

Date: 20070626

Docket: T-1515-06

Citation: 2007 FC 678

Ottawa, Ontario, June 26, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

and

ALLEN SMALL

Respondent

TRANSCRIPT OF REASONS

Let the attached edited version of the transcript of my Reasons for Order delivered orally from the bench at Halifax, Nova Scotia, on May 9, 2007, be filed to comply with section 51 of the *Federal Court Act*.

“ R. L. Barnes ”

Judge

IN THE FEDERAL COURT OF CANADA

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

and

ALLEN SMALL

Respondent

DECISION

HELD BEFORE: The Honourable Mr. Justice Barnes

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: Wednesday, May 9, 2007

APPEARANCES: Mr. Allan T. Matte
Solicitor for the Applicant

Mr. Allen Small
Self-represented

THE REGISTRAR: Mr. Mike Kowalchuk

Recorded by:
Drake Recording Services Limited
1592 Oxford Street
Halifax, NS B3H 3Z4
Per: Phil Drake, CCR

1 **BARNES, J. (Orally):** This is an
2 application for judicial review brought by the
3 Crown from a decision of the Pension Appeals Board
4 -- and hereafter I'm just going to refer to that
5 group as the Board -- by which the Respondent,
6 Allen Small, was granted an extension of time in
7 which to obtain leave to appeal from a decision of
8 a Canada Pension Plan Review Tribunal, and I'll
9 refer to that group as the Tribunal. These are my
10 reasons delivered orally at Halifax on May 9th, 2006
11 for allowing the Crown's application.

12 It appeared from the record before
13 the Court that Mr. Small's intended appeal
14 concerned the Tribunal's determination of his
15 deemed disability date, which was found to be April
16 2002 with benefits to commence in August 2002.

17 Mr. Small's request for an appeal
18 was in the form of a letter received by the Board
19 on January 31st, 2006, which was approximately six
20 weeks beyond the 90-day filing requirement set by
21 s.83(1) of the Canada Pension Plan. That letter
22 offered no explanation for Mr. Small's failure to
23 meet the 90-day appeal deadline. Mr. Small's
24 letter was also somewhat unclear as to what
25 decision he was concerned with, and the Board

1 assumed that he wished to appeal the Tribunal
2 decision. Because Mr. Small did not file any
3 material on this application before the Court, it
4 was not until this morning that he advised the
5 Court and the Crown that his intention was to
6 appeal an earlier ministerial decision by which his
7 first application for disability benefits was
8 denied. Apparently, instead of appealing that
9 decision he was advised to bring a fresh
10 application for benefits, which he did. It was in
11 connection with that application that he was
12 ultimately successful before the Tribunal.

13 Nevertheless, he feels that his
14 disability claim should properly have been assessed
15 as of the date of his first application, a
16 difference of about eight months' benefits. He
17 said today that that first application was
18 submitted by mailing on time, but it was lost
19 somewhere in transit.

20 Needless to say, the Board's
21 decision in this case was based on a wrong
22 assumption. Mr. Small is not challenging the
23 Tribunal's decision by which his disability claim
24 was accepted, and he understands that the
25 commencement date for benefits as determined on his

1 second application for benefits was correct. He
2 simply wants the Minister to reconsider the
3 decision to deny his first claim and to award
4 benefits as of the date of that earlier application
5 for benefits.

6 Given that the Board's decision was
7 based on a wrong assumption, an innocently made
8 assumption, certainly it should be set aside on
9 that basis. I will, however, deal as well with the
10 Crown's position on the merits of this application
11 because there, too, the Board erred.

12 In accordance with s. 83(1) of the
13 Canada Pension Plan, the Board did have discretion
14 to grant an extension of time to permit Mr. Small's
15 appeal to proceed. That decision was rendered by
16 the Board on July 14th, 2006. That decision offered
17 the following reasons for granting an extension to
18 appeal.

19 "The decision of the Review Tribunal
20 is dated July 27th, 2005 but apparently was not
21 communicated to the Applicant until September 16th,
22 2005.

23 The 90-day appeal period would
24 expire approximately December 16th, 2005.

25 The undated letter of the Applicant,

1 which I shall consider as an Application for an
2 Extension of Time in which to Appeal and Leave to
3 Appeal was received by the Pension Appeals Board on
4 January 31st, 2006, some one and a half months after
5 expiry of the appeal period.

6 In the *Minister of Human Resources*
7 *Development v. Josephine Gattellaro*, Snider, J.
8 states that a member's decision to grant leave to
9 appeal after the expiry of the 90-day period is
10 "highly discretionary."

11 Snider, J. went on to say that,
12 "four criteria must be followed on extension of
13 time applications under s. 83(1). They are:

- 14 1) A continuing intention to pursue
15 the
16 application, or appeal;
- 17 2) The matter discloses an arguable
18 case;
- 19 3) There is a reasonable explanation
20 for the delay; and
- 21 4) There is no prejudice to the other
22 party in allowing the extension.

23 Snider, J. concluded that the
24 Applicant had failed to provide a reasonable
25 explanation for the delay and an absence of

1 prejudice to the Minister.

2 By reason of the short lapse of time
3 between the expiry of the appeal period and receipt
4 of the application, I am prepared to exercise my
5 discretion and find that there was a continuing
6 intention to appeal and no reasons for the delay in
7 filing the appeal are required.

8 I do not feel the Minister will be
9 prejudiced in preparing her response to the appeal.

10 Although I have some reservations as
11 to whether the Applicant has an arguable case in
12 respect to the date of onset, for the purposes of
13 this application, I am prepared to find he does.

14 For the above reasons the
15 Application for an Extension of Time in which to
16 Appeal and Leave to Appeal is granted."

17 And that's the end of the quote from
18 the Board's decision.

19 It is very clear that the Board
20 granted the extension in the this case without
21 requiring Mr. Small to provide any evidence to
22 satisfy the four requirements established by the
23 Gattellaro decision.

24 Although the granting of an
25 extension to appeal is a discretionary remedy, it

1 must still be approached in a principled manner.
2 There is, after all, a legitimate interest in
3 bringing finality to decisions made in the course
4 of these types of disputes.

5 I accept the Applicant's submission
6 that the standard of review on issues of law in
7 this case is correctness, to the extent that this
8 case may raise issues of mixed fact in law the
9 standard is reasonableness, and there I rely on
10 Canada (Minister of Human Resources Development) v.
11 Hogervorst, which is at 2006, decision of the
12 Federal Court.

13 It is apparent from the Board's
14 decision that it correctly identified the legal
15 test for granting an extension of time to Mr.
16 Small. It is equally obvious that it then ignored
17 the test by granting an extension in the absence of
18 any evidence to establish a continuing intention to
19 appeal, a reasonable explanation for the delay and
20 the absence of prejudice to the Crown. This
21 constitutes a clear error of law for which no
22 deference is owed on judicial review. Even in
23 cases where the delay is of relatively short
24 duration, the Board must have some evidence to
25 satisfy the requirement for granting an extension

1 of time. Here it had none.

2 It is also insufficient for the
3 Board to simply assume an arguable issue. Here I
4 would draw upon the wisdom of my colleague, Justice
5 Yves de Montigny in the markedly similar case of
6 *Attorney General of Canada v. Causey*, a 2007
7 decision of the Federal Court, where he dealt with
8 this issue as follows at paragraph 23, and here I'm
9 quoting from that decision: "Not only did the Board
10 member not identify an arguable ground of appeal
11 but he went so far as to say he doubted whether
12 there was an arguable case. Granting leave to
13 appeal in the absence of proper reasons, especially
14 where the Board member questions whether a case is
15 arguable, is an error of law, whatever standard of
16 review is applied. See *Canada v Roy*, a 2005
17 decision of the Federal Court."

18 In this situation Mr. Small's letter
19 to the Board failed to disclose an arguable issue,
20 and of course as I've already mentioned he was
21 intending one thing by that letter and the Board
22 assumed another. That failure to disclose an
23 arguable issue might not be fatal, if the Board was
24 in a position to identify such an issue from the
25 record before it. Here, though, the Board

1 expressed a generalized reservation on this issue
2 and identified nothing which would justify the time
3 and expense of an appeal. Without intending to
4 predetermine this issue, I would only observe that
5 the Applicant appears to be correct in saying that
6 the determination of the deemed disability and
7 onset of payment dates are fixed by law and
8 calculated from the date of the application for
9 benefits, and indeed Mr. Small accepted that this
10 morning as being a correct view of the commencement
11 date, at least with respect to his second
12 application.

13 In that context, it is difficult to
14 identify an arguable basis for varying the
15 Tribunal's determinations; unless the Board can
16 find such a question, it should not presume the
17 existence of one. To do so is an error of law.

18 In the result, and for the reasons
19 I've given, this application for judicial review is
20 allowed. Given what we've learned this morning, it
21 would be pointless to send this back to the Board
22 for a redetermination, because the Board's decision
23 was based on a false assumption, as I mentioned
24 earlier in these reasons, but this should not
25 preclude Mr. Small from attempting to seek relief,

1 either directly from the department or possibly to
2 the tribunal or back to this Court, to the Federal
3 Court, if he feels that it's appropriate to attempt
4 to resurrect or to pursue his first application and
5 the relief he was claiming in connection with his
6 first application.

7 So, Mr. Small you may have some
8 rights here and some opportunities to pursue this,
9 the first application, but essentially what you're
10 going to have to do is go out and decide how you're
11 going to do that, and I think the place to start is
12 with the department and see what advice they can
13 give you as to where to take the matter further, if
14 you choose to do so.

15 So, those are my reasons and thank
16 you, gentlemen.

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CERTIFICATE OF COURT TRANSCRIBER

I, Philomena Drake, Court Transcriber, certify that I have transcribed the foregoing and it is a true and accurate transcript of the decision given in this matter, **HER MAJESTY THE QUEEN v. ALLEN SMALL**, taken by way of electronic recording.

Philomena Drake

Court Transcriber (Reg. #2006-36)

Halifax, Nova Scotia

Tuesday, May 29, 2007

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1515-06

STYLE OF CAUSE: HER MAJESTY THE QUEEN

- and -

ALLEN SMALL

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: MAY 9, 2007

**TRANSCRIPT OF REASONS
BY:** Justice Barnes

DATED: June 26, 2007

APPEARANCES:

Allan Matte APPLICANT

Allen Small ON HIS OWN BEHALF

SOLICITORS OF RECORD:

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