Federal Court Cour fédérale

Date: 20150219

Docket: T-771-13

Citation: 2015 FC 224

Calgary, Alberta, February 19, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GORDON ROLAND LEWIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Mr. Gordon Roland Lewis (the "Applicant") seeks judicial review of the decision of the Honourable D. H. Medhurst, a Designated Member (the "Member" or the "Designated Member") of the Pension Appeals Board. In that decision, the Member refused the Applicant's application for leave to appeal from a decision of the Review Tribunal upholding a re-consideration decision by Karen Olmstead, National Information and Benefit Services, Service

Canada, that his pension benefits had been correctly calculated in accordance with the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "Plan"), and he was therefore not entitled to an increase in his monthly benefits rate.

[2] In his application for judicial review, the Applicant seeks an order quashing the decision of the Designated Member, reconsideration of his application for leave to appeal, an order for recovery of losses, and costs in connection with this Application.

II. BACKGROUND

[3] The following facts and details are taken from the Tribunal Record that was provided by the Pension Appeals Board, as well as from the affidavit filed by the Applicant in support of this proceeding. No affidavit was filed on behalf of the Attorney General of Canada (the "Respondent") who, pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), represents the Minister of Employment and Social Development.

[4] The Applicant was born on May 12, 1945. Following completion of his education he worked as a carpenter. In December 1982, he was seriously injured in a car accident and was unable to work as a carpenter for many years. As a consequence of his inability to work, the Applicant did not contribute to the Plan between 1982 and 1994. He returned to work in 1998.

[5] By letter dated July 27, 2009, the Applicant made inquiries of the Alberta Regional Office of the Canada Pension Plan about his future entitlement to retirement pension benefits. He

referred to the car accident and said that it made him "unable to work effectively for about 17 years."

[6] The Applicant further advised that he was unable to find a lawyer to act on his behalf in seeking damages.

[7] Service Canada replied to the Applicant's inquiry by letter dated August 4, 2009. In part, Service Canada advised as follows:

> When we calculate your pension, we may be able to drop certain periods from your contributory period to increase the amount of your pension. The following periods may be left out of the pension calculation:
>
> - any months you were eligible for a Canada Pension Plan or Quebec Pension Plan Disability benefit if it is your case;
> - periods when you stopped working or your earnings were lower while you were raising a child under the age of 7;
> - low earning months after the age of 65; and
> - 15% of your lowest earning years in your contributory period. (This is what we call the drop out factor.)
>
> Your contributory period began in January 1966 and will end the month before the start of your pension. We estimate your pension at age 65 to be $425.11.
>
> The information in your file shows your pensionable earnings were as follows: …

[8] The Applicant sent another letter dated July 9, 2010, to Service Canada responding to the information provided about "possible pension benefits." He again referred to the motor vehicle accident in which he was injured in December 1982 and his difficulties in finding legal

representation. The Applicant repeated his earlier suspicion that the lawyers whom he consulted were in a conflict of interest with the insurance underwriters and he was not able to pursue a claim for insurance benefits.

[9] The Applicant said that he was unable to function for several years as a result of the accident. He further claimed that he has "repeatedly" claimed that the 17 years when he was not working should be deleted from the calculation of his pension entitlement.

[10] Further, the Applicant said that he had been informed previously by a "CPP agent" that his years of "great personal loss and inability to pay could be removed."

[11] The Applicant also said that he recently learned that he should have "qualified for disability" under the Plan. He said no lawyer had ever advised him of that possibility.

[12] Finally, in this letter, the Applicant expressed the opinion that since he paid maximum CPP premiums in most years, he should be entitled to the maximum benefit. He said he could not consider retirement until the issue of his pension benefits had been resolved.

[13] Service Canada replied to the Applicant by letter dated July 28, 2010, from Wheatley, A / Benefit Officer. The officer advised that since the Applicant had not applied for a retirement pension and has not been denied a benefit. The letter further advised that:

> A letter of contributions was sent to you August 4, 2009 (copy enclosed) explaining the calculation of Canada Pension and the dropout factor of 15% based on low or no earning years. There are

> no further provisions allowed within Canada Pension for years that you were not able to contribute to the plan.

[14] The letter set out estimations of the Applicant's pension benefits as follows:

> Estimates only of your Canada Pension Retirement Pension including any new earnings up to and including **2009 contributions** are as follows:
>
> At age 65 your **estimated** Retirement pension would be **$450.00** monthly.
>
> At age 70 your **estimated** Retirement pension would be **$580.00** monthly.

[15] The Applicant submitted his application for retirement pension benefits on August 6, 2010. That application was approved by Service Canada on September 1, 2010, with an effective date of June 2010.

[16] On May 18, 2011 the Applicant requested that Service Canada reconsider the decision about the amount of his pension benefits. By letter dated May 19, 2011 Karen Olmstead of Service Canada, advised the Applicant that after reviewing and reconsidering the file, Service Canada would be maintaining its original decision. She advised the Applicant of his right to appeal to a Review Tribunal.

[17] By letter dated May 31, 2011, the Applicant indicated his intention to appeal the decision about his pension benefits. The Applicant's application for pension benefits was received by the Office of the Commissioner of Review Tribunals on October 3, 2011.

[18] The Applicant's appeal before the Review Tribunal was held on September 11, 2012. The decision of the Review Tribunal was delivered on November 1, 2012. In that decision, the Review Tribunal reviewed the facts about the Applicant's work history and his contributions to the Plan, as well as the relevant statutory provisions. It decided that since the Applicant had never been found to be disabled pursuant to subsection 49(c) of the Plan, the "dropout" provision of subsection 49(c) did not apply. The Review Tribunal found that the Applicant's pension benefits were correctly calculated.

[19] The Applicant then submitted an application for leave to appeal to the Pension Appeals Board. The grounds of appeal were that the Review Tribunal had failed to consider the false information that was allegedly provided to the Applicant by CPP employees. He also alleged that CPP agents failed to advise him that, in order to have the years in which he was not working excluded from the pension benefits calculations, he would have had to be in receipt of disability benefits for the years in question.

[20] In a decision dated March 22, 2013, the Designated Member dismissed the application for leave to appeal, on the basis that the decision of the Review Tribunal was correct. The Member stated that subsection 49(c) applies only when a person seeking pension benefits has been in receipt of a disability pension and when there "has been a specific finding of disability" under the Plan.

III. SUBMISSIONS

[21] The Applicant now argues that the decisions made about his pension benefits were wrong and that he was misled into applying for his pension benefits earlier than he had wished to do so. Further, he submits that he was given erroneous advice by "CPP agents". He alleges that he was unfairly treated by employees of the Plan and that he was subjected to "excessive distress", including the return of premiums by Revenue Canada.

[22] The Respondent argues that the decision of the Designated Member meets the applicable legal standards and that there is no basis to interfere with the decision.

IV. DISCUSSION AND DISPOSITION

[23] The first matter to be addressed is the nature of this proceeding. An application for judicial review is a means by which a decision made by an administrative or statutory decision-maker is reviewed by the Court. The powers of the Court are limited to a review of the process followed by the decision-maker. The decision is to be assessed against a standard of review.

[24] The next matter to be addressed is the applicable standard of review. According to the decision of the Supreme Court of Canada in *Agraira v. Canada (Minister of Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559 at paragraph 48, where the jurisprudence has satisfactorily established a standard of review, that standard can be adopted.

[25] The prior jurisprudence has established that judicial review of a decision to grant or refuse an application for leave to appeal to the Board involves a two-step inquiry. First, the Court must ask if the tribunal applied the correct test of an arguable case, and second, whether a reviewable error was made in determining whether the requirements of the test were made out. In this regard, I refer to the decision in *Callihoo v. Canada (Attorney General)* (2000), 190 F.T.R. 114, where the Court said the following at paragraph 15:

> … the review of a decision concerning an application for leave to appeal to the [Pension Appeals Board] involves two issues,
>
> 1. whether the decision maker has applied the right test – that is, whether the application raises an arguable case without otherwise assessing the merits of the application, and
>
> 2. 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 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.

[26] The first issue, that is whether the Designated Member applied the correct legal test, is a question of law that is reviewed on a standard of correctness; see the decision in *Canada (Attorney General) v. Zakaria*, 2011 FC 136 at paragraph 15.

[27] A correctness review means that the reviewing Court can look at the matter anew and decide if the correct test was applied.

[28] The meaning of "arguable case" was discussed in *Canada (Attorney General) v. Carroll* (2011), 397 F.T.R. 166 at paragraph 14, where the Court said:

> The [Pension Appeals Board] also has a duty to apply the correct test for granting leave to appeal. The test is whether the applicant requesting leave has raised an arguable case **(*Callihoo v Canada (Attorney General*)**, [2000] FCJ No 612 (TD)). An applicant will raise an arguable case if she puts forward new or additional evidence (not already considered by the RT), raises an issue not considered by the RT, or can point to an error in the RT's decision.

[29] The second part of the test, that is whether an error was made in determining whether an arguable case was raised, is reviewable on the standard of reasonableness. The standard of reasonableness means that the decision is supported by evidence and is understandable, having regard to the relevant statutory scheme.

[30] Although the Designated Member did not specifically state the first part of the test, I am satisfied that consideration of the test is implicit in the decision, and there is no error in that regard.

[31] I now turn to whether the Designated Member erred in determining that no arguable case was raised. The Designated Member reviewed the essential elements of the Applicant's complaint. No new evidence was presented, the Applicant did not raise an issue that was not raised before the Review Tribunal, nor did he identify an error in the decision of the Review Tribunal.

[32] The Designated Member was mandated to look at the decision of the Review Tribunal and assess the grounds of appeal asserted by the Applicant in his application for leave. At a minimum, he must base such an arguable case on relevant matters. His submissions about bad

legal advice or misinformation from employees of the Plan, even if supported by evidence, are not relevant to the issue of the calculation of his pension.

[33] The Applicant, in his submissions before both the Review Tribunal and in his application for leave to appeal the decision of the Review Tribunal, challenges the manner in which his pension was calculated. This requires consideration of the relevant statutory provisions.

[34] The calculation of a pension is governed by subsection 46 of the Plan which provides as follows:

46. (1) Subject to this section, a retirement pension payable to a contributor is a basic monthly amount equal to twenty-five per cent of his average monthly pensionable earnings.	46. (1) Sous réserve des autres dispositions du présent article, une pension de retraite payable à un cotisant est un montant mensuel de base égal à vingt-cinq pour cent de la moyenne mensuelle de ses gains ouvrant droit à pension.

[35] The Plan further allows for removal of the lowest earning years, otherwise called the "dropout" provision, pursuant to paragraph 48(4)(a) which provides as follows:

48. (4) Where the number of months remaining after making any deduction under subsection (2) or (3) from the total number of months in the contributory period of a contributor exceeds one hundred and twenty, in calculating his average monthly pensionable earnings in accordance with subsection	48. (4) Lorsque le nombre des mois restant, une fois faite toute déduction prévue par le paragraphe (2) ou (3), du nombre total de mois compris dans la période cotisable d'un cotisant excède cent vingt, il doit, dans le calcul de sa moyenne mensuelle des gains ouvrant droit à pension en conformité avec le paragraphe
(1) there shall be deducted	(1), être déduit :
(a) from the number of months	a) du nombre de mois ainsi

remaining, a number of months equal to the lesser of	restant, un nombre de mois égal au moins élevé des deux chiffres obtenus respectivement aux sous-alinéas (i) et (ii) :

[36] Section 49 provides another "dropout" provision where a person has been in receipt of a disability pension. Subsection 49(b) and (c) are relevant to the Applicant and provide as follows:

49. The contributory period of a contributor is the period commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and ending	49. La période cotisable d'un cotisant est la période commençant soit le 1er janvier 1966, soit lorsqu'il atteint l'âge de dix-huit ans, selon le plus tardif de ces deux événements, et se terminant :
…	…
(b) where a benefit other than a disability pension commences after the end of 1986, with the earliest of	b) dans les cas où une prestation, autre qu'une pension d'invalidité, commence après la fin de 1986, avec le premier des mois suivants à survenir :
(i) the month preceding the month in which he reaches seventy years of age,	(i) le mois précédant celui au cours duquel il atteint l'âge de soixante-dix ans,
(ii) the month in which he dies, or	(ii) le mois de son décès,
(iii) the month preceding the month in which the retirement pension commences,	(iii) le mois précédant celui au cours duquel la pension de retraite commence,
but excluding	mais cette période ne comprend pas :
(c) any month that was excluded from the contributor's contributory	c) un mois qui, en raison d'une invalidité, est exclu de la période cotisable de ce cotisant

period under this Act or under a provincial pension plan by reason of disability, and …	conformément à la présente loi ou à un régime provincial de pensions; …

[37] The Review Tribunal found that the Applicant had never been found to be disabled pursuant to subsection 49(c) of the Plan and that consequently, subsection 49(c) did not apply to him.

[38] The Applicant is claiming that he was disabled after the accident in December 1982, and that the years in which he was unable to work due to his disability should be removed from the calculation of his retirement pension benefits under the Plan.

[39] The determination of a "disability" pursuant to the Plan does not depend upon self-assessment. I note that the Plan is a statutory scheme that allows for the payment of benefits in defined situations as set out in the legislation.

[40] As discussed in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, the Plan is not a social welfare scheme, but a program to provide social insurance to eligible Canadians who lose earnings due to disability, among other things

[41] Whether or not a person is eligible for CPP Disability Benefits depends on whether the individual meets the definition of disability set out in paragraph 42(2)(a) of the Plan, which provides as follows:

42. (2) For the purposes of this Act,	42. (2) Pour l'application de la présente loi :

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :

[42] Under the Plan, "disability" is determined by a Disability Adjudicator for the Plan. It is not a self-assessment process. The decision to grant a disability benefit requires compliance with the statutory terms.

[43] Under the statutory test for disability, the question is not whether an applicant has health problems, but rather, whether an applicant has a disability that is both severe and prolonged, so as to render the claimant disabled within the meaning of the Plan.

[44] The Applicant was never found to be disabled within the meaning of the Plan. He was consistently advised of this fact by the officers and administrators of the Plan.

[45] The statutory scheme does not provide discretion to dispense with compliance with the statutory conditions for obtaining a pension.

[46] Further, the statute confers no discretion upon the Designated Member to exercise any equitable powers to grant leave to appeal. The decision of the Designated Member was in accordance with the applicable legal principles and is reasonable. There is no basis for judicial

intervention. Accordingly, this application for judicial review is dismissed, with no order as to costs, since the Respondent does not seek costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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