

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20101018

Docket: A-107-10

Citation: 2010 FCA 271

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

DAVID WILLIAMS

Respondent

Heard at Toronto, Ontario, on September 29, 2010.

Judgment delivered at Ottawa, Ontario, on October 18, 2010.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

**SEXTON, J.A.
SHARLOW, J.A.**

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REASONS FOR JUDGMENT

NADON J.A.

[1] The Crown is applying for judicial review of a decision dated January 22, 2010, rendered by an Umpire, upholding a decision of the Board of Referees (“Board”) which allowed the respondent’s appeal of the Canada Employment Insurance Commission’s (“Commission”) decision denying him insurance benefits on the ground that he had voluntarily left his employment without just cause. In so concluding, the Commission relied on sections 29 and 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (“Act”).

[2] A brief summary of the facts will be useful for a proper understanding of the application now before us.

[3] The respondent was employed by Multi-Freight Express, a company in which he was a shareholder, partner and officer (vice-president). On October 12, 2007, he voluntarily left his employment. According to the respondent, the company was in financial difficulty; after canvassing with Ron Appel, his partner and president of the company, the various scenarios which could possibly save the company, it was agreed that Mr. Appel would buy the respondent's share in the business. As a result, Mr. Appel paid the respondent the sum of \$550,000, with \$250,000 upfront and the balance in monthly payments over the next five to eight years. According to Mr. Appel and the respondent, the buyout allowed the company to carry on its operations and to save most of the jobs.

[4] The respondent filed a claim for benefits effective April 6, 2008. On May 7, 2008, the respondent was notified by the Commission that he would not be receiving regular benefits because he had voluntarily left his employment without just cause. The respondent appealed the Commission's decision to the Board and argued, *inter alia*, that he had been justified in selling his share in the business to his partner in that he had likely saved the jobs of 50 employees by avoiding the potential bankruptcy of the company. On July 10, 2008, the Board allowed the respondent's appeal. In its view, the respondent had just cause to voluntarily leave his employment at Multi-Freight Express.

[5] After setting out the relevant facts, the Board turned to sections 29 and 30 of the Act. More particularly, it indicated at page 4 of its decision that subparagraph 29(c)(xiv) referred to "... circumstances prescribed in the *Employment Insurance Regulations*, that include Regulation 51...", which it then reproduced.

[6] It then stated, at page 4 of its decision, its conclusion that the respondent "...had just cause to quit his job; having regard to multiple circumstances, he had no reasonable alternative but to quit...". It then said more specifically that the respondent "... had just cause to quit his employment under section 29(c)(xiv) of the Act and Regulation 51...". It then explained why, in its view, the respondent met the requirements of section 51 of the *Employment Insurance Regulations* ("Regulations"). At page 5 of its decision, the Board said the following:

... The Appellant accepted an offer to leave his employment voluntarily (51(1)(a)), and the employer confirmed that the claimant's leaving resulted in the actual preservation of the employment of a co-worker whose employment would otherwise have been terminated in the course of the work-force reduction process (51(1)(b)). Ron Appel, the president of Multi Freight Express, confirmed this was so to the Commission, as document at Exhibit 6-1 – "The employer states the claimant leaving has saved the jobs of others within the company".

Regarding subsection (2) of Regulation 51, the Board finds that for the purpose of the appeal before it and the satisfaction of Regulation 51(1)(a) and (b), as argued above, that the Appellant left his employment in accordance with an employer work-force reduction process, as defined by Regulation 51(2)(a) to (d). The work-force reduction process was initiated by the president and the vice-president, being in this case "the employer" (51(2)(a)). It had as an objective a permanent reduction in the overall number of executive employees; the company has managed to continue because it reduced costs on the executive position the appellant left (51(2)(b)). The work-force reduction process, as defined by Regulation 51, offered both the president and the Appellant the option to leave employment voluntarily, even though only the Appellant was in the position of making that choice because he did not have the resources to buy his partner out and both agreed one of them had to quit if the other revenue-generating employees were not to lose their jobs. Finally, although the employer – the president, Ron Appel, and the vice-president – the Appellant, did not submit to the Commission documentation of the elements of the work-reduction process the Appellant's

voluntary retirement satisfied, the employer did document it in his evidence to the Commission and it was documented by the Commission, as Exhibit 6-1.

[Emphasis added]

[7] The Board then turned to subparagraph 29(c)(vii) of the Act and stated at page 6 of its decision:

In addition to quitting his job as the result of an employer-initiated workforce reduction process, the Appellant has just cause to quit his job under Section 29(c)(vii). He experienced a significant modification of terms and conditions respecting his income. During the year prior to voluntarily leaving his employment, the Appellant took a 40% reduction in his salary from \$100,000 to \$62,000 plus the loss of a valuable car package (Exhibit 6-1).

[8] The Commission appealed the Board's decision to the Umpire who, on January 10, 2010, dismissed its appeal.

[9] The essence of the Umpire's decision can be found at page 3 of his Reasons, where he says:

In my opinion, the claimant's declaration that he left voluntarily corresponds to the facts of the case, as they happened. He was the only one to leave and this can be seen not as "downsizing", or not a "workforce reduction" by the claimant himself. Yet, it was for the Board of Referees, according to the evidence, to decide it under the provisions of sections 29 and 30 of the law and Regulation 51, there was a workforce reduction, in fact. There is no contradiction that the Board of Referees needed to address. The claimant did not change his answers. It was the Commission that completed them and the Board of Referees could rely on this information to reach its conclusions.

[10] The Umpire went on to hold that the Board had correctly found that section 51 of the Regulations applied in the circumstances, adding that the evidence gathered by the Commission (Exhibit 6-1) was sufficient to meet the requirements of paragraph 51(2)(b) of the Regulations.

RELEVANT LEGISLATION

[11] Before stating my specific reasons for concluding that this judicial review application must succeed, I reproduce the relevant provisions of the Act and of the Regulations:

The Act

29. For the purposes of sections 30 to 33,
 (a) “employment” refers to any employment of the claimant within their qualifying period or their benefit period;
 (b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;
 (b.1) voluntarily leaving an employment includes
 (i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,
 (ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and
 (iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred;
 and
 (c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no

La Loi

29. Pour l’application des articles 30 à 33 :
 a) « emploi » s’entend de tout emploi exercé par le prestataire au cours de sa période de référence ou de sa période de prestations;
 b) la suspension est assimilée à la perte d’emploi, mais n’est pas assimilée à la perte d’emploi la suspension ou la perte d’emploi résultant de l’affiliation à une association, une organisation ou un syndicat de travailleurs ou de l’exercice d’une activité licite s’y rattachant;
 b.1) sont assimilés à un départ volontaire le refus :
 (i) d’accepter un emploi offert comme solution de rechange à la perte prévisible de son emploi, auquel cas le départ volontaire a lieu au moment où son emploi prend fin,
 (ii) de reprendre son emploi, auquel cas le départ volontaire a lieu au moment où il est censé le reprendre,
 (iii) de continuer d’exercer son emploi lorsque celui-ci est visé par le transfert d’une activité, d’une entreprise ou d’un secteur à un autre employeur, auquel cas le départ volontaire a lieu au moment du transfert;
 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

reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

- (i) sexual or other harassment,
- (ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,
- (iii) discrimination on a prohibited ground of discrimination within the meaning of the Canadian Human Rights Act,
- (iv) working conditions that constitute a danger to health or safety,
- (v) obligation to care for a child or a member of the immediate family,
- (vi) reasonable assurance of another employment in the immediate future,
- (vii) significant modification of terms and conditions respecting wages or salary,
- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (xi) practices of an employer that are contrary to law,
- (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
- (xiii) undue pressure by an employer on the claimant to leave their employment, and
- (xiv) any other reasonable circumstances that are prescribed.

30. (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their

raisonnable dans son cas :

- (i) harcèlement, de nature sexuelle ou autre,
- (ii) nécessité d'accompagner son époux ou conjoint de fait ou un enfant à charge vers un autre lieu de résidence,
- (iii) discrimination fondée sur des motifs de distinction illicite, au sens de la Loi canadienne sur les droits de la personne,
- (iv) conditions de travail dangereuses pour sa santé ou sa sécurité,
- (v) nécessité de prendre soin d'un enfant ou d'un proche parent,
- (vi) assurance raisonnable d'un autre emploi dans un avenir immédiat,
- (vii) modification importante de ses conditions de rémunération,
- (viii) excès d'heures supplémentaires ou non-rémunération de celles-ci,
- (ix) modification importante des fonctions,
- (x) relations conflictuelles, dont la cause ne lui est pas essentiellement imputable, avec un supérieur,
- (xi) pratiques de l'employeur contraires au droit,
- (xii) discrimination relative à l'emploi en raison de l'appartenance à une association, une organisation ou un syndicat de travailleurs,
- (xiii) incitation induite par l'employeur à l'égard du prestataire à quitter son emploi,
- (xiv) toute autre circonstance raisonnable prévue par règlement.

30. (1) Le prestataire est exclu du bénéfice des prestations s'il perd un emploi en raison de son inconduite ou s'il quitte

misconduct or voluntarily left any employment without just cause, unless
 (a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
 (b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

The Regulations

51. (1) Subject to the Act and these Regulations, but notwithstanding section 30 of the Act, a claimant who has left employment in accordance with an employer work-force reduction process that preserves the employment of co-workers may be paid benefits where

(a) the claimant accepted an offer to leave that employment voluntarily; and
 (b) the employer has confirmed that the claimant's leaving resulted in the actual preservation of the employment of a co-worker whose employment would otherwise have been terminated in the course of the work-force reduction process.

(2) For the purposes of subsection (1), an employer work-force reduction process is a process

(a) that is initiated by the employer;

volontairement un emploi sans justification, à moins, selon le cas :
 a) que, depuis qu'il a perdu ou quitté cet emploi, il ait exercé un emploi assurable pendant le nombre d'heures requis, au titre de l'article 7 ou 7.1, pour recevoir des prestations de chômage;
 b) qu'il ne soit inadmissible, à l'égard de cet emploi, pour l'une des raisons prévues aux articles 31 à 33.

Exclusion non touchée par une perte d'emploi subséquente

(2) L'exclusion vaut pour toutes les semaines de la période de prestations du prestataire qui suivent son délai de carence. Il demeure par ailleurs entendu que la durée de cette exclusion n'est pas affectée par la perte subséquente d'un emploi au cours de la période de prestations.

Le Règlement

51. (1) Sous réserve de la Loi et des autres dispositions du présent règlement et malgré l'article 30 de la Loi, le prestataire qui a quitté son emploi dans le cadre d'une compression du personnel effectuée par l'employeur et ayant pour effet de protéger l'emploi d'autres employés peut recevoir des prestations si :

a) d'une part, il a accepté l'offre de quitter volontairement cet emploi;
 b) d'autre part, l'employeur a confirmé que ce départ a effectivement eu pour effet de protéger l'emploi d'un autre employé, lequel emploi aurait autrement cessé dans le cadre de la compression du personnel.

(2) Pour l'application du paragraphe (1), une compression du personnel est une mesure :

a) qui est instituée par l'employeur;

(b) that has as its objective a permanent reduction in the overall number of employees;

(c) that offers employees the option to leave employment voluntarily; and

(d) the elements of which, including the elements described in paragraphs (a) to (c), are documented by the employer.

51.1 For the purposes of subparagraph 29(c)(xiv) of the Act, other reasonable circumstances include

(a) circumstances in which a claimant has an obligation to accompany to another residence a person with whom the claimant has been cohabiting in a conjugal relationship for a period of less than one year and where

(i) the claimant or that person has had a child during that period or has adopted a child during that period,

(ii) the claimant or that person is expecting the birth of a child, or

(iii) a child has been placed with the claimant or that person during that period for the purpose of adoption; and

(b) circumstances in which a claimant has an obligation to care for a member of their immediate family within the meaning of subsection 55(2).

[Emphasis added]

b) qui vise à réduire de façon permanente l'effectif global;

c) qui offre aux employés le choix de quitter volontairement leur emploi;

d) dont les caractéristiques, y compris celles visées aux alinéas a) à c), figurent dans des documents établis par l'employeur.

51.1 Pour l'application du sous-alinéa 29c)(xiv) de la Loi, sont notamment prévues les circonstances raisonnables suivantes :

a) le prestataire est dans l'obligation d'accompagner vers un autre lieu de résidence une personne avec qui il vit dans une relation conjugale depuis moins d'un an, dans l'un ou l'autre des cas suivants :

(i) l'un d'eux a eu ou a adopté un enfant pendant cette période,

(ii) l'un d'eux est dans l'attente de la naissance d'un enfant,

(iii) un enfant a été placé chez l'un d'eux pendant cette période en vue de son adoption;

b) le prestataire est dans l'obligation de prendre soin d'un proche parent au sens du paragraphe 55(2).

[Non souligné dans l'original]

ANALYSIS

[12] It is clear, in my view, that the Board erred in concluding that section 51 of the Regulations applied in the circumstances of this case. First, the Board was mistaken when it held that an employer workforce reduction process described in section 51 of the Regulations was a “circumstance” prescribed in subparagraph 29(c)(xiv) of the Act. That clearly is an error. It is not

section 51 of the Regulation, but rather section 51.1 thereof which prescribes “circumstances” which may be considered for the purposes of subparagraph 29(c)(xiv) of the Act.

[13] Second, it is also clear, in my view, that the requirements of section 51 of the Regulations are not met in the present matter. Paragraph 51(2)(d) requires that the elements prescribed in paragraphs (a) to (c) thereof be documented by the employer. Thus, the employer must document the fact that the workforce reduction process was initiated by him, that the workforce reduction has as its objective a permanent reduction in the overall number of employees and that it offers employees the option of leaving their employment voluntarily.

[14] I am prepared to accept that elements (a) and (c) of subsection 51(2) may have been documented by the employer, but clearly, element (b) has not. In fact, there are no documents in the record from the employer to support the requirement set out at paragraph 51(2)(d).

[15] Both the Umpire and the Board were of the view that the requirement set out at paragraph 51(2)(b) had been met in the circumstances. More particularly, they relied for this view on Exhibit 6-1 which, in my respectful view, does not satisfy the requirement of paragraph 51(2)(d) that the elements described in paragraphs (a) to (c) be “documented by the employer”. In effect, Exhibit 6-1 is simply a summary of a telephone conversation between a Commission employee and Mr. Appel, the president of Multi Freight Express. That summary does not constitute documentation by the employer of the fact that its workforce reduction “has as its objective a permanent reduction in the overall number of employees”.

[16] The Board gave an additional reason for concluding that the respondent had left his employment with just cause. It held that the reduction of the respondent's salary, from \$100,000 to \$62,000, plus the loss of a valuable car package during the year prior to his voluntary departure from his employment, brought the respondent within the ambit of subparagraph 29(c)(vii) of the Act. I have carefully reviewed the record and it does not appear that the respondent ever gave as a reason for leaving his employment the fact that his wages had been reduced. The record is clear that he left his employment only for the reason which I have explained at paragraph 3 of these Reasons.

[17] Consequently, the Umpire erred in not intervening.

DISPOSITION

[18] For these reasons, I would allow this judicial review application, I would set aside the Umpire's decision and I would return the matter to the Umpire with the direction that the matter be returned to a differently-constituted Board for reconsideration of the Commission's appeal in the light of these Reasons.

“M. Nadon”

J.A.

“I agree.

J. Edgar Sexton J.A.

“I agree.

K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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SHARLOW J.A.

DATED: October 18, 2010

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