Federal Court		Cour fédérale

Date: 20100205

Docket: T-783-09

Citation: 2010 FC 121

Montréal, Quebec, February 5, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

NORMAND FRANCOEUR

Applicant

and

THE TREASURY BOARD OF CANADA

and

THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision by Public Works and Government Services Canada (PWGSC) to reduce the superannuation of Normand Francoeur (applicant) under subsection 11(2) of the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 (PSSA), and of subsequent letters sent to the applicant by the PWGSC and the President of the Treasury Board of Canada.

FACTS

[2] The applicant was the victim of an automobile accident in 2003. The resulting disability forced him to retire from the Public Service of Canada on April 13, 2007.

[3] On July 18, 2007, the PWGSC informed him of his entitlement to superannuation of $1,091.79 per month.

[4] On August 7, 2008, the PWGSC found out that, since June 2003, the applicant had been eligible for a disability pension of $941.06 per month under the *Act respecting the Québec Pension Plan*, R.S.Q. c. R-9 (QPP pension). However, since the applicant's disability resulted from an automobile accident, the Société de l'assurance automobile du Québec (SAAQ) was already paying him an indemnity that was more than the QPP pension. That is why the latter was paid to the SAAQ, as a partial offset of the indemnity it was paying to the applicant, rather than directly to the applicant.

[5] A PWGSC pension officer informed the applicant, by letter dated December 28, 2008, that his superannuation would be reduced retroactively as of the date of his retirement because he had been eligible for the QPP pension even before that date. The applicant's basic superannuation was adjusted to $766.06 per month. The PWGSC also sought from the applicant reimbursement of a total overpayment of $7,093.14.

[6] On January 6, 2009, the applicant sent a letter to the PWGSC, appealing the reduction of his superannuation. The applicant stressed the precariousness of his financial situation and the fact that, since the QPP pension was paid entirely to the SAAQ, he did not benefit from it in any way.

[7] The PWGSC replied to the applicant by a letter dated February 16, 2009, explaining that his superannuation had been reduced in accordance with subsection 11(2) of the PSSA, and that the payment of the QPP pension to the SAAQ did not change the fact that he was eligible for it. The PWGSC therefore upheld its decision, but stated that it was willing to consider a reduced rate of reimbursement to accommodate the applicant's financial situation.

[8] On February 20, 2009, the applicant sent a letter to the President of the Treasury Board of Canada. In a letter dated April 21, 2009, the President explained that the applicant's superannuation had been reduced in accordance with paragraph 11(2)(*b*)of the PSSA because he was eligible for the QPP pension paid through the Société de l'assurance automobile du Québec. He added that [TRANSLATION] "as sponsor of the superannuation plan", the government was required to apply the PSSA uniformly and that, [TRANSLATION] "even in exigent circumstances, it is not possible to grant an exemption from the requirements of the Act".

[9] After receiving this letter, the applicant filed an application for judicial review of this decision.

STATUTORY FRAMEWORK

[10] The PSSA governs the superannuation plan of members of the Public Service of Canada. Superannuation is payable, for example, on the death or retirement of a plan member. The President of the Treasury Board is responsible for the application of the PSSA, but administration of the plan is delegated to the PWGSC under section 13 of the *Department of Public Works and Government Services Act*, S.C. 1996, c. 16.

[11] Moreover, like all Canadian workers, members of the Public Service of Canada must contribute, depending on their place of residence, either to the Canada Pension Plan or to a similar provincial plan, such as the Quebec Pension Plan (QPP), which in fact is the only existing provincial plan. Since the applicant is a resident of Quebec, he contributed to the QPP.

[12] The superannuation plan established by the PSSA is harmonized with the QPP. Subsection 11(1) of the PSSA provides for the payment of superannuation in accordance with a certain formula. However, subsection 11(2) provides as follows :

> Notwithstanding subsection (1), unless the Minister is satisfied that a contributor
>
> (*a*) has not reached the age of sixty-five years, and
>
> (*b*) has not become entitled to a disability pension payable under paragraph 44(1)(*b*) of the *Canada Pension Plan* or a provision of a provincial pension plan similar to the *Canada Pension Plan*,
>
> there shall be deducted from the amount of any annuity to which that contributor is entitled under this Part an amount [calculated according to a formula set out in subsections 11(2) and 11(2.1)].

Thus, the superannuation of a retired public servant who is entitled to a disability pension under a provincial plan such as the QPP will be reduced.

PRELIMINARY ISSUE

[13] The respondents contend that this application for judicial review should be dismissed because it does not concern a "decision" within the meaning of section 18.1 of the *Federal Courts Act*. In fact, the letter from the President of the Treasury Board to which this application apparently pertains is seemingly a courtesy letter, of an administrative nature only, merely confirming the decision made on December 28, 2008. Since this letter does not set out either a *de novo* exercise of discretion or a reconsideration of the previous decision, it is not a decision. The respondents rely, *inter alia*, on this Court's decision in *Moresby Explorers Ltd. v. Gwaii Haanas National Park Reserve*, [2000] F.C.J. No. 1944 (QL), in which Justice Pelletier ruled that "correspondence [that] simply shows persistent attempts to reverse a negative decision and a continuing commitment to the original decision by the respondents" does not constitute a new decision or a course of conduct.

[14] According to the respondents, the applicant should have applied for judicial review of the initial decision dated December 28, 2008. However, he did not do so, and is now out of time. The respondents add that the Court should not exercise its discretionary power to extend the time to enable him to do so.

[15] According to the applicant, he is not, in fact, seeking judicial review of the decision dated April 21, 2009, but rather of the reduction of his superannuation by the PWGSC, as well as of the

decision dated February 16, 2009. He denies being out of time, but adds that, if he is, the Court should extend the time since the letters sent to him did not explain the deadlines and procedures to be followed to challenge the reduction of his superannuation, and that he believed in good faith to have undertaken the appropriate procedures for doing so. He stresses the fact that his application is serious.

[16] I agree with the respondents that, as presented, the application for judicial review pertains to the letter of April 21, 2009, which is not a decision, but rather the expression of what Justice Pelletier, in *Moresby Explorers*, above, had described as the "continuing commitment to the original decision by the respondents".

[17] However, I granted at the hearing an extension of time in order to decide on the merits of this application. In *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 299, [1999] F.C.J. No. 846 (QL) (F.C.A.), at para. 3, the Federal Court of Appeal determined that the proper test to be taken into account when examining such an application was the continuing intention to pursue the application, the existence of some merit in the application, the prejudice to the respondent arising from the delay and the explanation for the delay.

[18] In the case at bar, the applicant, who is representing himself, has demonstrated his continuing intention to challenge the reduction of his superannuation, and he failed to submit an application for judicial review because he tried to do so by other means which seemed more appropriate to him. I note that in his letter of January 6, 2010, he said that he was

[TRANSLATION] “appealing” the PWGSC’s decision. In addition, the respondents, who made submissions on the merits of the case, have not suffered any prejudice from the fact that the case will be decided on its merits and not on a preliminary point. For that same reason, dismissing the application for an extension of time because of the weakness of its merits would not help the respondents because, in any case, they would have already lost the time needed to defend themselves.

ANALYSIS

[19] The issue raised by this application for judicial review is whether the PWGSC erred in reducing the applicant’s superannuation and in seeking reimbursement of the overpayment on the grounds that the applicant was entitled to a provincial disability pension, namely, the QPP.

[20] I agree with the respondents that it is a question of mixed fact and law, since it involves interpreting paragraph 11(2)(*b*) of the PSSA while applying it to the applicant’s specific situation. Therefore, the applicable standard of review is reasonableness.

[21] The applicant contends that subsection 11(2) of the PSSA does not apply to him because he is not yet 65, because the QPP pension is not a [TRANSLATION] “regular annuity” of the Quebec Pension Plan, and because he does not receive it as it is paid to the SAAQ.

[22] According to him, the reduction of his superannuation is abusive, because he does not benefit in any way from the QPP pension, which is paid to the SAAQ. He argues that this reduction

amounts to deductions totalling more than 130% within a single plan, whereas there is no legal system anywhere in Canada that allows for coordination and offset of more than 100%. He also stresses that the reduction of his superannuation has caused him irreparable damage and serious economic and moral harm.

[23] The respondents argue that, although the QPP pension is not paid to the applicant, he is still eligible for it, and that paragraph 11(2)(*b*) of the PSSA therefore applies to him. According to them, the *Act respecting the Québec Pension Plan* (AQPP) harmonizes the SAAQ income replacement indemnity and the QPP disability pension of a person who is potentially eligible for both.

[24] The first paragraph of section 105.1 of the AQPP provides as follows:

> …a disability pension shall be payable to a contributor for a disability resulting from an accident within the meaning of the Automobile Insurance Act (chapter A-25) only if the amount of income replacement indemnity to which the contributor is entitled under that Act is less than the amount of disability pension that would otherwise be payable to him. The amount of the pension shall, in such a case, correspond to the difference between the amount of disability pension otherwise payable and the amount of the income replacement indemnity….

However, the second paragraph of that section specifies that "[e]ven if the contributor's disability pension is reduced or no pension is payable to him, the other provisions of this Act remain applicable in respect of the contributor as if the pension to which he would have otherwise been entitled were payable to him…".

[25] Moreover, section 180.3 of the AQPP provides that the Régie des rentes du Québec "pay[s] to the Société de l'assurance automobile du Québec, on a monthly basis, a total amount

corresponding to the amounts of disability pension which, by reason of section 105.1, cannot be paid to the contributors referred to in that section".

[26] The respondents note that the Régie des rentes du Québec informed the applicant, by letter dated July 8, 2008, that he was entitled to a disability pension of $941.06 per month, but that this pension would not be payable to him because he was already receiving an indemnity from the SAAQ. The payment of this pension to the SAAQ rather than to the applicant is a result of sections 105.1 and 180.3 of the AQPP.

[27] According to the respondents, the Quebec legislator wanted to prevent a person from receiving compensation from the SAAQ and a disability pension from the QPP for the same disability. Similarly, it would be contrary to the objective of Parliament for a person to receive his or her full superannuation and a disability pension, in the interests of fairness to all contributors to the Public Service Superannuation Plan. Regardless of the arrangements made between the SAAQ and the Régie des rentes du Québec to harmonize the payment of disability benefits in Quebec following an automobile accident, the fact remains that federal legislation must be applied in accordance with its purpose. I concur.

[28] In fact, although the amount of the QPP pension is not paid to the applicant, it cannot be said that he is not eligible for it within the meaning of paragraph 11(2)(*b*) of the PSSA.

[29] Unfortunately for Mr. Francoeur, the arrangements made by the Quebec legislator are not subject to federal authority. The Quebec legislator could have made other arrangements. For example, the QPP pension could have been paid directly to the retired public servant, with the SAAQ indemnity reduced accordingly.

[30] As for paragraph 11(2)(*b*) of the PSSA, unless the applicant directly challenges the constitutionality of this provision by means of the appropriate procedure, the Court has no choice but to ensure that the PWGSC's application of it is reasonable. It is impossible for me to find in this case that it is not.

[31] I therefore find that the reduction of the applicant's superannuation was not only reasonable, but simply an inescapable consequence of the PSSA. It is unfortunate that the applicant is in a financial situation that he claims is precarious, but this fact alone does not allow the PWGSC or this Court to help him by applying the PSSA in contravention of its unequivocal terms and without regard for Parliament's intention.

[32] For these reasons, this application for judicial review is dismissed, without costs.

JUDGMENT

THE COURT ORDERS that:

the application for judicial review is dismissed, without costs.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-783-09
STYLE OF CAUSE:	NORMAND FRANCOEUR v. CANADA (TREASURY BOARD) ET AL.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 21, 2010
REASONS FOR JUDGMENT:	TREMBLAY-LAMER J.
DATED:	February 5, 2010

APPEARANCES:

Normand Francoeur	FOR THE APPLICANT
Pascale-Catherine Guay	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Normand Francoeur Laval, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENTS