

Date: 20070829

Docket: T-207-07

Citation: 2007 FC 869

Ottawa, Ontario, August 29, 2007

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

MARYANN C. MULVENEY

Applicant

and

MINISTER, HUMAN RESOURCES DEVELOPMENT CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The issue raised in this application for judicial review is whether the Minister's delegate committed a reviewable error when she found that the overpayment to Ms. Mulveney of Canada Pension Plan (CPP) disability benefits was not the result of erroneous advice or administrative error on the part of the Minister of Human Resources Development Canada (Minister) or an official of the Minister's department. The issue arises out of the following facts.

[2] By application signed on October 21, 1994, Ms. Mulveney applied for disability benefits under the CPP on the ground that she was suffering from Chronic Fatigue Immune Dysfunction

Syndrome. Her application was approved effective January of 1994. Ms. Mulveney returned to work on a brief, part-time basis in November of 1996, started full-time employment in September of 1997 and regained her prior position as a secondary school vice-principal in September of 1998.

[3] In February of 1999, Ms. Mulveney contacted Human Resources Development Canada (HRDC) to request that her disability benefits be stopped because she had returned to work. Ultimately, the Pension Appeals Board determined that Ms. Mulveney was not entitled to the payment of CPP benefits from July of 1997 to February of 1999.

[4] Subsection 66(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Act), provides that a person who receives a benefit to which they are not entitled shall forthwith return the amount of the benefit payment. Subsection 66(2) of the Act allows for the recovery of benefits paid to a person not entitled to such benefits. Notwithstanding these provisions, paragraph 66(3)(d) of the Act confers the following discretion upon the Minister:

66(3) Notwithstanding paragraph 61(2)(b) and subsections (1) and (2) of this section, where a person has received or obtained a benefit payment to which he is not entitled, or a benefit payment in excess of the amount of the benefit payment to which he is entitled, and the Minister is satisfied that

[...]

(d) the amount or excess of the benefit payment is the result of erroneous advice or administrative error on

66(3) Nonobstant l'alinéa 61(2)b) et les paragraphes (1) et (2) du présent article, lorsqu'une personne a reçu ou obtenu une prestation à laquelle elle n'a pas droit ou une prestation supérieure à celle à laquelle elle a droit et que le ministre est convaincu que, selon le cas :

[...]

d) le montant ou l'excédent de la prestation résulte d'un avis erroné ou d'une erreur administrative attribuable

the part of the Minister or an official of the Department of Social Development acting in an official capacity in the administration of this Act,

the Minister may, unless that person has been convicted of an offence under any provision of this Act or of the *Criminal Code* in connection with the obtaining of the benefit payment, remit all or any portion of the amount or excess of the benefit payment.

[underlining added]

au ministre ou à un fonctionnaire du ministère du Développement social agissant dans le cadre de ses fonctions en application de la présente loi,

le ministre peut, sauf dans les cas où cette personne a été condamnée, aux termes d'une disposition de la présente loi ou du *Code criminel*, pour avoir obtenu la prestation illégalement, faire remise de tout ou partie des montants versés indûment ou en excédent.

[non souligné dans l'original]

(Subsections 61(2), 66(1), 66(2), 66(3) and 66(4) of the Act are set out in the schedule to these reasons).

[5] Ms. Mulveney, as she was entitled to do, sought a positive exercise of discretion under paragraph 66(3)(d) of the Act, alleging administrative error on two grounds. First, HRDC was alleged to have erred by failing to provide periodic reminders about the criteria for the continuation of benefits. Such reminders were said to be necessary because of the cognitive impairment, concentration difficulty, and memory lapses associated with Ms. Mulveney's illness. Second, when Ms. Mulveney applied for CPP benefits she requested that the benefits not be paid to her by way of direct deposit into her bank account so that she would have a tangible reminder about the benefits she was receiving. Notwithstanding her initial request, in April of 1996 benefits began being paid by way of direct deposit into her bank account. Ms. Mulveney says this was done without her

permission and that had she received actual cheques she could have contacted HRDC earlier in order to stop the payment of benefits.

[6] By letter dated July 9, 2004, Ms. Mulveney was notified of the decision made on the Minister's behalf that the overpayment of CPP benefits was not the result of any error on the part of HRDC. The decision is very brief and is as follows:

We have reviewed your file in response to your claim of erroneous advice/administrative error on the part of Canada Pension Plan. One of your concerns is insufficient communication by CPP regarding return to work while in receipt of a disability benefit. The other concern is the direct deposit of your disability pension cheques without your authorization.

Re: insufficient communication regarding return to work:

- When you signed your application for a CPP Disability Benefit, you agreed to notify the CPP if you returned to work. Enclosed are copies of the Application Form and the last page of the Questionnaire when your signature appears.
- As part of a Direct Mail Project, CPP sent you a letter in December 1995 giving you information about your benefit. In your letter dated May 11, 2000 you indicated that you did receive this correspondence. Enclosed is a copy of the letter and print-outs you would have received.

Re: direct deposit of benefit payments:

- Without your authorization, CPP has no access to your bank account number or bank of choice.
- Each year that you were receiving benefits, you were issued a T4 form indicating the total amount of benefit paid. This is for reporting in your Income Tax return. In a telephone conversation, we agreed that you would forward copies of your Income Tax returns for the years you were receiving benefits. These have not been received.

As a result of this review, it has been determined that CPP did not err, therefore the recovery of the overpayment will be initiated.

STANDARD OF REVIEW

[7] On this application for judicial review, it is not for the Court to determine whether it agrees with the Minister's decision or whether it would have reached the same conclusion. Rather, the Court must determine, as a matter of law, what the proper standard of review to be applied to the Minister's decision is, and then it must apply that standard of review to the decision.

[8] In order to determine the standard of review, the Court must conduct a pragmatic and functional analysis in which it considers:

1. The nature of the review mechanism provided by the relevant legislation.
2. The relative expertise of the decision-maker.
3. The purpose of the legislation and the particular relevant legislative provision.
4. The nature of the question.

[9] Dealing with each factor in turn, the Act does not contain a privative provision or any appeal mechanism in respect of decisions made pursuant to subsection 66(3) of the Act. This factor is therefore neutral, counseling neither deference nor a more intensive review of the decision at issue.

[10] Expertise may be derived from specialized knowledge about a subject or from experience and skill in the determination of particular issues. In relation to the determination of whether an overpayment arose as a result of erroneous advice or administrative error, I am of the view that this is a matter that falls within the expertise of the Minister and his delegate, and that the delegate's expertise is superior to that of the Court. In this regard, the delegate has significant experience and

expertise in handling requests for the exercise of discretion to remit overpayments and, as supervisor of the medical adjudication unit of HRDC, she would have superior knowledge as to what constitutes administrative error or erroneous advice. This factor, being the most important of the four factors, militates in favour of affording deference to the decision.

[11] The purpose of subsection 66(3) of the Act is to allow the Minister to exempt individuals from what would otherwise be their obligation to repay benefits they received but were not entitled to. This factor, therefore, also signals that greater deference should be afforded to the decision.

[12] Subsection 66(3) requires the Minister to be “satisfied” that an overpayment is the result of erroneous advice or administrative error. This is a factual determination. Again, this factor militates in favor of deference.

[13] Weighing all of these factors which all, except for the neutral factor, counsel deference, I conclude that the delegate's decision that the overpayment was not the result of erroneous advice or administrative error should be reviewed against the standard of patent unreasonableness.

[14] I am supported in this view by jurisprudence from the Federal Court of Appeal that has considered subsection 66(4) of the Act. Subsection 66(4) is a parallel provision to subsection 66(3) in that where the Minister is satisfied that there has been an underpayment of any benefit as a result of erroneous advice or administrative error the Minister is required, pursuant to subsection 66(4), to take remedial action. In both *Leskiw v. Canada (Attorney General)*, [2004] F.C.J. No. 803, and *Kissoon v. Canada (Minister of Human Development Resources)*, [2004] F.C.J. No. 1949, the Court of Appeal dismissed appeals where this Court had applied the standard of review of patent

unreasonableness to determinations made under subsection 66(4) that no erroneous advice had been given. I can see no reason why different standards of review should be applied to the factual determination of the existence of erroneous advice or administrative error under subsections 66(3) and (4) of the Act.

[15] Ms. Mulveney raised a further issue on this application for judicial review. She argues that the decision-maker was biased. This raises an issue of procedural fairness to which the pragmatic and functional analysis does not apply. It is for the Court to determine, as a matter of law, whether the decision-maker complied with the content of the duty of fairness. See: *Canada (Attorney General) v. Fetherston*, 2005 FCA 111.

APPLICATION OF THE STANDARD OF REVIEW TO THE DECISION

[16] At the outset, I consider what review on the standard of patent unreasonableness requires. In *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 164, the Supreme Court of Canada explained that, while review on the standard of correctness means that there is only one possible answer, review on the standard of patent unreasonableness means that there could have been many appropriate answers, but not the answer reached by the decision-maker. In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 52, the Supreme Court described a patently unreasonable defect as one that leaves no real possibility of doubting that the decision is defective, and noted that a decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

(i) Insufficient Communication

[17] In concluding that there had not been any error arising out of insufficient communication, the Minister's delegate relied upon advice given to Ms. Mulveney in her application for CPP disability benefits and in a direct mailing sent to Ms. Mulveney in December of 1995. On both of these occasions, advice was provided that recipients of CPP benefits were obliged to notify HRDC if they returned to any full or part-time work. Ms. Mulveney argues that this conclusion is patently unreasonable because it was made without regard to the medical evidence with respect to her cognitive impairment when she received this information, and because the Minister's delegate failed to consider that the December 1995 mailing was the only correspondence Ms. Mulveney received from HRDC in the five-year period between 1994 and 1999. Had there been a regular correspondence from HRDC explaining her obligations, she says that the overpayment would not have occurred.

[18] In my view, it was not patently unreasonable for the Minister's delegate to rely upon the written advice provided to Ms. Mulveney in 1994 and 1995 with respect to Ms. Mulveney's obligation to notify HRDC of any return to work. For the delegate to have found the failure to provide more frequent advice about Ms. Mulveney's obligations to constitute erroneous advice or administrative error, the delegate would have had to construe the Act and its associated regulations so as to impose a positive obligation upon the Minister and his department to regularly remind benefit recipients of their obligation to inform HRDC of any return to work or change in their medical condition. I can find no provision in the Act or the *Canada Pension Plan Regulations*, C.R.C., c. 385 (Regulations), that justifies such a conclusion.

[19] Ms. Mulveney relies upon subsection 68(2) and subsections 69(1) and (2) of the Regulations, which are set out in the schedule to these reasons. She argues that from these provisions it may be implied that from time to time a person whose disability has been determined under the Act may be required to undergo special examinations, supply certain information, and the like. However, these provisions allow the Minister to obtain information from a recipient or to require that a recipient be examined or undergo rehabilitation measures. They do not require the Minister to do anything.

[20] As for the delegate's failure to expressly mention Ms. Mulveney's medical condition, it is settled law that a decision-maker is not obliged to refer to all of the evidence before the decision-maker in his or her reasons. See, for example, *Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (C.A.).

(ii) Direct Deposit of Benefit Payments

[21] It is common ground between the parties that Ms. Mulveney indicated in her application for CPP benefits that she did not want her disability pension to be deposited directly into her bank account, and that the tribunal record does not explain how it was that in April of 1996 CPP benefits began to be deposited directly into Ms. Mulveney's bank account. Faced with this uncertainty, the Minister's delegate inferred that Ms. Mulveney must have requested payment by direct deposit and provided the necessary information with respect to her financial institution and account number. Given that such information would be required and that such information is not publicly available, I cannot find the delegate's decision to be patently unreasonable.

[22] The delegate also drew the inference that Ms. Mulveney knew that she was in receipt of CPP benefits from the fact that T4 slips were issued to her annually indicating the amount of benefits paid and from the fact that Ms. Mulveney failed, as she had agreed to do, to provide copies of her tax returns for the years she was receiving benefits. In my view, again this was an inference available to the delegate on the evidence and it was not a patently unreasonable inference.

(iii) Bias

[23] On July 26, 2004, after she had received the decision, Ms. Mulveney spoke with the decision-maker. During that conversation the decision-maker is said to have advised that she was “1000% sure” that Ms. Mulveney had given her bank account number to HRDC, to have advised that “ignorance of the law is no excuse”, and to have accused Ms. Mulveney of harassing her. Ms. Mulveney characterizes the decision-maker as having a bullying demeanor and relies upon this evidence to argue that the decision-maker was biased.

[24] The test for bias is that articulated by the Supreme Court of Canada in *Comm. for Justice v. Nat. Energy Board*, [1978] 1 S.C.R. 369 at page 394. Namely, at law, the test for bias or a reasonable apprehension of bias is “what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [a decision-maker], whether consciously or unconsciously, would not decide fairly”. The Supreme Court also cautioned that the grounds for any apprehension of bias must be “substantial”. Subsequently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at paragraph 113, the Court wrote that the “threshold for a finding of real or perceived bias is high”.

[25] In my view, the evidence before the Court is insufficient to lead an informed person to the view that the decision-maker would not decide Ms. Mulveney's request fairly. A particularly relevant factor is that the conversation relied upon took place after the decision had been made. Moreover, decision-makers are presumed to act fairly and impartially in the absence of evidence to the contrary. See: *Ziindel v. Citron*, [2000] 4 F.C. 225 (C.A.) at paragraphs 36 to 37 and the authorities therein referred to. There is nothing on the face of the decision in this case that displaces that presumption. While Ms. Mulveney views the conclusion that she provided information about her bank account to HRDC to be an attack on her integrity, the fact the decision-maker reached this conclusion is not, by itself, indicative of bias. As well, the decision-maker may simply have concluded that Ms. Mulveney had no recall of providing the information due to her cognitive state in 1996.

CONCLUSION

[26] For these reasons, the application for judicial review must be dismissed. Counsel for the Minister did not press any claim for costs and, in the circumstances, the application will be dismissed without costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed without costs.

“Eleanor R. Dawson”

Judge

SCHEDULE

Subsections 61(2), 66(1), 66(2), 66(3) and 66(4) of the *Canada Pension Plan* are as follows:

61(2) Where an interim benefit has been paid under subsection (1) and payment of a benefit is subsequently approved,

(a) if the amount of the interim benefit was less than the amount of the benefit subsequently approved, the beneficiary shall be paid the additional amount that he would have been paid if the benefit had been approved at the time the interim benefit was approved; and

(b) if the amount of the interim benefit exceeded the amount of the benefit subsequently approved, the amount paid in excess thereof shall be deducted

61(2) Lorsqu’une prestation provisoire a été payée aux termes du paragraphe (1) et que le paiement d’une prestation est approuvé par la suite :

a) si le montant de la prestation provisoire était moindre que le montant de la prestation approuvée par la suite, il doit être payé au bénéficiaire le montant additionnel qui lui aurait été versé si la prestation avait été approuvée au moment où la prestation provisoire l’a été;

b) si le montant de la prestation provisoire dépassait le montant de la prestation approuvée par la suite, le montant versé en trop doit être déduit des

from subsequent payments of the benefit or otherwise recovered in such manner as the Minister may direct.

versements subséquents de la prestation, ou autrement recouvré ainsi qu'en peut décider le ministre.

[...]

[...]

66.(1) A person or estate that has received or obtained by cheque or otherwise a benefit payment to which the person or estate is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person or estate is entitled, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be.

66.(1) Une personne ou un ayant droit qui a reçu ou obtenu, par chèque ou autrement, un paiement de prestation auquel elle n'a pas droit, ou à qui a été payée une prestation dont le montant excédait celui auquel elle avait droit, doit immédiatement retourner le chèque ou le montant, ou l'excédent, selon le cas.

Recovery of amount of payment

(2) If a person has received or obtained a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, the amount of the benefit payment or the excess amount, as the case may be, constitutes a debt due to Her Majesty and is recoverable at any time in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

Recouvrement des prestations

(2) La prestation ou la partie de celle-ci que touche une personne et à laquelle elle n'a pas droit constitue une créance de Sa Majesté dont le recouvrement peut être poursuivi en tout temps à ce titre devant la Cour fédérale ou tout autre tribunal compétent, ou de toute autre façon prévue par la présente loi.

[...]

[...]

Remission of amount owing

(3) Notwithstanding paragraph 61(2)(b) and subsections (1) and (2) of this section, where a person has received or obtained a benefit payment to which he is not entitled, or a benefit payment in excess of the amount of the benefit payment to which he is entitled, and the Minister is satisfied that

(a) the amount or excess of the benefit payment cannot be collected within the reasonably foreseeable future,

(b) the administrative costs of collecting the amount or excess of the benefit payment are likely to equal or exceed the amount to be collected,

(c) repayment of the amount or excess of the benefit payment would cause undue hardship to the debtor, or

(d) the amount or excess of the benefit payment is the result of erroneous advice or administrative error on the part of the Minister or an official of the Department of Social Development acting in an official capacity in the administration of this Act,

the Minister may, unless that person has been convicted of an offence under any provision of this Act or of the *Criminal Code* in connection with the

Abandon d'une créance

(3) Nonobstant l'alinéa 61(2)b) et les paragraphes (1) et (2) du présent article, lorsqu'une personne a reçu ou obtenu une prestation à laquelle elle n'a pas droit ou une prestation supérieure à celle à laquelle elle a droit et que le ministre est convaincu que, selon le cas :

a) le montant ou l'excédent de la prestation ne peut être récupéré dans un avenir prévisible;

b) les frais administratifs de récupération du montant ou de l'excédent de la prestation seraient vraisemblablement égaux ou supérieurs au montant à récupérer;

c) le remboursement du montant ou de l'excédent de la prestation causerait un préjudice abusif au débiteur;

d) le montant ou l'excédent de la prestation résulte d'un avis erroné ou d'une erreur administrative attribuable au ministre ou à un fonctionnaire du ministère du Développement social agissant dans le cadre de ses fonctions en application de la présente loi,

le ministre peut, sauf dans les cas où cette personne a été condamnée, aux termes d'une disposition de la présente loi ou du *Code criminel*, pour

obtaining of the benefit payment, remit all or any portion of the amount or excess of the benefit payment.

avoir obtenu la prestation illégalement, faire remise de tout ou partie des montants versés indûment ou en excédent.

Where person denied benefit due to departmental error, etc.

Refus d'une prestation en raison d'une erreur administrative

(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

(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.

Subsections 68(2), 69(1), and 69(2) of the *Canada Pension Plan Regulations* are as follows:

68(2) In addition to the

68(2) En plus des exigences du

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| <p>requirements of subsection (1), a person whose disability is to be or has been determined pursuant to the Act may be required from time to time by the Minister</p> | <p>paragraphe (1), une personne dont l'invalidité reste à déterminer ou a été déterminée en vertu de la Loi, peut être requise à l'occasion par le ministre</p> |
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| <p>(a) to supply a statement of his occupation and earnings for any period; and</p> | <p>a) de fournir une déclaration de ses emplois ou de ses gains pour n'importe quelle période; et</p> |
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| <p>(b) to undergo such special examinations and to supply such reports as the Minister deems necessary for the purpose of determining the disability of that person.</p> | <p>b) de se soumettre à tout examen spécial et de fournir tout rapport que le ministre estimera nécessaire en vue de déterminer l'invalidité de cette personne.</p> |
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[...]

[...]

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| <p>69(1) For the purpose of determining whether any amount shall be paid or shall continue to be paid as a benefit in respect of a person who has been determined to be disabled within the meaning of the Act, the Minister may require that person from time to time</p> | <p>69(1) En vue de déterminer si un certain montant doit être payé ou doit continuer d'être payé comme prestation à l'égard d'une personne dont on a déterminé l'invalidité au sens de la Loi, le ministre peut requérir ladite personne, de temps à autre,</p> |
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| <p>(a) to undergo such special examinations,</p> | <p>a) de se soumettre à tout examen spécial,</p> |
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| <p>(b) to supply such reports, and</p> | <p>b) de fournir tout rapport, et</p> |
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| <p>(c) to supply such statements of his occupation and earnings for</p> | <p>c) de fournir toute déclaration sur son emploi et ses gains, pour toute</p> |
|---|--|

any period,

période,

as the Minister may specify.

qu'il peut indiquer.

(2) Where the Minister is of the opinion that a person who has been determined to be disabled within the meaning of the Act may benefit vocationally from reasonable rehabilitation measures, he may, from time to time, require that person to undergo such reasonable rehabilitation measures as he may specify.

(2) Lorsque le ministre est d'avis qu'une personne dont on a déterminé l'invalidité au sens de la Loi pourrait bénéficier de mesures raisonnables de réadaptation, il peut requérir, de temps à autre, que ladite personne se soumette à de telles mesures qu'il peut indiquer.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-207-07

STYLE OF CAUSE: MARYANN C. MULVENEY, Applicant and
MINISTER, HUMAN RESOURCES DEVELOPMENT
CANADA, Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 14, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: AUGUST 29, 2007

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