

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130627

Docket: A-1-12

Citation: 2013 FCA 174

**CORAM: SHARLOW J.A.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

EUGENE UPSHALL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at St. John's, Newfoundland and Labrador on June 27, 2013.

Judgment delivered from the Bench at St. John's, Newfoundland and Labrador on June 27, 2013.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at St. John's, Newfoundland and Labrador on June 27, 2013)

STRATAS J.A.

[1] Mr. Upshall applies for judicial review of the decision dated November 16, 2011 of the Pension Appeals Board (appeal CP26876). The Board upheld the decision of the Review Tribunal which upheld the Minister's division of pension credits between Mr. Upshall and his ex-spouse under section 55.1 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

[2] Section 55.1 of the *Plan* provides that the Minister must divide “unadjusted pensionable earnings,” colloquially known as “pension credits,” equally between spouses upon divorce except in certain specified circumstances, none of which are relevant here. Upon application, absent those specified circumstances, the equal division of pension credits is mandatory. As explained in this Court’s earlier decision in *Runchey v. Canada (Attorney General)*, 2013 FCA 16, and as the Board explained below, in certain circumstances, this can cause unfairness to one ex-spouse.

[3] Before the Board, Mr. Upshall asked that the Minister’s division of pension credits be set aside and be done on a different basis. In particular, Mr. Upshall urged that the pension credits be adjusted before the division is carried out by applying the child rearing provisions of the *Plan* to his ex-spouse. The Board noted that the provisions of the *Plan* do not permit this.

[4] Before the Board, Mr. Upshall attempted to argue that, by not permitting this, section 55.1 of the *Plan* was discriminatory, contrary to section 15 of the Charter, and thus, of no force or effect. The Board declined to entertain the constitutional argument because Mr. Upshall had failed to serve a notice of constitutional question. Accordingly, the Board dismissed Mr. Upshall’s appeal.

[5] In his judicial review in this Court, Mr. Upshall seeks to argue the constitutionality of section 55.1 of the *Plan*. He cannot do this. He can raise the constitutional issue before us only if he properly raised it before the Board and the Board determined it: *Okwuobi v. Lester Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257. *Okwuobi* recognizes that if an administrative tribunal has the jurisdiction to determine a constitutional issue, the constitutional issue must first be determined there.

[6] In any event, Mr. Upshall's constitutional argument – that the interaction between section 55.1 and the child rearing provisions of the *Plan* causes unfairness that is discriminatory under section 15 – must fail for two reasons. First, Mr. Upshall has not offered any evidence to show that the interacting provisions discriminate in the sense described by the Supreme Court in cases such as *Quebec (Attorney General) v. A.*, 2013 SCC 5 and *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396. Second, Mr. Upshall's argument in this case is identical to that of the unsuccessful applicant in *Runchey, supra*. In that case, this Court rejected the applicant's submissions that the interacting provisions discriminate under section 15.

[7] In our view, the only remedy for the unfairness Mr. Upshall identifies is an amendment to provisions of the *Plan*.

[8] Therefore, despite the able and articulate submissions of Mr. Upshall, we shall dismiss his application. The respondent has not sought its costs and so none shall be ordered.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-1-12

AN APPEAL FROM AN APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF PENSION APPEAL DATED NOVEMBER 17, 2011

STYLE OF CAUSE: Eugene Upshall v. Attorney General of Canada

PLACE OF HEARING: St. John's, Newfoundland and Labrador

DATE OF HEARING: June 27, 2013

REASONS FOR JUDGMENT OF THE COURT BY: Sharlow, Dawson, Stratas JJ.A.

DELIVERED FROM THE BENCH BY: Stratas J.A.

APPEARANCES:

Eugene Upshall

ON HIS OWN BEHALF

Michael Stevenson

FOR THE RESPONDENT

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FOR THE RESPONDENT