

Date: 20081016

Docket: T-94-08

Citation: 2008 FC 1164

Ottawa, Ontario, October 16, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MONA PELLAND

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] After initially being turned down for a survivor's pension under the Canada Pension Plan, Ms. Mona Pelland was found to be eligible by a Review Tribunal. In turn, the Minister of Human Resources and Skills Development asked the Pension Appeal Board (PAB) for leave to appeal the Review Tribunal's decision. A member of the PAB denied the Minister's request.

[2] The Minister argues that the PAB erred in two respects: first, by applying the wrong legal test and, second, by unreasonably denying leave to appeal. The Minister asks me to overturn the PAB decision and order another member to reconsider the leave application.

I am satisfied that the PAB erred and will, therefore, allow this application for judicial review.

[3] The two issues are:

1. Did the PAB apply the wrong legal test for deciding an application for leave to appeal?
2. Was the PAB's decision to deny leave unreasonable?

I. Factual Background

[4] Beginning sometime in the late 1980s, Ms. Pelland lived with Mr. Colin Sinclair in Churchill, Manitoba. Mr. Sinclair faced a number of health issues, including diabetes, cirrhosis and kidney disease. In the late 1990s, he began receiving medical treatments in Thompson and Winnipeg because facilities were lacking in Churchill. By 2002, Mr. Sinclair was receiving frequent dialysis treatments and moved to Winnipeg to be closer to medical facilities. In 2004, Mr. Sinclair died in hospital.

[5] Ms. Pelland applied for a survivor's pension in 2004. In her application and other supporting materials, she indicated that she and Mr. Sinclair had separated sometime in the mid-1990s (various dates were provided). The Minister concluded that she was not eligible for a survivor's pension under the *Canada Pension Plan Act*, R.S.C. 1985, c. P-6 because she was no longer living in a common-law relationship with Mr. Sinclair during the twelve months prior to his death. Ms. Pelland asked to have that decision reconsidered. The Minister did not change his mind.

[6] Ms. Pelland appealed the Minister's decision to the Review Tribunal. The Review Tribunal allowed her appeal on the basis that Ms. Pelland and Mr. Sinclair continued to be in a common-law relationship at the time of his death, even though they were no longer living together as a result of Mr. Sinclair's medical circumstances.

[7] The Minister sought leave to appeal the Review Tribunal's decision to the Pension Appeal Board. A member of the PAB denied leave. The member noted that the existence of a common-law relationship between Ms. Pelland and Mr. Sinclair was "undisputed". Further, he found that the Minister had not "established" that the Review Tribunal had erred in fact or law. Therefore, there was "no reasonable chance of success on appeal."

II. Did the PAB apply the wrong legal test?

[8] On a leave application, the PAB must determine whether there is some arguable ground on which the appeal might succeed. It should not decide whether the applicant could actually succeed.

[9] These propositions are set out in a series of cases: *Kurniewicz v. Canada (Minister of Manpower and Immigration)*, (1974) 6 N.R. 225 (F.C.A.); *Kerth v. Canada (Minister of Human Resources Development)* [1999] F.C.J. No. 1252; *Martin v. Canada (Minister of Human Resources Development)*, [1999] F.C.J. No. 1972; *Callihoo v. Canada (Attorney General)*, [2000] F.C.J. No. 612.

[10] Here, in my view, the PAB applied too high a standard. It noted that the Minister had not “established” an error on the part of the Review Tribunal. It then concluded that there was “no reasonable chance of success”. Both statements disclose standards that exceed the threshold of an “arguable case” and, accordingly, I must conclude that the member erred in law in applying them.

III. Was the PAB’s decision to deny leave unreasonable?

[11] The Minister argues that the law and the evidence presented to the PAB should have resulted in a grant of leave to appeal. The decision to deny leave, then, was unreasonable.

[12] The Minister points first to the statutory rules relating to the eligibility of a common-law spouse for a survivor’s pension. A “survivor” includes a person who was the common-law partner of the deceased at the time of death. A “common-law partner” is a person who was cohabiting in a conjugal relationship with the deceased at the time of death and had cohabited for a continuous period of at least a year (see s. 44(1), s. 42, and s. 2(1), set out in the Annex).

[13] The Minister argues that these rules preclude Ms. Pelland from qualifying for a survivor’s pension because she had not been living with Mr. Sinclair for at least two years prior to his death. In fact, the evidence showed that they may have separated much earlier than that. The Minister contends that, at the very least, the question whether Ms. Pelland fell within the rules of eligibility for a survivor’s pension presented an “arguable ground on which the appeal might succeed”.

Accordingly, the Minister submits that the PAB's statement that the existence of a common-law relationship at the time of death was "undisputed", as well as its decision to deny leave, were unreasonable. Clearly, the issue was very much disputed before the Review Tribunal.

[14] In my view, the question whether there is an arguable issue is for the PAB to decide. Because, as I have concluded above, the PAB has not yet answered that question, I am not prepared to find that the decision to deny leave was unreasonable. Given the PAB's error of law, the proper outcome of this judicial review is to send the case back to another member of the PAB to review the Minister's submissions and decide the leave application according to the proper test.

IV. Conclusion

[15] In light of the legal error by the PAB, another member should review the Minister's submissions and determine whether they disclose an arguable ground on which the Minister's appeal might succeed. There is no order relating to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. Another member of the Pension Appeal Board shall reconsider the Minister's application for leave to appeal.
3. There is no order relating to costs.

“James W. O’Reilly”

Judge

Annex "A"

Canada Pension Plan Act, R.S.C. 1985, c. P-6

Definitions

2. (1) In this Act,

"common-law partner" , in relation to a contributor, means a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor's death, the "relevant time" means the time of the contributor's death.

Definitions

42. (1) In this Part,

"survivor" , in relation to a deceased contributor, means

- (a) if there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor's death, or
- (b) a person who was the common-law partner of the contributor at the time of the contributor's death;

Benefits payable

44. (1) Subject to this Part,

- (a) a retirement pension shall be paid to a contributor who has reached sixty years of age;
- (b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who
 - (i) has made contributions for not less than the minimum qualifying period,
 - (ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a

Régime de pensions du Canada, L.R., 1985, ch. C-8

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.
«année »

«conjoint de fait » La personne qui, au moment considéré, vit avec un cotisant dans une relation conjugale depuis au moins un an. Il est entendu que, dans le cas du décès du cotisant, « moment considéré » s'entend du moment du décès.

Définitions

42. (1) Les définitions qui suivent s'appliquent à la présente partie.
«bénéficiaire d'une allocation familiale »

survivant » S'entend :

- a) à défaut de la personne visée à l'alinéa b), de l'époux du cotisant au décès de celui-ci;
- b) du conjoint de fait du cotisant au décès de celui-ci.

Prestations payables

44. (1) Sous réserve des autres dispositions de la présente partie :

- a) une pension de retraite doit être payée à un cotisant qui a atteint l'âge de soixante ans;
- b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :
 - (i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,
 - (ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,

disability pension had been received before the contributor's application for a disability pension was actually received, or (iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;

(iv) [Repealed, 1997, c. 40, s. 69]

(c) a death benefit shall be paid to the estate of a deceased contributor who has made contributions for not less than the minimum qualifying period;

(d) subject to subsection (1.1), a survivor's pension shall be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period, if the survivor

(i) has reached sixty-five years of age, or

(ii) in the case of a survivor who has not reached sixty-five years of age,

(A) had at the time of the death of the contributor reached thirty-five years of age,

(B) was at the time of the death of the contributor a survivor with dependent children, or

(C) is disabled;

(e) a disabled contributor's child's benefit shall be paid to each child of a disabled contributor who

(i) has made contributions for not less than the minimum qualifying period,

(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or (iii) is a contributor to whom a disability pension would have been payable at the

(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;

(iv) [Abrogé, 1997, ch. 40, art. 69]

c) une prestation de décès doit être payée à la succession d'un cotisant qui a versé des contributions pendant au moins la période minimale d'admissibilité;

d) sous réserve du paragraphe (1.1), une pension de survivant doit être payée à la personne qui a la qualité de survivant d'un cotisant qui a versé des cotisations pendant au moins la période minimale d'admissibilité, si le survivant :

(i) soit a atteint l'âge de soixante-cinq ans,

(ii) soit, dans le cas d'un survivant qui n'a pas atteint l'âge de soixante-cinq ans :

(A) ou bien avait au moment du décès du cotisant atteint l'âge de trente-cinq ans,

(B) ou bien était au moment du décès du cotisant un survivant avec enfant à charge,

(C) ou bien est invalide;

e) une prestation d'enfant de cotisant invalide doit être payée à chaque enfant d'un cotisant invalide qui :

(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,

(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,

(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en

time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1, had not been made; and

(iv) [Repealed, 1997, c. 40, s. 69]

(f) an orphan's benefit shall be paid to each orphan of a deceased contributor who has made contributions for not less than the minimum qualifying period.

application des articles 55 et 55.1;

(iv) [Abrogé, 1997, ch. 40, art. 69]

f) une prestation d'orphelin doit être payée à chaque orphelin d'un cotisant qui a versé des cotisations pendant au moins la période minimale d'admissibilité.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-94-08

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v. MONA PELLAND

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APPEARANCES:

Dale Noseworthy FOR THE APPLICANT

Unrepresented SELF-REPRESENTED RESPONDENT

SOLICITORS OF RECORD:

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

Mona Pelland SELF-REPRESENTED RESPONDENT
Winnipeg, MB