Federal Court  Cour fédérale

Date: 20141208

Docket: T-1288-14

Citation: 2014 FC 1179

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 8, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SERGE DESCHÊNES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision dated April 25, 2014, by the Department of Public Works and Government Services [Department] wherein it was determined that the applicant's period of service with the Government of Quebec, between October 6, 1986, and April 1, 1990, was not valid for the purposes of a service buyback.

[2] The impugned decision was made under the authority of clauses 6(1)(*b*)(iii)(F) and (K) of the *Public Service Superannuation Act*, RSC 1985, c P-36 [Act], which state:

6. (1) Subject to this Part, the following service may be counted by a contributor as pensionable service for the purposes of this Part:	**6**. (1) Sous réserve des autres dispositions de la présente partie, le service qui suit peut être compté par un contributeur comme service ouvrant droit à pension pour l'application de la présente partie :
[…]	[…]
(*b*) elective service, comprising,	*b*) le service accompagné d'option, comprenant :
[…]	[…]
(iii) with reference to any contributor,	(iii) relativement à un contributeur :
[…]	[…]
(F) any period of service in pensionable employment immediately prior to becoming employed in the public service, if he elects, within one year of becoming a contributor under this Part, to pay for that service,	(F) toute période de service dans un emploi ouvrant droit à pension, immédiatement avant de devenir employé dans la fonction publique, s'il choisit, dans le délai d'un an après qu'il est devenu contributeur selon la présente partie, de payer pour ce service,
[…]	[…]
(K) any period of service described in this paragraph, except a period described in clause (M) or (N), for which the contributor might have elected, under this Part, Part I of the *Superannuation Act*, the *Canadian Forces Superannuation Act*, the *Royal Canadian Mounted Police*	(K) toute période de service décrite au présent alinéa — sauf si elle est visée à la division (M) ou (N) — pour laquelle il aurait pu choisir, selon la présente partie, la partie I de la *Loi sur la pension de retraite*, la *Loi sur la pension de retraite des Forces canadiennes*, la *Loi sur la*

Superannuation Act or any order in council made under *The Canadian Forces Act, 1950*, as amended by the *Canadian Forces Act, 1954*, to pay, but for which the contributor failed so to elect within the time prescribed therefor, if the contributor elects, at any time before ceasing to be employed in the public service, to pay for that service	*pension de retraite de la Gendarmerie royale du Canada* ou tout décret pris en vertu de la *Loi de 1950 sur les forces canadiennes*, modifiée par la *Loi de 1954 sur les forces canadiennes*, de payer, mais pour laquelle il a omis de faire un choix dans le délai imparti à cette fin, s'il opte, à tout moment avant de cesser d'être employé dans la fonction publique, de payer pour ce service
[Emphasis added.]	[soulignements ajoutés]

[3] On November 21, 2009, the applicant submitted an application to buy back the years of pensionable service in pensionable employment for the Government of Quebec he could have counted by participating in the Government and Public Employees Retirement Plan. The dispute between the parties relates to the date on which the applicant ceased to be in pensionable employment. Subsection 13(3) of the *Public Service Superannuation Regulations*, CRC, c 1358 [Regulations] specifies that the period of service in pensionable employment shall not, in any case, be deemed to be immediately prior for the purposes of clause 6(1)(*b*)(iii)(F) of the Act if the contributor became employed in the public service after two years from the time he ceased to be employed in pensionable employment.

[4] The applicant has been a federal public servant since February 1, 1993. Prior to that, the applicant had worked for the Government of Quebec between October 6, 1986, and April 30, 1989, while on March 31, 1989, he was permitted to take two years' leave without pay to start a business – namely, from May 1, 1989, to May 1, 1991. During his years of service as a

provincial public servant, the applicant contributed to the Government and Public Employees Retirement Plan for the period from October 6, 1986, to April 1, 1990. This plan is administered by the Commission administrative des régimes de retraite et d'assurance du Québec [CARRA]. The applicant did not return to his employment with the Government of Quebec on May 1, 1991.

[5] If the applicant had ceased to be an employee of the Government of Quebec on the last date on which CARRA indicates that he was considered to be in service, namely, April 1, 1990, a period of more than two years passed after he had ceased to be in pensionable employment. However, if the applicant had ceased to be an employee of the Government of Quebec at the end of the leave without pay that was granted to him, namely, May 1, 1991, two years would not have passed and the period of employment with the Government of Quebec could be deemed to be immediately prior. In the second scenario, the applicant would have been able to buy back the period of service from October 6, 1986 to April 30, 1989, while in the first, the option exercised was invalid and his buyback application could not be approved by the Minister.

[6] In addition to requesting that the impugned decision be set aside, the applicant now wants the Court to order the Department to recognize the applicant's service during the period from October 6, 1986 to April 30, 1989 as being pensionable, as the Department had allegedly recognized in a decision dated December 15, 2010. The respondent vigorously disputes the applicant's claims. I am satisfied in this case that a reasonableness standard of review applies to questions of fact and to questions of mixed fact and law, which are in issue here: *Public Service Alliance of Canada v Attorney General of Canada*, 2008 FC 474 at para 18, affirmed by 2009 FCA 6 at para 6; *Nash v Canada (Attorney General)*, 2013 FC 683 at para 15.

[7] This application for judicial review must fail.

[8] To begin with, the fact that the applicant started making monthly contributions as of November 2009, created no legitimate expectation that the buyback application would ultimately be accepted by the Minister. First, the service buyback is only valid if the applicant successfully undergoes a medical examination. Second, following the receipt of the first monthly payment of $788.62, in November 2009, it was clearly indicated in the letter dated December 10, 2009, that the Department sent to the applicant to acknowledge receipt of the *Election Form for Elective Pensionable Service* (PWGSC 3006) [buyback application] that "we must still determine the validity of your service buyback" and that " [o]nce all the requirements of your service buyback have been met, we will provide you with the Service Buyback Notice (PWGSC 2097).

[9] The applicant claims that the Department had already ruled in his favour, and that it did so in a definitive manner, on December 15, 2010. He relies on an email sent to him by an employee of the Department that states, in particular:

> [translation]
> Time credited with CARRA and therefore pensionable with the public service: October 6, 1986, to April 30, 1989.
>
> Leave without pay from May 1, 1989, to May 1, 1991, not credited with CARRA, therefore not pensionable.

[10] According to the applicant, the December 15, 2010, e-mail amounts to a "decision" that expressly recognized the right to buy back the years of service for the period from October 6, 1986, to April 30, 1989. This must mean that the Department implicitly recognized the validity of the buyback option. The applicant further claims that the interpretation of the

wording "immediately prior" in clause 6(1)(*b*)(iii)(F) of the Act is discretionary, and given that the December 15, 2010, e-mail is a "decision", the Minister's discretion to make a decision was therefore spent according to the so-called *functus officio* doctrine. The impugned decision dated April 25, 2014, was therefore made without jurisdiction, while the doctrine of estoppel (if not that of legitimate expectation) means that the December 15, 2010, decision must be restored, which the respondent naturally disputes.

[11] In this case, the December 15, 2010, e-mail is not a [TRANSLATION] "final decision". The doctrine of estoppel does not apply. The Department's conduct created no legitimate expectation and the Department had ample jurisdiction to issue the impugned decision, dated April 25, 2014, which constitutes an acceptable outcome in light of the applicable law and the evidence in the record.

[12] First, it is clear that we are not dealing with the exercise of discretion. Clause 6(1)(*b*)(iii)(F) of the Act and subsection 13(3) of the Regulations set out precise conditions that must be met in order for a service buyback to be legally valid. These provisions grant no discretion to the decision-maker. Moreover, subsection 13(3) of the Regulations clearly states that a period of service having ended more than two years before the start of a contributor's employment in the public service shall not "in any case" be deemed to have been "immediately prior" for the purposes of clause 6(1)(*b*)(iii)(F). The Department therefore has an obligation to ensure that the pre-determined standard in the Act and Regulations are met in this case.

[13] Second, the December 15, 2010, e-mail is not a final decision. The applicant was given advance notice in writing that when his buyback application was processed, he would receive a *Service Buyback Notice* (TPSGC 2097). The December 15, 2010, e-mail merely provides information in a process that was still ongoing and that had not been completed – as is demonstrated by the employee's statement to the effect that a request for the applicant's service would be made to the Armed Forces in the event the new rules applied.

[14] In addition, on September 17, 2013, the buyback application was sent to the Pension Centre's Audit Section which, on September 24, 2013, issued a quality control observation indicating that CARRA documents showed that the applicant had ceased employment on April 1, 1990, and not on May 1, 1991, as the applicant had previously indicated. The service buyback was therefore invalid because the applicant's period of service with the Government of Quebec had ended more than two years before the start of his service with the federal public service.

[15] Before issuing the impugned decision dated April 25, 2014, the decision-maker diligently sought clarifications from the applicant or documents that could corroborate his claim that he had in fact ceased employment on May 1, 1991, rather than on April 1, 1990, as was indicated by the CARRA. Thus, on November 28, 2013, an employee of the Pension Centre e-mailed the applicant requesting that he submit documentation showing his date of resignation from the Government of Quebec. On April 11, 2014, a Pension Centre employee spoke with the applicant by telephone and requested that he provide a letter or a confirmation of the actual date on which he ceased his employment at the Government of Quebec. According to the notes of the Pension

Centre employee, the applicant told him that the information was in the file, that he had taken all possible measures, and that he would contact neither the Government of Quebec nor the CARRA.

[16] In this case, the impugned decision is reasonable and is based on the evidence in the record. The fact that the applicant was granted two years of leave without pay on March 31, 1989, does not, in and of itself, prove that he effectively ceased to be in the employ of the Government of Quebec on May 1, 1991, because he could very well have tendered his resignation before the end of his leave without pay. While it is true that the first part of the *Pensionable Employment Questionnaire* completed by the applicant indicates May 1, 1991, as the date on which he ceased employment, the second part of the same questionnaire completed by the CARRA, as well as the letter from the CARRA dated October 13, 2010, indicate that the date on which he ceased employment was April 1, 1990.

[17] In conclusion, based on the information contained in the record, it was therefore reasonable for the decision-maker to conclude that the date on which the applicant ceased his employment was April 1, 1990, and therefore a period of more than two years had passed between the end of the applicant's employment with the Government of Quebec and the beginning of his employment with the federal public service.

[18] For these reasons, the application for judicial review will be dismissed. Given the outcome, the respondent is entitled to costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs.

"Luc Martineau"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1288-14
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