

Federal Court



Cour fédérale

Date: 20100113

Docket: T-100-09

Citation: 2010 FC 34

Toronto, Ontario, January 13, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DEBBIE FARRELL

Applicant

and

**ATTORNEY GENERAL OF CANADA
and BRENDA MURDOCK**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to s. 18.1 of the *Federal Courts Act*, of a Pension Appeals Board (PAB) decision made on December 5, 2008, to not grant the Applicant leave to appeal a decision of a Review Tribunal (RT) to the PAB. If that decision stands, it ends a long battle over who is the rightful recipient of the Canadian Pension Plan (CPP) survivor and children's benefits of Brian Frederick Murdock who died on March 23, 2004.

[2] For the reasons that follow, that decision cannot stand; this application is allowed.

FACTS

[3] Brian Frederick Murdock was a successful engineer, and a loving father, who struggled with substance abuse and drug addiction. Ongoing drug addiction issues led to the separation of Brian Murdock and his wife, Brenda Murdock, on May 31, 2001. Around the same time, Brian Murdock began a relationship with Debbie Farrell.

[4] On March 23, 2004, Brian Murdock died tragically in a car accident. His death sparked a dispute over the rightful recipient of his CPP survivor and children's benefits.

[5] Section 44(1)(d) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, entitles Brian Murdock's "survivor" to receive benefits under the CPP. According to s. 42(1) of the Act:

"survivor", in relation to a deceased contributor, means

« survivant » S'entend :

(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

a) à défaut de la personne visée à l'alinéa b), de l'époux du cotisant au décès de celui-ci;

(b) a person who was the common-law partner of the contributor at the time of the contributor's death;

b) du conjoint de fait du cotisant au décès de celui-ci.

[6] There can only be one recipient of CPP survivor benefits. The potential benefits of a married but separated spouse, such as Brenda Murdock, can be usurped by a person who was a common-law partner of the deceased at the time of his death, such as Debbie Farrell claims to be. Section 2(1) of the Act defines "common-law" partner, in relation to a

contributor, 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”.

[7] If Debbie Farrell is found to be the common-law partner of Brian Murdock at the time of his death then she is entitled to CPP survivor benefits pursuant to s. 42(1)(b) of the Act. If she is not found to be the common-law partner of Mr. Murdock at the time of his death then Brenda Murdock is entitled to CPP survivor benefits pursuant to s. 42(1)(a) of the Act.

[8] On April 7, 2004, Brenda Murdock applied for CPP survivor benefits and for a CPP death benefit as the separated spouse of Brian Murdock. This application was subsequently granted. On August 5, 2004, Debbie Farrell applied for CPP survivor and children’s benefits as the common-law partner of Brian Murdock and the custodial parent of their dependent children. Upon reviewing Debbie Farrell’s application, the Minister of Human Resources and Social Development determined that she was entitled to the benefits. Consequently, the Minister reviewed and then cancelled Brenda Murdock’s benefits.

[9] Pursuant to s. 60(7) of the Act, Brenda Murdock sought reconsideration of the cancellation of her benefits claiming that Debbie Farrell did not meet the definition of common-law partner under the Act. After a thorough field investigation and review of the submitted documentation, the Minister concluded that Brian Murdock and Debbie Farrell

“were in fact in a common-law union at the time of the contributor’s death”. Consequently, the Minister disallowed Brenda Murdock’s reconsideration.

[10] The statutory reconsideration of this decision, pursuant to s. 81(1)(d) of the Act, appears to not have taken place. Rather, the Minister offered Brenda Murdock a direct appeal to an RT. On June 18, 2008, an RT was convened with three members. The RT heard *viva voce* evidence from Brenda Murdock, Debbie Farrell, and Matthew Murdock, Brian Murdock’s adult son.

[11] At the RT, the Minister’s representative submitted that “[t]he balance of evidence is that Brian Murdock and Debbie Farrell were indeed living in such a common-law relationship for at least one year prior to Mr. Murdock’s death and Brenda Murdock is not entitled to the Survivor’s benefit”.

[12] Brenda Murdock submitted that Ms. Farrell was an unscrupulous drug addict who took advantage of her husband, that Debbie Farrell and Brian Murdock were not cohabiting in the Murdock family home, that his paternity of Debbie Farrell’s children was questionable, and that Debbie Farrell was responsible for the illegal occupation and theft of property from the Murdock family home. Matthew Murdock’s evidence was also that his father lived alone in the Murdock family home, that he was not cohabiting with Debbie Farrell, and that Debbie Farrell and her drug associates had ruined the family home.

[13] Debbie Farrell's evidence was that she and Brian Murdock had an ongoing common-law relationship, that he was the biological father of their daughter Nicole and was the effective father of her son Cody, that the couple primarily resided together at her Guelph residence, and that the documentary evidence supported a finding that she was Brian Murdock's common-law partner.

[14] The RT stated that it was "faced with the task of trying to sort through a lot of conflicting evidence, both documentary and oral." The RT held that the marriage between Brian and Brenda Murdock created a rebuttable presumption that she was entitled to the CPP survivor benefits, and that to rebut this presumption, Debbie Farrell was required "to prove, on a balance of probabilities, based on a preponderance of evidence, that she was cohabiting with the deceased, Mr. Brian Murdock, at the time of his death such that she would comply with the requirements of the CPP".

[15] The RT reviewed the non-essential indicators of a common-law relationship described in *Betts v. Shannon*, 2001 LNCPEN 4 (PAB) (QL). The RT noted that there could be a common-law relationship in the absence of cohabitation and vice-versa. The RT noted "that there are no strict or binding guidelines or exhaustive definitions for 'cohabiting' and 'conjugal' when assessing the relationships between parties." The RT stated that all the evidence and history of the relationship must be assessed in determining whether the definitions within the Act have been met.

[16] The RT determined that there was no independent evidence of cohabitation between Brian Murdock and Debbie Farrell. The RT concluded that Debbie Farrell's evidence had established proof of a "relationship between herself and Mr. Murdock and between Mr. Murdock and her children, but [that] it does not go further than that". The RT found that there was no evidence of shared parenting responsibilities, no evidence of shared assets, and no evidence of the expectation of a long-term relationship.

[17] The RT determined that third-party evidence provided by Ms. Farrell tended to support a finding "that they were engaged as a family unit", but it discounted this evidence. The RT noted that none of the documents listing Brian Murdock as Debbie Farrell's common-law partner were prepared by him. The RT made negative credibility findings against Debbie Farrell on the basis of inconsistencies in her testimony, and because she had no explanation for her "illegal occupation" of the Murdock family home after the death of Brian Murdock.

[18] In contrast, the RT found the evidence of Brenda Murdock and Matthew Murdock to be consistent and reliable. The RT stated that it preferred their evidence, including the hearsay evidence of neighbours that was submitted, over the evidence of Debbie Farrell.

[19] The RT allowed the appeal, concluding:

We find a lack of credibility on the part of Ms. Farrell. That, combined with a complete lack of independent documentation to establish that Ms. Farrell and Mr. Murdock cohabited for the required period of one year as set out in the CPP, means that Ms. Farrell has failed to meet the onus of proof. Ms. Farrell has failed to

establish, on a balance of probabilities that she falls within the definition of a common-law spouse under the provisions of the CPP.

Conversely, we find that Mrs. Murdock has, on a balance of probabilities, shown that Ms. Farrell and Mr. Murdock did not cohabit in a relationship as required by the CPP.

We, therefore, find that Mrs. Murdock is entitled to survivor benefits and that Ms. Farrell is not.

[20] Pursuant to s. 83(1) of the Act, Debbie Farrell sought leave to appeal the negative RT decision to the Pension Appeals Board. Justice Binks was designated to exercise the duties under the Act to grant or refuse the leave request.

[21] Justice Binks refused Debbie Farrell's leave to appeal the decision of the RT to the PAB. Section 83(3) of the Act requires written reasons where leave to appeal is refused.

Justice Binks' reasons are reproduced, in full, below:

[1] It does not appear to me that Debbie Farrell has an arguable case (except in a superficial way) that she is entitled to the survivor benefits of Brian Murdock.

[2] The Tribunal has carefully analyzed the evidence before it which can reasonably lead only to the conclusion that Brenda Murdock is entitled to the survivor benefits.

[3] Debbie Farrell's application is accordingly dismissed.

[22] It is from this decision that judicial review is sought.

ISSUES

[23] The Applicant raises the following issues:

1. Whether the designated member erred by applying the wrong legal test?

2. Whether the designated member erred in concluding that the Applicant had not established an arguable case?

[24] Brenda Murdock was not represented in this proceeding. She provided a letter from her family physician stating that it would be too stressful for her to participate further in the process. She submitted a letter to the Court stating that she did not want her non-participation to be viewed as non-opposition to Debbie Farrell's claims, which she strenuously opposes.

[25] Debbie Farrell represented herself in this application; however, just prior to the hearing, the Court received a letter from Charles R. Davidson, a barrister and solicitor in Guelph, Ontario, wherein he informed the Court that Debbie Farrell wished him to appear with her to assist her and, with the permission of the Court, to speak on her behalf. Counsel for the Attorney General of Canada indicated that he did not oppose this request provided Mr. Davidson was bound by the arguments set out in the Applicant's memorandum. The Court granted Mr. Davidson permission to speak on behalf of Debbie Farrell. I would be remiss if I did not mention that his submissions proved helpful to the Court and that counsel for the Attorney General showed appropriate professionalism in the manner in which she dealt with this request.

ANALYSIS

[26] In *Callihoo v. Canada (Attorney General)* (2000), 190 F.T.R. 114 at para. 15 (T.D.), Justice MacKay set out the appropriate issues requiring determination in an application for leave to appeal a decision to the PAB:

... [T]he review of a decision concerning an application for leave to appeal to the PAB involves two issues,

1. whether the decision maker has applied the right test - that is, whether the application raises an arguable case without otherwise assessing the merits of the application, and
2. whether the decision maker has erred in law or in appreciation of the facts in determining whether an arguable case is raised. If new evidence is adduced with the application, if the application raises an issue of law or of relevant significant facts not appropriately considered by the Review Tribunal in its decision, an arguable issue is raised for consideration and it warrants the grant of leave.

[26] Beyond the allowance for new evidence, which is permitted on the grounds that the appeal at the PAB is a trial *de novo*, the review of leave decisions in these circumstances is not unlike the review of other administrative decisions. Questions regarding whether the correct test was applied are legal questions, and therefore reviewed on a standard of correctness. Questions regarding whether the facts were appropriately assessed are questions of mixed fact and law, and therefore reviewed on a standard of reasonableness: *Mcdonald v. Canada (Minister of Human Resources and Skills Development)*, 2009 FC 1074, at para. 6.

[27] The Federal Court of Appeal has held that the discretionary decision to grant or refuse leave in these cases attracts a high level of deference on judicial review: *Upshall v. Canada (Attorney General)*, 2009 FCA 284, at para. 19.

Whether there was an error in applying the wrong legal test?

[28] The Applicant made no oral submissions at the hearing on this ground of review. In my view, the decision of Justice Binks is not assailable on the basis that he applied the wrong test.

[29] The Applicant contends that Justice Binks elevated the legal test to a standard higher than that of an arguable case. She argues in her memorandum that Justice Binks applied the wrong legal test by evaluating the merits of her appeal rather than assessing whether it amounted to an arguable case. She submits that this error is evident in the statement: “It does not appear to me that Debbie Farrell has an arguable case (except in a superficial way) that she is entitled to the survivor benefits of Brian Murdock”.

[30] “On a leave application, the PAB must determine whether there is some arguable ground on which the appeal might succeed. It should not decide whether the applicant could actually succeed”: *Canada (Attorney General) v. Pelland*, 2008 FC 1164, at para. 8. The Applicant submits that this is exactly the approach that was wrongly taken by Justice Binks.

[31] Justice Binks explicitly stated that the Applicant’s submissions did not amount to an arguable case “except in a superficial way”. His use of the parenthetical words “except in a superficial way” is unfortunate and complicates the analysis as these additional words raise the question of whether a superficial argument may amount to an arguable case.

[32] In *Quinteros v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 643, at para. 13, I stated, in the context of an application for a stay of a removal order that one must take care to distinguish between a truly arguable case and one that merely has the appearance of so being:

The threshold cannot automatically be met simply by formulating a ground of judicial review which, on its face, appears to be arguable. It is incumbent on the Court to test the grounds advanced against the impugned decision and its reasons, otherwise the test would be met in virtually every case argued by competent counsel.

[33] In stating that the Applicant did not have “an arguable case (except in a superficial way)”, Justice Binks, in my view, did not elevate or replace the arguable case standard. He was simply stating that it was plain and obvious to him, based on the evidence, that the Applicant would have no reasonable chance of succeeding. This is supported by the statement that follows the impugned comment, where he states, “the evidence...can reasonably lead only to the conclusion that Brenda Murdock is entitled to the survivor benefits” (emphasis added).

[34] Therefore, I find that Justice Binks applied the correct legal test.

Whether it was unreasonable to conclude that the Applicant had not established an arguable case?

[35] The Applicant contends that she had three valid arguments that amounted to an arguable case: (1) that the RT misapplied the legal test for determining spousal status, (2) that the RT based its conclusion on an erroneous credibility finding, and (3) that the RT

improperly weighted or failed to consider all of the evidence. The Applicant submits, by implication, that Justice Binks' conclusion on the arguable nature of these contentions was unreasonable.

[36] The Respondent argues that the RT reasonably applied the test for presence of a common-law relationship developed in *Betts*. The Respondent contends that the finding of no available evidence to support an arguable case was open to Justice Binks and that his conclusion in this respect was reasonable. The Respondent submits that the RT did consider much of the evidence that formed the basis for the Applicant's appeal, and that the mere existence of new evidence does not necessarily warrant granting leave to appeal if the new evidence does not raise doubt on the original RT decision.

[37] Justice Binks concluded that the Applicant did not have an arguable case because the RT "carefully analyzed the evidence before it which [could] reasonably lead only to the conclusion that Brenda Murdock is entitled to the survivor benefits". His reasons are short, and the justification of a finding of no arguable case rests solely on his conclusion that the evidence could not reasonably lead to the conclusion that the Applicant was in a common-law relationship with Brian Murdock.

[38] Given the plethora of conflicting evidence, Justice Binks' conclusion was insufficiently justified, and is therefore unreasonable.

[39] Unless relevant, the PAB need not mention or discuss every piece of evidence before it: *Litke v. Canada (Minister of Human Resources and Social Development)*, 2008 FCA 366. Likewise, the existence of new evidence does not immediately mean that leave to appeal must be granted. The new evidence must have sufficient probative value to cast doubt on the RT decision, thereby necessitating that it be addressed by the PAB when considering whether or not to grant leave to appeal: *Roy v. Canada (Minister of Human Resources and Skills Development)*, 2009 FC 312; *Kerth v. Canada (Minister of Human Resources Development)* (1999), 173 F.T.R. 102 (T.D.). I agree with the Respondent that the new evidence in this case is not of such a probative nature that it ought to have been mentioned by Justice Binks. Nonetheless, I am of the opinion that there was substantial evidence in the record before the RT that makes the finding that Debbie Farrell had no arguable case, an unreasonable finding. I will mention only the most significant.

[40] The RT rejected a letter supporting the Applicant's claim to be the common-law spouse of Brian Murdock because it viewed it as "suspicious" given the fact that mail was sent to its author Janice Choudry at the Brian Murdock's Riverview Drive address at a time when the RT said that she had no right to be in the property; however, the record discloses that Janice Choudry and her husband had been tenants at that address. Had this been considered by the RT this could remove any suspicion it had. Once the basis for the suspicion is removed, the letter should be given appropriate weight as evidence.

[41] There were letters before the RT from Supervisors and Child Protection Workers of Family and Children's Services of Guelph and Wellington County, and from workers who

examined Nicole after her birth, stating that they observed Brian Murdock and Debbie Farrell living together at her residence in Guelph both prior to and subsequent to the birth of Nicole, and that the couple had plans to relocate from Guelph to his residence in Cambridge at some point in the future. This evidence from independent third parties was conceded by the RT as supporting that Debbie Farrell and Brian Murdoch were a family unit but it was otherwise given little weight by the RT because it said that the letters were obtained at the request of Ms. Farrell and were written several years after the fact. These letters, and other evidence tendered before the RT, strongly supported the Applicant's position and, frankly, the basis on which they were rejected seems to me to be arbitrary and unprincipled. Evidence is always solicited by one party or the other. This can form no reason for rejecting it as evidence. Further, in the circumstances of an unexpected death, it is not at all surprising that the letters would be dated after the events recited therein. These letters were from professionals with no interest in the matter at hand and were entitled to greater consideration than was given.

[42] Also relevant and not referred to by the RT is the fact that these professionals state that Brian Murdock was observed living in Guelph and not at his residence in Cambridge; this evidence contradicts the testimony of Brenda Murdock and Matthew Murdock. This evidence, coupled with the evidence that there was no hydro service to Brian Murdock's residence in Cambridge, should have caused the RT to at least question their evidence. Is it reasonable that a man would choose to live at a residence with no hydro rather than live with his friend, to choose a neutral word, at her house with their child? I would add that there is

other significant evidence that, if believed, would support that Brian Murdock was not residing at his residence in Cambridge but in Guelph with Debbie Farrell.

[43] It is also evident that the RT gave virtually no weight to evidence that supported that Brian Murdock accepted that he was the biological father of Nicole. There is a baptismal certificate that supported this claim as well as the previously referenced reports of social workers. These, it appears, were rejected because they were not in his hand. What baptismal certificate is in the hand of the parent? If a man admits to a priest that he is the father of the child and attends at the baptismal, is this not deserving of some weight?

[44] Further, it is asserted by the RT, incorrectly in my view, that there is nothing in his hand that showed him accepting that he was in a common-law relationship with Debbie Farrell. There was before the RT a “Consent to Surgical, Diagnostic or Medical Procedure Form” from Guelph General Hospital with reference to Debbie Farrell’s caesarean procedure, relating to the birth of Nicole, that purports to be signed by Brian Murdock as the “person legally authorized to give consent on behalf of the patient” Debbie Farrell on which he is described as her “common law husband”. If he did not purport to the hospital to being in that relationship to her then on what basis did the Hospital accept that he could give consent on her behalf?

[45] The Minister conducted a thorough field investigation and documentation review, and concluded that the Applicant and Brian Murdock were indeed in a common-law relationship at the time of his death. The Minister was represented at the RT and reiterated

this submission. The Minister recognized that there was conflicting evidence, but nonetheless concluded that a common-law relationship existed. The Applicant had evidence that would support the conclusion that she was in a common-law relationship with Brian Murdock, as indicated above, most notably letters from social services agencies personnel that indicated that Brian Murdock was present at the time of home visits, and that he was the biological father to one of the Applicant's children and an effective parent to the other, and that they had plans to move from Guelph to his residence together as a family. The RT, composed of three members, examined the same evidence and reached the opposite conclusion, despite its finding that Brian Murdock had some sort of relationship with the Applicant and a parental relationship with her two children.

[46] The Minister's position belies the conclusion that one could not reasonably reach the finding based on the evidence that a common-law relationship existed between Brian Murdock and the Applicant. To hold otherwise would require a finding that the Minister's assessment was perverse; it was not. Justice Binks obviously preferred the conclusion of the RT over the conclusion of the Minister, but he provided no reasons as to this preference. This omission results in a decision that is insufficiently justified, and is therefore unreasonable.

[47] Additionally, there are issues with the RT's negative credibility finding, upon which its conclusion regarding the existence of a common-law relationship largely rests. The RT made a negative credibility finding against the Applicant, largely on the basis of her inability or unwillingness to answer questions regarding events that transpired *after* the death of Mr.

Murdock. These questions were irrelevant to the issue before the RT and had nothing to do with the application of the *Betts* factors. The RT then inappropriately used this negative credibility finding to discount the Applicant's testimony on cohabitation with Brian Murdock.

[48] The RT appears to have been overly focused on the personal characteristics of the Applicant. The Applicant is not a model citizen. Like Brian Murdock, the Applicant struggles with drug addiction. The Applicant could not fulfill her parenting responsibilities, and her children were taken from her care by the Children's Aid Society. There is evidence from Brenda Murdock and her son that suggests that the Applicant acted in an unscrupulous manner after the death of Mr. Murdock, and that she may have participated in the illegal disposition of assets within the Murdock family residence. The Applicant, by her own evidence, does not work, and her sole source of income was the CPP survivor benefits of Brian Murdock.

[49] However, the question before the RT was not whether the Applicant is a good person or whether she behaved in an appropriate manner. Nor was the question before the RT whether Brenda Murdock was more deserving of her husband's CPP survivor benefits than the Applicant. The sole question was whether Brian Murdock and Debbie Farrell were in a common-law relationship for at least one year prior to his death. Justice Binks decision that the evidence can lead to only one conclusion is unreasonable and must be set aside.

CONCLUSION

[50] This application is allowed. The Applicant's application for leave to appeal is remitted back to the PAB for redetermination by a different Member. No costs are ordered.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review of the decision of the Pension Appeals Board dated December 5, 2008, dismissing the Applicant's application for leave to appeal is granted.
2. The Applicant's application for leave to appeal the decision of the Review Tribunal dated August 7, 2008, to the Pension Appeals Board is remitted back to the Pension Appeals Board for redetermination by a different Member; and
3. No costs are ordered.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-100-09

STYLE OF CAUSE: DEBBIE FARRELL v. ATTORNEY GENERAL OF CANADA and BRENDA MURDOCK

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 11, 2010

REASONS FOR JUDGMENT AND JUDGMENT: Zinn J.

DATED: January 13, 2010

APPEARANCES:

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Tania Nolet	FOR THE RESPONDENT The Attorney General of Canada
No appearance	FOR THE RESPONDENT Brenda Murdock

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