Date: 20091002

Docket: A-32-09

Citation: 2009 FCA 283

CORAM: **SEXTON J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

SHERRI BENEDETTI

Respondent

Heard at Vancouver, British Columbia, on October 1, 2009.

Judgment delivered at Vancouver, British Columbia, on October 2, 2009.

REASONS FOR JUDGMENT BY: SEXTON J.A.

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

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REASONS FOR JUDGMENT

SEXTON J.A.

I. Facts

[1] The respondent, Ms. Benedetti, was employed as a home support worker in British Columbia School District No. 73 from September 6, 2004 until October 5, 2006. On October 7, 2005, Ms. Benedetti was unable to continue work as a result of a walkout by members of the British Columbia Teachers' Federation (BCTF).

[2] By the fall of 2005, the collective agreement between the BCTF and the British Columbia Public School Employers' Association (BCPSEA) had expired. Members were in the process of negotiating a new agreement. The British Columbia government then tabled legislation to extend the expired contract. In response to the legislation, members of the BCTF and the Canadian Union of Public Employees (CUPE), which represented school support workers, staged a walkout. Ms. Benedetti was a member of CUPE.

[3] As a result of her unemployment, Ms. Benedetti applied to collect employment insurance. The Canada Employment Insurance Commission ("the Commission") denied Ms. Benedetti's claim for the period of October 7 to October 21, 2005, ruling that her inability to work occurred as a result of a work stoppage due to a labour dispute, and that she was accordingly disentitled under subsection 36(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 ("the Act").

II. Decisions Below

[4] Ms. Benedetti appealed the ruling to a Board of Referees. The Board of Referees surveyed the evidence and ruled that the Ms. Benedetti's unemployment stemmed from a political protest, not a labour dispute. It therefore allowed the appeal.

[5] The applicant then appealed the Board's decision to an Umpire. The Umpire upheld the Board of Referees' decision and dismissed the appeal. He held that when the BCTF opted to walk out, negotiations between it and the BCPSEA were still ongoing. Accordingly, the Umpire ruled that "the action was clearly as a result of government intervention by legislating an end to the dispute between the teachers and their employer" and that the Board's decision was reasonable.

III. Issues in the Application

[6] The applicant submits that the Umpire erred in maintaining the Board's decision finding that the dispute that caused the work stoppage between October 7, 2005 and October 21, 2005 was not a labour dispute as defined in the Act.

IV. Relevant Legislative Provisions

[7] The disentitlement provision in question is found in subsection 36(1) of the Act:

Subject to the regulations, if a claimant loses an employment, or is unable to resume an employment, because of a work stoppage attributable to a labour dispute at the factory, workshop or other premises at which the claimant was employed, the claimant is not entitled to receive benefits until the earlier of	Sous réserve des règlements, le prestataire qui a perdu un emploi ou qui ne peut reprendre un emploi en raison d'un arrêt de travail dû à un conflit collectif à l'usine, à l'atelier ou en tout autre local où il exerçait un emploi n'est pas admissible au bénéfice des prestations avant :
(*a*) the end of the work stoppage, and	*a*) soit la fin de l'arrêt de travail;
(*b*) the day on which the claimant becomes regularly engaged elsewhere in insurable employment.	*b*) soit, s'il est antérieur, le jour où il a commencé à exercer ailleurs d'une façon régulière un emploi assurable.

[8] Section 2 of the Act in turn defines the term "labour dispute" as follows:

"labour dispute" means a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons.	« conflit collectif » Conflit, entre employeurs et employés ou entre employés, qui se rattache à l'emploi ou aux modalités d'emploi de certaines personnes ou au fait qu'elles ne sont pas employées.

The word "dispute" (« conflit ») is not defined in the Act.

V. Analysis

A. *Standard of Review*

[9] The applicant submits that the standard of review is reasonableness. I agree. The determination of whether the work stoppage was attributable to a labour dispute is a question of mixed fact and law, as it depends on the application of the facts at hand to the legal term "labour dispute." In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court stated that "questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness" (at para. 52).

[10] The Supreme Court also stated that in determining the appropriate standard of review for an administrative tribunal, courts should first determine whether existing jurisprudence has already determined the appropriate standard of review in a satisfactory manner (at para. 62). There are no post-*Dunsmuir* cases addressing the exact question at hand, but relevant pre-*Dunsmuir* jurisprudence does exist. In *Canada (Attorney General) v. Stillo*, 2002 FCA 346, [2002] 296 N.R. 209, this Court held that "whether the work stoppage was attributable to a labour dispute as defined in the Employment Insurance Act is a question of mixed fact and law that will attract the intervention of this Court only if decided unreasonably."

B. *The Evidence*

[11] There was evidence to the effect that:

(a) Ms. Benedetti was not a member of BCTF, and was not a teacher. She was a home support worker and a member of CUPE, which in turn, decided to protest the passing of legislation by the B.C. government forcing teachers back to work;

(b) although the teachers formed a picket line, Ms. Benedetti was not part of it, and indeed she tried to go to work but was prevented by the picket line;

(c) there were ongoing negotiations between the teachers and their employer, and the teachers' contract had been extended pursuant to the B.C. Government legislation;

(d) the decision of the BCTF to stage a walkout was in reaction to the B.C. Government's decision to legislate the teachers back to work.

[12] It was open to the Board to accept or reject this evidence. The Umpire decided that the Board's decision was "entirely compatible with the evidence" and that "the Board's decision was well founded on the evidence before it."

C. *Was the Umpire's decision reasonable?*

[13] A decision is reasonable if it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, *supra* para. 8 at para. 47). I conclude that the Umpire's decision falls within such a range and is accordingly reasonable.

[14] The applicant directs the Court to precedent that, it submits, dictates that the Board and the Umpire erred in their application of the law to the facts. In *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2003 BCSC 534, [2003] 90 C.L.R.B.R. (2d) 306, members of the BCTF walked out of their schools to join a rally in protest of the *Education Services Agreement Act*, S.B.C. 2002, c. 1. The BCPSEA brought an application before the Labour Relations Board to have attendance at the rally declared a breach of section 57 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244, which states that "[a]n employee bound by a collective agreement . . . must not strike during the term of the collective agreement."

[15] This case is of no assistance to the applicant because the issue there was whether the Court or the Board was best positioned to hear the case. Its decision was not at all intended to interpret even the British Columbia *Labour Relations Code*, let alone the federal *Employment Insurance Act*.

[16] The applicant also relies upon André Bonneau, et al. (October 21, 1994), CUB 30448. In that case, a number of Quebec construction unions formed a protest movement, pursuant to which workers walked off the job. The protest arose as a result of a bill that sought to deregulate the residential construction sector, alter the negotiation process, and extend the collective agreement by a year. The Board of Referees determined on the facts that this work stoppage did not result from a labour dispute. The Umpire overturned that ruling, having reviewed it on a standard of correctness.

[17] This case does not assist the applicant either. First, the case, like the case at bar, was very fact driven. Second, as discussed above, the appropriate standard of review is now reasonableness, not correctness.

[18] In the end, the applicant relies almost entirely on precedent to support its argument. I have, however, distinguished these cases. Indeed, case law in general is of little assistance to Ms. Benedetti , as the fact-intensive nature of decision-making under subsection 36(1) of the Act is determinative of the outcome. Whether the applicant has met its burden of demonstrating that a work stoppage is due to a labour dispute is a question that can only be answered based on an assessment of all of the evidence, which is in turn applied to the law. This is a classic question of mixed fact and law. Furthermore, I emphasize the fact that the onus lies with the Commission to demonstrate that Ms. Benedetti is disentitled to her benefits.

[19] This Court is now two levels removed from the original findings of fact. Both the Board of Referees and the Umpire determined that the Commission did not prove legitimate grounds for disentitlement. I am of the opinion that this Court is not in a position to reweigh the evidence presented at the Board of Referees, nor is it able to say that both the decision of the Board and the decision of the Umpire were unreasonable.

VI. Disposition

[20] I would therefore dismiss the application.

"J. Edgar Sexton"

J.A.

“I agree
K. Sharlow J.A.”

“I agree
C. Michael Ryer J.A”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	October 2, 2009

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