Federal Court of Appeal | Cour d'appel fédérale

Date: 20120622

Docket: A-65-11

Citation: 2012 FCA 190

CORAM: **EVANS J.A.**
DAWSON J.A.
MACTAVISH J.A. (*ex officio*)

BETWEEN:

TREENA-RAY CHAULK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD

Intervener

Heard at Toronto, Ontario, on April 23, 2012.

Judgment delivered at Ottawa, Ontario, on June 22, 2012.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: DAWSON J.A.
MACTAVISH J.A. (*ex officio)*

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] The Canada Employment Insurance Commission (Commission) ruled that Treena-Ray Chaulk, a schoolteacher, had received an overpayment of Employment Insurance (EI) maternity benefits.

[2] She appealed that ruling to a board of referees (board), which allowed her appeal in a decision dated April 1, 2010. The Commission appealed to an umpire who held that the board had erred in law when it allowed Ms Chaulk's appeal. Ms Chaulk has made an application for judicial review to this Court to set aside the Umpire's decision (CUB 76095), dated January 6, 2011.

[3] EI benefits are reduced by the amount of any earnings arising out of employment that a claimant receives while in receipt of EI benefits, including payments under a maternity leave plan: subparagraph 35(2)*(c)*(ii) of the *Employment Insurance Regulations*, SOR/96-332 (Regulations). However, section 38 of the Regulations creates a partial exception to this general rule. Payments made to a claimant because of pregnancy are not treated as "earnings" for the purpose of section 35, and thus do not reduce EI maternity benefits, except to the extent that the payments and the EI benefits combined exceed her "normal weekly earnings".

[4] In the present case, the Commission decided that the combination of EI benefits and the salary top-up paid to Ms Chaulk by her employer under the collective agreement – the Supplemental Employment Insurance Benefit Plan (SEB) – exceeded her "normal weekly earnings" by $452. According to the Commission, this excess constituted "earnings", and thus reduced the amount of EI benefits to which she was otherwise entitled, and resulted in a weekly overpayment of $452.

[5] Paragraph 38*(a)* of the Regulations is the statutory provision directly relevant to this application.

38. The following portion of any payments that are paid to a claimant as an insured person because of pregnancy, for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act, or for the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or because of any combination of those reasons, is excluded as earnings for the purposes of section 35, namely, the portion that	38. Est exclue à titre de rémunération pour l'application de l'article 35 la partie de tout versement payé au prestataire à titre d'assuré en raison d'une grossesse, des soins donnés à un ou plusieurs enfants visés aux paragraphes 23(1) ou 152.05(1) de la Loi ou des soins ou du soutien donnés à un membre de la famille visé aux paragraphes 23.1(2) ou 152.06(1) de la Loi, ou d'une combinaison de ces raisons, qui :
(a) when combined with the portion of the claimant's weekly benefit rate from that employment, does not exceed that claimant's normal weekly earnings from that employment; and	*a)* d'une part, lorsqu'elle est ajoutée à la partie du taux de prestations hebdomadaires du prestataire provenant de son emploi, n'excède pas sa rémunération hebdomadaire normale provenant de cet emploi;
…	[…]

[6] The legal question to be decided in this application concerns the basis for calculating Ms Chaulk's "normal weekly earnings", a term that is not defined in the legislation. The Commission determined her "normal weekly earnings" by dividing her annualized salary by the 52 weeks of the year. The intervener, the Greater Essex District School Board, supports the Commission's position.

[7] Ms Chaulk disagrees. She says that since the collective agreement governing her employment only requires teachers to work for the 194 days of the school year, her salary should be attributed to those days. Thus, she argues, her "normal weekly earnings" should be calculated by dividing her salary by 194, and multiplying that amount by the 5 days of the working week. On this basis, her EI maternity benefits and SEB combined did not exceed her "normal weekly earnings"

and therefore no part of the SEB constituted “earnings” for the purposes of section 35. Accordingly, there was no overpayment of EI benefits.

[8] In my opinion, Ms Chaulk’s approach to the determination of “normal weekly earnings” is correct, and the Umpire therefore committed an error of law in allowing the Commission’s appeal from the Board’s decision. Accordingly, I would allow Ms Chaulk’s application for judicial review and set aside the Umpire’s decision.

Background

[9] At all material times, Ms Chaulk was employed by the Hastings and Prince Edward County District School Board (employer) as a permanent elementary school teacher. Like all other elementary school teachers in Ontario, Ms Chaulk was represented in her relations with her employer by a statutory bargaining agent, the Elementary Teachers Federation of Ontario (union).

[10] Subsection 2(3.1) of R.R.O. 1990, Reg. 304, enacted under the *Education Act*, R.S.O. 1990, c. E.2, provides that every school year shall include a minimum of 194 school days, of which no less than 188 shall be instructional days.

[11] Article 11.01 of the collective agreement between the union and the employer, which runs from September 1, 2008 to August 31, 2012, provides that teachers shall not be required to work any days preceding the official start of the school year for students, except in those years when 194

days are not available between Labour Day and June 30. Schools are closed in the months of July and August for the summer vacation.

[12] In 2009, Ms Chaulk earned an annualized salary of approximately $69,000. Under Article 9.02.01 of the collective agreement, teachers are paid their salary “owing or accruing due” in 26 or 27 equal instalments every second Friday of each month, commencing the last Friday in August. On a weekly basis, Ms Chaulk was paid $1,327.

[13] Ms Chaulk went on a pregnancy leave from her employment on June 22, 2009. The employer paid her a lump sum to compensate her for the unpaid portion of the 189/194 school days that she had worked in that school year. This payment included the salary instalments that otherwise would have been paid to her in July and August. At the same time, she applied for EI maternity benefits. On July 5, 2009, after the two-week statutory waiting period, she started to receive weekly EI benefits of $447.

[14] Article 31.04.06 of the collective agreement defines the amount of SEB payable and provides as follows.

> 31.04.06 For Pregnancy Leave only, and in lieu of the option to access sick leave for the post-partum period of recovery in accordance with 31.02.05, a Teacher who is eligible for E.I. may opt for a Pregnancy Leave SEB top-up; such top-up may be in addition to the SEB which is available for the two-week waiting period.
>
> 31.04.06.01 The Pregnancy Leave SEB top-up is based upon and is subject to Employment Insurance (E.I.) Regulations.

31.04.06.02 The Pregnancy Leave SEB top-up shall provide for the difference between what a Teacher receives from E.I. and 100 percent of her regular salary (based on 1/194) for the maximum of the six week post-partum period of recovery with no deduction of sick leave this period.

31.04.06.03 For the nine (9) weeks of Pregnancy Leave following the two-week waiting period and the six (6) weeks of post-partum recovery, or for the fifteen (15) weeks of Parental Leave following the two week waiting period, or any portion of both or either, the Employer shall provide a Pregnancy/Parental Leave SEB top-up equal to the difference between sixty (60) percent of the Teacher's regular weekly salary and the weekly amount of the E.I. benefit.

[15] Article 31.04.06.02 is the provision directly relevant to this case. As a practical matter, the "normal weekly earnings" issue only arises in the six weeks covered by this provision. In the two-week waiting period before a claimant starts to receive EI benefits, she receives only SEB. In the nine weeks following the six-week period, a teacher's SEB is limited to the difference between 60% of her regular salary and her weekly EI benefits. Thus, in this nine-week period, her weekly SEB and EI benefits would not exceed her "normal weekly earnings", however calculated.

[16] Pursuant to the terms of an arbitrator's award of January 15, 2009, the employer calculated the weekly SEB payable to Ms Chaulk under article 31.04.06.02 as the difference between 5/194 of her annualized salary and her EI benefits. Counsel for the Attorney General objected to the admission of this award and to references to it in the memorandum of fact and law filed on behalf of Ms Chaulk, because it was not before the decision-maker and was therefore not part of the tribunal record. At the hearing the Court dismissed this objection, on the ground that the award was

introduced as explanatory background to the application, and not as new evidence to contradict a finding of fact made by the decision-maker.

[17] In each of the six weeks in question in this application (starting on July 5 and ending on August 9, 2009), the combination of EI maternity benefits and SEB gave Ms Chaulk an income of $1,779. This is $452 *per* week more than the $1,327 *per* week that she would have been paid by her employer in each of these six weeks had she not been on leave. The Commission says that this $452 constitutes "earnings" and thus is an overpayment of $2,682 over the six-week period. However, if calculated on the basis of 5/194 of salary, her "normal weekly earnings" would be approximately $1785, and thus more than her EI and SEB benefits combined, so that no portion of the SEB would constitute earnings for the purpose of section 35.

[18] The origins of the dispute underlying the present proceeding are to be found in disagreements between the employer and the union over the payment of SEB. In an award dated July 5, 2006, Arbitrator Louise Davie held that, properly interpreted, the terms of the collective agreement provide for the payment of SEB during teaching and non-teaching periods, including July and August.

[19] The employer was subsequently advised by the Commission that for the purpose of pregnancy leave top-up, a claimant's "normal weekly earnings" under section 38 of the Regulations were to be determined on the basis of the employee's salary over a 52-week period (1/52 of annual salary). The employer and the union then jointly sought an interpretation from the Commission of

"normal weekly earnings" in the context of their collective agreement. They submitted that "normal weekly earnings" should be calculated by reference to the days in the school teaching year: that is, 5/194 of annual salary.

[20] The Commission rejected these submissions and stated that "normal weekly earnings" were 1/52 of a teacher's annualized salary. On the basis of this ruling, the employer took the position that it would limit weekly SEB payments to 1/52 of salary when, taken together with the EI benefit, 5/194 would exceed "normal weekly earnings". The employer relied on article 31.04.06.01 of the collective agreement which says that the pregnancy leave SEB top-up payments are subject to the EI Regulations. The parties returned to Arbitrator Davie for a ruling on this issue.

[21] In an award issued on January 15, 2009, the Arbitrator concluded that article 31.04.06.02 of the collective agreement expressly provided that the employer was to pay SEB to top up a teacher's EI benefits to "100 percent of her regular salary (based on 1/194) …" for a maximum of six weeks. The Arbitrator also held that because teachers worked a school year of 194 days, it was inappropriate for the Commission to calculate a teacher's "normal weekly earnings" for the purpose of section 38 on the basis of 1/52 of a teacher's salary.

[22] The employer proceeded to calculate the SEB payable to Ms Chaulk in accordance with this award, and so advised the Commission. The Commission maintained its interpretation of "normal weekly earnings", stating that it would treat an SEB payment as "earnings" to the extent that, when combined with Ms Chaulk's EI benefit, it exceeded 1/52 of her annualized salary. The Commission

issued a notice of overpayment to Ms Chaulk of $2,682 with respect to the six weeks commencing July 5, 2009.

Issues and Analysis

(i) *standard of review*

[23] The question to be decided in this application principally involves the interpretation of the Regulations, although the terms of the collective agreement provide important context to the interpretation of the disputed words in section 38, “normal weekly earnings”. Whether the “normal weekly earnings” of a teacher covered by this collective agreement are to be calculated on the basis of 1/52 weeks of the calendar year or 5/194 days of the school year is not limited to the facts of this case. Resolution of the issue in the present case is likely to have an impact on other teachers employed by this and other district school boards in Ontario under collective agreements containing similar provisions, including those relating to the SEB.

[24] The question in dispute in this application for judicial review is therefore properly characterized as one of interpretation, rather than one of application of the law to the facts: a question of law, rather than one of mixed fact and law.

[25] Standard of review questions occur at two points in the adjudication of disputes arising from the administration of the employment insurance scheme: on appeal from a board of referees to an umpire on the limited grounds set out in subsection 115(2) of the *Employment Insurance Act*, S.C.

1996, c. 23 (Act), and on an application for judicial review to this Court of an umpire's decision on an appeal from a board of referees.

[26] It has been consistently held by this Court that both umpires and the Court should review questions of law involving the interpretation of the employment insurance legislation on a standard of correctness: see, for example, *Canada (Attorney General) v. Sveinson*, 2001 FCA 315, [2002] 2 F.C. 205 at paras. 12-17 (umpires); *Budhai v. Canada (Attorney General)*, 2002 FCA 298, [2003] 2 F.C. 57 at paras. 42, 48 (boards of referees); *Stone v. Canada (Attorney General)*, 2006 FCA 27, [2006] 4 F.C.R. 120 paras. 13-18 (boards of referees).

[27] Statements to this effect can also be found in cases decided after *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2009] 1 S.C.R. 190 (*Dunsmuir*), even though *Dunsmuir* decided that a specialist tribunal's interpretation of its enabling statute is normally reviewed on the reasonableness standard: see, for example, *Martens v. Canada (Attorney General)*, 2008 FCA 240 at para. 30 (umpires and boards of referees); *MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306, 396 N.R. 157 at paras. 24-27; *Canada (Attorney General) v. Lemire*, 2010 FCA 314 at paras. 8-9; *Canada (Attorney General) v. Trochimchuk*, 2011 FCA 268, 415 N.R. 88 at para. 7.

[28] Counsel for the Attorney General submitted that recent decisions from the Supreme Court have made it even clearer that courts must almost invariably defer to a tribunal's interpretation of its enabling statute: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 24; *Alberta (Information and Privacy Commissioner) v.*

Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 30 and 34 (*Alberta Teachers*).

[29] In my view, while these decisions emphasize that a tribunal's interpretation of its enabling statute is nearly always reviewable on the reasonableness standard (see especially, *Alberta Teachers* at para. 34), they do not so materially alter the understanding of the law established in *Dunsmuir* as to warrant this Court's departing from its well-settled jurisprudence.

[30] A reviewing court may avoid a full standard of review analysis if previous jurisprudence has satisfactorily resolved the issue: *Dunsmuir* at paras. 57 and 62; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 708 at para. 30; *Alberta Teachers* at para. 37 (standard of correctness applied in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309 "based on precedent").

[31] In any event, a new regime is likely to be enacted relatively soon for employment insurance administrative appeals, and the standard of review issue can be considered afresh in that context: see Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 41st Parl. 1st Sess., 2012, cls. 223-250 (first reading in the Senate 18 June 2012). Little is to be gained by changing this Court's well-settled law at this late stage of the present regime. It is the prerogative of the Supreme Court of Canada to correct us if we have been wrong.

(ii) adequacy of reasons

[32] Counsel for Ms Chaulk argued that the Umpire's decision should be set aside because his reasons were inadequate as they do not provide a clear indication of the basis of his decision. Since I have concluded that the Umpire's interpretation of "normal weekly earning" was wrong in law, I need not address this issue.

[33] I would only add that, in light of the decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, it is likely to be difficult to persuade a reviewing court to intervene solely on the basis of the inadequacy of the reasons given by a tribunal. This is especially true when, as here, the issue in dispute is a question of law to which the standard of correctness applies.

(iii) Was the basis on which the Umpire determined Ms Chaulk's "normal weekly earnings" wrong in law?

(a) *jurisprudence*

[34] There is no authority directly on point, and neither the Act nor the Regulations define "normal weekly earnings" for the purpose of section 38. The Umpire relied on the short oral reasons in *Canada (Attorney General) v. Fox* (1997), 220 N.R. 60 (F.C.A.) (*Fox*), which appears to be the only occasion on which the meaning of **"**normal weekly earnings" has been judicially considered. However, in my view, *Fox* provides little assistance in resolving the present dispute.

[35] First, *Fox* involved a very different issue from that in the present case: whether vacation pay, an annual incentive allowance, and a 25-year service award should be included as part of the claimant's "normal weekly earnings". The Court held that they should not, because they were more akin to fringe benefits: they did not accrue weekly and were not paid on a periodic basis. In other words, the dispute in *Fox* was about whether particular items were to be included as part of the claimant's "normal weekly earnings" and not, as in the present case, the basis on which earnings are to be calculated.

[36] Second, the Court's definition of "normal weekly earnings" as "the ordinary, usual earnings that a claimant receives or earns on a regular basis" (at para. 3) (the underlining is mine) does not resolve the issue in our case. If the amount of earnings received by an employee is determinative, then the Commission is arguably right because, when not on leave, Ms Chaulk received salary payments based on 1/52 of her annualized salary. However, if the amount earned by an employee is determinative, Ms Chaulk can argue that she should succeed because, as the collective agreement stipulates and counsel for the Commission conceded, she earns her salary for performing professional duties in the 194 days of the school year.

[37] Counsel for Ms Chaulk submits that *Dick v. Deputy Attorney General of Canada*, [1980] 2 S.C.R. 243 supports her claim. In that case, a collective agreement provided that when a teacher started a maternity leave she was to be paid a lump sum for services already rendered. As in Ms Chaulk's case, the amount paid to Ms Dick at the start of her maternity leave was calculated on the number of days in the 200-day school year that she had performed her services. Ms Dick first

received EI pregnancy benefits in April; they were payable for fifteen weeks, which would have taken her to July 24.

[38] However, the Commission denied her any benefits after July 4, on the ground that the lump sum payment she had received from her employer in April included sums she would otherwise have received in July and August when no services were required. Consequently, according to the Commission, she was not unemployed in July and had received her usual remuneration for that month. Like Ms Chaulk, Ms Dick was paid her salary in instalments spread over twelve months when not on leave.

[39] The Supreme Court of Canada allowed Ms Dick's appeal and held that she was entitled to the normal fifteen weeks of pregnancy benefits. The Court agreed with the Commission that her contract of employment continued after she commenced her leave, but stated that she was "separated" from her employment when she started her leave. Consequently, the lump sum payment she received was for the services she had performed up to the time of separation, and none of it was attributable to the months of July and August when she was not required to work.

[40] Counsel for the Commission argues that *Dick* does not assist Ms Chaulk because the present case turns on a different statutory provision: the phrase "normal weekly earnings" in section 38 of the Regulations, which had not been enacted when *Dick* was decided. I agree that *Dick* is not directly on point. However, the Court did establish two propositions that are in my view relevant to the present case.

[41] First, whether Ms Dick's salary was paid in instalments spread over twelve months or the ten months of the school year was of no legal significance in this case. The method of payment is no more than an administrative convenience. Second, Ms Dick's lump sum payment was for services rendered to the start of the leave, and none of it was attributable to the months of July and August, when she was not required to render any services. In my view, Ms Chaulk's argument is consistent with these conclusions.

[42] I agree with counsel for the Commission that section 36 of the Regulations is not germane to this case. I shall therefore not review the jurisprudence on the allocation of income under this provision.

(b) *collective agreement*

[43] A determination of a claimant's "normal weekly earnings" for the purpose of section 38 of the Regulations cannot be made in the abstract, but must be made in the context of the claimant's employment contract: in this case, the collective agreement between Ms Chaulk's union and her employer. I agree with counsel for the Commission that parties cannot "contract out of" section 38. However, reference to the terms of a contact of employment is essential in order to determine, among other things, the number of weeks for which an employee is being paid.

[44] In oral argument, counsel for the Commission conceded that under the terms of the collective agreement, Ms Chaulk was paid for the number of weeks worked in the school year. That

is, although she received her salary every other week in instalments spread over twelve months, she was not paid for the months of July and August when she was not required to work.

[45] In my opinion, counsel was right to make this concession. The collective agreement provides that when teachers leave their employment during the school year, they are entitled to a payment calculated on the basis of the number of days that they have worked, divided by the 194 days of the school year. This is a clear indication that teachers are not paid for the months of July and August, and no provision in the agreement provides otherwise.

[46] Counsel also conceded (again, in view of *Dick*, correctly in my opinion) that whether teachers are paid their salary in instalments spread over ten months or twelve months is not relevant to the calculation of a claimant's "normal weekly earnings".

(c) *the "anomaly" argument*

[47] The Commission's principal argument was that on the basis of Ms Chaulk's approach to the determination of her "normal weekly earnings", she would be entitled in the six weeks in question to more than she would have been paid in those weeks had she not been on leave. Thus, if not on leave, Ms Chaulk would have been paid $1327 calculated on a weekly basis; whereas, while on pregnancy leave, her EI benefits and SEB totalled $1779 *per* week.

[48] Counsel argued that the EI benefits paid to Ms Chaulk were intended to go some way to replacing the income that she lost as a result of her pregnancy. It would thus be inconsistent with the

purpose of the scheme to permit her to retain the full amount of EI benefits in those weeks because, when they are added to the SEB payments, she would receive more than if she had not been on leave. Employers and employees cannot by the terms of the contract of employment bring about a result that Parliament could not have intended. It is unfair that, in a given period, a teacher on leave should receive more than a teacher with the same salary who was working. Parliament should not be taken to create such anomalies.

[49] On closer examination, however, this argument is less persuasive than might at first appear. It depends on limiting the comparator period to the six weeks when Ms Chaulk was receiving both EI benefits and an SEB top-up to 100% of her regular salary. As counsel for Ms Chaulk pointed out, if the period of time is expanded beyond those six weeks, Ms Chaulk received less than if she had not been on leave. This is because for the nine weeks of pregnancy leave following the six weeks of post-partum recovery, the SEB top-up is reduced to the difference between 60% of a teacher's regular salary and the weekly EI benefits.

[50] Moreover, as Ms Chaulk commenced her leave after working all but 5 of the 194 days in the school year, she received more for the six weeks in question than had she not been on leave, because of the EI benefits. The lump sum payment from her employer near the end of June included the salary instalments that she would have received in July and August, less 5/194 of her salary ($1779). The EI benefits paid to her in the six weeks from July 5 to August 9 totalled $2682 ($447 x 6). Thus, regardless of any SEB payment, Ms Chaulk was paid $903 ($2682 - $1779) more for that six-week period than had she not been on leave.

[51] Thus, in my opinion the anomaly on which the Commission relies in this complex statutory scheme is neither unique nor so glaring as to warrant rejecting Ms Chaulk's approach to the calculation of her "normal weekly earnings" in the context of this collective agreement.

Conclusions

[52] For these reasons, I would grant the application for judicial review with costs, set aside the decision of the Umpire, and remit the matter to the Chief Umpire or his Delegate on the basis that the Commission's appeal from the board of referees is dismissed.

"John M. Evans"
J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Anne L. Mactavish J.A." *(ex officio)*

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-65-11
(APPLICATON FOR JUDICIAL REVIEW FROM THE DECISION OF THE HONOURABLE R.J. MARIN, DATED JANUARY 6, 2011, DOCKET NO. CUB 76095)	
STYLE OF CAUSE:	TREENA-RAY CHAULK v. THE ATTORNEY GENERAL OF CANADA AND THE GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 23, 2012
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	DAWSON J.A. MACTAVISH J.A. (*ex officio*)
DATED:	June 22, 2012

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