Date: 20071023

Docket: A-371-06

Citation: 2007 FCA 333

CORAM: **SEXTON J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

STEPHEN JONES

Respondent

Heard at Toronto, Ontario, on October 23, 2007.

Judgment delivered from the Bench at Toronto, Ontario, on October 23, 2007.

REASONS FOR JUDGMENT OF THE COURT BY: RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 23, 2007)

RYER J.A.

[1] This is an application for judicial review of a decision of Umpire Jean A. Forget (CUB 66286), dated June 21, 2006, under the *Employment Insurance Act* S.C. 1996 c.23 (the Act) dismissing the applicant's appeal from a decision of the Board of Referees (the Board), dated June 8, 2005. The Board allowed the appeal of Mr. Stephen Jones from a decision of the Canada Employment Insurance Commission (the Commission) that Mr. Jones was disqualified from

receiving benefits because he lost his employment due to his own misconduct, pursuant to subsection 30(1) of the Act.

[2] Mr. Jones was employed as a taxi driver for a company that had a contract with the Halton School Board to drive children to and from a school. The employer had a policy that prohibited drivers from making any stops while driving the children to or from school. Notwithstanding this policy, Mr. Jones made a stop at his residence, which was across the street from the school, to drop off some cigarettes for his wife. This action was made known to his employer as a result of a complaint by the parents of the child who was in the car at the time that Mr. Jones dropped off the cigarettes. As a result, the employer terminated Mr. Jones employment.

[3] The Commission denied Mr. Jones application for benefits on the basis that he had lost his employment due to his own misconduct. Mr. Jones appealed this decision and, on July 9, 2004, the Board granted his appeal. The Commission successfully appealed that decision before Umpire Guy Goulard (CUB 63121) who held that the Board erred in law by failing to provide sufficient reasons for its decision to reject most, if not all, of the employer's evidence in favour of the evidence that was given by Mr. Jones. Accordingly, Umpire Goulard set aside the decision of the Board and ordered the matter to be returned before a differently constituted Board.

[4] The newly constituted Board also decided in favour of Mr. Jones, holding that there was insufficient corroboration of the employer's evidence on a number of matters and that in the absence of testimony from the employer, more weight was appropriately placed upon the testimony of Mr.

Jones. As a result, the Board concluded that the legal test of wilfulness and careless neglect that was required to show misconduct, had not been clearly demonstrated to have been met and the explanation of Mr. Jones that his conduct was a “first time error in judgment” was accepted.

[5] In reviewing this decision, Umpire Forget rejected the applicant’s contention that it was an error on the part of the Board to exclude the employer’s evidence because the employer did not testify before them. In so doing, the Umpire decided that the employer’s evidence had not been excluded; rather the Board simply preferred to accept the evidence of Mr. Jones. Moreover, the Umpire concluded that the Board provided reasons for their preference. The Umpire also concluded that the Board was aware of the proper legal test for misconduct and that after having made their factual findings – preferring the evidence of Mr. Jones to that of the employer – the Board correctly determined that the elements of the legal test for misconduct had not been met. As a result, the Umpire dismissed the Commission’s appeal.

[6] In reviewing the decision of the Umpire, we are of the view that he and the Board were correct in their stated understanding of the legal test for misconduct in subsection 30(1) of the Act.

[7] In its decision, the Board stated that:

> The Board had to decide on the employer’s evidence without the employer present and was therefore forced to place more weight on the direct testimony of the claimant who was present.
> [Emphasis added]

[8] If by the use of the word "forced" the Board meant that they were "legally compelled" to accept the evidence of Mr. Jones in absence of direct testimony from the employer, then the Board would have made an error in law. However, the use of the word "forced" is not, in our view, to be so construed. Instead, we believe that the Board was simply stating a preference for the evidence of Mr. Jones to that of the employer, which was a choice open to them. In so doing, the Board made no error in law and as such there was no error in law, on that point, that the Umpire failed to correct.

[9] Finally, we are unable to conclude that it was unreasonable for the Umpire to uphold the application of the facts, as found by the Board, to the legal test for misconduct, as stated by the Board. Accordingly, this application for judicial review will be dismissed.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-371-06

(APPEAL FROM A DECISION FROM THE UMPIRE IN, CUB 66286, WAS COMMUNICATED TO CANADA EMPLOYMENT INSURANCE COMMISSION ON JULY 26, 2006.)

STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. STEPHEN JONES
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 23, 2007
REASONS FOR JUDGMENT OF THE COURT BY:	(SEXTON, SHARLOW & RYER JJ.A.).
DELIVERED FROM THE BENCH BY:	RYER J.A.

APPEARANCES:

MS. SHARON McGOVERN	FOR THE APPLICANT
NO APPEARANCE	FOR THE RESPONDENT (on his own behalf)

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