Federal Court of Appeal

Cour d'appel fédérale

Date: 20110922

Docket: A-124-11

Citation: 2011 FCA 266

CORAM: **SHARLOW J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JASWANT KALER

Respondent

Heard at Toronto, Ontario, on September 22, 2011.

Judgment delivered at Toronto, Ontario, on September 22, 2011.

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

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

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] I would allow the applicant Crown's application for judicial review of the decision of Umpire Landry (the Umpire) upholding a decision of the Board of Referees (the Board). The Board granted the respondent's request to antedate her application for employment insurance benefits (benefits) under the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). The respondent did not file written submissions and although present at the hearing before us, did not make oral submissions.

[2] The respondent was laid off from her employment on November 7, 2008 and applied for benefits on August 19, 2009. The Commission denied the claim because the respondent had not accumulated sufficient insurable hours in the 52 weeks preceding her application. The respondent appealed to the Board of Referees and requested that her claim be antedated to November, 2008.

[3] Before the Board, the respondent stated that she was illiterate and did not apply for benefits earlier because her employer indicated she would be called back when more work was available. She left Canada for India in January, 2009. In February, she was involved in an accident in India and her return to Canada was delayed until July. After her return, family and friends advised her to apply for benefits. Although she requested her Record of Employment from her employer, she did not obtain it until August 6, 2009.

[4] The antedating of claims is permissible under subsection 10(4) of the Act in circumstances where good cause for the delay in applying for benefits is established. To establish good cause, the jurisprudence of this Court requires that a claimant "be able to show that [she] did what a reasonable person in [her] situation would have done to satisfy [herself] as to [her] rights and obligations under the Act": *Canada* (*A.G.*) *v. Albrecht*, [1985] 1 F.C. 710 (C.A.) (*Albrecht*). It is also settled law that a claimant has an obligation to take "reasonably prompt steps" to determine entitlement to benefits and to ensure her rights and obligations under the Act: *Canada* (*A.G.*) *v. Carry*, 2005 FCA 367, 344 N.R. 142 (*Carry*). This obligation imports a duty of care that is both demanding and strict: *Albrecht*, para. 13. Good cause must be shown throughout the entire period for which the antedate is required: *Canada* (*A. G.*) *v. Chalk*, 2010 FCA 243. Ignorance of the law,

even if coupled with good faith, is not sufficient to establish good cause: *Canada* (*A.G.*) *v. Somwaru*, 2010 FCA 336; *Carry*, para. 5.

[5] The Board acknowledged the legal test articulated in *Albrecht*. However, it did not examine the facts of the respondent's case in relation to the above cited principles of law. Rather, it accepted that the respondent was illiterate and concluded that the respondent's illiteracy "provides cause for taking an excessive amount of time to apply for benefits." It allowed the respondent's appeal with respect to the "denial of an antedate."

[6] The Umpire reviewed the factual context, referred to excerpts from the Board's decision and concluded there was evidence to support the finding that the respondent's illiteracy constituted good cause. The Umpire did not refer to any jurisprudence.

[7] In my view, the Umpire erred when he failed to address the applicable law regarding "good cause for delay." In *Canada* (*A.G.*) *v. Brace*, 2008 FCA 118, 377 N.R. 228, this Court concluded that an Umpire erred in failing to set out the proper legal test since the facts must be viewed expressly through the lens of the proper definition. In this case, the Board erred in failing to apply the law to the facts and the Umpire erred in failing to intervene.

[8] Consequently, for these reasons, I would allow the application for judicial review. At the hearing, Crown counsel informed the Court that the appropriate remedy would be to return the matter for rehearing. According to counsel, whether the respondent could succeed, with the benefit

of a supplemented record, remains an open question. Consequently, I would set aside the decision of the Umpire and return the matter to the Chief Umpire or one of his designates for redetermination on the basis that the decision of the Board of Referees be set aside and the matter be returned to a newly constituted Board of Referees for a new hearing. I would not award costs since none were sought.

"Carolyn Layden-Stevenson"
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-124-11

AN APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE J. LANDRY OF THE UMPIRE COURT, DATED JANUARY 27, 2011, IN COURT FILE NO.: CUB 76327.

STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. JASWANT KALER
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	SEPTEMBER 22, 2011
REASONS FOR JUDGMENT BY:	LAYDEN-STEVENSON J.A.
CONCURRED IN BY:	SHARLOW J.A. STRATAS J.A.
DATED:	SEPTEMBER 22, 2011

APPEARANCES:

Derek Edwards	FOR THE APPELLANT
No appearance	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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