

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111116

Docket: A-429-10

Citation: 2011 FCA 311

**CORAM: EVANS J.A.
PELLETIER J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ALEX GRAHAM

Respondent

Heard at Winnipeg, Manitoba, on November 15, 2011.

Judgment delivered at Winnipeg, Manitoba, on November 16, 2011.

REASONS FOR JUDGMENT BY:

LAYDEN-STEVENSON J.A.

CONCURRED IN BY:

**EVANS J.A.
PELLETIER J.A.**

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] For the reasons that follow, I would allow the Crown's application for judicial review of the decision of Umpire Stevenson (the Umpire) upholding a decision of the Board of Referees (the Board).

[2] The Employment Insurance Commission (the Commission) denied the respondent, Alex Graham, employment insurance benefits (benefits) under the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). The Board allowed Mr. Graham's appeal from the Commission's decision. The Umpire dismissed the Crown's appeal. In the Umpire's view, the Board applied the correct legal test and considered all relevant circumstances. Its decision therefore satisfied the reasonableness test in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*).

[3] While attending classes at Red River College, Mr. Graham worked part-time at a Canadian Tire store in Winnipeg. When the school term was over in April, 2009, he moved to his parents' home in Minnedosa to find full-time summer employment and save on living expenses. He had not secured employment in Minnedosa before leaving Winnipeg and he did not request a leave of absence from Canadian Tire. Within a month, he found full-time employment in Minnedosa. When he returned to Winnipeg as planned in August, 2009, he claimed benefits. The Commission determined that because he voluntarily left his employment at Canadian Tire without just cause, he had insufficient insurable hours from his employment in Minnedosa to qualify for benefits. In December, 2009, Mr. Graham renewed his claim. The Commission determined no benefits could be paid due to the previous disqualification. Further, a new claim could not succeed for the same reason the initial claim failed – insufficient hours of insurable employment after leaving his Canadian Tire employment without just cause.

[4] As stated earlier, the Board allowed Mr. Graham's appeal from the Commission's decision. The Umpire found no fault with the board's decision that it was reasonable for Mr. Graham to leave his employment at Canadian Tire.

[5] The question of "just cause" for leaving employment requires an examination of "whether having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment": *MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306; *Canada (Attorney General) v. Imran*, 2008 FCA 17. The claimant bears the burden of establishing just cause: *Canada (Attorney General) v. Patel*, 2010 FCA 95.

[6] The jurisprudence of this Court states that remaining in employment until a new job is secured is, without more, generally a reasonable alternative to taking a unilateral decision to quit a job: *Canada (Attorney General) v. Murugaiah*, 2008 FCA 10; *Canada (Attorney General) v. Campeau*, 2006 FCA 376. Further, a claimant's desire to improve his or her financial situation may constitute good cause, but it does not constitute just cause: *Canada (Attorney General) v. Richard*, 2009 FCA 122; *Canada (Attorney General) v. Lapointe*, 2009 FCA 147.

[7] The Board acknowledged the legal test for "just cause." However, it did not examine the facts of Mr. Graham's case in relation to the above-noted principles of law. Rather than applying the no reasonable alternative test, the Board considered whether Mr. Graham's conduct was reasonable in the circumstances and concluded that his choice qualified as reasonable behaviour. On the basis

of that finding, it determined he had just cause for leaving his employment because it put him in a more favourable economic situation enabling him to earn more money and incur fewer expenses.

[8] The Umpire reviewed the factual context, referred to an excerpt from the Board's decision and concluded that the Board's decision was reasonable. Other than *Dunsmuir* and *Khosa*, the Umpire did not refer to any jurisprudence.

[9] In our view, the Umpire erred when he failed to address the applicable law regarding just cause for leaving employment. In *Canada (Attorney General) v. Brace*, 2008 FCA 118, this Court held that an Umpire erred in failing to set out the proper legal test since the facts must be viewed expressly through the lens of the proper definition. In this case, the board erred in failing to assess the facts in accordance with the law. The Umpire erred in failing to intervene.

[10] Mr. Graham acknowledged that he wanted to be home for the summer because it was cheaper to live there. He also acknowledged that he could have continued working until he found other employment but did not consider it feasible. While Mr. Graham may have had good personal cause to leave his employment, he did not have just cause for leaving his employment, within the meaning of the Act.

[11] For these reasons, I would allow the application for judicial review, set aside the Umpire's decision and return the matter to the Chief Umpire, or his designate, for redetermination on the basis

that the respondent did not have just cause for leaving his employment. The Crown did not request costs and I would not award any.

"Carolyn Layden-Stevenson"

J.A.

"I agree

John M. Evans J.A.

"I agree

J.D. Denis Pelletier J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-429-10

**APPEAL FROM A DECISION OF THE UMPIRE RONALD C. STEVENSON DATED
SEPTEMBER 24, 2010, DOCKET NO. CUB 75290**

STYLE OF CAUSE: The Attorney General of Canada v.
Alex Graham

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: November 15, 2011

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

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

DATED: November 16, 2011

APPEARANCES:

Darcie Charlton FOR THE APPLICANT

Alex Graham SELF-REPRESENTED

SOLICITORS OF RECORD:

Myles J. Kirvan FOR THE APPLICANT
Deputy Attorney General of Canada