Federal Court of Appeal  Cour d'appel fédérale

Date: 20140703

Dockets: A-36-13
A-37-13

Citation: 2014 FCA 177

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
TRUDEL J.A.

Docket: A-36-13

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

RAYMOND CLOUTIER

Respondent

Docket: A-37-13

AND BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

SYLVAIN LEBLOND

Respondent

Heard at Montréal, Quebec, on October 23, 2013.

Judgment delivered at Ottawa, Ontario, on July 3, 2014.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] During the entire relevant period, Mr. Cloutier and Mr. Leblond (the claimants) were employees of Olymel L.P. (Olymel). On May 24, 2011, Olymel entered into a work-sharing agreement with the Employment Insurance Commission (the Commission) and the employees of Olymel, represented by their union. The purpose of this agreement was to avoid having to lay off a certain number of Olymel employees as a result of a reduction in the normal level of business activity for reasons beyond the control of the employer. The work-sharing program prevents layoffs when there is a temporary reduction in the amount of work and provides income support to workers entitled to employment insurance benefits whose work weeks have been temporarily reduced. This scheme is authorized by section 24 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

[2] The issue raised in these applications for judicial review is whether an employee continues to be entitled to work-sharing benefits if, in the course of a week, he or she does not perform services as planned in the work schedule as a result of taking paid leave under the collective agreement.

[3] The facts in dockets A-36-13 (*The Attorney General of Canada v. Raymond Cloutier*) and A-37-13 (*The Attorney General of Canada v. Sylvain Leblond*) are almost identical. The applications for judicial review were heard at the same time. Consequently, only one set of

reasons is rendered, the original of which will be filed in docket A-36-13, and a copy in docket A-37-13.

I. FACTS AND PROCEEDINGS

[4] Mr. Cloutier was to work two days during the week of July 31, 2011, but he did not perform services on those two days because of the death of a relative. He took the bereavement leave provided for under section 21 of the collective agreement. Olymel paid him $269.12 for the two days' bereavement leave.

[5] Mr. Leblond experienced the same situation during the same week: he had been supposed to work three days, and he took bereavement leave on those three days. Olymel paid him $465.50 for the three days.

[6] The Commission informed Mr. Cloutier and Mr. Leblond that they were not entitled to work-sharing benefits for the week of July 31 because they had not worked for at least 30 minutes during that week. According to the Commission, the week of July 31 was therefore to be considered as a regular-benefits week, except that the claimants had to serve their waiting period. They were therefore not entitled to regular or work-sharing benefits during this week.

[7] Each of the claimants appealed from the Commission's decision to the Board of Referees. Both of them argued that the Commission's representatives recognized during a union meeting that, except for sections 9 (seniority) and 13 (regular work week), the provisions of the collective agreement would remain in effect during the work-sharing period.

[8] Furthermore, the claimants alleged that the phrase "exerce un emploi en travail partagé", which appears in the Act, does not have the meaning given to it by the Commission. They referred to all the provisions of the Act where this phrase is used in support of their argument that "exercer un emploi" does not mean "work" but rather being employed by an employer.

[9] In turn, the Commission submitted that, under section 42 of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations), which requires claimants to be employed, they have to report to work and to perform services. This requirement is not respected when a claimant is away from his position, even if the claimant is remunerated by the employer for this absence under the collective agreement.

[10] The Board of Referees ruled in favour of the claimants. The Board was of the opinion that the collective agreement applied to work-sharing. When an employee takes leave provided for in the collective agreement, the hours paid are considered to be insurable hours for the purposes of the Act. The Board held that an employee was therefore entitled to work-sharing benefits in the week during which the leave was taken. It is implicit in this reasoning that an insurable hour is an hour during which the employee is employed in work-sharing employment.

[11] The Commission appealed from both these cases to the Umpire. Once again, it submitted that the test for entitlement to work-sharing benefits was the performance of services during the week in question. The Commission based its argument on the wording of the Act and the Regulations, as well as on the case law of this Court, including *Canada (Attorney General) v. Landry*, [1999] F.C.J. No. 1872 (QL).

[12] The claimants pointed out that the purpose of section 24 of the Act was to prevent, through a work-sharing scheme, layoffs during a period where there is a temporary reduction in the employer's normal level of business. Consequently, the provisions of the Act are to be interpreted in a manner that advances this purpose.

[13] According to the claimants, a claimant who is employed in work-sharing employment is deemed to have worked on the days the claimant does not work under a work-sharing agreement. The claimants further submitted that the same applies to statutory holidays and any special leave remunerated under the collective agreement. The claimants could therefore be considered to have been in employment during their paid bereavement leave.

[14] The Umpire examined the case law cited by the Commission in support of its argument and decided that it was not determinative. The *Landry* decision was excluded because it pertained to the cancellation of a work-sharing agreement and not the administration of such an agreement.

[15] In the Umpire's opinion, section 42 of the Regulations does not require claimants to work a minimum number of hours in order to be entitled to employment insurance benefits. Section 42 simply requires the employee to be employed in work-sharing employment. According to the English version of section 42, the claimant must be "employed" in work-sharing employment, that is, the claimant must have the status of an employee, which was the case during the relevant period.

[16] The Umpire was of the view that the claimants were prevented from working because of a death in the family. He ruled that it would be contrary to section 42 of the Regulations and the spirit of the Act to punish claimants by disentitling them from receiving work-sharing benefits under such circumstances. The Umpire believed the Board of Referees' conclusion to be reasonable. He, therefore, dismissed the Commission's appeal.

II. ISSUES

[17] The issues are as follows:

(1) What is the standard of review for the Umpire's decision?

(2) What is the meaning of the phrase "exerce un emploi en travail partagé" in subsection 24(3) of the Act and section 42 of the Regulations?

III. ANALYSIS

A. *What is the standard of review for the Umpire's decision?*

[18] According to the case law of this Court, in the case of a question of law, the decision of a board of referees or an umpire is reviewable on the standard of correctness: *Chaulk v. Canada (Attorney General)*, 2012 FCA 190, [2012] F.C.J. No. 831, at paragraphs 23-31. The interpretation of a statutory provision is a question of law. It follows that the applicable standard of review is correctness.

B. *What is the meaning of the phrase "exerce un emploi en travail partagé" in subsection 24(3) of the Act and section 42 of the Regulations?*

[19] The Commission bases its application for judicial review on the phrase "exerce un emploi en travail partagé", which appears in several places in the Act and the Regulations. For the purposes of the present dispute, it is sufficient to reproduce subsection 24(3) of the Act and section 42 of the Regulations.

24.(3) For the purposes of this Part, a claimant is unemployed and capable of and available for work during a week when the claimant works in work-sharing employment.	24.(3) Pour l'application de la présente partie, un prestataire est réputé être en chômage, capable de travailler et disponible à cette fin durant toute semaine où il exerce un emploi en travail partagé.
42. Work-sharing benefits are payable to a claimant who is employed in work-sharing employment for each week of unemployment that falls in a benefit period established for the claimant, and subject to sections 43 to 49, the Act and any regulations made under the Act apply to the claimant, with such modifications as the circumstances require.	42. Des prestations pour travail partagé sont payables au prestataire qui exerce un emploi en travail partagé pour chaque semaine de chômage comprise dans une période de prestations établie à son profit et, sous réserve des articles 43 à 49, la Loi et ses règlements s'appliquent au prestataire, avec les adaptations nécessaires.

[20] The Commission's argument that a period of work is required during a work-sharing week is based on the literal sense of the phrase "exerce un emploi". According to the Commission, subsection 24(3) of the Act and section 42 of the Regulations reflect Parliament's intention to distinguish between being employed, under the terms of a work-sharing agreement, and performing services in a given week. The Commission recognizes that the English version of the Act uses the verb "works" and the word "employed", but submits that both of these expressions must be read in harmony with the French expression "exerce un emploi", which [TRANSLATION] "implies more than a state of facts, but rather working during a given week": Applicant's Record, p. 290, paragraph 32.

[21] The Commission also submits that the interpretation according to which a person who "exerce un emploi à travail partagé" simply refers to an employee in a work-sharing setting renders section 44 of the Regulations moot:

44. A claimant is not entitled to work-sharing benefits for any week for which the claimant claims benefits under section 12 of the Act.	44. Le prestataire n'est pas admissible au bénéfice des prestations pour travail partagé à l'égard de toute semaine pour laquelle il demande des prestations visées à l'article 12 de la Loi.

[22] The benefits provided for in section 12 of the Act are regular benefits. If the interpretation favoured by the claimants is accepted, as soon as there is a work-sharing agreement, only work-sharing benefits are payable, to the exclusion of regular benefits, which is contrary to section 44. The Commission argues that this provision suggests that a claimant under a work-sharing scheme may receive regular benefits.

[23] The claimants submit that an analysis of the wording based on the difference between the words "works" and "employed" is not valid since these two words are translated by a single phrase, "exerce un emploi". According to the claimants, [TRANSLATION] "a literal interpretation of the French and English versions that takes the context into account and that is consistent with the other statutory provisions does not support the applicant's arguments": Respondent's Record, p. 59, paragraph 42.

[24] The parties' arguments, as I have just summarized them, focus on the literal meaning of the words used by Parliament. The thrust of the difference between their arguments is this: one says that the words can only mean "to be employed" while the other says that they can only

mean "to perform services". For the reasons below, it is my view that the words are fundamentally ambiguous and their meaning must be found by examining the context in which they are used. The starting point for such an analysis is a comparison between regular benefits and work-sharing benefits.

[25] To be entitled to regular benefits, claimants must be unemployed, that is, they must have ceased their employment with their employer and not have worked for the employer for seven consecutive days. This criterion is found in the definition of an interruption of earnings in section 14 of the Regulations. The requirement to be unemployed arises from the purpose of the Act, which is to support those who are temporarily unemployed. But there is also a matter of Parliament's legislative power in unemployment insurance. In *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669 (the Reference), the Supreme Court held that an interruption of employment is the factor that connects certain benefit schemes, such as maternity leave, to Parliament's legislative competence in employment insurance, without which it would fall under the legislative jurisdiction of the provinces over property and civil rights.

[26] One of the characteristics of the work-sharing scheme is that the relationship between the employer and the employer is not severed; the employee continues to be employed by the employer while receiving work-sharing benefits. In fact, one of the goals of this scheme is in fact to prevent layoffs during a period of reduction in the employer's normal level of business: Applicant's Record, at page 128.

[27] Another criterion of entitlement to regular benefits, found in subsection 18(1) of the Act, is that claimants must be capable of and available for work, and unable to obtain suitable employment. This criterion is understandable from the perspective of the claimant's unemployment: claimants must be ready to re-enter the labour force or risk not being entitled to benefits.

[28] Claimants employed in work-sharing employment do not have to re-enter the labour force since they never left it. They must, of course, be available for their employer, who can ask them to work extra days in addition to those provided in their schedule. Claimants under a work-sharing agreement are not required to accept an offer of employment from another employer. They are allowed to accept work from another employer on those days on which they are not working for their main employer, but are not required to do so: see Applicant's Record, at page 132.

[29] The last criterion of eligibility for regular benefits I wish to mention is an interruption of earnings. Under section 14 of the Regulations, a claimant not only must have been separated from his or her employer for seven consecutive days, as I noted above, but also must not have received any earnings from the employer for this period of unemployment. The employment insurance scheme is meant to meet the needs of those who are without an income because of a period of unemployment.

[30] In contrast, work-sharing claimants continue to be paid by their employer for the days on which they work, even though there are fewer of these than before the work-sharing agreement came into force.

[31] These differences between the work-sharing scheme and the regular benefits scheme would be inconsequential were it not for section 42 of the Regulations, which provides that, subject to sections 43 to 49, the Act and any regulations made under the Act apply to the claimant, with such modifications as the circumstances require. In the absence of any additional provisions, claimants covered by a work-sharing agreement are not entitled to benefits because they cannot satisfy the criteria of interruption of employment, interruption of earnings and availability. Moreover, exempting claimants from the interruption of employment criteria could remove the work-sharing scheme from Parliament's jurisdiction.

[32] Parliament understood these difficulties and acted accordingly. Regarding the interruption of earnings, section 43 of the Regulations provides that in respect of a person employed in work-sharing employment, an interruption of earnings occurs when there is a reduction of at least 10 per cent in the person's normal weekly earnings. The Commission does not participate in work-sharing regimes unless the hours of work in a work unit are reduced by at least 10 per cent: see Applicant's Record, at page 131.

[33] As for the other criteria that could prevent the payment of benefits to participants in a work-sharing scheme, Parliament used on the presumption created by subsection 24(3) of the Act, which I reproduce, again, below:

24.(3) For the purposes of this Part, a claimant is unemployed and capable of and available for work during a week when the claimant works in work-sharing employment.	24.(3) Pour l'application de la présente partie, un prestataire est réputé être en chômage, capable de travailler et disponible à cette fin durant toute semaine où il exerce un emploi en travail partagé.

[34] In the event of a claimant not working in work-sharing employment during a week, the presumption does not apply, and the payment of work-sharing benefits is not authorized by the Act because the claimant does not satisfy the eligibility criteria. But the question what it means to "exercer un emploi" in this context remains.

[35] The phrase "exercer un emploi" or "exerce un emploi" is not in the *Le Petit Robert* (2008) or the *Multi Dictionnaire de la langue française* (2003), or in the online dictionary *Le Trésor de la langue française*. The definition of the verb "exercer" in *Le Petit Robert* includes the meaning of "pratiquer (des activités professionnelles)" [carry out (work activities)] and gives as possible synonyms, depending on the context, "faire" [do], "s'aquitter" [fulfill or carry out], "remplir" [fulfill, carry out, or do] or "travailler" [work]. This does little to clarify the meaning of "exercer un emploi".

[36] In the Act, the expression "exercer un emploi" is sometimes synonymous with "to be employed", such as in the definition of "assuré" ["insured person"] in section 2 of the Act: "personne qui exerce ou a exercé un emploi assurable" ["a person who is or has been employed in insurable employment"]. In other circumstances, the phrase means the equivalent of the verb "travailler" [to work]. This is the case of subparagraph 54(*c*)(i), which authorizes the Commission to make regulations "prévoyant les conditions et les circonstances dans lesquelles le

prestataire est considéré comme ayant ou n'ayant pas effectué une semaine entière de travail pendant qu'il exerce un emploi à titre de travailleur indépendant" ["prescribing the conditions and circumstances under which a claimant while self-employed . . . is to be considered to have worked or not worked a full working week"]. It seems obvious to me that one cannot be employed (in the sense of being employed by an employer) when one is self-employed. "Exercer un emploi", in this context, must mean "travailler" [to work].

[37] In the case of subsection 24(3) of the Act and section 42 of the Regulations, both meanings of the phrase can be used without doing violence to the language. The necessary conclusion is that the phrase "exerce un emploi" is ambiguous and derives its meaning from its context.

[38] The English version of subsection 24(3) uses the word "works", which is a form of the verb "to work". According to the *Canadian Oxford* (Oxford University Press, Don Mills, 2001), the main meaning of this verb is "do work; be engaged in bodily or mental activity". This definition is followed by another: "be employed in certain work". The wording of subsection 24(3) and section 42 does not require that one of these meanings be used over the other. Just like the French version, the English version is ambiguous, which leads me to, once again, define these words in their context.

[39] Let us return to the wording of subsection 24(3), which provides that a claimant "is unemployed . . . during a week when the claimant works in work-sharing employment". This suggests that the issue of the application of the presumption (and entitlement to work-sharing

benefits) must be reviewed from week to week. This is consistent with the logic of the Act regarding entitlement to benefits. The time unit for benefit payment purposes is one week: see sections 9 and 12 of the Act, which provide that benefits are payable for each week of unemployment included in the benefit period. Parliament was careful to define "week of unemployment": see section 11 of the Act. Claimants are required to communicate with the Commission every week for which they are claiming benefits: see sections 49 and 50 of the Act.

[40] It is thus entirely logical that the presumption applies from week to week since the week is the basic time unit for the payment of benefits. If this is the case, it follows that employment must also be from week to week, meaning that the facts allowing the presumption to be applied may vary from one week to the next. A definition of "exercé un emploi" that gives primacy to the status of being employed is at odds with the idea of weekly changes. Generally speaking, employee status does not change during a benefit period.

[41] I am therefore of the opinion that the fact that the presumption applies from week to week shows that, in the context of subsection 24(3) of the Act, "exercer un emploi" is probably not referring to the status of being employed.

[42] Let us continue our examination of subsection 24(3). To which days of the week does the presumption apply? Days on which employees work their shift and are paid accordingly do not trigger the application of the presumption since no work-sharing benefits are payable or owed for these days. The presumption only operates on days where employees do not work since it is only on those days that claimants are without an income and wish to receive work-sharing benefits.

[43] If the presumption applies only to the days on which claimants do not work, its operation cannot depend on the claimants' status since their status is the same on both the days they do work and the days they do not. This suggests that what triggers the application of the presumption is the act of working, that is, performing services. For the purposes of subsection 24(3), therefore, "exercer un emploi" means working in the sense of performing services.

[44] Is this conclusion consistent with the wording of section 48 of the Regulations, reproduced below?

48. The rate of weekly benefits payable to a claimant employed under a work-sharing agreement approved by the Commission for the purposes of section 24 of the Act is an amount that bears the same ratio to the claimant's rate of weekly benefits determined pursuant to section 14 of the Act that	48. Le taux de prestations hebdomadaires qui est payable au prestataire employé aux termes d'un accord de travail partagé approuvé par la Commission pour l'application de l'article 24 de la Loi est un montant égal à son taux de prestations hebdomadaires établi selon l'article 14 de la Loi multiplié par la fraction:
(a) the number of hours, days or shifts that the claimant <u>did not work</u> because of the work-sharing agreement bears to	a) dont le numérateur est le nombre d'heures, de jours ou de quarts de travail pendant lesquels <u>il n'a pas travaillé</u> en raison de l'accord de travail partagé;
(b) the number of hours, days or shifts that the claimant would have worked for the employer according to the claimant's usual work schedule.	b) dont le dénominateur est le nombre d'heures, de jours ou de quarts de travail pendant lesquels il aurait travaillé pour l'employeur selon son horaire de travail habituel.
My emphasis	Je souligne

[45] The use of the verb "travailler" in paragraph (*a*) suggests that when Parliament means "work", it writes "travailler" and when it writes "exerce un emploi", it means something else.

[46] It is clear that when Parliament writes "travailler", it means "work". But the assumption that Parliament uses words in a consistent manner does not exclude the possibility that, in certain contexts, when Parliament says "exerce un emploi", it also means "travailler". Paragraph 54(*c*) of the Act, cited above, illustrates this. It is hard to imagine that a self-employed worker can have employee status.

[47] The same applies to section 11 of the Regulations, where Parliament refers to an insured person who "exerce un emploi pendant moins de 35 heures par semaine" ["is employed . . . for less than 35 hours per week"]. It is difficult to conceive how an insured person would have the status of an employee for only 35 hours a week. It is more likely that Parliament was speaking of an insured person who works ["travaille"] at least 35 hours a week.

[48] All this to say that, even though Parliament sometimes uses the verb "travailler" to express the idea of performing services, the fact remains that a review of the context suggests that it also sometimes uses the expression "exerce un emploi" to express this idea.

[49] In short, the Act, particularly subsection 24(3), requires a claimant to work during a week in order to be entitled to work-sharing benefits on the days he or she does not work during that week. The fact that the Commission accepts, as an administrative measure, that a 30-minute period of work satisfies this requirement does not change the nature of the requirement.

[50] In the case at bar, the claimants did not perform any services during the week of July 31, 2011, and cannot benefit from the presumption. They are therefore not entitled to work-sharing

benefits. The fact that they were paid two or three days that week under the collective agreement does not affect their entitlement to work-sharing benefits for that week. In order to grant the relief sought by the claimants, the days paid under the collective agreement would have to be considered as days on which the claimants performed services. Nothing in the Act or the Regulations authorizes such a fiction.

[51] I am sensitive to the fact that the representatives of the Commission seem to have reassured the employees that the provisions of the collective agreement would remain in force, except those regarding hours of work and seniority. Such promises on the part of officers of the Commission cannot change the wording of the Act. These promises may give rise to other remedies, but, in the context of an application for judicial review, all we can do is to ensure that the Act is respected as worded.

[52] I am also sensitive to the argument that the more senior employees in a work unit would not be inclined to support a work-sharing agreement if it meant relinquishing the benefits they have obtained from their employer in the course of collective bargaining. This result would go against the purpose of section 24 of the Act, which aims to prevent layoffs. On the other hand, we should not lose sight of the fact that the decision to participate in a work-sharing scheme depends on a number of factors, not all of which are related to seniority and benefits. Just one example of many: layoffs necessarily mean a redistribution of tasks, with more senior employees having to replace less senior ones and thus having to perform less desirable, and possibly less well paid, tasks. Each work unit must make its decision in light of these circumstances.

[53] Consequently, I would allow the application for judicial review with costs, set aside the decisions of the Umpire and the Board of Referees, and refer Mr. Cloutier's and Mr. Leblond's files back to the Social Security Tribunal for redetermination on the basis that Mr. Cloutier and Mr. Leblond are not entitled to work-sharing benefits for the week of July 31, 2011. The decision of the Court regarding the application for judicial review of Mr. Leblond will be filed in Docket A-37-13.

"J.D. Denis Pelletier"

J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-36-13
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. RAYMOND CLOUTIER
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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CONCURRED IN BY:	GAUTHIER J.A. TRUDEL J.A.
DATED:	JULY 3, 2014

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AND DOCKET:	A-37-13
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