Federal Court  Cour fédérale

Date: 20150508

Docket: T-1408-14

Citation: 2015 FC 615

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 8, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

THÉRÈSE BARIBEAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is challenging the legality of a decision rendered on May 13, 2014, in which the Government of Canada Pension Centre refused to recognize her periods of employment as an independent contractor for Environment Canada between April 2, 1990, and February 28, 1998, as pensionable service under the *Public Service Superannuation Act*, RSC 1985, c P-36 [PSSA].

[2] The applicant submits that the Pension Centre made a critical error by (1) not providing adequate reasons for its findings; (2) basing its analysis on common law principles rather than those enacted by the *Civil Code of Québec*, SQ 1991, c 64 (CCQ); and (3) concluding that the applicant's use of a company name amounts to acting through a separate entity.

[3] For the following reasons, the applicant's application for judicial review will be allowed.

I. Facts

[4] Between April 20, 1990, and February 28, 1998, the applicant concluded four consulting and professional services contracts with Environment Canada, some in her own name and others on behalf of her company name CORTEXTE ENR. These contracts all contained a clause providing that they were service contracts and that the applicant was not being hired as an employee, public servant or agent of the Crown. However, in 1999, Revenue Quebec and the Canada Revenue Agency [CRA] found that there was an employer-employee relationship between Environment Canada and the applicant, and consequently issued notices of reassessment for the applicant for the 1995, 1996, 1997 and 1998 taxation years (recovery for years prior to 1995 being statute-barred). Environment Canada did not challenge this decision.

[5] In February 1998, the applicant became a permanent employee of Environment Canada and a contributor under the PSSA. In 2004, she commenced proceedings to have the periods covered by her service contracts recognized as pensionable service under the PSSA.

[6] The Pension Centre rejected the request on the ground that, during the relevant period, the applicant and Environment Canada had not maintained an employer-employee relationship.

II. Issue and standard of review

[7] The following issue arises in this application:

- Did the Pension Centre err in concluding that, during the April 2, 1990, to February 28, 1998, period, the applicant was not an employee for the purposes of the PSSA?

[8] According to the applicant, the issue is a question of law outside the Pension Centre's expertise and, consequently, the Court should apply the standard of correctness, in accordance with the decision in *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 2182 v Canada (Attorney General)*, 2007 FC 449 at paras 106-108 [*CAW-Canada*]. In contrast, the respondent submits that the applicable standard is that of reasonableness, as held by this Court in *Public Service Alliance of Canada v Canada (Attorney General)*, 2008 FC 474 at paras 15-18 [*Public Service Alliance*]. I agree with the respondent. The issue raised by this application for judicial review is one of mixed fact and law that is reviewable on reasonableness (*Public Service Alliance*, above; *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]).

[9] In *Dunsmuir*, above, the Supreme Court held that the reasonableness of a decision is assessed in two stages. The result must be reasonable and therefore fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"; however, the

decision-making process must also be reasonable, which means there must be "justification, transparency and intelligibility within the decision-making process" (at para 47).

III. Analysis

[10] The applicant raises two main arguments to establish that the Pension Centre erred in concluding that she and Environment Canada did not have an employer-employee relationship during the relevant period.

[11] First, the Pension Centre reached a different conclusion from the one reached by the CRA, which means that the applicant was assessed as if she had been a government employee rather than a freelance worker, but was not considered to be an employee for the purpose of accumulating pensionable service. The applicant notes that [TRANSLATION] "in the present matter, the federal state unflinchingly states one thing and then the opposite". The Pension Centre relied on the CRA publication RC4110 entitled "Employee or Self-employed?" to conclude that there was no employer-employee relationship, while the CRA reached the opposite conclusion.

[12] Second, the Pension Centre erred in applying solely common law criteria even though the applicant lives and works in Quebec. Section 8.1 of the *Interpretation Act*, SRC 1985, c I-21, is clear: the common law and the civil law are equivalent sources of law, and for contracts entered into in Quebec, for services rendered in Quebec by a Quebec resident, the Pension Centre should have referred to the civil law rather than the common law. It should therefore have applied the standards of contract interpretation and the provisions of the CCQ dealing with contracts of work

or of enterprise. Under article 1426 of the CCQ, the interpretation which has already been given to the contract by the parties must be taken into account, and, from the outset, the Pension Centre should have considered the CRA's conclusion that there was an employer-employee relationship during the period under review. Moreover, the fact that the contracts included a provision stating that they did not create an employer-employee relationship does not have the force given to it by the Pension Centre since such a stipulation is not determinative in characterizing a contract (*Grimard v Canada*, 2009 FCA 47 at paras 32-34 [*Grimard*]). Lastly, the Pension Centre erred in concluding that there was a tripartite relationship because CORTEXTE ENR. and the applicant were one and the same person.

[13] According to the respondent, the Pension Centre's decision is reasonable and in line with previous decisions of this Court which offer definitions of a person employed in the public service under the PSSA. Determining whether a person is employed in the public service does not involve common law principles but rather principles provided for in the relevant federal statute (*Public Service Alliance*, above; *Burley v Canada (Attorney General)*, 2008 FC 525). In analyzing the scope of the provisions of the PSSA and the various clauses of the contracts entered into between the applicant and Environment Canada, it was reasonable for the Pension Centre to conclude that there was no employer-employee relationship. These contracts were contracts for the supply of services, and they include clear statements that they do not create an employer-employee relationship between Environment Canada and the applicant. Moreover, the contracts provide for a price for the work, and the applicant was therefore not receiving a salary within the meaning of the PSSA.

[14] The respondent also argues that the decisions made by the CRA do not apply outside its operating environment and that the CRA does not have the authority to determine whether the applicant is an employee under the PSSA. The respondent argues that the Pension Centre erred in applying common law rather than civil law principles. However, this is not a determinative error since [*TRANSLATION*] "the common law criteria and the CCQ provisions essentially refer to similar concepts".

[15] Fundamentally, I agree with the applicant's arguments. Even though the CRA's decisions are not determinative as such, it is my opinion that it was not reasonable for the Pension Centre to reach a different conclusion from the one reached by the CRA, in using a tool developed by the CRA, without explaining the reason for this contradiction. Both contradictory conclusions had a negative impact for the applicant, and no adequate or reasonable explanation was given to her. The decision therefore lacks transparency and intelligibility.

[16] Moreover, and even if I did not share the applicant's position on this first issue, it is my view that the Pension Centre's application of the Common Law is a critical error in this matter. Section 8.1 of the *Interpretation Act* provides as follows:

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be	**8.1** Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf

made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

[17] The importance given by the Pension Centre to the common law criteria is clear when it notes that [TRANSLATION] "the application of a common law criterion to the impugned employment period is a precondition that has to be satisfied for the employment period to be considered as pensionable service". The Pension Centre attributed great importance to the wording of the contracts, which provided [TRANSLATION] "that there was no employer-employee relationship and that no such relationship was anticipated in the future".

[18] It is true that there is no antinomy between the common law and civil law criteria and that a court would not err in taking into consideration common law criteria (*Grimard*, at paras 27-43). However, in the case at bar, the Pension Centre did not merely take the common law criteria into consideration: it applied them without considering the provisions of the CCQ. Even if there is some overlap between civil law and common law criteria, they are not interchangeable. In *9041-6868 Québec Inc v Canada (Minister of National Revenue)*, 2005 FCA 334, which also concerned the characterization of a contract, the Federal Court of Appeal held as follows:

> [6] It is possible, and in most cases even probable, that where contracts are similar they would be characterized similarly, whether the civil law or common law rules are applied. The exercise, however, is not a matter of comparative law, and the ultimate objective is not to achieve a uniform result. On the contrary, the exercise, as was in fact intended by the Parliament of Canada, is one of ensuring that the approach taken by the court is the approach that applies in the applicable system, and the ultimate objective is to preserve the integrity of each legal system. On that point, what was said by Mr. Justice Mignault in *Curly v. Latreille*,

(1920) 60 S.C.R. 131, at page 177 applies as well now as it did then:

> [TRANSLATION] It is sometimes dangerous to go outside a legal system in search of precedents in another system, based on the fact that the two systems contain similar rules, except, of course, where one system has borrowed a rule from the other that was previously foreign to it. Even when the rule is similar in the two systems, it may be that it has not been understood or interpreted in the same way in each of them, and because the legal interpretation—I am of course referring to interpretation that is binding on us—is in fact part of the law that it interprets, it may in fact happen that despite their apparent similarity, the two rules are not at all identical.
>
> I would therefore not base the conclusions that I think must be adopted in this case on any precedent taken from English law . . .

[Emphasis added]

[19] In the matter at bar, I believe that the application of the common law criteria is a critical error because it led the Pension Centre to give great importance to the parties' intentions as expressed in the contracts rather than to an assessment of the facts or the parties' reality, which play a crucial role in civil law. As indicated in *Grimard*, above, the parties' intention is not in itself a determinative factor in characterizing a contract. The behaviour of the parties in performing the contract must concretely reflect the intention expressed in the contract (at para 33). Article 2085 of the CCQ defines a contract of work in the following manner:

> 2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

[20] This article provides for three constituent elements: work, remuneration and subordination. The last element is the most significant characteristic of a contract (*Cabiakman v. Industrial Alliance Life Insurance Co*, 2004 SCC 55 at paras 27-28). By contrast, under article 2099 of the CCQ, a contract of enterprise leaves the contractor free to choose the means of performing the contract and does not create a relationship of subordination. Robert Gagnon describes the importance of the factual assessment when analyzing the relationship of subordination:

> [TRANSLATION]
>
> 92 — *Factual assessment* — Subordination is verified by reference to the facts. In that respect, the case law has always refused to simply accept the parties' description of the contract:
>
> > In the contract, the distributor himself acknowledges that he is working on his own account as an independent contractor. There is no need to return to this point, since doing so would not alter the reality; furthermore, what one claims to be is often what one is not.
>
> Despite the existence of a contractual clause clarifying the nature of the relationship between the parties, the courts will go beyond the contract, preferring to analyze the facts in order to determine the actual nature of the contractual relationship established between the parties. [Citations omitted] (Robert P. Gagnon, *Le droit du travail du Québec*, 7th ed (Cowansville, Quebec: Yvon Blais, 2013) at p. 91).

[21] In the matter at bar, it is my view that the Pension Centre could have arrived at the same conclusion by applying the civil law. However, I do not agree with the respondent that the application of the common law is without consequence, and it would have been possible for the Pension Centre to reach a different conclusion. Consequently, in my opinion, the decision should be set aside and referred back for redetermination. I do not, however, believe that the Court must

render all the orders sought by the applicant, namely to declare that the applicant was an employee of Environment Canada from April 2, 1990, to February 28, 1998, and that she is therefore entitled to buy back her years of service. This decision is for the Pension Centre to make, and it must do so in consideration of these reasons.

[22] In closing, I would add that it is an error to conclude that, in the case of some of the contracts that bound her to Environment Canada, the applicant acted through a separate entity. A company name is not a legal entity or a separate entity from the individual or corporation using it.

IV. Conclusion

[23] For all these reasons, the applicant's application for judicial review shall be allowed, with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The applicant's application for judicial review is allowed;

2. The case is referred back to another member of the Government of Canada Pension Centre for redetermination;

3. Costs are awarded in favour of the applicant.

"Jocelyne Gagné"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1408-14
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APPEARANCES:

Hélène Bergeron	FOR THE APPLICANT
Nadia Hudon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Droitravail inc. Advocate(s) Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT