Cour d'appel fédérale | Federal Court of Appeal

Date: 20151104

Dockets: A-427-14
A-428-14
A-426-14
A-430-14
A-431-14
A-438-14

Citation: 2015 FCA 242

CORAM: NADON J.A.
BOIVIN J.A.
DE MONTIGNY J.A.

Dockets: A-427-14
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BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

SÉBASTIEN PARADIS

Respondent

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AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ROLAND JEAN

Respondent

Hearing held at Montréal, Quebec, on October 6, 2015.

Judgment delivered at Ottawa, Ontario, on November 4, 2015.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: NADON J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] These applications for judicial review involve six decisions by the Social Security Tribunal, Appeal Division (Appeal Division) rendered on August 28, 2014, dismissing the appeals filed by the Employment Insurance Commission against the decisions of a board of referees. These decisions raise the same issue, namely whether long-distance truck drivers whose contract stipulates that they will work one week out of every two, for 55 to 60 hours a week, are unemployed and entitled to receive employment insurance benefits during their week of rest. A board of referees ruled in favour of the Respondents, and the Appeal Division upheld these decisions.

[2] For the following reasons, I believe that the applications for judicial review must be allowed.

I. The facts

[3] Messrs. Paradis and Jean are both long-distance truck drivers for *Entreposage Le Clos*, a small company located in Grand-Mère, Quebec, acting in turn as subcontractor for *XTL Transport*. The employer has two trucks and employs four drivers, who were told at the time of

hiring that they would work one week out every two, on an alternating basis. By this arrangement, the employer ensures that its trucks are always moving, thereby maximizing the profit they generate. The evidence reveals that the pay received by the employees depends on the kilometres driven. Over the years relevant to this case, Messrs. Paradis and Jean worked an average of 55 to 60 hours a week, on an alternating basis with a week of rest. The Respondents receive no pay for the periods when the employer does not assign them work.

[4] Starting in 2009 and 2010 respectively, Messrs. Paradis and Jean filed employment insurance applications for the weeks during which they did not work. As the reason for termination of employment, they indicated that the employer had a lack of work and that they did not expect to return to work with their employer until the following week. On May 10 and 18, 2011, the Canada Employment Insurance Commission (the Commission) rendered a series of decisions rejecting the Respondents' applications for benefits, on grounds that the periods off work in this case [TRANSLATION] "form part of [their] work schedule" (Applicant's Record, A-427-14, pp. 95-98; Applicant's Record, A-426-14, pp. 80-81).

[5] The Respondents appealed these decisions to a board of referees, which heard the appeals jointly on October 2, 2012. The Commission produced a report indicating that the average work week of a truck driver was 48 hours a week (Exhibit "K" - Service Canada, "411 – Truck Drivers", Applicant's Record, A-427-14, p. 182). It submitted that by working 55 to 60 hours during their work week, the Respondents were usually working more hours than a full-time employee and were entitled to one week of leave under their contract of employment. They therefore were ineligible for employment insurance benefits under the terms of subsection 11(4)

of the *Employment Insurance Act*, S.C. 1996, c 23 [the *Act*]. This provision stipulates that a person receiving a period of leave to compensate for working a greater number of hours than are normally worked in a week by persons employed in full-time employment shall not be entitled to payment of benefits for that period of leave.

[6] In turn, the Respondents produced a report indicating that 52 percent of truck drivers not self-employed normally work 50 hours or more a week, and almost one third (31 percent) had worked 60 hours or more a week in 1998 (Exhibit "A-1", Statistics Canada, "Work patterns of truck drivers", Applicant's Record, A-427-14, p. 149). They submitted that their hours of work during the week they were on the road therefore represented a normal work week and that they were not on leave during the weeks when they were without work.

[7] On November 16, 2012, the board of referees allowed the Respondents' appeals. Reviewing the evidence on record, the board of referees found that they were prepared to work every week and were not responsible for the fact the employer made the equipment available to them only every other week. The board stated that it was [TRANSLATION] "not abnormal for a long-distance truck driver's work week to be 55 to 60 hours a week", and favoured the Respondents' evidence in this regard, which was more specific to the case of long-distance truck drivers, over that of the Commission. The board therefore found that the Respondents did not work more hours than what was normal in their work sector and thus were not on leave during the weeks without work, so they were not covered by the exception set out in subsection 11(4) of the *Act*.

[8] The Commission appealed these decisions to the Appeal Division, primarily on grounds that the board of referees erred in comparing the Respondents' work hours only to the hours usually worked by people employed full-time in the same field, rather than considering the hours normally worked by a full-time employee regardless of the specific industry. The Appeal Division heard these appeals jointly on May 26, 2014.

II. The decision challenged

[9] On August 28, 2014, the Appeal Division dismissed the Commission's appeals. First, the Appeal Division determined that it had to apply the standard of correctness to the issues of law, and the standard of reasonableness to mixed issues of fact and law. It then pointed out that subsection 11(4) of the *Act* is applicable only under the assumption that the evidence shows that an employee worked more hours than those usually worked by persons employed in full-time employment and that this was an issue of fact. The Appeal Division was careful to point out that the Commission itself had compared the Respondents' hours of work with the hours worked by truck drivers, based on Exhibit "K", thus it could not criticize the board of referees for favouring the Respondents' more specific evidence on this point.

[10] The Appeal Division also found that even if the board of referees had erred by comparing the Respondents' hours of work with employees in the same field, no evidence was led by the Commission to support its statement that a normal work week is 40 hours. Given the limitations on its power to intervene as stipulated by subsection 115(2) of the *Act* (violation of a principle of natural justice, error of law, erroneous conclusion of fact, conclusion drawn abusively or

arbitrarily or without considering facts brought to its knowledge), the Appeal Division dismissed the appeals.

III. Issues

[11] This application for judicial review raises two issues.

a) What is the applicable standard of judicial review?

b) Did the Appeal Division err in concluding that subsection 11(4) of the *Act* does not apply to the Respondents, given the evidence produced?

IV. Legislative framework

[12] The provisions of the *Act* that are relevant to the instant dispute read as follows.

Establishment of benefit period 9. When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.	Période de prestations 9. Lorsqu'un assuré qui remplit les conditions requises aux termes de l'article 7 ou 7.1 formule une demande initiale de prestations, on doit établir à son profit une période de prestations et des prestations lui sont dès lors payables, en conformité avec la présente partie, pour chaque semaine de chômage comprise dans la période de prestations.
Week of unemployment 11. (1) A week of unemployment for a claimant is a week in which the claimant does not work a full working week. […] Exception — compensatory leave (4) An insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if	Semaine de chômage 11. (1) Une semaine de chômage, pour un prestataire, est une semaine pendant laquelle il n'effectue pas une semaine entière de travail. […] Exception : congé (4) L'assuré qui travaille habituellement plus d'heures, de jours ou de périodes de travail que ne travaillent habituellement au cours

(a) in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment; and (b) the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.	d'une semaine des personnes employées à plein temps et qui a droit, aux termes de son contrat de travail, à une période de congé est censé avoir travaillé une semaine entière de travail au cours de chaque semaine qui est comprise complètement ou partiellement dans cette dernière période.

V. Analysis

a) Standard of review

[13] The matter the Court must resolve in this case essentially concerns the scope that must be given to the exclusion set out in subsection 11(4) of the *Act*. Specifically, the matter in dispute is determining whether the number of hours usually worked during a week by persons employed in full-time employment must be assessed, for purposes of this provision, based on a job type or in a particular company, or instead must be assessed in reference to all workers. This is a matter of legislative interpretation and therefore a matter of law. In fact, the decision to be rendered in this case may have repercussions on other workers whose hours or periods of work are atypical and diverge from the normal practice. Incidentally, the Court must also determine whether the Respondents actually worked more than the number of hours usually worked over a week by persons employed in full-time employment; this is a question of mixed law and fact, since the answer (once the interpretation to be given to subsection 11(4) is established) depends on the application of a legal standard to the facts in the case.

[14] The parties have agreed that the standard of review applicable to the Appeal Division's decision is that of reasonableness, and I concur. It has been well established since the *Dunsmuir*

v New Brunswick, 2008 SCC 9 [*Dunsmuir*] decision that deference is usually appropriate when an administrative tribunal interprets its own statute or statutes closely connected to its function, as in this case: *Dunsmuir*, at paragraph 54; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at paragraphs 30 and 34; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paragraph 50 [*Agraira*]. The same holds true when the issue to be resolved is a question of mixed fact and law: *Dunsmuir*, at paragraph 53.

[15] The *Dunsmuir* decision also teaches that there is no need to conduct a contextual analysis to determine the applicable standard when the case law has already satisfactorily established the applicable standard of judicial review: *Dunsmuir*, at paragraph 57; *Agraira*, at paragraph 48. Two recent decisions by this Court have already conducted this analysis and thus dispense us from repeating the exercise.

[16] First, my colleague Justice Trudel reached the conclusion that the presumption that deference must be shown when an administrative tribunal interprets its enabling legislation applies in the context of judicial review of a decision by the Appeal Division, provided this presumption is not precluded by any of the exceptions cited by the case law (constitutional questions, questions of law that are of crucial importance to the legal system as a whole and that are outside the decision-maker's field of expertise, jurisdictional questions and questions regarding the jurisdictional lines between two or more competing specialized tribunals): see *Atkinson v Canada (Attorney General)*, 2014 FCA 187, at paragraphs 22-33. Admittedly, in that case, the decision of the Appeal Division reviewed by our Court related to interpretation of

another act, i.e. the *Canada Pension Plan*, R.S.C. 1985, c C-8. The fact remains that Justice Trudel's analysis was not based on the substantive provisions of the *Canada Pension Plan Act* but rather on the enabling legislation of the Appeal Division, i.e. the *Department of Employment and Social Development Act*, S.C. 2005, c 34. Her analysis therefore is fully transposable to the jurisdiction exercised by the Appeal Division under the *Act*.

[17] More recently, this Court ruled on the standard of review applicable to an Appeal Division decision quashing a decision by a board of referees: see *Thibodeau v Canada (Attorney General)*, 2015 FCA 167. In that case, Chief Justice Noël also conducted a contextual analysis and found, as well, that deference was appropriate when the Appeal Division interprets its own statute or statutes closely connected to its function. This Court therefore is only entitled to intervene where it deems that the Appeal Division decision does not fall within "possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at paragraph 47.

[18] There is no apparent need to carry the analysis further and determine the rigour with which the Appeal Division must review decisions of the board of referees on matters of law. This Court has frequently established that the umpire must apply the standard of reasonableness to mixed questions and to matters of fact determined by the board of referees (*Pathmanathan v Office of the Umpire*, 2015 FCA 50, at paragraph 15; *De Jesus v Canada (Attorney General)*, 2013 FCA 264, at paragraph 30; *Canada (Attorney General) v Merrigan*, 2004 FCA 253, at paragraph 10 [*Merrigan*]) and the standard of correctness to matters of law (*Martens v Canada (Attorney General)*, 2008 FCA 240, at paragraphs 30-31; *Chaulk v Canada (Attorney General)*,

2012 FCA 190, at paragraphs 26-29; *Stone v Canada (Attorney General)*, 2006 FCA 27, at paragraphs 15-18). Where the Appeal Division heard appeals of decisions by the board of referees, assuming the role previously assigned to the umpire pursuant to the transitional measures set out by the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c 19, ss. 266-267, it was appropriate that it refer to the appeal methods in effect immediately prior to April 1, 2013 and to the case law on the standard of review applicable under this system. For the purposes of the instant dispute, there is no need to rule on the standard of review that the Appeal Division should apply when reviewing appeals of decisions rendered by the General Division of the Social Security Tribunal.

[19] This being said, I am not convinced of the relevance of subjecting decisions rendered by the Appeal Division to an analysis based on the standard of review. When it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court. Given the risk of a blurring of lines, it seems to me that we must refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context. Not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal (ss. 18.1 and 28 of the *Federal Courts Act*, R.S.C. 1985, c F-7). Where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to

69 of that Act. In particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" (paragraph 58(1)(*b)* of the *Act*). There is no need to add to this wording the case law that has developed on judicial review.

[20] The role of this Court in the instant case therefore consists of determining whether the Appeal Division could reasonably find that the board of referees did not render a decision voided by an error of law. For all practical purposes, this comes down to asking whether the board of referees could reasonably interpret subsection 11(4) of the *Act* as it did, by comparing the Respondents' work week with that of long-distance truck drivers rather than that of all full-time workers.

b) Scope of subsection 11(4) of the Employment Insurance Act

[21] Section 9 of the *Act* stipulates that employment insurance benefits are payable for each week of unemployment. In turn, a week of unemployment is defined in subsection 11(1) of the *Act* as a week in which the claimant does not work a full working week. Subsections 11(2), (3) and (4), however, set out exceptions to this definition. Subsection 11(4) specifically provides that a period of planned leave must be considered a full working week in cases where a contract of employment provides periods of leave for persons who regularly work more hours than normal. The purpose of this provision is clear: to ensure that only workers whose work is interrupted may receive temporary benefits, in keeping with the spirit of a public insurance program based on the concept of social risk. A worker on compensatory leave for overtime already worked does not suffer a loss of income, regardless of whether he receives pay during this leave; his work has not

been interrupted and he maintains his bond with the employer: see *Canada (Attorney General) v Foy*, 2003 FCA 51, at paragraph 8 [*Foy*].

[22] The Applicant submitted that the Respondents' factual situation meets all the criteria for the exception set out in subsection 11(4) of the *Act*. Although this provision is silent on the number of hours that represents the hours usually worked by persons employed in full-time employment, the Applicant submits that it is common knowledge that 55 to 60 hours exceeds that number. Parliament did not clearly define this concept in the *Act* or regulations, it therefore intended to defer to the provincial legislation on the matter while also allowing for changes over time. However, both Quebec's *Act Respecting Labour Standards* (C.Q.L.R., c N-1.1, s. 52) and the *Canada Labour Code* (R.S.C. 1985, c L-2, s. 169) stipulate that a normal work week is 40 hours.

[23] On the other hand, the Respondents maintained that the Appeal Division could reasonably find that subsection 11(4) must be interpreted using a variable standard depending on the industry, when determining the number of hours normally worked by persons employed in full-time employment. They argue that the Applicant's thesis is contrary to the argument it made before the board of referees that the number of hours normally worked in a week must be determined in reference to the number of hours normally worked by all truck drivers (48 hours). They add that if the legislator wished to defer to provincial legislation in this matter, it could have stated this explicitly, especially since the provincial standards vary depending on the field of employment and the type of work, and focus on setting wage rates rather than determining the amount of time actually worked.

[24] The case law to which the parties have referred us is of little assistance, since identification of the control group for determining the number of hours usually worked does not appear to have been explicitly addressed by the courts. The *Merrigan* and *Foy* decisions specifically cited by the Respondents do not support their claim. In the first, the Court found that the issue of whether the claimant worked more than the number of hours normally worked in a week by persons employed in full-time employment is a matter of fact in which an umpire must not intervene, unless the decision is based on an erroneous conclusion, is drawn abusively or arbitrarily or in disregard for facts brought to the knowledge of the board of referees (paragraph 115(2)(c) of the *Act*, to the same effect as paragraph 58(1)c) of the *Department of Employment and Social Development Act*). In this instance, the Court was of the opinion that it was open to the board of referees to find that a week of 52 hours exceeded the number of hours usually worked in a week by persons employed in full-time employment, without specifying to which group reference must be made to make this comparison. In the *Foy* case, the Court accepted the findings of the board of referees and the umpire that the normal work week was 48 hours in Prince Edward Island, under the province's *Employment Standards Act*; no evidence supported the Attorney General's claim that the normal number of hours of work for a person employed in full-time employment was 40 hours.

[25] In the absence of any clarification on how to interpret a normal work week, we must presume that the legislator did not wish to make a distinction based on job category or industry for purposes of the exclusion set out in subsection 11(4) of the *Act*. Had it been otherwise, Parliament would certainly have explicitly stipulated this, as was done in section 31 of the *Employment Insurance Regulations*, SOR/96-332. This latter provision stipulates that a full work

week is the number of days normally worked in a calendar week by "persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed". It would have been easy to similarly define the concept of hours usually worked in a week by persons employed in full-time employment had this been the legislator's intent.

[26] Reasons of principle also argue against the contention accepted by the Appeal Division. Interpreting the exclusion set out in subsection 11(4) based on the hours usually worked by persons employed in full-time employment in a specific industry would effectively create disparities in access to employment insurance since the exclusion set out in subsection 11(4) would not apply uniformly and would favour those workers in fields where the work week is often longer, to the detriment of most workers, whose work week is shorter. It should be remembered that employment insurance is a social measure for the purpose of compensating unemployed workers for their loss of employment income and ensuring their economic and social security for a time, thus assisting them in returning to the labour market: *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 41. It is also significant that section 4 of the *Act* sets a uniform ceiling for insurable income, regardless of the income earned by the claimant from the job or the type of job he or she held. Using a variable exclusion based on the type of job to determine whether a person is on leave for the purposes of subsection 11(4) thus would not be consistent with the spirit of the legislation and the objective pursued by the legislator.

[27] I find this conclusion even more justified in the instant case given that the evidence shows not only that the Respondents were aware when they were hired of how their employer

operated, but also that the decision to employ four drivers and have them work in rotation on two trucks was based purely and simply on a business model designed to maximize the company's profitability. In fact, the employer made no secret of its reasons for operating its business in this way, pointing out that the drivers were less efficient when they worked several weeks in a row and that the most profitable way to operate the business was to keep its trucks moving without interruption: Applicant's Record, pp. 83-84. It is clear to me that the purpose of the *Act* was not to allow an employer to use the employment insurance fund to finance his business model. To the extent that the interpretation of subsection 11(4) allowed by the board of referees and the Appeal Division authorizes this outcome, I consider this an additional reason to find this unreasonable and beyond "possible, acceptable outcomes which are defensible in respect of the facts and law."

[28] For the purposes of this case, I see no need to rule on the Applicant's claim that the concept of "hours usually worked by persons employed in full-time employment" must be interpreted in reference to the various provincial laws on the matter. Although this may be a relevant indication for interpretation and application of subsection 11(4) of the *Act*, I would hesitate to make it a decisive criterion. There are a host of legislative and regulatory provisions that govern hours of work for a range of purposes (minimum standards, rates of pay, mandatory leave, etc.) and that therefore stipulate various systems depending on the nature of the jobs. We must refrain from mechanically equating any of these systems out of context with the exception set out in subsection 11(4) of the *Act*.

VI. Conclusion

[29] On these grounds, I allow the application for judicial review, I quash decision 2012-1948 rendered by the Appeal Division of the Social Security Tribunal and I refer the matter back to the Appeal Division of the Social Security Tribunal for a determination consistent with these grounds. Without costs.

"Yves de Montigny"

J.A.

"I concur.
M. Nadon J.A."

"I concur.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD IN THE CASE

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