Federal Court of Appeal | Cour d'appel fédérale

Date: 20091005

Docket: A-381-08

Citation: 2009 FCA 284

CORAM: **SHARLOW J.A.**
RYER J.A.
TRUDEL J.A.

BETWEEN:

EUGENE UPSHALL

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at St-John's, Newfoundland and Labrador, on September 16, 2009.

Judgment delivered at Ottawa, Ontario, on October 5, 2009.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: RYER J.A.
DISSENTING REASONS BY: SHARLOW J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an appeal arising from an Order by Mactavish J. (the Judge), dated June 26, 2008, whereby she denied Mr. Upshall's application for judicial review of the decision of a designated Member of the Pension Appeals Board (PAB), who refused Mr. Upshall's leave to appeal from a Review Tribunal (RT) decision.

[2] For the reasons that follow, I propose to allow the appeal and remit the matter back to the Board for a redetermination by another Member. Therefore, while I acknowledge and state in these

reasons Mr. Upshall's arguments concerning both legislative intent and his section 15 *Charter* rights, there will be no need to address them in substance.

[3] The relevant facts reveal that the appellant and his wife, Ms. Hickey, divorced in 1999. In March 2004, Ms. Hickey applied for a division of her *Canada Pension Plan* unadjusted pensionable earnings (pensionable earnings). Under the *Canada Pension Plan*, R.S.C. 1985, c. C-8) (the *Plan*), pensionable earnings are divided equally between the spouses when their marriage or common-law relationship ends.

[4] In April 2004, Ms. Hickey wrote to the Minister asking that her application be withdrawn. Her request was denied as the division was the result of a divorce. Upon reconsideration, at the request of the appellant, the Minister upheld his previous decision. A review of the file confirmed that Ms. Hickey's earnings were higher as a result of the division and that she would receive a greater benefit upon application for a retirement or disability pension (appeal book, tab 5, page 63). Therefore, Mr. Upshall appealed the Minister's decision to the RT.

[5] The Minister's decision was grounded on section 55.1 of the *Plan* which, in its relevant parts, reads as follows:

Canada Pension Plan, R.S.C. 1985, c. C-8)	*Régime de pensions du Canada*, L.R.C. 1985, ch. C-8)
55.1 (1) Subject to this section and sections 55.2 and 55.3, a division of unadjusted pensionable earnings shall take place in the	55.1 (1) Sous réserve des autres dispositions du présent article et des articles 55.2 et 55.3, il doit y avoir partage

following circumstances:	des gains non ajustés ouvrant droit à pension dans les circonstances suivantes :
(*a*) in the case of spouses, following the issuance of a decree absolute of divorce, a judgment granting a divorce under the Divorce Act or a judgment of nullity of the marriage, on the Minister's being informed of the decree or judgment, as the case may be, and receiving the prescribed information;	*a*) dans le cas d'époux, lorsqu'est rendu un jugement irrévocable de divorce, un jugement accordant un divorce conformément à la Loi sur le divorce ou un jugement en nullité de mariage, dès que le ministre est informé du jugement et dès qu'il reçoit les renseignements prescrits;
…	[…]
(5) Before a division of unadjusted pensionable earnings is made under this section, or within the prescribed period after such a division is made, the Minister may refuse to make the division or may cancel the division, as the case may be, if the Minister is satisfied that	(5) Avant qu'ait lieu, en application du présent article, un partage des gains non ajustés ouvrant droit à pension, ou encore au cours de la période prescrite après qu'a eu lieu un tel partage, le ministre peut refuser d'effectuer ce partage, comme il peut l'annuler, selon le cas, s'il est convaincu que :
(*a*) benefits are payable to or in respect of both persons subject to the division; and	*a*) des prestations sont payables aux deux personnes visées par le partage ou à leur égard;
(*b*) the amount of both benefits decreased at the time the division was made or would decrease at the time the division was proposed to be made.	*b*) le montant des deux prestations a diminué lors du partage ou diminuerait au moment où il a été proposé que le partage ait lieu.
(Emphasis is mine)	(L'emphase est la mienne)

[6] The appellant does not challenge the legality of the above-cited provision. Rather, he disagrees with the Minister's decision not to allow Ms. Hickey to withdraw her application and with the Minister's interpretation and application of that section of the *Plan*, which, he feels, were done contrary to the legislative intent and in violation of his section 15 *Charter* rights.

[7] Mr. Upshall has been arguing, at all levels, that the Minister should not have processed Ms. Hickey's application for a division of pensionable earnings, given that his own pensionable earnings would be reduced by such a division, without conferring any real benefit on Ms. Hickey, once the Child Rearing Dropout provisions of the *Plan* (Dropout provisions) were taken into account in calculating her pension entitlement.

[8] As explained by the Judge, the Dropout provisions allow contributors to drop periods out of the calculation where the contributor has not been working outside of the home or where the contributor's earnings have gone down, because the contributor was raising a child under seven years of age (reasons for Order at paragraphs 16-17). I understand therefore that dropping out periods of low earnings may have a favourable effect on the ultimate amount of a contributor's pension benefits.

[9] In the case at bar, Ms. Hickey was the spouse who could have claimed the benefits of the Dropout provisions. As of this date, she chose not to exercise that discretionary right.

[10] The appellant contends that by ignoring the Dropout provisions in the calculation of Ms. Hickey's entitlement, the Minister changed the rule and proceeded to the division of "adjusted" pensionable earnings.

[11] This argument was the main focus of the RT's decision whereby the appellant's thesis was dismissed on two grounds: (a) a division of the ex-spouses' unadjusted pension earnings was

mandatory following the issuance of their final divorce decree; and (b) the RT was without jurisdiction to grant an appeal based on subsections 55.1(5) and 66(4) of the *Plan*.

[12] Both the Judge and the designated Member of the PAB seized with the application for leave to appeal endorsed the RT's conclusion on "jurisdiction". I emphasize this word because I am of the view that the issue does not present itself as a jurisdictional matter.

[13] But before going on, I will now reproduce the relevant passages from both decisions. In the case of the PAB, the relevant portion is the whole decision. It reads:

> The Review Tribunal did not have jurisdiction in a case such as this and properly dismissed the appeal. For the same reasons leave to appeal to the Pension Appeals Board is refused (appeal book, page 25).

[14] For her part, the Judge was "satisfied that the RT was correct in holding that it had no jurisdiction to grant relief to Mr. Upshall under either subsection 55.1(5) or subsection 66(4) of the *Canada Pension Plan*" (reasons for Order at paragraph 46). She therefore concluded that the designated Member of the PAB had not erred in denying leave to the appellant.

[15] This purported lack of jurisdiction of the RT to entertain the appeal, once accepted, should have been enough to dispose of the matter (at all levels) in a summary fashion.

[16] However, the RT, in the event that it was in error on the jurisdictional issue, had gone on to consider the substance of Mr. Upshall's submissions (decision of the RT, appeal book, tab 5, page 33 at paragraph 22; Judge's reasons for Order at paragraph 20).

[17] These incidental remarks by the RT had a compelling effect on the Judge who also proceeded to analyze the merits of the appellant's arguments on (a) the Minister's failure to consider the Dropout provisions and; (b) the Minister's discriminatory interpretation of the impugned section of the *Plan*. With respect, I am of the view that the Judge should not have done so as she was called upon solely to judicially review the decision of the designated Member of the PAB. A leave application is a preliminary step to the hearing on the merits. The applicant need not prove his case at this stage (respondent's letter dated March 17, 2004, appeal book, tab 5, pages 129-130).

[18] As mentioned by the respondent at paragraph 48 of his memorandum of fact and law:

> 48. In determining whether to interfere with a decision of a designated Member of the PAB concerning an application for leave, the Court must consider two issues:
>
> a) whether the application for leave raises an arguable case without otherwise assessing the merits of the application; and
>
> b) whether the decision maker has erred in law or in appreciation of the facts in determining whether an arguable case is raised. If new evidence is adduced with the application, if the application raises an issue of law or of relevant significant facts not appropriately considered by the Review Tribunal in its decision, an arguable issue is raised for consideration and it warrants the grant of leave.
>
> (*Callihoo, v. Canada (Attorney General)*, [2000] F.C.J. No. 612 (T.D.)(QL) at paragraph 15[*Callihoo*])

[19] I am also reminded that in exercising his/her discretion to grant leave to appeal pursuant to subsections 83(1) and 83(2) of the *Plan*, (relevant portions appended to these reasons) a designated Member is entitled to a high degree of deference (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 CSC 9 at paragraph 51). However, subsection 83(3) (also appended to these reasons) requires that the person who refuses leave give written reasons; the designated Member's reasons were inadequate.

[20] All this being said, I disagree with the Order of the Federal Court for several reasons.

[21] Firstly, it was an error of law to uphold the decision of the designated Member of the PAB and to conclude, as he had, that the RT did not have jurisdiction to entertain Mr. Upshall's argument under section 55.1 of the *Plan*.

[22] It appears that the RT had examined the appellant's claim regarding the Minister's decision under section 55.1 as if the benefit had been denied due to departmental error. In such a case, subsection 66(4) of the *Plan*, cited by the RT at paragraph 17 of its decision, provides for a remedy to be determined at the sole discretion of the Minister with the purpose of placing "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" (paragraph 66(4)(*b*) of the *Plan*). Viewed from that angle, the RT could not have entertained a claim. This approach to the appellant's argument obviously led the RT to qualify the issue as a jurisdictional matter.

[23] However, the gist of the appellant's argument was that the Minister's interpretation of section 55.1 of the *Plan* was unfair, discriminatory and wrong in law. Pursuant to sections 81 and 82 of the *Plan* (relevant portions appended to these reasons) the RT may, amongst other things, hear the appeal of a former spouse who is dissatisfied with any decision made under section 55.1.

[24] Secondly, the judicial review was aimed at the discretionary decision of a designated Member of the PAB who had denied leave to appeal in the most laconic way, thereby making it impossible to identify, let alone assess, the basis for his decision. Under those circumstances, no deference was owed.

[25] Had the Judge, following the teachings of *Callihoo*, directed her attention more closely to the designated Member's decision rather than to that of the RT, I am persuaded that she would have allowed the application given the record, the error of law committed regarding the RT's powers under the *Plan* and the failure of the designated Member to even mention the arguments put forward by the appellant, which raised an arguable case for consideration.

[26] I would therefore allow this appeal with costs, I would set aside the Order of the Federal Court and, giving the Order that the Federal Court should have given, I would set aside the decision

of the PAB's designated Member and I would refer the matter back to the Board for a redetermination by another Member on the basis that leave to appeal the decision of the RT should be granted.

"Johanne Trudel"

J.A.

"I agree
C. Michael Ryer J.A."

SHARLOW J.A. (dissenting reasons)

[27] I agree with my colleague Justice Trudel that the Review Tribunal has the jurisdiction to entertain an appeal from a decision of the Minister under section 55.1 of the *Canada Pension Plan*, that Mr. Upshall was in substance appealing such a decision even though he also invoked section 66 of the *Canada Pension Plan*, and that the disposition of Mr. Upshall's application for judicial review should not have turned on the issue of jurisdiction. However, Justice Mactavish also concluded that, as a matter of law, Mr. Upshall's appeal from the Minister's decision could not succeed. In my view, that was a sound alternative ground for dismissing Mr. Upshall's application for judicial review. I would dismiss this appeal.

"K. Sharlow"

J.A.

APPENDIX

Canada Pension Plan, R.S.C. 1985, c. C-8	*Régime de pensions du Canada*, L.R.C. 1985, ch. C-8)
Appeal to Minister	Appel au ministre
81. (1) Where	81. (1) Dans les cas où :
(*a*) a spouse, former spouse, common-law partner, former common-law partner or estate is dissatisfied with any decision made under section 55, 55.1, 55.2 or 55.3,	*a*) un époux ou conjoint de fait, un ex-époux ou ancien conjoint de fait ou leurs ayants droit ne sont pas satisfaits d'une décision rendue en application de l'article 55, 55.1, 55.2 ou 55.3,
…	[…]
the dissatisfied party or, subject to the regulations, any person on behalf thereof may, within ninety days after the day on which the dissatisfied party was notified in the prescribed manner of the decision or determination, or within such longer period as the Minister may either before or after the expiration of those ninety days allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.	ceux-ci peuvent, ou, sous réserve des règlements, quiconque de leur part, peut, dans les quatre-vingt-dix jours suivant le jour où ils sont, de la manière prescrite, avisés de la décision ou de l'arrêt, ou dans tel délai plus long qu'autorise le ministre avant ou après l'expiration de ces quatre-vingt-dix jours, demander par écrit à celui-ci, selon les modalités prescrites, de réviser la décision ou l'arrêt.
…	[…]
Appeal to Review Tribunal	Appel au tribunal de révision
82. (1) A party who is dissatisfied with a decision of the Minister made under section 81 or subsection 84(2)	82. (1) La personne qui se croit lésée par une décision du ministre rendue en application de l'article 81 ou du paragraphe 84(2)
…	[…]

may appeal the decision to a Review Tribunal in writing within 90 days, or any longer period that the Commissioner of Review Tribunals may, either before or after the expiration of those 90 days, allow, after the day on which the party was notified in the prescribed manner of the decision or the person was notified in writing of the Minister's decision and of the reasons for it.

…

Powers of Review Tribunal

(11) A Review Tribunal may confirm or vary a decision of the Minister made under section 81 or subsection 84(2)

…

may take any action in relation to any of those decisions that might have been taken by the Minister under that section or either of those subsections, and the Commissioner of Review Tribunals shall thereupon notify the Minister and the other parties to the appeal of the Review Tribunal's decision and of the reasons for its decision.

…

Appeal to Pension Appeals Board

83. (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a

peut interjeter appel par écrit auprès d'un tribunal de révision de la décision du ministre soit dans les quatre-vingt-dix jours suivant le jour où la première personne est, de la manière prescrite, avisée de cette décision, ou, selon le cas, suivant le jour où le ministre notifie à la deuxième personne sa décision et ses motifs, soit dans le délai plus long autorisé par le commissaire des tribunaux de révision avant ou après l'expiration des quatre-vingt-dix jours.

[…]

Pouvoirs du tribunal de révision

(11) Un tribunal de révision peut confirmer ou modifier une décision du ministre prise en vertu de l'article 81 ou du paragraphe 84(2)

[…]

et il peut, à cet égard, prendre toute mesure que le ministre aurait pu prendre en application de ces dispositions; le commissaire des tribunaux de révision doit aussitôt donner un avis écrit de la décision du tribunal et des motifs la justifiant au ministre ainsi qu'aux parties à l'appel.

[…]

Appel à la Commission d'appel des pensions

83. (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82

decision of a Review Tribunal made under section 82

…

may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.

Decision of Chairman or Vice-Chairman

(2) The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.

…

Where leave refused

(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.

…

[…]

peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long qu'autorise le président ou le vice-président de la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.

Décision du président ou du vice-président

(2) Sans délai suivant la réception d'une demande d'interjeter un appel auprès de la Commission d'appel des pensions, le président ou le vice-président de la Commission doit soit accorder, soit refuser cette permission.

[…]

Permission refusée

(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.

[…]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-381-08
STYLE OF CAUSE:	Eugene Upshall v. Attorney General of Canada
PLACE OF HEARING:	St-John's, Newfoundland and Labrador
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DATED:	October 5, 2009

APPEARANCES:

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