Date: 20080401

Docket: A-481-07

Citation: 2008 FCA 118

CORAM: **LÉTOURNEAU J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

RONALD D. BRACE

Respondent

Heard at Halifax, Nova Scotia, on April 1, 2008.

Judgment delivered from the Bench at Halifax, Nova Scotia, on April 1, 2008.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Halifax, Nova Scotia, on April 1, 2008)

LÉTOURNEAU J.A.

[1] This is an application for judicial review of the decision of Umpire Stevenson (CUB 68932) who found that the respondent had "good cause" for the delay in making an application for unemployment benefits. As a result, he ordered the Canada Employment Insurance Commission (the Commission) to antedate the respondent's application to July 2, 2004.

[2] The respondent remained on the payroll of his employer as an inactive employee until July 2, 2004 receiving regular bi-weekly pay. After July 2, 2004, he received a final lump sum retirement allowance of $59,500. According to the respondent, he was told by his employer that he could not apply for unemployment insurance benefits until he received his record of employment.

[3] In December 2004, the respondent instructed a lawyer to enquire from his former employer about the issuance of the record of employment. According to him, his lawyer was informed that the said record would be issued in February 2005 when the respondent would receive the last of his severance payments. No record of employment was issued in February 2005 and yet it is only late in 2005 that the respondent's lawyer would have contacted the employer again. The employer said that it was the only time he was contacted. The requested document was issued on January 19, 2006. The respondent received it from his lawyer on January 23. He filed his application for benefits on March 2, 2006.

[4] At issue here is subsection 10(4) of the *Employment Insurance Act*, S.C. 1996, c. 23 (Act) which allows a claim for benefits to be antedated when there is a good cause for the delay in making the application. The provision reads:

Late initial claims	Demande initiale tardive
10. (4) An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier	**10.** (4) Lorsque le prestataire présente une demande initiale de prestations après le premier jour où il remplissait les conditions requises pour la présenter, la demande doit être considérée comme ayant été présentée à une date antérieure si le prestataire

day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.	démontre qu'à cette date antérieure il remplissait les conditions requises pour recevoir des prestations et qu'il avait, durant toute la période écoulée entre cette date antérieure et la date à laquelle il présente sa demande, un motif valable justifiant son retard.

[5] The Umpire was of the view that the respondent had good cause for the delay throughout the period from July 1, 2004 to March 2006. According to him, the good cause was the fact that the respondent relied on the incorrect advice from his employer and his action in seeking assistance of a lawyer to obtain the record of employment which he found to be reasonable.

[6] It is useful at this time to reiterate the justification for the obligation imposed upon a claimant to make an application for benefits once the eligibility conditions of section 7 of the Act are met. In *Canada (Attorney General) v. Beaudin*, 2005 FCA 123, at paragraphs 5 and 6, this Court expressed in the following terms the rationale for an early application:

> [5] It is worth noting that subsection 10(4) of the Act is not the product of a mere legislative whim. It contains a policy, in the form of a requirement, which is instrumental in the sound and efficient administration of the Act. On the one hand, this policy helps "to assure the proper administration and the efficient processing of various claims" and "to enable the Commission to review constantly the continuing eligibility of a claimant to whom benefits are being paid": see CUB 18145, June 29, 1999, by Umpire Joyal, and CUB 23893, June 27, 1994, by Umpire Rouleau. Antedating the claim for benefits may adversely affect the integrity of the system, in that it gives a claimant a retroactive and unconditional award of benefits, without any possibility of verifying the eligibility criteria during the period of retroactivity: see CUB 13007, December 12, 1986, and CUB 14019, August 7, 1987, by Umpire Joyal.

> [6] Furthermore, a sound and equitable administration of the system requires that the Commission engage in a quick verification that is as contemporaneous as possible with the events and circumstances giving rise to the claim for benefits: see CUB 15236A, April 30, 1987, by Umpire Strayer. Otherwise, the Commission finds itself in the difficult position of having to engage in a job or process of reconstruction of the events, with the costs and hazards pertaining to such a process. This is what explains the principle, long established by the jurisprudence of this Court, that ignorance of the Act does not excuse a delay in filing an initial claim for benefits.

[7] Moreover, we should add to this that a claimant is required during the benefit period to make regular and repeated applications for the benefits and declare income received during that period. Any false statement in this regard may entail a loss of or a reduction in benefits and the imposition of penalties. It may also result in the refund of benefits unduly paid to or illegally obtained by a claimant as well as in the issuance of a notice of violation which, pursuant to section 7.1 of the Act, increases the admissibility criteria for future benefits. All these obligations and the failure to fulfill them are difficult to enforce and sanction when applications for benefits are delayed and the benefits granted retroactively. The obligation and duty to promptly file a claim is seen as very demanding and strict. This is why the “good cause for delay” exception is cautiously applied.

[8] We note that the Umpire did not set out the legal test for determining whether an applicant for employment insurance benefits had “good cause” to delay so as to warrant the antedating of his claim. In *Canada (A.G.) v. Albrecht*, [1985] 1 F.C. 710 (F.C.A.), Marceau J.A. stated that in order to establish good cause, an applicant must “be able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act”.

[9] As Marceau J.A. also said in that case, the test is in part subjective and each case must be judged on its own facts. Nonetheless, in our opinion, the Umpire's failure to expressly view the facts through the lens of the above definition of "good cause" may well have led him astray in his assessment of the reasonableness of the Board of Referees' decision.

[10] In the present instance, the respondent states that from July 2004 forward he believed that his former employer was deliberately withholding his record of employment: see paragraph 52 of his memorandum of fact and law. In these circumstances, a reasonable person would not have continued relying on his employer's earlier advice that benefits cannot be claimed unless and until the record of employment is received.

[11] In addition, there is no evidence on the record that the respondent sought additional advice or a second opinion on this issue.

[12] On the facts of this case, in our opinion, it was not reasonably open to the Umpire to conclude as he did. Rather, a proper application of the legal test to the facts leads to the conclusion that a person in the respondent's situation would have enquired about his rights and obligations and the steps that he should take to protect his claim for benefits. An obvious place for enquire would have been the Commission.

[13] We agree with counsel for the appellant that, in effect, the Umpire accepted as good cause for the delay the respondent's inexperience with the system and his reliance on his employer's advice when the respondent was no longer justified in doing so.

[14] For these reasons, the application for judicial review will be allowed without costs, the decision of the Umpire set aside and the matter referred back to the Chief Umpire, or to the person that he designates, for a new determination on the basis that the respondent's appeal to the Umpire from the Board of Referees' decision shall be dismissed.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-481-07
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. RONALD D. BRACE
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	April 1, 2008
REASONS FOR JUDGMENT OF THE COURT BY:	LÉTOURNEAU J.A. EVANS J.A. RYER J.A.
DELIVERED FROM THE BENCH BY:	LÉTOURNEAU J.A.

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