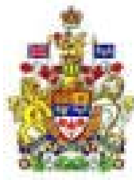
Federal Court of Appeal



Cour d'appel fédérale

Date: 20110615

Docket: A-434-10

Citation: 2011 FCA 205

CORAM: **BLAIS C.J.**
SHARLOW J.A.
TRUDEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GEORGE HAMM

Respondent

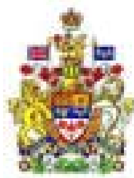
Heard at Vancouver, British Columbia, on June 8, 2011.

Judgment delivered at Ottawa, Ontario, on June 15, 2011.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: BLAIS C.J.
SHARLOW J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] This is an application for judicial review by the Attorney General of Canada of Umpire Durocher's decision in CUB 75288 dealing with the respondent's eligibility for benefits under a Long-Tenured Worker (LTW) program created pursuant to *An Act to amend the Employment Insurance Act and to increase benefits*, S.C. 2009, c. 30 (referred to colloquially as "Bill C-50"). The Umpire's interpretation of subsections 10(6), 10(8) and 50(10) of the *Employment Insurance*

Act, S.C. 1996, c. 23 (the Act), as applied to the request of the respondent Mr. Hamm for LTW status, is at the core of this application.

[2] I would allow the application for the reasons that follow.

The relevant facts

[3] In the course of his employment, Mr. Hamm filed for work-sharing benefits and a claim was established effective November 2, 2008. This type of benefit is available following an agreement between workers and the employer resulting in a reduction of hours of work. Such arrangements must be approved by the Commission which recognizes that, under certain circumstances, they are preferable to lay-offs. Section 24 of the Act specifically deals with work-sharing, along with Regulations 42 through 49 of the *Employment Insurance Regulations*, SOR/96-332, (the Regulations).

[4] Of course, employees participating in a work-sharing program will be eligible for regular benefits if they become unemployed. This is what happened to Mr. Hamm.

[5] The record shows that Mr. Hamm was paid $87 in work-sharing benefits in 2008. Then, he became unemployed and filed a renewal claim for benefits on February 18, 2009. It was accepted and made effective February 15, 2009 as an extension of the claim established effective November

2, 2008. As a result, the respondent's benefits were converted from work-sharing benefits to regular benefits as of February 15, 2009.

[6] In November 2009, the respondent inquired with the Commission about being approved for LTW status. His inquiries followed the enactment, on November 5, 2009, of Bill C-50, which was adopted to assist long tenure workers who lost their employment as a result of the recession in the late 2000 years. Bill C-50 amended the Act until September 11, 2010 to increase the maximum number of weeks for which benefits could be paid to certain claimants.

[7] The respondent's request was denied because he did not meet the requirements for eligibility set out in Bill C-50: a claimant's benefit period had to have been established between January 4, 2009 and September 11, 2010. The benefit period of Mr. Hamm had been established on November 2, 2008. Moreover, it was found that Mr. Hamm had not shown good cause to have his claim postdated due to the implementation of Bill C-50 (Commission's decision letter of December 17, 2009, applicant's record, tab 3B at page 46).

[8] Mr. Hamm successfully appealed the Commission's decision to the Board of Referees, which decision was upheld by the Umpire. Ensued the within application by the Commission.

The decision of the Board of Referees

[9] The Board of Referees allowed the appeal under subsection 10(6) of the Act. It was of the view that the Commission misinformed the respondent when he submitted his claim for benefits in February 2009. The respondent's evidence, which the Board of Referees found credible, is summarized as follows:

> …the Commission staff advised him that his best option was to reactivate his existing claim of November… 2008. At no time, during the Commission interview was the [respondent] advised of the [LTW] program and how best to file that type of application to allow him to be considered for the [LTW] program. The [respondent] had requested the Commission staff to provide him with all his options and what would be best for him (Board of Referees' decision, applicant's record, volume 1, tab 3B at page 65).

[10] The Board of Referees went on to say that the Commission staff had "either ignored or omitted to advise the [respondent] of the [LTW] program and how to best apply as a new claim" (*ibidem* at page 66). Taking support from a previous decision in CUB 13260, the Board of Referees held that:

> …where the Commission fails to advise a claimant as to the options available (i.e. cancellation) when a renew claim is filed, cancellation may be possible (*ibidem*).

The Decision of the Umpire

[11] The Umpire found that the Commission had failed to inform Mr. Hamm, “at the time he applied for benefits in February 2009, and thereafter,” that he could qualify for benefits under the [LTW] program (Umpire’s decision, applicant’s record, tab 3B at page 13). After mentioning that work-sharing benefits are not regular benefits, the Umpire noted that “(a)ccording to the docket, in 2008, only one day of benefits was paid to [Mr. Hamm]” (*ibidem* at page 14). From these findings, he drew two conclusions: (a) the benefit period, established in November 2008, had ended under subsection 10(8) of the Act; (b) when Mr. Hamm became unemployed in February 2009, he should have been advised to enter a new claim under the LTW program, “which was then available” (*ibidem*).

[12] Having found that an agent of the Commission had wrongly advised Mr. Hamm and on the basis that neither Mr. Hamm nor the Commission can plead ignorance of the law, the Umpire took comfort from the dissenting opinion of Hugessen J.A. (as he then was) in the case of *Granger v. Canada (Employment and Immigration Commission)* (C.A.), [1986] 3 F.C. 70, affirmed [1989] 1 S.C.R. 141 [*Granger*], to hold that “the Commission had the authority to cancel the November 2008 claim or payment if it decided that this was the obstacle to a claim under the [LTW] provisions” (*ibidem*).

[13] Finally, and because he saw “some form of retroactivity” in Bill C-50, the Umpire expressed the view that the Commission could also “have waived or varied the conditions and requirements, in

order to rectify the situation, under the provisions of subsection 50(10) of the Act" (*ibidem* at pages 15 and 16). He therefore dismissed the appeal by the Commission and reserved Mr. Hamm's rights to apply for LTW status.

[14] With respect, I conclude that the decision of the Board of Referees and the Umpire are based on an incorrect interpretation of the relevant provisions of the Act, as well as a palpable and overriding error of fact. It follows that the Umpire's decision confirming the decision of the Board of Referees cannot stand.

Analysis

A. The Relevant Legislation

[15] Section 10 of the Act contains rules regarding commencement, length and termination of a claimant's benefit period. For the purposes of this application, it suffices to know that subject to the exceptions mentioned in the Act, a benefit period generally lasts 52 weeks (subsection 10(2)). Specifically, as explained further in the discussion about the LTW provisions, that 52 week period is automatically extended by the number of weeks in which a claimant is employed in work-sharing employment (Regulation 45). Moreover, a benefit period will not be established if one is already in progress. A benefit period terminates on the occurrence of one of the events mentioned in subsection 10(8) while a benefit period may be cancelled where the conditions of subsection 10(6) are met.

[16] In its relevant parts, section 10 reads:

Beginning of benefit period	Début de la période de prestations
10. (1) A benefit period begins on the later of	**10.** (1) La période de prestations débute, selon le cas :
(*a*) the Sunday of the week in which the interruption of earnings occurs, and	*a*) le dimanche de la semaine au cours de laquelle survient l'arrêt de rémunération;
(*b*) the Sunday of the week in which the initial claim for benefits is made.	*b*) le dimanche de la semaine au cours de laquelle est formulée la demande initiale de prestations, si cette semaine est postérieure à celle de l'arrêt de rémunération.
Length of benefit period	Durée de la période de prestations
(2) Except as otherwise provided in subsections (10) to (15) and section 24, the length of a benefit period is 52 weeks.	(2) Sous réserve des paragraphes (10) à (15) et de l'article 24, la durée d'une période de prestations est de cinquante-deux semaines.
…	[…]
Cancelling benefit period	Annulation de la période de prestations
(6) Once a benefit period has been established for a claimant, the Commission may	(6) Lorsqu'une période de prestations a été établie au profit d'un prestataire, la Commission peut :
(*a*) cancel the benefit period if it has ended and no benefits were paid or payable during the period; or	*a*) annuler cette période si elle est terminée et si aucune prestation n'a été payée, ou ne devait l'être, pendant cette période;
(*b*) whether or not the period has ended, cancel at the request of the	*b*) à la demande du prestataire, que la période soit ou non terminée,

claimant that portion of the benefit period immediately before the first week for which benefits were paid or payable, if the claimant

(i) establishes under this Part, as an insured person, a new benefit period beginning the first week for which benefits were paid or payable or establishes, under Part VII.1, as a self-employed person within the meaning of subsection 152.01(1), a new benefit period beginning the first week for which benefits were paid or payable, and

(ii) shows that there was good cause for the delay in making the request throughout the period beginning on the day when benefits were first paid or payable and ending on the day when the request for cancellation was made.

…

annuler la partie de cette période qui précède la première semaine à l’égard de laquelle des prestations ont été payées ou devaient l’être si :

(i) d’une part, une nouvelle période de prestations, commençant cette semaine-là, est, si ce prestataire est un assuré, établie à son profit au titre de la présente partie ou est, si ce prestataire est un travailleur indépendant au sens du paragraphe 152.01(1), établie à son profit au titre de la partie VII.1;

(ii) d’autre part, le prestataire démontre qu’il avait, durant toute la période écoulée entre la date à laquelle des prestations lui ont été payées ou devaient l’être et la date de sa demande d’annulation, un motif valable justifiant son retard.

[…]

End of benefit period

(8) A benefit period ends when any of the following first occurs:

(*a*) no further benefits are payable to the claimant in their benefit period, including for the reason that benefits have been paid for the maximum number of weeks for which benefits may be paid under section 12;

(*b*) the benefit period would otherwise end under this section; or

Fin de la période

(8) La période de prestations prend fin à la date de la première des éventualités suivantes à survenir :

a) le prestataire n’a plus droit à des prestations au cours de sa période de prestations, notamment parce qu’elles lui ont été versées pour le nombre maximal de semaines prévu à l’article 12;

b) la période se trouverait autrement terminée au titre du présent article;

(*c*) [Repealed, 2002, c. 9, s. 12]	*c*) [Abrogé, 2002, ch. 9, art. 12]
(*d*) the claimant	*d*) le prestataire, à la fois :
(i) requests that their benefit period end,	(i) demande de mettre fin à une période de prestations établie à son profit,
(ii) makes a new initial claim for benefits under this Part or Part VII.1, and	(ii) formule une nouvelle demande initiale de prestations au titre de la présente partie ou de la partie VII.1,
(iii) qualifies, as an insured person, to receive benefits under this Part or qualifies, as a self-employed person within the meaning of subsection 152.01(1), to receive benefits under Part VII.1.	(iii) remplit les conditions qui lui donnent droit aux prestations prévues par la présente partie, dans le cas où il est un assuré, ou par la partie VII.1, dans le cas où il est un travailleur indépendant au sens du paragraphe 152.01(1).

[17] As mentioned earlier, section 24 of the Act deals with work-sharing benefits. The regulatory scheme relating to these particular benefits is set out in Regulations 42 to 49. Of particular interest to this application are Regulations 42, 45 and 46, which vary the general rules in such matters as the extension of a qualifying period or benefit period (not exceeding the number of weeks of the work-sharing employment) and the deferral of all or part of the waiting period until the work-sharing employment has terminated.

[18] They read:

WORK-SHARING BENEFITS

42. Work-sharing benefits are payable to a claimant who is employed in work-sharing employment for each week of unemployment that falls in a benefit period established for the claimant, and subject to sections 43 to 49, the Act and any regulations made under the Act apply to the claimant, with such modifications as the circumstances require.

…

45. Where a benefit period has been established in respect of a claimaint and for any week during that benefit period the claimant is employed in work-sharing employment, the benefit period shall be extended by the total of those weeks and subsections 10(12) to (15) of the Act apply, with such modifications as the circumstances require.

46. Where a claimant becomes employed in work-sharing employment and a waiting period or any portion of that period has not been served by the claimant as required by section 13 of the Act or earnings have not been deducted as required by subsection 19(1) of the Act, the serving of the period or the deduction of the earnings shall be deferred until that employment has terminated.

PRESTATIONS POUR TRAVAIL PARTAGE

42. Des prestations pour travail partagé sont payables au prestataire qui exerce un emploi en travail partagé pour chaque semaine de chômage comprise dans une période de prestations établie à son profit et, sous réserve des articles 43 à 49, la Loi et ses règlements s'appliquent au prestataire, avec les adaptations nécessaires.

[…]

45. Lorsqu'une période de prestations a été établie au profit du prestataire et que celui-ci exerce un emploi en travail partagé au cours d'une ou plusieurs semaines de cette période, celle-ci est prolongée du nombre de ces semaines et les paragraphes 10(12) à (15) de la Loi s'appliquent, avec les adaptations nécessaires.

46. Lorsque le prestataire commence à exercer un emploi en travail partagé et que le délai de carence prévu à l'article 13 de la Loi n'est pas écoulé ou que les déductions visées au paragraphe 19(1) de la Loi n'ont pas été effectuées, le délai de carence ou la partie non écoulée de celui-ci ou les déductions sont reportés jusqu'à la fin de l'emploi en travail partagé.

B. Standard of Review

[19] Sitting in judicial review, this Court is required to determine if, in his review of the decision of the Board of Referees, the Umpire erred in the selection of the correct standard of review and its application to that decision (*MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306 at paragraph 19).

[20] The Umpire's task is to review the Board of Referee's determinations on questions of law on a standard of correctness and its determinations on questions of fact and mixed fact and law on a standard of reasonableness (*Attorney General of Canada v. White*, 2011 FCA 190 at paragraph 2).

C. Mr. Hamm's benefit period had not ended under subsection 10(8) of the Act

[21] The Umpire accepted the fact that in the context of the work-sharing program, a benefit period had been established in favour of Mr. Hamm in November 2008. However, he concluded that the benefit period had ended pursuant to subsection 10(8) of the Act. While the Umpire was free to rely on any relevant section of the Act, I note that reliance on subsection 10(8) was his choice, as the Board of Referees had grounded its decision on subsection 10(6). I infer from the Umpire's reasons on this topic that he more particularly relied on paragraph 10(8)(*a*), which provides for the end of a benefit period when benefits are no longer payable. Indeed, the Umpire found that (1) only one day of benefits was paid to the claimant in November 2008; and (2) work-

sharing benefits are not regular benefits (Umpire's decision, applicant's record, tab 3B at pages 13 and 14).

[22] There is no doubt that work-sharing benefits are different than regular benefits. The first ones are reserved for individuals who participate in work-sharing programs where they receive their wages for the time worked and unemployment benefits for the days they do not work. They are specifically excluded from the statutory definition of "regular benefits" under subsection 2(1) of the Act. This difference, however, does not justify the conclusion reached by the Umpire.

[23] I agree with the Attorney General of Canada that Mr. Hamm did not meet the conditions of paragraph 10(8)(*a*) of the Act. It could not be said that Mr. Hamm had been paid benefits for the maximum number of weeks for which benefits could be paid in his benefit period. Moreover, the change in type of benefits did not signal the end of the benefit period established in November 2008. Claimants may receive more than one type of benefits within the same benefit period, *Canada (Attorney General) v. Brown*, 2001 FCA 385 at paragraph 6.

[24] At the hearing of this application, it was not contested that, in accordance with Regulations 45 and 46, Mr. Hamm's benefit period had consisted of 61 weeks, rather than the usual 52 weeks. It ran between November 2008 and January 2010.

[25] Paragraph 10(8)(*d*) also provides that a benefit period may end upon request by a claimant. The same can be said for the cancellation of a benefit period (paragraph 10(6)(*b*)). Of course, no

such requests were made by Mr. Hamm. I discuss this matter below when dealing with the Umpire's conclusion that the Commission misinformed Mr. Hamm.

D. Mr. Hamm's benefit period could not be cancelled under subsection 10(6) of the Act

[26] Subsection 10(6) of the Act, cited above, provides for the conditions under which the Commission may cancel a benefit period. Here, Mr. Hamm's benefit period could not be cancelled in February 2009 under paragraph 10(6)(*a*) because benefits had been paid in that period. He had received $87 in work-sharing benefits. Neither could it be cancelled under paragraph 10(6)(*b*), unless the respondent showed that between November 2008 (when the benefit period was established) and November 2009 (when Mr. Hamm applied for LTW status), there was a good cause for the delay in requesting the cancellation.

[27] The Umpire found that "[t]he circumstances as alleged by [Mr. Hamm], [did] constitute good cause" (*ibidem* at page 15) because an agent of the Commission had misinformed the respondent by not telling him to enter a new claim under the LTW program. In that context, he found that "the Commission had the power and authority to correct the error" (*ibidem*). Clearly, this conclusion is based on an erroneous finding of fact.

[28] As argued by the Attorney General of Canada, the Commission could not advise the respondent in February 2009 about his eligibility for LTW status and recommend that he apply for a new benefit period because the LTW program did not exist at the time. Bill C-50 was enacted on

November 5, 2009 and made retroactive to January 4, 2009. It was not introduced in the House of Commons until September 16, 2009 and in the Senate until November 4, 2009 (Canada Legislative Index, 40th Parliament – 2nd session (January 26, 2009 – December 30, 2009)). There was no evidence on record showing that the Commission should have known, as early as February 2009, that Bill C-50 would be enacted or that it would provide benefits for claimants establishing a benefit period starting on January 4, 2009. None of the conditions set forth in subsection 10(6) were met.

[29] In this vein, it was wrong of the Umpire to rely on the dissenting opinion in *Granger* and suggest that the Commission could either cancel or terminate Mr. Hamm's benefit period to bring him within the eligibility window of Bill C-50. Despite the utmost respect that I have for Hugessen J.A. (as he then was), the fact remains that the Supreme Court of Canada unanimously upheld the decision of our Court in *Granger* for the reasons given by Pratte J.A. Since then, *Granger* has been followed consistently (*Satinder v. Canada (Attorney General)*, 2002 FCA 491 at paragraph 9; *Canada (Attorney General) v. Buors*, 2002 FCA 372 at paragraph 5; *McCague v. Canada (Minister of National Defence)*, 2001 FCA 228 at paragraph 37; *Pfizer Inc. v. Canada (Commissioner of Patents)* (F.C.A.), [2000] F.C.J. No. 1801 at paragraph 24; *Canada (Attorney General) v. Duffenais* (F.C.A.), [1993] F.C.J. No. 387 at paragraph 4; *Barzan v. Canada (Minister of Employment and Immigration)* (F.C.A.), [1993] F.C.J. No. 311 at paragraph 2; *Canada (Minister of Employment and Immigration) v. Lidder* (F.C.A.), [1992] F.C.J. No. 212 at paragraphs 19 and 20; and *Canada (Attorney General) v. Young* (F.C.A.), [1989] F.C.J. No. 634 at paragraph 40). *Granger* stands for the proposition that "(a) judge is bound by the law. He cannot refuse to apply it, even on grounds of equity" (*Granger* at paragraph 9).

E. The Commission has no power to amend the Act

[30] Finally, in a more general way, the Umpire's decision is based on the erroneous premise that the Commission could, using its discretionary power under subsection 50(10) of the Act, vary the conditions and requirements of subsections 10(6) and 10(8), dealing with cancellation and ending of benefit periods, in order to bring Mr. Hamm within the eligibility period of Bill C-50.

[31] Subsection 50(10) of the Act does not apply. It deals generally with procedural matters and gives the discretionary authority to the Commission to relax the requirements set out in section 50. It cannot be used to waive the conditions of any other section of the Act (*Paxton v. Canada (Attorney General)*, 2002 FCA 360 at paragraphs 11 and 12).

[32] As sympathetic as Mr. Hamm's case may well have appeared to the Umpire, and as unfair as the cut-off date in Bill C-50 may have been seen in that context, it is trite law that an umpire is bound by the law and cannot simply apply equity in order to benefit a claimant.

Conclusion

[33] Therefore, I would allow this application for judicial review. I would set aside the decision of the Umpire in CUB 75288 and I would send the matter back to the Chief Umpire or his designate with the direction that the decision of the Board of Referees in Case Number 09-0209 be set aside

and the decision of the Commission, denying Mr. Hamm additional weeks of regular benefits under the LTW program, be restored.

"Johanne Trudel"

J.A.

"I agree
Pierre Blais C.J."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	June 15, 2011

APPEARANCES:

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