Federal Court of Appeal | Cour d'appel fédérale

Date: 20221208

Docket: A-256-21

Citation: 2022 FCA 215

CORAM: **PELLETIER J.A.**
RIVOALEN J.A.
ROUSSEL J.A.

BETWEEN:

ANTONINA SENNIKOVA

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the registry, on November 23, 2022.

Judgment delivered at Ottawa, Ontario, on December 8, 2022.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

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

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REASONS FOR JUDGMENT

ROUSSEL J.A.

[1] In early 2019, Ms. Sennikova was involved in an automobile accident that prevented her from returning to work. She applied for, and received, employment insurance (EI) sickness benefits. At approximately the same time, she sought compensation from her motor vehicle accident insurance provider and received $400 of weekly income replacement benefits. The Canada Employment Insurance Commission determined that the income replacement benefits

were earnings under paragraph 35(2)(*d*) of the *Employment Insurance Regulations*, SOR/96-332 (EI Regulations) and should be deducted from Ms. Sennikova's EI benefits. This resulted in an overpayment of $2,440 in EI benefits. Ms. Sennikova asked the Commission to reconsider its determination, but the Commission maintained its decision.

[2] Dissatisfied, Ms. Sennikova appealed the reconsideration decision to the General Division of the Social Security Tribunal. In essence, she argued that the Commission erred in treating her income replacement benefits as earnings and in finding that they were provided by or under provincial law. She maintained that income replacement benefits provided by commercial insurance companies did not fall under paragraph 35(2)(*d*) of the EI Regulations.

[3] The General Division confirmed the Commission's finding and dismissed the appeal. It found that: (1) the income replacement benefits paid to Ms. Sennikova under her motor vehicle accident insurance plan were provided under or pursuant to provincial law because they were authorized and regulated by the *Insurance Act*, R.S.O. 1990, c. I-8 and the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 (Schedule); (2) the income replacement benefits were paid to compensate Ms. Sennikova for her loss of income from employment; and (3) the insurance provider had not reduced the income replacement benefits to reflect the amount of EI benefits she was receiving.

[4] Ms. Sennikova then sought leave to appeal the decision of the General Division to the Appeal Division of the Social Security Tribunal. The Appeal Division refused to grant leave under subsection 58(2) of the *Department of Employment and Social Development Act*, S.C.

2005, c. 34 (DESDA), after determining that the various arguments advanced by Ms. Sennikova had no reasonable chance of success on appeal.

[5] The Appeal Division held that Ms. Sennikova had not demonstrated an arguable case that the General Division either erred in law or in fact when it concluded that the income replacement benefits paid under Ms. Sennikova's motor vehicle accident insurance plan were earnings within the meaning of paragraph 35(2)(*d*) and not subject to paragraph 35(7)(*b*) of the EI Regulations.

[6] Ms. Sennikova subsequently sought judicial review of the Appeal Division's decision before the Federal Court. In reasons cited as 2021 FC 982, the Federal Court dismissed the application, after concluding that the Appeal Division could reasonably find that none of the grounds raised by Ms. Sennikova had a reasonable chance of success.

[7] As the judgment under this appeal concerns an application for judicial review, the role of this Court is limited to determining whether the Federal Court identified the appropriate standard of review and applied it correctly. Put differently, I am required to step into the shoes of the Federal Court and focus on the decision of the Appeal Division itself (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47).

[8] I am satisfied that the Federal Court correctly selected the reasonableness standard of review in dismissing Ms. Sennikova's application for judicial review.

[9] Moreover, the Federal Court did not err in concluding that the decision of the Appeal Division was reasonable. When determining whether a decision is reasonable, the Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83). It must ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para. 99). The "burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para. 100).

[10] In order to grant leave to appeal the decision of the General Division, the Appeal Division had to be satisfied that Ms. Sennikova's appeal had a reasonable chance of success on one or more of the three grounds of appeal set out in subsection 58(1) of the DESDA.

[11] The Appeal Division examined and considered Ms. Sennikova's core argument that the income replacement benefits she received from her motor vehicle accident insurance provider did not constitute earnings under paragraph 35(2)(*d*) of the EI Regulations because the payments she received were not made "under a provincial law" but by her private commercial insurance company. Like the General Division, the Appeal Division set out the key parts of this provision, namely that motor vehicle accident insurance payments will be earnings if: (1) the payments are provided under a provincial law; (2) they are loss of employment earnings due to injury; and (3) EI benefits have not already been deducted from the auto insurance payments. The Appeal Division considered the purpose of the provision as interpreted by this Court in *Canada*

(Attorney General) v. Lalonde (1996), 142 D.L.R. (4th) 572, [1996] F.C.J. No. 1295 (QL), and agreed with the General Division's interpretation that payments made under the plan need only be made under a provincially regulated scheme. The Appeal Division then reviewed and accepted the General Division's reasons for finding that Ms. Sennikova's income replacement benefits were paid under a provincially regulated scheme. Finally, the Appeal Division addressed and rejected Ms. Sennikova's other allegations of bias, insufficient reasons and failure to rely on the Digest of Benefit Entitlement Principles. The Appeal Division was not satisfied that Ms. Sennikova had demonstrated an arguable case that the General Division had either erred in law or in fact and therefore, concluded that her proposed appeal had no reasonable chance of success.

[12] Based on the record before it, it was open to the General Division to find that Ms. Sennikova's payments received under her motor vehicle insurance plan were regulated under provincial legislation and were intended to compensate her loss of income from employment due to injury. The insurance documents Ms. Sennikova submitted in evidence referred specifically to the *Insurance Act* as well as to the *Statutory Accident Benefits Schedule.* Her submissions to the General Division referred to section 2 of the *Statutory Accident Benefits Schedule*, which states that, unless otherwise provided, the benefits in the Schedule shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring on or after September 1, 2010. Income replacement benefits are found in Part II of the Schedule, entitled "Income Replacement, Non-Earner and Caregiver Benefits" and the provisions therein explain how the amount of income replacement benefits is calculated. In the case of Ms. Sennikova, the calculation involved consideration of her gross employment income, as is evidenced from the claims calculator found in the record.

[13] Generally speaking, the purpose of subsection 35(2) of the EI Regulations is to account for the other sources of income intended to compensate the loss of earnings from unemployment. It sets out several forms of income considered earnings for benefit purposes. Other types of income provided under subsection 35(2) include, for example, workers' compensation benefits (para. 35(2)(*b*)), sickness and related benefits (para. 35(2)(*c*)), and moneys paid on a periodic basis on account of or in lieu of a pension (para. 35(2)(*e*)). With respect to paragraph 35(2)(*d*), the intent of the provision is to avoid double compensation where the claimant is also receiving, or entitled to receive, payments under a motor vehicle insurance plan regulated under provincial legislation, and those payments are meant to be compensation for actual or presumed loss of income from employment due to injury from a motor vehicle accident.

[14] I have carefully considered Ms. Sennikova's submissions, which are substantially the same as those she made in the instances below. While Ms. Sennikova may not agree with the interpretation and application of paragraph 35(2)(*d*) of the EI Regulations to her situation, she has not persuaded me that the decision of the Appeal Division is unreasonable in law or in fact. For the reasons given by the Federal Court, which I adopt as my own, I find that there is simply no reviewable error in the Appeal Division's decision that warrants this Court's intervention.

[15] Accordingly, I would dismiss the appeal with costs.

"Sylvie E. Roussel"
J.A.

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

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-256-21
STYLE OF CAUSE:	ANTONINA SENNIKOVA v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	NOVEMBER 23, 2022
REASONS FOR JUDGMENT BY:	ROUSSEL J.A.
CONCURRED IN BY:	PELLETIER J.A. RIVOALEN J.A.
DATED:	DECEMBER 8, 2022

APPEARANCES:

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