Federal Court of Appeal

Cour d'appel fédérale

Date: 20110915

Docket: A-43-11

Citation: 2011 FCA 252

CORAM: **NOËL J.A.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CURTIS HINES

Respondent

Heard at Ottawa, Ontario, on September 13, 2011.

Judgment delivered at Ottawa, Ontario, on September 15, 2011.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: SHARLOW J.A.
STRATAS J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20110915

Docket: A-43-11

Citation: 2011 FCA 252

CORAM: **NOËL J.A.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CURTIS HINES

Respondent

REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application by the Attorney General of Canada (the applicant) for judicial review of a reconsideration decision (CUB 73386B) by Chief Umpire Designate Michel Beaudry (the Umpire) dated December 17, 2010, wherein the Umpire allowed Mr. Curtis Hines' (the respondent) appeal and ruled that the respondent did not knowingly provide false information to the Canada Employment Insurance Commission (the Commission).

[2] The applicant contends that it was not open to the Umpire to reconsider his earlier decision as he was not presented with "new facts" as contemplated by section 120 of the *Employment*

Insurance Act, S.C. 1996, c. 23 (the Act). In the alternative, the applicant contends that the alleged "new facts" did not support the conclusion reached by the Umpire.

[3] For the reasons which follow, I am of the view that the Umpire was not presented with "new facts" as the applicant contends and that he had no authority to reconsider his earlier decision.

FACTUAL BACKGROUND

[4] The respondent filed an initial claim for employment insurance benefits on September 27, 2005. On May 15, 2006, the Commission, noting discrepancies between the declared earnings and actual earned amounts, determined that the respondent made false or misleading statements and imposed a penalty under the Act. On October 10, 2008 upon re-examination of the respondent's claim, the Commission imposed a penalty of $1,239.00 under the Act. The respondent does not contest that he incorrectly reported his earnings in 2005 and 2006.

[5] The respondent first appealed the Commission's decision to a Board of Referees (the Board) which dismissed the appeal on December 22, 2008. The respondent then appealed the Board's decision to an Umpire. In both his appeals to the Board and the Umpire, the respondent argued that his major depression affected his ability to cope with his financial obligations. On March 20, 2009, the Umpire Mr. Louis S. Tannenbaum (CUB 71980) dismissed the appeal as it pertained to the issue of allocation. As to the penalty and the notice of violation, the Umpire found that the initial Board failed to consider whether the false representations were made knowingly and sent the matter back to a differently constituted Board for a new hearing (applicant's record at p. 178).

[6] On June 11, 2009, the new Board found that the respondent knowingly made false representations in filing his claims for benefits. The respondent appealed the Board's decision to the Umpire on June 22, 2009. He argued that the Board failed to take into consideration that he was suffering from major depression rendering him unable to manage day-to-day finances at the time when he incorrectly completed the reporting cards.

[7] On April 23, 2010, the Umpire dismissed the appeal (CUB 73386A). He noted that in the absence of a doctor's note providing specific information that the respondent was in such a state of mind that he could not properly report his work and his earnings, it was reasonable to conclude that the respondent knew his statements were false. The Umpire ruled that the Board did not commit a reviewable error in fact or in law, but urged the Commission to work with the respondent to find a repayment schedule avoiding undue hardship.

[8] On September 16, 2010, the respondent sent a letter to the Umpire asking for reconsideration of this last decision on the ground that he had new facts to present. He reemphasized that his depression and alcohol use in 2005 and 2006 left him unable to complete adequately his E.I. claim. This letter was accompanied by a letter from his physician, P.G. Methven MD, dated July 21, 2010, stating (applicant's record at p. 37):

> This patient has been under my care for the past 20 years and is well known to me. Mr. Hines has suffered with depression for many years, this was particularly severe 2005 and 2006 [sic]. His ability to work and complete documentation was markedly impaired by his illness at that time.

DECISION OF THE UMPIRE

[9] The Umpire first recalled that in his first decision, he dismissed the appeal of the respondent in part due to the absence of a doctor's certificate providing specific information that the respondent was in a state of mind such that he could not properly report his work and earnings. Considering the September 16, 2010 letter and medical note provided by the respondent, the Umpire reversed his ruling. He set aside the Board's decision on the ground that the medical note confirmed that the respondent suffered from a particularly severe depression which markedly impaired his ability to work and produce documentation in 2005 and 2006.

[10] The Umpire acknowledged that the medical condition of the respondent was a fact that was known by the respondent and which was brought to the attention of the Board at the time of the hearing. However, the Umpire dismissed the applicant's contention that the medical note was not a new fact on the basis that the respondent was not aware of the need for a medical certificate to substantiate his claim. The Umpire also concluded that the medical note confirmed the allegation of the respondent "that his medical condition impaired his ability to manage his day to day affairs and led him to provide incorrect information" (reasons at p. 2).

[11] Based on this additional information the Umpire proceeded to reconsider his earlier decision and allow the appeal.

ALLEGED ERROR

[12] In support the application, the applicant contends *inter alia* that the Umpire applied the wrong legal test in holding that he had been presented with new facts in the form of the medical letter and note. When the correct legal test is applied, it is clear that the Umpire was not presented with new facts.

ANALYSIS AND DECISION

[13] The Umpire had no authority to reconsider his initial decision in the absence of "new facts" within the meaning of section 120 of the Act:

120. The Commission, a board of referees or the umpire may rescind or amend a decision given in any particular claim for benefit if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.	**120.** La Commission, un conseil arbitral ou le juge-arbitre peut annuler ou modifier toute décision relative à une demande particulière de prestations si on lui présente des faits nouveaux ou si, selon sa conviction, la décision a été rendue avant que soit connu un fait essentiel ou a été fondée sur une erreur relative à un tel fait.

[14] The test for determining whether "new facts" exist within the meaning of this provision has long been established. It was reiterated in *Canada (Attorney General) v. Chan*, [1994] F.C.J. No 1916, where Décary J.A., referring to the statutory predecessor to section 120 which bears essentially the same language, said (para. 10):

> … "New facts", for the purpose of the reconsideration of a decision of an umpire sought pursuant to section 86 of the Act, are facts that either happened after the

> decision was rendered or had happened prior to the decision but could not have been discovered by a claimant acting diligently and in both cases the facts alleged must have been decisive of the issue put to the umpire.
>
> [My emphasis]

[15] In assessing whether he was presented with new facts, the Umpire recognized that the claimant was aware of his medical condition at the relevant time. However, since the claimant was not aware of the need to substantiate his claim by way of a medical opinion, the Umpire held that the medical letter and note constituted "new facts". The reasoning is set out at page 2 of his reasons as follows:

> The Commission maintains that [the claimant's medical condition] does not constitute a new fact pursuant to section 120 of the [Act] because it was a fact which was known to the claimant at the time of the hearing before the [Board]. It is true that [the claimant] raised the issue of his medical condition at the hearing before the Board. What the claimant was not aware of however was that he needed to substantiate his claim by way of a medical certificate. He has now done this and his doctor is confirming what [the respondent] has been alleging from the outset; that his medical condition impaired his ability to manage his day to day affairs and led him to provide incorrect information, and that it was not his deliberate intention to mislead the Commission.
>
> [My emphasis]

[16] In my respectful view, the Umpire applied the wrong test in holding that the medical letter and note confirming the claimant's medical condition qualified as "new facts". The test is not whether the claimant was aware that a medical opinion had to be produced, but whether the claimant acting diligently could have produced this evidence.

[17] Applying the correct test, it is apparent that the claimant's medical condition was known at the relevant time and that a medical opinion confirming this condition could have been obtained, if sought. It follows that the medical letter and note cannot be viewed as "new facts".

[18] In the absence of new facts, the Umpire had no authority to reconsider his earlier decision. I would therefore allow the application for judicial review and set aside the decision of December 17, 2010 thereby allowing the Umpire's initial decision (CUB 73386A) to stand.

"Marc Noël"
J.A.

"I agree
K. Sharlow J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-43-11
APPEAL FROM A DECISION OF THE CHIEF UMPIRE DESIGNATE MICHEL BEAUDRY DATED DECEMBER 17, 2010, NO. CUB 73386B.	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. CURTIS HINES
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 13, 2011
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	SHARLOW J.A. STRATAS J.A.
DATED:	September 15, 2011 Modified September 16, 2011

APPEARANCES:

Linda Lafond	FOR THE APPLICANT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPLICANT
N/A	FOR THE RESPONDENT (SELF-REPRESENTED)