Federal Court of Appeal | Cour d'appel fédérale

Date: 20101109

Docket: A-96-10

Citation: 2010 FCA 301

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

DARRICK MACLEOD

Respondent

Heard at Halifax, Nova Scotia, on November 8, 2010.

Judgment delivered at Halifax, Nova Scotia, on November 9, 2010.

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The Attorney General of Canada (the Crown) applies for judicial review of the January 28, 2010 decision of Umpire Riche (the umpire) made pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). The umpire affirmed a decision of the Board of Referees (the board) allowing the appeal of the respondent (the claimant) on the basis that the claimant had "just cause" for leaving his employment. For the reasons that follow, I am of the view that the Crown's application should be allowed.

[2] The test for determining whether an individual had "just cause" under section 29 of the Act is whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment: *Astronomo v. Canada* (*A.G.)* (1998), 229 N.R. 247, 37 C.C.E.L. (2d) 141 at para. 6 (F.C.A.); *Canada (A.G.) v. Imran*, 2008 FCA 17, 378 N.R. 243 at paras. 2, 3.

[3] The claimant was employed with Met Inc. from October 27, 2008 until December 1, 2008, when he left to pursue a non-destructive testing course for Canadian General Standards Board Level II designation. The Commission denied his application for benefits on the basis that he voluntarily left his employment. On appeal, the board concluded that the claimant "did what any other reasonable person would do."

[4] On the Crown's appeal, the umpire referred to the correct test for "just cause" and concluded, at least implicitly, that the board had applied an incorrect test. However, the umpire concluded that "it was not…reasonable to expect the claimant to stay at a Level I position in these circumstances." He appears to have arrived at this conclusion on the basis that the claimant temporarily left his employment, without his employer's permission, for the purpose of pursuing his studies. This finding is inconsistent with the board's factual finding that the employment terminated on December 1, 2008. Although section 117 of the Act grants the umpire broad powers to decide questions of fact or law necessary for the disposition of an appeal, the umpire cannot substitute his assessment of facts for that of the board unless he finds that the board's assessment was not reasonably open to it: *Marlowe v. Canada* (*Attorney General*), 2009 FCA 102, C.L.L.C. 240-006.

[5] More importantly, the umpire's finding is inconsistent with the evidentiary record. The record shows that the claimant left his employment to undertake studies and did not simply attempt to take an unauthorized temporary leave of absence. Specifically, the claimant's notice of appeal to the board and his attached correspondence show that, in the claimant's view, he accepted a term contract until December 8, 2008 and he effectively fulfilled his contract by working until December 1, 2008, when he left his employment to undertake his studies (application record at pp. 68-72).Yet, the claimant received an email from his employer on November 21, 2008, requesting final confirmation as to whether he would continue working, rather than undertake his studies at that time, since the existing project was expected to continue into the spring of 2009. The claimant rejected the employer's request, elected to pursue the non-destructive testing course and suggested that his nephew would be able to replace him (application record at p. 83). Further, at the hearing, the claimant acknowledged that he knew, when he left his employment, the employer had work for him and wanted him to stay.

[6] It is settled law that voluntarily leaving one's employment to undertake studies does not constitute "just cause": *Canada* (*A.G.*) *v. Mancheron*, 2001 FCA 174, 109 A.C.W.S. (3d) 538 at para. 2. Consequently, neither the umpire nor the board could reasonably conclude, on the record, that the claimant had just cause for leaving his employment.

[7] I would allow the application for judicial review, set aside the decision of the umpire and return the matter to the Chief Umpire or one of his delegates for redetermination on the basis that

the claimant left his employment without just cause. The Crown did not seek costs, therefore, I would not award costs.

"Carolyn Layden-Stevenson"
J.A.

“I agree.
Eleanor R. Dawson J.A.”

“I agree
David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-96-10
STYLE OF CAUSE:	**AGC v. MACLEOD**
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	November 8, 2010
REASONS FOR JUDGMENT BY:	LAYDEN-STEVENSON J.A.
CONCURRED IN BY:	DAWSON J.A. STRATAS J.A.
DATED:	November 9, 2010

APPEARANCES:

Mr. MARK FREEMAN	FOR THE APPLICANT
Mr. DARRICK MACLEOD	ON HIS OWN BEHALF

SOLICITORS OF RECORD:

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