Federal Court  Cour fédérale

Date: 20150410

Docket: T-1151-14

Citation: 2015 FC 446

Toronto, Ontario, April 10, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LYNN CHMELNITSKY MOORS

Applicant

and

THE MINISTER OF NATIONAL REVEUNE,
THE CANADA REVENUE AGENCY, AND
THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Canadian Human Rights Commission [CHRC] decided on April 15, 2014, upon the review of an investigator's report and pursuant to section 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA], to dismiss the Applicant's claim that the Canada

Revenue Agency [CRA] discriminated against her on the basis of sex and family status. This is a judicial review of that decision.

[2] The Applicant, Ms. Moors, is an elementary school teacher from Brampton, Ontario and a member of the Ontario Teachers' Pension Plan [OTPP]. She went on maternity leave in November 1998 after the birth of her first child. She had two more children in December 2000, and November 2002, and returned to teaching in September 2006. It was at this time that she attempted to buy back pension credits related to her time on maternity leave. Due to her factual circumstances, the CRA instructed Ms. Moors that she would be subject to a Past Service Pension Adjustment [PSPA], the consequences of which, she submits, impeded her ability to save for retirement, in a discriminatory manner. I shall address the Applicant's submissions regarding the PSPA's discriminatory treatment below, but begin with an overview of the pension architecture in operation in this case.

II. Background: Financial Framework of the RRSP and RPP Investment Vehicles

[3] Registered Retirement Savings Plans [RRSPs] and Registered Pension Plans [RPPs] are investment vehicles designed to encourage Canadians to save for retirement by providing tax-deferral on income earned within the plans. While RRSPs are savings plans established by individuals, RPPs are arrangements between an employer or union to provide periodic payouts to employees upon their retirement. Canadians are permitted to participate in both of these plans simultaneously; however, the cumulative contribution made to these plans cannot exceed 18% of an employee's earned income per annum, up to a specified dollar amount.

[4] A pension adjustment [PA] is the value of benefits accrued in an RPP in a given year, and this amount reduces an employee's RRSP deduction limit for the following year. When an employee performs contractual duties for an employer, the pension benefits associated with that employment, accumulated on a present basis, are referred to as "current service" benefits. This can be distinguished from "past service" benefits, which are pension benefits provided to employees retroactively, for service rendered prior to the year(s) of the benefit.

[5] When member contributions are made for past service pension benefits, a PSPA must be reported by the employer and certified by the CRA. A PSPA is, at its maximum, equivalent to the sum total of the PAs that would have been calculated for the employee had they been accrued on a current service basis. The member has an interest in contributing funds to the pension for the time they spent on leave, otherwise described as "buying back pension benefits", as it can influence the payout upon retirement from defined benefit-RPPs. In simpler language, the greater the years of pensionable service a member has upon retirement, the greater the payout will be. Purchasing past service benefits allows members to retroactively increase their years of pensionable service.

[6] What must be noted, however, is that the PSPA certification is contingent on the member having unused RRSP deduction room. The purpose of the certification is to ensure there is no double counting of retirement benefits, and so no advantage is gained relative to what the person would have accumulated with current service contributions. In short, the CRA seeks to avoid a scenario where the employee contributes the maximum RRSP amount, and then through the purchase of prior benefits, also contributes the equivalent RPP amount, albeit retroactively.

Under such a scenario, the member would have effectively contributed 36%, as opposed to the allowable 18%, of income to these two retirement savings vehicles, resulting in a "double dipping" of retirement contributions.

[7] Thus, the unused RRSP deduction must be equal or greater than the amount of the PSPA for the certification to be approved. Members who have insufficient RRSP deduction room must transfer or withdraw property from their RRSPs to create it. This RRSP withdrawal may have immediate negative tax consequences for that member.

[8] When a member takes a leave of absence, such as maternity leave, parental leave or disability leave, the individual does not receive compensation from the employer during the absence, and is thus unable to accrue current RPP service benefits. To remedy the negative consequences that the inability to accrue current service benefits would have on a member during a leave of absence, the *Income Tax Act* (RSC, 1985, c. 1 (5th Supp)) [*ITA*] permits compensation to be prescribed to an employee during these periods of leave. The prescribed compensation generally equals the earnings the employee would have received during the period of the absence, had they not taken leave. As a result of the prescribed compensation, the member is able to continue to accrue benefits on a current service basis until the return to work.

[9] The *ITA* does not mandate that employers provide current service pension benefits to employees during periods of leave, nor does it mandate who pays for the benefits during such periods. These details must be negotiated between the employer and employee.

[10] The purchase of current service benefits during a period of leave may be made concurrently as the benefits accrue. The *ITA* also allows an employee to purchase current service benefits after the member has returned from a leave of absence. In such a circumstance, the member must elect this option prior to April 30th of the year immediately following the calendar year in which the period of leave comes to an end.

[11] If the member makes the election in the required timeframe, the purchase will be treated as though it had been made concurrently in the time period during which the benefit accrued, resulting in a PA for the member. Making the election before April 30 does not necessarily oblige the member to pay for the period of absence in a lump sum: the nature of the payment for these benefits (whether by lump sum or instalment) is a matter dictated by the terms of the RPP, not the *ITA*. In other words, it is up to the employer to determine the length of time for which the prescribed compensation benefit can be left unfunded.

[12] If the member chooses not to make the election in the required timeframe, the pension benefits must be purchased on past service basis, and a PSPA, discussed above, must be certified by the CRA.

III. Facts of this Case

[13] When the Applicant, Ms. Moors, was approved for maternity leave, she was given three options:

a) Contribute to the plan during her leave of absence; her PAs would be reported;

b) Once returning to work, elect to contribute to the plan by April 30th of the year following her return; her PAs would be reported; or

c) Buy back her pension credits, having not contributed during her leave of absence or elected to contribute to the plan by April 30th of the year following her return. A PSPA would need to be certified by the CRA, contingent on unused RRSP room and a threshold of savings (currently $8,000) sufficient to satisfy the requirements for certification.

[14] From November 1998 to August 1999, the Applicant contributed to her plan on a monthly basis (Option A). From September 1999 forward, the Applicant was no longer able to afford her monthly contributions during her maternity leave.

[15] The Applicant returned to teaching in September 2006. The Applicant did not elect to buy back the pension credits accumulated during her leave by April 30, 2007, as she was under the impression that she had 5 years upon her return to work to buy back the credits. When the Applicant subsequently attempted to purchase the pension credits related to the period from September 1999 to August 2006, she was informed by the CRA on February 3, 2011 that for a PSPA to be certified and the buyback completed, a qualifying RRSP withdrawal would need to be made.

[16] The Applicant submits that even after having withdrawn RRSP funds, she was precluded from buying back the credits relating to the entirety of her maternity leave because she did not have sufficient RRSP deduction room.

[17] Ms. Moors contends that the provisions of the *ITA* which base pension buy back eligibility on RRSP deduction limits are discriminatory, based on gender and family status. The

Applicant argues that since only women take maternity leave, the failure of the *ITA* to enable RRSPs to allow for contributions pursuant to prescribed income, as it does for RPPs, has a discriminatory effect resulting in a reduced ability for women to save for retirement. The Applicant expanded her arguments in the oral hearing before this Court to include men taking parental leave to care of their children.

[18] Ms. Moors launched a complaint with the Canadian Human Rights Commission in September 2011. An investigator was appointed and issued a report on January 27, 2014. The CHRC adopted the conclusions of the investigator and dismissed the complaint on April 15, 2014. The CHRC found that while the *ITA* rules relating to PSPAs adversely affected the complainant, the "adverse effects were unrelated to factors related to the complainant's sex and/or family status" (Applicant's Record [AR], p 153).

IV. Standard of Review

[19] As recently explained by Justice Webb in *Attaran v Canada (Attorney General)*, 2015 FCA 37 [*Attaran*], when the Court reviews a decision of the CHRC not to refer a complaint to the Human Rights Tribunal, the findings of fact made by the CHRC are to be reviewed on the standard of reasonableness (*Attaran* at para 14). If these factual findings are reasonable, the Court is then required to assess whether the CHRC's dismissal is reasonable, cognizant that the deference to be applied to the decision is constrained by the determinative nature of the decision (*Attaran* at para 14).

V. Analysis

[20] The initial onus rests on a human rights complainant to establish a *prima facie* case that discrimination has occurred under the *CHRA*. Having done so, the burden then shifts to the opposing party to justify the conduct or practice. To establish a *prima facie* case of discrimination, the Applicant must show (i) she has a personal characteristic protected from discrimination under the *CHRA*; (ii) she experienced an adverse impact with respect to the service; and (iii) the protected characteristic was a factor in the adverse impact (*Moore v British Columbia (Education),* 2012 SCC 61 at para 33).

[21] Once the complainant establishes a *prima facie* case, the party against whom the complaint is made may provide a reasonable explanation that, despite its appearance, the practice is not actually discriminatory. If a reasonable explanation is so provided, the complainant would have the burden of demonstrating that the explanation was a pretext for a practice that is actually discriminatory (*Attaran* at para 25). If the opposing party cannot provide a reasonable explanation for the discriminatory treatment, it may still avoid having engaged in a discriminatory practice if one of the exemptions available under the CHRA, such as bona fide justification, is applicable (*Attaran* at para 24; *Canada (Human Rights Commission) v Canada (Attorney General),* 2014 FCA 131 at para 21).

[22] While I note that the CHRC did not have the benefit of the Federal Court of Appeal's guidance in *Attaran* prior to its decision, I find its decision to be a reasonable one. The inability of the Applicant to purchase pension credits did not stem from discrimination related to her sex or family status. The investigator's report, the conclusion of which CHRC adopted, stated at various points that:

> "The evidence does not support that the ITA rules relating to PSPAs adversely affected the complainant based on sex and/or family status. These tax consequences exist for anyone who requires a PSPA."
>
> (AR, p 152)
>
> "The evidence also indicates that the ITA rules relating to PSPAs adversely affected the complainant. However, the adverse effects were unrelated to factors related to the complainant's sex and/or family status."
>
> (AR, p 153)

[23] In my view, these passages indicate that the CHRC concluded that the Applicant had not successfully established a *prima facie* case of discrimination. In other words, her sex and family status were not factors in the financial hardship she suffered in her pension planning.

[24] Section 5(b) of the *CHRA* states that it is a discriminatory practice in the provision of services to differentiate adversely in relation to any individual based on a prohibited ground of discrimination. To differentiate adversely is to treat a person differently by drawing a formal distinction between the claimant and others, or to fail to take into account the claimant's already disadvantaged position within Canadian society (*Quebec (Attorney General) v A*, 2013 SCC 5 at para 151). In this case, the service provided by the CRA is the certification of a PSPA for a member of an RPP who wishes to purchase pension credits after an approved leave of absence.

[25] While I have sympathy for the Applicant's inability to complete the purchase of the pension credits accumulated during her approved maternity leave, this was the result of an incomplete election of those credits by the requisite deadline. Had the Applicant made the election to purchase the credits by April 30, 2007, there would have been no need for the CRA to

certify a PSPA and no contributions would have been precluded due to insufficient unused RRSP room. As such, this matter is related more to an unfortunate incident of financial planning on the part of the Applicant with respect to her RPP, rather than the discriminatory effect of the *ITA*. Indeed, subsequent to the time period in question, the OTTP was changed to allow for greater flexibility in terms of payment over time than had been the case when the Applicant took her maternity leave.

[26] In summary, the Applicant's situation might have been played out differently had she taken her leave after the change noted above was implemented, but the rules in place at that time she took her leave, impacted her desired outcome negatively. I do not find that the negative outcome was triggered by discrimination within the law that can be remedied by the present judicial review.

[27] As the investigator noted, the Applicant claims that the reason for missing the election date of April 30, 2007 was that she did not have sufficient funds to purchase the credits in a lump sum contribution. This was the not the function of the *ITA*, but the Applicant's RPP. While the Applicant's RPP in this case required the plan member to pay into the plan by a specified date (April 30, 2007) for the buyback to be completed on a deemed current service basis, the *ITA* itself does not specify when the funds related to the election must be contributed, only that an election be made.

[28] The Applicant contends that the date imposed for the buyback pursuant to section 8308(4) of the *Income Tax Regulations* [ITR], April 30 of the year following a return from leave,

is arbitrary and discriminatory. I agree with the Respondents that it was not this deadline that precluded the Applicant from purchasing her pension credits, but rather her inability to provide a lump sum contribution to her plan at the deadline. In other words, while it was open to OTPP to recognize the Applicant's election and allow for contribution by instalment, the restrictions which prohibited her from doing so came from the terms of the plan, not the *ITA* or *ITR*. As mentioned above, the OTTP has since revised its practices and no longer requires a full contribution from a member by the deadline; it now only requires an expression of intent to purchase the credits, regardless of when payment is made (although the Court is mindful that this wasn't the case for her plan at the period in which her issues arose).

[29] With regards to the deadline, the Applicant argues that the "establishment of this date bears no logical relationship to relevant considerations and is itself discriminatory to a woman who has taken maternity leave" (AR, p 213, para 48).

[30] As a matter of practical necessity, the mere imposition of a deadline of general application cannot in itself be discriminatory. Deadlines imposed under the *ITA* and *ITR* are central to administrative efficiency (*1057513 Ontario Inc v The Queen*, 2014 TCC 272 at paras 29-30). There is no evidence in the record that it has had this effect relative to members returning from absences related to family leave or disability. Therefore, s. 8308(4) of the *ITR* does not discriminate against pregnant women or mothers on maternity leave in these circumstances.

[31] This brings me to the crux of the Applicant's argument – that the *ITA* is discriminatory *in effect* because RRSPs do not provide for a mechanism of prescribed compensation in the manner that RPPs allow.

[32] I should begin by stating that the Applicant in this case was not limited to the vehicle of RRSPs to save for her retirement. She could have, for instance, contributed to her RPP without the need for a PSPA on a deemed current service basis by either making monthly payments while on leave, or by electing to purchase the pension credits by the deadline. To that extent, she is not in the same situation as a person taking a leave of absence whose sole investment vehicle for retirement is limited to an RRSP.

[33] Furthermore, while the Applicant makes this argument regarding a discriminatory effect of the *ITA* upon judicial review, this was not the basis of the original complaint made to the CHRC. Rather, in the original complaint made on September 6, 2011, the Applicant stated that:

> "I believe I was subjected to discrimination due to my sex and feel that because of having gone on maternity/parental leave that I have been economically disadvantaged and unable to meet the criteria for Option 1 and 2 [the current service contributions and the buyback at the deadline] and I will continue to be disadvantaged in my pensionable years until the day I die <u>because of the current PSPA rules</u>." [emphasis and clarification added]
>
> (AR, p 56, para 6)

[34] The investigator, accordingly, devoted the report to addressing whether the PSPA rules discriminate against the Applicant. This Court is limited to assessing the analysis undertaken by the investigator in light of the complaint lodged. Addressing ancillary issues, however valid,

would go beyond the role of this Court upon judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 55).

[35] To the extent that the Applicant argues that the *ITA* and PSPA rules pertaining to RPPs disproportionately discriminate against women because only women take maternity leave, I do not agree that this is an appropriate way to frame the issue. The PSPA rules apply to a broad range of parties, including persons on family leave and disability leave (of both genders) and come into effect only when an election by the deadline has not been made. The PSPA framework is the default regime for past service pension buybacks, subject to provisions in the *ITA* and *ITR* which allow a buyback on a deemed current service basis. The *ITA* recognizes the particular significance of maternity and paternity leaves for RPPs by allowing members to accrue pension benefits at a notional full-time equivalent salary for up to 8 years of eligible leave – 3 years longer than the timeframe permitted for other types of leave. The provisions governing RPPs are consequently *more* sensitive to women on maternity leave when compared to members taking leave for alternate reasons, not less.

[36] The Respondents point the Court to *Sollbach v Canada*, [1999] FCJ 1912 at para 9 [*Sollbach*], in which the Federal Court of Appeal held that pregnant women seeking employment benefits did not suffer discrimination as the provision limiting such benefits was applied neutrally. Justice McDonald wrote for the Court:

> [9] We find that the Applicant has failed to show that pregnant women are discriminated against as a group under the legislation. Pregnant women are treated exactly the same as men and women on parental leave and the same as men and women who suffer from a disability. All are limited to a maximum of 30 weeks of compensation.

> (See also *Miller v Canada (Attorney General)*, 2002 FCA 370 at paras 5, 23).

[37] Even though human rights jurisprudence in Canada has evolved in the two decades since the Federal Court of Appeal's decision in *Sollbach*, it remains binding, and bolsters the investigator's conclusion that there was no actual or effective discrimination in this case.

VI. Conclusion

[38] I am of the opinion that the CHRC's decision, which found that the inability of the Applicant to purchase pension credits did not stem from discrimination related to her sex or family status, was a reasonable one. I make this finding despite the very able written preparation, oral arguments, and best efforts of the Applicant to convince me otherwise.

[39] This application is accordingly dismissed. No costs will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed. There is no order as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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