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

[TRANSLATION]

Citation: *D. G. v Canada Employment Insurance Commission*, 2019 SST 652

Tribunal File Number: GE-16-1958

BETWEEN:

D. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: May 1, 2018

DATE OF DECISION: July 10, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] Following a lack of work, the Appellant established a benefit period effective January 5, 2014. The following month, she asked to convert her regular benefits to sickness benefits for an indefinite period because of her health. Her request was granted. On her doctor's recommendation, the Appellant made a gradual return to work on March 19, 2014, working three days a week. She therefore continued to be a sickness benefit claimant while working a few days as part of her gradual return. For six of her weeks of sickness benefits, the Appellant reported earnings from hours she worked during her gradual return. The Employment Insurance Commission (Commission) deducted each dollar she received as income from her benefits according to section 21(3) of the *Employment Insurance Act* (Act).

[3] The Appellant argues that this provision of the Employment Insurance plan is discriminatory toward people who are gradually returning to work because the entire income of sickness benefit claimants are deducted from their benefits, whereas the income of claimants who receive regular benefits are only partially deducted from their benefits. She also argues that a person who is gradually returning to work is a person with health issues and that therefore the discrimination is based on mental or physical disabilities, a ground specifically protected by section 15 of the *Canadian Charter of Rights and Freedoms* (Charter).

[4] The Appellant further argues that people who are unable to work full-time for health reasons already form an especially vulnerable group and have an additional burden imposed on them by having their benefits reduced more than a person who is capable of working full-time or who does not have a disability. Finally, the Appellant is of the view that the effect of section 21(3) of the Act prevents sick people who are gradually returning to work from being treated the same as healthy people and therefore that it accentuates the distinction between the two groups arbitrarily and artificially.

[5] The Respondent, in turn, acknowledges that how earnings are handled under the Act differs based on whether claimants are capable of working. It therefore admits that the Act establishes a distinction based on physical or mental disability in terms of how earnings are handled. However, the Respondent claims that the Appellant failed to show that the difference in how the earnings of both groups are handled constitutes discrimination within the meaning of section 15(1) of the Charter, notably because she did not prove that she was a member of a group with a pre-existing disadvantage, because the distinction raised is absolutely not arbitrary, and because it does not compromise important rights. The Respondent further argues that, if the Tribunal found that section 21(3) of the Act infringes the right to equality that is protected by the Charter, this distinction would be justified within reasonable limits as part of a free and democratic society.

PRELIMINARY MATTERS

[6] The Tribunal's General Division heard the appeal previously, and it was brought before the Tribunal's Appeal Division. The Appeal Division found that the General Division had refused to exercise its jurisdiction by failing to decide on the Charter issue. As a result, it referred the file back to the General Division so that it could hold a hearing and decide solely on the Charter issue.

ISSUES

[7] The Tribunal must decide the following issues:

1. Do the effects of section 21(3) of the Act, which results in the Appellant's employment income being entirely deducted during her sickness benefit period, constitute discriminatory treatment based on her physical disability and therefore infringe her right to equality, which is guaranteed in section 15(1) of the Charter?

2. If so, is the infringement justifiable under section 1 of the Charter?

    a. Does the objective of the legislation relate to pressing and substantial concerns?

b. Is the means used to achieve the legislative objective reasonable and can it be justified in a free and democratic society?

ANALYSIS

[8] The Canadian Constitution establishes the country's rules of law. It is the supreme authority regarding any other Canadian legislative provision. The *Canadian Charter of Rights and Freedoms*, which protects human rights, notably by guaranteeing equality, is part of the Canadian Constitution. In fact, section 15(1) of the Charter provides that every individual is equal under the law, without discrimination, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.[1]

Issue 1: Is section 21(3) of the Act discriminatory within the meaning of section 15(1) of the Charter?

[9] It was in *Andrews*[2] that the Supreme Court of Canada decided for the first time in 1989 on the application of section 15 of the Charter. Judge McIntyre established that the purpose of section 15 was to "ensure equality in the formulation and application of the law." Furthermore, he specified that it was protection of substantive equality and not the concept of formal equality.

[10] The Supreme Court of Canada in *Andrews* also specified that the fact that certain individuals are treated differently does not mean that the right to equality in section 15 is automatically infringed. Judge McIntyre indicated that, in addition to being different for different people, the treatment must be recognized as having a discriminatory effect.

[11] What constitutes discriminatory treatment was then the subject of many debates and later a few Supreme Court of Canada decisions, which established various criteria and tests for analyses related to section 15 of the Charter. More recently, the *Kapp*[3] and *Withler*[4] decisions

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, s 15.
[2] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 (*Andrews*).
[3] *R v Kapp*, 2008 SCC 41 (*Kapp*).
[4] *Withler v Canada (Attorney General)*, 2011 SCC 12 (*Withler*).

clarified the test for challenges under section 15 by putting forward more than ever before the importance of substantive equality and of considering contextual factors in each case.

[12] For the following reasons, I find in this case that the Appellant has shown that section 21(3) is discriminatory. I have relied particularly on the Supreme Court of Canada decisions *Withler* and *Québec v A*[5] for my analysis of this case by answering the question in two stages.

A) Does section 21(3) of the Act create a distinction based on an enumerated or analogous ground?

[13] In February 2014, the Appellant changed from the Employment Insurance regular benefits plan to the sickness benefits plan because of a hand condition that prevented her from being able to work. About a month later, her condition improved and, following her doctor's advice, the Appellant gradually resumed working while continuing to be a claimant of sickness benefits. She therefore declared her income in her online reports, and, through the application of section 21(3) of the Act, all of that income was deducted from her benefits. The Act does state that "[i]f earnings are received by a claimant for a period in a week of unemployment during which the claimant is incapable of work because of illness, injury or quarantine, subsection 19(2) does not apply and, subject to subsection 19(3), all those earnings shall be deducted from the benefits payable for that week."

[14] Section 19(2) of the Act provides that, if a claimant has earnings during any week of unemployment, only a portion will be deducted from their benefits.[6] It is therefore clear that sickness benefits claimants are excluded from the application of section 19(2) of the Act. Claimants under the special sickness benefits plan therefore see 100% of their earnings deducted during their benefit period, while other type of claimants can receive a certain amount of income without it being deducted from their benefits. In other words, if two Employment Insurance claimants work one day during their benefit week, for example, their income for that day of work

[5] (*Québec (Attorney General) v A*, 2013 SCC 5 (*Québec v A*).
[6] There shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds $50, if the claimant's rate of weekly benefits is less than $200 or 25% of the claimant's rate of weekly benefits, if that rate is $200 or more (section 19(2) of the Act).

will not have the same impact on their benefits, depending on whether they are under the regular or the sickness benefits plan.

[15] The Respondent acknowledges that the earnings are deducted differently for claimants of sickness benefits and claimants of regular, parental, and compassionate care benefits, as well as of benefits for parents of critically ill children, who are capable of working.

[16] The parties therefore acknowledge that the Appellant received treatment different from that of other types of claimants in terms of the deduction of employment income because she received sickness benefits. I agree that it is established that the Act creates this distinction in treatment by excluding claimants of sickness benefits from the advantage conferred by section 19(2).

On what ground is the distinction based?

[17] The Appellant argues that the discrimination that she alleges is based on a ground explicitly enumerated in section 15(1) of the Charter, namely disability. She argues that the hand condition she has constitutes a physical disability. I accept the Appellant's definition of physical disability, which is drawn from decisions on the application of the Québec *Charter of Human Rights and Freedoms* (Québec Charter).[7] I agree that both charters have the same objectives and therefore that the notions should be treated the same way. Therefore, a disability or handicap must be understood as any physical or psychological anomaly that could potentially cause limitations to the capacity to perform work or even the mere perception that such an anomaly constitutes a limitation.

[18] I find that D. G.'s hand condition limited her capacity to work and consequently constitutes a disability. I therefore find that the Appellant has established that the distinction created by section 21(3) of the Act is based on a disability, a ground enumerated in section 15(1) of the Charter.

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[7] The Appellant refers to the following decisions: *Québec (Commission des droits de la personne et des droits de la jeunesse) c Montréal (Ville)* and *Québec (Commission des droits de la personne et des droits de la jeunesse) c Boisbriand (Ville)*.

[19] I note that the Respondent did not object to the fact that the Appellant is part of a group with a disability, acknowledging her condition and her limitations. It admitted that how earnings are treated differs based on whether claimants are capable or incapable of working and therefore that the Act establishes a distinction based on physical or mental disability.

B) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[20] As stated earlier, the Supreme Court has established that differential treatment of different groups is not in and of itself a violation of the rights guaranteed in section 15(1) of the Charter.[8] In fact, the protection offered by section 15 of the Charter will apply only when there is discrimination.[9] Generally, a discriminatory disadvantage is that which perpetuates prejudice or stereotypes.[10] However, each case is a specific case that must be analyzed by considering the unique circumstances and context.

[21] First, I acknowledge the qualification of Mr. Andrew M. Brown, Acting Director General, Employment Insurance Policy, as an expert witness. I find that it was shown that he is qualified to testify on the history and context of the Employment Insurance program and Parliament's intention when adopting various measures, such as the special benefits. I note that he held the position of Director, Special Benefits, Employment Insurance Policies, from 2014 to 2016. His perspective on the foundations of special benefits, particularly sickness benefits, is relevant to this issue.

[22] Mr. Brown testified that various pilot projects have been established in recent years to encourage workers to return to work. He was personally involved in developing those programs. He indicated that special maternity and sickness benefits exist first so that people can care for themselves and recover physically in order to return to the workforce. To obtain sickness benefits, a claimant must be unable to work because of injury or quarantine and must have a

[8] *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 at para 188, quoted in *Withler* and *Québec v A* at para 172.
[9] *Andrews*, paras 164 and 168; *Québec v A* at para 143.
[10] *Kapp* at para 17.

medical note that attests to it. Unlike recipients of regular benefits, claimants do not have to try to find employment.

[23] Mr. Brown explained that rules govern the situations in which a claimant receives a salary. He stated that the rules were always intended to encourage workers to accept work when they do not have any. In this case, the rules in 2014 were that, for each dollar earned, 50 cents was deducted from benefits. This rule applied to regular, fishing, parental, and compassionate care benefits. In the case of sickness benefits, for each dollar earned, the whole dollar was deducted from benefits.

[24] To explain this distinction, Mr. Brown stated that the procedure for regular benefits cases was established to encourage people to accept work. He also stated that, in cases of compassionate care or parental benefits, claimants have the capacity to work, and the measures are intended to encourage maintenance of the employment relationship. He further maintained that, in the spirit of the program, claimants of sickness and maternal benefits are unable to work, and the purpose of the plan is not to encourage them to return to work. He stated that the plan is not intended to encourage or cause people deemed incapable of working to accept work.

Discriminatory effects

[25] The Supreme Court of Canada enumerated four contextual factors to consider when analyzing the discriminatory effects connected with the perpetuation of a prejudice or stereotypes:[11]

- The pre-existing disadvantage, if any, of the claimant group;
- The degree of correspondence between the differential treatment and the claimant's reality;
- Whether the legislation or program has an ameliorative purpose or effect;
- Nature of the interest affected.

[11] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 (Law) and quoted in *Kapp*.

[26] On the subject of these four factors, the Respondent submits that the Appellant failed to show a pre-existing disadvantage for the identified group, notably because she did not submit evidence to that effect. It argues that evidence tending to prove that a claimant or their group has been historically disadvantaged is required to establish infringement of section 15(1) of the Charter, as the Supreme Court noted in *Taypotat*.[12] It further argues that the Appellant provided anecdotal evidence of her situation without proving that people who are unable to work full-time because of illness are a group with a pre-existing disadvantage, a vulnerability, or a stereotype within the meaning of section 15 of the Charter.

[27] The Respondent also argues that it showed a correspondence between the provision and the Applicant's situation. It argues that, to the extent that sickness benefits are in place for people who first show that they are unable to work, as confirmed by Mr. Brown, the correspondence is established with the fact that people who basically cannot work are not being incentivized to work. The Respondent is of the view that the measure in section 21(3) of the Act corresponds to the abilities and needs of sick claimants who are, by definition, incapable of working. It finds that giving a sick claimant incentive to work would be contrary to their situation and could delay their recovery.

[28] The Respondent also argues that the Appellant failed to prove that the measure provided in section 21(3) of the Act compromises important rights. The Appellant argued that she was disadvantaged financially when compared to claimants of regular benefits, but, according to the Respondent, a financial disadvantage is not enough to establish discrimination.

[29] In terms of the last factor, the nature of the interest affected, the Respondent did not provide submissions because it does not find this criterion relevant to this case. I agree. The fourth factor concerns cases where measures are taken with the goal of improving the conditions of groups that are even more disadvantaged than the claimant group. That is not this case here. Analyzing this aspect would therefore be pointless.

[30] For her part, the Appellant notes that the Supreme Court in *Québec v A* established that "[t]he key is whether a distinction has the effect of perpetuating arbitrary disadvantage on the

[12] *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548, 2015 SCC 30 (*Taypotat*).

claimant because of his or her membership in an enumerated or analogous group." She therefore argues that it is no longer necessary to establish the discriminatory nature of the distinction to prove the perpetuation of stereotypes or injury to dignity but that each situation must be assessed by considering the facts.

[31] The Appellant argues that the Act disregards the fact that people who are unable to work full-time because of illness already form an especially vulnerable group, given the financial insecurity that this situation can cause, in order to impose an additional burden on them. She argues that the additional burden originates from the fact that the Act is harsher toward her by reducing her benefits more than those of people who are not ill and could work full-time. The Appellant argues that the Supreme Court has stated that the equality guaranteed by the Charter requires that the Act enable everyone to receive the same advantages.[13] She added that section 21(3) has discriminatory effects because it prevents sick people who are gradually returning to work from being treated the same as healthy people.

My conclusions on the discriminatory impact: stereotyping

[32] When reaching my conclusions, I followed the teaching of Judge LeBel in *Québec v A*, that the court must undertake "a contextual inquiry. This inquiry must be undertaken from the point of view of a reasonable person in circumstances similar to those of the claimant who takes the relevant context into account."[14] He stated that there are two ways to prove substantive inequality and, as a result, discrimination. The first is to show that the challenged adverse measure perpetuates a prejudice toward members of a group identified in section 15(1) of the Charter. The second way is to show that the disadvantage imposed by the law is based on a stereotype of the claimant's group.[15]

[33] In this case, I find the effects of section 21(3) of the Act to be discriminatory because they are based on a stereotype.

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[13] The Appellant cited *R v Turpin*, [1989] 1 SCR 1296; *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; and *Symes v Canada* [1993] 4 SCR 695.
[14] *Québec v A* at para 154.
[15] *Withler* at para 36; *Québec v A* at para 201.

[34] The four factors Judge Iacobucci stated in *Law* have maintained their relevance as Supreme Court of Canada case law on the analysis for discrimination has progressed. As a result, they should still be considered. However, a relaxing of the application of these criteria has emerged from more recent Supreme Court of Canada decisions.[16] A less rigid and less systematic application of these criteria is now recommended. Judge LeBel in *Québec v A* clarified that the factors were useful, but that they were not exhaustive and that each criterion did not necessarily need to be assessed for every case involving alleged discrimination.[17] Context must now play a large part in each matter. He even added that context is **critical** to the analysis of each case.[18] That is the approach that I have applied to my reasoning.

[35] Concerning the first factor in this case (the pre-existing disadvantage of the claimant group), I acknowledge that the Appellant did not provide evidence of a historical disadvantage for people with physical disabilities. I find that the historical disadvantage of people with disabilities could easily be something of which the Tribunal takes judicial notice. It appears obvious to me that this group of people have experienced their share of obstacles in our society.[19] However, since the Respondent did not acknowledge this fact, it would be unwise[20] to apply judicial notice to the first factor. I therefore find that the pre-existing disadvantage was not shown. However, I grant little weight to this factor because I find that it is not determinative in the specific context of this issue. Furthermore, Judge LeBel indicated that "[a]lthough it can be helpful, in order to establish that an impugned law imposes a disadvantage by perpetuating prejudice, to show that certain individuals or classes of persons have historically been victims of prejudice, it is not necessary to do so."[21]

[36] I assign, however, considerable weight to the second factor: correspondence. I find that this factor enables an in-depth analysis of the Appellant's context and of the challenged provision. Furthermore, the Supreme Court of Canada reiterated in *Québec v A* that "[i]t now

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[16] Notably in *Withler* and *Québec v A* at para 154.
[17] *Québec v A* at paras 155 and 166.
[18] *Québec v A* at para 183.
[19] This was acknowledged in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 (although, in that case, it had to be admitted that the historical disadvantage had been proven).
[20] *Québec v A* at para 155.
[21] *Ibid* at para 182.

seems clearer that this factor can be used to determine whether the distinction creates a disadvantage by stereotyping."[22]

[37] I accept Mr. Brown's testimony that Parliament established its sickness benefits plan for people who cannot work because of their medical conditions. I also understand that Parliament's intention may have been to not encourage sick claimants to work. However, I find that, as explained by the Respondent, the correspondence is inconsistent with how it applies the Act. I find it curious that Parliament had intended that claimants of sickness benefits not work at all and that they use the entire time to recover while still allowing them to work under this type of special benefit. I further note that the issue of Parliament's intention will be addressed in greater detail at the section 1 stage—analysis of the infringement's reasonableness.

[38] I find that this idea of not encouraging claimants of sickness benefits to work does not correspond to those who may have the capacity to work part-time or on a gradual basis. When I consider the Appellant's situation, I realize that it turns out to be false that everyone who receives sickness benefits is unable to work. That may have been the case when the provision was introduced, but it is no longer the reality for people who have a disability. There are now people who are capable of working on a basis other than full-time. Discouraging these people from doing so does not correspond to their circumstances. I am of the view that excluding claimants of sickness benefits from the incentive to work does not consider the reality, needs, and abilities of claimants who cannot work full-time.[23] Their actual situation is that they have some ability to work, but it is limited.

[39] My reasoning about the absence of correspondence leads me broadly to the conclusion that the disadvantage the provisions of section 21(3) of the Act impose on the Appellant is based on a stereotype. The court recognized that stereotypes are "inaccurate generalizations about the characteristics or attributes of members of a group [...]. [I]naccurate assumptions and stereotypes about the capacities, needs, or desires of members of a particular group can carry forward ancient connotations of second class status, even if the legislators did not intend that meaning."[24] As in

[22] *Kapp* at para 23 and *Québec v A* at para 206.
[23] *Québec v A* at para 239.
[24] *Ibid* at para 202.

the analysis of the correspondence factor, I asked myself whether provision 21(3) of the Act reflects the Appellant's actual characteristics. I cannot answer in the affirmative because, as stated above, the provision reflects the situation of people who cannot work at all, which is not the case here.

[40] As the expert witness stressed, Parliament refused to encourage claimants of sickness benefits to return to work. Yet I am of the view that this premise does not reflect the situation or real characteristics of claimants of sickness benefits who have the capacity to work part-time or gradually return to work. This protection of claimants with disabilities is based on the false belief and the stereotype that these people are completely incapable of working. Yet, the Appellant clearly demonstrated that that does not reflect her situation at all. Her doctor prescribed a gradual return to work. That implies that she has some, albeit a limited, capacity to work. Who is better placed to decide whether that is what she needs to recover? A gradual return to work or working part-time may also be part of a treatment plan aimed at recovery and a return to full ability. Why would Parliament not want to encourage this type of return to employment?

[41] I acknowledge that members of the Appellant's group are not having their benefits withdrawn. However, even though they continue to receive them, I find that the group is disadvantaged when their earnings are allocated based solely on intrinsic characteristics over which they have no control (their disabilities). Yet, this disadvantage is based on the negative stereotype that people who have a disability and who receive sickness benefits are totally incapable of working. I find that this conception is not supported by any evidence and ignores the possibility of some people who have a physical disability having the capacity to work part-time or make a gradual return to work. It is based on the inaccurate characterization of the situation of claimants of sickness benefits who have disabilities.[25] This approach ignores the characteristics of a group of people who would not have the capacity to work full-time but whose treating physicians would like to encourage a gradual return to work. This means that the disadvantage and the measure are arbitrary.

[25] *Ibid* at para 271.

[42] The Respondent argues that only the loss of a financial advantage would justify a finding of discrimination. In this case, it has been acknowledged that the Appellant faced the financial disadvantage of $357 when section 21(3) was applied instead of the provisions of section 19(2). While this sum may seem minimal to some, it may be considerable to others. Regardless of the order of magnitude, I find that it is a disadvantage.

[43] Furthermore, I find that the Appellant has demonstrated that section 21(3) imposed a disadvantage on her group beyond the financial. Being excluded from an incentive to return to the labour market deprives such people from more generous benefits but also fundamentally discourages returning to work. I find that work is an integral part of society and self-actualization. Encouraging certain people to work and not encouraging another group solely because of their disability is unfair and contrary to the spirit of section 15(1) of the Charter.

[44] I also find that denying people with disabilities incentive to return to work causes those people to be treated as if they were not full members of society or they did not deserve to realize all of their human potential. Working represents full participation in society. Working is also connected to the "principle of personal autonomy or self-determination, to which self-worth, self-confidence and self-respect are tied, [and which] is an integral part of the values of dignity and freedom that underlie the equality guarantee."[26]

[45] I find that if a doctor recommends or even if a person with a disability believes that working, even in a limited way, contributes to the realization of their autonomy and their sense of having a full life, they should be able to do so without the State's interference.[27] I understand that the challenged provision does not bar them from doing so, but I would add that they must be able to do so under the same conditions as others, which is not the case here.

[46] After considering the entire context and all of the Appellant's circumstances, I find that provision 21(3) of the Act, which removes from recipients of sickness benefits the incentive to

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[26] *Law* at para 53.
[27] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, p 346; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, p 554.

return to work provided in section 19(2) of the Act, discriminates against the Appellant by applying a stereotype that risks worsening her socio-economic situation.

Issue 2: Is the infringement justifiable under section 1 of the Charter?

[47] When the infringement of section 15(1) of the Charter has been established, section 1 of the Charter provides that the government has the burden of proving that this infringement can be justified in a free and democratic society.[28]

[48] In this case, I find that the Respondent has failed to show that the infringement of section 15(1) is justified within the meaning of section 1 of the Charter.

[49] The analytical framework for answering this question was stated in *Oakes*[29] and has two stages, with sub-questions in the second part of the test:

a) Does the objective of the Act relate to pressing and substantial concerns?

b) Are the objective and the discriminatory measure proportional?

   a. Is the infringement rationally connected to the legislative objective?

   b. Does the challenged provision impair the right guaranteed by the Charter as little as possible?

   c. Does the fulfilment of the legislative objective prevail over the infringement of the guaranteed right?

[50] The Appellant did not provide an argument about the test for section 1 of the Charter.

[51] The Respondent argues that, essentially, all of the *Employment Insurance Act*, which is intended to offer financial assistance to people who are unemployed, achieves valid objectives that are pressing and substantial. Concerning the challenged measure more specifically, the

[28] *Egan v Canada*, [1995] 2 SCR 513 (*Egan*) at paras 63–64 and para 182; *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 43.
[29] *R v Oakes*, [1986] 1 SCR 103 at paras 68–71.

Respondent argues that its objective is to ensure that recipients of sickness benefits are not pressured to return to work before they are truly capable of doing so. It submits that this objective relates to pressing and substantial concerns.

[52] I cannot come to the same conclusion. I find that no persuasive evidence has been submitted that shows that the objective is pressing and substantial. The expert witness, Mr. Brown, admitted that, when the sickness benefit plan was established, no consideration was given to people who are [translation] “somewhat” sick or who have some capacity despite their condition (disability).

[53] With all due respect to Parliament and its discretion to introduce legislation as it sees fit, I find that the objective of protecting recipients of sickness benefits from the pressure to return to work before they are truly capable is not valid or substantial. Rather, this premise corresponds to a paternalistic approach that tries to protect claimants from themselves. When a doctor or a healthcare professional is of the view that a person can work in a limited way or perform a gradual return to work, the opinion of that health expert should be respected. There is nothing pressing or substantial in wanting to protect a person from the recommendations of their healthcare professional.

[54] Furthermore, if the objective is truly to protect claimants who are initially unable to work, the application is inconsistent with this objective because the Act allows recipients of sickness benefits to work and earn a salary without issue. This inconsistency makes me doubt Parliament’s real intentions and/or the objectives of the legislative provision.

[55] While I recognize that the entire Employment Insurance plan may achieve pressing and substantial objectives, the Appellant’s particular situation and the application of section 21(3) of the Act, in particular, must be analyzed contextually.

[56] I find that, to demonstrate justification under section 1 of the Charter, the Respondent must cite evidence supporting its position. I find no evidence demonstrating that Parliament was actually interested in the application of its measure to claimants, particularly those who have different types of disabilities, and to the entire plan. No arguments related to the potential costs of the plan justify limiting the incentive to return to work to certain types of claimants, especially

when those excluded are excluded based on an analogous ground such as disability, as they are in this case. No undesirable consequence of the annulment of section 21(3) has been clearly shown.

[57] Based on the above, I find that the Respondent failed to meet its burden of showing that the objective of section 21(3) relates to pressing and substantial concerns. Consequently, there is no need to continue the analysis of justification under section 1 of the Charter.

[58] I have no doubt that Parliament had good intentions and did not intend to discriminate against claimants with disabilities. However, in a changing society that may include more diversity in the realm of employment and personal conditions, I note on a balance of probabilities that the effect of section 21(3) of the Act is discriminatory, as the Appellant has shown, and that this infringement of the guaranteed right to equality is not justified in a free and democratic society.

CONCLUSION

[59] The appeal is allowed. Section 21(1) becomes void and the provisions of section 19(2) of the Act apply to the Appellant.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	May 1, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. G., Appellant Denis Poudrier, Representative for the Appellant François Véronneau, Representative for the Appellant (student-at-law) Aline Chalifoux, for the Employment Insurance Commission (Respondent) Sylvie Doire, Representative for the Respondent Andrew M. Brown, expert witness for the Respondent