Federal Court  Cour fédérale

Date: 20160614

Docket: T-2005-14

Citation: 2016 FC 664

Toronto, Ontario, June 14, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MICHAEL LANDRIAULT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Public Service Pension Centre ("Pension Centre") of Public Works and Government Services Canada ("PWGSC"), denying the request of the Applicant that he be permitted to participate in the Service Buyback Program of the *Public Service Superannuation Act*, RSC 1985, c P-36 ("PSSA") for periods of service provided under contracts with Environment Canada.

Background

[2] Between March 1992 and April 2005 the Applicant provided services to Environment Canada primarily by way of thirteen contracts (collectively, the "Contracts"). He became an indeterminate employee of Environment Canada in April 2005. The Contracts were made between Environment Canada and M.T.L Analytical ("MTL") or Michael T. Landriault "doing business under the name of M.T.L Analytical" or "doing business as" or "operating as" MTL and were for consulting and professional services related to oil chromatography and separations. The Contracts, when signed, were signed by the Applicant as the owner or president of MTL.

[3] On May 13, 2008 the Applicant submitted an Election Form for Elective Pensionable Services whereby he sought to elect to pay for past service provided by way of the Contracts. That is, he requested that his service under the Contracts with Environment Canada be treated as pensionable service under the PSSA ("Buyback Request"). On July 21, 2008 the superannuation, pension, transition and client services sector of PWGSC wrote to the Applicant noting that, as a rule, contract service is "not countable under the PSSA", but that it may be recognized as public service if it is determined that an employer/employee relationship existed. To assess whether or not an employer/employee relationship existed, PWGSC requested further information, including copies of the thirteen contracts and an explanation of why the service should be considered employment in the public service. The letter also stated that, in order to determine whether such a relationship existed, PWGSC evaluated nine factors which it listed in the form of questions to the Applicant.

[4] On October 15, 2008 the Applicant replied providing copies of the Contracts, a copy of his job description and responses to each of the listed factors.

[5] On February 4, 2009 PWGSC wrote to Environment Canada providing the information submitted by the Applicant. The letter stated that the determination of an individual's employment status is the responsibility of the employer department. Further, that a period of contract service may be recognized as public service if the contracting department is of the opinion that the service should be recognized as public service and the opinion is supported by a rationale demonstrating that an employer/employee relationship existed during the tenure of the contracts. It recommended that Environment Canada review the documentation and provide an opinion as to whether an employer/employee relationship existed during all or part of the tenure of the Contracts or if the service in question should remain as contract employment. Further, that this should be assessed using the Treasury Board of Canada Secretariat ("TBS") Contracting Policy and the Canada Revenue Agency ("CRA") guidelines and the facts of the relationship between the Applicant and the department. The letter also stated that an opinion was required so that PWGSC could make a final determination with respect to the Applicant's pension status.

[6] Over four years later, on April 23, 2013, Environment Canada responded to the February 4, 2009 letter ("EC Position"). It stated that Environment Canada had reviewed the documentation available regarding the Applicant's contract service and that the Applicant had provided services as a third party contractor through mechanisms such as a placement agency or a consulting firm. Further, that when Environment Canada engages third parties under contract, it does not accept responsibility for their employees. In the absence of clear evidence to the

contrary, any claim for employment related benefits is the responsibility of the third party contractor.

[7] By memorandum dated July 5, 2013 the PWGSC policy and advisory services division advised contributor services that, in the normal course, contract service is not countable under the PSSA as it is not employment in the public service. Employment in the public service applies to individuals who are hired under the *Public Service Employment Act*, SC 2003, c 22 ("PSEA") or a similar hiring authority. However, in some cases where an employer/employee relationship existed for periods of contract service, the service may be eligible for pension purposes under the PSSA. In this case, Environment Canada was of the opinion that there was no employer/employee relationship. Therefore, the Applicant's service retained its status as contract service. Given that determination, the periods of contract service could not be counted under the PSSA and the Applicant's Buyback Request was considered invalid. That decision was relayed by PWGSC to the Applicant by letter dated January 8, 2014 ("PWGSC Decision").

[8] By letters dated March 27, 2014 the Applicant, through his counsel, requested that both PWGSC and Environment Canada review their positions, based on the Federal Court of Appeal's decision in *1392644 Ontario Inc (Connor Homes) v Canada (National Revenue)*, 2013 FCA 85 [*Connor Homes*], and alleged that a factual analysis regarding the nature of the relationship between the Applicant and Environment Canada was required but had not been conducted. Further, that it was inappropriate to base the PWGSC Decision solely on Environment Canada's opinion. In those letters, the Applicant's counsel made submissions and included documents to support the Buyback Request.

[9] By letter of July 10, 2014 PWGSC responded to the request of the Applicant's counsel ("PWGSC Reconsideration"). It advised that the Pension Centre had conducted an extensive review of the case, including the supporting documents provided by counsel. The letter stated that each contract was between Environment Canada and MTL. Further, because Environment Canada contracted with the agency/firm, the services it provided to Environment Canada were rendered by a consultant of the agency/firm. The Applicant was selected by the firm to fulfil the provisions of the Contracts. Therefore, a tripartite relationship was established. The employer/employee relationship was established between the consultant and their agency/firm while the contract was between Environment Canada and the agency/firm. In the tripartite relationship, two employer/employee relationships could not exist simultaneously. Therefore, the Applicant's periods of contract service could not be considered employment in the public service for pension purposes. The letter also stated that while the opinion of Environment Canada had been requested, the final determination of whether an employee/employer relationship existed for pension purposes was the responsibility of the Pension Centre which had made that determination in full consideration of all evidence provided.

[10] By letter dated July 28, 2014 to the PWGSC the Applicant's counsel stated that in his view the PWGSC Reconsideration was wrong in fact and law and again asked that it be reconsidered. The letter made various submissions including that MTL is not a real company, the Applicant was not an employee of MTL, that MTL was not incorporated, it had no separate bank account and that the Applicant had registered for a GST number in his own name, MTL had no employees other than the Applicant and had only been created because the Applicant had been asked to do so by Environment Canada and for tax and accounting purposes. The letter

asserted that a proper analysis of the nature of the relationship had not been done as the PWGSC Decision had failed to perform a fundamental control test (*Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015 [*Pointe-Claire*]). The Applicant's counsel advised that if he did not receive a response within thirty days he would commence proceedings in the Federal Court.

[11] By email of August 28, 2014 counsel for PWGSC responded. The email stated that, at the outset it should be known that her client's decision remained as stated in its July 10, 2014 letter, the PWGSC Reconsideration. Further, that the final determination of whether an employer/employee relationship exists during the period in question rests with the Pension Centre, with input from the relevant department. Therefore, based on the facts and explanations provided in the PWGSC Reconsideration, the Applicant's contract employment could not be considered employment in the Public Service for pension purposes.

[12] On September 25, 2014 the Applicant filed the present application for judicial review referring to an August 28, 2014 decision of PWGSC and/or the Pension Centre as the underlying decision, but also stating that there were three relevant decisions of PWGSC, dated January 8, 2014, July 10, 2014 and August 28, 2014. The notice sought an order quashing the August 28, 2014 decision and granting his Buyback Request. In the alternative, it sought an order requiring PWGSC to reconsider its decision pursuant to accepted principles for determining if an employer/employee relationship exists.

Issues

[13] The Applicant submits that six issues arise:

i. Did PWGSC apply the correct law in denying the Applicant's Buyback Request?

ii. Did PWGSC follow its own policies in denying the Applicant's Buyback Request?

iii. Did PWGSC consider all the facts (and law) in denying the Applicant's Buyback Request?

iv. Did PWGSC act arbitrarily and/or inconsistently thereby denying the Applicant natural justice?

v. Has PWGSC failed to provide sufficient disclosure thereby denying the Applicant natural justice rights?

vi. Was the Applicant in an employer/employee relationship with Environment Canada for the period March 1992 to April 2005?

[14] The Respondent submits that there are four issues:

i. Is the application for judicial review out of time?

ii. If not, what decision is under review?

iii. What is the appropriate standard of review?

iv. Is the Pension Centre's decision denying the Applicant's request for his contractual service to be considered pensionable under the PSSA reasonable?

[15] In my view, the issues in this application can be reframed as follows:

1. Is the application for judicial review out of time?
2. If not, which decision is under review?
3. Was the decision denying the Applicant's Buyback Request reasonable?

Standard of Review

[16] The substantive issue raised in this application is one of mixed law and fact and is therefore reviewable on the reasonableness standard (*Public Service Alliance of Canada v Canada (Attorney General)*, 2008 FC 474 at paras 17-18; *Cohen v Canada (Attorney General)*, 2008 FC 676 at paras 10-20 [*Cohen*]; *Baribeau v Canada (Attorney General)*, 2015 FC 615 at paras 8-9 [*Baribeau*]; *Professional Assn of Foreign Service Officers v Canada (Attorney General)*, 2003 FCA 162 at para 12 [*Foreign Service Officers*]). I would also note that questions of law arising under a tribunal's home statute are presumptively reviewed on a reasonableness standard (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 35; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54 [*Dunsmuir*]).

[17] In applying the reasonableness standard, the Court will be concerned with the existence of justification, transparency and intelligibility in the decision-making process and also whether the decision falls within a range of possible, acceptable outcomes in respect of the facts and the law (*Dunsmuir* at para 47).

Issue 1: Is the application out of time?

[18] The Respondent submits that the application is out of time as the July 28, 2014 letter from PWGSC's legal counsel is not a decision. Rather, the letter is no more than a "courtesy response" which is not subject to judicial review (*Dhaliwal v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 982 [*Dhaliwal*]). This is unlike the PWGSC Decision and the

PWGSC Reconsideration, which were discrete exercises of discretion constituting decisions reviewable by this Court pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*]. And, as the PWGSC Reconsideration was rendered on July 10, 2014, the Respondent submits that the deadline for filing the application for judicial review was August 10, 2014. As the Applicant filed on September 25, 2014, the application is out of time.

[19] The Applicant submits that the letter from PWGSC's legal counsel is a reviewable decision and the application is, therefore, not out of time. The Applicant also refers to *Dhaliwal* and submits that it stands for the proposition that if new issues are introduced by counsel, then the response is a reviewable decision. The Applicant also submits that even if the application was filed out of time, the Court should exercise its discretion to extend the deadline on the basis of the factors set out in *Exeter v Canada (Attorney General)*, 2011 FCA 253 at para 4 [*Exeter*]. The Applicant submits that he meets each of the four factors: he pursued the application diligently; there is no prejudice to the Respondent as the buyback period has remained the same; the delay was a reasonable attempt by counsel to negotiate a settlement rather than commencing legal action; and, the application has a reasonable prospect of success as the Applicant's affidavit demonstrates that he meets the criteria for an employer/employee relationship. The Applicant also submits that the limitation period in s 18.1 of the *Federal Courts Act* does not apply because the Pension Centre is not a "federal board, commission or tribunal".

[20] In my view, the Applicant's submission that the Pension Centre is not a "federal board, commission or tribunal" is without merit. The term "federal board, commission or tribunal" is broadly defined in s 2 of the *Federal Courts Act* and includes any body, person or persons

having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament. This definition has been described as "sweeping" by the Supreme Court of Canada in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 3 which held that the federal decision-makers encompassed by that definition run the gamut from the Prime Minister and major boards and agencies to local border guards and customs officials and everyone in between. Moreover, prior cases before this Court have involved judicial review of Pension Centre decisions on the basis of the Court's jurisdiction under s 18.1 (see *Baribeau* and *Nash v Canada (Attorney General)*, 2013 FC 683).

[21] The Applicant also submits that, because he raised new issues in his July 28, 2014 letter to PWGSC, this causes the email response from counsel to comprise a new and reviewable decision. However, I disagree. First, it is clear from a plain reading of the email that it was merely a courtesy, as it was simply confirming the information that had been provided, as was the case in *Hallen v Canada (Attorney General)*, 2014 FC 88 at paras 6, 18. PWGSC's counsel stated that it should be recognized from the outset that her client's position "remains as previously stated in the July 10, 2014 letter". Further, as the Respondent submits, counsel also made it clear that she had no decision-making authority, stating that the "final determination of whether an employer-employee relationship existed…rests with the Pension Centre". For these reasons, I find that the letter did not "affect legal rights, impose legal obligations, or cause prejudicial effects" and, therefore, is not a reviewable decision (*Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 28-30).

[22] A factually somewhat similar situation arose in *Cohen*, in which the Court considered whether the application was out of time. As in this case, the applicant therein had received letters and the respondent challenged whether the most recent letter was a decision. However, *Cohen* is distinguishable as, in this matter, PWGSC's counsel did not "engage in a reconsideration of the matter" as did the letter at issue in *Cohen*.

[23] Similarly, while in his letter of July 28, 2014, counsel for the Applicant stated "If I do not hear from your office in thirty (30) days I will commence proceedings in Federal Court", this does not serve to extend the date of the subject decision. It is also of note that thirty days from July 28, 2014, the date of his submissions, would still have been beyond the thirty day limitation for challenging the PWGSC Reconsideration, which was rendered on July 10, 2014. As stated by Justice Pelletier, as he then was, in *Moresby Explorers Ltd v Superintendent of Gwaii Haanas National Park Reserve*, [2000] FCJ No 1944, referring to *Dhaliwal*:

> In *Dumbrava v. Canada (Minister of Citizenship & Immigration)* (1995), 101 F.T.R. 230 (Fed. T.D.), Nöel J. (as he then was), reviewed a series of cases dealing with the effect of correspondence with a decision maker after a decision has been made. In those cases, the Court held that a "courtesy response" does not create a new decision from which judicial review may be taken. As it was put by McKeown J. in *Dhaliwal v. Canada (Minister of Citizenship & Immigration)*, [1995] F.C.J. No. 982 (Fed. T.D.) "... counsel cannot extend the date of decision by writing a letter with the intention of provoking a reply." Before there is a new decision, subject to judicial review, there must be a fresh exercise of discretion such as a reconsideration of a prior decision on the basis of new facts.

[24] For these reasons, in my view, the decision that the Applicant properly challenges is the PWGSC Reconsideration and he is out of time.

[25] The question, therefore, is whether the Court should exercise its discretion to extend the deadline. The Applicant is correct that the considerations for exercising this discretion were set out in *Grewal v Canada (Minister of Employment and Immigration)*, [1985] FCJ No 144 as applied more recently in *Exeter* at para 4:

> 1) Does the moving party have a continuing intention to pursue an application for judicial review?
>
> 2) Has the responding party suffered any prejudice as a result of the moving party's delay?
>
> 3) Has the moving party offered a reasonable explanation for the delay?
>
> 4) Does the intended application for judicial review have any prospect of success?

[26] I have decided that it is appropriate in these circumstances to exercise my discretion and determine the application on its merits. In this matter there was a continuing intention to pursue judicial review, the delay was not significant and the Respondent suffered no prejudice. Indeed, Environment Canada itself caused an unexplained four year delay in responding to the Applicant during the period of 2009-2013. Nor can it be said that the Applicant had no prospect of success. Accordingly, there is a sufficient basis on which to ground the exercise of discretion.

Issue 2: Which decision is under review?

[27] For the reasons discussed above, as the email from PWGSC's counsel is not a reviewable decision, the decision properly under review is the PWGSC Reconsideration. I would also note that while Rule 302 of the *Federal Courts Rules*, SOR/98-106 ("Rules") states that, unless this Court orders otherwise, an application for judicial review shall be limited to a single order in

which relief is sought, this does not apply when there is a continuous course of conduct or ongoing situation (*Shotclose v Shorey First Nation*, 2011 FC 750 at para 64; *Festival Canadien des Films du Monde v Téléfilm Canada*, 2005 FC 1730). In my view, the PWGSC Decision and PWGSC Reconsideration were so closely linked that they should be considered one continuing decision (*Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 at para 6). Both involved essentially the same facts, the same decision-making body and both concerned the ongoing question of the Applicant's Buyback Request.

Issue 3: Was the decision denying the Applicant's Buyback Request reasonable?

Applicant's Position

[28] The Applicant submits that it was a mistake in law for the Pension Centre to rely solely on the "opinion" of Environment Canada in making the PWGSC Decision. PWGSC was required to evaluate the relationship between Environment Canada and the Applicant (*Connor Homes* at para 37).

[29] The Applicant further submits that, in the PWGSC Reconsideration, the Pension Centre denied his request on the basis that he was an employee of MTL and, therefore, could not be considered an employee of Environment Canada, which issue was not raised in the PWGSC Decision. The Pension Centre also erred in denying his request based solely on the fact that MTL existed and should have considered the specifics of the operation and the true nature of the creation of MTL. The Applicant relies on his affidavit dated November 7, 2014 in submitting that MTL was not a "real" company, it was not incorporated, it did not have a GST number or

bank account in its name and had no employees. Further, that Environment Canada directed the Applicant to create MTL so he could continue working there. Requests for Proposals were sent to MTL in advance by Environment Canada to ensure that it would win the contracts. The Applicant notes that the January 22, 2015 Affidavit of Denise Smith, a Senior Policy Advisor with the Advisory Services Division of the PWGSC Pension Centre ("Smith Affidavit") does not refute any of these points.

[30] The Applicant also submits that, in determining if there is a tripartite relationship, PWSGC failed to conduct the "fundamental control test" in order to identify the real employer in a tripartite relationship as required by the Supreme Court's decision in *Pointe-Claire* and that during cross-examination of Denise Smith on her affidavit counsel for the Respondent objected to questions on fundamental control.

[31] Further, the Applicant submits that PWGSC failed to consider its own policies and criteria in determining if there is an employer/employee relationship. He was informed by the letter of July 21, 2008 that his application would be assessed according to the specified nine factors which are derived from TBS and CRA guidelines, but that neither decision addresses these factors.

Respondent's Position

[32] The Respondent makes a distinction between the private law factors relied on by the Applicant and the public law analysis conducted by the Supreme Court of Canada in *Canada (Attorney General) v Public Service Alliance of Canada*, [1991] 1 SCR 614 [*Econosult*]. The Respondent submits that the purpose of the PSSA is to provide pension benefits to persons employed in the public service and that the PSSA provides definitions for "public service", "pensionable employment" and "salary". In view of these definitions, a person employed in the public service for the purposes of the PSSA is a person who occupies a position in a department. Therefore, as a rule, contractual periods of service are not "countable" under the PSSA as contractors are not persons employed in the public service because they are not appointed pursuant to a legislative authority and are not occupying a position in the public service. As a result, private law factors normally employed to resolve disputes regarding whether an individual is an employee or an independent contractor, are not relevant.

[33] Although *Econosult* dealt with the meaning of "employees in the Public Service" pursuant to the *Public Service Staff Relations Act*, RSC, 1985, c P-35 (Repealed, 2003, c 22, s 285) ("PSSRA"), courts have applied similar reasoning to the interpretation of employment in the public service in the context of the PSSA, being that a person cannot be employed with the public service unless formally appointed (*Burley v Canada (Attorney General)*, 2008 FC 525 [*Burley*]; *Foreign Service Officers*; *Cohen*).

[34] In this case, the Applicant was not employed pursuant to the PSEA or other legislative authority but chose to contract with the federal government as a consultant through MTL. The Contracts indicate that they do not create an employer/employee relationship. The Applicant did not meet the legislative requirements of the PSSA because he clearly contracted to provide services to the federal government as an officer, employee or agent of MTL during the relevant period. And, even if the Applicant had contracted with the federal government directly, rather than through MTL, he would still have been engaged contractually rather than under statute, as an independent contractor rather than as an employee.

[35] The Respondent also submits that to the extent that private law principles apply to determining whether the Applicant was employed in the public service, the PWGSC Decision took into consideration Environment Canada's conclusion, based on the nine factors and its review of the Contracts, and that there was no basis to support the Applicant's claim.

[36] The terms of the Contracts, when assessed against the factors normally used by a Court to gauge whether a worker is an employee or an independent contractor, indicate that the Pension Centre's decision that the Applicant was not an employee of the federal government was reasonable.

[37] The Respondent submits that there is no one conclusive test that can be applied to determine whether a person is an employee or an independent contractor (*671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59). Rather all of the factors that bear on the nature of the relationship, including those contained in the July 21, 2008 letter, must be considered.

[38] The Respondent submits that *Pointe-Claire* is distinguishable as the issue in that case was one of statutory interpretation to determine the employer in a tripartite relationship within the scope of the *Canada Labour Code*'s collective bargaining regime. The fundamental control test does not address the question of whether a tripartite relationship exists in the first place.

[39] As to the Applicant's assertion that MTL is not a "real" company, the party to the Contracts was a business entity named MTL Analytical and the Applicant executed the Contracts as its officer and agent. In any event, that information was not before the Pension Centre when it rendered its decisions.

Relevant Legislation

[40] In conducting this analysis it is necessary to consider the relevant statutory provisions, which are set out below.

PSEA

2 (1) The following definitions apply in this Act.	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
…	…
employee means a person employed in that part of the public service to which the Commission has exclusive authority to make appointments.	***fonctionnaire*** Personne employée dans la fonction publique et dont la nomination à celle-ci relève exclusivement de la Commission.
employer means	***employeur***
(a) the Treasury Board, in relation to an organization named in Schedule I or IV to the *Financial Administration*	a) Le Conseil du Trésor, dans le cas d'une administration figurant aux annexes I ou IV de la *Loi sur la gestion des*

Act; or	*finances publiques*;
(b) in relation to a separate agency to which the Commission has exclusive authority to make appointments, that separate agency.	b) l'organisme distinct en cause, dans le cas d'un organisme distinct dans lequel les nominations relèvent exclusivement de la Commission.

[41] The PSSA does not define "employee", however, the following provisions are relevant:

3 (1) In this Part,	3 (1) Les définitions qui suivent s'appliquent à la présente partie.
…	…
contributor means a person required by section 5 to contribute to the Public Service Pension Fund, and, unless the context otherwise requires,	***contributeur*** Personne tenue par l'article 5 de contribuer à la Caisse de retraite de la fonction publique, et, à moins que le contexte n'exige une interprétation différente :
(a) a person who has ceased to be required by this Act to contribute to the Superannuation Account or the Public Service Pension Fund, and	a) personne qui a cessé d'être tenue par la présente loi de contribuer au compte de pension de retraite ou à la Caisse de retraite de la fonction publique;
(b) for the purposes of sections 25, 27 and 28, a contributor under Part I of the *Superannuation Act* who has been granted an annual allowance under that Act or has died;	b) pour l'application des articles 25, 27 et 28, contributeur selon la partie I de la *Loi sur la pension de retraite* à qui a été accordée une allocation annuelle sous le régime de cette loi, ou qui est décédé.
…	…
pensionable employment means any employment in respect of which there was an established superannuation or	***emploi ouvrant droit à pension*** Tout emploi à l'égard duquel il existait un fonds ou régime établi de pension de

pension fund or plan, approved by the Minister for the purposes of this Part, for the benefit of persons engaged in that employment;

retraite ou de pension, approuvé par le ministre pour l'application de la présente partie, au bénéfice de personnes qui occupent cet emploi.

…

…

public service means the several positions in or under any department or portion of the executive government of Canada, except those portions of departments or portions of the executive government of Canada prescribed by the regulations and, for the purposes of this Part, of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner and Parliamentary Protective Service and any board, commission, corporation or portion of the federal public administration specified in Schedule I;

fonction publique Les divers postes dans quelque ministère ou secteur du gouvernement exécutif du Canada, ou relevant d'un tel ministère ou secteur, et, pour l'application de la présente partie, du Sénat et de la Chambre des communes, de la bibliothèque du Parlement, du bureau du conseiller sénatorial en éthique, du bureau du commissaire aux conflits d'intérêts et à l'éthique, du Service de protection parlementaire et de tout office, conseil, bureau, commission ou personne morale, ou secteur de l'administration publique fédérale, que mentionne l'annexe I, à l'exception d'un secteur du gouvernement exécutif du Canada ou de la partie d'un ministère exclus par règlement de l'application de la présente définition.

…

…

salary means

(a) as applied to the public service, the basic pay received by the person in respect of whom the expression is being applied for the performance of the regular duties of a position or office exclusive of any

traitement

a) La rémunération de base versée pour l'accomplissement des fonctions normales d'un poste dans la fonction publique, y compris les allocations, les rémunérations spéciales ou pour temps

amount received as allowances, special remuneration, payment for overtime or other compensation or as a gratuity unless that amount is deemed to be or to have been included in that person's basic pay pursuant to any regulation made under paragraph 42(1)(e), and	supplémentaire ou autres indemnités et les gratifications qui sont réputées en faire partie en vertu d'un règlement pris en application de l'alinéa 42(1)e);
…	…
6 (1) Subject to this Part, the following service may be counted by a contributor as pensionable service for the purposes of this Part:	6 (1) Sous réserve des autres dispositions de la présente partie, le service qui suit peut être compté par un contributeur comme service ouvrant droit à pension pour l'application de la présente partie :
…	…
(iii) with reference to any contributor,	(iii) relativement à un contributeur :
…	…
(F) any period of service in pensionable employment immediately prior to becoming employed in the public service, if he elects, within one year of becoming a contributor under this Part, to pay for that service,	(F) toute période de service dans un emploi ouvrant droit à pension, immédiatement avant de devenir employé dans la fonction publique, s'il choisit, dans le délai d'un an après qu'il est devenu contributeur selon la présente partie, de payer pour ce service,
…	…

[42] Section 11 of the *Financial Administration Act*, RSC 1985, c F-11 ("FAA"), human resource management, defines "public service":

11 (1) The following	11 (1) Les définitions qui

definitions apply in this section and sections 11.1 to 13.	suivent s'appliquent au présent article et aux articles 11.1 à 13.
…	…
public service means the several positions in or under	***fonction publique*** L'ensemble des postes qui sont compris dans les entités ci-après ou qui en relèvent :
(a) the departments named in Schedule I;	a) les ministères figurant à l'annexe I;
(b) the other portions of the federal public administration named in Schedule IV;	b) les autres secteurs de l'administration publique fédérale figurant à l'annexe IV;
(c) the separate agencies named in Schedule V; and	c) les organismes distincts figurant à l'annexe V;
(d) any other portion of the federal public administration that may be designated by the Governor in Council for the purpose of this paragraph.	d) les autres secteurs de l'administration publique fédérale que peut désigner le gouverneur en conseil pour l'application du présent alinéa.

Analysis

[43] Subject to limited exceptions, persons employed in the public service are required to contribute to the Public Service Pension Fund ("Pension Fund") pursuant to s 5 of the PSSA. In this matter, it is uncontested that the Applicant made no contributions to the Pension Fund during the period covered by the Contracts. In effect, the Applicant argues that his service under the Contracts was *de facto* employment with Environment Canada, thereby making it pensionable service under the PSSA.

[44] In *Econosult* the question before the Supreme Court of Canada was whether the Public Service Staff Relations Board had jurisdiction to decide that teachers working at a penitentiary

pursuant to a government contract with Econosult were employees in the public service within the meaning of the PSSRA. There the Supreme Court referred to the PSSRA, the PSEA and the FAA as they then were, and found that, when they were read together with the *Canada Labour Code*, RSC, 1985, c L-2, they revealed a scheme that created two separate and distinct labour regimes for two categories of federal employees. In the context of the labour relations scheme described in that case, the Supreme Court held that "there is just no place for species of *de facto* public servant". At paragraph 27 it adopted the reasoning of the Court below, the Federal Court of Appeal, where Justice Marceau stated:

> There is quite simply no place in this legal structure for a public servant (that is an employee of Her Majesty, a member of the Public Service) without a position created by the Treasury Board and without an appointment made by the Public Service Commission.

[45] Perhaps a more factually similar case is *Cohen*. There, the applicant had sought to purchase his period of service with the Law Reform Commission of Canada. Between 1985 and 1992 the applicant had worked full time with the Commission under a series of renewable and uninterrupted contracts and made no payments related to pension benefits. He worked at the Commission's premises, supervised many staff and was described as an integral member of the management team. However, TBS determined that this period of time was not countable for pension purposes under the PSSA as the evidence indicated he was an independent contractor and not an employee of the Commission. The Court noted that the decision-maker in that case had to make a determination in applying the evidence to the legal framework set out in ss 7 and 8 of the *Law Reform Commission Act*, but that the most authoritative decision on point was *Econosult*, referencing the language employed by Marceau J, above.

[46] Ultimately, the Court found that TBS' decision that the applicant was not eligible to purchase pensionable service for the purposes of that legislation, to be reasonable. On appeal of the decision in *Cohen*, the Federal Court of Appeal (2009 FCA 99) noted that, to succeed, the applicant would have to convince it that he was appointed pursuant to s 7(1) of the *Law Reform Commission Act*, i.e., that he was appointed in accordance with the PSEA, however, that he had not succeeded in doing so. The Federal Court of Appeal also noted that:

> The decision of the Supreme Court of Canada in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 [*Econosult*], is squarely against the position taken by the appellant. Status as a person employed under the *Public Service Employment Act*, R.S.C. 1985, c. P-32, cannot be acquired informally. While it may be that the parties could have organized their affairs differently, they chose to do so in a particular way and, in the face of the statutory scheme, we are unable to disregard the choices they made.

[47] In *Burley* the issue before this Court was whether the applicant was, for the purposes of the PSSA, employed by the public service while he was engaged in language training as a recruit for the Foreign Service Development program. The Court concluded that there was no basis to interfere with the decision under review which found that, for the purpose of the PSSA, the applicant was not employed in the federal public service while in language training. He was not, therefore, required or entitled to contribute to the superannuation fund during that period, and he was not entitled to accrue pension credits under the PSSA during the time spent in language training.

[48] Justice Dawson also found that, on the evidence, the decision-makers had correctly concluded that the applicant and the Department of Foreign Affairs and International Trade had agreed that, while in language training, the applicant had *ab initio* status and that the expressed

intention was that his employment would only commence after language training was successfully completed. In that circumstance, the applicant was not entitled to participate in the superannuation plan under the PSSA until after successful completion of the language training.

[49] However, recognizing that employment in the public service is not governed solely by principles of contract or employment law but is also regulated by statute, Justice Dawson found that it was necessary to consider whether the conclusion reached by the decision-makers was consistent with the provisions of the PSSA.

[50] Upon review of the definitions of "public service" and "salary" under ss 4(1), 5(1) of the PSSA, Justice Dawson stated:

> [34] From these provisions, I take that:
>
> - the purpose of the PSSA is to provide for the payment of superannuation benefits to "persons employed in the public service";
> - the PSSA covers a larger number of employees than the PSLRA;
> - benefits are paid to those who are required to contribute to one of the specified accounts or funds;
> - contributions are made by persons "employed in the public service"; and
> - contributions are tied to a contributor's salary, which is the basic pay received for performing the regular duties of a position or office.
>
> [35] The PSSA does not define what is meant in subsection 5(1) by the phrase "persons employed in the public service."
>
> [36] To determine whether Mr. Burley was employed in the public service while on language training, I take instruction from the approach adopted by the Federal Court of Appeal in

Professional Association of Foreign Service Officers v. Canada (Attorney General), [2003] F.C.J. No. 483 (C.A.) (QL).

[37] That case involved persons similarly situated to Mr. Burley and the question before the Court of Appeal was whether successful candidates in the FSDP, while taking language training, were employees so as to be included in the bargaining unit represented by the association.

[38] At paragraph 10 of its reasons, **the Court of Appeal characterized the question before the Public Service Staff Relations Board to be "whether someone who was not working under any private contract but was occupied as a student of language in a government language program and being paid a stipend by the Government of Canada for her presence there could be considered to be 'employed in the Public Service.'**" The Court of Appeal stated that determination of that question did not involve common law principles of contract law. Rather, the question would be answered by the application of relevant federal statutes governing employment in the public service.

[39] The Court of Appeal then went on, at paragraph 14, to state:

> The Board had to decide what is required for one to become an "employee" within the meaning of section 34 of the Public Service Staff Relations Act. In the Econosult case at 634 Sopinka J. quoted with approval from the decision of this Court under appeal where Marceau J.A. stated:
>
> There is quite simply no place in this legal structure for a public servant (that is, an employee of Her Majesty, a member of the Public Service) without a position created by the Treasury Board and without an appointment made by the Public Service Commission.
>
> For this reason the Supreme Court found that there was "just no place for a species of de facto public servant who is neither fish nor fowl".(Page 633). In the present case the applicant is contending that the candidates for the FSDP, while on language training, were some kind of de facto employees although they had not yet been given any formal appointment. It is true that DFAIT had recruited these candidates, screened them and put them on

> language training. It is not in dispute that DFAIT had the delegated authority from the Public Service Commission to appoint these candidates to Foreign Service Officer positions. But there is no formal instrument making such an appointment prior to their completion of language training. Section 22 of the Public Service Employment Act which governs hiring in the Public Service provides as follows:
>
> 22. An appointment under this Act takes effect on the date specified in the instrument of appointment, which date may be any date before, on or after the date of the instrument.
>
> [emphasis added]

[51] Justice Dawson acknowledged that the determination in *Foreign Service Officers* was made in the context of different legislation, the PSSRA, but she considered the nature of the Court of Appeal's analysis to be applicable in determining whether Mr. Burley was employed in the public service for the purpose of the PSSA while in language training. She concluded that the only document capable of being an instrument of appointment within the meaning of s 22 of the PSSA was the letter offering him an indeterminate appointment with the public service. Therefore, he was not, for the purpose of the PSSA, employed until the date of that letter and, for that reason, was not entitled to accrue pension credits under the PSSA prior to the date of that letter.

[52] In my view, *Burley* and *Foreign Service Officers* are somewhat distinguishable on their facts as they concern whether time spent in language training for *ab initio* recruits was pensionable employment. As stated in *Foreign Service Officers*, in distinguishing *Econosult*, the decision-maker was not considering whether a person engaged under private contract was *de facto* employed in the public service. Rather, whether a person in a government language

program being paid a stipend could be considered to be an employee in the public service (at para 10). A determination of that question involved not common law principles of contract law as in the *Econosult* case, but the application of relevant federal laws related to employment by the federal government.

[53] The recent decision of *Baribeau* is factually very similar to the matter before me. There the applicant also challenged the decision of the Pension Centre refusing to recognise her periods of employment as an independent contractor for Environment Canada as pension service under the PSSA. This Court granted the application for judicial review.

[54] It is of note that in that case, even though the contracts contained a clause providing that they were service contracts and that the applicant was not being hired as an employee, as is also the circumstance in this matter, Revenue Quebec and the CRA found that there was an employer/employee relationship between Environment Canada and the applicant for tax purposes. The applicant also argued that the contractual provision, stating that an employer/employee relationship was not created, was not determinative in characterizing the contract and that the Pension Centre erred in concluding that there was a tripartite relationship because she and her company were one and the same person.

[55] The Court agreed that even though the CRA's decision was not determinative, it was not reasonable for the Pension Centre to reach a different conclusion from that of the CRA, using a tool developed by the CRA, without explaining the reason for the contradiction. Justice Gagné also concluded that the Pension Centre erred in applying the common law criteria rather than

taking into consideration the Quebec Civil Code. This was a critical error because it led the Pension Centre to give importance to the parties' intentions as expressed in the contracts rather than to an assessment of the objective facts of the parties' reality, which played a crucial role in civil law. Justice Gagné also stated that it was an error to conclude that the applicant acted through a separate entity as "a company name is not a legal entity or a separate entity from the individual or corporation using it".

[56] In my view, it must be recalled that in *Econosult* the issue was whether the Public Service Staff Relations Board had jurisdiction to decide if teachers working pursuant to a contract between Econosult and a government department were employees within the meaning of the PSSRA. The Supreme Court of Canada's ultimate conclusion was that the Board did not have that jurisdiction in that circumstance. Further, the Supreme Court noted that the Federal Court of Appeal had distinguished the case from those involving a dispute as to whether a person is an independent contractor or employee and, as there was no dispute that the teachers provided by Econosult were employees rather than independent contractors, the question was whether they were government employees or employees of Econosult. Further, that in the case of employees of the private or semi-private sector, the legal relationship may be inferred from a situation of fact, and no particular form is necessary to give rise to the relationship of employer/employee. However, "[o]n the other hand, the status of a public servant cannot be inferred from a mere situation of fact, as employment in the public service is subject to a comprehensive set of rules which are strictly enforced".

[57] I do not understand this to suggest that in a situation such as this one where a person provides services under contract, and his status as an employee of either the business entity or of government is at issue, that the surrounding factual situation can be entirely disregarded. The Respondent suggests that in this situation the only relevant criterion is that the Applicant was not appointed as a member of the public service. However, on that premise, there would have been no need for the Pension Centre to have consulted with Environment Canada as the absence of an appointment would alone have sufficed to deny the Buyback Request. Further, as the Contracts were entered into with MTL, and as a business entity cannot be appointed as a public servant, this too would have been a complete answer to the request.

[58] Indeed, the Pension Centre does not appear to have viewed the situation in the light of *Econosult*. In its July 21, 2008 letter to the Applicant it acknowledged that, as a rule, contract service is not countable as public service, however, it went on to state that when it is determined that an employer/employee relationship existed during the period of contract employment, the service may be recognized as public service. It explicitly stated that to determine whether an employer/employee relationship existed "we evaluate such factors as for each 13 periods [*sic*]":

- Who was responsible for supervising / disciplinary control?
- Who provided the tools, facilities or material to perform the work?
- Were you subject to a risk of profit or loss?
- Was the work you performed an integral part of the work of the organization?
- Were you paid for statutory holidays, sickness, annual leave or injury on the job?
- Did you have authority to sub contract?

- Were you subject to deductions at source from your pay for such things as a pension plan, Employment Insurance, Canada Pension Plan / Quebec Pension Plan / or income taxes?

- Was the work comparable to that being carried out by the public service?

[59] And, in its February 4, 2009 letter to Environment Canada, the Pension Centre advised Environment Canada that the Buyback Request should be assessed using the TBS Contracting Policy and the CRA guidelines to determine if an individual was an employee or self-employed during the period in question and that: "[t]he facts of the relationship between the individual and the department should be considered in order to determine the employment relationship between the individual and the department".

[60] Based on this, it is apparent that the Pension Centre was of the view that the factual circumstances pertaining to the nature of the relationship between the Applicant and Environment Canada were relevant. Further, during cross-examinations on her affidavit, Ms. Smith confirmed in her testimony that the Pension Centre applies the nine criteria that were identified to the Applicant in the July 28, 2008 letter. And, when asked if the nine criteria help the Pension Centre determine if there is an employer/employee relationship, she testified that she believed this to be the case.

[61] The Applicant responded to the nine factors by his letter of October 15, 2008. The Pension Centre asked Environment Canada to provide an opinion as to whether an employer/employee relationship existed. It recommended that Environment Canada review the documentation provided by the Applicant, the history of Environment Canada and that the issue

be assessed using the TBS Contracting Policy and the CRA guidelines. The Pension Centre also specifically noted that "[t]he facts of the relationship between the individual and the department should be considered in order to determine the employment relationship between the individual and the department".

[62] The Environment Canada reply on April 23, 2013 stated that the available documentation had been reviewed and concluded that the Applicant had provided services as a third party contractor through mechanisms such as a placement agency or consulting firm. No rationale was provided and the PWGSC Decision stated in its one paragraph response that the request was denied because Environment Canada was of the opinion that there was no employer/employee relationship.

[63] I agree with the Applicant that because PWGSC identified specific factors and specified that Environment Canada was to consider the facts of the relationship between the Applicant and Environment Canada in determining whether or not an employer/employee relationship existed, Environment Canada was required to consider those factors in the context of its relationship with the Applicant and the related factual circumstances. However, when cross-examined on her affidavit, Ms. Smith could not explain why the Environment Canada position did not address the nine criteria. She also did not know if Environment Canada had considered the nature of MTL before it issued its opinion, nor whether the Pension Centre had investigated the nature of MTL before making its decision. Further, the record contains no information disclosed by Environment Canada or the Pension Centre in response to this application that would allow the Court to determine if the criteria or the factual circumstances of the relationship, other than the

fact that the Contracts were entered into by MTL, were considered. I also note that during the course of the cross-examination of Ms. Smith, counsel for the Respondent objected to all requests for undertakings to provide the materials upon which the Environment Canada position was based.

[64] Thus, the difficulty in this case is that there is no evidence that Environment Canada conducted the analysis that the Pension Centre deemed necessary when Environment Canada generated its "opinion", upon which the PWGSC Decision is founded.

[65] Nor is this cured by the PWGSC Reconsideration. While this states that the information provided by Applicant's counsel by letter of March 27, 2014 was considered, it simply concluded that because Environment Canada had contracted directly with MTL, a tripartite relationship existed and an employer/employee relationship was therefore established between the "consultant and the agency/firm whereas the work contract is between EC and the agency/firm". It does not indicate that it sought and reviewed the Environment Canada file materials that would or should have formed the basis of its opinion or that it considered any other factual circumstances.

[66] The Respondent is correct that information concerning the nature of MTL submitted subsequent to the PWGSC Reconsideration was not before the Pension Centre when it made its decision. This information included the Applicant's submission that MTL was not incorporated and that it did not have a bank account in its name, as described above. Therefore, the Pension Centre cannot be faulted for not considering that information. However, had

Environment Canada provided any reasons in support of its opinion, it is possible that this would have prompted the Applicant to provide that information in response, prior to the PWGSC Reconsideration being issued.

[67] Based on the record before me it is not apparent that Environment Canada considered the nine factual criteria that the Pension Centre identified as necessary to evaluate whether an employer/employee relationship existed or considered the facts of the relationship. Further, despite its reliance on Environment Canada's opinion, the Pension Centre provided no rationale for its support of Environment Canada's position. Although inadequacy of reasons is not a stand-alone ground of review *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, in order to meet the reasonableness standard, the decision under review must be justified, intelligible and transparent (*Dunsmuir* at para 47). In my view, for the reasons set out above, the PWGSC Decision and the PWGSC Reconsideration do not meet the reasonableness standard.

[68] Further, the Pension Centre's representations contained in its July 21, 2008 letter to the Applicant were clear, unambiguous and unqualified and refer to a process that it stated would be followed in assessing the Applicant's Buyback Request. Although the Applicant does not allege that he was promised a particular outcome (*Agraira v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36 at paras 95-97; *Mavi v Canada (Attorney General),* 2011 SCC 30 at paras 68-69), based on this representation, the Applicant had a legitimate expectation that those factors would be utilized in processing his application. Absent evidence that the process was followed, he therefore was also not afforded procedural fairness.

[69] As a final point, there was discussion within the written submissions and before me as to the sufficiency of PWGSC's disclosure in response to the Applicant's Rule 317 request and the effect of the many objections of Respondent's counsel during the cross-examination of Ms. Smith. The Respondent correctly states that the Applicant could and should have followed up on the objections made by the Respondent to the Applicant's questions during examinations pursuant to Rule 97 of the Rules. Further, that Rule 318 provides a process for challenging objections to production which the Applicant did not utilize.

[70] As I have determined that the application must be granted, I need not address these issues. However, prior to the matter being re-determined by the Pension Centre, all documents properly encompassed by Rule 317 should be disclosed in accordance with the requirements of that Rule. If the Applicant is not satisfied with the response he must address this by way of Rule 318. Further, in the course of its redetermination the Pension Centre shall consider the Applicant's submissions of July 28, 2014 and accept such other documentation as may be relevant to its application of the factors it has identified for consideration when determining the existence of an employer/employee relationship as well as the facts relevant to that relationship.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. The decision is returned for re-determination by a different member or panel of the Pension Centre;
3. Prior to re-determination, the Pension Centre and Environment Canada shall disclose all documents properly encompassed by Rule 317 and shall take into consideration the Applicant's submissions of July 28, 2014, and accept such other documentation as may be relevant to the application of the factors identified by the Pension Centre as to be considered, and the facts of the relationship between the Applicant and Environment Canada, when determining whether an employer/employee relationship exists; and
4. The Applicant shall have his costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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