Federal Court of Appeal | Cour d'appel fédérale

Date: 20120224

Docket: A-352-11

Citation: 2012 FCA 62

CORAM: **GAUTHIER J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

SYLVAIN GOULET

Respondent

Judgment delivered at Ottawa, Ontario, on February 24, 2012, on motion in writing and without appearance of the parties.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: GAUTHIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The parties have submitted a joint motion to this Court seeking a consent judgment allowing in part the Attorney General of Canada's application for judicial review of decision CUB 77503 rendered on July 8, 2011, by Umpire Jacques Blanchard.

Background

[2] In this case, the applicant is claiming from the respondent an $11,151.00 overpayment under the *Employment Insurance Act*, S.C. 1996, c. 23, for the January to September 2006 period

on the ground that, during that period, the respondent was self-employed or engaged in the operation of a business. The applicant is also seeking a $5,000.00 penalty for alleged false or misleading statements made by the respondent.

[3] The respondent appealed the matter before a Board of Referees established under the *Employment Insurance Act*. In a decision dated January 27, 2011, the Board of Referees cancelled the claim for the overpayment on the ground that the evidence submitted established that the respondent could rely on the exception set out in subsections 30(2) and (3) of the *Employment Insurance Regulations*, SOR/96-332:

30. (1) Subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.	**30.** (1) Sous réserve des paragraphes (2) et (4), le prestataire est considéré comme ayant effectué une semaine entière de travail lorsque, durant la semaine, il exerce un emploi à titre de travailleur indépendant ou exploite une entreprise soit à son compte, soit à titre d'associé ou de coïntéressé, ou lorsque, durant cette même semaine, il exerce un autre emploi dans lequel il détermine lui-même ses heures de travail.
(2) Where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full	(2) Lorsque le prestataire exerce un emploi ou exploite une entreprise selon le paragraphe (1) dans une mesure si limitée que cet emploi ou cette activité ne constituerait pas normalement le principal moyen de subsistance d'une personne, il n'est pas considéré, à l'égard de cet emploi ou de cette activité, comme ayant effectué une semaine entière de

working week.

(3) The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are

(*a*) the time spent;

(*b*) the nature and amount of the capital and resources invested;

(*c*) the financial success or failure of the employment or business;

(*d*) the continuity of the employment or business;

(*e*) the nature of the employment or business; and

(*f*) the claimant's intention and willingness to seek and immediately accept alternate employment.

travail.

(3) Les circonstances qui permettent de déterminer si le prestataire exerce un emploi ou exploite une entreprise dans la mesure décrite au paragraphe (2) sont les suivantes :

a) le temps qu'il y consacre;

b) la nature et le montant du capital et des autres ressources investis;

c) la réussite ou l'échec financiers de l'emploi ou de l'entreprise;

d) le maintien de l'emploi ou de l'entreprise;

e) la nature de l'emploi ou de l'entreprise;

f) l'intention et la volonté du prestataire de chercher et d'accepter sans tarder un autre emploi.

[4] The Board of Referees also cancelled the penalty claimed, on the ground that the evidence submitted demonstrated that the respondent had not knowingly made false statements within the meaning of the Act.

[5] The applicant appealed before an umpire, who dismissed the appeal on the ground that the Board of Referees had not erred in fact and law in making its decision.

[6] On September 27, 2011, the applicant applied to this Court for judicial review of the umpire's decision pursuant to section 28 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[7] However, on December 30, 2011, the parties filed, through their respective counsel, a joint motion for a consent judgment on the application for judicial review.

[8] In the affidavit appended to this motion, counsel for the applicant submitted that his mandate was now limited to [TRANSLATION] "confining the present application for judicial review of Umpire Blanchard's decision CUB 77503 solely to the issue of whether or not the respondent was unemployed". I understand from this affidavit that the applicant is no longer challenging the umpire's refusal to rescind the Board of Referees' decision to the effect that the evidence submitted demonstrates that the respondent did not knowingly make false statements within the meaning of the Act.

[9] The parties' counsel agree in writing that a judgment be rendered on the issue of whether or not the respondent was unemployed. Both counsel therefore require a judgment from this Court ensuring that a Board of Referees reconsider the matter following a new hearing, and that this Board receive directions from our Court regarding the test set out in subsection 30(2) of the *Employment Insurance Regulations*.

[10] The only reason given in support of this motion is that the parties [TRANSLATION] "have agreed to settle the present judicial review by consent". Given the cursory nature of this reason, Justice Trudel of this Court issued a direction on January 10, 2012, requesting counsel to provide brief explanations on (1) the errors of law or of principle committed by the umpire; and (2) the

reasons that would warrant the Court directing the next Board of Referees on the test to be applied upon reconsideration of the matter.

Analysis

Judicial review on consent

[11] The principal question raised by this proceeding is whether, in the context of an application for judicial review, this Court can set aside the decision of an umpire on the mere consent of the parties to the proceeding.

[12] Rule 349 of the *Federal Courts Rules*, SOR/98-106 (the "Rules") makes it possible to consent to the reversal or variation of an order appealed from if the resultant judgment is one that could have been given on consent. This rule, however, appears in Part 6 concerning appeals, and no such similar provision can be found in Part 5 of the Rules concerning applications, including applications for judicial review.

[13] Under section 118 of the *Employment Insurance Act*, the decision of the umpire is final and not subject to appeal or review, except for judicial review under section 28 of the *Federal Courts Act*. Therefore, an umpire's decision cannot be set aside by mere consent of the parties. Quashing such a decision by mere consent of the parties is, in my opinion, contrary to Parliament's intention and to the principle of finality and stability of judgments stated by Parliament. Formal judicial intervention is therefore required for this purpose.

[14] Thus, the parties to this proceeding may therefore settle among themselves the financial consequences of an umpire's decision, but that decision remains undisturbed, regardless of the terms and conditions of such a settlement. If the parties wish to quash the umpire's decision as part of their settlement, they must do so by applying for judicial review before this Court.

[15] This Court has on occasion disposed of an application for judicial review on joint motion by the parties insofar as certain conditions were respected: *Canada (Attorney General) v. Burnham*, 2008 FCA 380, 384 N.R. 149; *Lynch v. Canada (Minister of Manpower and Immigration)*, [1974] F.C.J. No. 1006 (C.A.) (QL); *Pennachio v. Canada (Minister of Manpower and Immigration)*, [1974] F.C.J. No. 1007 (C.A.) (QL). Although these decisions do not explain on what legal basis this Court can act, I note that subsection 18.4(1) of the *Federal Courts Act* (applicable to this proceeding by virtue of subsection 28(2) of that Act), requires of our Court that it hear and determine without delay and in a summary way an application for judicial review. Part 5 of the Rules establishes the summary way to be followed for dealing with such applications; however, Rule 55 allows the Court, in special circumstances, to vary a rule or dispense with compliance with a rule. On this basis, therefore, this Court may indeed render judgment on a judicial review application on joint motion of the parties when special circumstances warrant it.

[16] However, such a judgment is not rendered on the consent of the parties, but is rather a judgment on the merits of the application for judicial review rendered in a summary way on joint motion. Thus, the application for judicial review can only be allowed insofar as the parties

demonstrate an error by the umpire that justifies such a conclusion. It is therefore incumbent upon the parties to set out in their motion record the facts justifying the intervention of this Court and the legal grounds that support such an intervention: *Canada (Attorney General) v. Burnham*, above, at paragraphs 7 and 11, *Pennachio v. Canada (Minister of Manpower and Immigration)*, above, at paragraph 3.

[17] Moreover, in such circumstances, this Court cannot be bound by the parties' consent, be it with regard to the judgment to be rendered or with regard to the applicable legal principles. Thus, in *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.), Justice Décary pointed out at page 253 that a concession on a point of law could not be binding on the Court. The same conclusion was reached by Justice Pratte in *Life Underwriters Assn. of Canada v. Provincial Assn. of Quebec Life Underwriters* [1990] 3 F.C. 500 (C.A.), at pages 505–06 (supported in this respect by Justice Marceau, at page 508). Although this decision was reversed on another point in law (see [1992] 1 S.C.R. 449), the principle set out above is nonetheless still valid.

[18] Lastly, since a summary judgment in the context of an application for judicial review is rendered on an incomplete record and without this Court having had the opportunity to hear a counter-argument, the reasons supporting such a judgment cannot bind this Court in its subsequent decisions: *Uppal v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565 (C.A.), at pages 575–76, *Armstrong v. Canada* (1996), 136 D.L.R. (4th) 22, 197 N.R. 262, [1996] F.C.J. No. 599 (C.A.) (QL), at paragraph 20 of the QL version.

The present case

[19] In the present matter, the parties' common submissions rely on their reading of the respective decisions of the Board of Referees and of the umpire.

[20] In a brief joint letter dated January 19, 2012, prepared in response to the order issued by Justice Trudel, the parties' counsel make two arguments. First, they allege that the umpire erred in law through [TRANSLATION] "his refusal to intervene on the ground that the Board of Referees' decision regarding the state of unemployment was a factual one and that it was the Board's responsibility to determine the facts". According to the parties' counsel, the umpire therefore asked the wrong question by restricting the appeal before him to a simple issue of fact.

[21] Contrary to what the parties' counsel submit, the umpire did ask the correct question at page 4 of his decision:

> [TRANSLATION]
>
> The issue before the undersigned is whether the Board of Referees correctly applied the criteria pursuant to section 30 of the [*Employment Insurance*] *Regulations*. This is a question of mixed fact and law that must be reviewed on the standard of reasonableness (A-256-0, *Martens v. Canada (Attorney General)*, 2008 FCA 240).

[22] However, the parties' counsel add a second argument, namely that it [TRANSLATION] "is not enough for a Board of Referees to enumerate the factors in subsection 30(3) of the *Employment Insurance Regulations* (EIR) and to list the answers provided for each factor without answering the question before it, namely whether the claimant was operating his

business to the minor extent provided for by subsection 30(2) of the EIR". To support this last submission, both counsel rely on the judgment of this Court in *Martens v. Canada (Attorney General)*, 2008 FCA 240 ("*Martens*").

[23] In *Martens*, Justice Ryer wrote at paragraph 34 that "[w]hile not bound to apply *de novo* the test in subsection 30(2) [of the *Employment Insurance Regulations*], the Umpire was required to determine whether the relevant legal principles were correctly identified, considered and applied by the Second Board". More specifically, at paragraph 33 of *Martens*, this Court was of the following opinion:

> While the Second Board identified the relevant statutory considerations, in subsections 30(2) and (3) [of the Regulations], with respect to the determination of whether Mr. Martens' engagement in the farm operations was minor in extent, *there is no indication that the objective test in subsection 30(2) [of the Employment Insurance Regulations] was actually considered by the Second Board in arriving at its conclusion that this engagement was more than minor in extent*. Indeed, the Umpire summarized the decision of the Second Board as having reached *that conclusion based on a consideration of the six factors in subsection 30(3) alone*. The Umpire then proceeded to confirm the conclusion of the Second Board following his own consideration of those factors without expressly addressing the objective test contained in subsection 30(2) [of the *Employment Insurance Regulations*].
>
> (Emphasis added)

[24] Consequently, the only criticism the parties can make of the umpire is that he did not set aside the decision of the Board of Referees on the ground that it had not explicitly stated its conclusion that the respondent's business activities were not his principal means of livelihood during the concerned benefit period.

[25] At first sight, based on a reading of its decision, the Board of Referees does not seem to have completely taken into account the approach and principles set out in *Martens*. In other words, the Board of Referees did not ask whether the extent of the respondent's engagement in his business during the benefit period, determined according to the factors provided for at subsection 30(3) of the Regulations, was such that the respondent could not rely on that engagement as a principal means of livelihood. In the present case, the Board of Referees merely stated its findings of fact in light of the factors enumerated in subsection 30(3) of the *Employment Insurance Regulations* without drawing any explicit conclusion on the use of the test described in subsection 30(2).

[26] Thus, given the particular circumstances of the present matter, I would allow the application for judicial review, but only in part and with different conclusions to those suggested by the parties' counsel.

[27] I would exempt the parties from compliance with sections 306 to 316 of the Rules. I would also allow in part the application for judicial review, without costs, set aside that part of the umpire's decision, respecting the respondent's unemployment status, and refer the matter back to the Chief Umpire, or his or her designate, for a new determination, with directions to allow in part the appeal from the Board of Referees' decision, to set aside only that part of the Board of Referees' decision respecting the respondent's unemployment status, and to refer the

issue of the respondent's unemployment status for a new determination before a Board of Referees established in accordance with the *Employment Insurance Act*.

"Robert M. Mainville"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation,
Johanna Kratz, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-352-11
STYLE OF CAUSE:	Attorney General of Canada v. Sylvain Goulet

DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES.

REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	GAUTHIER J.A. TRUDEL J.A.
DATED:	February 24, 2012

WRITTEN REPRESENTATIONS BY:

Pauline Leroux	FOR THE APPLICANT
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