CanLII

Wihksne v. Canada (Attorney General), 2002 FCA 356 (CanLII)

Date: 2002-10-02
Docket: A-516-00
Other citations: 299 NR 211; [2002] FCJ No 1394 (QL); 20 CCEL (3d) 20
Citation: Wihksne v. Canada (Attorney General), 2002 FCA 356 (CanLII), <http://canlii.ca/t/4hrv>, retrieved on 2017-05-12

Date: 20021002

Docket: A-516-00

Neutral citation: 2002 FCA 356

CORAM: DÉCARY J.A.

LINDEN J.A.

LÉTOURNEAU J.A.

BETWEEN:

THOMAS WIHKSNE

Appellant

and

ATTORNEY GENERAL

OF CANADA

Respondent

Heard at Vancouver, British Columbia, on September 30, 2002.

Judgment rendered from the Bench at Vancouver, British Columbia,

on September 30, 2002, with Reasons to follow.

Reasons delivered at Vancouver, British Columbia, on October 2, 2002.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: LINDEN J.A.

LÉTOURNEAU J.A.

Date: 20021002

Docket: A-516-00

Neutral citation: 2002 FCA 356

CORAM: DÉCARY J.A.

LINDEN J.A.

LÉTOURNEAU J.A.

BETWEEN:

THOMAS WIHKSNE

Appellant

and

ATTORNEY GENERAL

OF CANADA

Respondent

REASONS FOR JUDGMENT

DÉCARY J.A.

[1] On June 10, 1995, the appellant applied for disability benefits pursuant to subsection 42(2) of the Canada Pension Plan (the "Plan"), R.S.C. 1985, c. C-8. By letter dated February 6, 1997, the appellant was advised by Human Resources Development Canada that his application was denied. On February 19, 1997, the appellant filed an application for reconsideration by the Minister. By letter dated November 27, 1997, the appellant was informed that his application for reconsideration was denied.

[2] On December 15, 1997, the appellant appealed that decision to the Review Tribunal. The appeal was dismissed on August 28, 1998. On October 26, 1998, the appellant filed an application, pursuant to s. 83 of the Plan, for leave to appeal. The application was dismissed by the Board member designated by the Chairman of the Pension Appeals Board on June 24, 1999. On August 13, 1999, the appellant applied for judicial review of the Board member's decision. On July 21, 2000, McKeown J., in a decision reported at 2000 CanLII 15882 (FC), 186 F.T.R. 124, dismissed the application for judicial review. Hence the within appeal.

[3] The Court allowed the appeal from the Bench with reasons to follow. These are the reasons for judgment.

[4] In August, 2001, the Federal Court of Appeal, in *Villani v. Canada (Attorney General)*, 2001 FCA 248 (CanLII), [2002] 1 FC 130, found that the interpretation given by the Board in recent years of the words "regularly pursuing any substantial gainful occupation" in subsection 82(1) of the Plan was overly restrictive and it adopted a more liberal approach.

[5] It is common ground that the Review Tribunal, the Board member and the Motions Judge, none of whom had the benefit of the *Villani* decision, applied an improper test. That led the Attorney General to concede that this appeal be allowed and that the matter be remitted to a Board member for reconsideration of the leave application. That concession, in turn, led counsel for the appellant to suggest that the matter be remitted to the Board member with directions that the leave application be granted.

[6] The sole issue, therefore, apart from the question of costs, that remains to be decided in this Court is whether or not the matter should be referred back with directions to grant the leave application.

[7] This Court had the opportunity, recently, to examine the power of the Court to issue such directions in a case that also involved the Pension Appeals Board. In *Rafuse v. Canada (Pension Appeals Board)*, (2002) 2002 FCA 31 (CanLII), 286 N.R. 385, 2002 F.C.A. 31, the Court concluded at paragraph 14 that such a power was "an exceptional power that should be exercised only in the clearest of circumstances". The Court declined, in the circumstances of that case, to exercise that power.

[8] I pause here to observe that in *Rafuse* the error of law at issue was the failure by the Board member to apply the proper test with respect to the granting of the leave application, not, as here, the failure to apply the proper legal test in determining whether or not there was severe disability within the meaning of the Plan. In addition, the applicant, in *Rafuse*, had already been found to have a severe disability and the only issue was with respect to the date at which the disability had started, essentially a factual determination.

[9] In the case at bar, we know, and it is conceded by the Attorney General of Canada, that at all levels in the decision process, the appellant's claim was examined by decision makers using an improper test. It may be said, in that regard, that the appellant never had a real opportunity to present his case, be it before the Review Tribunal, the Board member or the Motions Judge. Should the matter be sent back to the Board member for reconsideration of the leave application, he would inescapably come to the conclusion that since an improper test has been applied by the Review Tribunal, an arguable case has been demonstrated irrespective of the factual merits of the case (see *Callihoo v. Attorney General of Canada*, (2000) 2000 CanLII 15292 (FC), 190 F.T.R. 114 (MacKay J., T.D.)) and he could not but grant leave to appeal.

[10] There is no point, in my view, especially when the case has been dragging on for so long, in postponing the unavoidable outcome of the leave application and imposing on the applicant and on the Board additional, and in the end unnecessary costs. This is a clear case where the interests of justice cry out for directions putting an end to the process.

[11] The appellant seeks full compensation for the costs incurred to date in the Federal Court. I have not been convinced that there are valid reasons to derogate from Rule 407 which states the general principle that costs are to be awarded in accordance with column III of the table to Tariff B. As Wetston J. said in *Apotex Inc. v. Wellcome Foundation Ltd.* (1998) 1998 CanLII 8792 (FC), 159 F.T.R. 233, "an important principle underlying costs is that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party." This decision was confirmed at (2001) 2001 CanLII 22141 (FCA), 199 F.T.R. 320 (F.C.A.). Tariff B, admittedly, is already obsolete in many instances. But absent special considerations (see Rule 400(3)), the Court should be reluctant to attempt to rewrite Tariff B - a task better left to the Rules Committee - and to embark into a factual determination of costs which is better left in the hands of specialized taxing officers. I make mine these words of Nadon J., then sitting in the Trial Division, in *Hamilton Marine & Engineering Ltd. v. CSC Group Inc.* (1995) 99 F.T.R. 285:

22 I indicated to counsel during the hearing that there was no doubt that, in most cases, the fees provided in Tariff B were not sufficient to fully compensate a successful party. I also indicated to counsel during the hearing that, in my view, the tariff necessarily had to remain the rule and that an increase of the tariff fee was the exception. By that I meant that the discretion given to the Court to increase the tariff amounts pursuant to rule 344(1) and (6) of the Federal Court Rules was not to be exercised lightly. Put another way, the fact that the successful party's legal costs were far superior to the amounts to which that party was entitled under the tariff, was not in itself a factor for allowing an increase in those fees.

[12] As there are no special considerations in the case at bar, the appellant should therefore be entitled to costs, here and in the Trial Division, assessed in the usual way, i.e. by a taxing officer in accordance with column III of the table to Tariff B.

[13] The appeal should be allowed, the decision of the Motions Judge should be set aside and the matter should be remitted to the Chairman or Vice-Chairman of the Pension Appeals Board or their designate for a new determination to be made on the basis that the application for leave to appeal ought to be granted.

[14] The appellant should have his costs here and below, to be assessed in accordance with column III of the table to Tariff B.

(Sgd.) "Robert Décary"

J.A.

"I agree

Allen M. Linden" J.A.

"I agree

Gilles Létourneau, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-516-00

STYLE OF CAUSE: Thomas Wihksne v. The Attorney General of Canada

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: September 30, 2002

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: LINDEN J.A.

LÉTOURNEAU J.A.

DATED: October 2, 2002

APPEARANCES:

Mr. Craig Paterson	FOR THE APPELLANT
Mr. John Vaissi Nagy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Paterson & Associates Vancouver	FOR THE APPELLANT
Mr. Morris Rosenberg Deputy Attorney General of Canada	FOR THE RESPONDENT