

THE SUPERIOR COURT OVERTURNS THE DECISION OF THE COMMISSION DES LÉSIONS PROFESSIONNELLES: THE REDUCTION OF THE INCOME REPLACEMENT INDEMNITY AT AGE 65 IS NOT DISCRIMINATORY

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ON MARCH 18, 2010, THE COMMISSION DES LÉSIONS PROFESSIONNELLES ("CLP"), IN THE CASE OF *CÔTÉ ET TRAVERSE RIVIÈRE-DU-LOUP* (2010 QCCLP 2074), DECLARED INVALID SECTION 56 OF AN ACT RESPECTING INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES (THE "AIAOD"). IT FOUND THAT THE SECTION WAS DISCRIMINATORY BECAUSE IT CONTRAVENES WITH SECTION 10 OF THE *CHARTER OF HUMAN RIGHTS AND FREEDOMS* ("QUEBEC CHARTER") AND SECTION 15 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* ("CANADIAN CHARTER"). THIS DECISION WAS OVERTURNED BY THE SUPERIOR COURT.

Section 56 AIAOD provides for a reduction of the income replacement indemnity on the worker's 65th birthday or beginning in the second year following the date of the start of the disability where the employment injury occurs when the worker is 64 years of age or older.

The worker in this case was older than 64 years of age when he suffered an employment injury on November 29, 2007. The CSST reduced his income replacement indemnity by 25% as of November 29, 2008 under the second paragraph of section 56 AIAOD.

Through the judicial review process, the Commission de la santé et de la sécurité du travail ("CSST") and the Attorney General of Quebec asked the Superior Court to intervene because, in their view, the administrative judge made several errors in his analysis, particularly in concluding that section 56 AIAOD perpetuates prejudices and stereotypes.

The applicable standard of review in determining whether the judgment of the CLP was reasonable was that of correctness.

ANALYSIS OF THE SUPERIOR COURT

To resolve the issue in dispute, the judge, based on the decision by the Supreme Court in *Béliveau St-Jacques*, reviewed the purpose of the system created by the AIAOD. This system consists of a compensation fund created in accordance with insurance and liability principles. It is a no-fault liability system that prohibits any other recourse based on liability against the persons who caused the injury. Subsequently, relying on the decision in *Parent v. Viens*, the judge noted that the purpose of the income replacement indemnity is not to compensate for the loss of income but rather for the loss of earning capacity.

Citing the test in the case of *Law v. Canada* (hereinafter "*Law*"), the judge continued his analysis by referring to the principles that apply in assessing the merits of an allegation of discrimination: the complainant must show on the balance of probabilities that:

- 1) the impugned provision creates a distinction based on an enumerated or analogous ground;
- 2) the distinction creates a disadvantage by perpetuating a prejudice or applying stereotypes.

The judge found that the impugned provision undoubtedly makes a distinction based on age. However, he noted that one must avoid concluding that all distinctions constitute discrimination, as the Supreme Court of Canada recently reiterated on several occasions.

As for the second branch of the test, he referred to the four factors developed in *Law* for assessing whether the distinction is truly discriminatory: i) the existence of a pre-existing disadvantage; ii) the degree of correspondence between the difference in treatment and the actual situation of the claimant group; iii) the existence of an ameliorative purpose or effects; iv) the nature of the interest affected.

In analyzing the facts in this case, the judge determined the group with which the respondent (Mr. Côté) wished to be compared, namely "a worker aged at least 64 or who has reached 65, who is a victim of an employment injury as compared with another worker who has not reached this age." The judge held that Mr. Côté did not succeed in showing that section 56 AIAOD is discriminatory in relation to the comparison group in the absence of a pre-existing disadvantage.

Indeed, the evidence did not show that persons who are aged 64 or 65 years of age are, generally speaking, victims of a disadvantage. On the contrary, it showed that the majority of them are in fact retired and collect social pension benefits and old age pensions.

The judge also noted that the AIAOD often establishes distinctions based on age. As an example, he mentioned that when a worker is unable to perform his usual employment, the CSST will assign other suitable employment to him with any employer, but this analysis will not be the same once the worker has turned 60 years of age. Therefore, some distinctions confer a considerable advantage, although based on age.

In addition, the judge held that Mr. Côté was not able to show that the AIAOD did not take his true situation into account. Rather, the judge found that the aim of the impugned provision was to achieve an objective of the statute, namely the payment of income replacement indemnities. And, in his opinion, the effect of section 56 AIAOD, i.e. termination of the indemnity at age 65, is offset by the social programs such as old age security benefits, the Quebec Pension Plan, the Canada Pension Plan, etc. There was therefore no proof that the limit imposed by the AIAOD was unjustified.

Finally, the judge found that the only prejudice that was invoked, i.e. economic prejudice, was not real because, as noted above, it is offset by the social programs that take effect once section 56 AIAOD becomes applicable. Section 56 AIAOD is not discriminatory because it does not perpetuate any prejudices or stereotypes towards persons aged 65 and older. There is therefore no infringement of section 15(1) of the Canadian Charter.

With respect to the respondent's second allegation that section 56 AIAOD is contrary to section 10 of the Quebec Charter, the judge quickly put an end to the debate by citing the terms of section 10:

"Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap."

[emphasis added]

The legislative texts are clear and, therefore, no further inquiry is necessary. The AIAOD establishes a limit that is consistent with the text of the Quebec Charter. The judge therefore concluded that the CLP erred in holding that section 56 AIAOD contravenes section 10 of the Quebec Charter.

Accordingly, the judge quashed the decision of the CLP and declared that section 56 AIAOD does not contravene the Canadian and Quebec Charters. However, last March 29, the Court of Appeal granted the motion for leave to appeal filed by the respondent Côté (applicant before the CLP).

Please do not hesitate to contact one of the members of the labour and employment law team should you wish to obtain further updates on this case.

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