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COURT OF APPEAL FOR ONTARIO

DOHERTY, CRONK and MACFARLAND JJ.A.

B E T W E E N :	)	
	)	
SALISHA DALEY	)	Eric K. Grossman
	)	for the defendant/appellant
Plaintiff/Respondent	)	
	)	R.J. Reynolds
- and -	)	for the plaintiff/respondent
	)	
THE ECONOMICAL MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Defendant/Appellant	)	Heard: November 15, 2005
	)	

On appeal from the order of Justice Douglas Belch of the Superior Court of Justice dated December 17, 2004.

DOHERTY J.A.:

I

Overview

[1] Persons injured in automobile accidents are entitled to certain no fault benefits payable by their own insurer. Those benefits may include an income replacement benefit. If the accident occurred after November 1, 1996, the insured's entitlement to and the calculation of the income replacement benefit are determined by the provisions of Part II of the *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996*, O. Reg. 403/96 (the "Schedule"), as amended, passed pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8.

[2] The respondent ("Ms. Daley") is an insured under a policy issued by the appellant ("Economical Mutual"). Ms. Daley and Economical Mutual disagree as to the calculation of Ms. Daley's gross annual income for the purposes of determining the amount of her income replacement benefit. In essence, Ms. Daley claims that the calculation of her gross annual income should be based on her annual salary as fixed by her contract of employment. Economical Mutual contends that as Ms. Daley chose the four weeks prior to her accident as the operative period, her gross annual income must be determined by multiplying her gross income for the four weeks prior to the accident by thirteen. The two approaches yield significantly different amounts because although Ms. Daley was employed for the four weeks prior to the accident under the terms of the contract providing for an annual salary of $29,000, she had earned only the equivalent of two weeks pay based on that annual salary.

[3] The motion judge accepted the interpretation advanced on behalf of Ms. Daley. Economical Mutual appealed. I would allow the appeal. Ms. Daley was working at the time of the accident. The Schedule gives an insured who was employed but not self-employed at the time of the accident an option as to which of two periods of employment to use for the purposes of determining gross annual income. Ms. Daley chose to have her deemed gross annual income determined by reference to her gross income for the four weeks before the accident. That income did not reflect the annual income provided for in her contract of employment. That disconnect, however, does not permit the court to rewrite the eligibility provisions of the Schedule and treat Ms. Daley as though she fit into the category of persons who had not started their employment at the time of the accident, but who had a written contract of employment.

II

The Facts

[4] Ms. Daley was injured in a single car accident on May 18, 1997. Her husband was driving the vehicle. Ms. Daley and Economical Mutual could not agree on Ms. Daley's entitlement to an income replacement benefit under the Schedule. After mediation failed, Ms. Daley sued Economical Mutual. There are facts in dispute in the litigation, however, Ms. Daley and Economical Mutual also disagree on the proper statutory interpretation of the provisions of the Schedule referable to the calculation of income replacement benefit. They submitted a special case under Rule 22 of the *Rules of Civil Procedure* to the Superior Court requesting an interpretation of those provisions.

[5] For the purposes of the Rule 22 motion only, the parties agreed on the relevant facts. Ms. Daley suffered catastrophic and permanent injuries in the car accident rendering her substantially unable to perform the essential tasks of her employment. At the time of the accident, she was employed by Leader Motors Wholesales as a

bookkeeper. The terms of her employment and her work history prior to the accident were described in para. 8 of the special case:

> The Plaintiff says that as of the accident date, May 18, 1997, she was employed by Leader Motors Wholesales at an annual gross salary of $29,000 per year pursuant to a written contract of employment and had been paid two weeks' pay for the period of May 2, 1997 to May 16, 1997 in the amount of $1,115.38. The plaintiff had allegedly commenced employment at Leaders Motors on April 1, 1997.

[6] Paragraph 8 is unclear. On questioning by the court, both counsel indicated that the special case had proceeded on the basis that although Ms. Daley had been employed from April 1, 1997, the two weeks salary paid to her represented the entire amount earned by and owed to her by her employer as of May 18, the date of the accident.

[7] For the purpose of the motion, Ms. Daley and Economical Mutual agreed that Ms. Daley qualified for an income replacement benefit under para. 1 of s. 4(1) of the Schedule. That provision applies to insured persons who were "employed at the time of the accident and, as a result of and within 104 weeks after the accident", suffer a substantial inability to perform the essential tasks of their employment.

III

The Relevant Provisions of the Schedule

[8] Section 4(1) of the Schedule describes three categories of persons who are eligible for an income replacement benefit. Paragraph 1 applies to persons who were employed at the time of the accident. This group includes persons who were self-employed. Paragraph 2 applies to persons who were unemployed at the time of the accident, but had worked at least 26 of the previous 52 weeks. Paragraph 3 applies to persons who were entitled to start work under a legitimate written contract of employment within one year of the accident.

[9] Section 5 of the Schedule describes the period during which an income replacement benefit is payable. Basically, the benefit is payable for up to 104 weeks if the insured is substantially unable to perform the essential tasks of employment. The benefit is payable beyond the 104 weeks if, as a result of the accident, the insured is completely unable to engage in any employment for which she is reasonably suited by education, training or experience.

[10] Sections 6 and 7 of the Schedule address the amount of the income replacement benefit. Without getting into the details of those provisions, insured persons are entitled

to 80 percent of their "net weekly income from employment" for the first 104 weeks of disability and to the greater of that amount or $185.00 for every week after the first 104 weeks.

[11] The formula for determining "net weekly income from employment" is set out in s. 61. That formula provides that net weekly income from employment is calculated by taking the "gross annual income from employment" of the insured, making certain identified deductions, and dividing the remainder by 52.

[12] The calculation of "gross annual income from employment" is addressed in s. 8. Different parts of s. 8 apply to the three categories of persons who are eligible for an income replacement benefit under s. 4. Section 8(1) and s. 8(3) apply to persons like Ms. Daley who qualified for the benefit under para. 1 of s. 4(1) in that they were employed when the accident occurred, but were not self-employed. Section 8(1) reads:

> An insured person who is eligible for an income replacement benefit under paragraph 1 of section 4 and who was not self-employed at any time during the four weeks before the accident shall designate one of the following time periods:
>
> 1.The four weeks before the accident.
>
> 2.The 52 weeks before the accident.

[13] Section 8(3), the centre of the dispute in this appeal, describes how "gross annual income from employment" is to be calculated. If the insured was employed, but not self-employed at the time of the accident, his or her gross annual income will depend on whether the insured selects, pursuant to s. 8(1), the four week period before the accident or the 52 week period before the accident. The germane parts of s. 8(3) read as follows:

> (3) <u>For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 1 of section 4 shall be deemed to be the following amount:</u>
>
> 1. <u>In the case of a person who designated the four weeks before the accident under paragraph 1 of subsection (1), the person's gross income from employment for the four weeks before the accident, multiplied by 13.</u>

> 2. In the case of a person who designated the 52 weeks before the accident under paragraph 2 of subsection (1)…the person's gross income from employment for the 52 weeks before the accident [emphasis added].

[14] Ms. Daley chose the four week period prior to the accident for the purpose of determining her gross annual income, despite the fact that she had earned only the equivalent of two weeks income during that four weeks. Presumably, this designation yielded a higher deemed gross annual income than would have been the case had Ms. Daley designated the 52 weeks before the accident as the operative time period.

IV

Positions of the Parties

[15] The competing interpretations of s. 8(3) advanced before the motion judge and on appeal are set out in paras. 11 and 12 of the special case:

> 11. The Plaintiff [Ms. Daley] takes the position that on a proper interpretation of s. 8(3) her gross income from employment in the 4 week period prior to the accident date should be determined as her income level during that period, $29,000 per year or $2,230.77 per 4 week period, so that the Plaintiff would be determined to have a gross annual income consistent with her actual salary level of $29,000, and thus entitled to a weekly income replacement benefit of approximately $344.35.
>
> 12. The Defendant [Economical Mutual] takes the position that on proper interpretation of ss. 4, 6, 8 and 61 of the Schedule, the Plaintiff's gross income from employment in the four weeks prior to the accident date should be determined based on the actual pay received by the Plaintiff in that four week period. Accordingly, the Plaintiff's income would be based on $1,115.38 so that the Plaintiff would be determined to have a gross annual income of $14,500 and thus be entitled to a benefit of $181.75 per week, rising to $185 per week after 104 weeks.

V

Analysis

[16] The motion judge's interpretation of the relevant provisions raises a question of law and is subject to appellate review on a correctness standard: see *Mazur v. Elias* (2005), 75 O.R. (3d) 299 at para. 9 (C.A.).

[17] The motion judge began by correctly identifying the proper approach to the interpretation of those provisions. Quoting from *Bell ExpressVu Limited Partnership v. The Queen* (2002), 212 D.L.R. (4th) 1 at para. 26 (S.C.C.), he wrote:

> There is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[18] The approach to statutory interpretation described in *Bell ExpressVu* was applied to the interpretation of the regulations providing no fault benefits in *Hope v. Canadian General Insurance* (2002), 212 D.L.R. (4th) 247 at paras. 15-16 (Ont. C.A.). As indicated in *Hope*, the automobile accident compensation scheme in place in Ontario since 1990 provides for substantial first party no fault benefits while limiting an insured's right to advance tort claims. The scheme is intended to provide the insured with quick access to various readily calculable benefits, including an income replacement benefit in some circumstances, while at the same time controlling the costs of automobile insurance by limiting those benefits and limiting an insured's ability to advance tort claims arising out of an automobile accident. The object of the regulatory scheme has remained the same since 1990 despite the adjustment and readjustment of the balance struck between the availability and amount of first party benefits on the one hand, and access to tort claims on the other.

[19] The object of the income replacement benefit is entirely consistent with the overall object of the no fault benefits. The income replacement benefit is intended to provide compensation to an insured, without regard to fault, for income lost by that insured where, as a result of an accident, he or she is unable to perform the essential tasks of his or her employment.

[20] With one exception, entitlement to an income replacement benefit depends on an insured having been employed prior to or at the time of the accident. Again, with one exception, the quantification of the income replacement benefit will be determined by reference to the income the insured earned during a period of employment prior to the accident.

[21] The one exception is found in para. 3 of s. 4(1). Persons who fall within the category described in that paragraph are eligible for an income replacement benefit even if they were not employed at the time of the accident or prior to the accident as long as at the time of the accident they were entitled to commence employment within one year pursuant to a written contract of employment. Persons who fall within the exception in para. 3 of s. 4(1) will have their income replacement benefit calculated not on the basis of income earned from employment prior to the accident, but on the amount payable under the contract of employment extrapolated to reflect an annual income.

[22] Counsel for Ms. Daley submitted that the income replacement provisions are designed to provide compensation based on an insured's true annual income and that the language of specific provisions must be read with that object in mind. In my view, while some parts of s. 8 equate deemed gross annual income with the insured's true annual income, others do not equate the two. In at least two instances, the means used to calculate the deemed gross annual income will produce an amount that does not necessarily bear any relationship to the insured's true annual income.

[23] Insured persons like Ms. Daley who were employed but not self-employed at the time of the accident may choose to base their deemed gross annual income on either the prior 52 weeks or the prior four weeks. If an insured chooses the first option, the prior 52 weeks, the gross annual income will reflect the insured's true annual income. However, if the insured chooses the four week option, the deemed gross annual income may be very different than the insured's true annual income. For example, an insured may have been working for four weeks at the time of the accident on a weekly salary of $1,000 a week. That insured may not have worked at all in the year prior to those four weeks and her employment may have been scheduled to end the day after the accident. The insured described in this example, however, at her option, will be entitled to calculate deemed gross annual income on the basis of the $4,000 earned in the four weeks prior to the accident, yielding a deemed gross annual income of $52,000. Fifty-two thousand dollars can hardly be described as this hypothetical insured's true annual income. The availability of the option of calculating deemed annual income on income earned in the four weeks prior to the accident belies the contention that the purpose of s. 8 is to determine an insured's true annual income.

[24] Insured persons who fall within the category described in para. 3 of s. 4(1) may also be deemed to have a gross annual income that bears no resemblance to their actual annual income. Were Ms. Daley to qualify under para. 3 of s. 4(1), she could, pursuant to s. 8(5), use the $29,000 figure as the basis for determining her gross annual income. That figure would not, however, represent her true annual income. At most, it would reflect her potential future income for the year of the contract had she remained employed under the terms of the contract for the entire year. That contract stipulated that the employer

could unilaterally cancel the contract "at any time before the end of the period without any notice".

[25] It is inaccurate to suggest that the income replacement benefit calculated using the figure in the contract ($29,000) yields an amount that more closely represented Ms. Daley's true annual income than does the calculation based on the income from the four weeks prior to the accident. Neither interpretation results in a figure that reflects her true annual income. The figure favoured by Ms. Daley represents her potential annual income under the contract. The figure favoured by Economical Mutual is an extrapolation of her annual income based on her income from the four weeks prior to the accident. Both approaches provide compensation which could, depending on the circumstances, exceed or fall short of her true annual income.

[26] Having outlined the scheme of the Schedule and identified the object of the income replacement provisions, I turn to the language of those provisions. With respect to the contrary view, I think the language, read in its ordinary and grammatical sense, provides a clear and unambiguous formulation for the quantification of Ms. Daley's income replacement benefit.

[27] As acknowledged by the parties, Ms. Daley was employed at the time of the accident and qualified for the income replacement benefit under para. 1 of s. 4(1). Paragraph 3 of s. 4(1) had no application to Ms. Daley as she was not "entitled at the time of the accident to start work within one year" under a legitimate written contract of employment. Ms. Daley had been working under a contract of employment for at least six weeks prior to the accident.

[28] Section 8(1) specifically applies to an insured person who is "eligible for an income replacement benefit under paragraph 1 of section 4 and who was not self-employed at any time during the four weeks before the accident". This description fits Ms. Daley. She was required by s. 8(1) to designate either the four weeks prior to the accident or the 52 weeks prior to the accident as the relevant time period for the determination of her gross annual income under s. 8. Ms. Daley chose the four week time period.

[29] Calculation of deemed gross annual income for persons who qualify under para. 1 of s. 4 and have chosen the four week time period under s. 8(1) is specifically addressed in para. 1 of s. 8(3). The calculation required to determine deemed gross annual income under that paragraph is a straightforward one and is captured by the closing words: "the person's gross income from employment for the four weeks before the accident, multiplied by thirteen".

[30] It introduces unnecessary confusion to qualify the plain language of para. 1 of s. 8(3) by reference to the methodology to be used in calculating gross annual income from

employment under s. 8(5). That section expressly applies only to persons who qualify under para. 3 of s. 4(1). That is not Ms. Daley. The express language of both s. 8(3) and s. 8(5) cannot be ignored simply because on the facts of this case calculation of gross annual income under s. 8(5) would give Ms. Daley a higher deemed gross annual income than would calculation under s. 8(3).

[31] The interpretation advanced on behalf of Ms. Daley would require the court to rewrite s. 8(5) so that it would apply to some insured persons who qualified for the benefit under para. 1 of s. 4 as well as persons who qualified for the benefit under para. 3 of s. 4. That interpretation would also require the court to ignore some of the language in s. 8(3). On the interpretation urged by Ms. Daley, her gross annual income is determined by taking her annual income as stipulated in the contract and dividing it by thirteen. This process is very different than the one described in s. 8(3) which speaks of multiplying income from a four week period by thirteen to arrive at a gross annual income.

[32] The motion judge concluded that the language of s. 8(3) was not clear because, in his view, it could yield unfair and irrational results. In his view, it was both unfair and irrational to treat Ms. Daley differently than a person who had exactly the same contract of employment but had not started work before the accident occurred.

[33] I cannot accept this characterization. Income from employment prior to the accident is used to calculate the income replacement benefit in all cases save for insured persons who fall within the category described in para. 3 of s. 4. That category creates an exception to the general rule, which calculates the income replacement benefit based on actual income from employment before the accident, and allows the insured to calculate income based on anticipated earnings. In my view, the category of insured created by para. 3 of s. 4(1) is designed to ameliorate what could be a harsh result for a person who had a legitimate firm commitment of future employment at the time of the accident, but who did not qualify for income replacement benefits based on employment prior to the accident. The harshness of that result is modified by allowing the insured to base his or her claim on anticipated future earnings. The scheme's departure from the general approach to the calculation of the income replacement benefit to accommodate a specific situation where the general approach could produce an unduly harsh result can no more render that overall approach unfair or nonsensical than can the tail wag the dog.

[34] The exceptional nature of the category created by para. 3 of s. 4(1) is made all the more evident by s. 4(2). That subsection limits eligibility for the income replacement benefit under para. 3 of s. 4(1) to accidents that occur before April 15, 2004. Persons involved in accidents after that date can qualify for an income replacement benefit only under either para. 1 or 2 of s. 4(1), both of which require employment prior to or at the time of the accident.

[35] The motion judge described the interpretation advanced by Economical Mutual as unfair and irrational for a second reason. He held that it would be unfair to treat Ms. Daley differently than a person who had worked the entire four weeks prior to the accident. Once again, I must disagree with this characterization. In the first place, the distinction said to create the unfairness does not arise on the facts of this case. Ms. Daley did work the full four weeks prior to the accident. However, for reasons that are not apparent in the special case as framed by the parties, Ms. Daley had earned and been paid only the equivalent of two weeks salary. Had Ms. Daley earned 1/52 of her annual salary for each week of her employment prior to her accident, her deemed gross annual income as calculated under s. 8(3) would have accorded with the $29,000 referred to in her contract of employment. The disconnect between the amount in the contract and the amount she earned in the four weeks prior to the accident is not a product of any unfairness in the regulatory scheme, but flows from the fact that Ms. Daley earned two weeks income in the first six weeks of her employment.

[36] Even if the distinction between persons who worked the full four weeks and persons who did not work the full four weeks arose in this case, I would not describe that distinction as either unfair or irrational. Any scheme that bases entitlement to and quantification of an income replacement benefit on prior employment will fix a time frame for which the prior employment is to be considered. The choice of the appropriate time frame will of necessity be somewhat arbitrary. Whatever time frame is chosen, there will be individuals who fall just on the wrong side of the line.

[37] I also see no unfairness in distinguishing between persons who have worked the four weeks and persons who have not in a scheme that bases the amount of the income replacement benefit on the amount of income earned during the prescribed employment period. If the benefit is to increase as income increases, it is inevitable that persons who worked the full four weeks may well be entitled to a greater benefit than persons who did not. Distinguishing between individuals who have worked the full four weeks and those who have not is no more unfair than distinguishing between individuals who have both worked the full four weeks and have different incomes because one is paid more than the other for the same work.

[38] The motion judge also found ambiguity in the phrase “gross income from employment” in s. 8(3). In his view, that phrase could refer to income actually paid to the insured during the relevant period and to income due to the insured for that period, but not received by the insured. I am inclined to agree that the phrase “gross income from employment” refers to income earned within the four weeks whether that income is received or not during the four weeks. However, that interpretation does not create ambiguity or assist Ms. Daley. The parties agree that the two weeks salary paid to Ms. Daley represented what she had earned during the four weeks prior to the accident. It is

not suggested that Ms. Daley had earned more than she was paid in the four weeks prior to the accident.

[39] Counsel for Ms. Daley also relied on the well known proposition that *Charter* values should inform the interpretative exercise. He argues that:

> A statutory provision which grants a benefit to one subclass of disabled persons while granting an inferior benefit to another subclass for no rational reason will contravene s. 15 of the *Charter*.

[40] I do not think that reference to *Charter* values assists in the interpretative process. While it is no doubt true that *Charter* values can elucidate the meaning of legislative provisions where the language is unclear, *Charter* values do not justify rewriting the clear language of a statutory provision. If the statutory language is clear and if there is an inconsistency with the *Charter*, the appropriate remedy is a *Charter* challenge and a declaration of invalidity under s. 52 of the Constitution. Ms. Daley does not advance a *Charter* challenge.

[41] More to the point, there is nothing in the provisions, as I would interpret them, that undermines *Charter* values and, in particular, the equality value reflected in s. 15 of the *Charter*. Virtually all statutory provisions make distinctions. The no fault benefit provisions in the Schedule could not work if distinctions were not made among the various persons whose disabilities entitled them to some form of no fault benefit. The principle of equality underlying s. 15 of the *Charter* is not offended whenever a distinction is drawn by legislation. Equality is put at risk only where the distinction discriminates against an identifiable group on the basis of the grounds identified in s. 15 or on grounds analogous to those identified in s. 15.

[42] Counsel relies on the distinction made in the scheme between insured who are employed under a contract of employment and have commenced that employment when the accident occurs, but have worked fewer than four weeks, and other insured who have not commenced employment, but are entitled to commence employment under the same contract of employment within twelve months. The former category, which counsel describes as the disadvantaged group, must determine their gross annual income using s. 8(3). The latter category, which counsel describes as the advantaged group, use s. 8(5).

[43] The distinction described by counsel is not based on the disability of the insured on any ground enumerated in s. 15(1) of the *Charter*, or on any ground analogous to the enumerated grounds. The distinction relied on by counsel does not imperil the equality principle reflected in s. 15 of the *Charter*.

[44] I also can find no discrimination in the distinction drawn in the provisions: see *Nova Scotia (Workers' Compensation Board) v. Martin* (2003), 231 D.L.R. (4th) 385 at paras. 84-86 (S.C.C.). The group said by counsel for Ms. Daley to be the target of the discrimination, that is, insured persons who are employed under an employment contract and have commenced employment at the time of the accident, but worked less than four weeks, suffer from no pre-existing disadvantage, vulnerability, prejudice or stereotyping. The distinction is not based on any personal characteristic attributed to the insured by virtue of his or her membership in some identifiable group.

[45] Finally, and most significantly, the distinction drawn by counsel does not necessarily work to the disadvantage of the group that has already commenced employment under a contract of employment. Two examples will suffice to make this point. An insured who is employed under a contract of employment but has commenced work may choose to calculate gross annual income using the income earned in the 52 weeks prior to the accident. This approach is not available to the insured who has not yet commenced employment under the terms of an employment contract. That insured must use the figure in the employment contract. In some circumstances, income earned in the prior 52 weeks will be greater than the amount provided for in the contract of employment. In those circumstances, it will not be the insured who is in Ms. Daley's position that will be disadvantaged. The disadvantage will fall on the insured who has not yet commenced employment. Similarly, an insured who is employed under a contract of employment but has commenced work within four weeks of the accident may have received some form of signing bonus. Should the insured elect to calculate deemed gross annual income by reference to the income from the four weeks prior to the accident, the signing bonus will be included in that calculation. The inclusion of the bonus may well yield a deemed gross annual income that is higher than the annual income provided for in the contract. Once again, it is the insured who has not commenced employment under the contract of employment who would be at a disadvantage.

[46] As these examples hopefully demonstrate, the regulation does not uniformly work to the disadvantage of either of the groups identified by counsel for Ms. Daley. The relative advantage or disadvantage of the different calculations will depend on the specific circumstances and not on membership in any pre-identified group.

VI

[47] I would hold that the interpretation advanced by Economical Mutual is consistent with the object and scheme of the legislation and the plain and ordinary meaning of the relevant provisions of the Schedule. The real difficulty here is that Ms. Daley, for some unexplained reason, earned only the equivalent of 2/52 of her annual salary as provided for in the contract, despite having worked six weeks. The legislation cannot be rewritten

to overcome this anomalous situation. I would allow the appeal, set aside the order of the motion judge, and make an order in the terms of paragraph 12 of the special case.

[48] Economical Mutual is entitled to its costs if demanded on the motion and on the appeal on a partial indemnity basis. I would fix those costs at $5,000 on the motion and $4,000 on the appeal, inclusive of disbursements and GST.

RELEASED: "DD DEC 14 2005"

"Doherty J.A."
"I agree E.A. Cronk J.A."
"I agree J. MacFarland J.A."