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THE COURT OF APPEAL CONFIRMS THAT A DISTINCTION BASED ON AGE PROVIDED FOR BY SECTION 56 OF THE AIAOD IS NOT DISCRIMINATORY

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On June 14, 2012, the Quebec Court of Appeal confirmed the validity of the second paragraph of section 56 of the *Act Respecting Industrial Accidents and Occupational Diseases*[1] (hereinafter the "AIAOD" or the "Act").[2] Although this paragraph establishes a distinction based on age, the Court of Appeal is of the opinion that it is neither invalid nor discriminatory. The Court came to this conclusion in particular because the appellant, Mr. Bernard Côté, a worker 64 years old at the time his employment injury occurred, had not shown that the application of this paragraph created a disadvantage resulting from treatment different than that reserved for younger workers.

The provisions of the AIAOD

The AIAOD provides its beneficiaries with the right to receive an income replacement indemnity if an employment injury renders them unable to carry on their employment.[3] The second paragraph of section 56 of the Act, the validity of which was contested by Mr. Côté, provides that a worker at least 64 years of age who suffers an employment injury sees his income replacement indemnity:

1) Reduced by 25% from the second year following the date of the beginning of his disability;
2) Reduced by 50% from the third year;
3) Reduced by 75% from the fourth year following that date; and
4) Extinguished from the earliest of the following events: when the worker is again able to carry on his employment, the death of the worker or, at the latest, four years after the date on which he became unable to carry on his employment.[4]

The decisions of the lower courts

At first instance,[5] the Commission des lésions professionnelles (hereinafter the "CLP") refused to apply section 56 of the AIAOD in Mr. Côté's situation as he would be deprived, due to his age (64 years old), of a benefit conferred by the Act on other younger workers. In its decision, the CLP concluded that section 56 provides for a distinction based on age and felt that the criterion set out in the provision (workers at least "64 years of age") contravened the Quebec and Canadian Charters of rights and freedoms which prohibit discrimination.[6] Thus, the CLP held that the Commission de la santé et de la sécurité du travail (hereinafter the "CSST") could not reduce the income replacement indemnity paid to Mr. Côté. His employment injury not being consolidated at the time of the hearing and in light of his presumed inability to carry on his employment as a result of this injury, Mr. Côté was entitled to receive the indemnity provided for by the Act.[7]

The Attorney General of Quebec and the CSST requested judicial review of the CLP's decision by the Superior Court. For his part, Mr. Côté asked the Superior Court to declare section 56 of the AIAOD invalid by operation of section 10 of the Quebec Charter and subsection 15(1) of the Canadian Charter. Essentially, Mr. Côté argued that the second paragraph of the provision is discriminatory due to the words "64 years of age" (distinction based on age). In a judgment rendered February 4, 2011,[8] the Superior Court quashed the judgment of the CLP. It was held that Mr. Côté failed to prove that he suffered a real disadvantage even if the application of the second paragraph of section 56 resulted in his indemnity being decreased by 25% from the second year following the date of the beginning of his disability. The Superior Court felt that, insofar as this is a criterion set out by the Act itself, it falls within the purview of the exception provided for in section 10 of the Quebec Charter by the words "except as provided by law".

Mr. Côté appealed the Superior Court's judgment but the Court of Appeal dismissed the appeal.

The Court of Appeal's judgment

Like the Superior Court, the Court of Appeal felt that Mr. Côté failed to prove that he suffered a disadvantage under the AIAOD as a result of being treated differently than younger workers.

Moreover, Mr. Côté could benefit from the protection granted to him by section 10 of the Quebec Charter only if he showed that the infringement of which he was a victim coincided with the infringement of a fundamental right or freedom set out in the Quebec Charter.[9] This was not proven. In addition, section 10 explicitly authorizes distinctions based on age contained in legislative provisions.

With regards to the argument made by Mr. Côté under subsection 15(1) of the Canadian Charter, the fact that the Act provides for a particular method of indemnifying workers at least 64 years old does not automatically result in differential treatment amounting to a disadvantage for that group. All distinctions based on age are not necessarily prejudicial. The distinction that is criticized must present an "apparent" disadvantage. After engaging in a comparative analysis of the first and second paragraphs of section 56 of the AIAOD, the Court of Appeal concluded that "no real disadvantage" exists between the workers of the two groups in question.

Mr. Côté maintained that, had the event that caused his employment injury not occurred, he would have retained two paying jobs well after his 65th birthday. He argued that the second paragraph of section 56 of the Act "ignored his vision of the future", did not "take into account the time at which he would freely choose to leave the workforce", and deprived him of the same income replacement indemnity as that bestowed upon younger workers in the same circumstances. The Court of Appeal felt that Mr. Côté had not been treated differently from other workers and that there had not been any infringement of his right to equality. Indeed, if the CSST had to take into account the personal and subjective intentions of each worker as to the amount of time he plans to remain in the workforce or the age at which he plans to retire, the indemnification system provided for by the AIAOD would be unmanageable and distorted. Indeed, it would be transformed into "a veritable system of life annuities", which would not correspond in any way to the purpose of the Act.

Therefore, Mr. Côté's appeal was dismissed.

Comments

The fate of the CLP's decision was closely followed by many employers because, had the decision been upheld by the higher courts, it would have had important consequences for those employing workers at least 64 years of age who had suffered employment injuries. Indeed, in the event that the employment injuries of those workers were slow to heal, the employer would have had to assume the cost of income replacement indemnities without any progressive reduction until their extinguishment as provided for by the Act.[10] Moreover, the Court of Appeal noted that the argument made by Mr. Côté did not take into account section 57 of the AIAOD, which provided for the extinguishment of the right to the income replacement indemnity four years following the date on which he became unable to carry on his employment. That provision complements section 56 and Mr. Côté's argument cannot be made in isolation from it without resulting in an important contradiction.

According to the Court of Appeal, if some workers 64 years of age or older had to receive income replacement indemnities during a period corresponding to the intended duration of their working lives or their intended retirement age, the effect would be to stray from the main objectives of the AIAOD, which include the healing of employment injuries and the provision of compensation for the resulting harm. Moreover, as emphasized by the Superior Court,[11] it was shown that persons of that age have, at a minimum, access to sources of income that were not previously available to them, such as benefits under the Québec Pension Plan,the Canada Pension Plan, as well as Old Age Security program payments or pension benefits. Therefore, the progressive reduction of the income replacement indemnity from the age of 65 takes into account the overall context specific to Quebec residents, the majority of whom retire at that age and who have rights under various schemes ensuring that they have access to income.

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[1] R.S.Q., c. A-3.001.

[2] Decision of the Court of Appeal in *Côté* v. *C.S.S.T.*, 2012 QCCA 1146 (C.A.). To date, no application for leave to appeal to the Supreme Court of Canada has been filed.

[3] AIAOD, section 44.

[4] AIAOD, section 57.
[5] Decision of the CLP in *Côté* and *Traverse Rivière-du-Loup St-Siméon*, 2010 QCCLP 2074 (C.L.P.).
[6] Charter of Human Rights and Freedoms, R.S.Q., c. C-12 (hereinafter the "Quebec Charter") and the Constitution Act, 1982, Schedule B of the Canada Act 1982 (UK), 1982, c. 11 (hereinafter the "Canadian Charter").
[7] AIAOD, sections 44 and 46.
[8] C.S.S.T. v. C.L.P., 2011 QCCS 610 (C.S.).
[9] These fundamental rights and freedoms are set out in sections 1 to 9 of the Quebec Charter.
[10] AIAOD, section 57.
[11] Paragraph 42.