Date: 20080505

Docket: A-337-07

Citation: 2008 FCA 159

CORAM: **DESJARDINS J.A.**
NOËL J.A.
BLAIS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

YOLANDE HALLÉE

Respondent

Hearing held at Montréal, Quebec, on April 9, 2008.

Judgment delivered at Ottawa, Ontario, on May 5, 2008.

REASONS FOR JUDGMENT BY: BLAIS J.A.

CONCURRED IN BY: DESJARDINS J.A.
NOËL J.A.

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REASONS FOR JUDGMENT

BLAIS J.A.

[1] This is an application for judicial review of CUB decision No. 68404 dated May 31, 2007, by the Umpire. The Umpire dismissed the appeal of the Employment Insurance Commission (the Commission) on the basis that the respondent did not lose her employment by reason of her own misconduct within the meaning of section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

[2] Let us briefly review the sequence of events relevant to the case:

- The employer dismissed the respondent after she made a third mistake in administering medication in compliance with the employer's policy.

- In its December 5, 2006, decision, the Board of Referees (the Board) allowed the respondent's appeal because it was not satisfied that the respondent's actions constituted misconduct, given the working conditions and the respondent's state of stress and fatigue. The Board stated that it understood [TRANSLATION] "how such an error could occur, without concluding that it was misconduct".

- Regarding the fact that it was indeed the third consecutive mistake, the Board allowed the respondent's argument that the first two mistakes should not have been considered as they had occurred over a year beforehand.

- On May 31, 2007, the Umpire dismissed the Commission's appeal of the Board's decision, concluding that the Board had made no error warranting his intervention, as the working conditions and the respondent's state of stress and fatigue could have led the Board to conclude that there had been no misconduct within the meaning of the Act and that the error had not been deliberate.

[3] **RELEVANT STATUTORY PROVISIONS**

Disqualification — misconduct or leaving without just cause	Exclusion : inconduite ou départ sans justification
30. (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless	30. (1) Le prestataire est exclu du bénéfice des prestations s'il perd un emploi en raison de son inconduite ou s'il quitte volontairement un emploi sans justification, à moins, selon le cas :
(*a*) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or	*a*) que, depuis qu'il a perdu ou quitté cet emploi, il ait exercé un emploi assurable pendant le nombre d'heures requis, au titre de l'article 7 ou 7.1, pour recevoir des prestations de chômage;
(*b*) the claimant is disentitled under sections 31 to 33 in relation to the employment.	*b*) qu'il ne soit inadmissible, à l'égard de cet emploi, pour l'une des raisons prévues aux articles 31 à 33.
…	…
Appeal to umpire	Appel à un juge-arbitre
	115. (1) Toute décision d'un conseil

115. (1) An appeal as of right to an umpire from a decision of a board of referees may be brought by

(a) the Commission;

(b) a claimant or other person who is the subject of a decision of the Commission;

(c) the employer of the claimant; or

(d) an association of which the claimant or employer is a member.

Grounds of appeal
(2) The only grounds of appeal are that

(a) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) the board of referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

117. An umpire may decide any question of law or fact that is necessary for the disposition of an appeal and may
(a) dismiss the appeal;
(b) give the decision that the board of referees should have given;
(c) refer the matter back to the board of referees for re-hearing or re-determination in accordance with such directions as the umpire considers appropriate; or
(d) confirm, rescind or vary the decision of the board of referees in whole or in part.

arbitral peut, de plein droit, être portée en appel devant un juge-arbitre par la Commission, le prestataire, son employeur, l'association dont le prestataire ou l'employeur est membre et les autres personnes qui font l'objet de la décision.

Moyens d'appel
(2) Les seuls moyens d'appel sont les suivants :
a) le conseil arbitral n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) le conseil arbitral a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

c) le conseil arbitral a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

117. Le juge-arbitre peut trancher toute question de droit ou de fait pour statuer sur un appel; il peut rejeter l'appel, rendre la décision que le conseil arbitral aurait dû rendre, renvoyer l'affaire au conseil arbitral pour nouvelle audition et nouvelle décision conformément aux directives qu'il juge indiquées, confirmer, infirmer ou modifier totalement ou partiellement la décision du conseil arbitral.

ANALYSIS

[4] As the Board's decision makes clear, the Board chose not to take the respondent’s two previous errors into account, on the ground that the collective agreement provided for their exclusion.

[5] The existence of three consecutive errors was shown at all steps of the case, both in the documents filed in evidence and by the respondent's own admission.

[6] The argument to the effect that this major part of the evidence could be excluded based on the provisions of the collective agreement is without merit, as it was the Board’s duty to examine all the evidence submitted, and excluding two previous errors is an error in law.

[7] Moreover, the fact that the respondent gave the wrong medication to a resident despite the fact that the resident told her that it was not her usual medication; that the respondent, by her own admission, noticed that it was not the usual medication, yet did not check the information on the dosette; that the resident had to be taken to hospital; and that it was the third time that the respondent made such a significant error demonstrates unequivocally that the respondent’s conduct was so reckless as to approach wilfulness.

[8] The Board has the jurisdiction and is in a much better position to assess the evidence pertaining to the facts of the case. Also, all the evidence must be considered in light of the Act and well-established case law as to what constitutes misconduct.

[9] The conditions for applying section 30 of the *Employment Insurance Act*, which deals with misconduct, have been the subject of many decisions by our Court. *Canada (Attorney General) v. Brissette*, [1994] 1 F.C. 684, states:

> It is true, as counsel for the respondent contends, and as it was expressed in *Tucker* (supra), that in order for the conduct in question to constitute misconduct within the meaning of section 28 of the Act, it must be wilful or deliberate or so reckless as to approach wilfulness.…
>
> …
>
> The respondent was risking the loss of his driver's licence and thus his job by driving after consuming a quantity of alcohol that exceeded the allowable limit: he knowingly and deliberately caused the risk to occur.
>
> …
>
> … the fact that what is done might constitute misconduct under subsection 28(1) does not mean, however, that it necessarily results in disqualification from receiving unemployment insurance benefits. There must, first, be a causal relationship between the misconduct and the dismissal.…
>
> …
>
> In addition to the causal relationship, the misconduct must be committed by the employee while he or she was employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment (*Canada (Attorney General) v. Nolet*, F.C.A., A-517-91, March 19, 1992).

[10] In *Bellefleur v. Canada (Attorney General)*, 2008 FCA 13, [2008] F.C.J. No. 42, Létourneau J.A. explained at paragraph 3:

> A Board of Referees must justify its determinations. When it is faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.

[11] The Board ignored some fundamental evidence, namely, the two previous errors in administering medication. If it had taken the two previous errors into account, as it should have done, it would have reached only one conclusion, specifically, that the claimant was dismissed by reason of her own misconduct. The employer's policy was clear. Hence, the error in law. To that effect, see *Wiebe Door Services Ltd. v. M.N.R.* (1986), 5 W.W.R. 450, paragraph 26.

[12] For his part, the Umpire erred in dismissing the Commission's appeal and in refusing to intervene to quash the decision of the Board, which made a decision without regard for the material before it, in accordance with section 115 of the Act.

[13] According to the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, in cases of errors of law or jurisdiction, the applicable standard is correctness.

[14] As the Board and later the Umpire both rendered decisions without regard for the material before them in accordance with section 115 of the Act, it follows that the Umpire's decision was not correct and that the Court must intervene.

[15] I would allow the application for judicial review with costs, set aside the impugned decision, and refer the matter back to the Chief Umpire or his designate for redetermination on the basis that the respondent lost her employment by reason of her own misconduct.

"Pierre Blais"
J.A.

"I concur in these reasons."
"Alice Desjardins J.A."

"I concur."
"Marc Noël J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-337-07
APPEAL FROM A DECISION OF THE UMPIRE DATED MAY 31, 2007, CUB NO. 68404	
STYLE OF CAUSE:	Attorney General of Canada and Yolande Hallée
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CONCURRED IN BY:	DESJARDINS J.A. NOËL J.A.
DATED:	May 5, 2008

APPEARANCES:

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