A-704-95

OTTAWA, ONTARIO, Friday, September 27, 1996.

CORAM: MARCEAU
DÉCARY, JJ.A.
CHEVALIER, DEPUTY JUDGE

BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant

- and -

MICHELINE SAVARIE,

Respondent

J U D G M E N T

The application is allowed; the umpire's decision is quashed and the matter is returned to him for a redetermination with the assurance that the Board of Referees' decision is unfounded and the Commission's determination is to be reaffirmed.

"Louis Marceau"
J.A.

Certified true translation

Christiane Delon

A-704-95

CORAM: MARCEAU
DÉCARY, JJ.A.
CHEVALIER, DEPUTY JUDGE

BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant

- and -

MICHELINE SAVARIE,

Respondent

Hearing held in Montréal, Quebec, Wednesday, September 18, 1996.

Judgment rendered in Ottawa, Ontario, Friday, September 27, 1996.

REASONS FOR JUDGMENT: **MARCEAU J.A.**

CONCURRING: **DÉCARY J.A.**
CHEVALIER, DEPUTY JUDGE

A-704-95

CORAM: MARCEAU
DÉCARY, JJ.A.
CHEVALIER, DEPUTY JUDGE

BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant

- and -

MICHELINE SAVARIE,

Respondent

REASONS FOR JUDGMENT

MARCEAU J.A.

This application for judicial review of a decision by an umpire acting pursuant to the provisions of the *Unemployment Insurance Act* raises once again a problem of allocation for benefits purposes of money received by the claimant from her employer at the time of separation. Its distinctive feature is that it affects a host of claimants, since its solution would apply to a whole series of similar cases and could have implications for several umpires' decisions. Here is the issue.

All teachers employed by the Catholic school boards in the province of Quebec have terms of appointment that are determined by a collective agreement containing some special and unusual sick leave provisions. They contain, for example, the following provisions:

> [TRANSLATION]
> **5-10.40 A.** Where applicable, on the first staff day effective the beginning of the 1990-91 school year, the board shall credit all full time teachers in its employment who are covered by this article with six (6) days of sick leave. The days in question are non-cumulative but convertible into cash on the final day of each staff year when not used in the course of the year under the provisions of this article, at 1/200th of the applicable salary at that date per unused day, the said proportion applying for the unused fraction of a day.
>
> However, a teacher taking a leave without salary, a study leave with salary, preretirement leave or the benefits provided in subparagraph (3) of paragraph (A) of clause 5-10.31 shall be entitled to be credited a fraction of six (6) days of sick leave equivalent to the fraction of the time she or he has been on duty.
>
> If, however, the teacher continues to draw the benefits provided in subparagraph (2) of paragraph (A) of clause 5-10.31, on the first day of a staff year, she or he shall be entitled, where applicable, to be credited a fraction of six (6) days of sick leave insofar as she or he resumes her or his service with the board.
>
> ...
>
> **(C)** A teacher with thirteen (13) days or less of accumulated sick leave to her or his credit on June 1 may, by notifying the board in writing prior to that date, elect not to cash out the balance on the final day of the staff year of the six (6) days granted under paragraph (A) of this clause and unused under this article. A teacher who has made this election shall add, on the final day of the staff year, the balance of these six (6) days, which shall become non-cashable, to her or his days of sick leave accumulated previously.
>
> [Emphasis added]

Thus, the teachers have been credited with a certain number of sick leaves which, if they have not been used in the course of the year, are cashable on the final day of each staff year. Clearly, this is a pecuniary benefit that is part of the earnings and, for a teacher whose employment terminates with the end of the staff year, the money he or she accordingly receives is clearly subject to allocation in accordance with sections 57 and 58 of the *Unemployment Insurance Regulations*. But what is the applicable mode of allocation?

The Commission argues that the mode of allocation is the one set out in subsection 58(9) of the Regulations, which states:

> **58.(9)** Subject to subsections (9.1) and (10), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the nature of the earnings or the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation from employment in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

As one might imagine, the Commission has had to explain its approach many times, as these sick leave provisions of the teachers' collective agreement were adopted long ago and many umpires have had occasion to endorse its position, being themselves of the opinion that the decisive fact was that it was a share of earnings received upon separation from employment.[1]

But along comes the umpire who rendered the decision at issue here, thinking he should decide otherwise. The argument put forward by the respondent's counsel was sufficiently persuasive that he came down in opposition to the Commission's position. Hence the particular interest in this appeal, which I referred to initially.

* * *

This argument, which convinced the umpire and which was simply repeated on the hearing of this appeal by counsel for the respondent, is, when all is said and done, quite simple.

In its present formulation, adopted in 1989, subsection 58(9) of the Regulations, we are told, implies on its very face some direct causal connection rather than a pure coincidence between the separation from employment and the payment of leaves convertible into cash. This causal connection does not exist here. It does not exist

---

[1] CUB 16943 Briand; CUB 16767 Bélisle; CUB 18440 Pomerleau; CUB 18549 Gendron; and *Roger Lavallée v. C.E.I.C.*, A-691-90 (unreported).

because the payment is owing at the conclusion of the staff year to all teachers, the regular ones as well as the others, without distinction therefore between those whose contract of appointment is implicitly deemed renewable and those whose contract terminates at that point. Hence the cause of the payment is not the end of the employment contract, but the collective agreement, the terms and conditions of which fix the time when the payment will become payable as the end of the staff year. If, in the case of some teachers, that time is the same as the time at which their appointment terminates, this is merely a coincidence.

With respect, I think the umpire erred in allowing himself to be swayed by this argument which, in my opinion, is based on a mistaken interpretation of the expression "by reason of" in subsection 58(9) of the Regulations. It is clear that in referring to earnings paid or payable "by reason of" a separation from an employment, Parliament intended to exclude a payment that would be made at the time of separation, by mere temporal coincidence, such as, for example, the salary for the final week of employment or, better still, the repayment at the time of the employee's departure of money already owing by the employer but withheld by it (which was the case in *Canada (Attorney General) v. Kinkead* (1994), 170 N.R. 274). But it is equally clear, to my way of thinking, that the expression "by reason of" cannot be taken in the strict sense of "caused by", as the argument presupposes. Separation from employment — unless it is wrongful, which has nothing to do with this case — cannot, in itself, be a *cause* of an obligation, and cannot, *per se*, *give rise to* an obligation in the person of the employer. Cashable vacation pay or sick leaves, or any other compensation of the same kind received by an employee at the time when his contract of employment is terminated, always pertains to a right given to him under his contract or which inures to him under some legal provision. Employers are not in the habit of paying money to their employees at the time of their departure without being so constrained in some way.

In my opinion, a payment is made "by reason of" the separation from employment within the meaning of this provision when it becomes due and payable at the time of termination of employment, when it is, so to speak, "triggered" by the

expiration of the period of employment, when the obligation it is intended to fulfil was simply a potentiality throughout the duration of the employment, designed to crystallize, becoming liquid and payable, when, and only when, the employment ended. The idea is to cover any part of the earnings that becomes due and payable at the time of termination of the contract of employment and the commencement of unemployment. For if an employee's savings, the monies that are already his, should not bar him from receiving benefits under the *Unemployment Insurance Act*, in return it would seem but normal that the earnings to which he is entitled at the time of his departure should be taken into consideration before he is eligible to receive those benefits. Accordingly, my construction of the expression "by reason of", like that of many umpires, corresponds to the manifest intention of Parliament and is consistent with the *Kinkead* decision, which the umpire claims to rely on but at the cost of altering its meaning.

I am therefore of the opinion that the application is justified. The umpire's decision shall be quashed and the matter returned to him, so he may quash the decision of the Board of Referees and restore the Commission's determination.

"Louis Marceau"

J.A.

"I concur.
Robert Décary, J.A."

"I concur.
François Chevalier, D.J."

Certified true translation

Christiane Delon

IN THE FEDERAL COURT OF APPEAL

A-704-95

BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant

- and -

MICHELINE SAVARIE,

Respondent

REASONS FOR JUDGMENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO. A-704-95

STYLE:Attorney General of Canada
v. Micheline Savarie

PLACE OF HEARING:Montréal, Quebec

DATE OF HEARING:Wednesday, September 18, 1996

REASONS FOR JUDGMENT OF Marceau J.A.

CONCURRING:Décary J.A.
Chevalier, D.J.

DATED:Friday, September 27, 1996

APPEARANCES:

Francisco Couto	FOR THE APPLICANT
Jean-Guy Ouellet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

George Thomson Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Campeau, Ouellet et Associés Montréal, Quebec	FOR THE RESPONDENT