

**Date: 20070914**

**Docket: A-372-06**

**Citation: 2007 FCA 287**

**CORAM: RICHARD C.J.  
SHARLOW J.A.  
TRUDEL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**PARVINDER KAUR**

**Respondent**

Heard at Toronto, Ontario, on September 12, 2007.

Judgment delivered at Ottawa, Ontario, on September 14, 2007.

**REASONS FOR JUDGMENT BY:**

**TRUDEL J.A.**

**CONCURRED IN BY:**

**RICHARD C.J.  
SHARLOW J.A.**

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**REASONS FOR JUDGMENT**

**TRUDEL J.A.**

**INTRODUCTION**

[1] The Attorney General applies for judicial review challenging the June 23, 2006 decision of the Honourable David G. Riche, sitting as an Umpire pursuant to the *Employment Insurance Act*, S.C. 1996, c.23, wherein he cancelled the penalty imposed on the Respondent, issued a warning instead and eliminated the notice of violation because the penalty was non-monetary.

[2] The general question is whether the Umpire erred in law or exceeded his jurisdiction in doing so.

## **FACTS**

[3] In January 2001, Ms. Kaur made a claim for benefits made effective December 31, 2000.

[4] Ms. Kaur reported her unemployment using the teledec system from April 15, 2001 to April 28, 2001. The records showed that she had worked eight hours between April 15 and April 21, and was still working.

[5] The Commission conducted an investigation and was advised that the claimant was employed with Grocery Gateway Inc. while she was receiving benefits. The Commission sent her a questionnaire in July of 2002 wanting to know why she stopped working as she did not provide the reason. Ms. Kaur did not respond. When questioned, the employer stated that the claimant abandoned her job and stopped reporting to work.

[6] The Commission concluded that Ms. Kaur did not establish that she was justified in voluntarily leaving her employment. The decision resulted in an overpayment of \$3,061.00.

[7] The Commission concluded also that Ms. Kaur knowingly made one false or misleading statement when she failed to report that she voluntarily left her employment and a penalty of \$231.20 ensued.

[8] Ms. Kaur appealed to the Board of Referees. Before the Board and later before the Umpire, Ms. Kaur submitted that she did not voluntarily leave her work and was undergoing extreme pressure as she was facing a deportation order. The Board dismissed the appeal.

[9] Ms. Kaur appealed the decision to the Umpire.

### **UMPIRE'S DECISION**

[10] The Umpire allowed the appeal in part.

[11] He was of the opinion that Ms. Kaur did have a just cause for leaving her employment at the time. Therefore, he overturned the Board's decision on that issue. The Attorney General does not contest this finding.

[12] With respect to the failure to report as required and the false and misleading statement for the week of April 15 to 21, the Umpire states:

The claimant's reason was that she was subject to a deportation order at the time and was under great stress. The fact is, however, that she did make a false statement, although she may have done it automatically considering her situation and believing that she was soon to be deported. That being so, however, I do not believe it excuses her from being completely excused for giving a false report. The evidence does, however, suggest that leniency should be granted and maybe the proper penalty should be in the form of a warning rather than a monetary amount.

It is my view that the circumstances demand that the penalty be reduced to a warning.

[13] The Umpire found that Ms. Kauer did make a false statement, but reduced the penalty to a warning and decided that a notice of violation should not follow. These conclusions led to the present Application.

## ANALYSIS

[14] This case clearly relates to an Umpire's interpretation of the Act and his jurisdiction. No deference is due and the standard of review is correctness *Canada v. Sveinson*, 2001 FCA 315.

[15] In the case at bar, the Commission concluded that Ms. Kaur made one false or misleading statement when she failed to report that she voluntarily left her employment pursuant to section 38(1) of the Act.

[16] Once that conclusion is reached, the Commission may impose a penalty pursuant to subsection 38(2) of the Act. In this matter, the penalty was calculated at 80% (instead of 100% because it was her first offence) of Ms. Kaur's weekly benefits rate of \$289.00 times the number of false statement (1), for a total amount of \$231.20.

[17] Section 41 of the Act provides that the Commission may rescind or reduce the penalty:

**41.** The Commission may rescind the imposition of a penalty under section 38 or 39, or reduce the penalty, on the presentation of new facts or on being satisfied that the penalty was imposed without knowledge of, or on the basis of a mistake as to, some material fact.

**41.** La Commission peut réduire la pénalité infligée au titre de l'article 38 ou 39 ou annuler la décision qui l'inflige si des faits nouveaux lui sont présentés ou si, à son avis, la décision a été rendue avant que soit connu un fait essentiel ou a été fondée sur une erreur relative à un tel fait.

[18] As well, section 41.1 of the Act gives authority to the Commission to issue a warning instead of setting a penalty. Section 41.1 reads as follows:

**41.1 (1)** The Commission may issue a warning instead of setting the amount of a penalty for an act or omission under subsection 38(2) or 39(2).

**41.1 (1)** La Commission peut, en guise de pénalité pouvant être infligée au titre de l'article 38 ou 39, donner un avertissement à la personne qui a perpétré un acte délictueux.

(2) Notwithstanding paragraph 40(b), a warning may be issued within 72 months after the day on which the act or omission occurred.

(2) Malgré l'article 40, l'avertissement peut être donné dans les soixante-douze mois suivant la perpétration de l'acte délictueux.

[19] The Commission's decision to issue a warning or to settle a penalty to a certain amount is discretionary. The Board upheld the Commission's decision, then, the Umpire decided to substitute his own opinion for that of the Commission.

[20] This Court has, on many occasions, stated that a Board of Referees' or an Umpire's right to review a discretionary decision made by the Commission is limited.

[21] The decision of this Court in *Canada v. Tong*, 2003 FCA 281, summarizes the jurisprudence on that particular point. In this case, the Honourable Riche, again acting as Umpire, held that the Board's "findings of fact and their determination based on the law is correct." Nevertheless, he held that the part-time nature and short duration of Ms. Tong's employment ought to be considered mitigating factors allowing for the reduction of the penalty from 100% to 50% of the amount of the overpayment.

[22] Justice Noël writes:

4 It is well established that an Umpire has jurisdiction to intervene with the determination of the Commission or the Board of Referees only where it can be demonstrated that the Commission did not exercise its discretion judicially; that is, that it based its decision on a wrong principle, or took into account irrelevant considerations or failed to consider relevant considerations (*Canada v. Lebreton*, [1995] F.C.J. No. 1478 (F.C.A.); *Canada v. Dunham*, [1996] F.C.J. No. 1271 (F.C.A.)).

5 This Court has held that this standard applies to the determination of the quantum of a penalty imposed by the Commission. An Umpire cannot interfere with the quantum of a penalty unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it (*Canada v. McLean*, [2001] F.C.J. No. 176 (F.C.A.); *Canada v. Rumbolt*, [2000] F.C.J. No 1968 (F.C.A.)).

[Emphasis added]

[23] Therefore, the Court concluded that Umpire Riche effectively engaged in a re-weighing of the evidence and substituted his own discretion for that of the Commission. In so doing the Umpire went beyond the jurisdiction conferred upon him by the Act.

[24] In *Canada v. Idemudia*, [1999] F.C.J. No. 195 (F.C.A.), our Court held that an Umpire had exceeded his jurisdiction when referring the matter back to the Board of Referees with instruction to reconsider the penalties with a view of writing them off. The Court stated that the right to write off a penalty belongs to the Commission, (according to the Act and Regulations) and not to the Board of Referees or the Umpire. Such a decision belongs to the Commission and an Umpire or a Board of Referees cannot interfere with such discretion unless the Commission acted in a non-judicial manner.

[25] The same reasoning applies here.

[26] In the case at bar, the Commission found that Ms. Kaur made a false and misleading representation pursuant to subsection 38(1) of the Act. The Commission then found appropriate to issue a penalty and not only a warning. In calculating the quantum of the penalty, the Commission, even though it was unaware of any mitigating factor, decided to reduce the penalty by 20% as it was Ms. Kaur's first misrepresentation.

[27] In order to establish if the Commission's decision was exercised in a judicially correct manner, this Court established in *Canada v. Dunham*, [1997] 1 F.C. 462 (F.C.A.) that the Board can rely not only on the evidence that was before the Commission, but also on the evidence put before the Board. The appeal from the Commission to a Board of Referees is held *de novo*. Additional evidence can be introduced and the Board must make its own decision based on it.

[28] Ms. Kauer argued to the Board that her appeal had to succeed because, among other facts, she was undergoing extreme pressure as she was facing a deportation order.

[29] In *Dunham*, Justice Marceau writes:

I have no hesitation in believing that we would not be betraying the intention of Parliament if we said that the Board of Referees is not limited to the facts that were before the Commission. In assessing the manner in which the discretion is exercised, it may have regard to facts that come to its own attention. It must find that a relevant consideration was ignored, in that it is not for the Board simply to substitute its discretion for that of the Commission; it is essentially in the Commission's discretion to which Parliament refers. The Board, however, may find such an essential consideration, which the Commission ignored, in the material brought to its own attention. [Emphasis added]



[30] The Board considered the new evidence brought by Ms Kaur, and it decided that it did not warrant its intervention.

[31] Based on these principles, an Umpire would only be warranted in reducing the penalty if the Board failed to take this new evidence into consideration and indeed, if the Board's mistake falls within the confines of s. 115(2) of the Act. This is not the case here.

[32] The grounds of appeal to the Umpire are the following:

**115.** (2) The only grounds of appeal are that

(a) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) the board of referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

**115.** (2) Les seuls moyens d'appel sont les suivants :

a) le conseil arbitral n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) le conseil arbitral a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

c) le conseil arbitral a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[33] Therefore, it was not open to the Umpire to substitute his own opinion to that of the Board of Referees.

[34] According to subsection 7.1(1) of the Act, a notice of violation follows when a penalty is imposed under subsection 7.1(4) of the Act. Parliament intended to ensure that every violation of the type described in subsection 7.1(4) results in an increase in the number of hours required to qualify for benefits. Neither the Commission, nor the Umpire has any discretion in this regard.

[35] It is clear from subsection 7.1(4)(a) of the Act that a warning issued pursuant to section 41.1 of the Act is considered a penalty. This has been confirmed by this Court in *Canada v. Piovesan*, 2006 FCA 245 and *Canada v. Maxwell*, 2006 FCA 371.

[36] Therefore, the Umpire erred in law and exceeded his jurisdiction when he decided that a notice of violation should not be made.

## **CONCLUSION**

[37] The application for judicial review will be allowed without costs and the Umpire's decision in CUB 66301 will be set aside. The matter will be remitted to the Umpire or to another Umpire designated by the Chief Umpire with a direction that Ms. Kaur's appeal to the Umpire be confirmed on the question of just cause for leaving her employment and that the penalty and warning made by the Commission be confirmed.

“Trudel J.A.”

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J.A.

“I agree” Richard C.J.

“I agree” Sharlow J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-372-06

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v. PARVINDER  
KAUER

**PLACE OF HEARING:** Toronto, Ontario

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**REASONS FOR JUDGMENT BY:** TRUDEL J.A.

**CONCURRED IN BY:** RICHARD C.J.  
SHARLOW J.A.

**DATED:** September 14, 2007

**APPEARANCES:**

Susan Keenan FOR THE APPELLANT

Parvinder Kaur ON HER OWN BEHALF

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