

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20101209**

**Docket: A-105-10**

**Citation: 2010 FCA 335**

**CORAM: SEXTON J.A.  
EVANS J.A.  
PELLETIER J.A.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**DAN TRINH**

**Respondent**

Heard at Toronto, Ontario, on December 7, 2010.

Judgment delivered at Toronto, Ontario, on December 9, 2010.

**REASONS FOR JUDGMENT BY:**

**SEXTON J.A.**

**CONCURRED IN BY:**

**EVANS J.A.  
PELLETIER J.A.**

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**REASONS FOR JUDGMENT**

**SEXTON J.A.**

[1] This is an application for judicial review of the decision of Umpire Durocher (CUB 74050).

Both the Board of Referees and the Umpire found that the respondent had good cause for delaying her application for benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 (the “Act”).

[2] In my view, this application should be allowed. The Umpire’s finding that the respondent had good cause is unreasonable in light of the facts on the record and this court’s jurisprudence

holding that a claimant is generally expected to take reasonable steps to ascertain her obligations under the Act.

[3] The respondent's last day of work was August 15, 2008, at which time she returned to school. Her initial claim for employment insurance benefits was filed on May 5, 2009, effective to May 3, 2009. On her initial application, the respondent explained this delay by noting simply that she had "returned to school". In her Notice of Appeal to the Board of Referees, she further explained that "I didn't realize I should have applied immediately after my last day of work". In testimony before the Board of Referees, she stated that she had been given the wrong information about filing for benefits, although she does not appear to have identified the source of this information.

[4] Under subsection 10(4) of the Act, a claimant may antedate a claim for benefits where "good cause" existed for the entire length of the delay:

An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.

Lorsque le prestataire présente une demande initiale de prestations après le premier jour où il remplissait les conditions requises pour la présenter, la demande doit être considérée comme ayant été présentée à une date antérieure si le prestataire démontre qu'à cette date antérieure il remplissait les conditions requises pour recevoir des prestations et qu'il avait, durant toute la période écoulée entre cette date antérieure et la date à laquelle il présente sa demande, un motif valable justifiant son retard.

[5] The Canada Employment Insurance Commission denied the respondent's antedating request on the grounds that she had not shown good cause for the delay. On appeal, the Board of Referees accepted the respondent's testimony that she was given wrong information. It concluded that being misinformed was good cause for her late application, and allowed the appeal. The Umpire dismissed the Commission's appeal of the Board of Referees' decision, holding that its findings of fact were entitled to deference and that the decision was supported by the jurisprudence.

[6] The only reason given by the respondent for the delay is that she was ignorant of the law because she was misinformed. The issue is whether a claimant can rely solely on such unverified information in claiming "good cause" under subsection 10(4).

[7] In *Canada v. Carry*, 2005 FCA 367 at paragraphs 4-5, Justice Linden made clear that a claimant is under a positive obligation to ascertain her obligations under the Act:

The Umpire affirmed the decision of the Board on the basis that it was not unreasonable to hold that there was good cause in this case. The jurisprudence of this Court, however, clearly does not permit such a conclusion in this case in that a reasonable person is expected to take reasonably prompt steps to determine her entitlement to Employment Insurance benefits. Ignorance of the law and good faith, the reasons offered for the delay of nine months in this case, have been held to be insufficient to amount to good cause (emphasis added).

[8] Justice Létourneau came to a similar conclusion in *Canada v. Bryce*, 2008 FCA 118 at paragraphs 12-13:

On the facts of this case, in our opinion, it was not reasonably open to the Umpire to conclude as he did. Rather, a proper application of the legal tests to the facts leads to the conclusion that a person in the respondent's situation would have enquired about his rights and obligations and the steps that he should take to protect his claim for

benefits. An obvious place to enquire would have been the Commission. We agree with counsel for the appellant that, in effect, the Umpire accepted as good cause for the delay the respondent's inexperience with the system and his reliance on his employer's advice when the respondent was no longer justified in doing so (emphasis added).

[9] The general rule was set out by Justice Marceau in *Canada (Attorney-General) v. Caron* (1986), 69 N.R. 132 at paragraph 5 (C.A.):

What the [Umpire's] decision says is simply that the respondent's error as to her situation and her right to receive unemployment insurance benefits together with her good faith constituted good cause... This is precisely the approach which must be rejected if the will of Parliament is not to be frustrated, and which has in fact been rejected in [*Pirotte v. Canada (Unemployment Insurance Commission)*, [1977] 1 F.C. 314] and [*Canada (Attorney-General) v. Albrecht*, [1985] 1 F.C. 710 (C.A.)]. It is worth repeating what the latter judgment said should be the appropriate principle: only by demonstrating that he did what a reasonable and prudent person would have done in the same circumstances, either to clarify the situation regarding his employment or to determine his rights and obligations under the provisions of the Unemployment Insurance Act, 1971, can a claimant, who failed to make his claim at the time he ceased to be employed and to receive a salary, establish a valid excuse for his delay and have his application considered retroactively. I suppose there could be cases in which inaction and submissiveness would be understandable regardless, but I feel that the circumstances would have to be very exceptional... (emphasis added).

[10] The law is therefore clear that, barring exceptional circumstances, a prospective claimant in the respondent's position is expected to "take reasonably prompt steps" to understand her obligations under the Act. As part of this requirement, the respondent was expected to make reasonable inquiries to verify the information that she had received. Because she did not do so, it was unreasonable for the Umpire to conclude that this misinformation constituted good cause for the respondent's delayed application. It cannot be said that the circumstances in this case were "exceptional".

[11] For these reasons, the application for judicial review will be allowed without costs. The decision of the Umpire will be set aside and the matter referred back to the Chief Umpire, or the person that he designates, for a new determination on the basis that the appellant's appeal to the Umpire from the Board of Referees' decision shall be allowed.

"J. Edgar Sexton"

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J.A.

"I agree

John M. Evans J.A."

"I agree

J.D. Denis Pelletier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-105-10

**(APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF JUSTICE DUROCHER,  
AS UMPIRE DATED FEBRUARY 25, 2010 IN DOCKET NO. CUB 74050)**

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v. DAN TRINH

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 7, 2010

**REASONS FOR JUDGMENT BY:** SEXTON J.A.

**CONCURRED IN BY:** EVANS J.A.  
PELLETIER J.A.

**DATED:** December 9, 2010

**APPEARANCES:**

Derek Edwards FOR THE APPLICANT

Dan Trinh (No Appearance) FOR THE RESPONDENT

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