Date: 20080918

Dockets: A-316-07
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A-319-07

Citation: 2008 FCA 274

CORAM: **DÉCARY J.A.**
BLAIS J.A.
RYER J.A.

A-316-07

BETWEEN:

TAIGA WORKS-WILDERNESS LTD.

Applicant

and

CHOI HAH HUANG

Respondent

A-315-07

BETWEEN:

TAIGA WORKS-WILDERNESS LTD.

Applicant

and

YI BAO HUANG

Respondent

A-317-07

BETWEEN:

TAIGA WORKS-WILDERNESS LTD.

Applicant

and

SHAO PING HUANG

Respondent

A-318-07

BETWEEN:

TAIGA WORKS-WILDERNESS LTD.

Applicant

and

MUI KIU CHOW

Respondent

A-319-07

BETWEEN:

TAIGA WORKS-WILDERNESS LTD.

Applicant

and

JANET WAI CHUN YUK

Respondent

Heard at Vancouver, British Columbia, on September 15, 2008.

Judgment delivered at Vancouver, British Columbia, on September 18, 2008.

REASONS FOR JUDGMENT BY: BLAIS J.A.

CONCURRED IN BY: DÉCARY J.A.
RYER J.A.

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REASONS FOR JUDGMENT

BLAIS J.A.

[1] This is an appeal of a decision rendered by Umpire Max Teitelbaum of the Office of the Umpire, on May 28, 2007.

[2] Generally, the issue between the parties is whether five seamstresses in the employ of Taiga Works-Wilderness Equipment Ltd. ("Taiga") left their employment with or without just cause after Taiga allegedly modified the terms and conditions of their salary and wages.

[3] Specifically at issue in this judicial review is whether the umpire properly determined that the employees had just cause in leaving the employment of Taiga when the Majority Board of Referees had determined that the respondents represented by Ms. Huang did not have just cause.

[4] The decision of the umpire should be returned to the Chief umpire for redetermination.

Background

The Commission's Decision

[5] On December 20, 2005, the Canadian Employment Insurance Commission (the "Commission") determined that eleven seamstresses did not demonstrate just cause for leaving the employment of Taiga. This determination was based on the Commission's view that the respondents had not pursued reasonable alternatives to walking off the job, including contacting the employment agency or Employment Standards prior to quitting. It therefore imposed an indefinite disqualification of benefits pursuant to sections 29 and 30 of the *Employment Insurance Act.*

The Board's Decision

[6] At the Board level, the seamstresses' appeals were joined in two groups. The first group of appellants were represented by Ms. Huang (A-316-07), the second group of appellants were represented by Ms. Lau (A-321-07). The two groups were subject to two separate hearings before the Board of Referees and the evidence in each case does not appear to have been the same. Each decision, in turn, led to separate appeals before this Court.

[7] The Huang respondents appealed the Commission's decision to the Board of Referees (the "Board"). The Majority Board determined that the Huang respondents did not have just cause under section 29(c) of the *Employment Insurance Act*. They indicated that,

> [t]he claimant in the present case did not qualify under Item vii of Section 29 as the claimant's representative argued. Because of the complicated and changing system of piece work payment, it was impossible to determine a comparison in wages when different items were being produced. The Majority Board could not conclude whether there had been 'significant changes' to wages or salary.
>
> Neither could the Majority Board determine from the evidence that there had been 'significant' changes in work duties'. (Item ix of Section 29).

[8] The Majority Board also found that there was no real urgency for the Huang respondents to quit their job since other reasonable alternatives had been open to them. They found that,

> …the employer had the legal right to try out new formats in order to improve quality and quantity even if the new plan was complex and might take time, it was legal. The Majority Board finds that the working conditions were not so intolerable to cause the claimant to leave when she did. This observation was confirmed when the claimant stated that she would be willing to return to Taiga.

[9] Therefore, on March 13, 2006, the Majority Board ruled that the Huang respondents did not have just cause and dismissed the appeal. The minority of the Board found in favour of the Huang respondents and cited the factors raised by the Huang respondents as sufficient justification to demonstrate just cause.

[10] The Huang respondents appealed to the umpire. On July 4, 2006, before the umpire could issue a decision, the Commission reviewed the Board's decision and conceded the Huang respondents' appeal. The Commission recommended to the umpire that the Huang respondents'

appeal be allowed. On July 12, 2006 the Huang respondents notified the Commission that they were withdrawing their request for an oral hearing before the umpire. On July 18, 2006, the applicant notified the Commission that it was opposed to the Commission's change in position and requested an oral hearing before the umpire.

[11] The Huang respondents' appeal to the umpire was heard. The appeal was allowed and the Board's March 13, 2007 decision was set aside.

[12] The umpire considered written submissions from the applicant before making his decisions in the Huang respondents' cases. On May 28, 2007 the umpire concluded that these submissions did not contain new information and that they simply reiterated the employer's position.

[13] The umpire concluded that the Board had erred in their decision with respect to the Huang respondents. The umpire found that the employer had,

> […] unilaterally changed the conditions of employment. The employer decided to cause the employees to increase the production by removing their "coffee break" and by hiring "runners" so that the employees would not leave their sewing machines.
>
> The majority of the Board failed to give sufficient weight to the unilateral changes made by the employer.

[14] The umpire ruled that the majority/minority split in the Board's decision with respect to the Huang respondents indicated that there was evidence to support a finding of just cause.

Analysis

[15] In *Canada (Attorney General) v. Centre de valorisation des produits marins de Tourelle Inc.*, 2003 FCA 344, [2003] F.C.J. No. 1413 (QL) ("*Tourelle*"), Justice Létourneau concluded that an umpire did not have the authority to reweigh evidence,

> The umpire simply substituted his assessment of the facts and of the credibility of the witnesses, here the employer, for that of the Board of Referees.
>
> He did not have that power. His function is limited to "deciding whether the view of the facts taken by the Board of Referees was reasonably open to them on the record": *Attorney General of Canada v. McCarthy*, 174 N.R. 28 (F.C.A.). In the case at bar, the record contained sufficient evidence for the Board of Referees to arrive at the conclusions which the umpire incorrectly reversed.

[16] In the case at bar, the umpire concluded that the Board of Referees erred in their decision but specifically indicated that the weight given to the evidence was the basis of the error.

> The majority of the Board failed to give sufficient weight to the unilateral changes made by the employer. (emphasis added)

[17] In light of the decision in *Tourelle*, a determination of the weight to be given to evidence simply is not within the powers of the umpire and favours allowing the judicial review and having the appeal to the umpire redetermined.

[18] In his conclusion, the umpire states,

> In my view, the Commission's recommendation should be accepted. The submissions which the employer has made to the Umpire were before the Board of Referees and it is nothing but a reiteration of arguments that it had already made. The point here is that, as demonstrated by the split in the Board of Referees, there is evidence to support a finding of just cause. The minority Board member's decision, given the evidence, can certainly be said to be a reasonable finding. (emphasis added)

[19] While it may be true that a decision by the Board allowing the Huang respondents claim could have been allowed, it was not. Therefore, the umpire was to weigh the decision of the majority Board for reasonableness. Whether the minority Board's conclusion was reasonable is not determinative of the appeal before the umpire. There may have been a variety of conclusions open to the Board based on the evidence. It is the majority Board's decision that is to be examined under the umpire's analysis. The umpire notably does not make any finding regarding the reasonableness of the majority Board's decision.

[20] In its decision, the Board of Referees indicated that,

> Because of the complicated and changing system of piece work payment, it was impossible to determine a comparison in wages when different items were being produced. The Majority Board could not conclude whether there had been 'significant changes' to wages or salary.
>
> […]
>
> There can be no doubt that the claimant in the present case quit her job voluntarily when she had other alternatives to leaving at that time. The Majority Board found as fact, that there was no real urgency to leave at that time, and that the claimant could have contacted the Employment Standards Agency or EI Commission to gather advice as to her legal position.

[21] The umpire failed to evaluate whether the Board's finding that the Huang respondents did not have just cause for voluntarily leaving their employment based on the reasons given by the Board was reasonable.

[22] Therefore, the decision of the umpire should be set aside and the matter referred back to the Chief Umpire or his designate for redetermination on whether it was reasonable for the majority

Board to decide that the Huang respondents did not have just cause for voluntarily leaving the applicant's employment.

Conclusion

[23] I would allow the judicial review with respect to the Huang respondents, set the decision of the umpire aside and send the matter back to the Chief umpire or to an umpire designated by him to decide whether the Huang respondents did have just cause for voluntarily leaving the applicant's employment.

[24] The parties did not seek costs therefore I would award no costs.

"Pierre Blais"
J.A.

"I concur
Robert Décary J.A."

"I concur
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	**A-316-07** A-315-07 A-317-07 A-318-07 A-319-07
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CONCURRED IN BY:	DÉCARY J.A. RYER JA.
DATED:	September 18, 2008

APPEARANCES:

Robert A. Kasting	FOR THE APPLICANT
No one appeared	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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