
CANADA / JUDGMENT

Canada (Minister of Human Resources Development) v. Myrheim

2004 FC 884

COURT

Federal Court

DECIDED

21 June 2004

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Canada (Minister of Human Resources Development) v. Myrheim

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Decision Content

Date: 20040621

Docket: T-2079-03

Citation: 2004 FC 884

Between:

MINISTER OF HUMAN RESOURCES DEVELOPMENT,

Applicant,

- and -

INGVAR MYRHEIM,

Respondent.

Let the attached edited version of the transcript of my Reasons for order delivered orally from the bench at Edmonton, Alberta. on June 3, 2004, be filed to comply with Section 51 of the Federal Courts Act.

Carolyn A. Layden-Stevenson

Judge

Ottawa, Ontario

June 21, 2004

T-2079-03

IN THE FEDERAL COURT [2004 FC 884]

BETWEEN:

MINISTER OF HUMAN RESOURCES DEVELOPMENT Applicant

- and -

INGVAR MYRHEIM

Respondent

Held before the Honourable Madam Justice Layden-Stevenson, at the Federal Court, 5th Floor,
10060 Jasper Avenue, Edmonton, Alberta on the 3rd day of June, 2004 A.D.

REASONS FOR ORDER

APPEARANCES:

M. Mathieu For the Applicant

(No appearance) For the Respondent

Chantal St. Jean, Court Registrar -----

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Per: Janice Horne

MADAM JUSTICE LAYDEN-STEVENSON: The Minister of Human Resources Development, whom I will refer to as the Minister, applies for judicial review of the decision of the Old Age Security Review Tribunal, which I will call the tribunal, dated October 7th, 2003, following a hearing at Edmonton, Alberta on June 18th, 2003.

The respondent, Mr. Myrheim, did not file a respondent's record, as required by Rule 310 of the Federal Court Rules, 1998, nor did he appear at the hearing.

Rule 38 provides that the Court may proceed in the absence of the party if the Court is satisfied that notice of the hearing was given to that party in accordance with the rules.

In this case, the order scheduling the hearing was sent to Mr. Myrheim's last-known address, but was returned to the court registry. Registry personnel attempted, unsuccessfully, to telephone Mr. Myrheim and to find a new address and/or telephone number.

In the course of these efforts, registry personnel contacted the applicant to ascertain whether an updated address for Mr. Myrheim was available at Human Resources Development Canada, which I will refer to as HRDC. HRDC had received a new address and telephone number. Upon telephoning the new number and being connected to voice mail, registry left a detailed voice mail message and forwarded the order for hearing to the new address.

On May 7th, 2004, the respondent contacted registry by telephone and advised that he did not intend to be present at the hearing. At my request, registry again contacted Mr. Myrheim by telephone and inquired as to whether he wished to participate in the hearing by way of teleconference rather than attend in person. Mr. Myrheim declined.

In *Aubut v. Minister of National Revenue* (1990), 126 N.R. 381 (F.C.A.), leave to appeal dismissed (1991), 134 N.R. 239n (S.C.C), it was determined that where a party fails to appear at a hearing, the Court's only obligation is to determine whether the party was advised of the date and the place of the sitting. I am satisfied that Mr. Myrheim was so advised and thus, I will proceed in his absence.

By way of background, Mr. Myrheim attended the Edmonton HRDC office on August 22nd, 2000 to apply for CPP and Old Age Security benefits, which I will refer to as OAS benefits. He was to turn 65 years of age in May, 2001. He was not certain that he would be retiring because he had an offer to continue working for his company.

The record shows that Mr. Myrheim claimed to have soon afterwards contacted an HRDC agent by telephone to indicate that he wanted the OAS benefits held back. According to Mr. Myrheim, the agent told him that everything could be taken care of by telephone. The request was never confirmed in writing, and nothing in the HRDC file references this request. Both applications were processed, and the OAS benefits were due to begin on June 1st, 2001.

On December 4th, 2000, Mr. Myrheim sent a letter indicating that he wanted to delay the start of the CPP benefits because he intended to continue working beyond his planned retirement date of December 31st, 2000. His CPP benefits apparently began on June 1st, 2001, along with the OAS benefits, immediately following his 65th birthday.

The Minister indicates that on May 23rd, 2001, Mr. Myrheim requested that his benefits for June 2001 be withheld as an income tax deduction. Reference is made to an OAS expended screen -- applicant's record at page 112 -- which is far from expanded. It is not at all clear to me from the reference provided that the request was made.

It is clear, however, that the June 2001 benefits were withheld and future benefits were additionally withheld. From July 2001 until June 2002, some monies were withheld as a benefits clawback, while some were deducted for income taxes.

From July 2002 onwards, all benefits were withheld as a benefits clawback. I am unable to ascertain the amounts from the record, but counsel, prior to the hearing, had obtained this information and was able to enlighten me. While the information was of great assistance, this approach puts counsel in the awkward position of what amounts to giving evidence. Worse still, it leaves counsel without a proper record upon which to argue the merits of the application.

Long story short, Mr. Myrheim never did receive a cheque or a direct deposit for OAS benefits. HRDC states that he was issued an approval letter, correspondence explaining the clawback of benefits, and T4A receipts. None of these documents appear in the record. The letters in the record are blank generics, and the only indication of tax withholdings is the OAS expended screen referred to earlier, which provides little guidance or assistance, and a letter dated April 29th, 2003, that significantly post-dates the initiation of Mr. Myrheim's complaints.

On September 3rd, 2002, Mr. Myrheim submitted an application for OAS benefits. It was denied on the basis that he was in receipt of benefits. On reconsideration, the decision was upheld on the ground that there was no record of a request to withdraw the application requesting benefits to start in June 2001.

The tribunal, in considering Mr. Myrheim's appeal under Section 28 of the Old Age Security Act, found itself confronted with a choice between a completely credible individual whose memory of the event appeared to be clear as opposed to the absence of a descriptive denial on the file. The tribunal found no basis for doubting his word or the validity of his evidence. The tribunal allowed the appeal and concluded, and I'm quoting:

"The August 2000 application is considered to have been withdrawn by Mr. Myrheim. Accordingly, his application of September 2002 is approved with payment commencing in January 2003."

The Minister submits that the decision of the tribunal is ultra vires. Its jurisdiction is limited to those powers provided under the Old Age Security Act and the Canada Pension Plan. Under Section 27.1 and 28 of the Old Age Security Act, the tribunal may reconsider a decision of the Minister that results in no benefit being paid, or respecting the amount of the benefits.

Nothing in the Act, maintains the Minister, allows for an application to be submitted, but not acted upon. Once an application is approved, a pensioner may request in writing that HRDC cease to pay the pension. The Minister must approve such a request. Retroactive cessation, it is said, is not available. If the pensioner wants the payments to resume, that request must also be made in writing.

The Minister notes that Section 32 of the Act provides the Minister with jurisdiction to take remedial action if, as a result of administrative error or erroneous advice, a person has been denied a benefit or a portion of a benefit. This decision, once taken, is not reviewable by the tribunal, but by the Federal Court. As Mr. Myrheim's complaint arose from alleged administrative error or erroneous advice, the tribunal should have declined jurisdiction.

The question to be determined is whether the decision of the tribunal is ultra vires. The standard of review is therefore correctness: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary* 2004 SCC 19.

It is beyond doubt that Mr. Myrheim's complaint is alleged administrative error. It is also beyond doubt, in my view, that the Federal Court of Appeal decision in *Canada (Minister of Human Resources Development) v. Tucker* 2003 FCA 278 is dispositive.

The reasons in the Tucker case were released on June 23rd, 2003; that was five (5) days after the tribunal heard this appeal, but more than three (3) months before the decision was rendered. Mr. Justice Décary, at paragraphs 11 and 12 of Tucker, supra, stated, and I'm quoting from Mr. Justice Décary:

"11 In my view, the reasoning in Pincombe applies with respect to a decision made under Section 32 of the Act. This same reasoning must also apply to decisions made under paragraph 37(4)(d). Each provision provides a remedy to a person who due to erroneous advice or administrative error has received an incorrect payment of benefits. Decisions as to the forgiveness of an overpayment, or the repayment of an underpayment, made as a result of erroneous advice are simply not decisions 'respecting the amount of any benefit that may be paid to that person' within the meaning of subsection 27.1(1). The Act, just like the Plan at the relevant time in Pincombe, provides no other specific right of appeal of such a decision. The Trial Division Judge, therefore, erred in declining to apply Pincombe.

12 I would therefore allow the appeal on the basis that the Review Tribunal had no jurisdiction to entertain an appeal from the Minister's decision made under paragraph 37(4)(d) not to remit any or all of the overpayments."

Madam Justice Dawson, in *Canada (Minister of Human Resources Development) v. Mitchell* 2004 FC 437 stated, and I adopt her words as mine, and I'm quoting Madam Justice Dawson:

"The decision of the Federal Court of Appeal is binding upon me, and I am unable to distinguish it. It follows that the decision of the Review Tribunal should be set aside on the basis that it had no jurisdiction to grant relief based upon Section 32 of the Act."

Similarly, there is no basis upon which I can distinguish Mitchell. However, I do wish to add that, like Madam Justice Dawson, I am not satisfied that the Minister ever purported to make a decision under Section 32 regarding Mr. Myrheim.

Mr. Myrheim's complaint from the beginning alleged administrative error, but the Minister's representatives -- Tucker, supra, not having been decided -- treated it as a complaint under Section 28 of the Act, not under Section 32. When Mr. Myrheim first complained that his application had not been accepted in the phone call of September 23rd, 2002, the agent's notes indicate the following, and I'm quoting from the notes:

"He indicated that he was not informed about the fact that he would not be able to re-apply later.

He indicated that he had a meeting with someone when he first filled out his application and that none of this was mentioned to him.

He indicated that when he phoned, he did not want his pension."

The HRDC letter, forwarded the same day, indicated that the Minister would reconsider the decision upon further submissions being made. HRDC appears to have treated it as a subsection 27(1) reconsideration, both in practice -- the form letters conform to the requirements of Regulation 29 -- and before the tribunal.

The letter Mr. Myrheim wrote in response on October 1st, 2002, included the statement,

"In my opinion this error is not mine, but rather within your department."

This does not appear to have triggered anyone to look to Section 32. Rather, the Minister's response of October 28th, 2002, indicated that,

"You may appeal this decision to a Review Tribunal."

Before the tribunal, the Minister indicated that the right to appeal was pursuant to Section 28.

Mr. Myrheim's letter of November 2nd, 2002 suggested not only that the Edmonton office made an error in processing the application, but that he had received erroneous advice from the agent to whom he spoke.

Notwithstanding, the Minister's submissions, prepared on February 6th, 2003, made no mention of potential administrative error. The first mention of Section 32 was at the hearing of the appeal. The Chair asked that a representative of the Minister review the file for administrative error pursuant to Section 32 of the Act. The Minister's representative advised that there was no evidence on file to support administrative error.

It is at least arguable that had the Minister not taken this position, the tribunal might have declined jurisdiction. Instead, the tribunal was confronted with a situation where the Minister was insisting that Section 32 did not apply.

Counsel for the Minister prior to the hearing had recognized the existence of these problems and informed me that he has already recommended to those who instruct him that Mr. Myrheim be given consideration under Section 32 of the Act.

Counsel has undertaken to the Court that he will attempt to ensure that a decision under Section 32 is forthcoming. Alternatively, counsel has undertaken to seek instructions regarding the matter of consenting to an extension of time within which Mr. Myrheim could seek judicial review in the unlikely event that the Minister should take the position that a decision under Section 32 has been made.

Should that occur, then such a request should be referred to my attention for determination, since I am familiar with the facts and circumstances of this matter and, as stated by Justice Dawson, it is consistent with judicial economy.

In the final analysis, the application for judicial review will be allowed, and the decision of the Old Age Security Review Tribunal will be set aside on the basis that it is ultra vires.

In accordance with the Minister's request, it will be without costs. An order will go accordingly, and my reasons will be transcribed by the court reporter, certified as my reasons pursuant to the Federal Court Act, and then distributed to the parties.

--- Upon Concluding

Certificate of Transcript

I, the undersigned, hereby certify that the foregoing pages are a true and faithful transcript of the proceedings, transcribed to the best of my skill and ability.

Janice Horne, CSR

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2079-03

STYLE OF CAUSE: Minister of Human Resources Development v.

Ingvar Myrheim

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: June 3, 2004

TRANSCRIPT OF

REASONS FOR ORDER BY:

The Honourable Madam Justice Layden-Stevenson

DATED: June 21, 2004

APPEARANCES:

Mr. Michel Mathieu For Applicant

SOLICITORS OF RECORD:

Morris Rosenberg For Applicant

Deputy Attorney General of Canada

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