documentation required to apply for

her Old Age Security benefits. She then gave this documentation to her accountant, who promised to look into things, but did nothing. Ms. Vinet-Proulx changed accountants. In March or April 2003, while he was preparing her tax returns for 2002, Ms. Vinet-Proulx's new accountant noted that she was not receiving any Old Age Security benefits. He called the Department, with Ms. Vinet-Proulx present, to check on why she was not receiving any benefits. An employee advised him that the Department had not received an application. Therefore, he completed an application for benefits, which Ms. Vinet-Proulx hurriedly mailed to the Department in March or April 2003. However, neither the accountant nor Ms. Vinet-Proulx kept a copy of the application or proof of postage. In April 2004, Ms. Vinet-Proulx consulted her accountant regarding her income tax return for 2003. He noted that his client was still not receiving Old Age Security benefits. Ms. Vinet-Proulx filled out another application form for Old Age Security benefits, and this time, on the advice of her accountant, she mailed it to the Department by registered mail on April 13, 2004. The Department received the new application the next day. On June 8, 2004, Ms. Vinet-Proulx was advised by the Department that her application for Old Age Security benefits was approved and that she would receive her benefits retroactively from May 2003 (the Minister's initial decision).

[3] In a letter dated July 28, 2004, Ms. Vinet-Proulx requested a reconsideration of the Minister's initial decision, stating that she had sent the Department an application for benefits in March or April 2003. In support of her request for reconsideration, she submitted a letter from her accountant confirming that an initial application had been filled out and sent to the Department in March 2003. Searches of the Department archives were apparently made in June and August 2004. These searches showed that there was only one application for benefits in Ms. Vinet-Proulx's file.

This was the application signed on April 13, 2004, and received on April 14, 2004. No other computer entry concerning an application received before April 2004 could be tracked down in the Department's systems. In a letter dated December 15, 2004, Ms. Vinet-Proulx was advised that the Minister's initial decision had been upheld (the Minister's revised decision). On the same day, Ms. Vinet-Proulx appealed the Minister's revised decision to the Review Tribunal.

[4] On November 9, 2005, the Review Tribunal heard the appeal and decided to allow it. First of all, the Review Tribunal was of the opinion that the testimonies of Ms. Vinet-Proulx and her accountant were credible and concluded that they had completed and sent in the application for Old Age Security benefits by regular mail in March or April 2003. Furthermore, the Review Tribunal determined that Ms. Vinet-Proulx had done what she had to do to make an application for benefits. Thus, a posted letter had to be presumed to have been received by its addressee. Accordingly, the Review Tribunal concluded that Ms. Vinet-Proulx met all the entitlement conditions for Old Age Security benefits and had thus been entitled to receive them as of July 2002, not May 2003, as the Minister had previously decided.

[5] The Court must now determine if the Review Tribunal exceeded its jurisdiction or otherwise erred in law in declaring that Ms. Vinet-Proulx had been entitled to Old Age Security benefits since July 2002, that is, one month after her 65th birthday. On the one hand, it is uncontested that the standard of review applicable to a jurisdictional error or an error of law by a review tribunal is correctness (*Canada (Minister of Human Resources Development) v. Dublin (Estate of)*, 2006 FC 152, [2006] F.C.J. No. 258 (QL), at paragraph 6, and case law cited in this decision). On

the other hand, if the error invoked by the applicant concerns a question of fact that is within the jurisdiction of the Review Tribunal, the applicable standard is patent unreasonableness.

[6] In the case at bar, the Attorney General of Canada submits that the Review Tribunal exceeded its jurisdiction in conducting an analysis of the evidence that only the Minister may do in a case of erroneous advice or administrative error and in granting Old Age Security benefits to Ms. Vinet-Proulx from July 2002. The Attorney General of Canada also submits that the Review Tribunal erred in law in determining that a posted letter must be presumed to have been received by the addressee and in concluding that the Department had received Ms. Vinet-Proulx's application for benefits in March or April 2003, the year following her 65th birthday, thus entitling her to a pension from the month of July 2002.

[7] Ms. Vinet-Proulx represented herself. At the Court hearing, she was accompanied by her accountant, who counselled her. In brief, she submits that the contested decision was rendered on the basis of the evidence and was well founded for the reasons already given by the Review Tribunal, which decided to believe her testimony and that of her accountant.

[8] For the reasons that follow, this application for judicial review must be allowed. My conclusion is based solely on the Review Tribunal's lack of jurisdiction to render the order challenged in this case. Having said this, I hasten to add that the issues of determining on what date an application for benefits was sent by an applicant and of determining on what date the application in question was received by the Department are questions of fact that are within the jurisdiction of

the Review Tribunal. It may decide the issue on the basis of the testimonies heard and the documents filed, or even on the basis of presumptions, on a balance of probabilities. However, the crux of the dispute is the Minister's initial decision and revised decision, which were rendered on the basis of the application for benefits received by the Minister on April 14, 2004, and on the basis of another application for benefits completed by the applicant and which was not found, assuming it exists, by the Minister.

[9] Sections 8 and 27.1, subsection 28 (1) and section 32 of the *Old Age Security Act*, R.S.C. 1985, c. O-9 (hereafter "Act") are relevant to the case at bar. They read as follows:

8. (1) Payment of pension to any person shall commence in the first month after the application therefore has been approved, but where an application is approved after the last day of the month in which it was received, the approval may be effective as of such earlier date, not prior to the day on which the application was received, as may be prescribed by regulation.

(2) Notwithstanding subsection (1), where a person who has applied to receive a pension attained the age of sixty-five years before the day on which the application was received, the approval of the application may be effective as of such earlier day, not before the later of

(a) a day one year before the day on which the application was received, and

8. (1) Le premier versement de la pension se fait au cours du mois qui suit l'agrément de la demande présentée à cette fin; si celle-ci est agréée après le dernier jour du mois de sa réception, l'effet de l'agrément peut être rétroactif au jour — non antérieur à celui de la réception de la demande — fixé par règlement.

(2) Toutefois, si le demandeur a déjà atteint l'âge de soixante-cinq ans au moment de la réception de la demande, l'effet de l'agrément peut être rétroactif à la date fixée par règlement, celle-ci ne pouvant être antérieure au soixante-cinquième anniversaire de naissance ni précéder de plus d'un an le jour de réception de la demande.

(b) the day on which the applicant attained the age of sixty-five years, as may be prescribed by regulation.

27.1 (1) A person who is dissatisfied with a decision or determination made under this Act that no benefit may be paid to that person, or respecting the amount of any benefit that may be paid to that person, may, within ninety days after the day on which the person is notified in the prescribed manner of the decision or determination, or within such longer period as the Minister may either before or after the expiration of those ninety days allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

(2) The Minister shall, without delay after receiving a request referred to in subsection (1), reconsider the decision or determination, as the case may be, and may confirm or vary it and may approve payment of a benefit, determine the amount of a benefit or determine that no benefit is payable and shall without delay notify the person who made the request in writing of the Minister's decision and of the reasons for the decision.

28.(1) A person who makes a request under subsection 27.1(1) and who is dissatisfied with the decision of the Minister in respect of the request, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal under subsection 82(1) of the *Canada Pension Plan*.

27.1 (1) La personne qui se croit lésée par une décision de refus ou de liquidation de la prestation prise en application de la présente loi peut, dans les quatre-vingt-dix jours suivant la notification de la décision, selon les modalités réglementaires, ou dans le délai plus long que le ministre peut accorder avant ou après l'expiration du délai de quatre-vingt-dix jours, demander au ministre, selon les modalités réglementaires, de réviser sa décision.

(2) Le ministre étudie les demandes dès leur réception; il peut confirmer ou modifier sa décision soit en agréant le versement de la prestation ou en la liquidant, soit en décidant qu'il n'y a pas lieu de verser la prestation. Sans délai, il notifie sa décision et ses motifs.

28.(1) L'auteur de la demande prévue au paragraphe 27.1(1) qui se croit lésé par la décision révisée du ministre — ou, sous réserve des règlements, quiconque pour son compte — peut appeler de la décision devant un tribunal de révision constitué en application du paragraphe 82(1) du *Régime de*

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pensions du Canada.

(...)

32. 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 a benefit, or a portion of a benefit, to which that person would have been entitled under this Act, 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

32. S'il est convaincu qu'une personne s'est vu refuser tout ou partie d'une prestation à laquelle elle avait droit par suite d'un avis erroné ou d'une erreur administrative survenus dans le cadre de la présente loi, le ministre prend les mesures qu'il juge de nature à replacer l'intéressé dans la situation où il serait s'il n'y avait pas eu faute de l'administration.

[10] Sections 3 and 5 of the *Old Age Security Regulations*, C.R.C., c. 1246 (hereafter "Regulations"), must also be considered. These provisions read as follows:

3. (1) Where required by the Minister, an application for a benefit shall be made on an application form.

(2) Subject to subsections 5(2) and 11(3) of the Act, an application is deemed to have been made only when an application form completed by or on behalf of an applicant is received by the Minister.

5. (2) Where the Minister is satisfied that an applicant mentioned in subsection (1) attained the age of 65 years before the day on which the application was received, the Minister's approval of the application shall be effective as of the latest of

3. (1) Si le ministre l'exige, la demande de prestation doit être présentée sur une formule de demande.

(2) Sous réserve des paragraphes 5 (2) et 11(3) de la Loi, une demande n'est réputée présentée que si une formule de demande remplie par le demandeur ou en son nom est reçue par le ministre.

5. (2) Lorsque le ministre est convaincu que le demandeur visé au paragraphe (1) a atteint l'âge de 65 ans avant la date de réception de sa demande, l'agrément de celle-ci prend effet à celle des dates suivantes qui est postérieure aux autres :

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| <p>(a) the day that is one year before the day on which the application was <u>received</u>,</p> | <p>a) la date qui précède d'un an celle de la <u>réception</u> de la demande;</p> |
| <p>(b) the day on which the applicant attained the age of 65 years;</p> | <p>b) la date à laquelle le demandeur a atteint l'âge de 65 ans;</p> |
| <p>(c) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act; and</p> | <p>c) la date à laquelle le demandeur est devenu admissible à une pension selon les articles 3 à 5 de la Loi;</p> |
| <p>(d) the month immediately before the date specified in writing by the applicant.</p> | <p>d) le mois précédant la date indiquée par écrit au demandeur.</p> |

[11] Finally, subsections 82(1) and (11) as well as subsection 84(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (hereafter "CPP"), are also relevant:

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| <p>82. (1) A party who is dissatisfied with a decision of the Minister made under section 81 or subsection 84(2), or a person who is dissatisfied with <u>a decision of the Minister made under subsection 27.1(2) of the <i>Old Age Security Act</i></u>, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal in writing within 90 days, or any longer period that the Commissioner of Review Tribunals may, either before or after the expiration of those 90 days, allow, after the day on which the party was notified in the prescribed manner of the decision or the person was notified in writing of the Minister's decision and of the reasons for it.</p> | <p>82.(1) La personne qui se croit lésée par une décision du ministre rendue en application de l'article 81 ou du paragraphe 84(2) ou celle qui se croit lésée par <u>une décision du ministre rendue en application du paragraphe 27.1(2) de la <i>Loi sur la sécurité de la vieillesse</i></u> ou, sous réserve des règlements, quiconque de sa part, peut interjeter appel par écrit auprès d'un tribunal de révision de la décision du ministre soit dans les quatre-vingt-dix jours suivant le jour où la première personne est, de la manière prescrite, avisée de cette décision, ou, selon le cas, suivant le jour où le ministre notifie à la deuxième personne sa décision et ses motifs, soit dans le délai plus long autorisé par le commissaire des tribunaux de révision avant ou après l'expiration</p> |
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des quatre-vingt-dix jours.

...

(...)

(11) A Review Tribunal may confirm or vary a decision of the Minister made under section 81 or subsection 84(2) or under subsection 27.1(2) of the *Old Age Security Act* and may take any action in relation to any of those decisions that might have been taken by the Minister under that section or either of those subsections, and the Commissioner of Review Tribunals shall thereupon notify the Minister and the other parties to the appeal of the Review Tribunal's decision and of the reasons for its decision.

(11) Un tribunal de révision peut confirmer ou modifier une décision du ministre prise en vertu de l'article 81 ou du paragraphe 84(2) ou en vertu du paragraphe 27.1(2) de la *Loi sur la sécurité de la vieillesse* et il peut, à cet égard, prendre toute mesure que le ministre aurait pu prendre en application de ces dispositions; le commissaire des tribunaux de révision doit aussitôt donner un avis écrit de la décision du tribunal et des motifs la justifiant au ministre ainsi qu'aux parties à l'appel.

84.(1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to

84. (1) Un tribunal de révision et la Commission d'appel des pensions ont autorité pour décider des questions de droit ou de fait concernant :

(a) whether any benefit is payable to a person,

a) la question de savoir si une prestation est payable à une personne;

(b) the amount of any such benefit,

b) le montant de cette prestation;

(c) whether any person is eligible for a division of unadjusted pensionable earnings,

c) la question de savoir si une personne est admissible à un partage des gains non ajustés ouvrant droit à pension;

(d) the amount of that division,

d) le montant de ce partage;

(e) whether any person is eligible for an assignment of a contributor's retirement pension, or

e) la question de savoir si une personne est admissible à bénéficier de la cession de la pension de retraite d'un cotisant;

(f) the amount of that assignment,

f) le montant de cette cession.

and the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.

(Emphasis added.)

La décision du tribunal de révision, sauf disposition contraire de la présente loi, ou celle de la Commission d'appel des pensions, sauf contrôle judiciaire dont elle peut faire l'objet aux termes de la *Loi sur les Cours fédérales*, est définitive et obligatoire pour l'application de la présente loi.

(Je souligne.)

[12] As may be seen, the Review Tribunal is a statutory tribunal whose jurisdiction and authority are set out in particular in subsection 27.1(1) and in section 28 of the Act, as well as in sections 82 and 84 of the CPP. Accordingly, the Review Tribunal does not have any jurisdiction in equity and may not, for example, order the Minister to make an *ex gratia* payment (*Canada (Minister of Human Resources Development Canada) v. Dublin (Estate of), supra*). However, it has already been decided that a review tribunal does not have jurisdiction to set aside a decision of the Minister made under section 32 of the Act. In such a case, it is the Federal Court that has jurisdiction (*Pincombe v. Canada (Attorney General)*, [1995] F.C.J. No. 1320 (F.C.A.) (QL); *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278, [2003] F.C.J. No. 998 (QL); *Kissoon v. Canada (Minister of Human Resources Development Canada)*, 2004 FCA 384, [2004] F.C.J. No. 1949 (QL); *Canada (Minister of Human Resources Development) v. Mitchell*, 2004 FC 437, [2004] F.C.J. No. 578 (F.C.) (QL)).

[13] The Minister's revised decision was rendered pursuant to subsection 27.1(2) of the Act. Accordingly, the Review Tribunal had jurisdiction under subsection 28(1) of the Act to hear the appeal brought by Ms. Vinet-Proulx against the revised decision (*Minister of Human Resources Development v. Dublin (Estate of)*, *supra*). In such a case, under subsection 82(11) of the CPP, the Review Tribunal has jurisdiction to confirm or vary the Minister's revised decision and may take any measure that might have been taken by the Minister under subsection 27.1(2) of the Act. Under this subsection, the Minister may take the following measures: he may confirm or vary the previous decision, either by approving the payment of the benefit and determining its amount or by determining that no benefit is payable. It should be noted that, under the Act, the term "benefit" means "a pension, supplement or allowance", which are payments authorized under Parts I, II and III, respectively.

[14] Therefore, the question arises as to whether in the case of a request for reconsideration of the Minister's initial decision, the Minister was authorized under subsection 27.1(2) of the Act, following the approval of the application for benefits received on April 14, 2004, to allow the retroactive payment of a pension for a period previous to May 2003. In this case, subsection 8(2) of the Act and subsection 5(2) of the Regulations are clear and do not give the Minister any discretion: the approval of the application for benefits cannot take effect any earlier than one year before the date the application in question was received. Under subsection 3(2) of the Regulations, the application for benefits that gave rise to the Minister's initial decision was received by the Department on April 14, 2004, and was "deemed to have been made" by Ms. Vinet-Proulx on that date. Accordingly, I conclude that the Review Tribunal did not have jurisdiction to award pension

benefits retroactively from the month of July 2002, as this is contrary to the legislative and regulatory provisions on which the Minister's initial decision and revised decision are based.

[15] The representative of the Attorney General of Canada acknowledged at the hearing before this Court that the appeal of Ms. Vinet-Proulx was doomed to failure right from the start, even though the issue of the Review Tribunal's lack of jurisdiction to award benefits prior to May 2003 was not formally raised by the Department's representative who appeared before the Review Tribunal. That being said, under section 32 of the Act, the Minister may take such action as the Minister considers appropriate to place the person in the position that the person would be in, if the Minister is satisfied that a person, as a result of erroneous advice or administrative error in the administration of this Act, has been denied a benefit, or a portion of a benefit, to which that person would have been entitled. This would obviously include the possibility of paying a retroactive pension in a case in which it is more likely that a previous application for benefits had been sent in by an applicant and received by the Minister on a certain date but subsequently lost because of an administrative error.

[16] For these reasons, I have no other choice but to allow this application for judicial review, which appears to me to be well founded. The decision rendered by the Review Tribunal must be set aside, and the Minister's revised decision must be restored. However, this is not a case in which costs should be allowed.

[17] In conclusion, I note that even if this application for judicial review is allowed by the Court, which is the case here, the representative of the Attorney General of Canada made an undertaking to the effect that any application made by Ms. Vinet-Proulx under section 32 of the Act would be processed rapidly by the Department. If a new application for judicial review is filed, this Court may eventually have to rule on the reasonableness or unreasonableness of the decision which the Minister may later make under section 32 of the Act, should the Minister render a negative decision in this case.

ORDER

THE COURT ORDERS that the application for judicial review be allowed. The decision of the Review Tribunal is set aside, and the revised decision of the Minister is restored, without costs.

“Luc Martineau”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-200-06

STYLE OF CAUSE: Attorney General of Canada v. Lise Vinet-Proulx

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 23, 2007

**REASONS FOR ORDER
AND ORDER BY:** THE HONOURABLE MR. JUSTICE MARTINEAU

DATED: January 29, 2007

APPEARANCES:

Sandra Gruescu	FOR THE APPLICANT
Lise Vinet-Proulx LaSalle, Quebec	FOR THE RESPONDENT (For herself)

SOLICITOR OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
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