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

Citation: *ZB v Canada Employment Insurance Commission*, 2020 SST 910

Tribunal File Number: GE-20-309

BETWEEN:

Z. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: August 26, 2020

DATE OF DECISION: September 7, 2020

Canada

DECISION

[1] The appeal is dismissed. This means that Z. B. (the "Claimant") is not entitled to family caregiver benefits.

OVERVIEW

[2] The Claimant's six-year-old daughter fractured her arm. Her daughter had surgery on October 18, 2019 after an initial attempt to heal the fracture by casting was not successful. The Claimant's daughter has an autism diagnosis. The Claimant had to take time off work to care for her daughter after the surgery to ensure the surgical repair was not disrupted by her daughter's constant movements. On October 19, 2019, the Claimant applied for six weeks of Employment Insurance ("EI") caregiver benefits for a critically ill child. The Canada Employment Insurance Commission (the "Commission") denied the Claimant's request for caregiver benefits because the medical certificate the Claimant provided did not say that her daughter was critically ill or injured.[1] The Claimant submitted further medical information but it still did not say her daughter was critically ill or injured. The Commission upheld its decision after reconsideration. The Claimant appealed the decision to the Social Security Tribunal (the "Tribunal").

[3] The Claimant says the government amendments to the EI legislation in response to Covid-19 say a medical certificate certifying the child is critically ill or injured is no longer required to receive caregiver benefits. The Claimant says this amendment applies to her. The Claimant says other claimants receive benefits for having just cause for leaving their employment. She says she also had just cause for staying off work to care for her daughter. She says the law regarding caregiver benefits is flawed and should be changed. She says that money would be saved to the public health care system by paying her EI benefits as it means her daughter did not require further costly medical treatment. The Claimant argues further that the Commission engaged in a discriminatory practice in the provision of a service within the meaning of section 5 of the *Canadian Human Rights Act* (the "C.H.R.A."). She says this is because of the eligibility distinction in the legislation between critical and non-critical disabilities and the way the Commission's adjudicator interpreted the legislation to deny her benefits.

---

[1] GD3-24.

[4] I must decide whether the Claimant meets the requirements to receive caregiver benefits for a critically ill child. I find, for the reasons set out below, she does not.

PRELIMINARY MATTERS

[5] In her Notice of Appeal, the Claimant raised a constitutional issue. To put the constitutional validity, applicability or operability of the EI legislation in issue, a notice must be filed by the Claimant that complies with paragraph 20(1)(a) of the *Social Security Tribunal Regulations* ("SST Regulations"). The Claimant filed a notice on April 22, 2020.[2] I made a decision on July 4, 2020 that the Claimant's notice did not comply with paragraph 20(1)(a) of the SST Regulations. However, I allowed the Claimant until July 24, 2020 to provide an amended notice.[3] The Claimant did not file an amended notice so on July 29, 2020, I dismissed her Charter claim.[4]

[6] I invited the parties to provide written submissions prior to the hearing concerning the Tribunal's jurisdiction to hear a claim that section 5 of the C.R.H.A. had been violated, but no submissions were received. At the hearing, the Claimant's representative said he would provide some post hearing case references relating to the Tribunal's jurisdiction to consider the C.H.R.A. issue by August 27, 2020. I allowed this. On August 27, 2020, the Claimant provided additional submissions, which reiterate the Claimant's position that money would be saved to the healthcare system if the Claimant were granted EI benefits. The Claimant directs the Tribunal to the Canadian Human Rights Tribunal's ("C.H.R.T.") website concerning the jurisdictional question. No case law references were provided. The onus is on the Claimant to provide any material she wishes the Tribunal to review. I have considered the C.H.R.A. issue in the analysis below, but without having researched the information on the C.H.R.T. website.

---

[2] GD17.
[3] Interlocutory Decision of July 4, 2020.
[4] Interlocutory Decision of July 29, 2020

ISSUE

[7] Is the Claimant entitled to receive caregiver benefits for a critically ill child?

ANALYSIS

The Claimant is not entitled to receive caregiver benefits for a critically ill child

[8] The onus is on Claimants to prove they meet the requirements to receive benefits.[5]

[9] Family caregiver benefits for critically ill children are special benefits available to eligible claimants who take a leave from work to provide care or support to a critically ill child. A "critically ill child" is defined in the EI Regulations as a person under 18 whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury. [6]

[10] The issue in this appeal relates to this definition. To be eligible for critically ill child benefits, a medical doctor or nurse practitioner must issue a certificate, and one of the things it has to provide is that the child is a "critically ill child," as defined by the law.[7]

[11] On October 19, 2019, the Claimant applied for six weeks of critically ill child benefits so she could care for her daughter who had surgery on October 18, 2019 for a broken arm. The Claimant provided a medical certificate dated October 23, 2019 completed by a physician that said, as of October 18, 2019, her daughter's baseline health had significantly changed and that her daughter required the care of a family member until November 24, 2019. However, the certificate said the Claimant's daughter's her life was not at risk as a result of the illness or injury. [8]

[12] The Claimant provided further medical information to the Commission. However, that new information still did not confirm that the Claimant's daughter's life was at risk as a result of her illness or injury.[9]

---

[5] Subsection 49(1) of the *Employment Insurance Act.*
[6] Subsection 1(6) of the *Employment Insurance Regulations.*
[7] Section 23.2(1) of the *Employment Insurance Act.*
[8] GD3-19.
[9] GD3-40.

[13] The Commission says the Claimant is not eligible for benefits because she did not provide the required medical certificate certifying her daughter was critically ill within the definition set out in the EI Regulations.

[14] The Claimant says even though the required medical certificate was not provided, the situation was critical and became more critical as time went on. She says she had to stay home with her daughter because otherwise her daughter would have disrupted the healing of the fracture after surgery and may have required further surgeries.

[15] The Claimant testified that her eight-year-old daughter is on the severe end of the autism spectrum and non-verbal. Her daughter has sensory issues and as such is always climbing, jumping and running. The Claimant said her daughter's fracture did not heal with the initial cast so she had to have surgery. The Claimant says the situation was critical. After the surgery, her daughter did not sleep for three days and was crying in pain. The doctor told the Claimant that her daughter could not fall after the surgery for six weeks so she was not able to jump or run. The Claimant said this had to be monitored so she had to stay with her daughter to prevent further unnecessary complications and surgeries. The Claimant explained that her daughter is right handed and it was her right arm that was impacted so if it did not heal properly, this could have affect her daughter's ability to work and livelihood in the future and become even more critical. The Claimant says the definition of "critical" in the legislation needs to be more objective.

[16] It is not in dispute that the Claimant's daughter required her care so that her surgical repair would not be disrupted. I acknowledge that the Claimant and her family experienced a stressful and difficult situation managing the healing of the fracture. However, it is not enough that the Claimant has to care for her child. The term "critically ill child" is a defined term in the law. It requires, not only that care is required, but that the child's life be at risk as a result of the illness or injury. It is a condition of eligibility that a medical certificate be provided saying the child's life is at risk as a result of the illness or injury.[10] The medical certificate the Claimant

[10] Section 23.2(1) of the *Employment Insurance Act*.

provided did not say that. The Claimant is not therefore eligible for caregiver benefits to care for her daughter.

[17] The Claimant made a number of other arguments as to why she should be entitled to benefits. None of them changes my decision. I will address each of them below.

The Claimant says the amendments to the EI legislation as a result of Covid-19 apply to her and she does not have to provide a medical certificate certifying her daughter is a "critically ill child".

[18] The Claimant maintains she is not required to provide a medical certificate certifying her child was a "critically ill child" because the amendments to the EI legislation as a result of Covid-19 removed that requirement. The Claimant's representative acknowledges there is nothing in the amending legislation that says the amendments regarding the provision of medical certificates apply retroactively. However, he says that in the past the government has retroactively compensated individuals who have been discriminated against so the same logic should apply in the Claimant's situation.

[19] The Commission says the amendments to the EI Act in response to COVID-19 do not apply to the Claimant because the law was not changed until March 2020, and the amendments apply to claims made before March 2020. The Claimant wanted to be paid benefits during parts of October and November 2019, and she has to meet the substantive requirements that were part of the law for those weeks she wants to be paid. At that time, the law said that she was required to provide the medical certificate certifying her daughter was a "critically ill child."

[20] I find the Claimant must provide the required medical certificate to establish her eligibility for caregiver benefits in accordance with the law in effect at the time her benefit period was to begin.

[21] With respect, the Claimant's representative's argument about the government having in the past retroactively compensated individuals it discriminated against is a generalisation without regard to the specific legislation in question.

The Claimant says she had just cause for voluntarily leaving her employment to care for her daughter.

[22] The Claimant argues other individuals who voluntarily leave their employment with just cause receive benefits. She says she had just cause for voluntarily leaving her employment to care for her daughter to prevent disruption to the surgical repair.[11]

[23] This argument is irrelevant to the issue under appeal. The Commission did not disqualify the Claimant from receiving benefits for the reason she voluntarily left her employment without just cause.[12] Rather, the Commission decided the Claimant was not entitled to caregiving benefits for a critically ill child, as she did not meet the eligibility criteria, namely the requirement to provide the medical certificate certifying her daughter was a "critically ill child."

The Claimant says she should be paid benefits because money was saved to healthcare system because she stayed home to care for her daughter.

[24] The Claimant submits that the Commission has violated the *Canada Health Act* because a large amount of money was saved by the provincial healthcare system than would have been paid out in EI benefits. The Claimant asserts that because she stayed home, her daughter did not require further expensive health care. She says the EI Act should be changed to grant caregiver benefits in this type of situation.

[25] I have no jurisdiction to make a ruling under the *Canada Health Ac*t and it is not relevant to the Claimant's eligibility for caregiver benefits for a critically ill child whether money was saved to the healthcare system. The question before me is whether the Claimant meets the legislated eligibility requirements. In this case, she does not meet the eligibility requirements, as she could not provide the required medical certificate.

[11] GD2-13.
[12] Claimants are disqualified from benefits if they voluntarily leave their employment without just cause under section 30 of the *Employment Insurance Act.*

[26] As I explained to the Claimant and her representative at her hearing, the Tribunal has no jurisdiction to amend the law.

The Claimant says the Commission engaged in a discriminatory practice in the provision of a service under section 5 of the C.H.R.A.

[27] The Claimant submits that the Commission engaged in a discriminatory practice in the provision of services (EI benefits) contrary to section 5 of the C.H.R.A. because of the eligibility distinction in the EI legislation between critical and non-critical disabilities and because the Commission's adjudicator interpreted the legislation in such a way that the Claimant was denied caregiver benefits for critically ill children.[13] She says her daughter suffered prima facie discrimination when she was classified as not having a disability worthy of needing home care from her mother.

[28] The Claimant submits the Tribunal has jurisdiction to hear such a claim and can disregard a provision in the EI legislation if the provision is inconsistent with section 5 of the C.H.R.A.[14] She refers to the primacy of human rights law over other laws.

[29] The Commission says the Tribunal does not have jurisdiction to decide whether a discriminatory practice under section 5 of the C.H.R.A. has occurred. The Commission submits that this issue does not fall within the Tribunal's mandate as defined by s. 64 of the *Department of Employment and Social Development Act* and section 113 of the EI Act. The Commission submits that while the Tribunal can decide any question of law or fact that is necessary for the disposition of an application, it cannot pronounce that an EI Act provision or EI Regulation are invalid because they conflict with the C.H.R.A. The Commission says only the C.H.R.T. can grant a remedy if a "discriminatory practice" exists.

[30] I will first consider the jurisdictional issue. Section 5 of the C.H.R.A. deals with discriminatory practices in relation to goods, services, facilities, or accommodation. It provides that it is a discriminatory practice in the provision of goods, services, facilities or

---

[13] GD2-14, GD2-17.
[14] GD17-12.

accommodation customarily available to the general public (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.[15] There are a number of prohibited grounds of discrimination including disability.[16] Under the C.H.R.A., individuals can file a complaint regarding an enumerated discriminatory practice, and anyone found to have engaged in such a practice may be made subject to an order by the C.H.R.T. [17]

[31] I find that the Tribunal does have jurisdiction to consider whether a discriminatory practice has occurred under section 5 of the C.H.R.A.

[32] Given its quasi-constitutional status, human rights legislation is generally considered to prevail over other conflicting legislation.[18] The Supreme Court of Canada has held that human rights tribunals do not have exclusive jurisdiction over human rights cases and, unless there is statutory language to the contrary, other tribunals have concurrent jurisdiction to apply human rights legislation. [19]

[33] This Tribunal has a broad jurisdiction to decide questions of law necessary for the disposition of any appeal that comes before it.[20] There is no statutory language that negates its jurisdiction to apply human rights legislation. The Supreme Court of Canada has specifically commented on this Tribunal's consideration of section 5 of the C.H.R.A. In that regards, Justices Côté and Rowe said in the *Andrews* case:

> "We are therefore of the view that the particular question at issue — whether legislation can be challenged as discrimination in the provision of a service — does not arise within a particularly discrete administrative regime over which the Tribunal has exclusive jurisdiction (Dunsmuir, at para. 55; Rogers Communications, at para. 18; Johnstone, at paras. 47-48). Various other decision makers — including the Commission, the Social

---

[15] Section 5 of the *Canadian Human Rights Act.*
[16] Section 3(1) of the *Canadian Human Rights Act*.
[17] Section 4 of the *Canadian Human Rights Act.*
[18] *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145; *Winnipeg School Division No. 1 v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150.
[19] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513.
[20] Section 64 of the *Department of Employment and Social Development Act* provides that the Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

> Security Tribunal, and labour arbitrators — have been and will continue to be asked that very same question"[21]

[34] Although I am not bound by other decisions of this Tribunal, I note that the Appeal Division of the Tribunal has previously entertained a claim that a provision of the EI Act violated section 5 of the C.H.R.A. and found it had jurisdiction to consider that issue. [22]

[35] I next have to decide whether the Commission has engaged in a discriminatory practice in the provision of a "service" customarily available to the general public contrary to section 5 of the C.H.R.A.

[36] The Claimant submits that EI payments for family caregivers of critically ill children are a "service customarily available to the general public". She says this is because the EI system is a contributory scheme, which provides social insurance for Canadians who suffer a loss of income as a result of a loss of their employment or who are unable to work by reason of illness, pregnancy and childbirth or parental responsibilities for a newborn or newly adopted child. She argues the Federal Court of Appeal decision in *Druken*[23] supports her position in that regard. In *Druken*, the Federal Court of Appeal found that application of mandatory eligibility provisions under the *Unemployment Insurance Act* was a service under section 5 of the C.H.R.A.

[37] The Claimant acknowledges that a challenge to legislation and nothing else is not a discriminatory practice. However, she says her challenge is not just a challenge to the legislation. She says that the Commission engaged in a discriminatory practice because the legislation prefers critical disabilities over non-critical disabilities. She argues as well that the Commission's adjudicator's ministerial action to interpret the legislation to exclude her daughter's autism and her broken arm disability such that she did not receive El funds was a discriminatory practice.

[38] The Commission submits that the denial of EI benefits is not a discriminatory practice in the provision of a service. The Commission says the Claimant's argument is an attack only on

---

[21] *Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII) (*Andrews*), paragraph 85.
[22] *Canada Employment Insurance Commission v. M. W.*, 2014 SSTAD 371.
[23] *Canada (AG) v. Druken*, [1989] 2 FC 24 (*Druken*).

the EI legislation and the Supreme Court of Canada has said that a claimant cannot attack the provisions of legislation using the C.H.R.A.[24] The Commission points out that the Appeal Division of this Tribunal previously held that a challenge to the legislative requirement of a minimum amount of insurable hours to qualify for EI benefits was not a discriminatory practice in the provision of a "service" within the meaning of section 5 of the C.H.R.A.[25]

[39] The law is clear that legislation generally does not fall within the meaning of "services" and that an attack on legislation is not a discriminatory practice under the CHRA. The Federal Court of Appeal decided in 2012 that the *Druken* case relied on by the Claimant is no longer good law.[26]

[40] As Justices Cote and Rowe of the Supreme Court of Canada pointed out in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, if administrative decision makers, "use their statutory discretion in a manner that effectively denies access to a service or makes an adverse differentiation on the basis of a prohibited ground, s. 5 will be engaged. But, when they are engaged simply in applying valid legislation, the challenge is not to the provision of services, but to the legislation itself."[27]

[41] The Commission's decision to deny benefits was made not because of any interpretation by the Commission's decision-maker as to the nature of the Claimant's disability, but because the Claimant could not provide the medical certificate stating that her daughter's life was at risk due to the illness or injury. It is the legislation which distinguishes entitlement based on critical and non-critical disabilities and only the legislation. The Commission's decision-maker had no

---

[24] GD21-241, *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* 2018 SCC 31 at paragraph 56.

[25] *Canada Employment Insurance Commission v. M. W.*, 2014 SSTAD 371, Can LII.

[26] In *Druken*, the Attorney General had conceded that s. 5 of the C.H.R.A applied to the impugned provisions of the Unemployment Insurance Act, 1971so the point was not argued. However, the Federal Court of Appeal in *Public Service Alliance of Canada v Canada Revenue Agency,* 2012 FCA 7 *(Murphy)*, considered the finding in *Druken* and specifically rejected as being good law. The Federal Court of Appeal made clear in *Murphy* that an attack on legislation and nothing else is not a service and therefore is not a discriminatory practice within the meaning of section 5 of the C.H.R.A. The Federal Court of Appeal recently reached the same conclusion as in *Murphy* – that an attack on legislation is not a discriminatory practice under the CHRA *in Canadian Human Rights Commission v Attorney General of Canada,* 2016 FCA 200 *(Andrews)*. The Federal Court of Appeal's decision in *Andrews* was upheld by the Supreme Court of Canada in Canada *(Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII).)

[27] GD21-259, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII), paragraph 97.

discretion in the decision that was made. The law says that the required medical certificate has to be provided to establish eligibility and the Commission's decision maker had to apply that law. It is the law that resulted in the Claimant not being able to meet the requirements to be paid critically ill child benefits, not the actions of the Commission's decision maker.

[42] The Claimant has not proven that a discriminatory practice has occurred. Her complaint is a challenge to legislation, and nothing else. The Claimant has not identified a discriminatory practice within the meaning of section 5 of the C.H.R.A.

CONCLUSION

[43] I am sympathetic to the Claimant's situation. However, no matter how compelling the circumstances, I cannot step outside the law. The Claimant is not entitled to caregiver benefits for a critically ill child.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	August 26, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Z. B., Appellant Mark Brown, Representative for the Appellant