Federal Court  Cour fédérale

Date: 20110726

Docket: T-1353-10

Citation: 2011 FC 934

Ottawa, Ontario, July 26, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LINDA BARTLETT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the alleged decision of the Minister, dated 21 July 2010 (Decision), refusing the Applicant's request for remedial action pursuant to subsection 66(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP), specifically for an award of interest on her retroactive disability pension benefits.

BACKGROUND

[2] The Applicant first applied for disability pension benefits in 1977. This application was refused. The Applicant again applied for disability benefits in 2001. This application was also denied both initially and upon reconsideration. In 2003, the Applicant submitted new information, which resulted in a finding by the Pension Appeals Board that the Applicant was disabled within the meaning of the CPP.

[3] The Applicant began receiving disability pension benefits retroactive to 2000. In 2005, the Applicant, believing that she was being denied additional benefits due to an administrative error, requested that the Minister review her file pursuant to subsection 66(4). The Minister informed the Applicant that no such error had occurred, a decision which the Applicant successfully challenged in a judicial review application before the Federal Court (*Bartlett v Canada (Attorney General)*, 2007 FC 89). The Minister subsequently reconsidered the Applicant's subsection 66(4) request and granted retroactive benefits on the basis of her first application. By letter dated 28 August 2007, the Minister provided a breakdown of the Applicant's CPP disability payments from 1978 to 2007 and the amount she would be receiving after taxes.

[4] In October 2007, the Applicant asked the Minister to review her file, alleging that the amount she was being paid was too low and that "it is reasonable and fair to ask to be paid cost of living increases from 1978 to 2007 … [and to be] placed 'in the position that [she] would be under the act had erroneous advice not been given or the administrative error … not been made."

[5] By letter dated 2 February 2009, the Minister responded, advising the Applicant that she was paid her CPP disability pension starting in November 1977 and that her lump sum retroactive payment reflected the increases in the cost of living. She was also advised that when the calculation was made, her earnings were adjusted upward to reflect increases in average wages and her calculated benefit was escalated each year since 1977 by the Consumer Price Index to reflect the increases in the cost of living. She was also advised that "there is no statutory provision in the CPP to pay interest on CPP payments."

[6] Despite continued correspondence between the Applicant and the Minister, the Applicant's request for additional monies was refused. On 14 June 2010, the Applicant wrote directly to the Minister of Human Resources and Skills development, requesting that the Minister take remedial action under subsection 66(4) of the CPP to award her interest on the retroactive payment of her disability benefits. The Minister refused the request by letter dated 21 July 2010, stating that such action is not possible under the statutory provisions of the CPP. This is the alleged Decision under review.

DECISION UNDER REVIEW

[7] The relevant passages of the Minister's letter of July 21, 2010 are as follows:

> As I wrote to you in May 2010, the calculation of the retroactive payment of your Disability benefit was correct and a payment of $51,300.22 that you were paid in 2007 already included the cost-of-living increases from 1978 to 2007. A copy of that letter is enclosed for your information. Please also find enclosed letters that were sent to you from a Service Canada Centre in Victoria, which further explains the calculation of the retroactive payment of your Disability benefit.

> With respect to your request for interest on the retroactive payment of your disability benefit, I must advise you that this is not possible. Unlike the *Income Tax Act*, which provides for the charging of interest on overdue taxes and which pays interest on refunds, the CPP legislation does not contain such provisions. Our policy is not to charge interest on overpaid benefits and, in the same way, interest is not paid on benefits owing.

ISSUES

[8] The following preliminary issues arise on this application:

a. Whether the 21 July 2010 letter is a "decision" within the meaning of the *Federal Courts Act* and therefore subject to judicial review; and

b. Whether the application is out of time.

[9] Depending on the Court's determination of the preliminary issues, the following issue may arise in this application:

> Whether the Minister has jurisdiction to award interest pursuant to subsection 66(4) of the CPP.

STATUTORY PROVISIONS

[10] The following provisions of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (Act), are applicable in these proceedings:

Application for judicial review	**Demande de contrôle judiciaire**
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou

anyone directly affected by the matter in respect of which relief is sought.

par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Grounds of review	**Motifs**
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	*a*) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	*b*) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	*c*) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or	*e*) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(*f*) acted in any other way that was contrary to law.	*f*) a agi de toute autre façon contraire à la loi.

[11] The following provisions of the CPP are applicable in these proceedings:

Where person denied benefit due to departmental error, etc.	**Refus d'une prestation en raison d'une erreur administrative**
66. (4) Where the Minister is satisfied that, as a result of erroneous advice or administrative	**66.** (4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus

error in the administration of this Act, any person has been denied	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, 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.	*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.

STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[13] Whether the Minister can award interest pursuant to subsection 66(4) of the CPP is a question of jurisdiction. It is reviewable on a standard of correctness. See *Dunsmuir*, above at paragraph 59; and *Dillon v Canada (Attorney General)*, 2007 FC 900 at paragraphs 13-14. When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process. Rather, it will undertake its own analysis of the question.

ARGUMENTS

The Applicant

The Minister Should Restore Her to the Same Position She Would Have Been in But For the Administrative Error

[14] The Applicant concedes that, under section 66 of the CPP, there is no automatic right to interest on retroactive disability pension payments. However, section 66 of the CPP allows the Minister to collect interest from an overpayment of benefits. It also allows an applicant who has suffered a loss due to withheld disability payments to collect interest on the retroactive payments. Under the legislation, the applicant must be restored to the same position she would have been in if the administrative error had not been made. If the Minister denies the request for interest, an applicant can apply for judicial review of that decision.

[15] As a result of an administrative error, the Applicant's pension disability benefits were withheld for 29 years. Although she did receive a retroactive payment, she argues that it did not put her in the position she would have been in if the administrative error had not been made. This is contrary to subsection 66(4) of the CPP. When an administrative error has been made, as occurred

in the instant case, the Applicant asserts that the remedial action by the Minister should favour the applicant.

[16] Between 1978 and 2007, the Consumer Price lndex (CPI) increased by $497.14. Each month for 10 months in 1978, the Applicant claims that she received $109.17; however, the CPI for 2007 (when the Applicant received her retroactive payment) was $606.31. The Applicant argues that she lost $4971.40 in buying power for the year 1978. Furthermore, during the 29 years that her pension was withheld in error, she lost $68,615.56 in buying power.

[17] The Applicant submits that the Minister did not follow the CPP guidelines during the period from 2007 to 2010, when the Applicant was repeatedly requesting a review of her file. The Minister failed to keep accurate records and to return her phone calls and letters in a timely manner. The Applicant argues that she had a legitimate expectation that the Minister would take remedial action under subsection 66(4) so as to put her in the same position she would have been in had the administrative error not occurred. Because the Minister did not, she asks the Court to set aside the Minister's Decision.

The Respondent

Preliminary Issue #1: The 21 July 2010 Letter is not a "Decision"

[18] The Respondent submits that the 21 July 2010 letter is a courtesy letter. Contrary to the Applicant's assertions, it is not a "decision" within the meaning of the Act and therefore cannot properly be made the subject of judicial review. In *Hughes v Canada (Customs and Revenue*

Agency), 2004 FC 1055 at paragraph 6, Justice Douglas Campbell of this Court distinguished between a "decision" and a courtesy letter. He said: "The case law is clear that a courtesy letter written in response to a request for reconsideration is not a decision or order within the meaning of the *Federal Courts Act*, and, therefore, cannot be challenged by way of judicial review …."

[19] The Respondent submits that a true decision demonstrates a fresh exercise of discretion, whether or not the original decision is changed, varied or maintained. It is a fresh decision if the decision-maker agrees to reconsider his or her original decision by reference to facts and submissions that were not on the record when the original decision was made. See *Dumbrava v Canada (Minister of Citizenship and Immigration)* (1995), 101 FTR 230, 1995 FCJ No 1238 (QL), at paragraph 15. Where the decision-maker does not refer to any new facts or submissions and does not state that he or she is reconsidering the decision, there is no fresh exercise of discretion and therefore no decision to attract judicial review. An applicant cannot extend the date of decision by writing a letter with the intention of provoking a reply. See *Brar v Canada (Minister of Citizenship and Immigration)* (1997), 140 FTR 163, [1997] FCJ No 1527 (QL) at paragraph 8.

[20] The Respondent argues that the 21 July 2010 letter does not consider new facts or submissions. The Applicant's request for payment of interest had already been addressed in a series of letters from the Minister, confirming that no additional monies could be paid. Indeed, the 21 July 2010 letter refers to one such letter. The 21 July 2010 letter is clearly limited to re-confirming what was already communicated to the Applicant. It is a courtesy letter and is not subject to judicial review. The application should be dismissed for this reason.

Preliminary Issue #2: The Application Is Out of Time

[21] By letter dated 28 August 2007, the Minister provided to the Applicant a detailed breakdown of the benefits that she would be paid as a result of the Federal Court's 2007 ruling. Enclosed was a Payment Explanation Statement listing each year for which benefits would be paid and the amount of the benefit. If the Applicant disagreed with the Minister's calculations, she should have applied for judicial review within 30 days as is required under subsection 18.1(2) of the Act.

[22] By letter dated 11 September 2007, the Minister again explained the calculation. She confirmed that the amount being paid had been indexed for the cost of living. This letter was sent to the Applicant as a courtesy in response to her inquiry. Finally, in the letter dated 2 February 2009, the Minister set out, in full, her position on the quantum of the benefits, the cost of living indexing and the payment of interest. None of the subsequent letters constitute a fresh consideration of the issue. The Applicant did not file her notice of application for judicial review until 23 August 2010, approximately a year and a half later. The application was brought too late in time and, therefore, should be dismissed.

The CPP Does Not Provide for Payment of Interest on Retroactive Benefits

[23] The Respondent submits that, if this Court decides that the application is properly brought, the remaining issue is whether the Minister erred in determining that there is no provision in the CPP for the payment of interest on retroactive benefits.

[24] The Respondent argues that the jurisprudence favours an interpretation of subsection 66(4) that is consistent with the Minister's position that interest is not payable on retroactive benefits. The Federal Court of Appeal in *Whitton v Canada (Attorney General)*, 2002 FCA 46 at paragraph 37, considered section 32 of the *Old Age Security Act*, a provision similar to subsection 66(4) of the CPP. The Court of Appeal said that, with respect to a person who was denied benefits to which he was entitled, "[t]he Minister must take the necessary action to place the appellant to the position he would be in, had an administrative error not been made. The action that must be taken is to reinstate the pension forthwith and repay the benefits that were suspended, with interest."

[25] However, the Federal Court noted in *King v Canada*, 2007 FC 272 at paragraphs 31-32, that there is no automatic right to interest on payments of retroactive benefits but that an Applicant could seek interest from the Minister. The Minister, it was stated, had the authority under subsection 66(4) to take remedial action. The Federal Court decision was then appealed to the Federal Court of Appeal (*King v Canada (Minister of Human Resources and Social Development)*, 2009 FCA 105 [*King FCA*]), which distinguished *Whitton*, above, from cases involving subsection 66(4). The Respondent therefore submits that *Whitton* provides no authority for the proposition that the Minister can award interest under subsection 66(4).

[26] The Respondent states that the most recent case on this issue is *Jones v Canada (Attorney General)*, 2010 FC 740 [*Jones*], which concerned an application under subsection 66(4), seeking, *inter alia*, interest on retroactive benefits. In that case, Justice Johanne Gauthier observed as follows:

> There is also no need to deal with the parties' argument with respect to the Minister's power to grant interest pursuant to subsection 66(4) of the CPP, except to note that the case law referred to by the parties only addresses the issue by way of *obiter* or as a suggestion. A more thorough analysis will be required when this question really needs to be determined especially considering the grave consequences it would have not only on claims under this Act but under similar provisions in many other legislations.

The Respondent contends that Justice Gauthier's comments confirm that there is no jurisprudential authority to award interest on retroactive benefits pursuant to subsection 66(4).

[27] The Respondent further suggests that the language of the CPP clearly indicates that an award under subsection 66(4) is limited to the payment of benefits. Subsection 66(4) allows the Minister the discretion to take such measures as she considers appropriate to place the person in the position that the person would be in "under this Act," as opposed to in any other respect. This wording suggests that the authority to grant interest must be found in the Act. As there is no such provision in the Act, there is no such authority.

[28] The Respondent submits that the CPP is a complete code dealing with the payment of benefits. In the absence of a specific provision allowing for the payment of interest on benefits, such an obligation does not arise. See *Gladstone v Canada (Attorney General)*, 2005 SCC 21 at paragraph 12. The Respondent relies on the Ontario Court of Appeal decision in *Gorecki v Canada (Attorney General)* (2006), 265 DLR (4th) 206, 146 ACWS (3d) 834 [*Gorecki*] at paragraph 7, which states:

> The CPP is a complete statutory code that makes no provision for the payment of interest on benefits where there is a delay between the date on which the beneficiary became entitled to the benefit and the

> date on which the benefit was paid. It has been held that where a comprehensive statutory scheme does not provide for the payment of interest by the Crown, no interest is payable.

[29] The Respondent argues that, had Parliament intended to create an entitlement to interest, it could have easily done so. In *King*, above, the Federal Court of Appeal, at paragraph 37, cautioned about opening the "floodgates" when triggering a monetary remedy under subsection 66(4). It observed that "the financial impact on various government departments might well be substantial," particularly considering that "[m]any benefit-conferring statutes contain similar provisions to subsection 66(4) of the CPP."

[30] The Respondent submits that, if interest is to be payable on retroactive benefits, it is for Parliament expressly to decide, taking into full consideration the cost and feasibility of such a remedy in the context of the program being administered.

ANALYSIS

Background

[31] Ms. Bartlett feels that the Minister of Human Resources Development Canada has not dealt fairly with her.

[32] After being refused disability pension benefits in 1977 she persisted and was eventually found to be disabled within the meaning of the CPP in 2003.

[33] She began receiving disability pension benefits retroactive to 2000, but she felt she was entitled to more and convinced this Court that she was right and that she had been denied additional benefits through administrative error.

[34] Following Justice Yvon Pinard's decision to this effect, the Minister reconsidered Ms. Bartlett's subsection 66(4) request and granted her retroactive benefits back to 1978.

[35] The Minister's decision to this effect under subsection 66(4) of the CPP is found in a letter dated 28 August 2007. That letter provided a Payment Explanation Statement setting out Ms. Bartlett's CPP benefit entitlements for each year from 1978 to 2007 as well as the tax implications. The total CPP payment to Ms. Bartlett net of tax was $87,374.20 out of a total taxable benefit of $138,674.42. The letter of 28 August 2007 invited Ms. Bartlett to call Human Resources and Social Development if she had any questions. Ms. Bartlett certainly did have questions.

[36] She was understandably upset that she had been denied her legal entitlement to benefits for such a long time and she did not feel that receipt of monies in 2007 was the same thing as receipt when they should have been paid to her.

[37] Ms. Bartlett is tenacious and highly articulate. She represented herself very ably in the hearing before me. Based upon her past experiences with CPP, she does not trust them to get things right and she does not give up. Without ill will or rancour (Ms. Bartlett was very pleasant in Court) she told me that if I did not get this application right and agree with her she would be placing the matter before the Federal Court of Appeal, so I too am on notice.

[38] After receiving the letter of 28 August 2007, which set out the benefits to which the Minister felt Ms. Bartlett was entitled following reconsideration under subsection 66(4) as a result of Justice Pinard's decision of 30 January 2007, Ms. Bartlett set about trying to persuade the Minister that the payments which he had decided to award her through the exercise of the powers granted by subsection 66(4) of the CPP were not sufficient to put her in the position that she would have been in "had erroneous advice not been given or the administrative error … not been made."

[39] At first, Ms. Bartlett argued and tried to persuade the Minister that the payments were too low because they did not take into account cost-of-living increases that had occurred between 1978 and 2007. Ms. Bartlett wrote to the department, and the Minister informed her in various letters that the lump sum retroactive payment she had received had taken into account, and so reflected, cost-of-living increases during the relevant period. She was also advised that the lump sum calculation had adjusted her earnings upward to reflect increases in average wages and that her benefit had been escalated each year since 1977 by the Consumer Price Index to reflect increases in the cost of living.

[40] Ms. Bartlett continued to argue with the Minister that the payment was too low and that she had not been placed in the position that she would have been in had the administrative error not been made.

[41] The Minister continued to explain that no error had been made in the calculation of her benefits and that the reconsideration decision of 28 August 2007 placed her in the position that she would have been in accordance with subsection 66(4) and that no other payments could be made. A

letter of 2 February 2009, for instance, clearly informed Ms. Bartlett that no interest would or could be paid to her: “there is no statutory provision in the CPP to pay interest on CPP payments.”

[42] None of this satisfied Ms. Bartlett. It appears as though she wrote to the Minister of Human Resources and Skills Development on 22 April 2010 through her member of Parliament, Ms. Cathy McLeod, and was told by the Acting Director General Payments and Processing in an updated reply that, as previous letters had already explained, the calculation of payments was correct and would stand. Then, on 14 June 2010, she again wrote a letter to the Hon. Diane Finley, the Minister of Human Resources and Skills Development in which she explained her request and concluded as follows:

> I ask that the Minister consider Remedial action under s. 66(4) of the *Canada Pension Act* to award interest on the retroactive Disability Pension Benefits. Thankyou (*sic*).

[43] At this point, the Applicant decided to re-characterize her request for additional monies as a claim for interest. The immediate reply to this 14 June 2010 letter was another letter from the Acting Director General Payments and Processing, confirming previous correspondence. This letter, dated 21 July 2010, also addressed the Applicant’s recent demand for interest:

> With respect to your request for interest on the retroactive payment of your disability benefit, I must advise you that this is not possible. Unlike the *Income Tax Act*, which provides for the charging of interest on overdue taxes and which pays interest on refunds, the CPP legislation does not contain such provisions. Our policy is not to charge interest on overpaid benefits and, in the same way, interest is not paid on benefits owing.

[44] This is the letter which Ms. Bartlett says is a decision of the Minister not to exercise her discretion under subsection 66(4) of the CPP to pay her interest and which is the subject of this judicial review application.

Is There a Decision to Review?

[45] It is immediately apparent from the correspondence to which I have referred (and the rest of the correspondence on the record bears this out) that Ms. Bartlett's request for interest dated 14 June 2010 was made as part of her on-going effort to secure greater payments than had been awarded to her in the reconsideration decision of 28 August 2007. The Minister's replies to Ms. Bartlett have all been confirmations of that decision and polite letters of explanation as to why the calculations were correct and took into account Ms. Bartlett's cost-of-living concerns and as to why no further payment could or would be made. The letter of 2 February 2009 specifically advises her that "there is no statutory provision in the CPP to pay interest of CPP payments."

[46] Ms. Bartlett seeks to avoid the problems arising from her decision not to seek judicial review of the 28 August 2007 reconsideration by characterizing her 14 June 2010 request for interest as a new request for the Minister to exercise her discretion under subsection 66(4) on a new matter and the 21 July 2010 letter as a new decision by the Minister that this Court should now review.

[47] There are several reasons why I think the Court cannot accept Ms. Bartlett's characterization of what she is asking the Court to review.

[48] First of all, the record reveals that, whether Ms. Bartlett characterizes her request for a greater payment as a claim for cost-of-living increases or a claim for interest, her complaint about the 28 August 2007 reconsideration decision that followed Justice Pinard's judgment is essentially the same. She is saying that being paid a sum of money in 2007 is not the same thing as receiving it at earlier dates when it should have been paid. To my mind, there is merit in this argument, but that is not the issue I am faced with here.

[49] The essential point is that the 21 July 2010 letter upon which this application is based is not a new decision and is not a new exercise by the Minister of the powers granted by subsection 66(4) of the CPP. The letter is, rather, one in a long series of letters to the Applicant explaining why the 28 August 2007 reconsideration decision must stand and why no additional payments can be made to her, however those additional payments are characterized.

[50] Ms. Bartlett was unhappy with the 28 August 2007 reconsideration when she received it and yet she has not asked this Court to review it. The letter of 21 July 2010 is simply further confirmation that the reconsideration decision cannot be revisited. The Minister exercised her discretion under subsection 66(4) and the result was the 28 August 2007 reconsideration decision, which is not before this Court for review.

[51] With all sympathy for Ms. Bartlett, I have to accept the facts before me which reveal that the 21 July 2010 letter is not a new decision. It is one of many courtesy letters of explanation addressing why the 28 August 2007 decision must stand. In my view, it would have been quite acceptable for Ms. Bartlett to attack the reconsideration decision of 28 August 2007 by way of judicial review

before this Court within the timeframes allowed. It is not acceptable, however, to bring a belated collateral attempt to attack that decision by treating the 21 July 2010 letter as a new decision.

[52] Second, I can find nothing in the CPP or the jurisprudence that gives the Minister the jurisdiction or the power to revisit and reconsider the decision on entitlement that was made on 28 August 2007 because Ms. Bartlett has belatedly decided to re-characterize her request for additional payments as a request for interest.

[53] Ms. Bartlett originally complained that the payments were not sufficient because they did not reflect cost-of-living increases and other related factors. Yet she never attempted to seek judicial review of the 28 August 2007 reconsideration decision on these grounds. Her belated request for interest is an attempt to secure additional monies for the same reasons: the difference in time between payment of benefits and the time when they should have been paid.

[54] As the Respondent points out:

> An application for judicial review in respect of a decision of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the expiration of those 30 days.
>
> The Federal Court has drawn a distinction between a "decision" within the meaning of the *Federal Courts Act* which can properly be made the subject of judicial review, and a courtesy letter which can not (*sic*).

Time Limitation

[55] The record also reveals that, on the related point of time limitation, Ms. Bartlett has not brought her real complaint (i.e. her disagreement with the Minister's reconsideration decision of 28 August 2007) within the time specified by the *Federal Courts Rules* and she has not sought an extension of time within which to bring such an application.

[56] In the Minister's letter dated 28 August 2007, Ms. Bartlett was given details of the benefits she would be paid as a result of the Federal Court's ruling. Enclosed was a Payment Explanation Statement listing each year for which benefits would be paid and the amount of the benefit. If Ms. Bartlett disagreed with the Minister's calculations, her recourse was to apply for judicial review within 30 days. She did not commence such a challenge within the requisite time, nor has she asked the Court to extend the time for bringing any such application.

[57] By letter dated 11 September 2007, the calculation was again explained. It was confirmed that the amount being paid had been indexed for the cost-of-living. This letter was sent to Ms. Bartlett as a courtesy in response to her inquiry.

[58] An additional letter was sent to Ms. Bartlett in response to a further inquiry. In this letter, dated 2 February 2009, it was again confirmed that her benefits had been indexed to the cost-of-living. The issue of interest was also clearly and specifically addressed: "Also, there is no statutory provision in the CPP to pay interest on CPP payments."

[59] At this point the Minister's position regarding the quantum of the benefits, the cost-of-living indexing and the payment of interest had been fully confirmed and set out, yet the application was not commenced until approximately a year and a half later.

[60] What followed was a series of letters from Ms. Bartlett requesting additional monies and responses from the Minister confirming that nothing further could be paid. I have to agree with the Respondent that none of these letters constitutes a fresh consideration of the issue sufficient to extend the date of the decision. The application has to be dismissed as being out of time.

Availability of Interest Payment

[61] Should I be wrong on the preliminary issues, then I will also address the merits of this application.

[62] Ms. Bartlett is well aware that there is no provision in the CPP that specifically addresses whether interest is payable on CPP payments. This is why she has fallen back on the powers granted to the Minister under subsection 66(4) of the CPP to request interest. This attempt to obtain interest through the back door of subsection 66(4) is fraught with conceptual and political difficulties which are all reflected in the case law associated with this statutory provision. Justice Gauthier assessed relevant jurisprudence in her recent decision in *Jones*, above, where she had the following to say at paragraph 63:

> There is also no need to deal with the parties' argument with respect to the Minister's power to grant interest pursuant to subsection 66(4) of the CPP, except to note that the case law referred to by the parties only addresses the issue by way of *obiter* or as a suggestion. A more

> thorough analysis will be required when this question really needs to be determined especially considering the grave consequences it would have not only on claims under this Act but under similar provisions in many other legislations.

[63] Ms. Bartlett showed herself to be fully alive to these legal issues and took the position that this application is the very case to decide what Justice Gauthier declined to decide. Ms. Bartlett also pointed out, correctly, that interest has been awarded in earlier cases, notably *Whitton*, above. The implications of *Whitton* are, however, difficult to assess, bearing in mind the Federal Court of Appeal's decision in *King*, above, and Justice Gauthier's assessment of the relevant jurisprudence in *Jones*, which confirms that we have no real authority on the issue of whether or not interest on benefits can be paid pursuant to subsection 66(4) of the CPP.

[64] Having already found that the application in the present case should be dismissed because the 21 July 2010 letter is not a decision of the Minister and that the real decision of 28 August 2007 has not been brought before the Court in accordance with the time limitations set forth in the *Federal Courts Rules*, anything I have to say on this matter will, once again, be *obiter*.

[65] However, in the event that I should be wrong on the grounds set out above, I find the Respondent's arguments persuasive on this issue.

[66] Subsection 66(4) allows the Minister the discretion to take such measures as s/he considers appropriate to place a person in the position that the person would be in "under this Act" had the erroneous advice not been given or had the administrative error not occurred. The person is therefore put in the position he or she would have been in under the Act, as opposed to in any other

respect. The authority to grant interest therefore must, in my view, be found in the Act. There is no such provision and therefore no such authority.

[67] I accept the Respondent's argument that the CPP should be regarded as a complete code dealing with the payment of benefits. It imposes no obligation on the Minister to pay interest in addition to other benefits set out in the Act. In the absence of a specific provision allowing for the payment of interest on benefits, such an obligation does not arise. The case law cited by the Respondent appears to support this position and Ms. Bartlett has not provided any real analysis of the statutory scheme. She simply relies on *Whitton*, above, which does not really address the issues now raised directly by the Respondent.

[68] In *Gorecki*, above, the appellant had filed a proposed class action seeking interest on a lump sum retroactive payment awarded pursuant to a successful appeal of the denial of his claim for disability benefits to the Pension Appeals Board. The Attorney General brought a motion to strike the statement of claim on the grounds of jurisdiction and standing and on the ground that the claim disclosed no reasonable cause of action. The motion judge rejected the Attorney General's jurisdiction and standing arguments but did strike out the claim on breach of trust, breach of fiduciary duty and unjust enrichment. The Ontario Court of Appeal agreed with the motion judge's decision to strike the claims for breach of fiduciary duty and unjust enrichment. In doing so, the Court, at paragraph 7, said as follows:

> The CPP is a complete statutory code that makes no provision for the payment of interest on benefits where there is a delay between the date on which the beneficiary became entitled to the benefit and the date on which the benefit was paid. It has been held that where a comprehensive statutory scheme does not provide for the payment of interest by the Crown, no interest is payable.

[69] It would seem then that, as the Respondent points out, in the absence of an express provision in the CPP allowing for the payment of interest on retroactive benefits, no such obligation exists. Had Parliament intended to create an entitlement to interest on retroactive benefits, it could have easily done so. The lack of such explicit authority supports the Respondent's position that no such obligation exists.

[70] In *King FCA*, above, at paragraph 37, the Federal Court of Appeal cautioned about opening the "floodgates" when triggering a monetary remedy under subsection 66(4):

> In closing, it should be noted that if the respondent 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 (see, for example *Old Age Security Act*, R.S.C. 1985, c. O-9, section 32; *Special Retirement Arrangements Act*, S.C. 1992, c. 46, Sch. I, section 23; *War Veterans Allowance Act*, R.S.C. 1985, c. W-3, section 26; *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, subsections 42(10) and 42(11)). If this court were to hold that "erroneous advice" can be taken to have been given any time an initial decision denying a benefit is subsequently reversed by a higher authority, thus triggering an entitlement to a monetary remedy, the floodgates might be open to claims not only under the CPP, but under all of these other statutes, as well. There is no indication that this was Parliament's intention.

[71] Both Justice Gauthier in *Jones* and Justice Edgar Sexton of the Federal Court of Appeal writing for the panel in *King FCA* have cautioned against the introduction of such a remedy without consideration of the impact thereof, not just on the CPP but on other statutes with a provision similar to subsection 66(4). In my view, the inclusion of interest on retroactive benefits is a matter that Parliament must specifically direct, with full consideration of the cost and feasibility of such a remedy in the context of the program being administered.

[72] In addition to the above, the approach to this matter put forward by Ms. Bartlett gives rise to serious conceptual complications. In her written materials, Ms. Bartlett puts forward no explanation as to how any such interest could be calculated in her case. At the hearing, she suggested that an average of prime could be used over the relevant period. However, she also suggested that what she is looking for under subsection 66(4) is something approaching a tortious measure of compensation: i.e. that she should be put in the position she would have occupied had the administrative error not occurred. She mentioned investments and uses she could have made of the benefit money if it had been paid when it was supposed to be paid. No evidence was provided of any such loss. If this approach were mandated under subsection 66(4), then the Minister would need to engage in an extensive investigation for each applicant to determine the consequences (foreseeable or otherwise) of failure to pay benefits when due. Ms. Bartlett has placed no evidence before the Minister or the Court that would allow for such an assessment. However, it seems to me that if the Minister was required under subsection 66(4) to assess interest as a form of compensation "to place the person in the position that the person would be in under the Act had the erroneous advice not been given or the administrative error not been made" then the legal and practical problems would become insurmountable. Using an average of prime, as Ms. Bartlett suggests, would simply be an arbitrary exercise because it might have nothing to do with placing any particular applicant in the position that they would have been in, at least in the sense suggested by Ms. Bartlett. This is another reason, in my view, why Parliament could not have intended that interest should be awarded under subsection 66(4) in this way and why this matter must be explicitly directed by Parliament after full consideration of the cost and feasibility of such a remedy.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No costs are requested by the respondent and none are awarded.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1353-10
STYLE OF CAUSE:	**LINDA BARTLETT**
	and
	THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 10, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	July 26, 2011

APPEARANCES:

Linda Bartlett	FOR THE APPLICANT (Self-represented)
Allan Matte	FOR THE RESPONDENT

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