Date: 20080527

Docket: A-392-07

Citation: 2008 FCA 192

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RÉJEAN CANTIN

Respondent

Hearing held at Québec, Quebec, on April 29, 2008.

Judgment delivered at Ottawa, Ontario, on May 27, 2008.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
BLAIS J.A.

Date: 20080527

Docket: A-392-07

Citation: 2008 FCA 192

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RÉJEAN CANTIN

Respondent

REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] This is an application for judicial review of a decision by an Umpire with regard to a representative appeal brought before the Board of Referees by a group of 77 employees of the company Tembec of Saint-Raymond (Tembec or the employer). The Court's decision will apply not only to the respondent, Réjean Cantin, but also to the 77 claimants who are in the same position as he.

[2] On May 17, 2005, Tembec notified the Quebec Minister of Employment and Social Solidarity that Tembec had decided to [TRANSLATION] "cease operations at its Saint-Raymond plant" and was "obliged to proceed with a collective dismissal of its workforce".

[3] The date scheduled for the "collective dismissal" was August 9, 2005. One hundred and thirty-five hourly-paid employees and 30 managers were potentially affected (applicant's record, page 65).

[4] This notice to the Quebec Minister of Employment and Social Solidarity was given in accordance with section 84.0.4 of the *Act respecting labour standards* (R.S.Q., c. N-1.1), which prescribes that such notice be given in situations where there is a "collective dismissal for technical or economic reasons" ("licenciement collectif pour des raisons d'ordre technologique ou économique"). Section 84.0.1 of the Act defines collective dismissal as follows:

84.0.1. [Interpretation] The termination of employment by the employer, including a layoff for a period of six months or more, involving not fewer than 10 employees of the same establishment in the course of two consecutive months constitutes a collective dismissal governed by this division.	**84.0.1 [Définition]** Constitue un licenciement collectif régi par la présente section une cessation de travail du fait de l'employeur, y compris une mise à pied pour une durée de six mois ou plus, qui touche au moins 10 salariés d'un même établissement au cours d'une période de deux mois consécutifs.
[Emphasis added.]	[Je souligne.]

[5] On August 24, 2005, Réjean Cantin, one of the affected employees, filed a claim for employment insurance benefits.

[6] As a result of information obtained from the employer, the Canada Employment Insurance Commission (the Commission) determined that the compensation payments received in lieu of notice, vacation pay, statutory holiday credits, floating holidays and extra pay constituted earnings. The amount was allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations*, S.O.R./96-332 (the Regulations).

[7] On August 17, 2005, the employer sent the following letter to its employees (applicant's record, p. 57):

> [TRANSLATION]
>
> I regret to inform you that we are terminating your employment with Tembec in accordance with the collective dismissal notice dated May 17.
>
> To facilitate your transition, the company will, without prejudice, pay you the sum of XXXXX ($XX,XX) in severance pay minus any statutory deductions. You will be paid this sum conditional upon your signing the attached document, entitled "Receipt, Release and Settlement" form.
>
> Your record of employment and any other final documents will be mailed to you as soon as possible at the abovementioned address.
>
> …
>
> [Emphasis added.]

[8] On September 13, 2005, an agreement was reached between the employer and the union of which Mr. Cantin was a member. The agreement provided as follows:

> [TRANSLATION]
>
> WHEREAS the undersigned Parties hereby wish to confirm the terms and conditions of the termination of employment of the employees of Tembec's Saint-Raymond plant.

> NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING AND OF WHAT IS STIPULATED BELOW, the parties agree as follows:
>
> 1. Severance pay will be offered under the following proposed terms:
>
> …
>
> Employees from St-Raymond who choose to accept severance pay for termination of employment, as described above, must notify the employer in writing by February 15, 2006, and in so doing, waive their right to be recalled and terminate their employment relationship with Tembec. Employees who do not notify the employer by February 15, 2006 will retain their right to be recalled in accordance with the collective agreement and will lose their right to severance pay.
>
> [Emphasis added.]
>
> …

[9] Moreover, the "Receipt, Release and Settlement" form signed on September 24, 2005 by Mr. Cantin, who accepted the agreement, stated:

> [TRANSLATION]
>
> I, Réjean Cantin, hereby acknowledge receiving from Tembec the sum of $42,224 (minus the applicable statutory and tax deductions) in lieu of severance pay.
>
> I recognize that by accepting this sum and signing this document, I, in so doing, waive my right to be recalled and the rights that relate to it, and terminate my employment relationship with Tembec as of September 24, 2005.
>
> [Emphasis added.]
>
> …

[10] Severance pay was therefore offered to employees who accepted it subject to their waving their right to be recalled and terminating their employment relationship with the employer.

Mr. Cantin received the sum of $42,224 on September 24, 2005.

[11] The Commission considered the $42,224 to be earnings within the meaning of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) and allocated the amount in accordance with subsections 36(9) and (10) of the Regulations.

[12] The Board of Referees that heard the Respondent's appeal refused to uphold the Commission's decision with regard to the severance pay, which the Board characterized as compensation. The Board of Referees explained its decision in the following terms:

> 3. With respect to the severance pay, the Board finds that this amount was paid as compensation for termination of the employment relationship and for relinquishing the right to reinstatement stipulated in the collective agreement (subsection 10-06c). The nature of this amount is clearly indicated in the agreement (Exhibit 11.4).
> Accordingly, it does not constitute earnings within the meaning of section 35 of the Regulations and should not be allocated, as determined in decisions A-693-99, paragraph 18 and A-140-03, paragraph 19.
>
> [Emphasis added.]

[13] The Board of Referees based its decision on two decisions of our Court, namely *Her Majesty the Queen v. Robert Plasse*, A-693-99, and *Nicole Meechan and The Attorney General of Canada*, A-140-03, both of which concerned reinstatements following terminations resulting from wrongful dismissals.

[14] The Umpire, before whom the severance pay issue was appealed, upheld the Board of Referees' decision as follows:

> Consequently, the Commission's appeal is dismissed regarding the issue of the allocation of the severance pay. To clarify, I would like to point out that this amount constituted earnings within the meaning of section 35 of the Regulations and that it should be allocated in accordance with section 36(19)(*b*) of the Regulations.

[15] The respondent is not contesting that the severance pay represents earnings within the meaning of section 35 of the Regulations. The issue to be determined is under which paragraph of section 36 the severance pay should be allocated. The applicant argues that it should be allocated according to subsections 36(9) and (10) of the Regulations, while the respondent submits that paragraph 36(19)(*b*) of the Regulations applies in this case.

STATUTORY PROVISIONS

[16] Paragraph 54(*s*) of the Act reads as follows:

Regulations 54. The Commission may, with the approval of the Governor in Council, make regulations	**Règlements** 54. La Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements :
(*s*) defining and determining earnings for benefit purposes, determining the amount of those earnings and providing for the allocation of those earnings to weeks or other periods;	*s*) définissant et déterminant la rémunération aux fins du bénéfice des prestations, déterminant le montant de cette rémunération et prévoyant sa répartition par semaine ou autre période;

[17] Subsection 35(2) of the Regulations, which deals with the determination of earnings, reads as follows:

Determination of Earnings for Benefit Purposes 35. (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings has occurred and the amount to be deducted from benefits payable under section 19 or subsection 21(3) or 22(5) of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire	**Détermination de la rémunération aux fins du bénéfice des prestations** 35. (2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour déterminer s'il y a eu un arrêt de rémunération et fixer le montant à déduire des prestations à payer en vertu de l'article 19 ou des paragraphes 21(3) ou 22(5) de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire

income of a claimant arising out of any employment, including	provenant de tout emploi, notamment:
…	[…]
[Emphasis added.]	[Je souligne.]

[18] Subsections 36(9), 36(10) and 36 (19) of the Regulations, which deal with the allocation of earnings, read as follows:

Allocation of Earnings for Benefit Purposes 36. (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.	**Répartition de la rémunération aux fins du bénéfice des prestations** 36. (1) Sous réserve du paragraphe (2), la rémunération du prestataire, déterminée conformément à l'article 35, est répartie sur un nombre donné de semaines de la manière prévue au présent article et elle constitue, aux fins mentionnées au paragraphe 35(2), la rémunération du prestataire pour ces semaines.
(9) Subject to subsections (10) and (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the nature of the earnings or the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.	(9) Sous réserve des paragraphes (10) et (11), toute rémunération payée ou payable au prestataire en raison de son licenciement ou de la cessation de son emploi est, abstraction faite de la nature de la rémunération et de la période pour laquelle elle est présentée comme étant payée ou payable, répartie sur un nombre de semaines qui commence par la semaine du licenciement ou de la cessation d'emploi, de sorte que la rémunération totale tirée par lui de cet emploi dans chaque semaine consécutive, sauf la dernière, soit égale à sa rémunération hebdomadaire normale provenant de cet emploi.
(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were	(10) Sous réserve du paragraphe (11), toute rémunération qui est payée ou payable au prestataire, par suite de son licenciement ou de la cessation de son emploi, après qu'une répartition a été faite conformément au paragraphe (9) relativement à ce licenciement ou à cette

allocated and, regardless of the nature of the subsequent earnings or the period in respect of which they are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.	cessation d'emploi est additionnée à la rémunération ayant fait l'objet de la répartition, et une nouvelle répartition est faite conformément au paragraphe (9) en fonction de ce total, abstraction faite de la nature de la rémunération subséquente et de la période pour laquelle elle est présentée comme étant payée ou payable.
(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated	(19) La rémunération non visée aux paragraphes (1) à (18) est répartie :
(*a*) if they arise from the performance of services, to the period in which the services are performed; and	*a*) si elle est reçue en échange de services, sur la période où ces services ont été fournis;
(*b*) if they arise from a transaction, to the week in which the transaction occurs.	*b*) si elle résulte d'une opération, sur la semaine où l'opération a eu lieu.
[Emphasis added.]	[Je souligne.]

RESPONDENT'S ARGUMENTS

[19] The respondent argues that there was a separation from employment within the meaning of subsection 36(9) of the Regulations on August 9, 2005, as a result of the collective dismissal notice given by the employer on May 17, 2005. At that time, Tembec's employees received their vacation pay, statutory holiday credits, floating holidays and extra pay.

[20] Later, negotiations were held between the employer and the union, resulting in severance pay being offered to those employees who wanted it, with the result of their waiving, according to the respondent, their right to reinstatement and terminating their relationship with their employer. As there cannot be two separations from employment, the respondent argues that the $42,224, while

qualifying as earnings, should be allocated as earnings to which none of subsections (1) to (18) apply. The earnings should therefore be allocated according to subsection 36(19) of the Regulations.

LEGAL TERMINOLOGY

[21] Subsection 36(9) of the Regulations stipulates that "[s]ubject to subsections (10) and (11), all earnings paid … to a claimant by reason of a lay-off (licenciement) or separation from an employment (cessation de son emploi) shall, regardless of the nature of the earnings or the period in respect of which the earnings are purported to be paid …, be allocated to a number of weeks that begins with the week of the lay-off (licenciement) or separation (cessation d'emploi) …".

[22] In *Canada (Attorney General) v. Tremblay*, [1996] F.C.J. No. 1335, at footnote 5, I wrote the following on behalf of the Court about subsection 58(9) of the Regulations, now subsection 36(9):

> 5. The word "licenciement" in the French version of subsection 58(9) of the Regulations is perhaps not the most fortunate choice of words to express the concept of "lay-off" used in the English version. We would note that the Quebec *Act respecting labour standards*, R.S.Q., c. N-1.1, subs. 83.1(2), and the *Ontario Employment Standards Act*, R.S.O. 1990, c. E-14, s. 58, use "mise à pied" for "lay-off". For the *Canada Labour Code*, R.S.Q. 1985, c. L-2, see subs. 230(3).

[23] There is no doubt that the word "licenciement" in the French version of subsections 36(9) and (10) of the Regulations refers to a lay-off. The English version of these subsections (lay-off)

could not be any clearer on this matter. The expression “separation from an employment” (cessation de son emploi) in the same subsections refers to the termination of the employment relationship.

[24] Our Court is not responsible for interpreting the *Quebec Act respecting labour standards*. It is nonetheless useful to note that under that Act, the termination of employment by the employer (cessation de travail du fait de l’employeur), including a lay-off for a period of six months or more (y compris une mise à pied pour une durée de six mois ou plus), constitutes a collective dismissal governed by this division (constitue un licenciement collectif régi par cette section). Thus, the expression “cessation de travail du fait de l’employer” is rendered in English by “termination of an employment by the employer”. Both expressions therefore refer to the termination of the employment relationship. Moreover, the expression “mis à pied” is rendered by “lay-off”. It seems to me therefore, that within the meaning of section 84.0.1 of the Quebec *Act respecting labour standards*, the employer’s measure on August 9, 2005, when Tembec’s employees were laid off as a result of a collective dismissal, does not constitute a “termination of an employment by the employer” (une cessation de travail) within the meaning of Quebec legislation, as the employer itself offered “severance pay” one month later, that is, on September 17, 2005. Under Quebec legislation, the measure taken seems to be a lay-off for a period of six months or more.

[25] That being said, how should the employer’s letter of September 13, 2005, and the “Receipt, Release and Settlement” form signed on September 24, 2005, be interpreted within the meaning of the Act and the Regulations?

[26] The measure taken by the employer on August 9, 2005, did not constitute a separation from an employment (cessation d'emploi) within the meaning of subsection 36(9) of the Regulation. According to the interpretation adopted in paragraph [23] of my reasons, it was a lay-off (licenciement or mise à pied).

[27] The form entitled "Receipt, Release and Settlement" signed on September 24, 2005, reminded the respondent that "by accepting this sum and signing this document, I, in so doing, waive my right to be recalled and the rights that relate to it, and terminate my employment relationship with Tembec as of September 24, 2005". The final termination of the employment relationship therefore took place on September 24, 2005, following Mr. Cantin's acceptance of severance pay, which he recognized having received. As a result, Mr. Cantin relinquished his employment relationship and right to be recalled and any rights that relate to this.

[28] The $42,224 compensation received by Mr. Cantin on September 24, 2005, falls under the expression "all earnings paid … to a claimant by reason of a … separation from an employment" found in subsections 36(9) and 36(10) of the Regulations.

[29] Paragraph 36(19)(*b*), which applies only to earnings not described in subsections (1) to (18), cannot be applied.

[30] The Umpire and the Board of Referees erred in applying the applicable statutory provisions, namely paragraph 36(19)(*b*) instead of subsections 36(9) and (10) of the Act. This is an error in law, combined with an error of mixed fact and law that justifies the intervention of this Court (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

[31] Moreover, the Umpire and the Board of Referees confused the right to be recalled with the right to reinstatement, although this case involved only the right to be recalled.

[32] It is true that Mr. Tremblay, the respondent's counsel, used the expression [TRANSLATION] "right to be recalled to work" before the Umpire as being equivalent to the expression "right to reinstatement" (see letter to the Umpire dated May 20, 2007, applicant's record, p. 16).

[33] In federal law, however, the right to reinstatement is an employee's right to resume his or her position following a wrongful dismissal, if the employee is granted reinstatement. In this case, the Board of Referees erred by applying *Plasse* and *Meechan*, in which the claimants received compensation to relinquish their right to reinstatement following a wrongful dismissal. The Umpire erred in not recognizing the Board's error.

CONCLUSION

[34] I would allow the application for judicial review, set aside the Umpire's decision, and refer the matter back to the Chief Umpire or his designate for redetermination on the basis that the severance pay that Rejéan Cantin acknowledged receiving should be allocated in accordance with subsections 36(9) and (10) of the Regulations.

[35] The appellant waived its costs.

"Alice Desjardins"
J.A.

"I concur.
Gilles Létourneau J.A."

"I concur.
Pierre Blais J.A"

Certified true translation
Johanna Kratz.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-392-07
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. RÉJEAN CANTIN
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	APRIL 29, 2008
REASONS FOR JUDGMENT BY:	DESJARDINS J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. BLAIS J.A.
DATED:	MAY 27, 2008

APPEARANCES:

Pauline Leroux	FOR THE APPLICANT
Benoît Roy Déry	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Pépin et Roy Québec (Quebec)	FOR THE RESPONDENT