Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. C. v Canada Employment Insurance Commission*, 2019 SST 68

Tribunal File Number: AD-18-202

BETWEEN:

S. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 31, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, S. C. (Claimant), worked as a X until July 2012, when her employer terminated her employment, shortly after the Claimant declared that she was pregnant. Initially, the Claimant applied for Employment Insurance regular benefits, but she withdrew her application in favour of maternity and parental benefits. She received $7,275 in maternity benefits from September 2, 2012 to December 15, 2012, and $16,975 in parental benefits from December 16, 2012 to August 17, 2013.

[3] In May 2014, the Claimant commenced legal proceedings for wrongful dismissal against her former employer. The claim was settled and the Respondent, the Canada Employment Insurance Commission (Commission), initially and on reconsideration, determined that a portion of the settlement funds constituted earnings. It applied the earnings against her Employment Insurance claim, resulting in an overpayment, broken down as follows: $7,275 for overpayment of maternity benefits and $4,077 for overpayment of parental benefits.[1] In another letter to the Claimant, the Commission advised her that it was unable to reconsider the issue of the repayment of a debt, "since the issue is not one that the Commission has authority to reconsider."[2]

[4] The Claimant appealed the Commission's reconsideration decision to the General Division. The General Division upheld the Commission's determination. The Claimant accepts the General Division's findings that close to $33,000 of the settlement with her former employer constituted earnings, but she disputes the General Division's findings that there is an overpayment owing under section 45 of the *Employment Insurance Act*. The gist of the Claimant's arguments is that the General Division erred in its interpretation of section 45 of the *Employment Insurance Act* in finding that she owes any overpayment at all. Alternatively, if she

[1] Commission's letter dated January 23, 2017, at pages GD3-40 to 41 and GD3-48 to GD3-49 and Commission's reconsideration decision, dated April 4, 2017, at pages GD3-58 to GD3-59.
[2] Commission's Reconsideration decision, dated April 4, 2017, at page GD3-57.

owes an overpayment, it erred in finding that she is required to repay the gross amount of the maternity and parental benefits, rather than the net amounts that she received.

[5] I must decide whether the General Division erred in law and, if so, I must decide the appropriate disposition of the matter.

ISSUE

[6] The central issue is whether the General Division erred in law in its interpretation of section 45 of the *Employment Insurance Act*.

ANALYSIS

Grounds of appeal

[7] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Issue 1: Did the General Division err in law in its interpretation of section 45 of the *Employment Insurance Act*?

a. General background

[8] The Claimant submits that the General Division misinterpreted section 45 of the *Employment Insurance Act* when it found that the section applied to her and found her liable for an overpayment, and that the amount of the overpayment was for the gross amounts of maternity and parental benefits, rather than net amounts. The section states:

> If a claimant receives benefits for a period and … for any other reason, an employer … subsequently becomes liable to pay earnings, including damages for wrongful dismissal … to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

[9] The General Division interpreted the section to mean that the Claimant was responsible for an overpayment because her former employer paid the Claimant damages relating to her wrongful dismissal claim relating to the same period when she received Employment Insurance benefits. The General Division also determined that the Claimant had to repay an amount that the Commission would not have paid if the employer had paid her earnings during this same timeframe.

[10] In the proceedings before the General Division, the Claimant argued that section 45 of the *Employment Insurance Act* did not apply because even if she had remained employed, she would not have been working, given that she would have been on maternity leave. Her employer therefore would not have been paying her any wages.

[11] Rather than receiving employment income, she claimed that she would have received maternity and special benefits. She argued that because she was on a maternity leave and because she would not have received any employment income from September 2, 2012 to August 17, 2013, the amount of any overpayment should have excluded the amount of any maternity and paternity benefits she received. The General Division considered the Claimant's submissions in this regard. It determined that section 45 does not draw any distinction between regular benefits and special benefits and that an overpayment had indeed resulted.[3]

b. Interpretation of section 45

[12] The Claimant submits that on a plain reading of section 45 of the *Employment Insurance Act*, there is no repayment obligation because the period for which benefits were received and the period for which earnings were received must correspond. In other words, the Claimant argues

[3] General Division decision at para 32.

that the special benefits received "for a period" must correspond with the "same period" for which the Claimant's employer was liable to pay damages for wrongful dismissal. She argues that the two periods are incongruous because the damages for wrongful dismissal were intended to compensate her during a time when she would not have otherwise been on leave, but for the dismissal. She would not have been working while on maternity leave or on parental leave. The Claimant argues that the General Division should not have attributed the settlement payment for wrongful dismissal to the same period as her maternity leave because she was totally incapable of working during this time. She claims that a proper interpretation of section 45 would defer or suspend the allocation of any earnings from her settlement with her employer until after her leave period finished.

[13] At the same time, the Claimant submits that the General Division misinterpreted section 45 of the *Employment Insurance Act* in part because it failed to apply general rules of statutory construction. She argues that it adopted an overly restrictive approach and failed to accord sufficient attention to the scheme, object, and context of the *Employment Insurance Act* and the employment insurance regime. In particular, the Claimant argues that the General Division found that her special benefits constituted collateral advantages that required repayment, without consideration of when her notice period commenced.

[14] The Claimant submits that if there was any ambiguity or conflict between section 36(9) of the *Employment Insurance regulations* and section 45 of the *Employment Insurance Act*, that, in keeping with section 12 of the *Interpretation Act* and with the prevailing jurisprudence, [4] the General Division should have given a wide and liberal interpretation to sections 36(9) of the *Employment Insurance Regulations* and 45 of the *Employment Insurance Act*. She argues that the General Division should have interpreted section 45 in a manner consistent "with the overarching and flexible principles of fairness and compensation"[5] and it should have been guided by the scheme and object of the *Employment Insurance Act*.

[15] Under section 36(9) of the *Employment Insurance Regulations*, all earnings paid or payable to a claimant because of a lay-off or separation from an employment shall be allocated to

[4] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)
[5] Submissions of the Appellant at AD3-92

a number of weeks that begins with the week of the lay-off or separation. The section also sets out how that allocation is to be made.

[16] The Claimant asserts that the *Employment Insurance Act* is intended to be remedial: in the case of maternity benefits, she claims that they are designed to protect those who are pregnant and in need of maternity leave, while parental benefits are designed to protect vulnerable parents who are unable to work because of childcare needs. Unlike regular benefits, which are intended to provide temporary income replacement for those unable to find work, she claims that maternity benefits are intended for those who are unable to work because of pregnancy, and parental benefits are intended for those unable to work because of childcare responsibilities.

[17] The Claimant argues that section 45 of the *Employment Insurance Act* is intended to prevent double recovery from the same cause of action; for instance, the section is intended to preclude a claimant from receiving both Employment Insurance regular benefits as well as damages awarded or received through the course of litigation proceedings for wrongful dismissal. She asserts that the section is engaged only when a claimant's Employment Insurance regular benefit period coincides with the post-employment notice period.

[18] The Claimant contends that there are strong policy considerations against disentitling a pregnant employee from receiving special benefits such as maternity and parental benefits and disentitling the same employee from seeking redress for wrongful dismissal. The Claimant maintains that she did not receive any excess recovery or any collateral benefits from receiving Employment Insurance special benefits and settlement funds from her employer.

[19] The Claimant argues that if the General Division had applied the general rules of statutory construction with a view to the scheme and objects of the *Employment Insurance Act*, the General Division would have avoided the absurd result of effectively depriving her of any maternity benefits and of reducing the amount of parental benefits that she received. She claims that depriving her of the full amount of the special benefits is absurd because these benefits were intended to protect her during pregnancy and subsequently, when she was caring for her infant child, i.e. when she was incapable of working.

[20] The Claimant argues that the General Division's interpretation in effect allows an employer to benefit from terminating a pregnant woman shortly before her maternity leave, or from terminating a parent shortly before parental leave, thereby disentitling claimants from applying for special benefits and dissuading them from seeking redress against the employer for the wrongful dismissal. The Claimant argues that this interpretation deprives a claimant of the means to cope with the economic dislocation caused by an involuntary inability to work and would limit, rather than extend, the protections afforded under the *Employment Insurance Act* and any applicable provincial employment standards legislation.

[21] The Claimant argues that the earnings arising out of the settlement should have been attributed wholly to her expected earnings after the Employment Insurance benefits period that ended on August 17, 2013, because the settlement with her employer was necessarily premised on the supposition that, if it had not dismissed her, the Claimant would have continued working, taken her maternity and parental leave, and then returned to work.

[22] The Claimant argues that the courts have held that employers may not include maternity leave as part of an employee's notice period. She argues that that same principle should apply to the circumstances of her case and in the interpretation of section 45, which would preserve the special benefits and exclude them from consideration for the calculation of any overpayment. The Claimant relies on two decisions from British Columbia: *Whelehan v Laidlaw Environmental Services Ltd.*[6] and on *Wells v Patina Salons Ltd*.[7]

[23] In *Whelehan,* Allan J. concluded that Ms. Whelehan's maternity leave should not coincide with the applicable notice period. In determining the appropriate notice period, the court found that the notice period had to take into account the fact that Ms. Whelehan was approximately seven months pregnant at the time and unable to seek employment. The court compared the purposes of reasonable notice and maternity leave. Whereas the law requires employers to provide dismissed employees with compensation for an adequate period to enable them to pursue suitable re-employment without unreasonable financial disadvantage, the philosophy behind maternity leave was to provide job security during their absence. The court

[6] *Whelehan v Laidlaw Environmental Services Ltd.*, 1998 CanLII 6137 (BCSC-Chambers) at paras 18 to 20.
[7] *Wells v Patina Salons Ltd.*, 2003 BCSC 1731 at paras 21 to 22.

wrote that "[t]he policy basis underlying maternity leave … would be defeated if an employer could terminate a pregnant employee at the commencement of her maternity leave so that her period of notice was spent during that leave."

[24] In *Wells*, Satanove J. followed the same reasoning set out in *Whelehan* in determining that any maternity leave is excluded from notice periods, otherwise this would defeat the policy of protecting women from penalties in the workplace due to pregnancy. The Claimant notes that these protections are also afforded under employment standards legislation in several provinces, including Ontario and British Columbia,

[25] The Commission argues that the General Division's interpretation of section 45 of the *Employment Insurance Act* is correct and that I should refrain from giving it the interpretation that the Claimant urges me to make, as this would be contrary to the section's plain meaning. As the Commission notes, in *Canada (Attorney General) v Knee*,[8] the court recognized that "rigid rules are always apt to give rise to some harsh results that appear to be at odds with the objectives of the statutory scheme. However, tempting as it may be in such cases … adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning."

[26] The Commission argues that the section does not draw any distinction between regular and special benefits, and that there is no room for any discretion or any exceptions.

[27] In terms of statutory interpretation, the Commission's position represents one approach, but that presupposes that the ordinary meaning of the section is overwhelmingly clear when it may not be, and it also ignores other aspects of interpretation. Another, perhaps more modern, approach to statutory construction involves reading the words of an Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of that Act, the object of that Act, and the intention of Parliament.[9]

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[8] *Canada (Attorney General) v Knee*, 2011 FCA 301 at para 9.
[9] *Rizzo & Rizzo Shoes Ltd.*, *supra* note 4 and Driedger, 2nd ed. p. 87.

[28] Even so, the Claimant argues that, even on a plain reading of the statute, it is plainly clear that section 45 of the *Employment Insurance Act* excludes special benefits and that this interpretation is consistent with the overall scheme and object of the *Employment Insurance Act*.

[29] There is a certain attractiveness to the Claimant's submissions. There are valid social policy considerations identified in the *Whelehan* and *Wells* decisions that claimants in the this position should be entitled to receive special benefits such as maternity or parental benefits without having them eclipsed by damages received in the course of a settlement of a claim for wrongful dismissal. After all, a settlement award of this nature is unconnected to and independent of any claim for special benefits. More importantly, the special benefits would afford some measure of financial protection and job security to women seeking leave.

[30] However, I cannot accede to the Claimant's submissions that, on a plain reading, the section necessarily excludes the consideration of any special benefits. There is no explicit reference to any special benefits of any nature. Parliament could have readily defined those benefits that a claimant receives "for a period" as being limited to regular benefits, but it did not do so.

[31] Inasmuch as I agree that the Claimant's interpretation of the section would serve the purpose of providing some protection, and that it also accords in part with the scheme and object of the *Employment Insurance Act*, I am however unable to find that the General Division erred in the manner that the Claimant suggests. I do not see that the Claimant adduced any evidence of clear legislative intent. While legislative intent alone is not determinative of the interpretation of any statutes, it is often an overriding consideration, as I find to be in this case. If the section had drawn some correlation between the nature of those earnings and the nature of the benefits, I might have been swayed to find otherwise, but I am unconvinced that, for the purposes of section 45, I can distinguish between regular and special benefits on the basis of the references to "for a period" and "for the same period."

[32] Finally, there is the issue of the tax deductions. The applicable wording in section 45 of the *Employment Insurance Act* is "an amount equal to the benefits that would not have been paid." The Claimant received $6,390 in net maternity benefits after deductions, yet she is expected to repay $7,275. The Claimant argues that this interpretation of section 45 that requires

her to repay the gross amounts cannot be correct because it produces an absurd result, requiring her to repay more in benefits than she received. I agree that it is unjust and absurd to require the Claimant to repay an amount greater than she received, but for the same reasons that I have determined that the section does not exclude special benefits, I cannot infer that Parliament intended that a claimant be responsible to repay only the net amount of any benefits. The legislature defined the amount required to be repaid as an overpayment without any reference to the deduction of any taxes.

CONCLUSION

[33] I find that the General Division did not err in its interpretation of section 45 of the *Employment Insurance Act*. Accordingly, the appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	October 16, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	S. C., Appellant Martha Cook, Counsel for the Appellant S. Prud'homme, Representative for the Respondent (by way of written submissions only)