

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230717

Docket: A-3-23

Citation: 2023 FCA 161

**CORAM: RENNIE J.A.
GLEASON J.A.
GOYETTE J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DOMENIC BACILE

Respondent

Heard at Ottawa, Ontario, on June 27, 2023.

Judgment delivered at Ottawa, Ontario, on July 17, 2023.

REASONS FOR JUDGMENT BY:

GOYETTE J.A.

CONCURRED IN BY:

**RENNIE J.A.
GLEASON J.A.**

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REASONS FOR JUDGMENT

GOYETTE J.A.

[1] Mr. Bacile was a truck driver. After the company he worked for was restructured, he lost his job effective July 15, 2021. This date was also his last day on the company's payroll.

[2] On July 29, 2021, Mr. Bacile signed a notice of termination letter that gave details of the severance package provided to him. The package included, among other things, severance pay in

the form of continued salary as well as health and dental insurance benefits to October 7, 2021, inclusive (health coverage).

[3] On August 24, 2021, Mr. Bacile filed a claim for employment insurance benefits (EI) pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). However, the Canada Employment Insurance Commission (“Commission”) notified Mr. Bacile that, because of his continued salary, his EI benefit period would only start on October 10, 2021. According to the Commission, since Mr. Bacile’s EI benefit period fell outside of the period beginning on September 27, 2020, and ending on September 25, 2021, he was entitled to EI for only 20 weeks—not 50: for reference, see s. 9, ss. 12(1) and (2.1) of the Act.

[4] The Social Security Tribunal of Canada’s General Division (“General Division”), in *DB v. Canada Employment Insurance Commission*, 2022 SST 1451 (*per* A. Mitchell), dated April 6, 2022, accepted Mr. Bacile’s argument that his interruption of earnings occurred on July 15, 2021, the day on which his employment was terminated. It found that neither the continued salary nor the health coverage included in his severance package could change the effective date of the termination of his employment: General Division Decision at paras. 17-18. Because of this, the General Division held that Mr. Bacile was entitled to 50 weeks of EI: General Division Decision at para. 21.

[5] The Social Security Tribunal of Canada’s Appeal Division (“Appeal Division”), in *Canada Employment Insurance Commission v. DB*, 2022 SST 1450, dated December 12, 2022 (*per* P. Lafontaine), dismissed the Commission’s appeal from the General Division’s decision. It

agreed that pursuant to subsections 35(6) and 36(9) of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations), “the severance package received by [Mr. Bacile] from his former employer constitutes earnings payable by reason of a lay-off or separation and, as such, does not prevent [Mr. Bacile] from establishing an interruption of earnings”: Appeal Division Decision at para. 21. The Appeal Division upheld the General Division’s conclusion that Mr. Bacile had an interruption of earnings on July 15, 2021, and was entitled to a maximum of 50 weeks of EI based on the temporary pandemic measures in place: Appeal Division Decision at para. 27.

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, the Appeal Division may only intervene in a decision of the General Division in an employment insurance appeal where one of three grounds of appeal exists: (1) the General Division failed to observe a principle of natural justice, (2) the General Division erred in law, or (3) the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it: *Uvaliyev v. Canada (Attorney General)*, 2021 FCA 222, 338 A.C.W.S. (3d) 295 at para. 7.

[7] On judicial review, this Court is to assess the Appeal Decision’s decision on the reasonableness standard in light of these constraints (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 23, 83, 86 [*Vavilov*]; *Canada (Attorney General) v. Hull*, 2022 FCA 82 at para. 12 [*Hull*]). This standard applies equally to the review of the Appeal Decision’s exercise of statutory interpretation: *Hull* at para. 12; *Vavilov* at paras. 115 and 124.

[8] The only issue in this application for judicial review is whether the Appeal Division reasonably upheld the General Division's decision that Mr. Bacile's interruption of earnings occurred on July 15, 2021—or more specifically, that earnings ceased to arise from Mr. Bacile's employment on this date, pursuant to subsection 14(1) of the Regulations.

[9] Before this Court, the Attorney General of Canada (Applicant) argues that the Appeal Division's decision is unreasonable because it failed to take into account Mr. Bacile's health coverage pursuant to paragraph 35(10)(d) of the Regulations. Paragraph 35(10)(d) states that “[f]or the purposes of subsection [35](2), income includes [...] the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.” According to the Applicant, health coverage cannot constitute earnings payable by reason of a lay-off or separation under subsections 35(6) and 36(9) of the Regulations. Thus, an interruption of earnings would only have occurred on October 7, 2021, the date when such health coverage ended. Under this interpretation, Mr. Bacile would only be entitled to 20 weeks of EI.

[10] The Applicant acknowledges that subsections 35(6) and 36(9) of the Regulations have the effect of removing from earnings the continued salary payable to Mr. Bacile as part of his severance package. However, the Applicant considers that subsections 35(6) and 36(9) of the Regulations do not remove the health coverage included in Mr. Bacile's severance package because they are separate from the continued salary, and they extended his employment relationship.

[11] I disagree: nothing in the text or context of the provisions justifies a different treatment for health coverage from continued salary. On the contrary, the wording of paragraph 35(10)(d) makes it clear that health coverage constitutes earnings for purposes of subsection 35(2) of the Regulations. From the moment that these earnings are paid or payable by reason of a lay-off or separation from an employment, which is clearly the case in the present matter, subsections 35(6) and 36(9) remove them, just like continued salary, from earnings for purposes of determining the interruption of earnings.

[12] The Court presumes harmony, coherence and consistency in the interpretation of provisions within a statutory scheme and between statutes dealing with the same subject matter: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at para 52; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 27. There is no apparent reason in the text or context of the Regulations justifying a different treatment for health coverage from continued salary nor could the Applicant provide a rationale or purpose that would support that interpretation.

[13] I have reviewed the jurisprudence referred to by the Applicant. It is sufficient to note that some of the cases arose in circumstances where employees received payments labelled “severance” but were not separated from their employment. Some cases were also decided prior to the amendments to the Regulations and the addition of subsection 35(6). Another case referred to by the Applicant does not concern interruption of earnings. Accordingly, I find that these cases do not assist the Applicant.

[14] In light of the above, I am of the view that the decision of the Appeal Division is reasonable. I would therefore reject the application for judicial review, with costs.

"Nathalie Goyette"

J.A.

"I agree.

Donald J. Rennie J.A. "

"I agree.

Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR JUDGMENT BY: GOYETTE J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

DATED: JULY 17, 2023

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ON THEIR OWN BEHALF

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