

Federal Court



Cour fédérale

Date: 20151113

Docket: T-1864-14

Citation: 2015 FC 1267

Ottawa, Ontario, November 13, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

SHARON MALOTT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms Sharon Malott was the victim of two unrelated sexual assaults that occurred during the course of her employment. As a result of post-traumatic stress, Ms Malott was unable to work. She received benefits from the Ontario Workers Safety Insurance Board (WSIB) based on her employment history with the Department of External Affairs and International Trade in the form of a lump sum payment (\$129,215.79) equivalent to the monthly disability payments to

which she was entitled, plus a supplementary wage loss award and a lifetime wage loss benefit. In addition, based on her service in the Canadian Forces, she received a disability award of \$161,319.63. However, Veterans Affairs Canada (VAC) reduced that amount by the lump sum she had received from the WSIB. According to VAC, the WSIB payment represented compensation for a non-economic loss and should, therefore, be deducted from her VAC disability award.

[2] Ms Malott appealed to a Review Panel, which upheld VAC's decision. She appealed further to an Appeal Panel, but was unsuccessful.

[3] Ms Malott argues that the Appeal Panel's decision was unreasonable because it did not take account of evidence showing that the WSIB payment represented a non-economic loss. In addition, she argues that the Panel treated her unfairly by relying on materials not disclosed to her. She asks me to quash the Panel's decision and order another panel to reconsider VAC's position.

[4] I agree with Ms Malott that the Panel's conclusion – that she had received an award from WSIB representing a non-economic loss – was unreasonable. On that basis, I will grant this application for judicial review. It is unnecessary to consider Ms Malott's allegation of unfairness.

II. The Appeal Panel's Decision

[5] The Panel determined that the relevant portion of the payment Ms Malott received from WSIB compensated her for a non-economic loss and was, therefore, deductible from her VAC

award. The Panel relied on the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50, ss 53(1),(2), and the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21, s 52(3) (see Annex for enactments cited).

[6] Under the Act, the Minister of Veterans Affairs may reduce a disability benefit by a prescribed amount. The Regulations state that a prescribed amount includes a payment for non-economic loss. If the WSIB payment represented compensation for a non-economic loss, it would be deductible from the VAC amount. If not, Ms Malott would be entitled to the full VAC benefit.

[7] The Panel noted that Ms Malott's claim dated to 1987 and, at that time, the compensation she received from WSIB would not have been treated as a payment for a non-economic loss. Accordingly, WSIB stated that Ms Malott was not in receipt of a payment for a non-economic loss. However, the Panel did not feel bound by WSIB's characterization.

[8] The Panel considered the characteristics of both economic and non-economic awards. In its view, an economic loss payment would generally:

- Represent lost wages;
- Take account of the person's ability to earn an income;
- Increase with a decrease in earnings, and vice versa; and
- Cease on retirement.

[9] By contrast, a non-economic loss award would generally:

- Compensate a person for diminished functional capacity;
- Correspond with the severity of the disability;
- Remain constant even with changes in the person's earnings; and
- Continue after retirement.

[10] The Panel found that the WSIB award was tied to Ms Malott's medical and psychological condition, was unconnected to changes in her income, and was payable for life. Therefore, it concluded that the award represented compensation for a non-economic loss. The fact that the WSIB benefit was calculated as a percentage of her income did not make it an economic loss payment. Normally, according to the Panel, non-economic loss payments are based on pre-injury earnings. That does not mean, though, that they represent compensation for economic loss.

III. Was the Appeal Panel's decision unreasonable?

[11] The Attorney General of Canada submits that the Panel's decision was not unreasonable because it considered the evidence before it and took account of valid criteria for characterizing economic versus non-economic compensation.

[12] I disagree. The Panel seemed to have overlooked evidence and factors that may have led it to a different result.

[13] As mentioned, there was evidence before the Board showing that Ms Malott's WSIB benefit was characterized by WSIB as compensation for a loss in earnings. Of course, as the

Panel itself stated, it was not bound by WSIB's opinion. However, the Board should have considered the basis on which that characterization had been made.

[14] Under the Ontario legislation at the relevant time – the 1980s – compensation was simply not payable for non-economic losses. The WSIB benefit Ms Malott received was payable under s 45(1) of the pre-1989 *Workmen's Compensation Act*, RSO 1980, c 539, as amended by SO 1984, c 58, which states that the “impairment of earning capacity of the worker” had to be estimated based on the nature and degree of the person's injury. The person would be entitled to compensation by way of periodic payments during his or her lifetime, or for a shorter period of time. The amount could not exceed 90 percent of the person's net average earnings. Based on this formula, in 2010, Ms Malott received a lump sum from WSIB representing accumulated monthly payments for the reduction in her earning capacity dating back to 1987.

[15] This legislation provided only for compensation for economic losses. Compensation for non-economic loss was added later, but only for injuries incurred on or after January 2, 1990. This did not apply to Ms Malott. The letter from WSIB cited by the Panel confirmed that Ms Malott was not eligible for compensation for non-economic loss. Accordingly, the legislation under which the WSIB payment was made to Ms Malott was clearly aimed at providing compensation for lost wages, an economic loss.

[16] The Panel noted that Ms Malott's WSIB benefit was tied to the degree of her psychological impairment and inferred from that fact that the payment was for a non-economic

loss. But surely both economic benefits and non-economic compensation must take account of the degree of the person's disability. This would seem to be a neutral factor.

[17] There was other evidence that the Panel appeared not to consider. For example, WSIB advised Ms Malott that she had to disclose any changes in her earnings or income and that any changes could affect her entitlement to benefits. But, contrary to that evidence, the Panel found that her benefit was not dependent on her income. Even according to the Panel, to vary a benefit as a result of fluctuations in income would be indicative of a payment for an economic loss, not for a non-economic loss.

[18] The WSIB benefit was, indeed, payable for life. However, that was also true for other benefits that Ms Malott received, benefits that the Panel itself characterized as being for economic loss. Therefore, the fact that the WSIB benefit was payable for life could not have been a determinative factor. In addition, while Ms Malott's WSIB benefit was granted to her for life, this was not automatic. The WSIB could have granted her compensation for a shorter period, including termination upon retirement.

[19] Accordingly, even applying the criteria the Panel felt were most relevant, it is not clear that the WSIB benefit represented payment for a non-economic loss. Given that there was evidence and legislative authority that was not considered by the Panel and which contradicted its findings, I find that its conclusion was unreasonable.

[20] In addition, I note that the Panel failed to recognize its obligation to draw all reasonable inferences from the evidence in Ms Malott's favour, and to give her the benefit of any doubt about whether she had made out a valid claim (s 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18).

IV. Conclusion and Disposition

[21] The Panel failed to take account of relevant evidence and statutory authority when it found that Ms Malott's WSIB benefit represented compensation for a non-economic loss. Accordingly, its conclusion does not fall within the range of defensible outcomes based on the facts and the law. I must, therefore, allow this application for judicial review and order another Panel to reconsider the issue.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, with costs.
2. The matter is remitted to another Panel for reconsideration.

"James W. O'Reilly"

Judge

ANNEX

Canadian Forces Members and Veterans Re-establishment and Compensation Regulations, SOR/2006-50

Règlement sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes, DORS/2006-50

53. (1) “additional amount” means an amount other than a disability award that is paid or payable to a member or veteran for noneconomic loss in respect of a disability for which a disability award is payable.

53. (1). « somme supplémentaire » Somme — autre qu'une indemnité d'invalidité — que le militaire ou le vétéran a reçue ou est en droit de recevoir pour une perte non pécuniaire à l'égard d'une invalidité pour laquelle une indemnité d'invalidité est exigible.

(2) For the purposes of subsection 52(3) of the Act, a disability award payable to a member or veteran shall be reduced by the amount determined in accordance with subsection 54(1) if an additional amount is paid or payable from the following sources:

(2). Pour l'application du paragraphe 52(3) de la Loi, si le militaire ou le vétéran a reçu ou est en droit de recevoir une des sommes supplémentaires ci-après, la somme déterminée conformément au paragraphe 54(1) est retranchée de l'indemnité d'invalidité exigible :

(a) amounts arising from a legal liability to pay damages; and

a) toute somme découlant d'une obligation légale d'indemnisation;

(b) benefits under

b) des prestations au titre :

(i) the Government Employees Compensation Act,

(i) de la Loi sur l'indemnisation des agents de l'État,

(ii) any provincial workers' compensation legislation,

(ii) de toute loi provinciale sur les accidents de travail,

(iii) a compensation plan established by any other legislation of a similar nature, whether federal, provincial or of another jurisdiction other than a plan to which the member or veteran has contributed, and

(iii) d'un programme d'indemnisation de même nature établi au titre d'une loi fédérale, provinciale ou de toute autre autorité législative, exception faite du programme auquel le militaire ou le vétéran a contribué,

(iv) a compensation plan of a similar nature established by the United Nations or by or under an international agreement to which Canada is a party, other than a

(iv) de tout programme d'indemnisation semblable établi par les Nations Unies ou en vertu d'un accord international auquel le Canada est partie, exception

plan to which the member or veteran has contributed.

faite du programme auquel le militaire ou le vétéran a contribué.

Canadian Forces Members and Veterans Re-establishment and Compensation Act, SC 2005, c 21

Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes, LC 2005, c 21

Reduction of award

Réduction

52. (3) If an amount is paid or payable to a person from a prescribed source in respect of a death or disability for which a disability award is payable, the Minister may reduce the disability award payable to the person by a prescribed amount.

52. (3) Le ministre peut retrancher la somme prévue par règlement de l'indemnité d'invalidité exigible en raison du décès ou de l'invalidité du militaire ou vétéran par toute personne qui, pour la même raison, a reçu ou est en droit de recevoir des sommes d'une source réglementaire.

Veterans Review and Appeal Board Act, SC 1995, c 18

Loi sur le Tribunal des anciens combattants (révision et appel), LC 1995, c 18

Rules of evidence

Règles régissant la preuve

39. In all proceedings under this Act, the Board shall

39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :

(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;

a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;

(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and

b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;

(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

FEDERAL COURT
SOLICITORS OF RECORD

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