Federal Court of Appeal

Cour d'appel fédérale

Date: 20110315

Docket: A-313-10

Citation: 2011 FCA 99

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

DENIS LONG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on March 14, 2011.

Order delivered at Toronto, Ontario, on March 15, 2011.

REASONS FOR ORDER BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: DAWSON J.A.
MAINVILLE J.A.

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REASONS FOR ORDER

LAYDEN-STEVENSON J.A.

[1] Mr. Long applies for judicial review of the decision of the Umpire dismissing his appeal from a decision of the Board of Referees (the board).

[2] Mr. Long previously had qualified for employment insurance benefits pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). He worked during his benefit period which began November 2, 2008 and accumulated insurable hours. His benefit period ended on November

28, 2009. Mr. Long was laid off on November 27, 2009 and applied for employment insurance benefits on December 3, 2009. His application was denied because he had not worked the requisite number of hours during his qualifying period, which under normal circumstances, would begin on November 30, 2008 and end on November 28, 2009. The Commission determined the qualifying period to be November 2, 2008 to November 28, 2009. Mr. Long had been unable to work for a six-week period from September 20, 2008 to October 31, 2009 due to a work-related injury.

[3] Before the board, Mr. Long argued, among other things, that his qualifying period should be extended back to October 19, 2008 (six weeks) under paragraph 8(2)(a) of the Act. The board rejected that argument. It concluded that a prior benefit period was established the week commencing November 2, 2008 and the qualifying period could not be extended beyond this date. The Umpire dismissed Mr. Long's appeal from the board's decision.

[4] The only issue argued on this application for judicial review is whether the Umpire erred in dismissing the appeal on that basis. I conclude that the Umpire ought to have dismissed the appeal because I arrive at the same determination as the board, although I do so by a different route.

[5] In my view, this Court's decision in *Jackson v. Canada* (*A.G.*), [1991] F.C.J. No. 522 (C.A.) (*Jackson*) is dispositive. There, the Court interpreted subsection 7(1) of the former legislation, which is in substance the same as subsection 8(1) of the Act.

[6] Subsection 8(1) provides for two possible qualifying periods. It specifically requires that the shorter of the two possibilities be chosen as the applicable qualifying period. In *Jackson*, this Court

held that it is after taking into consideration any applicable extensions - in this case under paragraph 8(2)(a) - of the 52 week period that a determination can be made as to which of the two possible qualifying periods is the shorter.

[7] Subsection 8(1) and paragraph 8(2)(a) of the Act read:

8. (1) Subject to subsections (2) to (7), the qualifying period of an insured person is the shorter of (*a*) the 52-week period immediately before the beginning of a benefit period under subsection 10(1), and (*b*) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period under subsection 10(1).	**8.** (1) Sous réserve des paragraphes (2) à (7), la période de référence d'un assuré est la plus courte des périodes suivantes : *a*) la période de cinquante-deux semaines qui précède le début d'une période de prestations prévue au paragraphe 10(1); *b*) la période qui débute en même temps que la période de prestations précédente et se termine à la fin de la semaine précédant le début d'une période de prestations prévue au paragraphe 10(1).
(2) A qualifying period mentioned in paragraph (1)(*a*) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that throughout the week the person was not employed in insurable employment because the person was (*a*) incapable of work because of a prescribed illness, injury, quarantine or pregnancy;	(2) Lorsqu'une personne prouve, de la manière que la Commission peut ordonner, qu'au cours d'une période de référence visée à l'alinéa (1)*a*) elle n'a pas exercé, pendant une ou plusieurs semaines, un emploi assurable pour l'une ou l'autre des raisons ci-après, cette période de référence est prolongée d'un nombre équivalent de semaines : *a*) elle était incapable de travailler par suite d'une maladie, d'une blessure, d'une mise en quarantaine ou d'une grossesse prévue par règlement;

[8] Mr. Long's argument fails because he selects paragraph 8(1)(a) as the shorter of the two possible qualifying periods and then adds his proposed six-week extension. His approach is contrary to the *Jackson* ruling. Applying *Jackson*, Mr. Long's paragraph 8(1)(a) qualifying period is 58 weeks (granting him credit for the paragraph 8(2)(a) extension). His paragraph 8(1)(b) qualifying period, ascertained in accordance with the formula contained in that paragraph, is 56 weeks. The 8(1)(b) qualifying period, being the shorter of the two possibilities, is the qualifying period that must apply.

[9] The board, albeit by a different route, reached the same conclusion and the correct result. Consequently, it was proper for the Umpire to dismiss the appeal of the board's ruling on this issue.

[10] However, that does not end the matter. Mr. Long also raises an issue of procedural fairness. This argument arises because it was only at the hearing of this application that *Jackson* was raised for the first time and then, by the Court. It had not been referred to by the respondent at any stage of the proceedings and neither the board nor the Umpire made reference to it. While that omission does not alter the binding effect of *Jackson*, it does cast a shadow over Mr. Long's application.

[11] Mr. Long claims, had *Jackson* been argued before the board or the Umpire, he would have approached his application for judicial review of the Umpire's decision differently. Specifically, he would have challenged other aspects of the Umpire's decision rather than focus exclusively on what he perceived to be his strongest ground. While the onus always lies on an applicant to advance all grounds upon which an application for judicial review is sought, in the peculiar circumstances of

this matter and particularly the manner in which it unfolded, I am concerned about Mr. Long's perception that his hearing before this Court was unfair.

[12] Consequently, although Mr. Long has not been successful (and cannot succeed) on the ground that he advanced, in my view, it would be appropriate to grant leave for him to serve and file an amended notice of application to address any other grounds upon which he challenges the decision of the Umpire. When asked to address the prospect of this potential remedy at the hearing, counsel for the respondent took no position.

[13] I would grant leave to Mr. Long to serve and file an amended notice of application within 30 days of the date of the order in this matter. All other steps in the proceeding should run in accordance with the provisions of the *Federal Courts Rules*, SOR/98-106. In the circumstances, I would make no order as to costs.

"Carolyn Layden-Stevenson"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-313-10
(APPEAL FROM A DECISION OF THE HONOURABLE R.J. MARIN, DATED MARCH 23, 2010, DOCKET NO. CUB 74847)	
STYLE OF CAUSE:	DENIS LONG v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 14, 2011
REASONS FOR ORDER BY:	LAYDEN-STEVENSON J.A.
CONCURRED IN BY:	DAWSON J.A. MAINVILLE J.A.
DATED:	MARCH 15, 2011

APPEARANCES:

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Derek Edwards	FOR THE RESPONDENT

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