

**Date: 20081208**

**Docket: A-341-08**

**Citation: 2008 FCA 388**

**CORAM: LINDEN J.A.  
SHARLOW J.A.  
TRUDEL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**GURJINDER UPPAL**

**Respondent**

Heard at Vancouver, British Columbia, on December 8, 2008.

Judgment delivered from the Bench at Vancouver, British Columbia, on December 8, 2008.

**REASONS FOR JUDGMENT BY:**

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Vancouver, British Columbia, on December 8, 2008)**

**TRUDEL J.A.**

[1] The Attorney General of Canada (the applicant) has applied for judicial review of a decision by Umpire R. C. Stevenson (CUB 70476), dated April 25, 2008. Mr. Uppal, the respondent, did not appear.

[2] After losing his employment, the respondent claimed unemployment benefits. His claim was denied by the Commission. It determined that the respondent had knowingly made false or representations resulting in an overpayment of over \$13,000 and imposed a penalty of \$1,239. This

penalty amounted to three times the claimant's rate of weekly benefits as permitted by paragraph 38(2)(a) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

[3] The respondent's appeal to the Board of Referees was unsuccessful, so he appealed again to the Umpire raising several issues. The respondent won with respect to the penalty, which was reduced to \$372.

[4] The crux of the present Application is the exercise, by the Commission, of its discretion to impose penalties on claimants who receive or try to receive benefits by knowingly making misrepresentations.

[5] Subsection 38(2) of the Act reads:

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|---|---|
| <p>(2) The Commission may set the amount of the penalty for each act or omission at not more than</p> <ul style="list-style-type: none"> <li>(a) three times the claimant's rate of weekly benefits;</li> <li>(b) if the penalty is imposed under paragraph (1)(c),             <ul style="list-style-type: none"> <li>(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and</li> <li>(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or</li> </ul> </li> <li>(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.</li> </ul> | <p>(2) La pénalité que la Commission peut infliger pour chaque acte délictueux ne dépasse pas :</p> <ul style="list-style-type: none"> <li>a) soit le triple du taux de prestations hebdomadaires du prestataire;</li> <li>b) soit, si cette pénalité est imposée au titre de l'alinéa (1)c), le triple :             <ul style="list-style-type: none"> <li>(i) du montant dont les prestations sont déduites au titre du paragraphe 19(3),</li> <li>(ii) du montant des prestations auxquelles le prestataire aurait eu droit pour la période en cause, n'eût été la déduction faite au titre du paragraphe 19(3) ou l'inadmissibilité ou l'exclusion dont il a fait l'objet;</li> </ul> </li> <li>c) soit, lorsque la période de prestations du prestataire n'a pas été établie, le triple du taux de prestations hebdomadaires maximal en vigueur au moment de la perpétration de l'acte délictueux.</li> </ul> |
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[6] Before imposing a penalty on the respondent, the Commission calculated the penalty amount using its *National Policy on False Statements Made Knowingly*, which has been applied to all decisions made on June 1, 2005 and after (Applicant's Record, Tab 3). On that basis, and after taking into consideration the existence of mitigating circumstances, the Commission set the penalty at 40% the of the net overpayment (Umpire's decision, at page 5). It then reduced it to \$1239 to respect the maximum amount allowed under the Act.

[7] The Umpire concluded that subsection 38(2) of the Act requires the Commission to calculate penalties in reference to a claimant's weekly benefit rate. He found that the Commission "departed from the legislated policy enacted by the Parliament" when it adopted new guidelines regarding false or misleading statements made knowingly because "if penalties are to be 'more commensurate with the amount of the overpayment' as stated in the new guidelines, rather than referenced to benefit rates, the policy change should come from Parliament" (reasons for decision, at page 7).

[8] Ultimately, the Umpire concluded that the Board "effectively refused to exercise its jurisdiction by not considering the effect of the guidelines and "erred in law in upholding what amounted to the mandatory imposition of a maximum penalty for a first offence" (*ibid.* at page 8).

[9] The Umpire's decision presents difficulties in two ways.

[10] First, the record is unclear as to whether the validity of the guidelines had been an issue between the parties. They were obviously not discussed by the Commission or by the Board. In his reasons, the Umpire introduced the subject in the following manner:

While the *vires* or validity of the Guidelines is not something an Umpire can determine in the context of a claimant's appeal it is appropriate to refer to them as their application or misapplication is relevant to the questions of whether the Commission acted judiciously in determining a penalty and whether the Board of Referees erred in its assessment of the judiciousness of the Commission's decision." *ibid*, at page 7).

[11] Counsel does not recall whether the validity of the new guidelines was formally put to the Umpire and whether the parties were given a chance to properly argue the point.

[12] Secondly, regardless of the guidelines, the Umpire did not put his mind to the Commission's decision itself, that is whether all of the relevant factors or some irrelevant factors had been considered by the Commission. His only comments were that the mitigation factor, to be meaningful, should have been applied to the final penalty and the quantum of the penalty was too high for a first offence.

[13] It is trite law that an Umpire cannot interfere with the quantum of a penalty unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it (*Canada v. McLean*, [2001] F.C.J. No. 176 (FCA); *Canada v. Rumbolt*, [2000] F.C.J. No. 1968 (FCA)).

[14] In concluding as he did, the Umpire substituted his own discretion for that of the Commission and exceeded his jurisdiction.

[15] This error is sufficient to allow the application. The new guidelines shall be discussed by this Court if and whenever their validity is properly challenged.

[16] Therefore, the application for judicial review will be allowed.

[17] The decision of the Umpire of April 25, 2008 will be set aside on the issue of the penalty imposed under subsection 38(2) of the Act and the matter will be remitted to the Chief Umpire (or his designate) for redetermination in accordance with these reasons.

"Johanne Trudel"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-341-08

**STYLE OF CAUSE:** Attorney General of Canada v.  
Gurjinder Uppal

**PLACE OF HEARING:** Vancouver, B.C.

**DATE OF HEARING:** December 8, 2008

**REASONS FOR JUDGMENT OF THE COURT BY:** (LINDEN, SHARLOW, TRUDEL  
JJ.A.)

**DELIVERED FROM THE BENCH BY:** TRUDEL J.A.

**APPEARANCES:**

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