

Date: 20080923

Docket: A-373-07

Citation: 2008 FCA 283

**CORAM: DESJARDINS J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

ROY THÉRIAULT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Fredericton, New Brunswick, on September 23, 2008.

Judgment delivered at Fredericton, New Brunswick, on September 24, 2008.

**REASONS FOR JUDGMENT OF THE COURT BY:
CONCURRED IN BY:**

**DESJARDINS J.A.
NOËL J.A.
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REASONS FOR JUDGMENT OF THE COURT

DESJARDINS J.A.

Introduction

The issue in this case, an issue raised *proprio motu* by the Court, is whether it was open to the Umpire to decide on the earnings and allocation of amounts received by the applicant, Roy Thériault, without first verifying that there had been an interruption of earnings within the meaning of the *Employment Insurance Act* (S.C. 1996, c. 23) and Regulations (*Employment Insurance Regulations*, S.O.R./96-332).

[1] We have before us the applicant's application for judicial review of a decision of the Umpire dated June 28, 2007. That decision sets aside the one made by the Board of Referees that granted Mr. Thériault's application to cancel a notice of allocation issued in accordance with sections 35 and 36 of the Regulations and a notice of debt in the amount of \$1901.00 issued by the Employment Insurance Commission.

[2] The dispute, as expressed by the parties, essentially concerns an overpayment and the legal effect that an amount offered to the applicant by the employer's insurer as a wage replacement indemnity, which amount the applicant refused to cash, would have on the calculation of employment insurance benefits.

[3] Before addressing the dispute referred by the parties, there is still the issue of the applicant's actual eligibility for employment insurance benefits.

Facts

[4] The applicant made a claim for "regular" employment insurance benefits, effective October 9, 2005 (Applicant's Memorandum, paragraph 2).

[5] The applicant states, in his initial claim for benefits (Applicant's Record, page 44), that he filed a record of employment at a Service Canada Centre located in New Brunswick.

[6] The applicant cited a [TRANSLATION] “shortage of work” as the reason for his claim (Respondent’s Record, Exhibit 2-7; Applicant’s Record, page 42).

[7] Neither the Applicant’s Record nor the Respondent’s Record contains a copy of the record of employment.

[8] Despite the grounds of shortage of work stated in his initial claim dated October 2005, the applicant states that he was suspended from the work place as of January 5, 2006, while still receiving his wages from the employer during a period of approximately 10 weeks from the start of January 2006 until March 10, 2006 (Applicant’s Memorandum, paragraph 3).

[9] The applicant claims that the employer asked him to see a doctor, which he says he did in January 2006 without having obtained medical leave at that time (Applicant’s Record, page 96).

[10] However, the employer states that it had suspended the applicant from its place of employment [TRANSLATION] “since it deemed the man to be a danger to himself and to the other employees” (Applicant’s Record, page 98). There is no evidence in the record that supports this allegation, which the applicant refutes. The applicant even filed a petition signed by the other employees, in which they denied the employer’s statement on this matter.

[11] On the contrary, the applicant maintains that he was available and fit for work as of January 2006.

[12] It was not until June 7, 2006, that the applicant obtained a medical certificate certifying his inability to work for medical reasons. The period of illness continued until August 2006 when another medical certificate was issued, this one certifying that the applicant was fit to return to work, which he did as of September 6, 2006.

[13] The applicant claims that he requested a record of employment in January 2006, but did not receive one (Applicant's Record, page 96).

[14] This claim by the applicant is corroborated by the version of the employer, which claims that it did not issue a record of employment (Applicant's Record, page 95).

Decision of the Umpire

[15] The Umpire's opinion was that the monetary amounts received by the applicant as wages and wage loss indemnity payments were earnings within the meaning of subparagraph 35(2)(c)(i) of the Regulations, which under subsection 36(12) of the Regulations should be allocated to the weeks in respect of which the payments are paid or payable. He thereby confirmed the Commission's decision and overturned the decision of the Board of Referees that had ruled in favour of the applicant.

Analysis

[16] It is not possible to determine from the record as it stands whether there was an interruption of earnings from the applicant's employment. This is an essential condition to be entitled to receive unemployment benefits. Subsection 7(1) of the Act sets forth that unemployment benefits are payable to an insured person who qualifies to receive them. Subsection 7(2) of the Act stipulates that one of these conditions is "an interruption of earnings from employment."

[17] The insured person declared that there had been "shortage of work", but the employer did not issue a record of employment, contrary to subsection 19(2) of the Regulations, which requires the employer to do so in respect of a person employed by the employer in insurable employment who has an interruption of earnings. Indeed, paragraph 19(3)(a) of the Regulations requires the employer to issue a record of employment "not later than five days after the later of (i) the first day of the interruption of earnings, and (ii) the day on which the employer becomes aware of the interruption of earnings." In this case, the employer continued to pay wages to the applicant and itself made the necessary requests for the applicant to receive short-term disability insurance benefits from Great West Life, the employer's insurer.

[18] The Umpire made an error of law in failing to consider whether the applicant was entitled to unemployment benefits under the circumstances. Without an "interruption of earnings" within the meaning of subsections 7(1) of the Act and 19(2) of the Regulations, the applicant was not entitled to the benefits and the Commission had no jurisdiction in this matter. It was not open to the Commission to rule on the earnings and allocation until after it had ascertained that the applicant was entitled to receive unemployment benefits.

[19] The application for judicial review should be granted without costs, for the sole purpose of quashing the Umpire’s decision for want of jurisdiction of the Commission.

“Alice Desjardins”

J.A.

“I concur.
Noël J.A.”

“I concur.
Johanne Trudel J.A.”

Certified true translation
Sarah Burns

Appendix

Employment Insurance Act (1996, c. 23)

Qualifying for Benefits Benefits payable to persons who qualify

7. (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

Qualification requirement

(2) An insured person, other than a new entrant or a re-entrant to the labour force, qualifies if the person (a) has had an interruption of earnings from employment; and

(b) has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

...

Loi sur l'assurance-emploi (1996, ch. 23)

Conditions requises pour recevoir des prestations Versement des prestations

7. (1) Les prestations de chômage sont payables, ainsi que le prévoit la présente partie, à un assuré qui remplit les conditions requises pour les recevoir.

Conditions requises

(2) L'assuré autre qu'une personne qui devient ou redevient membre de la population active remplit les conditions requises si, à la fois :
a) il y a eu arrêt de la rémunération provenant de son emploi;

b) il a, au cours de sa période de référence, exercé un emploi assurable pendant au moins le nombre d'heures indiqué au tableau qui suit en fonction du taux régional de chômage qui lui est applicable.

[...]

**Employment Insurance
Regulations (SOR/96-332)**

Record of Employment

19. (2) Every employer shall complete a record of employment, on a form supplied by the Commission, in respect of a person employed by the employer in insurable employment who has an interruption of earnings.

(3) Subject to subsection (4), copies of the record of employment completed pursuant to subsection (2) shall be distributed by the employer in the following manner:

(a) the employee's copy shall be delivered to the insured person not later than five days after the later of

(i) the first day of the interruption of earnings, and

(ii) the day on which the employer becomes aware of the interruption of earnings;

(b) the Commission's copy shall be sent to the Commission within the time limit set out in paragraph (a); and

(c) the employer's copy shall be kept and retained as a part of the employer's records and books of account in accordance with subsection 87(3) of the Act.

...

**Règlement sur l'assurance-
emploi (DORS/96-332)**

Relevé d'emploi

19. (2) L'employeur établit un relevé d'emploi, sur le formulaire fourni par la Commission, lorsque la personne qui exerce un emploi assurable à son service subit un arrêt de rémunération.

(3) Sous réserve du paragraphe (4), l'employeur distribue de la façon suivante les exemplaires du relevé d'emploi établi conformément au paragraphe (2) :

a) il remet l'exemplaire de l'employé à l'assuré dans les cinq jours suivant le dernier en date des jours suivants :

(i) le premier jour de l'arrêt de rémunération,

(ii) le jour où il prend connaissance de l'arrêt de rémunération;

b) il envoie l'exemplaire de la Commission à celle-ci dans le délai visé à l'alinéa a);

c) il garde l'exemplaire de l'employeur et le verse aux registres et livres comptables qu'il est tenu de conserver selon le paragraphe 87(3) de la Loi.

[...]

(5) Where an employer has failed to deliver a record of employment to an insured person or to the Commission or the employer is not available or is unable to provide information respecting the record of hours of insurable employment and the insurable earnings of that person because the employer's records are destroyed or lost, the person, on becoming a claimant, may provide, in respect of their hours of insurable employment and insurable earnings, a statement containing evidence of the hours and earnings.

...
(Emphasis added)

(5) Si l'employeur n'a pas remis de relevé d'emploi à l'assuré ou à la Commission, ou si l'employeur ne peut être rejoint ou est, du fait de la destruction ou de la perte de ses registres, incapable de fournir les renseignements relatifs à l'état des heures d'emploi assurable et de la rémunération assurable de l'assuré, celui-ci peut, dès qu'il devient prestataire, fournir une déclaration, avec preuves à l'appui, de ses heures d'emploi assurable et de sa rémunération assurable.

[...]
(mon soulignement)

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-373-07

**AN APPLICATION FOR JUDICIAL REVIEW REGARDING A DECISION OF THE
UMPIRE DATED JUNE 28, 2007, FILE NO. CUB68580**

STYLE OF CAUSE: Roy Thériault v. Attorney General
of Canada

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: September 23, 2008

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

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

**CONCURRING REASONS BY:
DISSENTING REASONS BY:**

DATE OF REASONS: September 24, 2008

APPEARANCES:

Roy Thériault FOR THE APPLICANT

Sandra Doucette FOR THE RESPONDENT

SOLICITORS OF RECORD:

For himself FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada FOR THE RESPONDENT