Federal Court of Appeal | Cour d'appel fédérale

Date: 20120420

Docket: A-313-11

Citation: 2012 FCA 120

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

BETWEEN:

JONATHAN BRADFORD

Applicant

and

CANADA EMPLOYMENT INSURANCE COMMISSION

HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA

Respondent

Heard at Edmonton, Alberta, on April 17, 2012.

Judgment delivered at Ottawa, Ontario, on April 20, 2012.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

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

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Mr. Bradford seeks judicial review of the decision of Umpire Seniuk (the Umpire) who denied his appeal from the decision of the Board of Referees (the Board) upholding the Commission's denial of his antedate request pursuant to subsection 10(4) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the *Act*).

Background

[2] Under subsection 10(4) of the *Act*, a claim for Employment Insurance (EI) benefits made after the day when the claimant was first qualified to make the claim can be "antedated" if the claimant shows (a) that he was qualified to receive benefits on the earlier day and (b) that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made. It is not disputed that Mr. Bradford met the first condition.

[3] According to this Court's jurisprudence, in order to establish "good cause", a claimant must demonstrate that he did what a reasonable and prudent person would have done in the same circumstances: *Canada (A.G.) v. Albrecht*, [1985] 1 F.C. 710 (C.A.); *Canada (A.G.) v. Caron*, [1986] A.C.F. no 85 (QL), 69 N.R. 132; *Canada (Attorney General) v. Smith*, [1993] F.C.J. No. 368 (QL), 153 N.R. 317 (C.A.).

[4] In this matter, the Applicant submitted his claim for benefits on November 22, 2006, requesting that his claim be antedated to February 28, 2006, the day after his last day of work with his employer.

[5] In explaining this nearly nine-month delay, the Applicant said that when he lost his employment, he chose not to file a claim. He intended to live off his savings until he found suitable employment. Much later, he had to reassess his financial situation after becoming aware of "a debt that [he] potentially owe[d] to the EI program due to an overpayment that apparently occurred over 5 years ago" [Application for Employment Insurance Benefits, p. 41 of the Applicant's Record].

[6] According to the Applicant, but for the Commission's mishandling of this overpayment claim, he would have been aware of the alleged debt and would have claimed the benefits on a timely basis.

[7] Apart from his testimony explaining in detail the history of this previous overpayment claim between 2002 and 2006, Mr. Bradford relied on a decision of another Board of Referees made two years earlier (the 2007 decision) granting him an extension to file an appeal of the Commission's decision in respect of this overpayment claim after finding that there were "a number of existing discrepancies that warrant the allowance of an extension".

[8] For the Applicant, this finding in the 2007 decision, coupled with various precedents where umpires accepted that delay caused by the Commission's errors in communicating relevant information constituted a "good cause" to grant an antedate request, could only lead to the conclusion that his request should be granted.

[9] But the Board did not accept that this was so. It confirmed the Commission's decision that Mr. Bradford had not established good cause for his nine-month delay. Although the Board accepted that the Commission's failure to provide "information which is timely and necessary for the claimant to make intelligent decisions regarding his application for benefits" could constitute good cause, this was not what happened here in the Board's opinion. More particularly, the Board pointed out that, contrary to the case law cited in support of his argument, the information Mr. Bradford says he did not receive in a timely fashion related "not to the antedate case at hand, but to another case entirely".

[10] Moreover, the Board found that even if it were to accept to follow the reasoning proposed by the Applicant, he himself was responsible for part of the delay in getting the information about the overpayment because "any reasonable person who has a possible $10,000 debt hanging over his head would have provided the Commission with updates as to his whereabouts so as to be informed of the consequences of his earlier attempts to resolve that case."

[11] The evidence before the Board was that the Applicant knew, at least as of November 2003, that the Commission was claiming that he owed an amount in the order of $10,000 to cover overpayment and penalties. Mr. Bradford stated that for a full year he made numerous attempts to get in touch with the Commission, requesting clarification on the overpayment and attempting to convince the Commission otherwise. But at the end of 2004, he gave up because of the lack of response to his many letters and phone calls and did not keep the Commission informed of his current address after that. The Commission's later attempts to communicate with him (only one phone call and one letter) failed until the Commission obtained his correct address from Revenue Canada.

[12] Mr. Bradford appealed. The two grounds to the appeal to the Umpire can be summarized as follows:

i) The Board erred in law by misconstruing the case law as requiring that the Commission be solely responsible for the delay in filing a claim; and

ii) The Board erred by ignoring the 2007 decision which had already determined on the basis of the same facts that the Commission was solely at fault.

[13] As mentioned, the Umpire did not accept Mr. Bradford's arguments and found that "the Board of Referees committed no error of law, natural justice or fact, and its decision ought not to be disturbed".

ANALYSIS

[14] The Applicant raised six grounds or errors in the Umpire's decision that, in his view, justify either individually or as a whole this Court's intervention. In my view, most of these alleged errors do not relate directly to the grounds of appeal that the Umpire had to deal with. The appeal provided for at section 115 of the *Act* is not a review *de novo* where the Umpire simply substitutes his own appreciation of the matter.

[15] Thus, I propose to deal first with the errors that could affect the Umpire's findings in respect of the grounds of appeal before him. If the Umpire did not err in that respect, the rest of his comments becomes superfluous and could not justify this Court's intervention.

[16] First, I must say that I cannot agree with Mr. Bradford's argument that the Umpire did not address at all or at least sufficiently the two grounds of appeal he had raised.

[17] It is clear that the Umpire did not agree that the Board had erred in law. After correctly setting out the main legal principles that must guide any determination of whether there is "good cause" (second and third paragraphs at pages 3-4 of the decision), the Umpire noted at page 7 that "Mr. Bradford makes too much of the jurisprudence that allows for Commission errors to be a consideration in determining whether the antedate should be allowed. That is a consideration, it is true, but the jurisprudence is clear that each case must be decided on the basis of all the relevant factual considerations." In his view, this is exactly what the Board did. I agree.

[18] The jurisprudence of this Court is clear: each case must be judged on its own facts. Mr. Bradford's assertion that the Board was legally bound to conclude that he had shown good cause once it accepted that the Commission was partly (or even totally) at fault for the breakdown in communication in respect of the overpayment is simply wrong**.**

[19] The Board's statement that the Commission's failure to provide information could constitute good cause (see paragraph 9 above) must be read in its proper context. It does not lead to the conclusion advanced by the Applicant because, later on, the Board also states clearly that the information that arrived late (October 2006) in this matter was not of the same nature as the information that has in the previous cases been found to be necessary for a claimant to make an intelligent decision, since the information concerned another case. In other words, no matter who was responsible for the lack of communication of this information, the information itself was not necessary to ascertain one's rights under the *Act* and to claim benefits within the statutory deadline in the current case.

[20] In *Lajeunesse v. Canada (Employment and Immigration Commission)*, [1995] F.C.J. No. 1369 (QL) (C.A.), this Court confirmed that inquiries about an overpayment debt of which one is, at least in general terms, well aware, simply have no bearing on the question of whether a claimant had good cause to delay making his claim. Although it is true that, as noted by the Applicant, he made more effort and inquiries than Mr. Lajeunesse did, there is no doubt that the Board was entitled at

law to make the findings it did in this respect. Thus, Mr. Bradford has not established that the Umpire erred on this first ground nor has he persuaded me that the Board made any error of law.

[21] Turning to the second ground of appeal, the Umpire stated that the Board was not bound by factual findings of other Boards of Referees made in related cases, especially when the applicable test to determine whether an extension of time to file an appeal should be granted is different from the one set out at subsection 10(4) of the *Act*. In his opinion, the jurisprudence with respect to antedate requests is much more developed and "it is that jurisprudence that must guide the Board of Referees' decision on that issue, not the decision of another Board on the issue of an extension of time to appeal a decision on the question of earnings and allocation."

[22] Once again, I agree with the Umpire. In the circumstances, he had no sound basis to conclude that the Board ignored or improperly discarded the 2007 decision.

[23] This also means that Mr. Bradford's argument that the Umpire misconstrued the 2007 decision cannot be determinative of this judicial review. Neither can the other three errors of fact allegedly made by the Umpire in his general reassessment of the merits of the question before the Board.

[24] This brings me to the last issue raised by the Applicant – bias. Mr. Bradford relies on two facts. First, the Umpire also heard (consecutively) his appeal relating to the overpayment (CUB

77242). Second, the Umpire referred a number of times to the fact that the Applicant "pursued the antedate seeking a remedy to his over payment dispute with the Commission." Mr. Bradford construes these references as a reproach. He believes that the Umpire construed his request as a misuse of the system and this could only have tainted his decision. He could not fairly decide the issues before him.

[25] The test for reasonable apprehension of bias was articulated by Justice de Grandpré in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, at page 394:

> ....the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[26] When read in context, I do not believe that a reasonable and well informed person would understand the Umpire's statement as a reproach. It was clear and undisputed during the hearing before the Umpire - and this is reflected in his decision - that, but for the delay, Mr. Bradford had the right to claim benefits. He had worked the required number of insurable hours when he lost his employment. Although normally the reason why one decides to exercise his or her rights under the *Act* is not relevant, here Mr. Bradford had clearly put the issue in play when he stated in his antedate request that he changed his mind in October-November 2006 and made this claim <u>because</u> of this potential debt and its impact on his ability to live on his savings.

[27] Having considered all the circumstances, including the fact that the Umpire did properly address the grounds of appeal before him, I cannot conclude that the well informed person would think that it is more likely than not that the Umpire did not decide the matter fairly.

[28] Mr. Bradford has not persuaded me that there was a breach of procedural fairness. In fact, I am satisfied that his submissions and evidence were received and properly considered.

[29] In the circumstances, I would dismiss the application with costs.

"Johanne Gauthier"

J.A.

"I agree.
J.D. Denis Pelletier"

"I agree.
David Stratas"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-313-11
STYLE OF CAUSE:	Jonathan Bradford v. Canada Employment Insurance Commission Human Resources and Skills Development Canada
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	April 17, 2012
REASONS FOR JUDGMENT OF THE COURT BY:	PELLETIER, GAUTHIER, STRATAS JJ.A.
REASONS DATED:	April 20, 2012

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