Federal Court of Appeal | Cour d'appel fédérale

Date: 20131024

Docket: A-8-13

Citation: 2013 FCA 251

CORAM: **SHARLOW J.A.**
MAINVILLE J.A.
NEAR J.A.

BETWEEN:

JEFFERY ROBY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on October 3, 2013.

Judgment delivered at Ottawa, Ontario, on October 24, 2013.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: MAINVILLE J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The Employment Insurance Commission concluded that the applicant Jeffery Roby received benefits under the *Employment Insurance Act*, S.C. 1996, c. 23, that exceeded his statutory entitlement by $5,426, and that he must reimburse the Crown for the overpayment. Mr. Roby has consistently taken the opposite position, but he has been unable to persuade the Commission, a Board of Referees and an Umpire that he is correct. He now seeks relief from this Court by way of

an application for judicial review of the Umpire's decision. For the reasons that follow, I have concluded that Mr. Roby's application should succeed.

[2] In this Court, the Crown conceded that Mr. Roby is entitled to succeed with respect to $701 of the claimed overpayment because the Commission failed to respect a statutory deadline. Therefore, Mr. Roby's application must succeed at least with respect to that $701. The amount now in issue is $4,725.

Statutory framework

[3] The following provisions of the *Employment Insurance Act* are the foundation of the Crown's right to require a return or repayment of an amount paid to a claimant in excess of the claimant's entitlement:

43. A claimant is liable to repay an amount paid by the Commission to the claimant as benefits (a) for any period for which the claimant is disqualified; or (b) to which the claimant is not entitled.	**43.** La personne qui a touché des prestations en vertu de la présente loi au titre d'une période pour laquelle elle était exclue du bénéfice des prestations ou des prestations auxquelles elle n'est pas admissible est tenue de rembourser la somme versée par la Commission à cet égard.
44. A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.	**44.** La personne qui a reçu ou obtenu, au titre des prestations, un versement auquel elle n'est pas admissible ou un versement supérieur à celui auquel elle est admissible, doit immédiatement renvoyer le mandat spécial ou en restituer le montant ou la partie excédentaire, selon le cas.

Facts

[4] The relevant facts are undisputed and are briefly summarized. Mr. Roby was a police officer in 2001 when he suffered a work related injury. He applied for sickness benefits under the *Employment Insurance Act*. At the same time, he submitted a "direct deposit application" which instructed the Commission to deposit his benefits to his bank account at the Canadian Imperial Bank of Commerce (CIBC).

[5] Two important events occurred before the Commission formally advised Mr. Roby that he was entitled to benefits. First, in November of 2002, he made an assignment for the general benefit of his creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The assignment in bankruptcy included an assignment of Mr. Roby's CIBC bank account, which came under the sole control of the trustee in bankruptcy. Second, in December of 2002, Mr. Roby instructed the Commission to disregard his direct deposit application because, in his words, "the CIBC account is no longer valid."

[6] By letter dated February 10, 2003, Mr. Roby was informed that his application for sickness benefits had been approved for the maximum 15 week period from May 5, 2002 to August 17, 2002.

[7] Unfortunately, in January of 2003, the Commission had already deposited sickness benefits totaling $5,426 to Mr. Roby's CIBC account, contrary to his direction. On January 21, 2003, the Commission acknowledged to Mr. Roby that his benefits had been deposited in error to the CIBC account and that the Commission would accept full responsibility for not forwarding the

funds to him. At that time, the Commission assured Mr. Roby that they would "take care of it from their end", and apologized for the inconvenience. The next day, the Commission sent Mr. Roby a cheque payable to him in the amount of $5,426. Mr. Roby accepted the cheque and cashed it.

[8] The record discloses no evidence as to what steps, if any, the Commission took or tried to take to recover the unauthorized deposits from CIBC, either through CIBC or through the trustee in bankruptcy.

[9] In April of 2003, CIBC applied the unauthorized deposits to a debt owed by Mr. Roby in respect of another account. The record does not disclose why or on what legal basis that was done, but neither party has suggested that there are grounds for finding any impropriety on the part of CIBC or the trustee in bankruptcy with respect to that transaction.

[10] The Commission subsequently took the position that Mr. Roby had received his statutory entitlement twice, and sought to recover what they characterized as an overpayment. It appears that by the date of the hearing of Mr. Roby's application in this Court, the Crown had collected some or all of the purported overpayment.

[11] As indicated above, Mr. Roby appealed to the Board, challenging the Commission's determination that there was an overpayment. A hearing was convened to consider the appeal and the appeal was dismissed. However, that decision was set aside by an Umpire because Mr. Roby was not given notice of the hearing (CUB 78195). A second hearing was convened at which Mr. Roby testified. In a decision dated January 17, 2012, the Board concluded that Mr. Roby had

received an overpayment. Mr. Roby appealed that decision. His appeal was dismissed (CUB 80197). Mr. Roby now seeks judicial review of the Umpire's decision.

Discussion

[12] The decision of the Umpire cannot stand. It is based on the Board's factual finding, confirmed by the Umpire, that the Commission had deposited Mr. Roby's benefits to his CIBC bank account in accordance with Mr. Roby's instructions. That factual finding was not reasonably open to the Board or the Umpire in the face of the uncontradicted evidence that:

(a) Mr. Roby withdrew his direct deposit application before his entitlement was determined;

(b) the Commission did not give effect to Mr. Roby's withdrawal of the direct deposition application;

(c) before issuing the replacement cheque to Mr. Roby, the Commission acknowledged its error in failing to give effect to the withdrawal and informed Mr. Roby that they would "take care of things from their end".

[13] In these circumstances, Mr. Roby acted reasonably in accepting the replacement payment offered by the Commission, based on the assurance of the Commission that they would take responsibility for correcting the erroneous misdirection of the previous payments.

[14] Having determined that the Umpire's decision cannot stand, it is necessary for this Court to consider whether the issues raised by Mr. Roby should be resolved by this Court on the

available record. As there are no facts in dispute, I have concluded that the record is sufficient to enable this Court to reach an appropriate disposition. Given that this matter has been unresolved for almost 10 years, it would be appropriate to do so.

[15] It is argued for Mr. Roby that the only reasonable conclusion on the available evidence is that the misdirected payments were not amounts paid to Mr. Roby or from which he benefited, and therefore a fundamental condition for the application of sections 43 and 44 of the *Employment Insurance Act* was not met. The Crown argues the contrary, based on two cases, *Lanuzo v. Canada (Attorney General)*, 2005 FCA 324 and CUB 54925 (July 5, 2002). For the following reasons, I am not persuaded that those cases are dispositive.

[16] In *Lanuzo*, a claimant for employment insurance benefits was held to be required to repay the amount he had received in excess of his statutory entitlement even though the overpayment was the result of an error on the part of the Commission. I do not doubt the correctness of that decision, but it is based on evidence that the claimant actually received the amounts that comprised the overpayment. In this case, Mr. Roby did not actually receive the amounts that the Commission misdirected to his CIBC bank account. That is sufficient to distinguish *Lanuzo*.

[17] CUB 54925 is a decision that is closer on its facts to this one, but it is not identical. The claimant in CUB 54925 initially requested that his benefits be deposited to his bank account with Canada Trust, and subsequently requested that his benefits be deposited to his bank account with the Royal Bank. After the amended request, the Commission mistakenly deposited to the Canada Trust

account a payment representing benefits for a certain two week period. When the claimant advised the Commission that he had not received a payment relating to that period, the Commission issued him a replacement payment, and warned him that he was responsible for advising the Commission if the original payment was discovered. The payment that was deposited in error to the Canada Trust bank account was seized by a creditor of the claimant pursuant to a garnishment order. The Board concluded, and the Umpire agreed, that the claimant benefitted from the misdirected payment when it was applied, albeit without the claimant's consent, to reduce a debt he owed to a third party. On that basis, the claimant was held to be liable to repay the amount claimed by the Commission as an overpayment.

[18] The difference in this case is that at the time the Commission misdirected the payments in issue to Mr. Roby's CIBC bank account, Mr. Roby was in bankruptcy. Significantly, this was his first bankruptcy, with the result that he was presumptively entitled to an automatic and absolute discharge from all of his unsecured debts pursuant to section 168.1 of the *Bankruptcy and Insolvency Act* (subject to certain exceptions that, on the available evidence, probably would not have applied to Mr. Roby).

[19] The Board and the Umpire should have considered whether, given these circumstances, the misdirected payments actually benefitted Mr. Roby. If they had considered that question, they would have concluded that on a balance of probabilities, the debt reduced by the misdirected payments would have ceased to be a liability of Mr. Roby upon his discharge from bankruptcy. That is sufficient to distinguish the facts in this case from the facts in CUB 54925 and to support the position of Mr. Roby that the misdirected payments did not benefit him.

[20] I acknowledge the possibility that Mr. Roby could in fact have benefitted from the misdirected payments. For example, the debt in issue might have been a secured debt which would have been unaffected by the bankruptcy. One may speculate about other possibilities but I am not prepared to do so, given the assurances the Commission gave to Mr. Roby in 2003 that they would "take care of [their mistake] from their end". In these circumstances, it was incumbent on the Commission to take at least the steps required to determine with reasonable certainty what became of the misdirected payments before simply assuming that they benefitted Mr. Roby.

[21] The Crown argues that, by virtue of the definition of "total income" in the *Bankruptcy and Insolvency Act*, the amounts deposited to Mr. Roby's CIBC account were income of Mr. Roby. That submission is coupled with a reference to the obligation of the trustee in bankruptcy to determine the amount of income the bankrupt is entitled to retain and the amount he must contribute to the estate. It is not entirely clear how this submission assists the Crown's position, but in any event it is not supported by any evidence as to what, if anything, the trustee in bankruptcy determined or did in relation to the payments in issue. That is not surprising, given that there is no evidence that the Commission made any attempt to investigate those matters.

Conclusion

[22] The only reasonable conclusion on the evidence is that Mr. Roby did not benefit from the misdirected payments. Therefore, I would allow the application for judicial review and set aside the decision of the Umpire. I would refer this matter back to the office of the Chief Umpire with a direction that Mr. Roby's appeal to the Umpire is to be allowed, his appeal to the Board is to be allowed, and the Commission is to be directed to cease all attempts to collect the purported

overpayment from Mr. Roby, and to reimburse him for any amounts that have already been collected on account of the purported overpayment.

Costs

[23] Mr. Roby has also claimed costs in this Court. As the successful party, he would normally be entitled to costs. However, Mr. Roby represented himself until a very short time before the hearing in this Court. Normally the costs awarded to a self-represented litigant are limited to disbursements. However, that limitation does not apply in this case because the law firm Baker & McKenzie LLP became Mr. Roby's solicitor of record shortly before the hearing. Mr. Tonkovich of that firm appeared at the hearing as counsel for Mr. Roby.

[24] Baker & McKenzie LLP acted for Mr. Roby *pro bono*, but that is not a bar to a costs award in Mr. Roby's favour. That is well explained by Feldman J.A., writing for the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 216 O.A.C. 339, 82 O.R. (3d) 757, at paragraphs 34 and 35:

> [34] It is clear from the submissions of the *amici* representing the views of the profession, as well as from the developing case law in this area, and I agree, that in the current costs regime, there should be no prohibition on an award of costs in favour of *pro bono* counsel in appropriate cases. Although the original concept of acting on a *pro bono* basis meant that the lawyer was volunteering his or her time with no expectation of any reimbursement, the law now recognizes that costs awards may serve purposes other than indemnity. To be clear, it is neither inappropriate, nor does it derogate from the charitable purpose of volunteerism, for counsel who have agreed to act *pro bono* to receive some reimbursement for their services from the losing party in the litigation.
>
> [35] To the contrary, allowing *pro bono* parties to be subject to the ordinary costs consequences that apply to other parties has two positive consequences: (1) it ensures that both the non-*pro bono* party and the *pro bono* party know that they are not free to abuse the system without fear of the sanction of an award of costs; and (2) it promotes access to justice by enabling and encouraging more lawyers to volunteer to work *pro*

> *bono* in deserving cases. Because the potential merit of the case will already factor into whether a lawyer agrees to act *pro bono*, there is no anticipation that the potential for costs awards will cause lawyers to agree to act only in cases where they anticipate a costs award.

[25] Mr. Tonkovich also drew our attention to paragraph 36 of *1465778 Ontario*, which confirms the general principle that costs belong to the party to whom they are awarded (and, by necessary implication, not to that party's solicitor):

> [36] Where costs are awarded in favour of a party, the costs belong to that party. See Mark M. Orkin, Q.C., *The Law of Costs*, looseleaf (Aurora: Canada Law Book, 2005) at §204 and *Rules of Civil Procedure*, rule 59.03(6). However, *pro bono* counsel may make fee arrangements with their clients that allow the costs to be paid to the lawyer. This ensures that there will be no windfall to the client who is not paying for legal services.

[26] In the Federal Court and in this Court, costs are payable to and by the parties, and not their solicitors, because of Rule 400(7) of the *Federal Courts Rules*, SOR/98-106. However, Rule 400(7) also provides that costs may be paid to a party's solicitor in trust.

[27] At the hearing of Mr. Roby's application in this Court, Mr. Tonkovich candidly advised the Court that there was no agreement between himself and Mr. Roby with respect to any sharing of a costs award. However, after the hearing and while this matter was under reserve, Mr. Tonkovich advised the Court by letter that he and Mr. Roby had agreed that the portion of any costs award expressly allocated to the *pro bono* services provided by Baker & McKenzie LLP could be retained by that firm.

[28] In my view, this is an appropriate case to award costs for the benefit of *pro bono* counsel. In exemplary fashion, Mr. Tonkovich untangled a confusing body of evidence and argument, discerned the most important legal issues, and effectively presented submissions that were of significant assistance to the Court in the efficient resolution of this case. However, the amount of the award must be modest given the applicable tariff, and will necessarily represent only a fraction of the actual value of the time Mr. Tonkovich must have spent in preparing for the hearing and presenting argument.

[29] I would award costs in the amount of $2,500 inclusive of all disbursements and taxes, payable to Baker & McKenzie LLP in trust, subject to the following directions. (1) Mr. Roby is to be reimbursed for all disbursements reasonably and necessarily incurred by him in this matter before Mr. Tonkovich began to act for him, including court fees and the cost of preparing, serving and filing documents. (2) Any amount that remains may be retained by Baker & McKenzie LLP as compensation for their *pro bono* services. (3) If any dispute arises as to the amount to which Mr. Roby is entitled, a motion may be made to this Court for a resolution.

"K. Sharlow"

J.A.

"I agree
Robert M. Mainville J.A."

"I agree
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-8-13

(APPEAL FROM A DECISION OF THE EMPLOYMENT INSURANCE UMPIRE DATED NOVEMBER 16, 2012, DOCKET NO. CUB 80197)

DOCKET:	A-8-13
STYLE OF CAUSE:	JEFFERY ROBY v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 3, 2013
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	MAINVILLE, NEAR JJ.A.
DATED:	OCTOBER 24, 2013

APPEARANCES:

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