Federal Court  Cour fédérale

Date: 20120509

Docket: T-1419-11

Citation: 2012 FC 556

Ottawa, Ontario, May 9, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

DONNA MCLAUGHLIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of the decision of the Pension Appeals Board [PAB or the Board], dated May 27, 2011, in which the PAB denied the applicant leave to appeal the decision of the Review Tribunal [RT] to the PAB. In its decision, the RT determined that the applicant was not entitled to survivor benefits under the *Canada Pension Plan*, RSC 1985, c C-8 [CPP] even though she was still married to Mr. McLaughlin at the time of his death, because Mr. McLaughlin had cohabited with another woman, Diana Gunderman, for more than a year prior to his death and, accordingly, Ms. Gunderman met the definition of survivor under the CPP.

[2] The statutory provisions that govern this case are set out in the CPP. Paragraph 44(1)**(**d**)** of the CPP provides that a survivor's pension is payable to the "survivor" of a deceased contributor. Subsection 42(1) of the CPP defines a "survivor" as meaning:

> (a) if there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor's death, or
>
> (b) a person who was the common-law partner of the contributor at the time of the contributor's death;
>
> a) à défaut de la personne visée à l'alinéa b), de l'époux du cotisant au décès de celui-ci;
>
> b) du conjoint de fait du cotisant au décès de celui-ci.

"Common-law partner" is defined in subsection 2(1) of the CPP as:

> … a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor's death, the "relevant time" means the time of the contributor's death.
>
> …La personne qui, au moment considéré, vit avec un cotisant dans une relation conjugale depuis au moins un an. Il est entendu que, dans le cas du décès du cotisant, « moment considéré » s'entend du moment du décès.

[3] These provisions create a presumption that the individual who is married to the contributor at the time of his or her death is entitled to the survivor pension. This presumption, however, is displaced where the contributor no longer cohabits with the person to whom he or she is married and, instead, enters into a conjugal relationship with a common-law partner. Where such relationship exists for at least a year prior to the contributor's death, the statute provides that survivor benefits are entirely payable to the common-law partner, regardless of how long the contributor might have been married.

[4] In the present case, both the applicant and Ms. Gunderman made an application for CPP survivor benefits. The Department of Human Resources and Skills Development Canada [HRSDC], which administers the CPP, determined that Ms. Gunderman was entitled to the survivor benefits because she met the definition of a common-law partner contained in the CPP. The applicant appealed HRSDC's decision to the RT, where she represented herself during the hearing. She argued that as she was the contributor's legal wife and supported their children, she should be entitled to the benefits, especially because she claimed that Ms. Gunderman had manipulated Mr. McLaughlin and used the power of attorney she possessed over his affairs to make decisions he would not have countenanced, like making herself (Ms. Gunderman), as opposed to the children, the beneficiary of his life insurance policy.

[5] The RT dismissed the applicant's appeal, determining that Ms. Gunderman met the statutory definition of a common-law partner as she had cohabited with the deceased for more than one year, was joint owner of their home, paid some of the utility bills for the home, was listed in Mr. McLaughlin's tax return as his common-law spouse, was involved in a sexual relationship with the deceased for more than one year, and as the couple had given each other assistance, communicated on a personal level and represented to the world that they were common-law partners. In so doing, the RT applied the criteria for a conjugal relationship set out in the leading decision on the point: *Canada (Minister of Social Development) v Pratt*, 2006 CP 22323 (PAB), 2006 LNCPEN 5 [*Pratt*].

[6] In her application for leave to appeal to the PAB, the applicant raised the same arguments she made before the RT and referred to (but did not file) an affidavit from her nephew, Jason

McLaughlin, which had been filed in an action commenced in the Ontario Superior Court by the applicant, where, amongst other things, she sought to set aside some of the decisions Ms. Gunderman had made under the power of attorney. The PAB dismissed the application for leave, holding that the applicant had “no arguable case to present on appeal” (at para 4 of the PAB's decision). In making its decision, the PAB referred to several paragraphs in the RT's decision, where the salient facts were summarized.

[7] The parties have raised three issues in the present application for judicial review:

1. Should large portions of the applicant's affidavit be struck as an improper attempt to place evidence before the court that was not before the PAB?

2. Did the PAB fail to observe the requirements of natural justice in rendering inadequate reasons? and

3. Should the PAB's decision be set aside as being unreasonable?

Each of these issues is examined below.

Should portions of the affidavit be struck?

[8] The general rule, which has been qualified as “trite law”, is that an applicant on judicial review can only rely on evidence that was before the decision-maker. There are limited exceptions to this general principle, namely, where the evidence is directed toward an alleged breach of natural justice or of the duty of fairness, where the evidence is necessary to understand the scope of the inferior tribunal’s jurisdiction or where the evidence merely provides uncontroversial background facts for the assistance of the Court (see e.g. *Ochapowace Indian Band v Canada (Attorney General)*, 2007 FC 920 at para 9, 316 FTR 19; *Bekker v Canada*, 2004 FCA 186).

[9] The respondent argues that virtually all of the applicant's affidavit should be struck because it contains material that was not before the PAB. In addition, the respondent asserts that Jason McLaughlin's affidavit, which is attached as an exhibit to the applicant's affidavit, should be given virtually no weight because, as an exhibit, its deponent could not be cross-examined, citing in this regard *594872 Ontario Inc v Her Majesty the Queen (No 2)*, [1992] 1 CTC 344, 92 DTC 6298, at para 14. The applicant, on the other hand, argues that most of the facts contained in Ms. McLaughlin's affidavit were also before the PAB (albeit in a less eloquent form) through the applicant's written submissions and that she referred to (but did not file) Jason McLaughlin's affidavit with the PAB. The applicant also asserts that many of the impugned paragraphs in her affidavit are relevant to her natural justice argument.

[10] In my view, the applicant is correct in stating that many of the impugned paragraphs in her affidavit contain information that was before the PAB. More specifically, the facts set out in paragraphs 4-6, 9-12, 16, 17 and 19 of the applicant's affidavit are all contained in the record that was before the PAB. While the affidavit was prepared with the assistance of counsel and is expressed in clearer and more convincing terms than the applicant's written submissions to the PAB, the facts in these paragraphs were all before the PAB and, accordingly, may be restated by the applicant in her affidavit. It is arguable that the facts contained in paragraphs 18, 21 and 22 of the applicant's affidavit relate to the applicant's natural justice argument and, accordingly, are likewise properly before the Court. However, the facts (and exhibits) referenced in paragraphs 13 through 15 of the applicant's affidavit were not before the PAB and do not fall into one of the recognized exceptions regarding the admission of new evidence on a judicial review application. The fact that Ms. McLaughlin referred to Jason McLaughlin's affidavit in her comments to the PAB did not

place that affidavit in evidence; as counsel for the respondent properly noted, had Ms. McLaughlin tried to do so, the respondent could have argued that the affidavit could not be filed as it could not cross-examine the deponent. Accordingly, paragraphs 13 through 15 of the applicant's affidavit will be struck. I would, however, note that even if the evidence contained in these paragraphs were before the Court, it would have no impact on the outcome of this judicial view application.

Did the PAB fail to apply the principles of natural justice?

[11] The applicant's argument that the PAB violated the principles of natural justice in failing to provide adequate reasons may be disposed of summarily in that the Supreme Court of Canada has recently determined that the inadequacy of reasons given by a tribunal does not give rise to breach of natural justice, provided that some reasons are given. In this regard, in *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, [2011] 3 SCR 708, Justice Abella, writing for a unanimous Court, stated at paragraphs 20 and 22:

> Procedural fairness … can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness.
>
> […]
>
> It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. …
> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.
>
> [Emphasis added]

Should the PAB's decision be set aside as being unreasonable?

[12] The parties agree that in reviewing the PAB's decision, this Court must a) assess whether the PAB applied the correct legal test in determining whether or not to grant leave and b) assess whether its application of the test to the facts before it was reasonable (citing *Callihoo v Canada (Attorney General)*, [2000] FCJ No 612, 190 FTR 114 at para 15 [*Callihoo*] and *Farrell v Canada (Attorney General)*, 2010 FC 34 at para 26, [2010] FCJ No 30 [*Farrell*]). They also concur that the test to be applied by the PAB in deciding whether or not to grant leave requires that it determine whether or not the applicant has raised an arguable case or, to put the matter another way, has a reasonable chance of success on the appeal (see *Callihoo* at para 15; *Farrel* at para 26; *Fancy v Canada (Minister of Social Development)*, 2010 FCA 63). Where they part company, though, is in the application of these principles to the instant case.

[13] The applicant asserts that the PAB applied the incorrect test and that, as opposed to evaluating the chances of success of an appeal, the Board incorrectly focused on the merits of the proposed appeal and determined that it had no chance of success. A review of the PAB's decision reveals that this argument is without merit. The PAB in fact determined that the applicant had "no arguable case to present on appeal" in the final paragraph of its decision (para 4 of the PAB's decision). It thus applied the correct test.

[14] As concerns the reasonableness of the PAB's assessment of the merits of the applicant's proposed appeal, the applicant asserts that she possessed an arguable case that Ms. Gunderman did not meet the definition of a "common-law partner", within the meaning of the CPP, because Ms. Gunderman in effect perpetrated a fraud upon Mr. McLaughlin, by taking advantage of him in his

dying days to change the beneficiaries under his life insurance policy, and by making other decisions that were to her own financial benefit and to which he would not have agreed. The applicant asserts in this regard that the PAB was required to apply a multi-factored analysis in determining whether Ms. Gunderman met the definition of a "common-law partner", and that one of the factors it ought to have considered was whether she had committed breaches of trust or engaged in other wrongful conduct to the detriment of Mr. McLaughlin. Unsurprisingly, the applicant was unable to cite any authority in support of this proposition.

[15] In essence, the applicant is requesting that a decision-maker evaluate the *quality* of the relationship between two individuals to determine whether or not the relationship should fall within the definition of a "common-law partnership". However, the case law interpreting the definition of a "common-law partner" in the CPP (or in family law jurisprudence on the similar concept of "common-law relationship") does not contemplate an assessment of the type the applicant urges. Indeed, this type of assessment would not be an appropriate inquiry for an administrative adjudicator or a court and, accordingly, the applicable tests all involve consideration of questions of fact and intent to ascertain whether the parties live in a conjugal relationship that is similar to marriage. Thus, in *Pratt* at para 42, the Board reviewed the common-law jurisprudence and listed the following factors as being indicative of a conjugal relationship:

1) Shelter, including considerations of whether the parties lived under the same roof, slept together, and whether anyone else occupied or shared the available accommodation;

2) Sexual and personal behaviour, including whether the parties have sexual relations, maintain an attitude of fidelity to each other, communicate on a personal level, eat together, assist each other with problems or during illness or buy each other gifts;
3) Services, including the roles they played in preparation of meals, doing laundry, shopping, conducting household maintenance and other domestic services;
4) Social, including whether they participated together or separately in neighbourhood and community activities and their relationship with respect to each other's family members;
5) Societal, including the attitude and conduct of the community towards each of them as a couple;
6) Support, including the financial arrangements between the parties for provision of necessaries and acquisition and ownership of property; and
7) Attitude and conduct concerning any children.

[16] The Supreme Court of Canada confirmed, in the family law context, that these are the factors that ought to be used to test whether or not a common-law conjugal relationship exists in *M v H*, [1999] 2 SCR 3, [1999] SCJ No 23 at para 59: “the generally accepted characteristics of a conjugal relationship... include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple.”

[17] In light of the foregoing, the PAB’s conclusion that the applicant had no arguable case to present on appeal is certainly reasonable.

[18] The present application for judicial review, accordingly, must be dismissed.

Costs

[19] The respondent does not seek its costs in this matter, given the issues involved, the very modest means of the applicant and the fact that counsel for the applicant has acted on a *pro bono* basis. In the circumstances, no award of costs is made.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Paragraphs 13, 14 and 15 of the applicant's affidavit, sworn September 21, 2001, as well as exhibits "A" and "B" to that affidavit are struck;
2. This application for judicial review of the decision of the PRB, dated May 27, 2011, is dismissed; and
3. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1419-11
STYLE OF CAUSE:	*Donna McLaughlin v Attorney General of Canada*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 1, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	GLEASON J.
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