Federal Court of Appeal | Cour d'appel fédérale

Date: 20230308

Docket: A-124-22

Citation: 2023 FCA 49

CORAM: **LASKIN J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

LAURA JOHNSON

Respondent

Heard at Ottawa, Ontario, on March 7, 2023.

Judgment delivered at Ottawa, Ontario, on March 8, 2023.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: LASKIN J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] Laura Johnson applied for parental benefits under the *Employment Insurance Act*, S.C. 1996, c. 23, on March 4, 2021. In her application, she elected to receive extended parental benefits and received her first payment in July 2021 following 15 weeks of maternity benefits.

[2] The *Employment Insurance Act* states that a claimant for parental benefits "shall elect" the maximum number of weeks of benefits, being 35 weeks for standard and 61 weeks for extended parental benefits, and that the election is irrevocable once benefits are paid: subsections 23(1.1) and 23(1.2).

[3] In October 2021, Ms. Johnson learned from her accountant that her choice was financially detrimental. She then contacted the Canada Employment Insurance Commission (Commission) and asked to change her election to standard parental benefits. The Commission refused that request and advised Ms. Johnson that the election as to the type of benefits is irrevocable once benefits are paid. Ms. Johnson sought reconsideration of that decision, but the Commission did not change its decision.

[4] Ms. Johnson successfully appealed that decision to the Social Security Tribunal General Division. It described the issue as which type of parental benefits Ms. Johnson wanted when she made her choice in the application. In its view, while the option she chose in her application matters, it was not the only thing to consider. Ms. Johnson asserted that she had spoken with someone at the Commission who had told her that if she wanted 54 weeks of benefits she needed to choose extended benefits. Ms. Johnson said the application was confusing and she did not understand that parental benefits did not include maternity benefits.

[5] The General Division decided Ms. Johnson meant to select the standard benefits option because she always intended to take one year of leave and adding 35 weeks of standard parental benefits to her maternity benefits was consistent with that plan. Because that is what she meant

to do, said the General Division, Ms. Johnson chose standard parental benefits. In its view, it was not relevant that Ms. Johnson selected 54 weeks, not 52, and did not contact the Commission until October when her accountant advised her that extended parental benefits were financially disadvantageous.

[6] The Commission appealed that decision to the Appeal Division of the Tribunal, arguing that the General Division based its decision on erroneous findings of fact and erred in failing to address *Karval v. Canada (Attorney General)*, 2021 FC 395 [*Karval*], a decision the Commission relied on before the General Division in support of its position. The Commission also asserted that the General Division acted contrary to the provisions of the *Employment Insurance Act* by effectively changing Ms. Johnson's election after she had been paid benefits.

[7] The Appeal Division determined that the General Division made an error of law by not considering whether the Commission had misled Ms. Johnson "despite how the Federal Court highlighted this issue in *Karval*". Nonetheless, it dismissed the Commission's appeal because it agreed with the result, concluding that because Ms. Johnson was misled, her election was invalid and relief was available in the form of an election to receive standard benefits.

[8] Both parties agreed that if the Appeal Division determined that the General Division had made an error of law, the Appeal Division could make the decision the General Division should have made. Accordingly, in a decision dated May 10, 2022 (file number AD-22-30), the Appeal Decision rescinded the Commission's decision to pay Ms. Johnson extended parental benefits and dismissed the appeal.

[9] The Attorney General of Canada now seeks judicial review of that decision. The only question before us is whether the Appeal Division's decision is reasonable: *Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109 at para. 11; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 83 and 86 [*Vavilov*]; *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6 at para. 34. If it is, then the application for judicial review must be dismissed.

[10] The Attorney General asserts it is not reasonable, relying primarily on this Court's decision in *Canada (Attorney General) v. Hull*, 2022 FCA 82 [*Hull*]. Ms. Johnson says the decision is reasonable and that the application for judicial review should be dismissed.

[11] To be reasonable, a decision must be "defensible in respect of the facts and law"; the "governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority": *Vavilov* at paras. 86 and 68.

[12] In *Karval*, the Federal Court concluded the claimant in that case was precluded from changing her election from standard benefits to extended parental benefits by subsection 23(1.2) of the *Employment Insurance Act*: *Karval* at para. 16. However, in an obiter comment, the Federal Court suggested where a claimant "is actually misled by relying on official and incorrect information, certain legal recourse might be available under the doctrine of reasonable expectations": *Karval* at para. 14. Obiter statements are expressions of opinion that are unnecessary to the decision and not binding.

[13] I need make only two observations about the obiter statement from *Karval*. First, the doctrine of reasonable (or more usually legitimate) expectations is more typically associated with procedural fairness issues rather than substantive rights. The relevant conditions are set out in *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at para. 68. Moreover, even if legal recourse might be available, the Federal Court in *Karval* did not suggest that recourse would include requiring or even permitting the Commission to change the type of parental benefits a claimant elected.

[14] In *Hull*, this Court explained why that is not possible—subsections 23(1.2) and (1.2) of the *Employment Insurance Act* allow for only one interpretation. The word "elect" means "what a claimant indicates as their choice on the application form" and "once a claimant has chosen on the application form the parental benefit and the number of weeks she wishes to claim, and once payments of those benefits have started, it is impossible for the claimant, the Commission, the General Division or the Appeal Division to revoke, alter or change the election.": *Hull* at paras. 62-64.

[15] Under the governing legislation, neither the Commission nor the Social Security Tribunal has the jurisdiction to decide an election is invalid or to change an election after it is made and parental benefits have been paid. The purposes for this restriction are explained in *Hull* at paragraphs 57 to 59. They include ensuring certainty and efficiency for the Commission once payment of parental benefits has started, and affording other parties who may be affected by the election certainty and efficiency in their planning.

[16] While the Appeal Division delivered its decision before this Court's decision in *Hull*, that decision is nonetheless unreasonable for the reasons given in *Hull*. Once Ms. Johnson made her election in the application form and benefits were paid, the governing statutory scheme precluded her, the Commission, or the Social Security Tribunal from changing her election.

[17] For these reasons, I would allow the application for judicial review. Although courts should generally respect Parliament's intention to entrust matters to administrative decision-makers, it may be appropriate to decline to remit a matter to an administrative decision-maker where it is evident to the Court that a particular outcome is inevitable: *Canada (Attorney General) v. Burke*, 2022 FCA 44 at paras. 115-117.

[18] In my view, given the law and the findings of fact in this case, no useful purpose would be served by remitting the matter back to the Social Security Tribunal (Appeal Division) for redetermination because only one reasonable conclusion would be open to it. Counsel for the applicant agrees. Accordingly, I would set aside the decision of the Social Security Tribunal (Appeal Division) dated May 10, 2022 and, giving the order it should have given, allow the Commission's appeal of the decision of the Social Security Tribunal (General Division), all without costs.

"K.A. Siobhan Monaghan"
J.A.

"I agree
J.B. Laskin J.A."

"I agree
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A DECISION OF THE SOCIAL SECURITY TRIBUNAL'S APPEAL DIVISION DATED MAY 10, 2022, FILE NUMBER AD-22-30

DOCKET:	A-124-22
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. LAURA JOHNSON
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 7, 2023
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	LASKIN J.A. MACTAVISH J.A.
DATED:	MARCH 8, 2023

APPEARANCES:

Marcus Dirnberger	FOR THE APPLICANT
Laura Johnson, assisted by Justin Johnson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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