Federal Court of Appeal  Cour d'appel fédérale

Date: 20120330

Docket: A-385-11

Citation: 2012 FCA 105

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ARMAND DOUCET

Respondent

Heard at Fredericton, New Brunswick on March 28, 2012.

Judgment delivered at Ottawa, Ontario, on March 30, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

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

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The applicant seeks to have set aside CUB decision No. 77637 dated August 19, 2011, in which Umpire Guy Coulard dismissed the appeal of the Employment Insurance Commission of Canada ("Commission") from a decision by a board of referees that allowed the appeal of the respondent, Armand Doucet (the "claimant"), from the Commission's decision denying him benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 ("Act"), on the ground that he had lost his job by reason of his own misconduct.

[2] The claimant, who comes from New Brunswick, was working on a work site in Manitoba. His employer forbade employees to consume alcohol in the rooms provided to them and operated a zero-tolerance policy on drunkenness in the workplace. The claimant was dismissed after a few months on the site on the ground that he was found drunk in his room. The Commission therefore denied him employment insurance benefits on the ground that he had lost his employment by reason of his own misconduct. The Court notes that the employer provided another reason for the dismissal, alleging that the claimant had injured a security guard, but the Commission did not accept this reason for dismissal for its decision since it was of the opinion that the claimant's version denying this incident was credible: Applicant's Record, at page 59.

[3] The claimant appealed the Commission's decision before a board of referees. He admitted before the Board of Referees that he had had two or three beers in his room following his shift, but denied that he had been drunk. He acknowledged that the employer forbade the consumption of alcohol in employees' rooms. He argued, however, that there was a distinction between his employer's so-called zero-tolerance policy on drunkenness in the workplace and his employer's policy on the simple consumption of alcohol in employee's rooms outside working hours. In the latter case, the claimant noted, the employer usually took disciplinary action in the form of a warning, and not dismissal, in the case of a first violation. In support of his argument, he added that other employees involved in a similar situation had received a warning from the employer.

[4] The respondent therefore submitted before the Board of Referees that his dismissal had been part of a planned layoff of a hundred or so employees and that the disciplinary action taken against him, namely, his dismissal, for the minor offence in question had been designed to save the employer the cost of his airline ticket for his return home should he have been part of the planned layoff. According to the claimant, three other employees were dismissed at the same time as he was so that the employer could save the transportation costs resulting from their layoff as part of the planned group termination.

[5] The Board of Referees accepted the version of the facts submitted by the claimant and therefore allowed the appeal. The Umpire upheld the decision of the Board of Referees, but provided the following reason to support his decision (CUB decision No. 77637, Applicant's Record, at page 10):

> In this case, I reviewed the evidence in the docket, in particular the Board's detailed decision. I am of the view that the Board properly analysed and summarized the evidence in the docket and at the hearing. The Board accepted the claimant's testimony that other employees received warnings for the same conduct, so he could not have foreseen that his action might lead to dismissal.

[6] In light of the Umpire's reasoning, the applicant submits that the Umpire erred in fact and in law since (a) the claimant had admitted that he had violated one of his employer's policies and that, in such circumstances, [TRANSLATION] "even if the risk was not absolute, there was a real possibility of being dismissed as a result of consuming alcohol": Applicant's Memorandum, at paragraph 20; and (b) given the decision of this Court in *Canada (Attorney General) v. Lee*, 2007 FCA 406, 372 N.R. 198, the fact that an employer imposes different penalties on other individuals guilty of similar misconduct is not relevant when deciding whether misconduct

occurred within the meaning of section 30 of the Act: Applicant's Memorandum, at paragraph 37.

[7] It is my opinion that the Umpire indeed erred in declaring that the different penalties for other employees were relevant factors when analysing a claimant's misconduct for the purposes of section 30 of the Act. However, this error by the Umpire does not dispose of the present matter. With respect, I am also of the opinion that the Umpire neither considered nor took into account the principal aspect of the Board of Referees' decision.

[8] The decision of the Board of Referees was made on the basis of the Board's findings that [TRANSLATION] "the employer dismissed the claimant for other reasons since it was about to lay off a large number of employees and would have to pay the airline tickets of employees unless they were dismissed for misconduct" and [TRANSLATION] "the claimant's drinking a few beers did not warrant his being dismissed given that he had never received a warning": Decision of the Board of Referees, at page 145 of the Applicant's Record.

[9] To determine for the purposes of the Act whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment. The misconduct must therefore constitute a breach of a duty that is express or implied in the contract of employment: *Canada (Attorney General) v. Brissette*, [1994] 1 F.C. 684 (C.A.), at paragraph 14; *Canada (Attorney General) v. Cartier*, 2001 FCA 274, 284 N.R.

172, at paragraph 12; *Canada (Attorney General) v. Nguyen*, 2001 FCA 348, 284 N.R. 260, at paragraph 5.

[10] When, as in the present matter, the breach of the duty in the contract of employment is admitted, it is not a matter of deciding whether or not the dismissal was for just cause under labour law, but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal: *Canada (A.G.) v. Tucker*, [1986] 2 F.C. 329 (C.A.), at paragraphs 12 to 23; *Meunier v. Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377, at paragraph 2; *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, 279 D.L.R. (4th) 121, at paragraph 14.

[11] But the alleged misconduct must indeed be the real cause of the dismissal.

[12] The Board of Referees' decision in the present matter relied on the following explicit or implicit findings of fact: (a) the applicant was not drunk; (b) the first disciplinary measure imposed for a first offence of drinking beer in one's room was suspension and not dismissal; and (c) the real cause of the respondent's dismissal was the employer wishing to avoid having to pay for the respondent's return following his planned lay-off. The Board of Referees' conclusion that drinking a few beers did not warrant dismissal must be considered in light of its main finding regarding the real cause of the dismissal and gives substance to this main finding.

[13] The Board of Referees therefore concluded that the misconduct of which the claimant was accused to justify his dismissal was merely an excuse to dissemble the real cause of the loss of employment. This finding of fact was not challenged by the applicant before the Umpire or before this Court.

[14] In the present matter, the claimant submits that the real cause of his dismissal was not his misconduct but rather another reason, namely the employer's desire to evade having to pay for the claimant's return trip following his planned lay-off. The issue here is not the severity of the penalty, but its main cause. In these circumstances, the Board was justified in taking into account the employer's practice in similar incidents and the absence of a warning prior to the dismissal. These facts were noted not to mitigate the claimant's misconduct but rather to confirm that the real cause of his dismissal was not the cause claimed by the employer. The Umpire therefore had to dismiss the applicant's appeal, albeit not for the reasons set out in his decision.

[15] For these reasons, the application for judicial review should therefore be dismissed.

"Robert M. Mainville"

J.A.

"I concur.
J.D. Denis Pelletier J.A."

"I concur.
Johanne Gauthier J.A.

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-385-11
APPEAL FROM A DECISION OF UMPIRE GUY GOULARD DATED AUGUST 19, 2011.	
STYLE OF CAUSE:	Attorney General of Canada v. Armand Doucet
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	March 28, 2012
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	PELLETIER J.A. GAUTHIER J.A.
DATED:	March 30, 2012

APPEARANCES:

Julien Matte	FOR THE APPLICANT
Armand Doucet	FOR THE RESPONDENT (REPRESENTING HIMSELF)

SOLICITORS OF RECORD:

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