Federal Court of Appeal  Cour d'appel fédérale

Date: 20161116

Docket: A-336-15

Citation: 2016 FCA 285

CORAM: **PELLETIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

JENNIFER MCCREA

Appellant

and

THE ATTORNEY GENERAL OF CANADA and THE CANADA EMPLOYMENT INSURANCE COMMISSION

Respondents

Heard at Toronto, Ontario, on September 12, 2016.

Judgment delivered at Ottawa, Ontario, on November 16, 2016.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from an Order of the Federal Court dated July 20, 2015 (Docket: T-210-12) (Amending Order). This Amending Order amended the previous Order dated May 7, 2015 (2015 FC 592) (Original Order) by, *inter alia*, deleting one of the common questions related to the class proceeding. The Appellant is appealing this deletion of the common question.

[2] For the reasons that follow, I would allow this appeal.

I. Background

[3] The Appellant brought a motion to certify an action as a class proceeding under Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 (*Rules*). The action is related to the denial of sickness benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 (*EI Act*) to individuals who were receiving parental benefits under the *EI Act* when they became ill. The Appellant's claim arises as a result of amendments made to the *EI Act* in 2002 and her allegation that the Canada Employment Insurance Commission (the Commission) and Service Canada failed to properly implement the amendments, which resulted in individuals who were on parental leave being denied claims for sickness benefits.

[4] The Appellant had asserted a number of causes of action. The Federal Court Judge only certified the class proceeding for negligence (paragraph 11 of her reasons for her Original Order and later described as "negligent implementation of the *Act*" in paragraph 447 of these reasons). In the Original Order the following Common Questions were certified:

> *The EI Act Interpretation and Administration Issues*
>
> i) Were persons who, during the Class Period, were on parental leave and who suffered from an illness, injury or disability before or during their parental leave eligible to collect sickness leave benefits, all as defined under the *EI Act*?
>
> ii) If the answer to question i) is "yes", was the *EI Act* – during the Class Period – administered by the defendant (the Commission or Service Canada) in accordance with its terms when the defendants failed to approve the sickness leave benefits of the Class Members?

General Negligence Issues

iii) If the answer to the question ii) is "no", did the defendant (the Commission or Service Canada) owe the Class Members a duty of care in administering the *EI Act*?

iv) If the answer to question iii) is "yes", then what is the content of the duty, and which defendants owed such a duty?

v) If the answer to question iii) is "yes", did the defendants who owed such a duty breach that duty of care?

Aggregate Damages, Vicarious Liability and Administration Costs Issues

vi) Should the defendants pay the cost of administering and distributing recovery to the Class?

[5] No one filed an appeal from the Original Order. Instead, the Respondents brought a motion under Rule 397 requesting that the Federal Court Judge reconsider the Original Order on the basis that the order does not accord with the reasons and that it omitted a reference to the Respondents' motion to strike the pleadings being allowed in part. The motion was granted and a number of amendments were made to the Original Order. The only amendment that is in issue in this appeal is the deletion of common question v): "If the answer to question iii) is "yes", did the defendants who owed such a duty breach that duty of care?"

II. Standard of Review

[6] The standards of review will be correctness for questions of law and palpable and overriding error for questions of fact or mixed fact and law where there is no extricable question of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] F.C.J. No. 943).

III. Analysis

[7] As noted above no appeal was filed from the Original Order. This appeal is from the Amending Order and, therefore the only issue is whether the Federal Court Judge erred in law in deleting common question v) from the Original Order.

[8] Generally once a court has rendered an order it is without jurisdiction to reopen or change that order. In *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 85, 246 N.S.R. (2d) 104, Cromwell J. (as he then was) noted that:

> 36 *Functus officio* is a rule about finality: once a tribunal has completed its job, it has no further power to deal with the matter. In relation to court proceedings, the principle means that, in general, once a court has issued and entered its final judgment, the matter may only be reopened by means of appeal. To this general rule, however, there are at least two exceptions: the court may correct slips and, as well, address errors in expressing its manifest intent: *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186; see also *Civil Procedure Rule* 15.07.
>
> 37 These principles developed in the context of court decisions which are subject to full rights of appeal. The existence of these full rights of appeal fostered the view that an appeal, rather than a reopening of the case before the initial decision-maker, was generally the preferred way to address errors in the initial decision.

[9] In the *Rules* these exceptions are reflected in Rule 397:

397 (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	397 (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :

(a) the order does not accord with any reasons given for it; or	a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;
(b) a matter that should have been dealt with has been overlooked or accidentally omitted.	b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.
(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.	(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

[10] While the common law permitted a court to change its order if it did not reflect the "manifest intent" of the court, Rule 397(1)(a) only refers to an order that "does not accord with any reasons given for it." It is not clear whether this wording was intended to change the common law. If it was intended to change the common law, it should be noted that the authority to make the *Rules* is provided in section 46 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. This authority is limited to making rules regulating the practice and procedure in the Federal Court and this Court and certain other specified matters. As a result, the *Rules* cannot override the substantive common law (*Condessa Z Holdings Ltd. v. Rusnak*, 104 D.L.R. (4th) 96, at pages 120(t) to 121(c), 109 Sask. R. 170, (Sask. C.A.)). In my view, the power to reconsider an order on the basis that it does not accord with any reasons given for it must concur with the common law and, therefore, the Court can only correct an order, under this Rule, if it does not reflect the manifest intention of the Court as expressed in the reasons provided by that Court.

[11] In the Amending Order, the Federal Court Judge referred to paragraph 374 of her reasons as clearly indicating that "whether the defendants breached any duty of care will require an individual assessment":

> 374 The remaining issues in Group B, whether and how the defendant breached the duty of care, whether the breach caused damages, and the quantum or measure of any such damages, will require individual findings of fact with respect to each class member. The issue of whether and how the defendant breached the duty of care may have common aspects, as this would follow from a finding regarding the interpretation of the Act and consideration of the concepts of foreseeability and proximity, but other aspects would require more individual assessment.

[12] In the first sentence the issue of "whether and how the defendant breached the duty of care" is included with the issues related to damages and, with respect to all of the issues listed, it is noted that individual findings of fact will be required. The second sentence, however, separates "the issue of whether and how the defendant breached the duty of care" and notes that, with respect to this issue that it "may have common aspects, as this would follow from a finding regarding the interpretation of the Act and consideration of the concepts of foreseeability and proximity, but other aspects would require more individual assessment." Having indicated that there may be common aspects to the question of whether the Respondents breached the duty of care does not necessarily indicate a clear intention to not certify as a common question whether the Respondents (who before this question is addressed would be found to have owed a duty of care and the content of that duty would also have been determined) have breached this duty.

[13] In paragraph 375 of her reasons, the Federal Court Judge noted that:

> 375 Although individual assessment of who owed and who breached the duty may be required, the determination whether such a duty was owed will advance the litigation.

[14] Although the Federal Court Judge stated that "an individual assessment of who owed and who breached the duty may be required…" , she did certify the following as common questions iii) and iv):

iii) If the answer to the question ii) is “no”, did the defendant (the Commission or Service Canada) owe the Class Members a duty of care in administering the EI Act?

iv) If the answer to question iii) is “yes”, then what is the content of the duty, and which defendants owed such a duty?

[15] Therefore she did certify the question of whether the Commission or Service Canada owed a duty of care in administering the *EI Act* and if so, the content of the duty and which defendant owed the duty despite her statement that it would require an individual assessment to determine who owed the duty. As a result, in my view, it is far from clear that her original intention was not to also certify, as a common question, the second aspect identified jointly with “who owed the duty” in paragraph 375, namely, which one or both of the Commission and Service Canada (who would have found to owe a duty of care before question v) is addressed) breached that duty.

[16] The common issues that were to be certified were identified in paragraph 382 of her reasons which was shortly after the paragraphs referred to above. The common issues listed in paragraph 382 included the question in issue in this appeal.

[17] As a result, in my view, it cannot be said that the manifest intention of the Federal Court Judge was not to certify question v) related to whether the Commission or Service Canada (who, as a result of questions iii) and iv) would have been found to have owed a duty), breached that duty. It should be noted that this common question is conditional, directly and indirectly, on the other questions that have been certified. Although question v) is not conditional on question iv), it is logical that it would be addressed only after question iv) is answered.

[18] Before question v) is addressed by the Federal Court, the questions related to the interpretation and administration of the *EI Act* will have been answered. Only if the answer to those questions supports the claim of the Appellant will the question of whether the Commission or Service Canada owed a duty of care in administering the *EI Act* be addressed and only if this answer is favourable to the Appellant will the question iv) related to the content of the duty and which one or both of the Commission and Service Canada owed the duty, be addressed. Once all of those issues are resolved, there is no apparent reason why a Court could not determine whether the Commission and / or Service Canada (who must have been found to owe a duty in order for question v) to be relevant) breached the duty of care.

[19] While the Respondents also submit that the Federal Court Judge could have deleted the common question in issue pursuant to Rule 397(2), I do not agree. Since, in my view, the reasons do not exhibit a manifest intention to not certify this question, I am not persuaded that it was a clerical error or mistake to include this common question in the Original Order.

[20] As a result, I would allow the appeal, without costs, and strike paragraphs 2 and 4 from the Amending Order with the result that common question v) as contained in the Original Order is restored.

"Wyman W. Webb"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED JULY 20, 2015, NO. T-210-12

DOCKET:	A-336-15
STYLE OF CAUSE:	JENNIFER MCCREA v. THE ATTORNEY GENERAL OF CANADA et al
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 12, 2016
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	PELLETIER J.A. NEAR J.A.
DATED:	NOVEMBER 16, 2016

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