Date: 20091016

Docket: A-76-09

Citation: 2009 FCA 296

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JOHN WILLIAM GREEY

Respondent

Heard at St. John's, Newfoundland and Labrador, on September 16, 2009.

Judgment delivered at Ottawa, Ontario, on October 16, 2009.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review of a decision of Umpire David G. Riche (the Umpire), dated December 2, 2008, CUB 71639, whereby he denied the appeal filed by the Canada Employment Insurance Commission (the Commission) against a decision of the Board of Referees (the Board).

[2] Once again, this Court is called upon to discuss “employment” in the context of “just cause”, this time in the case of a person who quits full time paid employment to take an unpaid volunteer position.

[3] Subparagraph 29(*c*)(vi) of the *Employment Insurance Act* (S.C. 1996, c. 23) (the Act) provides as follows:

Employment Insurance Act (S.C. 1996, c. 23)	*Loi sur l’assurance-emploi* (L.C. 1996, ch. 23)
29. For the purposes of sections 30 to 33,	29. Pour l’application des articles 30 à 33 :
…	[…]
(*c*) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:	*c*) le prestataire est fondé à quitter volontairement son emploi ou à prendre congé si, compte tenu de toutes les circonstances, notamment de celles qui sont énumérées ci-après, son départ ou son congé constitue la seule solution raisonnable dans son cas :
…	[…]
(vi) reasonable assurance of another employment in the immediate future,	(vi) assurance raisonnable d’un autre emploi dans un avenir immédiat,
…	[…]
(emphasis added)	(je souligne)

[4] The issues, as framed by the parties, are whether the volunteer position assumed by Mr. Greey constituted “employment” within the meaning of the Act and, if so, whether, having regard to

the circumstances of this case, it met the overarching “no reasonable alternative” test under section 29 of the Act.

[5] For the reasons that follow, I would allow this application for judicial review without costs on the basis that the work performed by Mr. Greey did not constitute employment.

Relevant Facts

[6] Mr. Greey’s work history shows that from 2005 until April 14, 2006, he worked full time at Tim Hortons in Newfoundland. During the same period, he also worked part-time at Sobeys. Although these occupations allowed Mr. Greey to earn a living, they did nothing in terms of bringing him closer to his goal of becoming a commercial pilot. Mr. Greey, who already had his commercial pilot license (contrary to the Umpire’s statement, at page 2 of his reasons), needed to accumulate flying hours on his log book certificate as it would enable him to eventually fly for commercial airlines.

[7] So, in April 2006, Mr. Greey left his position with Tim Hortons in Newfoundland and moved to Ontario where, on the weekends from May until August of 2006, he provided his services to Skydive Toronto Inc. (Skydive) without remuneration.

[8] Mr. Greey was known at Skydive, where he had successfully completed a Parapilot course in 2005 after graduating from Moncton Flight College with his diploma in Aviation Technology. In the summer of 2005, he had also flown planes for Skydive as a junior pilot.

[9] At the same time, Mr. Greey also managed to get a transfer to a Sobeys location in Ontario where he worked part-time. He did not, however, seek a transfer to a Tim Hortons location in that province (a) because it was difficult in view of the fact that these businesses are operated as franchises, but mostly (b) because he did not like the work.

[10] After the summer of 2006, Mr. Greey accepted a position with the Moncton Flight College in New Brunswick where he worked from October 2006 until December 26, 2006. He then filed an application for Employment Insurance benefits (EI benefits).

Procedural History

[11] In the first round of litigation, the Commission and the Board of Referees determined that Mr. Greey did not qualify for EI benefits because he had voluntarily left his employment at Tim Hortons without just cause, and therefore his hours of work there could not be used to establish a claim for benefits. As a result, Mr. Greey had insufficient hours of insurable employment.

[12] Following an appeal by Mr. Greey, Umpire Teitelbaum, in CUB 69882, quashed the decision of the Board of Referees and returned the matter to a newly constituted Board with

instructions to address the claimant's argument with respect to whether Mr. Greey's unpaid position with Skydive constituted employment.

[13] Applying itself to that task, the new Board, in turn, found that Mr. Greey had just cause to leave his employment at Tim Hortons and decided that he was entitled to EI benefits. The Crown appealed the Board's decision to an Umpire. The appeal was denied by Umpire Riche, who upheld the finding of the newly constituted Board (CUB 71639), hence the within application for judicial review by the Crown.

Position of the parties

[14] Citing the decision of our Court in *Bérubé v. Canada (Employment and Immigration Commission)* (F.C.A.) [1990] F.C.J. No. 137 [*Bérubé*], the Crown argues that the Umpire failed to address the argument that a claimant who provides his services free of charge is not thereby performing work within the meaning of the relevant provision. Therefore, "employment only exists when a person expects to derive financial benefit from the activity in question" (applicant's memorandum of fact and law, at paragraph 35).

[15] The Crown argues in the alternative that the Umpire also failed to apply the proper legal test in assessing the question of just cause. The Umpire ignored both the "no reasonable alternative" test and the overall scheme of the Act (applicant's memorandum of fact and law, at paragraph 43).

[16] Mr. Greey did not file a notice of appearance, nor did he file a memorandum of fact and law. Although he had ample opportunity to make written and oral submissions in this matter, he did not do so except in an irregular fashion by way of a letter prior to the hearing. The panel was able to assess Mr. Greey's position from that letter and from the comments of Mr. Greey's father, who was permitted to speak on behalf of Mr. Greey at the hearing. A further request by Mr. Greey to file post-hearing submissions was denied.

[17] Simply put, Mr. Greey's position is that the Skydive position was employment under the Act. Skydive's owner owned the planes, set the work schedule, assigned duties, set pilot selection criteria, required references, and dismissed pilots for rudeness to customers, poor attendance or reckless behaviour. For Mr. Greey, no other "alternative, full time, paid employment came even close to matching the Skydive Toronto economic benefit, nor offered to provide work experience in Greey's chosen field as a commercial pilot" (respondent's letter of August 14, 2009 to this Court). Therefore, he satisfies the "no other alternative" test.

Standard of Review

[18] In *Canada (Attorney General) v. Campeau*, 2006 FCA 376, citing *Tanguay v. Canada (Unemployment Insurance Commission)*, [1985] F.C.J. No. 910, this Court found at paragraph 17 that the determination of what constitutes "just cause" is a question of law. I am of the view that the scope and meaning of "employment" within the context of the just cause provision is a question of statutory interpretation, which is a question of law. As already held by our Court, the standard of

review of a decision of a Board of Referees and an Umpire on questions of law is correctness (*Martens v. Canada (Attorney General)*, 2008 FCA 240).

[19] As a result, the decision as to whether the Umpire asked himself the correct legal question should be reviewed on a standard of correctness. However, the proper application of the legal test is a question of mixed fact and law that should be reviewed on the standard of reasonableness (*Ibid.*, at paragraph 31).

[20] After a careful review of the Umpire's reasons, I conclude that the decision of the Umpire cannot stand because it is based on an error of law, namely, a misinterpretation of "employment" in section 29 of the Act.

Analysis

[21] Should the position with Skydive be considered "employment"? No. The answer to this question is dispositive of the application. Therefore, it will be unnecessary to address the issue regarding the "no reasonable alternative" test.

[22] Subsection 2(1) of the Act defines 'employment' as follows: "… the act of employing or the state of being employed". Although obvious, for the purposes of this application, it is useful to note that the word **'**or**'** is not used here to illustrate a set of alternatives as the state of employment

necessarily ensues from the act of employing. A mutual agreement is needed to form a contract of employment where the employee's services have been or will be compensated by the employer.

[23] In the case at bar, Skydive clearly states that Mr. Greey was not an employee (see applicant's record, pages 81 and 93). Of course, that statement alone does not suffice to characterize the relationship between Skydive and Mr. Greey. For reasons that need not be discussed here, it could be advantageous for an employer to deny having employed someone.

[24] As mentioned earlier, Mr. Greey has argued in his letter that he was an employee of Skydive because the latter owned the planes and scheduled Mr. Greey's activities while demanding quality service for its clients. I accept that the elements of ownership of equipment and degree of control can be of assistance in determining the nature of the relationship between Skydive and Mr. Greey.

[25] However, "[w]hat must always remain of the essence is the search for the total relationship of the parties" (emphasis added) (see *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1986] 3 F.C. 553, at paragraph 15).

[26] While explaining his working relationship with Skydive, Mr. Greey has written that he "bartered his time in return for free flying hours", which resulted for him in an "immediate non-pecuniary benefit worth over $14 000" (respondent's letter of August 14, 2009, at page 3).

[27] He argued that the *Digest of Benefit Entitlement Principles*, Chapter 5 “Earnings” (Ottawa: Human Resources and Social Development Canada, online http://www.hrsdc.gc.ca/en/ei/digest /chp5.shtml) (the *Digest*) recognized that a barter arrangement could constitute employment.

[28] The *Digest* is an interpretive guide that is not binding on this Court (see *Canada (Attorney General) v. Savard (F.C.A.)*, 2006 FCA 327, [2007] 2 F.C.R. 429, at paragraphs 18 and 28), but I accept that it is entitled to consideration and may constitute an important factor in the interpretation of statutes (see *Silicon Graphics Ltd. v. Canada (C.A.)*, 2002 FCA 260, [2003] 1 F.C. 447).

[29] At section 5.3.1.1 of the *Digest*, a barter arrangement is defined as follows:

> A barter arrangement, which is an agreement to exchange services between individuals, is considered employment because one person is providing services to another. To that extent, there is the existence of an expectation of services to be performed and an expectation of payment in the form of an exchange of services to be received.

[30] In the case at bar, I fail to see how this definition can advance Mr. Greey’s position. There was no evidence on record allowing the Umpire to conclude to the existence of an agreement to exchange services between Mr. Greey and Skydive.

[31] Even if Mr. Greey had succeeded at showing the *existence of an expectation of services to be performed* by him, there was clearly no *expectation of payment in the form of an exchange of services to be received* from Skydive. The benefit claimed by Mr. Greey, free flying time and the accumulation of flying hours, did not constitute a service by Skydive in exchange for the services

Mr. Greey provided to Skydive. In a barter situation, although there is no money exchanged for services that are rendered, the value of the services exchanged could be said to be non-pecuniary income arising out of employment. But here, no services were exchanged.

[32] The *Digest* also includes at Chapter V a section dealing with benevolent or volunteer work. Under Chapter 5.3.2.1, it is mentioned that "benevolent or volunteer work is generally understood to be work performed without any expectation of monetary reward" (applicant's record, at page 114). When the volunteer receives, or expects to receive, remuneration or material benefit, it no longer is benevolent work but rather employment.

[33] So Mr. Greey's thesis based on the *Digest* fails if employment is not proven.

[34] This then brings us back to the basic principle that when determining what constitutes employment under the Act, one must necessarily look at the remuneration or material benefit derived from the employment by a claimant.

[35] In his reasons, the Umpire started his discussion on the subject of employment by rejecting the Board's finding that "the claimant was not an employee of the airline company as he had not received wages" (Umpire's reasons, at page 1). The Umpire concluded that this was not "the test whether work of a volunteer nature can be considered to be insurable employment" (Umpire's reasons, at page 1). He then stated what he considered to be the proper test upon which he would ground his analysis.

[36] Applying himself to that task, he borrowed the words of Addy J. in CUB 5560 (CUB *Samson*) who had written:

> If a claimant who works for an employer is to be considered employed within the meaning of the *Unemployment Insurance Act* and specifically within the meaning of the above two sections, [21(1) of the *Unemployment Insurance Act* and 155(1) of the Regulations as they were then] it is absolutely essential that an employer-employee relationship exists between the employee and the person receiving his services. This type of relationship necessarily implies that during or subsequent to employment, remuneration is payable to the employee by the employer for services rendered or, at least, the employee must tender his services for the specific purpose of eventually receiving remuneration, or monetary or material benefit of some kind from his employer.

[37] In CUB *Samson*, a decision dated 27 April 1979, it had been found that Ms. Samson was working at her brothers' business without remuneration as a form of therapy to improve her mental and physical health. She did not entertain any hopes of obtaining subsequent employment there. Her case was examined in light of subsection 21(1) of the *Unemployment Insurance Act* (later subsection 10(1) of the *Unemployment Insurance Act*, R.S. 1985, c. U-1), which then provided that "a week of unemployment for a claimant is a week in which he does not work a full working week".

[38] Surprisingly, the Umpire took support from CUB *Samson*, upheld by a decision of our Court delivered by Pratte J. in December 1979 (*Attorney General of Canada v. Françoise Samson*, [1980] 1 F.C. 620) [*Samson*] without mentioning that Pratte J., 10 years later, wrote in *Bérubé, supra*:

> I believe I was wrong to say, in *Samson*, that a person providing his services to another free of charge can still be performing work within the meaning of s. 10 (1) of the *Unemployment Insurance Act*. It now seems to me that the only work with which the *Unemployment Insurance Act* is concerned, and consequently the only work referred to in s. 10(1) and the

> Regulations, is work which is done for oneself or for another with the aim or in the expectation of deriving a financial benefit therefrom (emphasis added).

[39] One should know that Mr. Bérubé had been denied EI benefits at all levels on the ground that he was not unemployed. He worked without pay for 50 hours a week in a canteen owned by his mother. The Board of Referees, affirmed by the Umpire, had concentrated solely on the number of hours worked by the claimant, regarding the fact that his work was unpaid as irrelevant.

[40] Hugessen J., writing for this Court in *Bérubé*, held that:

> It can clearly be seen from all the foregoing not only that the board of referees erred in ignoring the unpaid nature of the applicant's work but also that, in the circumstances of the case at bar, one of the main questions that it had to answer was precisely that of whether the said work was really unpaid, namely if the applicant did not really expect to derive any financial benefit from it (emphasis added).

[41] More recently, and in line with *Bérubé*, this Court held in *Canada (Attorney General) v. Traynor*, [1995] F.C.J. No. 836 [*Traynor*], at paragraph 9, that "[r]emuneration, actual or eventual, for the services rendered is necessary in order for a job to constitute "employment" for the purposes of the Act." I would note that Ms. Traynor in that case had been told that she would not receive any income in the form of a stipend during her internship; Justice Marceau's use of the word 'remuneration' was therefore also in reference to a financial benefit (*Traynor*, *supra*, at paragraph 2).

[42] Although the Umpire had distanced himself from the test applied by the Board, he adopted the Board's reasoning and came to the same conclusion, but with his own chosen test.

[43] He, therefore, noted with approval, at page 3 of his reasons, that "… while the claimant did not receive immediate cash remuneration for the work performed, he did receive great benefits in the use of the expensive aircraft at no charge which enabled him to accumulate valuable flight hours…". The Umpire also wrote that "[t]he Board found that the claimant will get direct and eventual remuneration through the accumulation of flying time." Furthermore, the Umpire held that "If [Mr. Greey] did not do it in this manner, it would have cost him considerable amounts of money to hire aircraft or find some other employer who was prepared to take him on to perform services for them."

[44] He then concluded, at page 3 of his reasons, that he was "satisfied that the employer-employee relationship existed because the employer scheduled his work time and the claimant received a material benefit of some kind in that he obtained his hours which he needed" (emphasis added).

[45] With respect, while these statements demonstrate the Umpire's understanding of the requirements to be a pilot and the costs involved in training and accumulating flying hours, they also show that the Umpire improperly addressed the legal question presented to him. He committed an error of law.

[46] Following the teachings of *Bérubé*, *supra* and *Traynor*, *supra*, the Umpire should have first identified the elements of the relationship between the parties which implied detecting some form of employment and the presence of a financial benefit or remuneration received or to be received in exchange for the provision of services.

[47] In other words, the proper test was whether Mr. Greey expected to derive any *financial benefit therefrom*, that is from Skydive, and not "some kind" of benefit independent of Skydive. Instead, the Umpire concluded that the accumulation of flight time constituted a material benefit to Mr. Greey without asking himself as to the nature and source of that benefit.

[48] I agree with the Crown that:

> The purpose of the Act is not to subsidize the pursuit of the laudable goal of professional advancement. One cannot rely on the EI system when one quits paid full time employment in order to volunteer. Qualifying such activities as "employment" could expand the EI system into a subsidy program for informal means of education through volunteering (applicant's memorandum of fact and law, at paragraph 38).

[49] The Crown's statement is consistent with the scheme of the Act. The Act sets up an insurance scheme under which unemployed persons are protected against the loss of income resulting from unemployment. The purpose of the scheme is obviously to compensate unemployed person for a loss; it is not to pay benefits to those who have not suffered a loss (see *Canada (A.G.) v. Walford*, [1978] F.C.J. No. 185 at paragraph 8; *Canada (Attorney General) v. Lesiuk (C.A.)*, [2003] 2 F.C. 697 at paragraph 15; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] S.C.J. No. 57) at paragraph 18).

[50] In reality, Mr. Greey took a break from his jobs to pursue his own interest and his long term career aspiration. Luckily for him, his plan worked and apparently "he has been successful in obtaining a paid position flying with a commercial airline" (respondent's letter of August 14, 2009 to this Court). However, the process of accumulating flying hours, although it was exactly what Mr. Greey was searching for, when volunteering, was not a financial benefit, actual or eventual, derived from Skydive.

[51] Had the Umpire assessed Mr. Greey's thesis having in mind the proper test and the overall scheme of the Act, I am of the view that he would have reached a different conclusion and held that Mr. Greey's position at Skydive did not constitute employment under the Act.

[52] For these reasons, I would allow this application for judicial review, I would set aside the decision of the Umpire, and I would remit the matter back to the Chief Umpire, or his or her designate, for redetermination on the basis that the appeal by the Commission should be allowed, and Mr. Greey should be disqualified from receiving EI benefits as his volunteer position with Skydive did not constitute *employment* under the Act. As the Crown has not sought costs, none should be awarded.

"Johanne Trudel"

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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