Federal Court of Appeal  Cour d'appel fédérale

Date: 20120110

Docket: A-140-11

Citation: 2012 FCA 7

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
GAUTHIER J.A.

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA
and CATHY MURPHY

Appellants

and

CANADA REVENUE AGENCY

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

Heard at Ottawa, Ontario, on January 10, 2012.

Judgment delivered from the Bench at Ottawa, Ontario, on January 10, 2012.

REASONS FOR JUDGMENT OF THE COURT BY: NOËL J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20120110

Docket: A-140-11

Citation: 2012 FCA 7

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
GAUTHIER J.A.

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA
and CATHY MURPHY

Appellants

and

CANADA REVENUE AGENCY

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on January 10, 2012.)

NOËL J.A.

[1] In support of their appeal the appellants essentially reiterate the arguments which were successively addressed by the Canadian Human Rights Tribunal (the Tribunal) at first instance and

by the Federal Court on judicial review. The Canadian Human Rights Commission (the Commission) for its part argues again that assessing actions by the Canada Revenue Agency (CRA), more precisely the Minister of National Revenue (the Minister) pursuant to the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the ITA) are "services" within the meaning of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA).

[2] In a very thorough analysis which should be commended for its clarity, the Tribunal addressed each of these arguments, and applying a standard of reasonableness, the Federal Court judge was unable to identify any justification for his intervention. We can detect no error as to the standard of review that was applied by the Federal Court judge (see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, para. 24 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, para. 30), or his conclusion that there was no reviewable error, although we want to make it clear that we would have reached the same conclusion applying a standard of correctness.

[3] The only issue with respect to which we can usefully comment is the Tribunal's conclusion that the alleged discrimination in this case does not result from any ministerial action that might be viewed as a service, but rather from the application of the ITA based on undisputed facts (reasons of the Tribunal, para. 50). As was held by the Tribunal (para. 54):

> … Even if the tasks undertaken by the CRA […] constitute a service, they are not the basis for the adverse differentiation alleged in the complaint. The source of the alleged discriminatory practice is found solely within the legislative language of ss. 110.2 and 120.31 of the ITA. None of the evidence before me establishes that

> the alleged discrimination arises from the conduct of CRA officials or the discretionary implementation of policies or practices by the CRA. …

[4] Indeed, pursuant to section 152 of the ITA the Minister has the mandatory duty to assess taxes in conformity with the law. It follows that even if the Minister's assessing actions could be viewed as services, the Minister had no choice but to assess all those in receipt of Qualifying Retroactive Lump-Sum Payments (QRLSP's) in the same manner, regardless of their personal characteristics.

[5] Rather, the complaint is directed at the provisions of the ITA which provide for the taxation of QRLSP's, or more precisely at "the manner in which these payments are taxed" as the appellants put it at paragraph 73 of their memorandum. According to the appellants, this manner of taxing QRLSP's should not be applied to the payments in issue, not because they fail to qualify under the relevant provisions of the ITA, but because giving effect to these provisions would compound the discrimination to which the complainants were subjected to by their employer.

[6] This is a direct attack on sections 110.2 and 120.31 of the ITA, based on considerations that are wholly extrinsic to the ITA. As was held in *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5 at paragraphs 37 and 38 with respect to an identical challenge directed at specified provisions of the *Citizenship Act*, R.S.C. 1985, c. C-29, this type of attack falls outside the scope of the CHRA since it is aimed at the legislation *per se*, and nothing else. Along the same lines, the Federal Court in *Wignall v. Canada (Department of National Revenue (Taxation))*, 2003 FC 1280, observed in *obiter* that an attempt pursuant to the CHRA to counter the application of paragraph

56(1)(*n*) of the ITA based solely on its alleged discriminatory impact on the complainant, could not succeed; only a constitutional challenge could yield this result. In our view, the opinion expressed in these cases is the correct one since the CHRA does not provide for the filing of a complaint directed against an act of Parliament (see subsection 40(1) which authorizes the filing of complaints and sections 5 to 14.1 which sets out the "discriminatory practices" against which complaints may be directed).

[7] The decision of this Court in *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (F.C.A.) [*Druken*] was decided on the basis that the complaint in that case was directed at a discriminatory practice in the provision of a service within the meaning of section 5, a matter that was conceded by the Attorney General and therefore not argued (see the caveat expressed by Robertson J.A. in *Canada (Attorney General) v. McKenna*, [1999] 1 F.C. 401 (C.A.), paras. 78 to 80). Despite this concession, a reading of the decision and the remedy granted (*Druken*, p. 29, letter a) make it clear that the complaint was directed solely at the operability of paragraphs 3(2)(*c*) and 4(3)(*d*) of the *Unemployment Insurance Act*, S.C. 1974-75-76, c. 80 and 4(3)(*d*) of the *Unemployment Insurance Regulations*, C.R.C., c. 1576), and, to that extent, for the reasons already given, such a complaint does not come within any of the practices that may form the object of a complaint under the CHRA.

[8] There is no merit to the appellants' alternative contention that parts of the amounts assessed under to the QRLSP mechanism could be waived through the exercise of ministerial discretion pursuant to subsection 220(3.1) of the ITA and that the Minister engaged in a discriminatory

practice in failing to exercise this discretion in favour of the complainants (memorandum of the appellants, paras. 58 and 59). First, it is worth noting that no relief was sought pursuant to subsection 220(3.1). More importantly however, a reading of section 120.31 makes it clear that the amounts assessed pursuant to that provision are taxes and therefore could not be waived by the Minister.

[9] We need only note in this respect that the amount computed under that provision is the "tax payable" (subsection 120.31(2)), which includes an "amount that would be calculated as interest" at the prescribed rate applicable to refunds (subparagraph 120.31(3)(*b*)(ii)), on the assumption that the specified portion of the lump-sum payment being reallocated and the tax thereon had been paid in the year to which it relates (paragraph 120.31(3)(*b*)). That the tax includes an amount intended to reflect the interest shortfall resulting from the fact that the tax was not paid in the years in which it ought to have been paid according to the assumption underlying the QRLSP mechanism does not alter its nature.

[10] The decision of the Tax Court in *Fetterly v. The Queen*, 2006 TCC 94, is of no assistance to the appellants. In that case, McArthur J. said in *obiter* (para. 13):

> While it is not open to me to decide for the Committee, the $15,475.72 amount that the Appellant wishes to have the Committee consider, has all the indicia of interest. As Mogan J. in *Sanford v. The Queen*, [2000] T.C.J. No. 801 stated "If a two-legged creature with feathers waddles like a duck, quacks like a duck, and looks like a duck, it must be a duck". In as much as I am empowered to do so, I suggest that the amount is in fact interest and recommend that the Appellant's application under the fairness package be given careful consideration.

[11] In so suggesting, McArthur J. did not purport to decide the issue and the appellants were unable to identify any instance since this decision was rendered in 2006 where part of the taxes assessed pursuant to the QRLSP mechanism were waived pursuant to this logic. Again, that the computation of the tax comprises amounts intended to reflect the notional interest shortfall from the government's perspective does not alter the fact that it is a tax, and subsection 220(3.1) does not empower the Minister to waive the payment of taxes.

[12] The decision of the Tax Court in *Milliken v. Canada*, [2002] T.C.J. No. 151 [*Milliken*] on which the appellants also rely is no more helpful to their case. The language of subparagraph 120.31(3)(*b*)(ii) is clear. The Minister has no choice but to apply the prescribed rate pursuant to subsection 164(3) in computing the notional interest shortfall, and we do not read *Milliken* as saying otherwise (see *Milliken*, paras. 19 and 20). As to the manner in which the interest was to be computed, subsection 248(11) provides that this rate "shall be compounded daily" with the result that, again, the Minister has no discretion in this regard.

[13] Finally, it is not surprising that the QRLSP mechanism only favored a small fraction of the complainants in this case given that the payments which they received relate to years dating as far back as 1985 (reasons of the Tribunal, para. 73). As the evidence makes clear, there was no guarantee that this measure would yield a more favorable result than having the lump-sum payment taxed in whole in the year of receipt under the usual rule (subsection 5(1) of the ITA). Indeed, the

only guarantee was that the method most beneficial to the taxpayer would be applied. This is what occurred in this instance, as would be the case for any other person in receipt of a similar payment.

[14] The above should not be read as detracting from any of the other self-standing grounds on which the complaint was dismissed by the Tribunal.

[15] We would dismiss the appeal with costs to the respondent Canada Revenue Agency. We would award no costs for or against the Commission.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-140-11
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BEAUDRY OF THE FEDERAL COURT DATED FEBRUARY 22, 2011, DOCKET NO T-808-10.	
STYLE OF CAUSE:	PUBLIC SERVICE ALLIANCE OF CANADA and CATHY MURPHY and CANADA REVENUE AGENCY and CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 10, 2012
REASONS FOR JUDGMENT OF THE COURT BY:	LÉTOURNEAU, NOËL AND GAUTHIER JJ.A.
DELIVERED FROM THE BENCH BY:	NOËL J.A.

APPEARANCES:

David Yazbeck	FOR THE APPELLANTS
Catherine Lawrence Craig Collins-Williams	FOR THE RESPONDENT (Canada Revenue Agency)
Daniel Poulin	FOR THE RESPONDENT (Canadian Human Rights Commission)

SOLICITORS OF RECORD:

RAVEN, CAMERON, BALLANTYNE & YAZBECK, LLP Ottawa, Ontario	FOR THE APPELLANTS

MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE RESPONDENT (Canada Revenue Agency)
C.H.R.C. LITIGATION SERVICES DIVISION Ottawa, Ontario	FOR THE RESPONDENT (Canadian Human Rights Commission)