

Date: 20090331

Docket: A-548-07

Citation: 2009 FCA 102

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

BETWEEN:

DONALD MARLOWE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on March 31, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on March 31, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on March 31, 2009)

RYER J.A.

[1] This is an application for judicial review of a decision of Umpire Teitelbaum (CUB 69121), dated August 23, 2007, dismissing an appeal of Mr. Donald Marlowe from a decision of the Board of Referees (the “Board”) that he is not entitled to benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 (the “Act”) for a period from June 8, 2003 to April 24, 2004 (the “benefit period”) because he was self-employed, within the meaning of subsection 30(1) of the *Employment Insurance Regulations*, SOR/96-332, (the “Regulations”) during that period. The Board also upheld

the assessment of a penalty under section 38 of the Act for providing false and misleading information and issued a notice of a very serious violation under section 7.1 of the Act.

[2] When an insured person makes an initial claim for benefits, section 9 of the Act requires the establishment of a benefit period and mandates the payment of benefits to the claimant for each week of unemployment that falls within the benefit period. Subsection 11(1) of the Act provides that a week of unemployment for a claimant is a week in which that claimant does not work a full working week.

[3] If a claimant is self-employed or engaged in the operation of a business on his or her own account (“self-employment”) during any week in a benefit period, subsection 30(1) of the Regulations deems that claimant to have worked a full working week during that week. As a result, that week will not be considered to be a week of unemployment for the purposes of section 9 of the Act. Subsection 30(2) of the Regulations provides an exception to the deeming rule in subsection 30(1) of the Regulations where the self-employment is minor in extent. The issue in this application is whether that exception applies to Mr. Marlowe.

STATUTORY PROVISIONS

[4] The relevant statutory provisions are section 9 and subsection 11(1) of the Act and subsections 30(1) to (3) of the Regulations. These provisions are reproduced in the appendix to these reasons.

DISCUSSION

[5] We are not persuaded that the Umpire made any reviewable error in declining to set aside the decision of the Board that the applicant was not entitled to benefits because he was self-employed within the meaning of subsection 30(1) of the Regulations throughout the benefit period and that his self-employment was not minor in extent, so as to fall within the exception contained in subsection 30(2) of the Regulations.

[6] The Board's decision was primarily based upon its findings that:

- (a) the applicant was engaged in the start-up of his new business on a full-time basis during the benefit period;
- (b) the applicant's assertion that he spent only 10 to 15 hours per week in the new business was not credible; and
- (c) the full-time commitment of the applicant to his new business was not compatible with his assertion that finding alternate employment was his first priority.

[7] Before the Umpire the applicant argued that the Board made a factual error by describing income reported in his 2003 income tax return as business income when it was really income from his former employment. The Umpire essentially concluded that this factual error was an insufficient basis upon which to set aside the Board's decision.

[8] Before this Court, the applicant alleges that the Umpire should have overturned the decision of the Board on the basis a number of additional factual errors. The applicant argues that:

- (a) his job-searching efforts during the benefit period should have been given greater consideration;
- (b) his gross income for the new business during the portion of the benefit period that fell within 2004 was inaccurately described; and
- (c) his income from the new business was incorrectly stated.

[9] The applicant also argues that the Umpire erred by failing to “quantify” the time that the applicant spent in the new business and that such quantification by the Umpire was necessary to support his statement that the applicant was engaged in the new business on a full-time basis.

[10] The factual findings that the applicant challenges are essentially factual findings of the Board. It was not open to the Umpire, as it is not open to this Court, to simply substitute the factual findings that the applicant urges for those made by the Board. Before such intervention can occur, the applicant must show that the impugned factual findings were made in a perverse or capricious manner or without regard to the material that was before the Board.

[11] Moreover, any factual errors that have been established, having regard to this high standard, must also be material in the sense that they are capable of having an impact upon the decision in question.

[12] In this case, the essential factual findings of the Board are that the applicant was engaged in the start-up of the new business on a full-time basis throughout the benefit period and that his assertions to the contrary were not credible. We are all of the view that these findings were open to the Board, based on the evidence that was presented to it, and the applicant has not established any basis upon which these findings could be overturned.

[13] In addition, in our view, the Umpire was correct in concluding that the factual error of the Board in relation to the applicant's 2003 income tax return was not material.

[14] Finally, it was not the obligation of the Umpire to "quantify" the time that the applicant spent in the new business in the benefit period. The Umpire's reasons simply demonstrate his acceptance of the essential factual findings of the Board. It is the obligation of the applicant to establish that these essential factual findings were made in a perverse or capricious manner or without regard to the material that was before the Board. In our view, the applicant has not done so.

[15] In conclusion, we are of the view that the applicant has not demonstrated any error on the part of the Umpire that would warrant setting aside his decision to uphold the decision of the Board that the applicant was not entitled to the benefit of the exception in subsection 30(2) of the Regulations because his self-employment in the new business during the benefit period was full-time, and therefore not minor in extent.

[16] With respect to the penalty that was imposed under section 38 of the Act, the evidence before the Board was that the Applicant failed on thirteen occasions to report that he was self-employed. In our view, these failures were a sufficient basis upon which to impose the penalty.

DISPOSITION

[17] For the foregoing reasons, the application will be dismissed, with costs.

"C. Michael Ryer"

J.A.

APPENDIX

Employment Insurance Act	Loi sur l'assurance-emploi
<p>9. When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.</p> <p>...</p> <p>11. (1) A week of unemployment for a claimant is a week in which the claimant does not work a full working week.</p>	<p>9. Lorsqu'un assuré qui remplit les conditions requises aux termes de l'article 7 ou 7.1 formule une demande initiale de prestations, on doit établir à son profit une période de prestations et des prestations lui sont dès lors payables, en conformité avec la présente partie, pour chaque semaine de chômage comprise dans la période de prestations.</p> <p>...</p> <p>11. (1) Une semaine de chômage, pour un prestataire, est une semaine pendant laquelle il n'effectue pas une semaine entière de travail.</p>
Employment Insurance Regulations	Règlement sur l'assurance-emploi
<p>...</p> <p>30. (1) Subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.</p> <p>(2) Where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.</p> <p>(3) The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are</p> <ul style="list-style-type: none"> (a) the time spent; (b) the nature and amount of the capital and resources invested; (c) the financial success or failure of the employment or business; (d) the continuity of the employment or business; (e) the nature of the employment or business; and (f) the claimant's intention and willingness to seek and immediately accept alternate employment. 	<p>...</p> <p>30. (1) Sous réserve des paragraphes (2) et (4), le prestataire est considéré comme ayant effectué une semaine entière de travail lorsque, durant la semaine, il exerce un emploi à titre de travailleur indépendant ou exploite une entreprise soit à son compte, soit à titre d'associé ou de coïntéressé, ou lorsque, durant cette même semaine, il exerce un autre emploi dans lequel il détermine lui-même ses heures de travail.</p> <p>(2) Lorsque le prestataire exerce un emploi ou exploite une entreprise selon le paragraphe (1) dans une mesure si limitée que cet emploi ou cette activité ne constituerait pas normalement le principal moyen de subsistance d'une personne, il n'est pas considéré, à l'égard de cet emploi ou de cette activité, comme ayant effectué une semaine entière de travail.</p> <p>(3) Les circonstances qui permettent de déterminer si le prestataire exerce un emploi ou exploite une entreprise dans la mesure décrite au paragraphe (2) sont les suivantes :</p> <ul style="list-style-type: none"> a) le temps qu'il y consacre; b) la nature et le montant du capital et des autres ressources investis; c) la réussite ou l'échec financiers de l'emploi ou de l'entreprise; d) le maintien de l'emploi ou de l'entreprise; e) la nature de l'emploi ou de l'entreprise; f) l'intention et la volonté du prestataire de chercher et d'accepter sans tarder un autre emploi.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-548-07

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DELIVERED FROM THE BENCH BY: RYER J.A.

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