

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20131219**

**Docket: A-179-13**

**Citation: 2013 FCA 294**

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

**BETWEEN:**

**KUEG AYAI**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Calgary, Alberta, on November 27, 2013.

Judgment delivered at Ottawa, Ontario, on December 19, 2013.

**REASONS FOR JUDGMENT BY:**

**PELLETIER J.A.**

**CONCURRED IN BY:**

**STRATAS J.A.  
NEAR J.A.**

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**REASONS FOR JUDGMENT**

**PELLETIER J.A.**

[1] At the opening of this appeal, the respondent asked that the Attorney General of Canada be substituted for the Employment Insurance Commission as respondent in this appeal. That request will be granted and the style of cause will be amended with immediate effect.

[2] Mr. Ayai seeks judicial review of a decision of an umpire appointed under the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), dismissing his appeal from the decision of the Board of

Referees. The latter confirmed the Employment Insurance Commission's decision to deny Mr. Ayai regular or sickness benefits pursuant to s. 18 of the Act.

[3] At all material times, Mr. Ayai was or had been employed at a poultry processing plant. He suffered from a medical condition which, at times, limited his ability to do all aspects of his job. In addition, the work environment is one in which certain limitations cannot be accommodated for occupational safety reasons. As a result, Mr. Ayai was sent home by his employer in December 2010. He received short term disability benefits under the company disability plan but those benefits ran out in March 2011.

[4] Mr. Ayai then applied for Employment Insurance benefits. He was told that in order to qualify for sickness benefits, he would have to provide a medical certificate confirming that he was unable to work. Mr. Ayai's physician had already certified that he was able to work at light duties but there were no such jobs with his employer. As a result, he was not in a position to provide a medical certificate, and so, his claim for sickness benefits was refused. Mr. Ayai was also told that he could qualify for regular benefits if he was willing to look for other employment. He refused to do so: see Respondent's Record at page 44.

[5] Mr. Ayai challenged the Commission's decision before the Board of Referees. The Board's conclusion was that "after reviewing all the factual evidence presented [...] this claimant has not established that he is unable to work due to his illness or injury at any time and that he has not proven that apart from his illness or injury [...] he is otherwise available for work": see Respondent's Record at page 74.

[6] Mr. Ayai appealed from the Board of Referees to the Umpire. In his notice of appeal, Mr. Ayai challenged the refusal of both sickness and regular benefits: see Respondent's Record at page 76. The Umpire dismissed the appeal on the basis that Mr. Ayai had not produced a medical certificate establishing that he was unable to work by reason of illness as required by s. 18 of the Act. The Umpire did not deal with the issue of regular benefits.

[7] Mr. Ayai now appeals to this Court.

[8] The standard of review of the Umpire's application of the law to the facts is reasonableness: see *Karelia v. Canada (Attorney General)*, 2012 FCA 140 at paragraph 12. The Umpire's conclusion that Mr. Ayai had not provided the evidence necessary to establish his entitlement to sickness benefits was reasonable on the record before him.

[9] The Umpire's failure to deal with Mr. Ayai's appeal with respect to regular benefits would normally result in the matter being sent back to the Umpire for a ruling. However, in light of the evidence before the Board of Referees to the effect that Mr. Ayai was not prepared to look for or accept other employment, based, it seems, on his view of a constitutional right to work for his regular employer to the exclusion of all others, the outcome of such a referral would be a foregone conclusion.

[10] The remedies available on judicial review are discretionary, even where it is shown that intervention would be warranted. This was recently confirmed by the Supreme Court and this Court.

In *Dennis v. Adams Lake Band*, 2011 FCA 37, [2011] F.C.J. No. 150, this Court wrote, paragraphs 28 and 30:

28 ... *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6. ... provides us with more guidance about the power of a reviewing court not to quash a decision of an administrative body, even when there are grounds for doing so.

...

30 The message in *MiningWatch* is that the broadest range of practical factors must be considered and legal error or non-compliance should not be given undue weight: the practicalities may outweigh the legalities.

[11] In this case, the Umpire's error cannot alter the inevitable outcome of Mr. Ayai's application for judicial review. As a result, the interests of justice are best served by dismissing it now rather than referring it back to the Umpire. Since no costs were requested, none will be awarded.

"J.D. Denis Pelletier"

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J.A.

"I agree  
David Stratas"

"I agree  
D.G. Near"

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-179-13

**STYLE OF CAUSE:** KUEG AYAI v. EMPLOYMENT  
INSURANCE OF CANADA

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** NOVEMBER 27, 2013

**REASONS FOR JUDGMENT BY:** PELLETIER J.A.

**CONCURRED IN BY:** STRATAS & NEAR J.J.A.

**DATED:** DECEMBER 19, 2013

**APPEARANCES:**

Kueg Ayai ON HIS OWN BEHALF

Valerie Meier FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada