

Date: 20080417

Docket: A-403-07

Citation: 2008 FCA 145

**CORAM: LÉTOURNEAU J.A.
SHARLOW J.A.
TRUDEL J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RITA SCOTT

Respondent

Heard at Toronto, Ontario, on April 17, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on April 17, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on April 17, 2008)

LÉTOURNEAU J.A.

[1] This is an application for judicial review of a decision rendered by an Umpire (CUB 68669) who reversed the decision of a Board of referees (Board), thereby accepting an antedated claim for unemployment insurance benefits.

[2] For the reasons that follow, we are of the view that the application should be granted.

[3] The respondent delayed her claim for benefits for some ten (10) months. She left her work on January 28, 2005. From April 18 to November 18, 2005, she was a sponsored student. She said she was unaware that she may have been entitled to such benefits while receiving assistance through a First Nation Education Authority.

The decision of the Board

[4] The Board found that she offered no good cause for the delay in applying for benefits. In the Board's opinion, the respondent had been negligent in not informing herself of her rights and obligations under the *Employment Insurance Act*, S.C. 1996, c. 23 (Act). It also found that there was a period of time during which she was not a student.

[5] The Board considered three justifications provided by the respondent, i.e. that she was a student, her fear of being accused of attempting to abuse the system by applying for unemployment benefits because of the other financial assistance she was receiving, and the fact that she was unaware that, as a sponsored student, she could apply for unemployment insurance benefits: see the Board's decision at pages 56 and 57 of the Applicant's Record.

[6] Confronted with the respondent's admitted ignorance of the law, the Board properly applied the legal principles established by this Court in *Canada (A.G.) v. Albrecht*, [1985] 1 F.C. 710. It looked at what a reasonable person would have done to satisfy herself as to her rights and

obligations under the Act: see *Albrecht, supra*. It concluded that the respondent had failed to act diligently.

The decision of the Umpire

[7] Before the Umpire, the representative of the respondent argued that the Board had failed to consider the respondent's argument that she feared she would be accused of attempting to abuse the system. We do not think that this is a fair reading of the Board's decision as the Board addressed that issue.

[8] Pursuant to that contention, the Umpire requested a transcription of the hearing before the Board to confirm exactly what the respondent had stated before the Board. Unfortunately, the tapes could not be located. Upon being informed of the fact that the tapes were unavailable, the Umpire granted the respondent's appeal and quashed the Board's decision. The following paragraphs are the only two paragraphs that the Umpire gave in support of his conclusion:

I agree with the claimant's representative's submissions that what the claimant would have stated to the Board was important in determining if she has established just cause for her delay in applying for benefits. Once again, the Commission is responsible for not providing a copy of the recording of a Board hearing. The claimant should not be penalized for the Commission's negligence.

I accept that the claimant had made the comments as stated by her representative and that these comments could have provided an explanation in regard to a good cause for her delay in applying for benefits earlier.

[Emphasis added]

[9] We believe that it is important once again to underline the exceptional nature of the benefit conferred by subsection 10(4) of the Act. The subsection allows for the antedating of a claim. In *The Attorney General of Canada v. Brace*, 2008 FCA 118, at paragraphs 6 and 7, quoting excerpts from *Canada (Attorney General) v. Beaudin*, 2005 FCA 123 and providing additional justification for the timely filing of an application for benefits, this Court wrote:

[6] It is useful at this time to reiterate the justification for the obligation imposed upon a claimant to make an application for benefits once the eligibility conditions of section 7 of the Act are met. In *Canada (Attorney General) v. Beaudin*, 2005 FCA 123, at paragraphs 5 and 6, this Court expressed in the following terms the rationale for an early application:

[5] It is worth noting that subsection 10(4) of the Act is not the product of a mere legislative whim. It contains a policy, in the form of a requirement, which is instrumental in the sound and efficient administration of the Act. On the one hand, this policy helps "to assure the proper administration and the efficient processing of various claims" and "to enable the Commission to review constantly the continuing eligibility of a claimant to whom benefits are being paid": see CUB 18145, June 29, 1999, by Umpire Joyal, and CUB 23893, June 27, 1994, by Umpire Rouleau. Antedating the claim for benefits may adversely affect the integrity of the system, in that it gives a claimant a retroactive and unconditional award of benefits, without any possibility of verifying the eligibility criteria during the period of retroactivity: see CUB 13007, December 12, 1986, and CUB 14019, August 7, 1987, by Umpire Joyal.

[6] Furthermore, a sound and equitable administration of the system requires that the Commission engage in a quick verification that is as contemporaneous as possible with the events and circumstances giving rise to the claim for benefits: see CUB 15236A, April 30, 1987, by Umpire Strayer. Otherwise, the Commission finds itself in the difficult position of having to engage in a job or process of reconstruction of the events, with the costs and hazards pertaining to such a process. This is what explains the principle, long established by the jurisprudence of this Court, that ignorance of the Act does not excuse a delay in filing an initial claim for benefits.

[7] Moreover, we should add to this that a claimant is required during the benefit period to make regular and repeated applications for the benefits and declare income received during that period. Any false statement in this regard may entail a loss of or a reduction in benefits and the imposition of penalties. It may also result in the refund of benefits unduly paid to or illegally obtained by a claimant as well as in the issuance of a notice of violation

which, pursuant to section 7.1 of the Act, increases the admissibility criteria for future benefits. All these obligations and the failure to fulfill them are difficult to enforce and sanction when applications for benefits are delayed and the benefits granted retroactively. The obligation and duty to promptly file a claim is seen as very demanding and strict. This is why the “good cause for delay” exception is cautiously applied.

[10] The Umpire could not use the unavailability of the transcript as a ground for setting aside the Board’s decision unless it could be shown that the absence of the tape or transcript effectively denied the respondent her right of appeal before the Umpire: see *Canada (Attorney General v. Valladolid*, 2004 FCA 142.

[11] There is no such prejudice in this case because the respondent made the same argument before the Umpire that she had made before the Board. The Umpire’s duty was then to consider and assess the argument. This he did not do. It was not sufficient for him to say “that these comments could have provided an explanation in regard to a good cause for her delay in applying for benefits earlier.” (emphasis added). Either the respondent’s fear did provide a good explanation or it did not. To state what a possible effect of an argument is and to leave it at that is not to adjudicate on the merit of that argument. It leaves the answer in the realm of speculation.

[12] In the present instance, the Board found that the failure of the respondent to claim benefits immediately upon her eligibility was the result of her ignorance of the law. If, as she said, she did not claim the benefits while a student because she was afraid that it could be seen as an abuse, she then had at the time even more reasons for inquiring about her status, her rights and obligations under the Act.

[13] In our opinion, it was not reasonably open to the Umpire on the facts of this case to conclude as he did. A reasonable person in the respondent's situation would have taken steps to enquire about her rights and obligations under the Act.

[14] The application for judicial review will be allowed, the decision of the Umpire set aside and the matter referred back to the Chief Umpire, or a person that he designates, for a new determination on the basis that the respondent's appeal from the decision of the Board of referees shall be dismissed.

“Gilles Létourneau”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-403-07

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v.
RITA SCOTT

PLACE OF HEARING: Toronto, Ontario

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DELIVERED FROM THE BENCH BY: LÉTOURNEAU J.A.

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