Federal Court of Appeal | Cour d'appel fédérale

Date: 20101123

Docket: A-51-10

Citation: 2010 FCA 314

CORAM: **NOËL J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RENÉ LEMIRE

Respondent

Heard at Montréal, Quebec, on November 4, 2010.

Judgment delivered at Ottawa, Ontario, on November 23, 2010.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

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

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The respondent was dismissed for having sold contraband cigarettes on his work premises. His claim for employment insurance benefits was denied by the Canada Employment Insurance Commission (the Commission) on the ground of misconduct. A Board of Referees established under the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) decided that there was no misconduct. The Umpire confirmed the decision of the Board of Referees. The Commission now seeks judicial review of that decision. For the following reasons, I would allow the application for judicial review.

Background and Facts

[2] The respondent was dismissed by his employer, Les Rôtisseries St-Hubert, a large, family-oriented restaurant chain specializing in roasted chicken. At the time of his dismissal, the respondent was employed as a delivery person at the chain's Drummondville restaurant, and had been for many years.

[3] The Umpire summarized as follows the events leading to the dismissal, according to the respondent's account (at pages 1 and 2 of his decision):

> [TRANSLATION]
> "My director caught me selling a carton of contraband cigarettes to a co-worker and another one to my manager. I was on work premises, I was in uniform, ready for work, but I was not working. It was October 17, but I sold one on Thursday and the other one on Friday."
> The employer has a policy on this matter: "According to the law, we cannot sell contraband cigarettes. But I was in the parking lot."
> The claimant was aware of the policy before the incident occurred, but he said that "my boss never told me that I couldn't sell cigarettes there."
> Why were you dismissed? "I don't know why, after 17 years of service ... I think that he should have warned me before that I could not sell cigarettes in the parking lot when it is not my shift."
> "I am filing a grievance and I spoke to my union representative."

Decisions

[4] The Board of Referees decided that in order for there to be misconduct, "the act complained of must have been wilful" or of "such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance". In the respondent's case, the Board of Referees found, without providing a detailed explanation, that "[i]n this case, no intent of that kind was shown in the current matter. There was no complaint or conviction".

[5] The Umpire was of the opinion that the respondent's illegal act did not affect the respondent's job as a delivery person or directly harm the employer's business. He added that the record did not show the laying of criminal charges or a conviction in relation to the illegal act. He noted that the respondent sold contraband cigarettes to his immediate superior at his request. The Umpire therefore dismissed the Commission's appeal.

Parties' positions

[6] The Commission submits that the decisive error made by the Board of Referees and the Umpire is their erroneous interpretation of the notion of misconduct under section 30 of the Act, which is a question of law reviewable on a standard of correctness. The Umpire allegedly erred in law in finding that the respondent's actions could not constitute misconduct because it was not established that his actions had directly harmed the employer's business or resulted in a complaint or a criminal or penal conviction.

[7] As for the respondent, he submits that the applicable standard of review is reasonableness because the decisions of the Board of Referees and the Umpire are based on a lack of adequate evidence of misconduct. Alternatively, the respondent submits that the Umpire correctly interpreted the notion of misconduct under section 30 of the Act by requiring that the acts complained of have potential repercussions on the employment, and no such repercussions were established in this case. There must, in fact, be a causal link between the alleged misconduct and the employment.

Standard of Review

[8] It is established in the case law of this Court that the standard of review applicable to the decisions of an Umpire is correctness with regard to questions of law and reasonableness with regard to the application of the law to the facts: *Budhai v. Canada (Attorney General)*, 2002 FCA 298, at paragraphs 47–48; *Elite Mac v. Canada (Attorney General)*, 2008 FCA 184, at paragraph 6. Therefore, it is the correctness standard that applies to the interpretation of the notion of misconduct under section 30 of the Act: *Canada (Attorney General) v. McNamara*, 2007 FCA 107, 366 N.R. 201, at paragraph 13; *Canada (Attorney General) v. Hallée*, 2008 FCA 159, at paragraph 13.

[9] The Court must determine, according to the correctness standard, whether the Umpire erred in identifying the standard of review applicable to the Board of Referees' decision. In this case, therefore, before deferring to the Board of Referees' assessment of the evidence, the Umpire had to ensure himself that the Board had correctly applied the legal test for misconduct. The Umpire's decision in that respect is reviewable on the standard of correctness: *Budhai v. Canada (Attorney General)*, above, at paragraph 22; *Canada (Attorney General) v. Roberge*, 2009 FCA 336, 402 N.R. 76, at paragraph 6.

[10] Moreover, this is the approach adopted by the Act, which does not restrict the grounds of appeal of a Board of Referees' decision to an Umpire on a question of law or natural justice, but does establish a more restrictive framework governing appeals on an erroneous finding of fact. Subsection 115(2) of the Act provides as follows:

115. (2) The only grounds of appeal are that	115. (2) Les seuls moyens d'appel sont les suivants :
(*a*) the board of referees failed to	*a*) le conseil arbitral n'a pas observé un

observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(*b*) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or	*b*) le conseil arbitral a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(*c*) the board of referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	*c*) le conseil arbitral a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

Notion of misconduct

[11] Subsection 30(1) of the Act provides that a claimant "is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause . . .". The legal notion of misconduct for the purposes of this provision has been defined in the case law as wilful misconduct, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal: *Canada (A.G.) v. Tucker*, [1986] 2 F.C. 329 (C.A.), at paragraph 15; *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, 279 D.L.R. (4th) 121, at paragraph 14.

[12] The two components of this jurisprudential definition have also been considered by the case law.

[13] The notion of wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious,

deliberate or intentional: *Canada (Attorney General) v. Secours* (1995), 179 N.R. 132 (F.C.A.). Therefore, no criminal or penal conviction is required to establish misconduct: *Canada (Attorney General) v. Granstrom*, 2003 FCA 485 at paragraph 12.

[14] To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment: *Canada (Attorney General) v. Brissette*, [1994] 1 F.C. 684 (C.A.), at paragraph 14; *Canada (Attorney General) v. Cartier*, 2001 FCA 274, 284 N.R. 172, at paragraph 12; *Canada (Attorney General) v. Nguyen*, 2001 FCA 348, 284 N.R. 260, at paragraph 5.

[15] However, this is not a question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal: *Meunier v. Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377 at paragraph 2.

[16] This legal test established in the case law to circumscribe the notion of misconduct set out in section 30 of the Act must be viewed within the general context of the Act. Indeed, this Act seeks, above all, to protect Canadian workers from involuntary job losses related to the financial difficulties of the businesses they work for or economic troubles. That is the primary purpose of this legislation, to which were added, as time went by, certain additional employment-related programs. Thus, employment insurance contributors need not bear the burden of those who leave their

employment voluntarily without just cause or lose their employment because of their misconduct. That is the specific legislative framework within which the notion of misconduct must be considered.

Analysis

[17] First of all, I note that the employer's policy, acknowledged by both the respondent and the Umpire, states that employees cannot sell contraband cigarettes on work premises. It is also undisputed that the respondent sold contraband cigarettes in the employer's parking lot while wearing his work uniform.

[18] The items of evidence accepted by the Board of Referees to decide that there was no misconduct are (a) the lack of a criminal or penal complaint or conviction against the claimant for those contraband sales, (b) the fact that the sales were made outside working hours and (c) the lack of a warning by the employer prior to the dismissal.

[19] As discussed above, the lack of a criminal or penal complaint or conviction is irrelevant for the purposes of misconduct when, as is the case here, the facts in question are established. With respect, the decisions to the contrary by the Board of Referees and the Umpire summarily trivialize illegal activities carried out by employees on their work premises. That is all the more remarkable in this case, since the evidence shows that the employer has a policy prohibiting the sale of contraband cigarettes.

[20] As well, although the illegal sales took place after the employee's working hours, it is indisputable that they occurred on the work premises, that is, the employer's parking lot. The respondent is a delivery person, and in this context it is reasonable to consider the employer's parking lot as work premises. One can readily understand that a family-oriented restaurant chain would have little tolerance for an employee who conducts illegal transactions on his work premises while wearing his employer's uniform. Furthermore, the Court notes that the employer had a policy concerning this matter which the respondent chose to disregard.

[21] With regard to the lack of a warning, the applicable collective agreement provides that in the event of dismissal for serious cause, no such warning is required. The employer decided to dismiss the respondent without a warning because the employer considered that the illegal act was serious cause. The evidence in the record shows that even the union representative was of the opinion that a suspension of three to six months should have been imposed instead of the dismissal (at page 34 of the record). Such a suspension communicates the seriousness the respondent's actions, even for his union. Moreover, paragraph 29(*b*) of the Act provides that loss of employment includes suspension for the purposes of applying section 30 of the Act.

[22] In *Canada (Attorney General) v. Marion*, 2002 FCA 185, at paragraphs 2 and 3, Justice Létourneau noted that it is not for a Board of Referees to rule on the severity of the disciplinary measure but, rather, to decide whether the actions were misconduct under the Act:

> In that decision, the Board of Referees found that the actions of the claimant in taking drugs, specifically smoking a joint on the job, did not disqualify him from receiving benefits under section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (Act). The ground for the Board's decision was that the dismissal without notice of an employee with 14 years of service in these circumstances, when it was his first offence of that

> nature, was an excessive and unfair penalty given that there were other workers who had been suspended as a warning for similar behaviour (consuming alcohol).
>
> The role of the Board of Referees was to determine not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal, but rather whether the employee's conduct amounted to misconduct within the meaning of the Act: *Fakhari and Attorney General of Canada* (1996), 197 N.R. 300 (F.C.A.); *A.G.C. v. Namaro* (1983), 46 N.R. 541 (F.C.A.); *Canada v. Jewell* (1994), 175 N.R. 350 (F.C.A.); *A.G.C. v. Secours* (1995), 179 N.R. 132 (F.C.A.); *Attorney General of Canada v. Langlois*, A-94-95, February 21, 1996 (F.C.A.). [Emphasis added]

[23] In addition, in *Canada (Attorney General) v. Jolin*, 2009 FCA 303, 398 N.R. 375, an employee with 10 years of service with his employer, who was dismissed following a refusal to work, challenged the Commission's refusal to pay him the benefits provided for by the Act. In that case, the Umpire disagreed that an employee with 10 years of service could be dismissed for refusing to work. This Court decided, to the contrary, that the Board of Referees had exceeded its jurisdiction in ruling on the justification of the claimant's dismissal, which was an error that the Umpire was bound to correct. The following principle is set out at paragraph 11 of that decision:

> Here, there is no doubt that the claimant's conduct was wilful and that the claimant knew that this conduct could lead to serious disciplinary consequences. In fact, he expected to be suspended. That the disciplinary sanction was harsher than the one the claimant expected does not mean that his conduct was not misconduct.

[24] In this case, the Board of Referees did not apply the proper legal test to decide the issue of misconduct, and its error in that respect was reviewable by the Umpire on a standard of correctness. The Umpire was bound to intervene, and he therefore made a reviewable error in failing to set aside the decision of the Board of Referees.

[25] In this instance I would allow the application for judicial review, set aside the Umpire's decision and refer the matter back to the Chief Umpire, or his designate, for redetermination on the basis that the respondent lost his employment because of his misconduct and was therefore not entitled to receive employment insurance benefits.

"Robert M. Mainville"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-51-10
(APPEAL OF AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION DATED DECEMBER 4, 2009, DOCKET NO. CUB 73786.)	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. RENÉ LEMIRE
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CONCURRED IN BY:	NOËL J.A. PELLETIER J.A.
REASONS DATED:	November 23, 2010

APPEARANCES:

Chantal Labonté Pauline Leroux	FOR THE APPLICANT
Jean Guy Ouellete	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPLICANT
Ouellet, Nadon et Associées Montréal, Quebec	FOR THE RESPONDENT