

Date: 20090616

Docket: A-636-08

Citation: 2009 FCA 207

**CORAM: DÉCARY J.A.
LINDEN J.A.
EVANS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DAVID TOMPSON

Respondent

Heard at Vancouver, British Columbia, on June 16, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on June 16, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on June 16, 2009)

EVANS J.A.

[1] This is an application for judicial review by the Attorney General of Canada to set aside a decision of Umpire Teitelbaum (*CUB 71295*). The Umpire had allowed an appeal by David Tompson from a decision of the Board of Referees dismissing his appeal from a determination by the Employment Insurance Commission that he was disqualified from receiving employment insurance benefits because he had been dismissed from his employment for misconduct: see *Employment Insurance Act*, S.C. 1996, c. 23, subsection 30(1) (“Act”).

[2] The Attorney General submits that the Umpire erred in law because he reweighed the evidence and substituted his own findings of fact for those made by the Board. An Umpire is only entitled to reverse a decision by a Board for error of fact when the finding was made in a perverse and capricious manner or without regard for the evidence before it: paragraph 115(2)(c) of the Act. The Attorney General says that there was evidence before the Board that Mr Tompson left for vacation when he knew that his employer had not approved his request for leave. Based on this finding, the Attorney General argues, the Board could reasonably conclude that Mr Tompson was dismissed for misconduct, and therefore disqualified from receiving benefits.

[3] The Umpire held that there was no evidence supporting the Board's finding of fact that Mr Tompson left for vacation knowing that his request for leave had not been approved. The Umpire's view of the evidence led him to the view that there had been a miscommunication between Mr Tompson and his employer, as a result of which Mr Tompson assumed that his request had been approved because he had not been advised that it had been refused.

[4] The evidence on the record is not altogether clear. However, it is agreed that Mr Tompson requested vacation leave and that soon afterwards, before his request for leave had been considered by the employer, he cancelled the request. The operations manager of the employer said that Mr Tompson had spoken to him on his cellular telephone to tell him that he was cancelling his request for leave. Mr Tompson, on the other hand, says that he spoke to "dispatch" and asked that the employer be informed that he had cancelled his request for vacation leave.

[5] Mr Tompson says that he telephoned “dispatch” later that day to tell the employer that he had changed his mind again and now wanted to reinstate his request for leave. The operations manager says that he did not receive this message and that there is no record of its receipt by “dispatch”. It is agreed, however, that the employer did not approve a leave for Mr Tompson.

[6] The Board had before it the notes that an officer of the Commission had made of a telephone conversation that she had had with Mr Tompson when investigating his claim for employment insurance benefits. The notes stated:

I asked the claimant if his leave request had been signed and the leave approved.
He said no. I asked why he wouldn't have contacted the employer to find out why.
He said it wasn't disapproved and everyone knew he was going.

The officer also recorded Mr Tompson's allegation that the employer was simply looking for an excuse to dismiss him because he had had a grievance in the previous year.

[7] In its reasons, the Board stated that Mr Tompson confirmed that he went on vacation knowing that his request had not been approved. This would appear to be a reference to Mr Tompson's oral evidence.

[8] The Board did not reject Mr Tompson's uncontradicted evidence that he asked for his request for leave to be reinstated and, hearing nothing, assumed that his leave had in fact been approved, even though he had not received formal notification in accordance with company policy. Mr Tompson told the Commission's officer that his assumption was based on the fact that he had ample accrued holiday time and had the most seniority. In view of this evidence, it was

unreasonable for the Board to have concluded that he went on vacation “knowing it had not been approved”.

[9] The most that the Board could have found on the evidence before it was that Mr Tompson went on vacation when he knew that he had not received formal approval of his leave request and he did not try to confirm that his request for leave had in fact been approved. The Commission’s officer’s notes of her conversation with Mr Tompson are not inconsistent with this view.

[10] Leaving for vacation without receiving written approval, but assuming that it had been approved, is materially different from the Board’s finding that he left knowing that his request had not been approved. While this conduct might warrant disciplinary action by the employer, it is not clearly so serious a breach of duty in the circumstances of this case as to constitute “misconduct” within the meaning of the Regulations and thus to disqualify the employee from receiving employment insurance benefits.

[11] Accordingly, we are not persuaded that the Umpire committed any reviewable error in setting aside the Board’s decision on the ground that it was based on an unreasonable finding of fact, namely, that Mr Tompson had gone on vacation “knowing it had not been approved”.

[12] For these reasons, the Attorney General’s application for judicial review will be dismissed.

“John M. Evans”

J.A

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-636-08

(JUDICIAL REVIEW OF AN ORDER OF MAX M. TEITELBAUM, UMPIRE, DATED NOVEMBER 7, 2008)

STYLE OF CAUSE: Attorney General of Canada v. David
Tompson

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: June 16, 2009

REASONS FOR JUDGMENT OF THE COURT BY: (DÉCARY, LINDEN, EVANS JJ.A.)

DELIVERED FROM THE BENCH BY: EVANS J.A.

APPEARANCES:

Lindsay Morphy FOR THE APPLICANT

David Tompson On his own behalf

SOLICITORS OF RECORD:

John H. Sims, Q.C. FOR THE APPLICANT
Deputy Attorney-General of Canada