Federal Court  Cour fédérale

Date: 20100118

Docket: T-943-09

Citation: 2010 FC 48

Montréal, Quebec, January 18, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ROSE MARLENE MONK

Applicant

and

ATTORNEY GENERAL
FOR CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] In 2006, Marlene Monk applied for a disability pension under the *Canada Pension Plan.* One of the benefits of the *Plan* is that workers who have made contributions thereto from their earnings are entitled to a disability pension should they become disabled, even if the disability is not work related. In order to qualify Ms. Monk was required to have sufficient earnings and to make contributions thereon "…for at least four of the six calendar years prior to the onset of the disability" (section 44 of the *Plan*). This "minimum qualifying period" expired in December 2001.

[2] Thus the prime question was not whether Ms. Monk was disabled in 2006, but rather whether the onset of her disability related back to 2001. Her application was dismissed. She was entitled to and did ask for reconsideration.

[3] Although the Review Tribunal found that she had a prolonged disability as defined by subsection 42(2)(*a*)(ii) of the *Plan*, and that her condition appears to be ongoing and indefinite, that was not the situation at the time of her "minimum qualifying period," December 2001. It was held that she did not have sufficient earnings and contributions in four of the last six years leading up to her disability, and so her appeal was dismissed.

[4] The next step is an appeal to the Pension Appeals Board, provided that leave to appeal has been granted by a designated member thereof. If leave is refused, section 83 of the *Plan* requires the decision maker to give reasons. Leave was refused. This is a judicial review of that decision. Ms. Monk's case is two-pronged. She submits that the reasons given were inadequate, and in any event were unreasonable.

THE FACTS

[5] Ms. Monk worked steadily from 1992 to 1999 at an annual salary which ranged from $18,000 to $22,000. Her record of earnings shows no income for the years 2000 and 2001, and in 2002 her income was under the basic exemption. In 2003, her income was some $21,000 and in 2004 some $15,000. Her employment history was set out in the decision of the Review Tribunal, the decision on which leave to appeal was sought, and need not be repeated in detail, save to say that in 2001 and 2002 she was employed by the Kamloops Indian Band which did not, and in law was not

obliged, deduct CPP contributions from her earnings. When she applied for her disability pension and became aware of the non-payment she attempted to file an election to pay CPP for those years. However the Canada Revenue Agency ruled that she was out of time. That decision is not before this Court. Thus, the requirement to make contributions in four of the last six calendar years before the onset of disability demands the onset to have occurred by December 2001.

[6] The Review Tribunal held that she was not disabled at that time. It relied strongly upon the income she earned in 2003 and 2004, which was consistent with her earlier earnings.

[7] In her application for leave to appeal that decision, Ms. Monk referred to ongoing regular surgeries which she requires and attempted to characterize her earnings in 2003 and 2004 as a failed attempt to work. She also downplayed the fact that from 2004 to 2006 she received employment insurance, to which a person is not entitled unless she declares that she is ready, willing and able to work.

THE DECISION UNDER REVIEW

[8] Leave was refused by the Honourable Pierre Mercier, a retired Superior Court Judge. His reasons are short and are set out in full:

> [1] There is no doubt the evidence establishes the Appellant was not disabled as of her minimum qualifying period (M.Q.P.) of December 2001. Neither is there any doubt that the Appellant was disabled at the time of the hearing before the Review Tribunal.
>
> [2] The sole question left to be determined is whether the earnings of $21,000+ in 2003 and of $15,000+ in 2003 and of $15,000+ in 2004 can be treated as a failed attempt to return to work in which event she could qualify for disability benefits as of her aforementioned M.Q.P.

> [3] The income earned in 2003 and 2004 compares favourably to the income earned by the Appellant while she was working full-time from 1992 to 1999 and that fact, considered with the length of time worked by her in 2003 and 2004, leaves the Appellant with no arguable case that the employment in 2003 and 2004 can be considered merely as a failed attempt to return to work.
>
> [4] Leave to appeal is refused.

DISCUSSION

[9] The standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). As applied to this case, were the required reasons given in refusing leave comprehensible to the unsuccessful applicant and to the reviewing court? (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869) Furthermore, the decision would not only be unreasonable, but also incorrect, if the wrong test was applied in determining whether or not leave should be granted. Leave should be granted if the application raises an arguable case. Otherwise, the merits are not to be assessed. Ms. Monk was entitled to, but did not, raise new facts in her application for leave. Therefore, in review, I have to determine whether the decision maker erred in law or in appreciation of the facts in determining no arguable case was raised (*Callihoo v. Canada (Attorney General)* (2000), 190 F.T.R. 114).

[10] In my opinion, there is no basis for setting aside the decision to refuse leave. The reasons therefore are to be read in conjunction with the underlying decision. There was absolutely no medical evidence that Ms. Monk was unable to work in December 2001, the "minimum qualifying period," and there was no basis for arguing that her earnings in 2003 and 2004 should not be considered as evidence of her ability to work. The parties were unable to find any case law dealing with the concept of a failed attempt. It is not necessary, and it would inappropriate for me to attempt

to draw a firm demarcation line, which in any event would have to be dependent on the facts of particular cases. No doubt a return to work which only lasted a few days would be a failed attempt. However, two years of earnings consistent with what had been earned before cannot be a failed attempt.

[11] For these reasons the application for judicial review shall be dismissed. The Attorney General did not seek costs and none shall be granted.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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