

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20120504**

**Docket: A-300-11**

**Citation: 2012 FCA 139**

**CORAM:** EVANS J.A.  
DAWSON J.A.  
MACTAVISH J.A. (*ex officio*)

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**BILL BURKE**

**Respondent**

Heard at Toronto, Ontario, on April 25, 2012.

Judgment delivered at Ottawa, Ontario, on May 4, 2012.

**REASONS FOR JUDGMENT BY:**

**DAWSON J.A.**

**CONCURRED IN BY:**

**EVANS J.A.  
MACTAVISH J.A. (*ex officio*)**

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**REASONS FOR JUDGMENT**

**DAWSON J.A.**

[1] This is an application for judicial review of a decision of an Umpire (CUB 77245). The Umpire dismissed an appeal of a unanimous decision of the Board of Referees brought by the Canada Employment Insurance Commission (Commission). The issue raised on this application is whether the decision of the Umpire dismissing the appeal was reasonable.

The Facts

[2] The respondent, Mr. Burke, was employed by a construction firm as a supervisor. His last day worked was September 26, 2009. Thereafter, he did not apply for employment insurance benefits until January 25, 2010. At that time he requested that his claim be antedated to September 27, 2009.

[3] Mr. Burke advised the Commission that he did not claim benefits earlier because he had good reason to be confident that he would be offered employment on a new project either as a manager or a machine operator. If everything went as planned, he expected to commence work on the new project at the end of November or, as he later stated, the beginning of December, 2009. A contract was in place for this project and the required supplies and equipment were on site. However, independent of the contract, negotiations were required with a First Nation. It became apparent to Mr. Burke by January 20, 2010 that the new project would not proceed due to the lateness of the season.

[4] Mr. Burke's antedate request was denied by the Commission because it found he did not show that from September 27, 2009 to January 24, 2010 he had "good cause" to justify his late application for benefits within the meaning of subsection 10(4) of the *Employment Insurance Act*, S.C. 1996, c. 23.

### The Decision of the Board of Referees

[5] The Board of Referees directed itself to the correct test to be applied when determining whether or not good cause exists to justify a delay in applying for benefits. A claimant is required to show that he or she acted as a reasonable and prudent person would have done in similar circumstances throughout the entire period of the delay. The Board then found as fact that the claimant did what any reasonable person would do. The Board supported this conclusion with reference to the facts and conclusions reached in CUB 58234.

### The Decision of the Umpire

[6] The Umpire began his reasons by correctly setting out the relevant chronology and Mr. Burke's explanation for the delay. After explaining the position of the appellant Commission, the Umpire reviewed the decision of the Board of Referees. He noted the Board's reliance on CUB 58234, where a 74-day delay in applying for benefits was found to be reasonable in the circumstances. Unfortunately, after having correctly set out the relevant chronology in the case before him, the Umpire committed an arithmetic error and calculated the period of delay in the case before him to be 90 days. In fact, the delay was 121 days.

[7] The Umpire went on to correctly state the duty to promptly file a claim for benefits, and noted that the "good cause for delay" exception must be cautiously applied. The Umpire then correctly set out the test for establishing good cause.

[8] The Umpire next reviewed the prior decision in CUB 75829 and found that the comments made by the Umpire in that case were applicable to Mr. Burke's situation. Ultimately, the Umpire concluded that there were insufficient differences between the facts of Mr. Burke's case and the facts in CUB 58234 to warrant any interference with the finding of the Board of Referees.

#### Standard of Review

[9] The Commission did not argue before the Umpire that the Board of Referees failed to observe any principle of natural justice or otherwise acted beyond its jurisdiction. While the Commission argued that the Board of Referees committed an error in law by not considering all of the evidence, the determination of whether Mr. Burke had good cause for delay is a mixed question of fact and law. Therefore, the Umpire was only entitled to interfere with the decision of the Board of Referees if it was unreasonable. To assess the reasonableness of that decision the Umpire was required to apply a legal test to the facts. It follows from the nature of the question before him, that the Umpire's decision is to be reviewed by this Court on the standard of reasonableness.

#### Application of the Standard of Review

[10] In his memorandum of fact and law, the Attorney General argued on behalf of the Commission that the Umpire's decision is unreasonable in two respects. First, the Umpire erred when calculating the period of delay. Second, the Umpire failed to intervene to correct the Board's unreasonable determination that the respondent had established good cause for the entire period of delay.

[11] In my view, the first asserted ground of error must fail for the following reasons. First, as noted above, the Umpire at an early point in his reasons correctly set out the last day worked and the date Mr. Burke applied for benefits. Thus, the Umpire knew the period during which Mr. Burke delayed claiming benefits. Viewing the record as a whole I am not persuaded that the Umpire's misstatement of the length of the delay was material to his decision. Second, while the length of the delay is a relevant factor, the more important consideration is the reason for the delay (*Canada (Attorney General) v. McBride*, 2009 FCA 1, [2009] F.C.J. No. 8 at paragraph 6). The Umpire understood the respondent's explanation and there is nothing in the record to suggest that Mr. Burke's reason for delaying in filing his application for benefits changed during the relevant period.

[12] With respect to the second asserted ground of error, a court is required to consider both the reasons given and the outcome when determining the reasonableness of a decision. A reviewing court is to show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 47 and 48).

[13] The Board of Referees correctly set out the legal test to be applied. It found that Mr. Burke had every expectation that he would be working by the first part of December, 2009, that the work was delayed due to negotiations and it became apparent to Mr. Burke by January 20, 2010 that the work would not start that winter. He then applied for benefits on January 25, 2010. These findings of fact were supported by the record before the Board.

[14] On the basis of these findings of fact, the Board's conclusion that Mr. Burke had acted as any reasonable and prudent person would act in the circumstances fell within the range of possible, acceptable outcomes which were defensible in respect of the facts and law. The Board's reasons were justified, transparent and intelligible. Its decision was, therefore, reasonable. It follows that it was reasonable for the Umpire to dismiss the Commission's appeal from the decision of the Board.

Conclusion

[15] For these reasons, I would dismiss the application for judicial review. As Mr. Burke did not enter any formal appearance I would not make any award of costs.

“Eleanor R. Dawson”

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J.A.

“I agree.

John M. Evans J.A.”

“I agree.

Anne Mactavish J.A.” (*ex officio*)

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-300-11

**STYLE OF CAUSE:** Attorney General of Canada v.  
Bill Burke

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 25, 2012

**REASONS FOR JUDGMENT BY:** Dawson J.A.

**CONCURRED IN BY:** Evans J.A.  
Mactavish J.A. (*ex officio*)

**DATED:** May 4, 2012

**APPEARANCES:**

Michael J. Sims

FOR THE APPLICANT

Bill Burke  
self-represented

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE APPLICANT

N/A

FOR THE RESPONDENT