Date: 20090402

Docket: A-346-08

Citation: 2009 FCA 105

CORAM: **DÉCARY J.A.**
SEXTON J.A.
BLAIS J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

DANIEL KING

Respondent

Heard at Toronto, Ontario, on March 2, 2009.

Judgment delivered at Ottawa, Ontario, on April 2, 2009.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: DÉCARY J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

INTRODUCTION

[1] The issue in this case arose from the refusal by the Minister of Human Resources and Skills Development ("the Minister"), as she is now known, to award interest on a retroactive disability pension payment awarded to the respondent by the Pension Appeals Board (PAB). The Federal Court determined a preliminary question of law set out in an order of the Federal Court, concerning the proper interpretation of subsection 66(4) of the *Canada Pension Plan* (CPP). That section allows the Minister to provide a remedy to a person who has been denied a pension as a result of erroneous advice or administrative error in the administration of the CPP. The motions judge held

that in the circumstances of this case, “erroneous advice” had been given to the Minister by reason of the Pension Appeals Board having reversed the Minister’s initial decision to deny the respondent a disability pension. For the reasons that follow, I disagree with this conclusion, and would allow the Crown’s appeal.

LEGISLATION

[2] The question stated by the Federal Court requires the court to consider the interpretation of subsection 66(4) of the *Canada Pension Plan,* R.S.C. 1985, c. C-8:

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 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	*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.

FACTS

[3] The facts relevant to the appeal are straightforward. The respondent initially applied for disability benefits under the CPP on May 13, 1996. That application was denied on September 12, 1996, and the denial was confirmed upon reconsideration on October 30, 1996. The Review Tribunal dismissed the respondent's appeal on July 24, 1998. All of these decision-makers were of the opinion that his disability was not "severe and prolonged" within the meaning of the CPP.

[4] However, the PAB in a decision dated November 26, 2002 allowed the respondent's appeal of the Review Tribunal's decision. The PAB concluded that he had suffered from a "severe and prolonged" disability since February 1995. He has received a regular disability pension since that decision, and received a lump sum amount of retroactive benefits. The CPP does not provide for the automatic payment of interest on retroactive benefits in such instances.

[5] The respondent initially filed an action in the Federal Court, seeking to recover interest on his retroactive benefits. In an order dated March 8, 2007, the court determined that it did not have the jurisdiction to consider this claim in the context of an action (310 F.T.R. 120, 2007 FC 272 at para. 32). The court indicated that the proper course was for the respondent to make a request for a remedy under subsection 66(4) of the CPP (at para. 33).

[6] The respondent made a request for interest pursuant to subsection 66(4) on March 9, 2007. He claimed that the Minister acted on "erroneous advice" and/or made an "administrative error" in her initial decision to deny him a disability pension, made clear by the fact that the PAB later ruled

in his favour. The Minister denied this request on July 18, 2007, finding that no erroneous advice had been given, nor had any administrative error occurred.

[7] The respondent commenced an application for judicial review of this decision, asking that the application proceed as a class action. Following a case management conference, the Federal Court issued an order on February 22, 2008 referring the following preliminary question of law 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*?

[8] On June 20, 2008, the motions judge answered the question of law in the affirmative (2008 FC 777). In his view, the word "erroneous" had a "common meaning of a 'mistake' or wrong in the sense of 'incorrect'". He also held that "erroneous" had a legal meaning, including "incorrect in the sense of that which is disagreed with by a higher authority" (at para. 24).

[9] The motions judge found, as a matter of law, that the Minister makes the decision to award or deny a disability pension, on the advice of department officials (at para. 33). He found support for this conclusion in *Whitton v. Canada (Attorney General)*, [2002] 4 F.C. 126, 2002 FCA 46 (*Whitton*).

[10] On the facts of this case, the motions judge concluded that department officials had given the Minister erroneous advice that the respondent's disability was not "severe and prolonged". In his view, this advice had been proven to be erroneous by reason of the decision of the PAB to reverse the decision of the Review Tribunal, and thus the decision of the Minister denying the pension to the respondent (at para. 38). The motions judge also concluded that such advice was factually incorrect because the evidence before the PAB was "essentially the same" as that before the Minister (at para. 41).

[11] Finally, the motions judge dismissed the Crown's argument that this conclusion fettered the Minister's discretion to determine whether "erroneous advice" had been given in any particular case. He held that even where the PAB ultimately disagrees with the Minister's initial assessment, the advice may not have been erroneous at the time it was given if the PAB's decision is made on the basis of "new facts, or alternatively old facts seen in a new context" (at para. 40). On these specific facts of this case, however, the motions judge felt that the facts before the Minister and those before the PAB were "essentially the same" (at para. 41).

ISSUE

[12] There is only one issue in this appeal, namely whether the motions judge erred in answering the preliminary question of law in the affirmative. The parties are agreed that this is a question of law reviewable on a standard of correctness (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at para. 8; *Camp Mini-Yo-We v. Canada (Canada Revenue Agency)*, 2006 FCA 413 at para. 16). This court is therefore entitled to substitute its opinion for that of the motions judge.

ANALYSIS

[13] In my view, the motions judge erred in his interpretation of the word "advice". He concluded that when a decision is made to award or deny a disability pension, the decision is made by the Minister, acting on advice provided to her by civil servants.

[14] It is true that subsection 60(6) of the CPP requires a person to make an application for benefits to "the Minister", and that subsection 60(7) states that "the Minister" must consider and decide pension applications. However, there is no suggestion that the Minister herself actually considers every one of the more than 60,000 applications that are made for disability benefits annually. The practice of the Department of Human Resources and Skills Development is that the power to decide whether an applicant's disability is severe and prolonged is exercised by medical adjudicators appointed for this purpose.

[15] This practice is in accordance with subsection 24(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

Power to act for ministers	Exercice des pouvoirs ministériels
24. (2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include	**24.** (2) La mention d'un ministre par son titre ou dans le cadre de ses attributions, que celles-ci soient d'ordre administratif, législatif ou judiciaire, vaut mention :
(*a*) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in	*a*) de tout ministre agissant en son nom ou, en cas de vacance de la charge, du ministre investi de sa charge en application d'un décret;
	b) de ses successeurs à la charge;

council;

(*b*) the successors of that minister in the office;

(*c*) his or their deputy; and

(*d*) notwithstanding paragraph (*c*), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

c) de son délégué ou de celui des personnes visées aux alinéas *a*) et *b*);

d) indépendamment de l'alinéa *c*), de toute personne ayant, dans le ministère ou département d'État en cause, la compétence voulue.

[16] Paragraph 24(2)(*d*) states that where a statute grants a Minister the power to make a decision, that power may also be exercised by department officials who are appointed to do so. That is, such an official may make a binding decision herself, without consulting with the Minister and without any personal intervention by the Minister, and without delivering advice to anyone.

[17] The operation of paragraph 24(2)(*d*) was explained by Justice Létourneau in *Canada (Human Resources Development) v. Wiemer* (1998), 228 N.R. 341 at para. 11 (F.C.A.), another case concerning a decision made under the CPP:

> There is no requirement under the Act that approval of an application for a division of unadjusted pensionable earnings be given by the Minister personally. Under subsection 24(2) of the *Interpretation Act*, R.C.S. 1985, c. I-21, powers given to a minister to do an act or a thing can be exercised by a person appointed to serve in the department over which the minister presides in a capacity appropriate to the doing of the act. Indeed, section 24 merely recognizes in legislation an existing practice dictated by the diversity and complexities of modern public administrations. Prior to the enactment of this provision, our Courts had recognized the existence of a principle of implied delegation of ministerial powers in order to ensure a proper and efficient functioning of public administrations. Recently, the Supreme Court of Canada reasserted the principle when Major J., writing for the Court, concluded that the express delegation or devolution of powers to department officials found in s. 7 of

> the *Fisheries Act* may appear unnecessary today. "When power is entrusted to a Minister of the Crown, Major J. wrote, the act will generally be performed not by the Minister but by delegation to responsible officials in his department".

[18] This was clearly the pattern followed in this case. The letter conveying the initial decision to deny the respondent a disability pension was signed by an employee of the Income Security Programs Branch, Northern Ontario Area. The letter confirming that decision upon reconsideration was signed by L. Bates, who was identified as a registered nurse with the same department. Neither decision was signed by the Minister. Further, there is no suggestion that either letter constituted advice that was being relayed to the Minister.

[19] In these circumstances, there is no “advice” being provided to the Minister, within the plain and ordinary meaning of that word. The *Oxford English Dictionary*, 2nd ed., defines advice as an “opinion given or offered as to action; counsel, *spec.* medical or legal counsel”. Similarly, *Black’s Law Dictionary*, 8th ed., defines advice as “guidance offered by one person, esp. a lawyer, to another”. Also, the word « avis », which is used in the French text, has an equivalent meaning in French dictionaries. See, for example, *Le nouveau Petit Robert de la langue française*, 2009 « opinion que l’on donne à qqn touchant la conduite qu’il doit avoir. ». In short, the plain and ordinary meaning of the word advice contemplates a communication of some sort. There is no evidence of any communication to the Minister at all regarding the respondent’s case.

[20] The respondent argues, relying on *Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27 at para. 36 *Rizzo*), that remedial legislation such as the CPP, and subsection 66(4) in particular, should be given

a broad and generous interpretation, and that “any doubt arising from difficulties of language should be resolved in favour of the claimant”. However, there is no doubt arising from the language of subsection 66(4) of the CPP. The meaning of the word “advice” is not ambiguous or unsettled. As such, this passage from *Rizzo* does not assist the respondent.

[21] I also reject the argument that the decisions of medical adjudicators are, by operation of law, deemed to be advice always accepted by the Minister. This court has not been referred to any authority standing for this proposition.

[22] The motions judge relied on *Whitton* to support the conclusion that it is the Minister acting on advice who makes decisions under the CPP. In my view, he erred in doing so. In that case, Mr. Whitton’s old age pension was suspended, pending an investigation into allegations that he had been cashing benefit cheques made out to his deceased mother. The Minister argued that she was entitled to set-off the amounts Mr. Whitton had allegedly fraudulently obtained against monies admittedly owing to Mr. Whitton for his own old age pension.

[23] This court concluded that there was no authority under the CPP for the Minister to recover by set-off, that Mr. Whitton was legally entitled to his old age pension, and that the Minister was illegally refusing to pay it. To this end, this court issued an order of *mandamus*, requiring that Mr. Whitton’s benefits be reinstated.

[24] Having already found that the requirements for *mandamus* were met, the court went on to say (at para. 37):

> To conclude on this point, I will refer to section 32 of the [Old Age Security] Act, which was reproduced earlier. At this point, the Minister must be satisfied that, as a result of erroneous advice, the appellant has been denied benefits to which he would have been entitled. The Minister must take the necessary action to place the appellant into 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] First and foremost, *Whitton* is distinguishable on its facts. It involved a decision taken by department officials, in the absence of legal authority, to deny an individual his pension, not by reason of his failure to prove entitlement, but rather for extraneous reasons. In my view, its reasoning is not applicable to a situation where a department official, in the ordinary course of her duties and in accordance with the CPP, makes a decision on an application for a disability pension, even if that decision is subsequently disagreed with by the PAB.

[26] Further, the application of section 32 of the *Old Age Security Act* (an equivalent provision to subsection 66(4) of the CPP) was not directly in issue in *Whitton*. What was in issue was the appropriate remedy available to the Minister to recover the monies allegedly wrongly received by Mr. Whitton. While the court held that the Minister could not set off such monies against Mr. Whitton's own pension, it did not hold that the Minister could not sue to recover such monies. What was at issue was Mr. Whitton's right to an order of *mandamus* requiring payment of his own pension monies to him.

[27] Secondly, in any event I do not read the above-quoted paragraph as establishing the principle that it is the Minister acting on advice who makes decisions under the CPP. The court did not state this principle expressly in *Whitton*, and it is at odds with both the authority conferred on department officials by paragraph 24(2)(*d*) of the *Interpretation Act*, and the plain and ordinary meaning of the word "advice". Contrary to the respondent's argument, the fact that the Minister was ordered to pay the benefit to Mr. Whitton does not lead inexorably to the conclusion that the decision to suspend the benefit was one made by the Minister, on advice. This is simply a reflection of the fact that the Minister bears ultimate legal responsibility for administrative decisions made by department officials.

[28] Thus I conclude that subsection 66(4) of the CPP, when permitting the Minister to grant a remedy where he finds that erroneous advice has been given or administrative error has occurred, does not purport to deal with situations where a decision of the Minister has been reversed. If this had been Parliament's intention, it would have been very simple for the legislature to use the word "decision". Instead of saying that where a decision is reversed, a remedy may be granted, the legislature provided only that a remedy could be granted where there was "erroneous advice or administrative error". The phrase "erroneous advice or administrative error" cannot be equated with the word "decision".

[29] In *Rizzo* at para. 21, the Supreme Court endorsed Driedger's modern approach to statutory interpretation (cited from *Construction of Statutes*, 2nd ed., 1983 at 87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[30] Relying on the *Rizzo* approach, it cannot be said:

> a) that the words "erroneous advice or administrative error", read in their entire context and in their grammatical and ordinary sense, refer to "a decision";
>
> b) that to so construe those words would cause subsection 66(4) to be read harmoniously with the scheme of the Act; or
>
> c) that the object of the CPP and the intention of Parliament was to create extra remedies to be available to the Minister where her decision is simply reversed.

[31] I am of the view that "erroneous advice", as it appears 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 any advice which, on occasion, may be given to the Minister of her officials in the course of deciding whether a pension should be awarded. 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 of the previous decisions of this court and the Federal Court relating to subsection 66(4) (see *Pincombe v. Canada (Attorney General)* (1995), 189 N.R. 197 (F.C.A.); *Leskiw v. Canada (Attorney*

General), 233 F.T.R. 182, 2003 FCT 582, aff'd 320 N.R. 175, 2004 FCA 177, leave to appeal denied [2004] S.C.C.A. No. 317; *Cowton v. Canada (Human Resources Development)*, 2004 FC 530; *Graceffa v. Canada (Minister of Social Development)*, 306 F.T.R. 193, 2006 FC 1513).

[32] This conclusion is supported by the fact that, contrary to the conclusion of the Federal Court, the respondent's proposed interpretation of subsection 66(4) would fetter the Minister's discretion to determine whether erroneous advice has been given or administrative error has occurred in any given case. If a decision of the PAB, effectively overruling a decision of the Minister or her delegate, in the absence of new evidence, constitutes proof of erroneous advice having been given, then there is no room left for the Minister to decide this question. This would emasculate the part of subsection 66(4) which provides that the Minister must satisfy herself that an error has been made.

[33] The respondent argued that the Minister does not have the discretion to determine whether there has been erroneous advice or administrative error, and that her discretion is fully exercised by deciding whether a denial of a benefit has resulted, and in choosing the appropriate remedy. However, in *Kissoon v. Canada (Minister of Human Development Resources)*, 245 F.T.R. 152, 2004 FC 24 at para. 4 (aff'd 2004 FCA 384), the court was clear that the Minister has the discretion to determine whether there has been erroneous advice:

> The decision of the Minister under section 66(4) of the CPP is discretionary. Although the Minister "shall" take remedial action that it considers appropriate, this duty arises only once the Minister is satisfied that erroneous advice has been given or that an administrative error has occurred. The requirement to take remedial action is conditional and, therefore, <u>does not fetter the Minister's discretion to first satisfy himself that an error has been made…</u>
> [Emphasis added]

[34] Thus, I do not agree with the conclusion of the motions judge that the discretion is not fettered, simply because the Minister could determine that the evidence before the PAB was different than the evidence presented with the original application.

[35] I would also observe, even though in my view it is not relevant to determining whether there is "advice" or not within the meaning of subsection 66(4), that on the facts of this case, it is clear that the PAB had the advantage of a great deal of evidence that wasn't before the medical adjudicator when the initial decision was made to deny the respondent a disability pension. At the hearing before this court, counsel for the appellant pointed to eighteen significant medical reports that had not been put before the medical adjudicator, but were considered by the PAB. The PAB's decision makes it clear that it relied on some of this new evidence in reaching its conclusion that the respondent's disability was severe and prolonged.

[36] Therefore, it cannot possibly be said that the initial decision that the respondent's disability was not severe and prolonged was based on erroneous advice solely because the PAB reversed the decision to deny him a pension. The PAB had new evidence before it.

[37] 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, s. 32; *Special Retirement Arrangements Act*, S.C. 1992, c. 46, Sch. I, s. 23; *War Veterans Allowance Act*, R.S.C. 1985, c. W-3, s. 26; *Public Service*

Superannuation Act, R.S.C. 1985, c. P-36, ss. 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.

CONCLUSION

[38] For all of the foregoing reasons, I would allow the appeal, set aside the judgment of the Federal Court and answer the preliminary question of law stated by the Federal Court in the negative. The Crown did not seek costs.

"J. Edgar Sexton"
J.A.

"I agree
Robert Décary J.A."

"I agree
Pierre Blais J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-346-08
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STYLE OF CAUSE:	Attorney General of Canada v. Daniel King
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REASONS FOR JUDGMENT BY:	Sexton J.A.
CONCURRED IN BY:	Décary J.A. Blais J.A.
DATED:	April 2, 2009

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