

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120306

Docket: A-280-11

Citation: 2012 FCA 74

**CORAM: BLAIS C.J.
EVANS J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DEJA WARREN

Respondent

Heard at Vancouver, British Columbia, on March 6, 2012.

Judgment delivered from the Bench at Vancouver, British Columbia, on March 6, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on March 6, 2012)

LAYDEN-STEVENSON J.A.

[1] The issue on this application for judicial review is whether the Umpire erred in failing to find that the Board of Referees (the Board) wrongly concluded that the sum of \$12,000, received by the respondent, constituted compensation for relinquishment of a right to reinstatement. In our view, the Umpire did err in failing to correct the error of the Board. Consequently the application for judicial review will be allowed.

[2] The respondent was employed by the Province of British Columbia. Following an incident at her workplace, the respondent was absent from work for medical reasons. She applied for benefits under a short term illness and injury plan (STIP plan). The employer denied her claim. The respondent applied for and received medical employment insurance benefits (medical benefits) from October 25, 2009 until March 6, 2010. Subsequently, she applied for and received regular employment insurance benefits (benefits).

[3] While in receipt of medical benefits, the respondent filed a grievance with respect to the employer's refusal to pay benefits under the STIP plan. Discussions between the respondent's union representative and the employer culminated in a settlement agreement (the agreement). The terms of the agreement, dated January 26, 2010, provide for the full and final settlement of all matters outstanding between the respondent and the employer. Pursuant to the agreement, the employer was required to pay to the respondent the all-inclusive sum of \$12,000, less any statutory deductions, and to provide a neutral letter of reference. The respondent was required to resign her employment, return her employer's property, withdraw her grievance and release her employer from any liability with respect to any claims that may arise regarding the employment or the cessation of the employment. The respondent subsequently executed a release (containing the customary non-admission of liability clause) on February 2, 2010.

[4] The respondent informed the Employment Insurance Commission (the Commission) that she had received \$9,600 (net) from her employer. The Commission deducted the \$12,000 (gross)

from the benefits received by the respondent. The Commission determined, after deduction, that there was an overpayment of \$1,536.

[5] The Board concluded, on the basis of this Court's decisions in *Canada v. Plasse* (2000), 261 N.R. 380 (F.C.A.) (*Plasse*) and *Meechan v. Canada (Attorney General)*, 2003 FCA 368 (*Meechan*), that sums received from the relinquishment of a right to reinstatement are not deductible earnings. It determined that the respondent, at the time of entering the settlement agreement, had a right to be reinstated because her employment had not been terminated, and she was therefore in a position to "re-establish her office."

[6] The Attorney General (the Crown) appealed the Board's decision. The Umpire determined that the question at issue was one of mixed fact and law, reviewable on a standard of review of reasonableness. The Umpire concluded that it was open to the Board to find that the monies were paid in consideration for the respondent relinquishing her right to reinstatement.

[7] It is common ground that, unless the payment can be characterized as compensation for relinquishment of the right to reinstatement, it is properly allocated under the provisions of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) and the *Employment Insurance Regulations*, SOR/96-332 (the Regulations).

[8] In our view, the Board and, in turn, the Umpire misinterpreted the law stated in *Plasse* and *Meechan*. The legal principle to be taken from these authorities was succinctly stated in the decision of this Court in *Attorney General of Canada v. Cantin*, 2008 FCA 192 (*Cantin*). There, the Court stated that, in federal law, the right to reinstatement is an employee's right to resume his or her position following a wrongful dismissal. In such circumstances, compensation to relinquish the right to reinstatement following a wrongful dismissal does not constitute earnings within the meaning of the Act and the Regulations (*Cantin*, para. 33). However, wrongful dismissal is a prerequisite to a right to reinstatement.

[9] The respondent was not wrongfully dismissed. To the contrary, until she tendered her resignation, her employer considered her to be an absentee employee. Indeed, the employer's pre-settlement position was that the respondent could be subject to disciplinary action upon her return to the workplace. The respondent's resignation was a term of the settlement agreement; the right to be reinstated did not arise and was not negotiable. The Board, in essence, considered that a return to the status quo was equivalent to a right to reinstatement. That is not so. In failing to properly interpret and apply the law, the Board erred. Its application of its erroneous interpretation of the law to the facts rendered its decision unreasonable. The Umpire erred by failing to correct the Board's error.

[10] For these reasons, the application for judicial review will be allowed. The decision of the Umpire will be set aside and the matter will be returned to the Chief Umpire, or his designate, for redetermination on the basis that the payment received by the respondent did not constitute

compensation for relinquishment of a right to be reinstated. The Crown did not request costs and none will be awarded.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-280-11

**APPEAL FROM A DECISION OF THE UMPIRE L.P. LANDRY, DATED APRIL 29, 2011,
CUB 76966**

STYLE OF CAUSE: Attorney General of Canada v. Deja
Warren

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 6, 2012

REASONS FOR JUDGMENT OF THE COURT BY: BLAIS C.J., EVANS AND
LAYDEN-STEVENSON J.J.A.

DELIVERED FROM THE BENCH BY: LAYDEN-STEVENSON J.A.

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