Federal Court of Appeal | Cour d'appel fédérale

**Date: 20201116**

**Docket: A-100-19**

**Citation: 2020 FCA 199**

**CORAM:** **WEBB J.A.**
**WOODS J.A.**
**RIVOALEN J.A.**

**BETWEEN:**

**STACEY COURT**

**Applicant**

**and**

**CANADA (ATTORNEY GENERAL)**

**Respondent**

Heard at Toronto, Ontario, on September 16, 2020.

Judgment delivered at Ottawa, Ontario, on November 16, 2020.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: WEBB J.A.
WOODS J.A.

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**REASONS FOR JUDGMENT**

**RIVOALEN J.A.**

I. Introduction

[1] The applicant seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal (the Appeal Division) rendered on January 31, 2019 (AD-18-202).

[2] Before the decision of the Appeal Division was rendered, the applicant's matter was considered by the General Division of the Social Security Tribunal (the General Division). Its decision, rendered on February 19, 2018 (GE-17-1536), turned on its interpretation of section 45 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the EIA) and subsection 36(9) of the *Employment Insurance Regulations*, S.O.R./96-332 (the Regulations). On appeal, the Appeal Division determined that there was no error in law in that interpretation and affirmed the General Division's finding that the payment to the applicant of settlement funds for her wrongful dismissal claim resulted in an overpayment of benefits previously paid to her during periods of maternity and parental leave. Further, the Appeal Division found that the applicant was required to repay the gross amount of those benefits, notwithstanding that she received the net amount.

[3] This decision focuses on the Appeal Division's interpretation of section 45 of the EIA and subsection 36(9) of the Regulations. The General Division and the Appeal Division considered section 45 of the EIA and subsection 36(9) of the Regulations, but neither was asked to consider the impact, if any, of subsections 36(2) or 38(1) of the Regulations. Before this Court, the applicant raised a new argument dealing with subsection 38(1) of the Regulations. This Court raised an additional question regarding the effect, if any, of subsection 36(2) of the Regulations.

## II. Standard of review

[4] The standard of review in this application for judicial review is reasonableness. This Court need only consider whether the Appeal Division's conclusion and reasons are reasonable (see *Stavropoulos c. Canada (Procureur général)*, 2020 CAF 109, [2020] A.C.F. no. 738 (QL) at

para. 11, also citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 83, 86 [*Vavilov*]; see also *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6, [2020] F.C.J. No. 15 (QL) at paras. 34-35).

[5] When considering matters of statutory interpretation, *Vavilov* reminds us that "the reviewing court does not undertake a *de novo* analysis of the question or 'ask itself what the correct decision would have been'" (*Vavilov* at para. 116, citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 50).

## III. The facts

[6] As surrounding context is important, I will summarize the basic facts of this matter.

[7] The applicant's employment was terminated during her pregnancy.

[8] There is no dispute that the applicant was entitled to maternity and parental leaves of absence and applied for them in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the ESA of Ontario).

[9] The applicant also applied for benefits under the EIA. She received by way of maternity benefits a total of $7,275.00 ($6,390.00 net of deductions), covering the maximum allowable 15 weeks for the period from September 2, 2012, to December 15, 2012. The applicant received by way of parental benefits a total of $16,975.00 ($14,910.00 net of deductions) covering the maximum allowable 35 weeks from December 16, 2012, to August 17, 2013.

[10] In 2014, the applicant sued her former employer in the Ontario Superior Court of Justice for wrongful dismissal and breach of contract. In 2016, after a pre-trial conference, the parties settled the suit for $50,000. From that amount, the applicant was left with $33,828.83 after the deduction of legal expenses.

[11] In January 2017, the Canada Employment Insurance Commission (the Commission) notified the applicant that the $33,828.83 represented earnings and created an overpayment of her maternity and parental leave benefits. The Commission found that an overpayment arose because the applicant's earnings were not deducted from the benefits paid to her. The Commission calculated the applicant's normal weekly earning rate to be $1,239. This amount represented her "pre-termination" earnings.

[12] The applicant's request for reconsideration of the Commission's decision was unsuccessful. Subsequently, her appeal to the General Division was dismissed. The General Division found that the damages paid to the applicant in the amount of $33,828.83 constituted earnings and that those earnings should be allocated to the weeks commencing July 15, 2012, (the applicant's last work week) to February 2, 2013 (the date her benefits ended), for a total allocation of $34,069.74. From there, the applicant was granted leave to appeal to the Appeal Division on a question of law in accordance with paragraph 58(1)(*b*) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34. The Appeal Division affirmed the General Division's findings that the settlement funds represented earnings and created an overpayment of the applicant's benefits. The Appeal Division accepted that the applicant's proposed interpretation of section 45 of the EIA would serve the purpose of providing some

protection to pregnant women seeking leave, and that it also accords in part with the scheme and object of the EIA, but was unable to find that the General Division erred. The Appeal Division member wrote that "[i]f the section had drawn some correlation between the nature of those earnings and the nature of the benefits, I might have been swayed to find otherwise, but I am unconvinced that, for the purposes of section 45, I can distinguish between regular and special benefits on the basis of the references to 'for a period' and 'for the same period.'" (Appeal Division's decision, para. 31, Appeal Book, Tab 2, p. 15)

[13] At the hearing before this Court, the applicant confirmed that there is no dispute that the sum of $33,828.83 represents earnings as described under section 35 of the Regulations. Therefore, when considering the arguments advanced by the applicant, those monies are to be treated as "earnings" for the purposes of section 45 of the EIA and section 35 of the Regulations.

[14] With this background in mind, and before returning to the applicant's arguments, I will highlight the legislation at play.

## IV. Legislative provisions

[15] Under subsection 2(1) of the EIA, "benefits", "regular benefits" and "special benefits" are defined as follows:

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| **Interpretation** | **Définitions et interprétation** |
| **2(1)** In this Act, | **2(1)** Les définitions qui suivent s'appliquent à la présente loi. |

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| … | […] |
| **benefits** means unemployment benefits payable under Part I, VII.1 or VIII, but does not include employment benefits; (prestation) | **prestation** Prestation de chômage à payer en application de la partie I, VII.1 ou VIII. En est exclue la prestation d'emploi. (benefits) |
| **regular benefits** means benefits payable under Part I and Part VIII, but does not include special benefits or benefits by virtue of section 24 or 25; (prestations régulières) | **prestations régulières** Prestations versées au titre de la partie I ou VIII, à l'exception des prestations spéciales ou en raison de l'article 24 ou 25. (regular benefits) |
| **special benefits** means benefits paid for any reason mentioned in subsection 12(3) or 152.14(1); (prestations spéciales) | **prestations spéciales** Prestations versées pour une raison mentionnée aux paragraphes 12(3) ou 152.14(1). (special benefits) |

[16] Clearly, unemployment benefits payable under Part I of the EIA are "benefits" in this context. "Employment benefits" are defined as "benefits established under section 59", which are payable under Part II of the EIA.

[17] Special benefits under subsection 12(3) are payable under Part I of the EIA. Such benefits include, among other things, maternity and parental leave benefits.

[18] There is no dispute that the applicant qualified for and received special benefits pursuant to subsection 12(3) of the EIA. Clearly, those special benefits are unemployment benefits that fall within the definition of "benefits".

[19] Section 45 of the EIA requires claimants in certain circumstances to return benefits to the Receiver General. It prevents "double-dipping" or "double-recovery". The section reads as follows:

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| **Return of benefits by claimant** | **Remboursement de prestations par le prestataire** |
| **45** If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid. | **45** Lorsque le prestataire reçoit des prestations au titre d'une période et que, soit en application d'une sentence arbitrale ou d'un jugement d'un tribunal, soit pour toute autre raison, l'employeur ou une personne autre que l'employeur — notamment un syndic de faillite — se trouve par la suite tenu de lui verser une rémunération, notamment des dommages-intérêts pour congédiement abusif ou des montants réalisés provenant des biens d'un failli, au titre de la même période et lui verse effectivement la rémunération, ce prestataire est tenu de rembourser au receveur général à titre de remboursement d'un versement excédentaire de prestations les prestations qui n'auraient pas été payées si, au moment où elles l'ont été, la rémunération avait été ou devait être versée. |

[20] Section 36 of the Regulations speaks to the allocation of earnings as determined under section 35 for benefit purposes. Specifically, subsections 36(2) and 36(9) state:

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| **Allocation of Earnings for Benefit Purposes** | **Répartition de la rémunération aux fins du bénéfice des prestations** |
| **36(2)** For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35. | **36(2)** Pour l'application du présent article, la rémunération du prestataire ne peut être répartie sur les semaines durant lesquelles elle n'avait pas valeur de rémunération ou n'avait pas été comptée comme rémunération selon l'article 35. |
| … | […] |

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| **36(9)** Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment. | **36(9)** Sous réserve des paragraphes (10) à (11), toute rémunération payée ou payable au prestataire en raison de son licenciement ou de la cessation de son emploi est, abstraction faite de la période pour laquelle elle est présentée comme étant payée ou payable, répartie sur un nombre de semaines qui commence par la semaine du licenciement ou de la cessation d'emploi, de sorte que la rémunération totale tirée par lui de cet emploi dans chaque semaine consécutive, sauf la dernière, soit égale à sa rémunération hebdomadaire normale provenant de cet emploi. |

[21] The applicant raised for the first time, before this Court, the application of subsection 38(1) of the Regulations. It reads as follows:

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| **Maternity Leave, Leave for the Care of a Child and Compassionate Care Leave Plans** | **Régimes de congés de maternité, de congés pour soins donnés à un enfant et de congés de soignant** |
| **38(1)** 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, of a critically ill child or of a critically ill adult, or because of any combination of those reasons, is excluded as earnings for the purposes of section 35, namely, the portion that | **38(1)** 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 à donner à un ou plusieurs enfants visés aux paragraphes 23(1) ou 152.05(1) de la Loi ou des soins ou du soutien à donner à un membre de la famille visé aux paragraphes 23.1(2) ou 152.06(1) de la Loi, à un enfant gravement malade ou à un adulte gravement malade, ou d'une combinaison de ces raisons, qui : |

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| (*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; |
| (*b*) does not reduce the claimant's accumulated sick leave or vacation leave credits, severance pay or any other accumulated credits from that claimant's employment. | *b*) d'autre part, ne réduit pas les crédits de congés de maladie non utilisés ou de vacances, l'indemnité de départ ou tout autre crédit accumulé par lui dans le cadre de son emploi. |

## V. Issues before this Court

[22] At the heart of this application is whether the Appeal Division's interpretations of section 45 of the EIA and subsection 36(9) of the Regulations, viewed in the light of this factual matrix, are reasonable. The application of those interpretations to these facts results in the applicant having to pay a portion of her special benefits to the Receiver General. I will also consider the applicant's new argument dealing with the interpretation of subsection 38(1) of the Regulations and our question regarding the effect, if any, of subsection 36(2) of the Regulations.

[23] A secondary issue is whether the Appeal Division reasonably determined that section 45 requires the applicant to repay the gross amount of the special benefits rather than the net amount.

## VI. Analysis of applicant's arguments

### A. *Gross v. net*

[24] This Court brought to the applicant's attention section 60(*n*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [the ITA] as a full response to her argument on this issue. The applicant essentially conceded this point during oral submissions. No further analysis is required as the ITA specifically provides a deduction in computing income of any amount paid by the taxpayer as a repayment under Part I of the EIA. Moreover, in my view, if the applicant is required to pay back benefits in this case, it is reasonable for her to pay back the gross amount of the benefits.

### B. *Subsection 38(1) of the Regulations*

[25] The applicant advances a new argument before this Court with regard to the effect of subsection 38(1) of the Regulations. She acknowledges that there was no agreement in place between herself and her employer to top-up her maternity leave benefits. However, she submits that she ought to have enjoyed the protection of subsection 38(1) of the Regulations because it expressly excludes salary top-up amounts received by a claimant on maternity leave or parental leave from "earnings" for the purpose of section 35 of the Regulations and section 45 of the EIA.

[26] The applicant submits that it is unreasonable and unfair for an employee who is terminated while pregnant to enjoy less protection under the EIA than an employee who receives a salary top-up and maternity leave benefits.

[27] The phrase “normal weekly earnings” found in subsection 38(1) is not defined in the EIA. Its meaning was considered in this Court’s decision in *Chaulk v. Canada (Attorney General)*, 2012 FCA 190, [2012] F.C.J. No. 831 (QL) [*Chaulk*]. The applicant relies on this decision to urge this Court to consider the hardship occasioned by her termination.

[28] I cannot accept the applicant’s arguments.

[29] The EIA is a complex statutory scheme. This Court provided some guidance in *Chaulk* on the interpretation of the words “normal weekly earnings” found in paragraph 38(1)(*a*) of the Regulations. This Court agreed with Ms. Chaulk that her employment insurance maternity benefits and Supplemental Employment Insurance Benefit Plan (SEB) combined did not exceed her “normal weekly earnings” and therefore no part of the SEB constituted earnings for the purposes of section 35. In *Chaulk*, there was no overpayment of employment insurance maternity benefits, but an analogous statement cannot be made of the applicant’s circumstances.

[30] The *Chaulk* decision can be distinguished from the present matter. In *Chaulk*, this Court was faced with the interpretation of a collective agreement where an employee and employer had agreed to a salary top-up plan during maternity leave. While employed but during her maternity leave, Ms. Chaulk received maternity leave benefits and a salary top-up, which, when combined, did not exceed her normal weekly earnings. That is precisely the situation contemplated in subsection 38(1) of the Regulations. Additionally, the *Chaulk* decision did not deal with the termination of an employee.

[31] Subsection 38(1) of the Regulations has no application here.

C. *Subsection 36(2) of the Regulations*

[32] During the hearing, this Court raised the question of what impact, if any, subsection 36(2) of the Regulations has on the interpretation of section 45 of the EIA when applied to the applicant's circumstances.

[33] In her supplementary submissions, the applicant describes the question as being whether the Appeal Division's decision is unreasonable because of a patent lack of concordance between the benefits period and the earnings period.

[34] The applicant acknowledges that her settlement funds were earnings under section 35 of the Regulations. The applicant argues that the only way she can avail herself of subsection 36(2) of the Regulations is to demonstrate that the settlement earnings "did not constitute earnings" during her leave period.

[35] The applicant submits that the answer lies in interpreting subsection 36(2) of the Regulations to require the actual concordance of the "earnings" and "benefits periods" for the purpose of section 45 of the EIA. She argues that subsection 36(2) of the Regulations is a form of regulatory failsafe to ensure concordance within the general allocation scheme found in the Regulations. Since section 45 of the EIA requires concordance between an earnings period and a benefits period in order to establish an overpayment, her proposed interpretation, she argues,

would uphold the legislative intent of the entire scheme and would demand consideration of the actual circumstances of the applicant.

[36] In his supplementary submissions, the respondent provides a textual, contextual and purposive analysis of subsection 36(2). I agree with the submissions of the respondent in this regard. The applicant's arguments concerning subsection 36(2) are an attempt to impose her policy preferences; her proposed interpretation is unsupported by a textual, contextual and purposive analysis called for in these circumstances.

[37] Subsection 36(2) operates only in very narrow circumstances to prevent earnings from being allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35. In the review before this Court, the applicant's earnings were always captured as such under section 35 because it was determined by the General Division, and conceded by the applicant, that this was income arising out of employment. That finding was not appealed to the Appeal Division.

[38] Allocating the earnings is straightforward. Subsection 36(1) sets out how earnings are to be allocated, and subsection 36(9) describes how to do that for the type of payment received in this case: by allocating to a number of weeks, beginning with the week of the lay-off. This is exactly what was done. Given that there was no point where these earnings did not constitute earnings or were not taken into account as earnings, subsection 36(9)'s application was not altered by subsection 36(2).

[39] Again, as with the submissions made with respect to subsection 38(1) of the Regulations, I cannot accept the applicant's arguments. Subsection 36(2) of the Regulations is not applicable to this matter because there is no dispute that the settlement monies are earnings falling under section 35 of the Regulations.

D. *Section 45 of the EIA*

[40] Turning now to the heart of this application for judicial review, the applicant argues that the Appeal Division's interpretations of section 45 of the EIA and subsection 36(9) of the Regulations are unreasonable.

[41] The applicant repeats her arguments that the Appeal Division misinterpreted section 45 of the EIA and the Regulations. In particular, she submits its interpretation does not adequately take into account her singular circumstances of employment, which included her "vested legal right to unpaid maternity and parental leave" when her employment was terminated. Ultimately, she states that the Appeal Division's decision is "contrary to the scheme and purpose of the [EIA], produces absurd results, and results in serious injustice." (Applicant's Memorandum of Fact and Law at para. 4)

[42] The applicant submits there is no dispute that she was legally entitled to maternity and parental leave benefits, and that the employer was not obligated to pay her any earnings during these two leave periods. Had the applicant's employment not been terminated, she reasons that her "normal weekly earnings" during these two leave periods would have been zero because she was unable to provide services and her employer was not obligated to pay her.

[43] The applicant relies on sections 35 and 36 of the Regulations, which she says provides the meaning of "earnings" for the purpose of applying section 45 of the EIA. Section 35 of the Regulations defines "earnings" to be the entire income of a claimant arising out of employment. She is not disputing that the settlement monies of $33,828.83 represent "earnings" under this section. Rather, she argues that section 36 of the Regulations contemplates that earnings are to be allocated only to those weeks where the claimant actually earned employment income.

E. *Subsection 36(9) of the Regulations*

[44] The applicant submits that subsection 36(9) of the Regulations prescribes how earnings payable to a claimant because of a termination are to be allocated. As in *Chaulk*, the applicant argues that the determination of a claimant's "normal weekly earnings" cannot be made in the abstract, but must be made in the context of the actual circumstances surrounding a claimant's employment.

[45] The applicant contends that the outcome of the Appeal Division's decision is unreasonable. If it is left to stand, she asserts, an employer could appropriate the benefit of a pregnant employee's right to receive maternity and parental leave benefits by summarily terminating her employment just before her leave period begins. The applicant submits that such an outcome is unreasonable; is at odds with the common law; and is at odds with provincial employment laws that stipulate that notice periods ought not to run concurrently with maternity and parental leaves. In support of this, she relies on two British Columbia Supreme Court decisions: *Whelehan v. Laidlaw Environmental Services Ltd.*, B.C.L.R. (3d) 129, [1998] B.C.J.

No. 847 (QL) [*Whelehan*] and *Wells v. Patina Salons Ltd.*, 2003 BCSC 1731, [2003] B.C.J. No. 2615 (QL) [*Wells*].

## VII. Are the Appeal Division's interpretations of section 45 of the EIA and subsection 36(9) of the Regulations unreasonable?

[46] For the following reasons, in my view the Appeal Division's interpretations of section 45 of the EIA and subsection 36(9) of the Regulations are reasonable.

[47] First, I will briefly address the applicant's arguments on the operation of the common law and provincial employment laws on which she relies and how those intersect with the applicant's rights and obligations under the EIA.

[48] Broadly stated, the EIA concerns the relationship between the unemployed person and the state, rather than between the employee and the employer. The EIA affords, among other things, a mechanism for providing replacement income when an interruption of employment occurs because of the birth or arrival of a child (see *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669 at para. 75).

[49] The right of a pregnant claimant to take time off work is governed, not by the EIA, but by employment standards and related provincial legislation (in this case, the ESA of Ontario). These employment standards vary from province to province, and combined with provincial human rights legislation, provide broad safeguards against an employee being penalized because she is pregnant or taking maternity leave. In this matter, the ESA of Ontario does not require an

employer to pay a salary during the period of maternity leave or parental leave. The policy considerations that underpin the EIA call for the state, and not employers, to bear this financial burden.

[50] At common law, an employer is precluded from treating the maternity leave period of absence as severing an employee's continuous employment. Otherwise, an employee on maternity leave would be at risk of losing her tenure, entitlements and other benefits (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321).

[51] Therefore, if an employee is wrongfully dismissed while she is pregnant, she is entitled to the protections afforded to her by the employment standards and human rights legislation of her province of residence as well as under the common law.

[52] If the claimant received benefits under the EIA and for the same period received monies from a settlement of a wrongful dismissal claim, the plain reading of section 45 of the EIA is clear. The section refers only to "benefits", which includes any regular and special benefits, and refers specifically to "damages for wrongful dismissal" as earnings.

[53] There is a presumption that an award for wrongful dismissal or settlement funds are "earnings" under section 35 of the Regulations, unless the settlement agreement specifically identifies sums attributable to legal fees and disbursements, making clear that a portion of the settlement was not paid for lost income. In the matter before us, it was agreed that legal fees and

disbursements were deducted from the $50,000 proceeds of settlement, leaving a balance of $33,828.83 to be treated as income under section 35 of the Regulations.

[54] Turning to the Regulations, the plain reading of subsection 36(9) of the Regulations is also clear. It requires that *all earnings* paid to the applicant by reason of the settlement of her wrongful dismissal claim, "regardless of the period in respect of which the earnings are purported to be paid … be allocated to a number of weeks that begins with the week [of her termination] in such a manner that [her] total earnings … from that employment are … equal to her normal weekly earnings from that employment."

[55] Section 45 of the EIA, read in conjunction with subsection 36(9) of the Regulations, operates so that once the applicant receives settlement monies from her employer, she will be required to repay the amount determined as an overpayment of unemployment benefits regardless of the period in respect of which earnings are purported to be paid. Therefore, even if she received a settlement representing only monies she might have earned when she returned to work from her maternity leave, but for her dismissal, she has received an overpayment of benefits and she is obliged to repay them.

[56] Although the applicant argues that her interpretation is consistent with the general design of the EIA and its regulatory scheme, she has not provided evidence to support this assertion. As the Appeal Division noted at paragraph 29 of its reasons, while the applicant's interpretation has a certain attractiveness, the applicant has not adduced any evidence of a clear legislative intent that claimants should not have to repay their maternity or parental leave benefits in the event of a

settlement derived from a claim for wrongful dismissal. This intent is not evidenced anywhere in the EIA or the Regulations.

[57] As set out in paragraph 30 of the Appeal Division's reasons, when considering section 45 of the EIA, Parliament could readily have defined the benefits that a claimant receives for a period as being limited to regular benefits, but it did not do so. I am of the view that the Appeal Division demonstrably justified its interpretation of section 45 of the EIA and related Regulations while taking into consideration the context surrounding the applicant's maternity leave and termination from her employment.

[58] The application of the Appeal Division's interpretations to the particular facts involving the applicant do not render the Appeal Division's reasons unreasonable or "absurd".

[59] The applicant's reliance on *Whelehan* and *Wells* is misplaced. Those decisions are neither inconsistent with nor determinative of the analysis that must be undertaken in this judicial review application.

[60] The applicant argues *Whelehan* and *Wells* establish that notice periods ought not to run concurrently with maternity and parental leaves. The passages from *Whelehan* that deal with these concepts reads as follows:

> [18] It is useful to compare the underlying purposes of reasonable notice and maternity leave. The law requires employers to provide dismissed employees with compensation for an adequate period of time to enable them to pursue suitable re-employment without unreasonable financial disadvantage. The philosophy behind

> maternity leave is that women who are pregnant are entitled to a leave of absence from their jobs in order to accommodate childbirth and they are entitled to the assurance that their job tenure is secure during the period of their absence. That philosophy is reflected in s. 56 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("the *Act*") which provides that the services of an employee on maternity leave are deemed to be continuous for the purposes of calculating vacation entitlement, pensions, medical benefits or other plans beneficial to the employee.
>
> [19] The policy basis underlying maternity leave -- protecting pregnant women against penalties with respect to their job tenure and other terms of their employment by reason of pregnancy and childbirth -- would be defeated if an employer could terminate a pregnant employee at the commencement of her maternity leave so that her period of notice was spent during that leave.
>
> [20] I conclude that Ms. Whelehan's maternity leave should not coincide with the applicable notice period which I have determined to be eight months.

[61] The passage from *Wells* that speaks to these concepts reads as follows:

> [21] There was also an issue of whether the plaintiff's maternity leave interrupted the notice period or whether the notice period ceased at that point. Madam Justice Allan discussed this issue in W*helehan v. Laidlaw Environmental Service Ltd.* (1998) 1998 CanLII 6137 (BC SC), 55 B.C.L.R. (3d) 129 (S.C.). In that case, the plaintiff was on maternity leave when the defendant gave her notice of termination, but in my view the same reasoning should apply. Pregnant women are entitled to take a leave of absence from their jobs in order to accommodate childbirth and they are also entitled to an assurance that their job is secure during their absence. This policy of protecting women from penalties in the workplace due to pregnancy would be defeated if an employer could include maternity leave as part of a notice period.

[62] I do not find it helpful in this context (*i.e.*, of whether a claimant must pay to the Receiver General an overpayment of benefits) to speak of "maternity leaves must not run concurrently with notice periods". Such language is potentially misleading when taken out of its original context.

[63] The point of *Whelehan* and *Wells* is that an employer's obligation to pay damages in lieu of reasonable notice is not diminished by reason of a terminated employee being on maternity leave. In other words, these cases stand for the proposition that an employer who is obligated to pay damages for wrongful dismissal is not entitled to deduct from those damages whatever benefits are received by a terminated employee who is on maternity leave. This principle was presumably taken into consideration when the applicant's suit against her former employer was settled. There is no evidence on this point one way or another in the record before this Court, but it is enough that the onus was clearly on the applicant to take this principle into account in her negotiations with her former employer. Section 45 of the EIA read in conjunction with subsection 36(9) of the Regulations could not be clearer.

[64] For all these reasons, based on the record that was before the Appeal Division, I am of the view that it was open to it to conclude that the applicant was required to apply the monies she received from the settlement of her suit to pay back the special benefits she received.

[65] As I indicated earlier in these reasons, the EIA is a complex statutory scheme. I am satisfied that in the context of the facts before it, the Appeal Division properly considered the pertinent aspects of the text, context and purpose of section 45 of the EIA and related Regulations in its interpretation of the provisions. From the record that was before it, I find that it applied its particular insight into the statutory scheme at issue and adopted an interpretation that was reasonable (see *Vavilov* at paras. 120-21). The Appeal Division fulfilled its task.

[66] When reviewing the administrative decision as a whole, including the reasons and the outcome reached, I am of the view that the Appeal Division's decision is reasonable.

## VIII. Conclusion

[67] In conclusion, I would dismiss the application for judicial review. In keeping with the agreement reached between the parties, I would not award costs.

"Marianne Rivoalen"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Judith Woods J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-100-19 |
| **STYLE OF CAUSE:** | STACEY COURT v. CANADA (ATTORNEY GENERAL) |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 16, 2020 |
| **REASONS FOR JUDGMENT BY:** | RIVOALEN J.A. |
| **CONCURRED IN BY:** | WEBB J.A.<br>WOODS J.A. |
| **DATED:** | NOVEMBER 16, 2020 |

**APPEARANCES:**

| | |
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