Federal Court  Cour fédérale

Date: 20140521

Docket: T-725-13

Citation: 2014 FC 485

Toronto, Ontario, May 21, 2014

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SALVATORE CONSIGLIO

Applicant

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

JUDGMENT AND REASONS

[1] Mr. Salvatore Consiglio (the "Applicant") seeks judicial review of a decision dated March 7, 2013 of a Designated Member of the Pensions Appeal Board (the "PAB" or the "Board") refusing the Applicant leave to appeal a decision of the Review Tribunal (the "Review Tribunal"). The Review Tribunal determined that it did not have the discretion to extend the statutory retroactive period for the payment of a Disabled Contributor's Child Benefit ("DCCB") beyond 11 months before the application was received.

I. Background

[2] The following facts are taken from the Tribunal Record and the Application Records filed by the Applicant and the Attorney General of Canada (the "Respondent"), who represents the Board, that is the decision-maker.

[3] The Applicant applied for disability benefits pursuant to the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "Plan") on October 2, 1991. He indicated in his application that he was the married father of three children.

[4] The benefits application was approved with an effective date of November 1990. Benefits were also approved for the Applicant's three children who were noted in the application and living with him.

[5] A fourth child was born to the Applicant on November 22, 1993. No application for benefits for this child was received until September 28, 2011. This application was approved with the effective payment date in October 2010. In his application requesting benefits for this fourth child, the Applicant said that he was unaware that he needed to make a further application for benefits should he have another child. He asked for the retroactive payment of benefits for this child.

[6] The Applicant sought reconsideration of the initial decision in a letter dated November 17, 2011. He again stated that he was unaware that should he have another child, he

would need to apply on behalf of such child. The Applicant said the following in his letter of November 17, 2011:

> When I applied and was accepted for disability, the letter I received from Service Canada stated that I would receive a certain amount every month at such a date.
>
> The letter did not say that, should I have another child, call in and your benefits will increase.
>
> I certainly would have called in but nobody told me, I did not know.
>
> I did not complain, I didn't appeal, I did not know the rules if any. I just dealt with the lesser income than I was used to.

[7] By letter dated April 24, 2012, Service Canada, the agency responsible for administering benefits under the Plan, advised the Applicant that it was maintaining its decision about the effective date of commencement of benefits for the fourth child. The Applicant was advised that he could appeal this decision to a review tribunal.

[8] The Applicant exercised his right to appeal to the Review Tribunal. The decision was negative. The Review Tribunal found that it did not have the discretion to extend the retroactive effective date of the payment of benefits for the Applicant's youngest child. It reviewed the statutory scheme and noted that it does not have any equitable power to extend the maximum statutory period for retroactive payments.

[9] The Applicant then sought leave before a Designated Member of the Board to appeal that decision to the Board. The Designated Member refused leave to appeal on the basis that there is

no discretion "to make an order effective retroactively to 11 months" preceding the application for benefits.

[10] Following receipt of the decision of March 7, 2013 refusing leave to appeal, the Applicant commenced this application for judicial review.

II. Discussion and Disposition

[11] The first matter to be addressed is the nature of this proceeding. An application for judicial review is a means by which a statutory decision-maker is reviewed by the Court. The powers of the Court are limited to a review of the process followed by the decision-maker. The decision is to be assessed against a standard of review.

[12] Questions of procedural fairness, including the right of an applicant to present his case, are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43. Otherwise the decision is reviewable on the standard of reasonableness, that is whether it "displays justification, transparency and intelligibility": see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[13] Next, the nature of the decision here must be addressed. The Applicant is seeking judicial review of a decision refusing him leave to appeal to the Board concerning retroactive payment of benefits, pursuant to the Plan, to a dependent child.

[14] The Plan is a statutory scheme that allows for the payment of benefits in defined situations as set out in the legislation.

[15] As discussed in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, the Plan is not a social welfare scheme but a program to provide social insurance to eligible Canadians who lose earnings due to disability, among other things. It is a contributory scheme in which "Parliament has defined both the benefits and the terms of entitlement"; see *Granovsky*, *supra*, at paragraph 9.

[16] The decision to grant a disability benefit requires compliance with the statutory terms. Subsection 74(2) of the Plan sets out the relevant time-frame as follows:

Commencement of payment of benefit	**Début du versement de la prestation**
74. (2) Subject to section 62, where payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with,	(2) Sous réserve de l'article 62, lorsque le paiement d'une prestation d'enfant de cotisant invalide ou d'une prestation d'orphelin est approuvé, relativement à un cotisant, la prestation est payable pour chaque mois à compter
(a) in the case of a disabled contributor's child's benefit, the later of	*a)* dans le cas d'une prestation d'enfant de cotisant invalide, du dernier en date des mois suivants :
(i) the month commencing with which a disability pension is payable to the contributor under	(i) le mois à compter duquel une pension d'invalidité est payable au cotisant en vertu de la présente loi ou selon

this Act or under a provincial pension plan, and	un régime provincial de pensions,
(ii) the month next following the month in which the child was born or otherwise became a child of the contributor, and	(ii) le mois qui suit celui où l'enfant est né ou est devenu de quelque autre manière l'enfant du cotisant;
(b) in the case of an orphan's benefit, the later of,	*b)* dans le cas d'une prestation d'orphelin, du dernier en date des mois suivants :
(i) the month following the month in which the contributor died, and	(i) le mois qui suit celui où le cotisant est décédé,
(ii) the month next following the month in which the child was born,	ii) le mois qui suit celui où l'enfant est né.
but in no case earlier than the twelfth month preceding the month following the month in which the application was received.	Toutefois, ce mois ne peut en aucun cas être antérieur au douzième précédant le mois suivant celui où la demande a été reçue.

[17] Subsection 74(2) is important because it sets out the requirement that a benefit is payable "in no case earlier than the twelfth month preceding the month following the month in which the application was received."

[18] In this case, the application on behalf of the fourth child was received in September 2011. The application was approved with an effective date of October 2010. This determination, initially made by Service Canada, was maintained upon the request for reconsideration and upon appeal to the Review Tribunal.

[19] The Designated Member found the decision to be correct in law and dismissed the application for leave to appeal to the Board.

[20] The decision under review is the refusal to grant leave to appeal. In *Callihoo v. Canada (Attorney General)* (2000), 190 F.T.R. 114 the Court said that the review of a decision of a designated member upon an application for leave to appeal involves two issues: first, whether the correct test of an arguable case was addressed and second, whether an error was made in finding that no arguable case was raised.

[21] The first issue, that is whether the Designated Member applied the correct legal test, is a question of law that is reviewed on a standard of correctness; see the decision in *Canada (Attorney General) v. Zakaria*, 2011 FC 136 at paragraph 15.

[22] The meaning of "arguable case" was discussed in *Canada (Attorney General) v. Carroll* (2011), 397 F.T.R. 166 at paragraph 14, where the Court said:

> The PAB also has a duty to apply the correct test for granting leave to appeal. The test is whether the applicant requesting leave has raised an arguable case *(Callihoo v Canada (Attorney General)*, [2000] FCJ No 612 (TD)). An applicant will raise an arguable case if she puts forward new or additional evidence (not already considered by the RT), raises an issue not considered by the RT, or can point to an error in the RT's decision.

[23] Although the Designated Member did not specifically state the first part of the test, I am satisfied that consideration of the test is implicit in the decision.

[24] The Designated Member reviewed the essential elements of the Applicant's complaint. No new evidence was presented nor any issue raised that was not considered by the Review Tribunal, nor did the Applicant identify an error in the decision of the Review Tribunal. There is no error in the way the Designated Member considered the first part of the test. A correctness review means that the reviewing Court can look at the matter anew and decide if the correct test was applied.

[25] The second part of the test, that is whether an error was made in determining whether an arguable case was raised, is reviewable on the standard of reasonableness. As noted above, the standard of reasonableness means that the decision is supported by evidence and is understandable, having regard to the relevant statutory scheme.

[26] Considering the evidence and the submissions raised by the Applicant both before the Designated Member and in this application, I am satisfied that the decision of the Designated Member meets this standard. The Designated Member reviewed the facts and concluded that the decision of the Review Tribunal was correct. That conclusion is reasonable in the circumstances.

[27] There is no reviewable error in the decision of the Designated Member and this application will be dismissed.

[28] While there is no legal basis to interfere with the decision of the Designated Member in dismissing the application for leave to appeal, there may be some basis upon which relief may be granted to the Applicant.

[29] The Applicant has maintained that he did not know he was receiving benefits for his three daughters who were included in his original application, or that he needed to notify Service Canada about the birth of his fourth daughter. He says that he received lump sum payments, with no explanation that the payment included benefits for his children.

[30] It appears from the correspondence in the Certified Tribunal Record that there was a change in Service Canada policy since the Applicant began receiving benefits. That change was with respect to notifying an applicant of the specific benefits being paid and the recipients of those benefits, as well as notifying applicants of the requirement to inform Service Canada about the birth of more dependent children.

[31] There are emails, at Tab 7 of the Certified Tribunal Record, indicating that some time after the Applicant started receiving his benefits, Service Canada began sending recipients "breakdown letters" itemizing the benefits they were receiving.

[32] There is nothing in the file to indicate that the Applicant ever received one of these letters. In fact, the correspondence expresses doubt that the Applicant was ever informed that he was receiving benefits in relation to his children. The evidence of the Applicant is that he was never told that he was receiving benefits for his three oldest daughters, or that he needed to notify Service Canada in order to receive benefits for his fourth daughter. This may be a basis for the Applicant to pursue other avenues of redress under the Plan.

[33] In the result, the application for judicial review is dismissed. In the exercise of my discretion, pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106, I make no award as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

In the exercise of my discretion, pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106, I make no award as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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