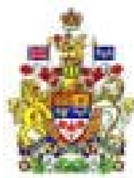
Federal Court of Appeal  Cour d'appel fédérale

**Date: 20110614**

**Docket: A-457-10**

**Citation: 2011 FCA 204**

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

**BETWEEN:**

**JAMES JAMIESON**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

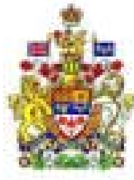
Heard at Vancouver, British Columbia, on June 8, 2011.

Judgment delivered at Ottawa, Ontario, on June 14, 2011.

REASONS FOR JUDGMENT BY: BLAIS C.J.

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

Federal Court of Appeal



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## REASONS FOR JUDGMENT

**BLAIS C.J.**

[1] The applicant asks for judicial review of the decision of an Umpire dated September 29, 2010, which upheld the Board of Referees' decision (Board) that the applicant had voluntarily left his employment without just cause and was therefore disqualified under sections 29 and 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (Act) from receiving employment insurance benefits.

**BACKGROUND**

[2] The applicant was offered the position of Chief Engineer at the Plaza 500 Hotel in Vancouver in July 2008. An employment contract was signed on July 3, 2008, stipulating the terms and conditions of the position. Among these conditions were provisions dealing with vacations, which stipulated that the applicant would be entitled to three weeks of paid holidays upon completing one year of service.

[3] The issue in this application relates to a leave request made by Mr. Jamieson in March 2009. He asked for two days off on March 12 and 13, 2009. The employer denied the request on the ground that the applicant did not yet have leave owed to him under the contract, that inadequate notice had been given and because operational issues would require him to be present at work for those two days.

[4] While the events that followed are the source of some dispute, it is clear that the applicant disagreed with his employer's decision and felt that he was in fact entitled to take those two days off, either as vacation in lieu of previous overtime work or because he felt that the hotel could manage without him for those two days. The record also suggests that the applicant informed his employer that he would not be at work for the two days in question, regardless of the fact that his leave request had been denied.

[5] On March 11, 2009, having received confirmation from the applicant that he would not be at work on the next two days (March 12 and 13), the employer requested that he return his keys,

parking pass and name tag. Later, that afternoon, the applicant tendered a letter of resignation citing his employer's refusal of his leave request as his reason for resigning: Respondent's Record, Tab A, pages 76, 77. The letter is dated March 10, 2009. The applicant says that this is a typographical error and the letter was actually prepared on March 11, 2009, but in my view, nothing turns on whether the letter was prepared on March 10 or March 11. On March 13, 2009, the employer sent the applicant a letter accepting his resignation and reiterating its view that the applicant had abandoned his employment.

[6] The applicant filed a claim for employment insurance benefits, describing the reason for his loss of employment as a dismissal. After interviewing the applicant and the employer's representative, the Employment Insurance Commission (Commission) determined that he had voluntarily left his employment without just cause and denied his application for benefits.

**BOARD OF REFEREES' DECISION**

[7] Sitting on appeal from the Commission's decision, the Board found that the applicant had left his employment voluntarily by choosing to take the unauthorized leave.

[8] The Board then considered the issue of just cause under section 29 of the Act. The Board ultimately found that reasonable alternatives to resigning were available to the applicant, namely to continue working until his one year anniversary date and seek authorized leave, to file a request for medical leave or to respond to his employer's request for the return of hotel belongings by assuring that he would not in fact take the two days off and thereby save his employment. Further, the Board

found insufficient evidence to conclude that the applicant's working conditions provided just cause for voluntarily leaving his employment.

**UMPIRE'S DECISION**

[9] In reference to the grounds for review set out in subsection 115(2) of the Act, the Umpire was satisfied that the Board's decision did not disclose an error of law or findings of fact made without regard to material before it, and consequently upheld the Board's decision.

**APPLICANT'S POSITION**

[10] The applicant challenges the Umpire's decision on the following grounds: (1) that the Umpire erred in failing to find that the record establishes that the applicant was dismissed and did not leave his employment voluntarily; (2) that the Umpire failed to consider evidence of workplace antagonism; and (3) that the Umpire erred in failing find that the decision of the Board was biased because it was unduly influenced by flawed written submissions on the part of the Commission.

**RESPONDENT'S POSITION**

[11] Referring to a decision of our Court, *Canada (Attorney General) v. Peace*, 2004 FCA 56 at para. 20, citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, the Respondent suggests that:

> "So long as this determination is reasonable and adequately supported by the evidence – and not made in a perverse or capricious manner or without regard for the material before it – the Umpire has no jurisdiction to interfere even where contradictory evidence exists. For this reason, the Umpire is not permitted to substitute his own assessment of the facts and of the credibility of the witnesses for that

> of the Board. His function is limited to deciding whether the view of facts taken by the Board was reasonably open to it on the record."

[12] The respondent also suggests that the Umpire committed no reviewable error that justifies the intervention of our Court and, therefore, that application should be dismissed.

**ANALYSIS**

[13] The issue in this case is whether the applicant voluntarily left his employment and, if so, if he had demonstrated just cause pursuant to section 29 of the Act. The applicant argues that the issue of dismissal should have formed part of the Board's or the Umpire's considerations, and that he was denied procedural fairness by being prevented to tender evidence pertaining to this issue.

[14] The difficulty facing the applicant is that the Commission found as a fact that the applicant had communicated to the employer his intention to take two days leave, with or without the employer's consent. In the context of this case, it is irrelevant whether the ensuing loss of employment was, as a matter of employment law, a resignation or a dismissal. The Commission clearly found that the event triggering the loss of employment was the voluntary act of the applicant in insisting on taking two days off without the consent of the employer.

[15] That factual conclusion was reasonably open to the Board, based on the evidence before it. That evidence included the three documents that the applicant says the Board rejected or ignored, which were "to whom it may concern" letters from other employees supporting the position of the

applicant and stating their respective versions of the events. Those letters were of marginal relevance, and the Board was entitled to give them little or no weight.

[16] As to whether the Umpire should have considered the question of "antagonism" between the applicant and the Umpire, this issue was not raised before the Board or the Umpire, and it is not clearly supported by the record. Therefore, it cannot be a basis upon which this Court can reverse the Umpire's decision.

[17] The applicant's argument on the question of bias is based on an incorrect understanding of the role of the Commission. The applicant criticizes certain aspects of the written submissions made by the Commission to the Board in defence of its decision to deny the applicant employment insurance benefits. What is said in those submissions is the position of the Commission. The duty of the Board, as a decision maker independent of the Commission, is to consider the submissions of the Commission and the contrary submissions of the applicant in light of documentary evidence and oral evidence presented, and to decide whether the Commission's decision should be allowed to stand. The record discloses no evidence that the Board was biased or that a reasonable apprehension of bias can be found in the contents of the Commission's submissions to the Board.

[18] In conclusion, I find that the Board's reasons for dismissing the applicant's appeal were rational and entirely reasonable, and the Umpire made no reviewable error in declining to intervene.

[19] This application should be dismissed.

"Pierre Blais"

Chief Justice

"I agree.
Sharlow J.A."

"I agree.
Trudel J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-457-10 |

**Application for judicial review from a decision by Umpire Denis Durocher, September 29, 2010 (CUB 75287)**

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| **STYLE OF CAUSE:** | James Jamieson v. AGC |
| **PLACE OF HEARING:** | Vancouver, B.C. |
| **DATE OF HEARING:** | June 9, 2011 |
| **REASONS FOR JUDGMENT BY:** | CHIEF JUSTICE BLAIS |
| **CONCURRED IN BY:** | SHARLOW J.A.<br>TRUDEL J.A. |
| **DATED:** | June 14, 2011 |

**APPEARANCES:**

| | |
|---|---|
| James Jamieson | FOR THE APPLICANT, ON HIS OWN BEHALF |
| Sally Rudolf<br>Department of Justice | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Myles J. Kirvan<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |