

Date: 20090226

Docket: A-100-08

Citation: 2009 FCA 56

**CORAM: DÉCARY J.A.
BLAIS J.A.
SHARLOW J.A.**

BETWEEN:

**JAGMOHAN SINGH GILL
SHATRU GHAN**

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 18, 2009.

Judgment delivered at Ottawa, Ontario, on February 26, 2009.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

**DÉCARY J.A.
BLAIS J.A.**

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal of the judgment of Justice Hugessen (2008 FC 185) dismissing the action of Mr. Jagmohan Singh Gill and Mr. Shatru Ghan for a declaration that section 12.1 of the *Public Service Superannuation Regulations*, C.R.C. c. 1358 (the PSSR) violates subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the Charter), and for certain other remedies.

[2] Most full time employees of the public service of Canada are entitled to retirement pensions under the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36. Broadly speaking, pensionable

service under that Act is employment during a period in which an employee is required to contribute to the federal government superannuation fund. However, pension benefits are not determined by reference to those contributions. Rather, the public service superannuation plan is a defined benefit plan in which the benefits are determined by a formula. The basic formula for a retirement pension is 2% per year of pensionable service (to a maximum of 35 years) multiplied by the average of the best five consecutive years of salary.

[3] There is no mandatory retirement age for employees of the federal public service. However, it is not possible for a person to achieve 35 years of pensionable service without commencing federal government employment at approximately age 36. This is because section 12.1 of the PSSR provides that an employee of the federal public service cannot make contributions to the federal government superannuation plan after December 31 of the year in which the employee attains 71 years of age.

[4] Mr. Gill and Mr. Ghan joined the federal public service in 1969 and 1973 at the age of 39 and 45, respectively. They both continued to work past the age of 71. They were both subject to section 12.1 of the PSSR, which meant that although they have both been employed full time in the federal public service for 35 years or more, they can never become entitled to a retirement pension based on 35 years of service. They argue that section 12.1 of the PSSR causes them to receive less by way of retirement pension than younger federal government employees with equivalent years of service, and that this amounts to discrimination based on age, contrary to the Charter.

[5] For the purposes of this appeal, I accept as correct the “comparator group” determined by Justice Hugessen, namely, public service employees who joined the public service at such an age that they can still provide 35 years of service before reaching the age of 71. Mr. Gill and Mr. Ghan argued that Justice Hugessen chose the wrong comparator group. However, I am not persuaded that their case would be improved by their choice of comparator group, “public service lawyers under the age of 71 who have coverage under the *Public Service Superannuation Act* and the PSSR”.

[6] The record is not clear on the quantum of the financial loss anticipated by Mr. Gill and Mr. Ghan. However, the Crown has not suggested that the absence of that evidence should be fatal to their claim. For the purposes of this appeal, I am prepared to assume without deciding that Mr. Gill and Mr. Ghan will be financially disadvantaged by the fact that their years of pensionable service will necessarily be less than the maximum of 35 years, in that the retirement pension they are entitled to receive will be less than it would have been if section 12.1 of the PSSR had not been enacted. Mr. Gill and Mr. Ghan have the advantage of a cessation of pension contributions for their years of employment after the age of 71 years, but again I will assume without deciding that the cessation of pension contributions will not offset the assumed net loss of pension benefits.

[7] It follows that I agree that Mr. Gill and Mr. Ghan have established that, because of section 12.1 of the PPSR, they will be treated less advantageously, in financial terms, than federal public employees comprising the comparator group, and that the difference in treatment will be based on their age. However, the difference in treatment by itself cannot establish a Charter claim based on age discrimination. It is necessary to consider the factors enumerated in *Law v. Canada (Minister of*

Employment and Immigration), [1999] 1 S.C.R. 497, as recently explained in *R. v. Kapp*, 2008 SCC 41, in order to determine whether the difference in treatment based on age amounts to age discrimination.

[8] Justice Hugessen found that all of the contextual factors from *Law* favoured the position of the Crown that the difference in treatment resulting from section 12.1 of the PSSR does not amount to age discrimination. I agree substantially with his analysis, which I need not repeat. In my view, his reasoning is not undermined by his reliance on the portions of *Law* that refer to “human dignity”, an element of the contextual factors analysis that is somewhat discounted in *Kapp*.

[9] I will say only that, in my view, the most important factor in the context of this case is that section 12.1 of the PSSR neither causes nor perpetuates any adverse effect on persons over the age of 71 on the basis of any negative stereotyping of older people or, more importantly, older workers.

[10] On the contrary, section 12.1 of the PSSR was put in place as one aspect of the federal government’s policy to conform the public service superannuation plan to other legislation governing Canada’s income retirement system, especially the provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and *Income Tax Regulations*, C.R.C., c. 945, which set out the requirements for the registration of pension plans administered by employers other than the federal government. The restriction in section 12.1 of the PSSR reflects the same restriction found in clause 8502(e)(i)(A) of the *Income Tax Regulations*, which provides that, for persons who are beneficiaries

of pension plans other than the public service superannuation plan, pension contributions must cease at age 71. The validity of this provision has not been challenged in this case.

[11] For these reasons, I would dismiss this appeal with costs, which the parties have agreed should be set at \$3,000 inclusive of disbursements.

“K. Sharlow”

J.A.

“I agree.
Robert Décary J.A.”

“I agree.
Pierre Blais J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-100-08

STYLE OF CAUSE: JAGMOHAN SINGH GILL,
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BLAIS J.A.

DATED: February 26, 2009

APPEARANCES:

Jagmohan Singh Gill
Shatru Ghan

FOR THE APPELLANTS
(On their own behalf)

Elizabeth Richards

FOR THE RESPONDENT

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