

Federal Court



Cour fédérale

Date: 20090804

Docket: T-1361-07

Citation: 2009 FC 796

Ottawa, Ontario, August 4, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

DANIEL KING

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant, Daniel King, brings this motion for certification pursuant to subsection 334.16(1) of the *Federal Court Rules*, SOR/98-106, seeking that the within proceeding be certified as a class proceeding and the applicant appointed as the representative applicant.

FACTS

[2] The applicant suffered a workplace injury and applied for disability pension under the Canada Pension Plan, R.S. 1985 c. C-8 (CPP) on May 10, 1996.

[3] The applicant received a letter on September 12, 1996, informing him that his application had been denied because he did not fully meet the requirements of the CPP. The applicant sought a reconsideration of his application, which was again denied. The applicant then filed an appeal of the denial to the Review Tribunal. The Review Tribunal dismissed the appeal on July 24, 1998.

[4] The applicant appealed to the Pension Appeals Board, which allowed the appeal on November 26, 2002 and ordered that the applicant be a paid disability pension retroactive to February 1995.

[5] The applicant received \$109,869.49 from the respondent's department called "Human Resources Development Canada (HRDC)", the aggregate of each of the monthly benefit payments he would have received had these payments been made in a timely manner. The applicant sought additional payment in the form of interest. He received a letter from HRDC advising him that the Department's policy was not to pay interest. The applicant then sought remedial action under subsection 66(4) of the CPP. This request was denied on July 18, 2007.

[6] Following this decision, the applicant commenced these proceedings for judicial review of the decision of the Minister to refuse to pay interest or some other form of

enhanced benefit to compensate for the seven-year delay in the payment of the disability benefits that the applicant was ultimately found entitled to receive.

[7] On February 22, 2008, I stated the following legal question for determination on a preliminary basis:

Does the decision of the Pension Appeals Board that the applicant is entitled to a disability pension mean the initial decision of the minister of Human Resources and Social Development denying him a disability pension was based on “erroneous advice” within the meaning of subsection 66(4) of the Canada Pension Plan?

[8] Following a hearing, this legal question was determined in the affirmative by Mr. Justice Phelan on June 20, 2008: *King v. Canada (Minister of Human Resources and Social Development)*, 2008 FC 777, 330 F.T.R. 217. The respondent appealed the Order of Justice Phelan to the Federal Court of Appeal on July 23, 2008. I denied the respondent’s motion seeking a stay of the applicant’s application for judicial review pending this appeal on August 27, 2008, concluding that further delaying the application was not in the interests of justice to the public or the applicant, and that the respondent would not suffer irreparable harm if the stay was not granted.

[9] The Federal Court heard this motion for certification in Ottawa on Tuesday, January 20, 2009. At the hearing, the parties decided and the Court agreed that the Court will reserve its decision pending the Judgment of the Federal Court of Appeal from the Judgment of Mr. Justice Phelan on the preliminary question of law since the Federal Court of Appeal had at that point set the date for the appeal on March 2, 2009. The Federal Court of Appeal heard the appeal on March 2, 2009 and rendered its judgment, reversing the decision of Justice

Phelan, on April 2, 2009: *King v. Canada (Minister of Human Resources and Social Development)*, 2009 FCA 105. Following this decision, the Court invited the parties to make supplementary submissions, which were filed on July 10, 2009. The Court has carefully reviewed these submissions.

ISSUES

[10] The issue before this Court is whether the requirements of Federal Court Rule 334.16 are satisfied by the applicant's motion for certification.

RELEVANT LEGISLATION

[11] Rule 334.16(1) provides:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace,

resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

les points de droit ou de fait communs;

e) il existe un représentant demandeur qui:

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[12] Rule 334.16(2) provides:

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste

preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[13] In addition, Rule 334.18 provides:

334.18 A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:

(a) the relief claimed includes a claim for damages that would require

334.18 Le juge ne peut invoquer uniquement un ou plusieurs des motifs ci-après pour refuser d'autoriser une instance comme recours collectif :

a) les réparations demandées comprennent

an individual assessment after a determination of the common questions of law or fact;	une réclamation de dommages-intérêts qui exigerait, une fois les points de droit ou de fait communs tranchés, une évaluation individuelle;
(b) the relief claimed relates to separate contracts involving different class members;	b) les réparations demandées portent sur des contrats distincts concernant différents membres du groupe;
(c) different remedies are sought for different class members;	c) les réparations demandées ne sont pas les mêmes pour tous les membres du groupe;
(d) the precise number of class members or the identity of each class member is not known; or	d) le nombre exact de membres du groupe ou l'identité de chacun est inconnu;
(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.	e) il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe.

[14] Subsection 66(4) of the CPP provides:

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

(c) an assignment of a retirement pension under section 65.1,

the Minister shall take such remedial 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.

b) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,

c) la cession d'une pension de retraite conformément à l'article 65.1,

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.

ANALYSIS

[15] The purposes and standard for certifying an action as a class proceeding were recently summarized cogently by my colleague, Justice Mactavish, in *Buffalo v. Samson Cree Nation*, 2008 FC 1308. At paragraphs 28-32, Justice Mactavish stated:

28 As the Supreme Court of Canada has observed, class actions allow for improved access to justice for those who might otherwise be unable to seek vindication of their rights through the traditional litigation process. Class actions also enhance judicial economy, allowing a single action to decide large numbers of claims involving similar issues. Finally, class actions encourage behaviour modification on the part of those who cause harm: see *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69.

29 In the above trilogy of cases, the Supreme Court also held that an overly restrictive approach to the application of class action certification legislation must be avoided, so that the benefits of class actions can be fully realized.

30 Moreover, the Supreme Court noted in the *Hollick* case that:

... the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action. [at paragraph 16]

31 In other words, a certification motion is a procedural matter. Its purpose is not to determine *whether* the litigation can succeed, but rather, *how* the litigation should proceed: see *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419, (S.C.J.) at paragraph 12.

32 In a motion such as this, the onus is on the plaintiff to establish an evidentiary basis for certification. That is, the plaintiff must show some basis in fact for each of the certification requirements, apart from the requirement that the pleadings disclose a reasonable cause of action. This latter requirement is governed by the principle that pleadings should not be struck unless it is "plain and obvious" that no claim exists: see *Hollick*, at paragraph 25.

[16] Rule 334.16(1) uses mandatory language, providing that a court shall grant certification where all the elements of the test are met. The elements of the test are conjunctive; if the applicant fails to meet any of the listed criteria, the certification motion must fail: *Buffalo v. Samson Cree Nation*, 2008 FC 1308, per Justice Mactavish at paragraph 34. The respondent submits that the applicant fails to meet each of the requirements of subsection 334.16(1) of the Federal Court Rules, *supra*. Therefore, I will address each requirement in turn.

a) Reasonable Cause of Action

[17] The plaintiff alleges three causes of action. In determining whether each discloses a reasonable cause of action, the Court will apply the test for striking out applications for

judicial review, namely, whether the alleged cause of action is so clearly improper as to be bereft of any possibility of success. See *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* [1995] 1 F.C. 588 (C.A.). This test for applications for judicial review is appropriate because this proposed class action is by way of application for judicial review as opposed to by action.

[18] The applicant submits that there are three reasonable causes of action in this proposed class proceeding. The first cause of action is that the Minister's decision to deny the applicant his pension was based on "erroneous advice" within the meaning of subsection 66(4) of the CPP Act because the Pension Appeals Board expressly said that there was no new evidence which the Board relied upon in allowing the appeal. Then, the request by the applicant for interest from the Minister under subsection 66(4), which request was denied, gives the applicant a cause of action to judicially review the Minister's decision denying him interest.

[19] The second cause of action alleged by the applicant is that the original decision by the Minister denying him a pension was based on an error of law regardless of whether the applicant appealed that decision to the Minister for reconsideration or to the Review Board or ultimately to the Canada Pension Appeals Board.

[20] The third alleged cause of action is that the applicant requested the documents relied upon by the Minister with respect to certain medical information before the Minister which was denied the applicant. The applicant states this is a breach of the duty of fairness and

amounts to an “administrative error” or “erroneous advice” within the meaning of subsection 66(4) of the CPP Act. The Court will now consider each cause of action.

(i) First cause of action

[21] With respect to the first cause of action, at the hearing, the respondent agreed that Justice Phelan’s decision, if confirmed on appeal, provides that the applicant was denied his pension on the basis of “erroneous advice” and the applicant has a cause of action for judicial review of the Minister’s decision denying him interest under subsection 66(4) of the CPP Act. From reading Justice Phelan’s decision and the decision of the Pension Appeals Board, there are two preconditions which the applicant has met for this cause of action:

1. the Pension Appeals Board found that the Minister was entitled to a disability pension and that the Minister’s decision denying him of disability pension was wrong; and
2. the Pension Appeals Board decision specified that its decision was not based on any new evidence not originally before the Minister.

Following this finding by the Pension Appeals Board, the applicant made a request to the Minister for interest under subsection 66(4) of the CPP Act. Interest does not automatically follow the award of retroactive disability pension payments. There must be a request to the Minister under subsection 66(4). Accordingly, I would have been satisfied that this application for judicial review by the applicant discloses a reasonable cause of action in order to proceed if the Federal Court of Appeal had affirmed the decision of Justice Phelan.

[22] On April 2, 2009 in *The Attorney General of Canada v. Daniel King*, 2009 FCA 105, per Sexton J.A., the Federal Court of Appeal allowed the appeal from Justice Phelan's Judgment, set aside the decision of Justice Phelan and answered in the negative the following preliminary question of law which I had set down for determination:

Does the decision of the Pension Appeals Board that the Applicant is entitled to a disability pension mean that the initial decision of the Minister of Human Resources and Social Development denying him a disability pension was based on "erroneous advice" within the meaning of subsection 66(4) of the *Canada Pension Plan*?

[23] The Federal Court of Appeal held that "erroneous advice", as the term is used in subsection 66(4) of the CPP, refers to advice given by the Department of Human Resources and Skills Development to a member of the public, and not to advice which, on occasion, may be given to the Minister in the course of deciding whether a pension should be awarded. Justice Sexton held at paragraph 31:

... The CPP is one of the largest social benefit schemes in the country. The statute and its regulations are complex, and many applicants are not represented by counsel. As such, department officials sometimes provide summary information over the phone or in person at local offices concerning eligibility for benefits, deadlines for filing, and so forth. Where an official gives a member of the public incorrect information, resulting in the denial of a benefit, the Minister may decide to provide a remedy. This has been the situation in all previous decisions of this court and the Federal Court relating to subsection 66(4) ...

[24] The Court of Appeal held that if a decision of the Pension Appeal Board that overrules a decision of the Minister, in the absence of new evidence, were to constitute proof of erroneous advice, there would be no discretion for the Minister under subsection 66(4), which provides that the Minister must satisfy herself that an error has been made.

[25] Justice Sexton also held at paragraph 35 that in this case, it is clear that the Pension Appeal Board had access to evidence that was not before the medical adjudicator when the initial decision was made denying Mr. King's disability pension. It was also held by the Court of Appeal that the Pension Appeal Board decision makes clear that it relied on new evidence. Accordingly, the fact that the Minister initially held that the disability was not severe and prolonged was not based on erroneous advice solely because the Pension Appeal Board reversed the decision. The Pension Appeal Board had new evidence before it.

[26] Justice Sexton closed at paragraph 37 by finding that if Mr. King were to succeed on this appeal, the financial impact on various government departments "might well be substantial". Many benefit-conferring statutes contain similar provisions to subsection 66(4) of the CPP. Justice Sexton held that "floodgates" would be opened under CPP and other statutes, and "... There is no indication that this was Parliament's intention".

[27] Accordingly, in view of the Federal Court of Appeal Judgment, it is conceded by the parties that Mr. King does not have a cause of action on the basis that the Minister's decision denying him his pension was "based on erroneous advice" because the Pension Appeal Board overturned the Minister's decision.

(ii) Second cause of action

[28] With respect to the second proposed cause of action, namely that the Minister erred in law in denying the disability pension, this alleged error is a question of mixed fact and

law that would need to be determined on judicial review. However, judicial review is barred from a person if that person has adequate alternative remedies under the statute. Mr. King did pursue his alternative remedies by, first seeking reconsideration by the Minister, then appealing to the Review Board, and then appealing to the Pension Appeals Board.

Following the decision of the Pension Appeals Board if a person is dissatisfied, that person has a right of judicial review before the Federal Court of Appeal. This Court does not have that jurisdiction. The second cause of action is not a cause of action that could possibly succeed. In any event, the applicant succeeded before the Pension Appeals Board, and has no other cause of action regarding this alleged error following the Federal Court of Appeal Judgment in this case.

[29] Moreover, even if the Minister is found to have erred in law in denying the disability pension, the plaintiff would have to rely on section 66(4) for the recovery of interest on this basis. The Federal Court of Appeal's judgment has limited the ambit of "erroneous advice" under section 66(4) to advice given to the public. An error of law by the Minister in denying the plaintiff's disability pension is therefore excluded from this definition. Thus, even if the plaintiff obtained a ruling from the appropriate decision-making body finding that the Minister had erred in law in denying his pension claim, he would not have a cause of action for recovery of interest under section 66(4) on this basis.

(iii) The third cause of action

[30] The third proposed cause of action, namely that the Minister did not disclose the documents on which he relied in making the decision, does not trigger one of the

preconditions for a subsection 66(4) CPP request for interest. The failure to provide the documents is not an “administrative error” or “erroneous advice” upon which the Minister based his decision to deny the pension. The applicant submits that the failure to disclose these documents was an “administrative error.” Even if this were so, however, subsection 66(4) requires that the denial of the pension be a result of the administrative error. Even if the documents were disclosed, that does not mean that the disability pension applicant would have been entitled to a pension. Accordingly, this cause of action has no possibility of success.

Conclusion

[31] As the pleadings do not disclose a reasonable cause of action, the Court does not need to consider the remaining requirements of Rule 334.16(1).

COSTS

[32] Rule 334.39(1) provides that costs should be awarded only where the conduct of a party unnecessarily lengthened the duration of the proceeding, or where the conduct of a party was improper, vexatious and unnecessary or was taken through negligence, mistake or excessive caution. At the hearing, the parties agreed that the circumstances do not warrant an award of costs for this motion.

ORDER

THIS COURT ORDERS that:

This motion for certification of this application for judicial review as a class action is dismissed.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1361-07

STYLE OF CAUSE: DANIEL KING v. HER MAJESTY THE
QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 20, 2009

**REASONS FOR ORDER
AND ORDER:** KELEN J.

DATED: August 4, 2009

APPEARANCES:

Mr. Frank Provenzano
Mr. Peter Sengbusch

FOR THE APPLICANT

Mr. Barney Brucker
Mr. Travis Henderson

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Frank Provenzano
Barrister & Solicitor
Sault Ste. Marie, Ontario

FOR THE APPLICANT

Mr. Peter Sengbusch
Barrister & Solicitor
London, Ontario

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

FOR THE RESPONDENT