Citation: *N. B. v. Canada Employment Insurance Commission*, 2015 SSTAD 504

Appeal No. 2011-2457

BETWEEN:

N. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER:	Mark BORER
DATE OF DECISION:	April 21, 2015
DECISION:	Appeal dismissed

DECISION

[1] The appeal is dismissed.

BACKGROUND

[2] On October 20, 2011, a panel of the board of referees (the Board) determined that the appeal of the Appellant should be denied. In due course, the Appellant appealed that decision to an umpire on the basis that certain specified sections of the *Employment Insurance Act* (the *Act*) are contrary to ss. 15(1) of the *Canadian Charter of Rights and Freedoms*.

[3] On April 1, 2013 the Appeal Division became seized of any appeal not heard by an umpire by that date.

[4] On December 11, 2013, a pre-hearing teleconference was held for case management purposes.

[5] On September 10, 2014, an in-person hearing was held. The Appellant and her counsel, as well as counsel for the Commission, attended and made submissions.

[6] The parties agree that proper notice of this constitutional challenge has been given to the provincial and federal Attorneys General in compliance with the *Social Security Tribunal Regulations* and the *Federal Courts Act*. None of the Attorneys General expressed an interest in making submissions or otherwise appearing.

THE LAW

[7] Part VII.1 of the *Act*, entitled "Benefits for Self-Employed Persons", was added to the *Act* in 2009. As might be gathered from the title, this Part sets out various provisions regarding the entitlement of self-employed persons to benefits.

[8] In her appeal, the Appellant alleges that s. 152.07, s. 152.08, and s. 152.16 infringe upon her equality rights as guaranteed by ss. 15(1) of the *Charter*.

[9] Section 152.07 states that

(1) Qualification requirements – A self-employed person qualifies for benefits if

(a) at least 12 months have expired since the day on which the person entered into an agreement referred to in subsection 152.02(1) with the Commission, or if a period has been prescribed for the purpose of this section, a period that is at least as long as that prescribed period has expired since that day;

(b) the agreement has not been terminated or deemed to have been terminated;

(c)) the person has had an interruption of earnings from self-employment; and

(d) the person has had during their qualifying period an amount of self- employed earnings that is equal to or greater than the following amount:

(i) $6,000 or the amount fixed or determined in accordance with the regulations, if any, for that qualifying period,

…

[10] Section 152.08 states that

(1) Qualifying period – The qualifying period of a self-employed person is the year [meaning a calendar year, as established in ss. 2(1) of the *Act*] immediately before the year during which their benefit period begins.

(2) Earnings – A self-employed person's self-employed earnings during a qualifying period may not be taken into account in respect of more than one initial claim for benefits.

[11] Section 152.16 states that

(1) Rate of weekly benefits – The rate of weekly benefits payable to a self- employed person is 55% of the result obtained by dividing the aggregate of the amounts referred to in paragraphs (a) and (b) by 52:

(a)) the amount of their self-employed earnings, determined under paragraph 152.01(2)(a), (b) or (c), as the case may be, for their qualifying period; and

(b) if they had insurable earnings from employment, including insurable earnings earned as a person to whom regulations made under Part VIII apply, for their qualifying period, the amount of those insurable earnings for that period, calculated without taking into account prescribed insurable earnings.

(2) Excess not to be included – Only the portion of the aggregate of the amounts referred to in paragraphs (1)(a) and (b) that does not exceed the maximum yearly insurable

earnings as calculated under section 4 is to be taken into account for the purposes of subsection (1).

[12] Section 15 of the *Charter* states that

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

INTRODUCTION

[13] As noted above, this appeal hinges on whether or not s. 152.07, s. 152.08, or s. 152.16 of the *Act* contravene ss. 15(1) of the *Charter*. In argument before me, the parties agreed that if these provisions are upheld then the Board decision was correct and this appeal must be dismissed.

[14] Having considered the matter, I find that I cannot agree with the arguments put forward by the Appellant. For the following reasons, I find that this appeal must fail.

ANALYSIS

i The history and purpose of the *Employment Insurance Act*

[15] In support of its position that the impugned provisions are constitutional, the Commission has submitted an affidavit from Michael Duffy. In 2011, Mr. Duffy described his role as "Director of the Regulatory and Revenue Policy Design Division in the Employment Insurance Policy Directorate in the Skills and Employment Branch in the Department of Human Resources and Skills Development [now the Department of Employment and Social Development]". As it was not challenged by the Appellant, I have relied heavily upon his affidavit evidence (sometimes verbatim) for the below comments regarding the evolution and purpose of the *Employment Insurance Act*.

[16] The *Employment Insurance Act* (formerly the *Unemployment Insurance Act*) has been in place since 1940 and has evolved over time. The purpose of this legislation was to provide insurance to guard against unemployment, but it was not intended to cover all unemployment universally or to provide blanket unemployment assistance.

[17] According to Mr. Duffy, the legislation was intended to "support labour market transitions by providing temporary income support to eligible insured persons who experience an interruption of earnings due to a loss of employment income as a result of a job loss, sickness, the birth or adoption of one or more children, or providing care or support to a gravely ill family member".

[18] In practical terms, this means that benefits were limited to temporary assistance following the loss of employment from specified causes. Benefits were never linked to financial need but instead to the amount of the premium paid by the claimant, which was in turn linked to income. It also means that benefits were further limited by so-called "co-insurance" features. These features were intended to limit financial risk to the program, and included replacing only a portion of the claimant's usual income.

[19] Further, because the program is financed entirely through premiums just like any other insurance program, a contributor is not automatically entitled to benefits and must still meet the eligibility requirements established by the *Act*.

[20] Traditionally, the program was intended to benefit only those engaged in insurable employment, as set out in s. 5 of the *Act*. As noted by Mr. Duffy, insurable employment under the *Act* means "employment under a contract of service whereby a worker agrees to provide his or her services to an employer for a salary or some other form of remuneration".

[21] As the self-employed do not work under an employer-employee relationship where the availability of work, salary, workload and hours of work are outside of their control, it was initially determined that they should not be covered by the program.

[22] Over the years, a wide variety of reports and White Papers were released (and a number of committees were formed) on the topic of the operation of the employment insurance system. Mr. Duffy details them all at length, and the Commission has helpfully provided copies of them,

but for our purposes it is sufficient to say that they all agreed that benefits should not be extended to self-employed persons.

[23] These reports noted that self-employed persons would be difficult to insure using the current system because of the very nature of self-employment. What would constitute unemployment for a self-employed person? How would the amount of the premiums be determined, given that the self-employed person controls the salary they are paid and the hours they work?

[24] Over time, however, views began to evolve. In 2009, the government tabled the *Fairness for the Self-Employed Act*, to extend the maternity, parental, sickness and compassionate care benefits to self-employed persons on a voluntary basis. Regular benefits, however, were still not extended to the self-employed.

[25] Under this new system, the self-employed choose whether or not to sign up for the program by entering into an agreement with the Commission to do so. Once this agreement has been signed, the self-employed person must pay premiums on all self- employment income forevermore.

[26] One purpose of this was to limit the self-selection effect. An example of a self- selection effect is where a person who knows that they will be eligible for benefits in the near future signs up in order to maximize their financial benefit at the expense of the system.

[27] According to Mr. Duffy, measures such as this are necessary to maintain the integrity and financial stability of the self-employment benefits program.

ii The Appellant's specific situation

[28] The Appellant is a self-employed lawyer. In March 2010, she signed an agreement with the Commission to pay employment insurance premiums in exchange for being able to receive special self-employment insurance benefits in times of need. As noted above, once an agreement has been signed the self-employed person cannot opt out except under specified conditions that are not relevant here.

[29] As a result of this agreement, the Appellant began paying premiums on her self-employment income.

[30] Soon thereafter, the Appellant became pregnant and because of her pregnancy and medical history, complete bed rest was ordered by her doctor as of August 1, 2010, in order to minimize the chance of complications.

[31] Upon receiving the Appellant's application for benefits on January 4, 2011, the Commission determined that she was indeed entitled to special benefits. They further determined that based upon the Appellant's usual anticipated self-employment income, a weekly benefit rate of $468.00 was payable.

[32] Normally, the Appellant would have claimed benefits as soon as she became unable to work, in this case on August 1, 2010. However, because the self-employed benefits program had only just come into existence, the earliest benefits could be claimed was the first week of January 2011. According to the *Act*, the qualifying period is the calendar year prior to the year in which benefits were claimed. This meant that in the Appellant's case, her qualifying period was the 2010 calendar year instead of the 2009 calendar year.

[33] Since the Appellant had been unable to work for part of the year, her earnings in 2010 were considerably less than they had been in 2009 and previous years. Once the Commission recalculated the benefit rate based upon the Appellant's actual self- employment income during the qualifying period, the weekly benefit rate was determined to be $261.00 instead of $468.00. This created a significant overpayment for the Appellant.

[34] The Appellant submits that the above operation of the law has resulted in a violation of her s. 15 equality rights. She asks that she be allowed benefits at a benefit rate based upon the 2009 calendar year or her best 14 weeks of income in 2010.

iii The two step test to be applied in a ss. 15(1) *Charter* challenge

[35] In *Withler v. Canada (Attorney General)*, 2011 SCC 12, the Supreme Court of Canada held at paragraph 30 that

> The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) does the law create a distinction that is based on an enumerated or analogous ground? (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[36] The purpose of the first step in the ss. 15(1) analysis is to make sure that only those distinctions that were intended to be prohibited by the *Charter* proceed to the next step. Subsection 15(1) protects only against distinctions made on the basis of the enumerated grounds or grounds analogous to them.

[37] As the Supreme Court of Canada stated in *Corbiere v. Canada (Attorney General)*, [1999] 2 SCR 203, an analogous ground is one based on a personal characteristic that is immutable or changeable only at an unacceptable cost to personal identity.

[38] That being said, a distinction based on an enumerated or analogous ground is not by itself sufficient to find a violation of ss. 15(1). According to *Withler*, it must also be shown that the law has a discriminatory impact in terms of prejudicing or stereotyping.

[39] It was also held in *Withler* that the analysis of *Charter* rights is to be undertaken in a purposive and contextualized manner. The central concern of ss. 15(1) is combatting discrimination defined in terms of perpetuating disadvantage and stereotyping. It must be asked whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the Appellant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group.

iv Is the differential treatment suffered by the Appellant based on enumerated or analogous grounds?

[40] In answering this question, I find the comments of the Federal Court of Appeal in *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3, to be highly relevant. In that case, the court noted at paragraph 21 of their decision that

> By definition, laws granting social benefits entail a differential treatment. In determining categories of beneficiaries and eligibility requirements, they treat differently the persons who are excluded from their scope of application and, as a result, are denied benefits. I do not think that one can argue that these persons are not subject to a substantively differential treatment. The question is whether this occurs on the basis of one or more personal characteristics.

[41] Similarly, I find that there can be no doubt in the case before me that the Appellant has suffered differential treatment. She has received a lower benefit than others in a similar position would have. But I cannot conclude that this was because of an enumerated or analogous ground as required by *Withler*.

[42] The Appellant submits that she received a weekly benefit rate of $261.00 instead of $468.00 because she "suffers from [a] medical condition which prevents her from earning income from self-employment during the pregnancy".

[43] Instead, I am of the view that the differential treatment she received results not from her status as a woman or a disabled person but from two unrelated factors: the self- employment status of the Appellant and the transitional nature of the program at the time the Appellant applied for benefits. If either of these factors were not present, the Appellant would not have experienced differential treatment.

[44] If the Appellant had not been self-employed, and instead had worked for a law firm or for some other employer, she could have received sickness benefits beginning August 1, 2010. This would have allowed the establishment of a qualifying period that would not have included the period of August 2010 to January 2011, wherein the Appellant was on bed rest and unable to work. In turn, based upon the evidence submitted as to her usual self-employment income, this would have resulted in the Appellant having a weekly benefit rate of $468.00.

[45] Similarly, if the Appellant's pregnancy had happened a year later, the self- employment benefit program would already have been in force when the Appellant began her doctor-ordered bed rest and the Appellant would have been able to claim benefits immediately. This would have resulted in a weekly benefit rate of $468.00, again based upon the evidence submitted as to the Appellant's usual self-employment income, because the qualifying period would have been a year in which the Appellant had been able to work throughout.

[46] Looking at the situation from another perspective I note that, all else being equal, a male lawyer with an illness that required bed rest would have been in exactly the same situation. They would have been caught by the transitional year provisions, and would have been saved if their

illness had occurred a year later. They would also have received full benefits if they were employed by a law firm or some other employer instead of being self-employed.

[47] Crafting an employment insurance regime is not a simple task. As noted above, Parliament has attempted to assist the unemployed in a manner that shares risk and is financially sustainable, and has done so using insurance principles. By definition, this means that some persons will qualify and others will not.

[48] The Federal Court of Appeal, in its discussion of other provisions of the *Employment Insurance Act* in *Lesiuk*, at paragraph 51 of their decision, phrased it this way:

> The eligibility requirements are not a manifestation of a lack of respect or loss of dignity. They are an administratively necessary tool tailored to correspond to the requirements of a viable contributory insurance scheme.

[49] Having considered the above, I find that the differential treatment suffered by the Appellant was not based on enumerated or analogous grounds.

[50] In view of this finding, I further find that the Appellant has not discharged her onus of establishing on a balance of probabilities that her rights under ss. 15(1) of the *Charter* have been infringed.

CONCLUSION

[51] For the above reasons, the appeal is denied.

Mark Borer
Member, Appeal Division