Federal Court of Appeal | Cour d'appel fédérale

Date: 20211015

Docket: A-176-19

Citation: 2021 FCA 200

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

ESTÉBAN OUIMET

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Montreal, Quebec, on September 28, 2021.

Judgment delivered at Ottawa, Ontario, on October 15, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an application for judicial review of a decision by the Social Security Tribunal – Appeal Division (the Appeal Division), rendered on April 16, 2019 (2019 SST 358). This is the first case to raise the interrelationship of the *Act respecting parental insurance*, CQLR, c. A-29.011 (the Quebec Act) and the provisions of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) and the *Employment Insurance Regulations* (SOR/96-332) (the Regulations). More specifically, the core issue in this case is as follows: do the paternity benefits provided for by the

Quebec plan and the maternity and parental benefits provided by the federal plan under of subsection 76.19(1.1) of the Regulations constitute “corresponding types of benefits”.

[2] This question is not just moot: the answer not only pertains to the amount of benefits that can be paid under the Act but also to the starting point of the benefit period. More specifically, the outcome of this appeal will determine whether Mr. Ouimet should reimburse the $4,400.00 that he received in regular benefits after he lost his employment.

[3] For the reasons that follow, I am of the opinion that the Appeal Division’s decision should be upheld and that the paternity benefits received under the Quebec plan are of the same type as the benefits provided under the Act when a child is born.

[4] The facts are not disputed and can be briefly summarized. The applicant, Mr. Ouimet, accrued 600 hours of insurable employment between May 1 and September 15, 2017. After his child was born, Mr. Ouimet took paternity leave and received benefits under the Quebec Act from September 17 to October 21, 2017. He subsequently returned to work, but unfortunately his two employers laid him off a few weeks later. During this last period, he accrued a total of approximately 400 hours of insurable employment.

[5] After losing his positions, the applicant submitted an employment insurance claim for regular benefits on December 6. His benefit period was first established in the period beginning on December 3, 2017, and he received benefits starting on that date. The Employment Insurance Commission nevertheless performed verifications and determined that the beginning of the

benefit period was not December 3, 2017, but in fact September 17, when the applicant began receiving paternity benefits under the Quebec plan.

[6] There is no doubt that if the applicant had not started receiving paternity benefits on September 17, he would have been entitled to receive regular employment insurance benefits when he was laid off in early December 2017 because he would then have accrued 1,000 hours of insurable employment during his qualifying period (that is, according to subsection 8(1) of the Act, in the 52 weeks preceding December 3, 2017). Subsection 7(2) of the Act provides that the minimum hours of insurable employment in the region where Mr. Ouimet lived was 665 hours.

[7] However, subsection 76.19(1.1) of the Regulations provides that a benefit period is deemed to be established when the benefit period was established under a provincial law, and it is deemed to have begun the same week as the period established under the provincial law if the claimant would have been entitled to the corresponding types of benefits under the Act in respect of the same period. Given how important this provision is in deciding the appeal, I would like to reproduce it here:

76.19(1.1) A benefit period is deemed to be established when a benefit period was established under a provincial law, and it is deemed to have begun the same week as the period established under the provincial law if the claimant would have been entitled to the corresponding types of benefits under the Act in respect of the same period.	**76.19(1.1)** Une période de prestations est réputée établie au moment où la période de prestations a été établie en vertu de la loi provinciale et elle est réputée avoir débuté la même semaine que celle établie en vertu de la loi provinciale dans le cas où le prestataire aurait été en droit de recevoir des prestations du même genre en vertu de la Loi pour la même période.

[8] Since Mr. Ouimet had not accrued the minimum number of insurable hours of employment on September 17, 2017, the Commission considered him disentitled to be paid regular employment insurance benefits pursuant to subsection 7(2) of the Act and asked him to reimburse the $4,400.00 overpayment. The Commission reviewed the case and upheld its original decision.

[9] The Social Security Tribunal – General Division (the General Division) reversed the Commission's decision in a ruling rendered on October 26, 2018 (2018 SST 1313). The General Division held that subsection 76.19(1.1) did not apply in this case, because the paternity benefits provided for in the Quebec plan and the parental benefits provided for in the employment insurance program were not corresponding types of benefits. Therefore, the Commission was not justified in modifying the beginning of the applicant's benefit period. By resetting the beginning of the benefit period to December 3, 2017, the applicant qualified for employment insurance benefits. As a result, there was no overpayment.

[10] On April 16, 2019, the Appeal Division allowed the Commission's appeal on the grounds that the General Division had erred in law in interpreting the phrase "corresponding types of benefits". According to the Appeal Division, according to its ordinary meaning, the phrase "corresponding types" means types "that share some common features" or "that express a resemblance". Therefore, it would not be necessary for the claimant to be entitled to receive identical benefits under the Quebec and federal plans.

[11] The Appeal Division added that the words “corresponding types”, when read in the light of their overall context, keeping in mind the spirit and object of the Act, support the conclusion that paternity benefits provided by the Quebec plan are equivalent to the benefits provided by the federal plan within the meaning of subsection 76.19(1.1). Here is the Appeal Division’s explanation:

> [TRANSLATION]
>
> [27] Maternity and parental employment insurance benefits are paid to parents who are caring for a newborn or newly adopted child. The Québec Parental Insurance Plan (QPIP) pays benefits to all entitled salaried and self-employed workers who go on maternity leave, paternity leave, parental leave, or adoption leave. The Plan also provides financial support for new parents who want to spend more time with their children in the first months of their lives.

[12] Mr. Ouimet is seeking judicial review of this decision. The only issue to be decided by this Court is whether the decision of the Appeal Division to set aside the General Division’s interpretation of the phrase “corresponding types of benefits” is reasonable. We should keep in mind that pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, the Appeal Division could intervene only insofar as the General Division had failed to observe a principle of natural justice, erred in law in making its decision, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the evidence.

[13] Therefore, the role of this Court in the case at bar is to determine whether the Appeal Division could reasonably find that the General Division erred in law, which amounts to asking whether the General Division was entitled to interpret subsection 76.19(1.1) as it did. To put it

another way, the issue is whether the Appeal Division's decision to set aside the General Division's interpretation is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paragraph 85.

[14] In its factum, the applicant argues that the Appeal Division failed to take into account Parliament's intention in its interpretation of subsection 76.19(1.1), which was to prevent a claimant from receiving benefits under the Quebec plan and the Act for the same period. This is why this provision establishes that the beginning of a federal benefit period is deemed to be the same as the beginning of a provincial benefit period. Therefore, the federal and provincial benefit periods would begin at the same time for a woman who was receiving maternity benefits from the Quebec plan. However, the applicant argues that a claimant cannot not receive paternity benefits under the Act because the Act provides only maternity and parental benefits. Therefore, a claimant cannot receive employment insurance benefits for the same period and for the same purposes as the benefits set out in the Quebec plan.

[15] Furthermore, subsection 76.19(1) also provides that provincial benefits paid to a claimant are considered to be benefits paid under the Act where the claimant would have been entitled to receive corresponding types of benefits under the Act. Provincial benefits will therefore be taken into account in the computation of the maximum total number of weeks for which benefits may be paid under the Act.

[16] The applicant also contends that the Appeal Division unreasonably erred in law by failing to consider the context in which the phrase “corresponding types of benefits” is used. In the applicant’s opinion, paternity benefits are distinct and different from the maternity and parental benefits under the QPIP and the Act in that they apply only to fathers and have their own set of requirements. The applicant also argued that the Act was amended in 2019 so that the number of weeks of shareable parental benefits was increased from 35 weeks to 40 weeks while the maximum number of weeks that could be taken by one of the parents was maintained at 35 weeks. Here, this amendment made the two plans correspond with one another. However, this was not the case when this dispute arose in 2017.

[17] At the hearing, counsel for the respondent raised new textual arguments that do not appear in her memorandum of fact and law. She argued that Parliament does not speak in vain and when it wants to refer to all provincial benefits without distinction (for example in subsection 76.09(3)) it does not use the phrase “corresponding types”. Similarly, it was argued that the phrase “corresponding types of benefits” used in the context of section 76.2 of the Regulations clearly refers to maternity or parental benefits when read in conjunction with paragraphs 12(3)(a) and (b) of the Act. Starting from the principle that the provisions of a law or regulation must be interpreted harmoniously and applied in such a way as to form a coherent whole, the applicant argues that it would be illogical for the meaning of an identical expression to change from one section to another.

[18] In my opinion, none of these apparently clever arguments can be accepted.

[19] There is no doubt that the Act is a social measure that should therefore be interpreted in favour of claimants in the event of ambiguity: *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, 142 D.L.R. (3rd) 1 at page 60; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193. Yet, the relevant provision must also lend itself to different interpretations, each as plausible as the other given its language, context and purpose: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at paragraph 27; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, 337 D.L.R. (4th) 385 at paragraph 33.

[20] In the case at bar, I conclude that the Appeal Division could reasonably find that subsection 76.19(1.1) is unambiguous and that the General Division erred in finding that paternity benefits under the Quebec plan and parental benefits are not corresponding types of benefits simply because paternity benefits do not exist under the federal plan.

[21] The very language of the provision is unambiguous in my opinion. If Parliament had intended subsection 76.19 (1.1) to apply only in cases where the same type of benefit is offered by both levels of government, it would not have used the phrase “corresponding types of benefits”. As the Appeal Division correctly pointed out, the phrase “corresponding types” does not mean “identical”. Instead, they refer to resemblance between types of benefits or types of benefits that share common characteristics. That interpretation is consistent with the overall context of the Regulations. The “provincial benefits” covered by the disentitlement provisions are defined in section 76.01 as benefits paid to a person under a provincial plan in cases of pregnancy or in respect of the care by that person of one or more of their new-born children.

Subsections 76.03(b) and (c) also provide that provinces can set their own entitlement requirements and be more generous than the federal system. It is therefore clear that provincial benefits were not expected to be identical to federal benefits and that the impossibility of cumulating benefits only in cases where the two plans overlapped was not contemplated.

[22] As for the applicant's argument based on the absence of the words "corresponding types" in other provisions of the Regulations, it can be quickly disposed of. On the one hand, as mentioned above, this argument was not raised in the originating notice of judicial review and was not developed in the applicant's factum either. It would therefore be unfair to consider it because the respondent did not have the opportunity to deal with it properly. Furthermore, this argument was never raised before the General Division or the Appeal Division of the Social Security Tribunal. However, Parliament entrusted that Tribunal with the mandate of settling employment insurance disputes, and this Court must respect that choice by leaving it to the Tribunal to be the first to consider an argument and state its opinion. This approach is all the more appropriate when an issue raised for the first time in judicial review falls within the area of expertise of the administrative tribunal, as the Supreme Court stated in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 22-28. It would therefore be inappropriate for the Court to rule on the applicant's argument without being able to benefit from the Tribunal's insight, especially since the wording of a provision is but one of the facets of statutory interpretation.

[23] The Appeal Division's interpretation is not only consistent with the ordinary meaning of the words and the overall context of the statutory text that includes subsection 76.19(1.1), it is

also consistent with the object sought by Parliament. In *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, the Supreme Court held that federal jurisdiction over unemployment insurance authorized Parliament to legislate not only to provide maternity benefits but also parental benefits, since both benefits relate to the "function of the reproduction of society" (at paragraph 73). The Court added the following comment (at paragraph 75):

> . . . I therefore find that parental benefits, like maternity benefits, are in pith and substance a mechanism for providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child, and that it can be concluded from their pith and substance that Parliament may rely on the jurisdiction assigned to it under s. 91(2A) of the *Constitution Act, 1867*. . . .

[24] There is no doubt that the same conclusion should be reached with respect to paternity benefits. These benefits and maternity and parental benefits undeniably share the objective of allowing parents of newborns (or adopted children) to be temporarily absent from work to care for their children. Maternity and parental benefits play the same social role as benefits provided to fathers to share this important responsibility with mothers, and paternity benefits are clearly "corresponding types of benefits".

[25] The 2019 amendment to the Act seems to provide greater support for the respondent's argument than the applicant's. By adding five weeks to parental benefits when they are shared between the two parents, in a way, the Act creates a plan that is equivalent to the Quebec plan and creates paternal benefits (when the father takes advantage of these five additional weeks) without explicitly creating a new category of benefits. This clearly shows that there is no real difference between parental benefits and paternity benefits.

[26] Finally, there is no doubt that Part III.1 of the Regulations, which contains subsection 76.19(1.1), was adopted to implement the agreements reached by the government of Canada and a provincial government and to facilitate the coexistence of the two plans. The title of Part III.1 is also revealing: “Reduction of Premiums for Employees Covered by a Provincial Plan and for their Employers”. The objective is clear and is clearly expressed in the Summary of the Regulatory Impact Study: [TRANSLATION] “. . . the formula for computing the reduction in contributions ensures that the reduction in contributions corresponds to the expected savings in the employment insurance account arising from the implementation of a provincial pregnancy or childcare benefit plan” (Respondent’s Record, at page 2795).

[27] It is in this context that the language of subsection 76.19(1.1) and other entitlement provisions must be considered. The first provision in Division 3 of the Regulations concerning entitlement, section 76.01, states that a person is disentitled to be paid benefits related to pregnancy or care of a newborn baby if they are entitled to receive provincial benefits under a provincial plan. It does not matter whether these provincial benefits are maternity, parental or paternity benefits, as long as they are equivalent to or greater than the amount of benefits that the person is entitled to receive under the Act.

[28] The second provision limiting entitlement is set out in subsection 76.19(1) of the Regulations. It specifies that provincial benefits paid to a claimant if the claimant would have been entitled to the “corresponding types of benefits” under the Act will reduce the maximum number of weeks for which benefits may be paid to the claimant under the Act.

[29] The third provision that limits entitlement is now in issue. As previously mentioned, subsection 76.19(1.1) provides that a benefit period is deemed to have been established and is deemed to have begun the same week as the period established under provincial law if the claimant would have been entitled to the "corresponding types of benefits" under the Act in respect of the same period. That provision was added in 2010 to ensure that provincial benefits will be considered when a claimant from that province submits a subsequent claim under the Act.

[30] Those and other provisions (see in particular sections 76.16 and 76.17 of the Regulations) are not intended solely to reduce the benefits payable under the Act. Their main purpose is to provide some consistency when an agreement has been reached with a province that has adopted its own pregnancy or childcare benefits plan and to ensure fairness between residents of different provinces: see Summary of the Regulatory Impact Study, Respondent's Record, at page 2573. It goes without saying that in order to achieve these objectives all provincial benefits paid to a person to enable them to care for a newborn baby should be considered "corresponding types of benefits" regardless of the label the province decides to give them.

[31] Accepting the applicant's argument, as the General Division did, would imply that the applicant could have received paternity benefits for the same period under the Quebec Act and parental benefits under the Act. This would not only contravene subsection 76.09(1) of the Regulations, it would also be unfair to other Canadians in other provinces who would thereby find themselves funding benefits to which residents of Quebec do not contribute.

[32] Furthermore, the claimant could subsequently receive regular benefits that would not take into account the paternity benefits he has already received, which would give him an unfair advantage over all other claimants residing in another province that does not have a plan equivalent to Quebec's plan. This would clearly run counter to the wording of subsections 76.19(1) and (1.1) as well as the objective pursued by Parliament.

[33] In the light of the foregoing analysis, I am therefore of the view that it was entirely reasonable for the Appeal Division to rule that the General Division's decision was erroneous in law and that the appeal should be allowed. I am aware that, in the particular context of this case, the application of subsection 76.19(1.1) entails consequences that may seem unduly draconian to the applicant. Nevertheless, it is for the Commission, with the agreement of the Governor in Council, to make the necessary adjustments if such an outcome is deemed to be undesirable.

[34] I would therefore dismiss this application for judicial review, without costs.

"Yves de Montigny"
J.A.

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

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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