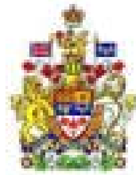
Federal Court of Appeal



Cour d'appel fédérale

Date: 20100603

Docket: A-322-09

Citation: 2010 FCA 148

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

SHARYL L. BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on June 1, 2010.

Judgment delivered at Vancouver, British Columbia, on June 3, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Ms. Sharyl Brown was diagnosed with a serious disease and was unable to work while she received treatment for her illness. She applied for employment insurance benefits and received sickness benefits for 15 weeks, the maximum period allowed by paragraph 12(3)(*c*) of the *Employment Insurance Act* S.C. 1996 c. 23 ("the Act"). She was found to be disentitled to regular benefits because she was not capable of and available for employment during her illness and period of treatment: see paragraph 18(*b*) of the Act. Ms. Brown appealed this disentitlement to the Board of Referees without success and then to the Umpire, again without success. She now seeks judicial review of the Umpire's decision by this Court.

[2] Ms. Brown does not challenge the Commission's application of the Act to her circumstances. Rather, she challenges the basic fairness of the law itself. In her view, the limitation of sickness benefits to 15 weeks is unfair because sickness arises from circumstances beyond a claimant's control and while other claimants who are unemployed due to circumstances beyond their control are entitled to benefits for 52 weeks, a claimant who is sick is only entitled to receive benefits for a period of 15 weeks. Had Ms. Brown had the benefit of legal representation, she would have characterized her complaint as a constitutional challenge to the validity of s. 12(3)(*c*) on the basis that it is discriminatory contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.

[3] There is no issue that the Act was properly applied to Ms. Brown and that her application must fail unless she is able to successfully challenge the constitutional validity of paragraph 12(3)(c) of the Act. The issue in this application for judicial review is whether she can do so.

[4] Before dealing with the merits, there are two preliminary matters to be dealt with. The first is the style of cause. Ms. Brown named Canada (Minister of Human Resources and Skills Development) as the respondent in her application for judicial review. The Attorney General of Canada appeared in response to the Notice of Application and seeks to have the style of cause amended to substitute the Attorney General of Canada for the Minister of Human Resources and Skill Development as the proper respondent. That request is consistent with the law and with the practice in the Federal Courts and will be allowed. Ms. Brown did not object to the change. The style of cause will be amended accordingly.

[5] The second preliminary matter deals with the notice of constitutional question filed by Ms. Brown, as required by section 57 of the *Federal Courts Act* R.S.C. 1985 c. F-7. The Attorney General challenges Ms. Brown's notice of constitutional question on the ground that it does not specify the time and place of hearing so that the various Attorneys General would not be in a position to appear in response to the application for judicial review should they wish to do so. For the reasons which follow, I am of the view that this argument, while technically correct, makes no difference to the outcome of the appeal.

[6] There is a longstanding principle that constitutional questions should not be decided except upon a full factual record. The rationale for this position was clearly articulated by Cory J. in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 as follows:

> 8 Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. … In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> 9 Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues.

[7] In this case, Ms. Brown did not appear at the hearing of the Board of Referees nor at the hearing before the Umpire. As a result, the only record before each tribunal was the documentary record compiled by the Commission together with certain written representations submitted by Ms. Brown. Those submissions raise obliquely the question of discrimination and constitutional validity but they do not establish any factual foundation which would permit a tribunal to properly adjudicate a constitutional challenge to the validity of the limitation on sickness benefits found at paragraph 12(3)(*c*) of the Act. Not surprisingly, given her lack of legal training, Ms. Brown has failed to provide a factual basis for her argument. One consequence of her failure to do so is that the Attorney General has been deprived of the opportunity to tender evidence on the question of whether, assuming a breach of section 15, the latter can be justified under section 1 of the Charter.

[8] For those reasons, this Court is not in a position to proceed with Ms. Brown's challenge to the constitutional validity of paragraph 12(3)(*c*). While it is true that her notice of constitutional question may be technically deficient, the real issue is that she has not put before the Court a factual record upon which a determination of constitutional validity could appropriately be made.

[9] For those reasons, I would dismiss the application for judicial review without costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-322-09
STYLE OF CAUSE:	SHARYL L. BROWN v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 1, 2010
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. STRATAS J.A.
DATED:	June 3, 2010

APPEARANCES:

Sharyl L. Brown	ON HER OWN BEHALF
François Choquette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT