Date: 20080516

Docket: T-1679-07

Citation: 2008 FC 619

BETWEEN:

MARLENE LAYDEN

Applicant

and

MINISTER OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT CANADA

Respondent

REASONS FOR JUDGMENT

MACTAVISH J.

[1] Marlene Layden seeks judicial review of the decision of a member of the Pension Appeal Board granting leave to the Minister of Human Resources and Social Development Canada to appeal a decision of the Review Tribunal granting Ms. Layden a disability pension.

[2] For the reasons that follow, I am of the view that the application should be allowed.

Background

[3] Ms. Layden was employed as a bus driver from 1989 to June 3, 2004, when she ceased working because of severe back pain. On October 22, 2004, she submitted an application for Canada Pension Plan disability benefits.

[4] Ms. Layden's claim was initially rejected by a Medical Adjudicator who found that she had failed to establish that she had a disability that prevented her from performing work on a regular basis. Ms. Layden then provided the adjudicator with further medical information, but her application was once again rejected.

[5] The Review Tribunal subsequently granted Ms. Layden's appeal, finding that she could not return to work, and should be granted a disability pension.

[6] In particular, the Review Tribunal found that in light of Ms. Layden's evidence that her pain was severe, constant, and unpredictable to such an extent that it was affecting her sleep, it was not realistic to believe she could be retrained, or work part time with lighter duties, or be employed at any type of job.

[7] At paragraph 26 of its reasons, the Review Tribunal asked rhetorically:

> Who would hire an employee who is in pain continuously, is taking narcotic medication, who cannot drive a vehicle because of her condition and who needs to spend time in a hot tub several times a day on a regular basis?

[8] The Minister then sought leave to appeal the decision of the Review Tribunal on May 23, 2007. It is the decision granting the Minister leave to appeal the Review Tribunal's decision that forms the subject matter of this application for judicial review.

The Statutory Scheme

[9] Appeals to the Pension Appeals Board are governed by section 83 of the *Canada Pension Plan*. The party seeking to appeal a decision of a Review Tribunal must apply in writing to the Chairman or Vice-Chairman for leave to appeal the decision to the Pension Appeals Board.

[10] Subsection 83(2) of the *Canada Pension Plan* provides that on receipt of an application for leave, the Chairman or Vice-Chairman shall either grant or refuse that leave.

[11] Subsection 83(2.1) of the *Canada Pension Plan* allows the Chairman or Vice-Chairman of the Board to designate a member of the Board to deal with a leave application. The decision in this case was made by a member of the Board designated for that purpose.

[12] Section 7 of the *Pension Appeals Board Rules of Procedure* provides that applications for leave shall be disposed of *ex parte*, unless the Chairman or Vice-Chairman directs otherwise. No such direction was made in this case, and the application for leave was dealt with by the member on an *ex parte* basis.

[13] Subsection 83(3) of the *Canada Pension Plan* requires that written reasons be given where leave to appeal is refused. There is no similar statutory requirement in cases where leave is granted, and no reasons were provided for the Board's decision in this case.

[14] Subsection 83(4) of the *Plan* provides that where leave is granted, the application for leave to appeal becomes the notice of appeal, and shall be deemed to have been filed at the time the application for leave to appeal was filed.

The Issue on this Application

[15] Ms. Layden asserts that the process by which the Minister obtained leave was unfair, in that the representations made by the Minister's counsel in connection with the application for leave did not comply with the requirement to provide full and fair disclosure in seeking leave through an *ex parte* application.

Standard of Review

[16] Ms. Layden's application raises questions as to the fairness of the process followed in relation to the granting of leave. As the Federal Court of Appeal observed in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at paragraphs 52 and 53, the pragmatic and functional analysis (since replaced by the "standard of review analysis") does not apply where judicial review is sought based upon an alleged denial of procedural fairness. Rather, the task for the Court is to determine whether the process followed in a given case satisfied the level of fairness required in all of the circumstances.

[17] This has not changed as a consequence of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9: see Justice Binnie's concurring decision at paragraphs 129 and 151 of *Dunsmuir*, where he confirmed a reviewing court has the final say in relation to questions of procedural fairness. See also *Halifax Employers' Association v. Tucker*, 2008 FC 516.

Jurisdiction

[18] Although section 28 of the *Federal Courts Act* provides that judicial review of decisions of the Pension Appeals Board is to the Federal Court of Appeal, the Federal Court of Appeal has held that decisions of the Chair or Vice-Chair (or, presumably, their delegates), in the exercise of the jurisdiction confined to them by statute, are not decisions of the Pension Appeals Board itself. Judicial review of such decisions is to the Federal Court: see *Martin v. Canada (Minister of Human Resources Development)*, [1997] F.C.J. No. 1600 (F.C.A.), at paragraph 5. See also *Gramaglia v. Canada (Pension Plan Appeal Board)*, [1998] F.C.J. No. 200, at paragraph 5.

[19] I do not understand this to have changed as a consequence of the Federal Court of Appeal's recent decision in *Mazzotta v. Canada (Attorney General)*, [2007] F.C.J. No. 1209.

Prematurity

[20] Although not raised by the Minister, the Court raised with the parties the question of whether it should intervene in this matter, given that all of the substantive arguments raised by Ms.

Layden with respect to the merits of the Review Tribunal's decision could be addressed before the Pension Appeals Board.

[21] The vast majority of decisions from this Court dealing with decisions made with respect to applications for leave to appeal from decisions of the Review Tribunal involve cases where leave was denied. Indeed, the only case of which the parties were aware where judicial review was sought with respect to a decision granting leave is *Mrak v. Canada (Minister of Human Resources and Social Development)*, [2007] F.C.J. No. 909.

[22] At paragraph 21 of *Mrak*, Justice Lemieux noted the unusual nature of the application, holding that the applicant had to establish the existence of "special circumstances" justifying judicial review from a decision granting leave, because the granting of leave is an interlocutory proceeding which does not decide the merits of an appeal.

[23] Justice Lemieux went on to refer to the general rule that absent special circumstances, there should not be immediate judicial review of an interlocutory judgment: see *Mrak*, at paragraph 28. See also *Szczecka* v. *Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 934, (F.C.A.), *Sherman v. Canada (Customs and Revenue Agency)*, 2006 FC 715 at paragraph 39, and *Zündel v. Canada (Human Rights Commission)* [2000] 4 F.C. 255, 256 N.R. 125 (C.A.), at paragraph 10.

[24] There are a number of reasons why, in the absence of special circumstances, interlocutory rulings made by administrative tribunals should not be challenged until the tribunal has rendered its final decision. These include the fact that the application may be rendered moot by the ultimate outcome of the case, and the risk of the fragmentation of the process, with the accompanying costs and delays. In some cases, there may also be a possibility that the tribunal may end up modifying its original ruling as the hearing unfolds.

[25] In this case, however, Ms. Layden's concern with respect to the fairness of the leave process is not a matter that would be dealt with by the Pension Appeals Board, whose mandate, once leave is granted, is to conduct a *de novo* hearing into the merits of her claim for a disability pension, not to revisit the leave process. The case also raises concerns with respect to the integrity of the leave process that may not otherwise be addressed.

[26] I am therefore satisfied that special circumstances exist in this case that justify the exercise of the Court's discretion to deal with the application for judicial review, despite the fact that it involves an interlocutory decision.

Analysis

[27] The leave provisions in section 7 of the *Pension Appeals Board Rules of Procedure* are unusual, in that applications for leave are presumptively dealt with without notice to the opposing party. It may be that most applications for leave are brought by pension claimants, and that the Minister is content to simply address the matter before the Pension Appeals Board. As this case

demonstrates, however, this is not always the case, as it was the Minister who sought leave to appeal here.

[28] In *Commissioner of Competition v. Labatt Brewing Company Limited et al*., 2008 FC 59, I recently had occasion to consider the duty on parties seeking *ex parte* relief in some detail. As I observed in that case:

> [23] A party seeking *ex parte* relief has the duty of ensuring that the Court is apprised of all of the relevant facts. The reason why this is so is self-evident. As Justice Sharpe noted in *United States of America v. Friedland,* [1996] O.J. No. 4399, both the judge hearing an *ex parte* motion and the party against whom the order is sought are literally "at the mercy" of the party seeking the relief in issue.
>
> [24] Justice Sharpe went on to observe at paragraph 26 of *Friedland* that:
>
> > The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:
> >
> > There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction. (*Watson v. Slavik*) [citation omitted]
>
> [25] It is for this reason that the law requires that a party seeking *ex parte* relief must do more than simply present its own case in the best possible light, as would be the case if the other side were present. Rather, the person seeking *ex parte* relief must:

> [S]tate its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side: *Friedland*, at ¶27.
>
> [26] This duty of the utmost good faith imposes "a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances": see *Canadian Paraplegic Assn (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.*, [1997] N.J. No. 122 (Nfld.Lab. Ct of App.), at ¶18, as cited in *TMR Energy Ltd. v. State Property Fund of Ukraine*, [2005] F.C.J. No. 116, 2005 FCA 28, at ¶65.
>
> [27] The Court went on to observe in *Friedland* that the duty to make full and frank disclosure is not to be imposed in a formal or mechanical manner. A party should not be deprived of a remedy because of "mere imperfections in the affidavit or because inconsequential facts have not been disclosed". Rather, the defects complained of must be relevant and material to the discretion to be exercised by the Court. [at ¶31]

[29] It should be noted that one of the reasons cited in *Friedland* for allowing for a certain degree of latitude to a party making such an application is that *ex parte* applications are almost always brought on an emergency basis, with little time for preparation of material. That is not the situation in this case.

[30] I appreciate that the scheme of the *Canada Pension Plan* is intended to allow for inexpensive and informal access to timely pension benefits adjudication. Indeed, as was noted

above, many applications for leave will be brought by pension claimants, many of whom will not be represented by counsel: see *Mazzotta*, previously cited, at paragraph 17. These individuals will usually have no understanding of the requirement to provide full and frank disclosure on an *ex parte* application, and will likely simply advocate for their own position. In such circumstances, it may be that applicants should not be held to the standard described in the *Labatt* case. That is an issue for another day, however, as it is not the situation that confronts the Court in this case.

[31] In this case, the application for leave was brought by legal counsel representing the Minister. In my view, the duty of full and frank disclosure on the Minister in an *ex parte* application for leave to appeal brought before a senior member of the Pension Appeals Board is no different than the duty imposed on parties in any other kind of *ex parte* proceeding.

[32] That is, counsel for the Minister must do more than simply present the Minister's own case in the best possible light, but must state that case fairly, and, in addition, must inform the member of any points of fact or law which favour the claimant.

[33] In the course of the hearing before the Court in this matter, it became readily apparent that counsel for the Minister was not aware of there being any particular responsibility on his part in seeking *ex parte* relief. Indeed counsel clearly stated that, in his view, his only obligation in preparing the application for leave was "to provide information to support [the Minister's] arguable case", and that this was what he had done in this case.

[34] In my view, the written representations made by the Minister's counsel to the designated member did not meet the standard of full and fair disclosure described above.

[35] For example, paragraph 26 of the Minister's Application for Leave and Notice of Appeal makes reference to a July 7, 2005 report from Ms. Layden's chiropractor. After reviewing the treatment provided by the chiropractor, the paragraph states that the report noted that "[Ms. Layden's] pain and spasms had decreased in a modest but steady manner and the frequency of the severe episodes had decreased".

[36] A review of the original medical report discloses that what the chiropractor actually said was:

> To date, Ms. Layden's pain and spasm has decreased in a modest but steady manner. The frequency of the severe episodes has decreased, *however severe episodes occur episodically and randomly. The severity of the pain and unpredictability of the episodes as well as an inability to tolerate either prolonged sitting or standing makes the prospect for employment unlikely at this time.* [Emphasis added]

[37] In this regard, counsel for the Minister acknowledged quite candidly that he did not "do a balanced pro and con of the case" but rather "took the part [from the report] that supported [his] position". However, the selective use of portions of the report cited in paragraph 26 of the Application for Leave created a misleading impression with respect to Ms. Layden's condition.

[38] Particularly troubling is the omission of the chiropractor's opinion as to Ms. Layden's unemployability, which was the central issue in the appeal.

[39] Also of concern is the fact that counsel did not draw the designated member's attention to the fact that the package of material attached as an appendix to the Application for Leave and Notice of Appeal contained medical information relating to another individual, which had no bearing on Ms. Layden's case. The inclusion of this information in the record had evidently been raised as an issue before the Review Tribunal, which had quite properly disregarded the material in its deliberations.

[40] Of particular concern is the November 28, 2006 document entitled "Additional Comments to the HRSD Explanation of the Decision under Appeal to the Review Tribunal", which summarizes the reports purportedly relating to Ms. Layden. This document states that:

> On September 20, 2006, Dr. W. Reynolds, Rheumatologist, assessed Mrs. Layden's symptoms of pain and fatigue. On examination, her neck, back and shoulder movement was painful, as were all the tender points. Her grips were reduced. Mrs. Layden was encouraged to incorporate exercise into her daily activities, especially stretching routines and modest walking activities. Tramacet (for pain relief) was prescribed. *The evidence on file does not indicate that Mrs. Layden has participated in an active exercise program. In fact, her treatment modalities include passive exercise, in the form of physiotherapy and chiropractic adjustments. In addition, if Mrs. Layden follows Dr. Reynold's recommendations, this may improve her functional capacity and comfort level.* [Emphasis in the original]

[41] There is no dispute about the fact that Dr. Reynolds' report had nothing to do with Ms. Layden. Counsel for the Minister points out that he made no specific reference to this document in the Application for Leave and Notice of Appeal, and argues that the inadvertent inclusion of third party information in Ms. Layden's file "has no bearing on whether the Minister has an 'arguable case' before the Pension Appeals Board".

[42] With respect, that is not the point. The Minister had a representative present at the hearing before the Review Tribunal, and was thus aware that the record included someone else's medical records. The summary document cited above suggests that Ms. Layden had not complied with medical advice purportedly received from a doctor she had never seen, and further suggests that if she were to comply with this advice, her functional capacity might be improved. In the circumstances, the duty to fairly state the case on an *ex parte* application obligated the Minister to make it clear in the Application for Leave and Notice of Appeal that this document should be disregarded.

[43] Additional concerns relate to the statement appearing at paragraph 32 of the Application for Leave and Notice of Appeal that:

> [I]n his report dated April 25, 2005, Dr. Benoit recommended that [Ms. Layden] attend a pain management clinic. There is no information on file or mention[ed] in the Review Tribunal decision to suggest that [Ms. Layden] received any treatment at a pain management clinic.

[44] This too suggests that Ms. Layden had not complied with the medical advice that she had been given, and that there may be therapeutic options available to her that would enable her to continue working.

[45] This is not a fair representation of the situation. While it is technically true that Ms. Layden had not attended a pain management *clinic*, a review of the record discloses that she had in fact received treatment on at least two occasions from Dr. Patrice Langlois, who is a pain management *specialist*.

[46] Moreover, Ms. Layden could hardly be faulted for her failure to attend at a pain management clinic, as it is clear from the record that she had been on the waiting list for additional pain management treatment for some considerable time when the Application for Leave was brought.

Conclusion

[47] For these reasons, the application for judicial review is allowed. The matter is remitted to the Chair, Vice-Chair or designated member of the Pension Appeals Board for re-determination. In the circumstances, the Court directs that Ms. Layden be given the opportunity to respond to the Minister's Application for Leave prior to a decision being made in relation to the Application.

[48] Each party shall have five business days in which to serve and file written submissions with respect to the question of costs, which submissions are not to exceed three pages in length. The

parties will each then have three further business days in which to serve and file any reply submissions that they may have, which are not to exceed two pages in length.

"Anne Mactavish"

Judge

Ottawa, Ontario
May 16, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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