Federal Court of Appeal | Cour d'appel fédérale

CORAM: DENAULT J.A.
DÉCARY J.A.
CHEVALIER D.J.

A-999-96

BETWEEN: ATTORNEY GENERAL OF CANADA,

Applicant,

and:

ALFREDO D'ASTOLI,

Respondent.

Hearing held at Montréal, Quebec, on Wednesday, October 8, 1997

Judgment delivered at Ottawa, Ontario, on Friday, October 24, 1997

REASONS FOR JUDGMENT BY: DENAULT J.A.

CONCURRED IN BY: DÉCARY J.A.

CHEVALIER D.J.

Federal Court of Appeal  Cour d'appel fédérale

A-999-96

OTTAWA, THIS 24TH DAY OF OCTOBER 1997

CORAM: THE HONOURABLE MR. JUSTICE DENAULT
THE HONOURABLE MR. JUSTICE DÉCARY
THE HONOURABLE DEPUTY JUSTICE CHEVALIER

BETWEEN: ATTORNEY GENERAL OF CANADA,

Applicant,

and:

ALFREDO D'ASTOLI,

Respondent.

REASONS FOR JUDGMENT

DENAULT J.A.

In this case, counsel for the applicant, relying on the recent decision of this Court in *Thibault*[1] which rejected one interpretation of the decision in *Venditelli*,[2] asked that the decision of the umpire be set aside; the umpire had allowed the claimant's appeal on the ground, as in *Venditelli*, that the decision of the Minister of National Revenue concerning the insurability of the employment implied the conclusion that at the time when the claimant claimed benefits he was employed in employment and was therefore not a self-employed contractor.

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1 *Robert Thibault v. Employment and Immigration Commission* (unreported), May 1, 1997, file no. A-247-96 (CUB 32697).

2 *Attorney General of Canada v. Louis Venditelli* (unreported), June 1, 1982, file no. A-860-81 (CUB 7015).

I believe that the interpretation adopted by this Court in *Thibault* must now prevail and that, accordingly, the application for judicial review must be allowed.

However, the case merits further explanation, since counsel for the respondent has suggested that the Court should, in any event, go back to the rule established in *Venditelli*. I do not share that view, as I shall explain.

Let us briefly review the facts. The claimant, who owns 25 per cent of the shares and is the sole director of Tuiles, Terrazzo, Marbre A. D'Astoli Inc., devotes himself full-time to his business. It is not disputed that his business keeps him busy year-round. However, he claimed unemployment insurance benefits on March 16, 1992,[3] alleging a shortage of work (Applicant's Record (A.R.), pp. 31-33). In a statement to the Commission, he said that he [TRANSLATION] "... has debts and that is why he is drawing unemployment benefits" (A.R., p 38). On December 1, 1992, the Commission decided that the claimant had not been employed in insurable employment between March 25, 1991 and March 13, 1992, within the meaning of paragraph 3(1)(*a*) of the *Unemployment Insurance Act* (the Act), and informed him that he could appeal that decision to the Minister of National Revenue under subsection 61(3) of the Act (Respondent's Record (R.R.), p. 4). On July 22, 1993, the Minister's representative determined that the employment was insurable for the qualifying period from March 25, 1991 to March 13, 1992,[4] since there was an employer-employee relationship between the claimant and Tuiles, Terrazzo, Marbre A. D'Astoli Inc. (A.R., p. 100). That decision was not appealed.

On November 15, 1993, the Commission informed the respondent that he was not entitled to benefit for the benefit period that started on March 16, 1992, because he was engaged in the operation of a business either on his own account or in partnership, he worked a full working week and he was not unemployed (A.R., p. 94). In so deciding, the Commission relied on Section 8 and subsections 10(1) and 40(1) of the Act, and on paragraph 43(1)(*a*) of the Regulations (A.R., p. 94). The claimant appealed to the board of referees, which upheld the Commission's decision. However, he was successful before the

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3 He also claimed benefit on December 28, 1989 (file no. A-1000-96) and on January 11, 1991 (file no. A-1001-96).

4 In that decision the Minister's representative also determined the insurability of the employment from February 14, 1989 to December 22, 1989 (file no. A-1000-96) and from January 15, 1990 to December 7, 1990 (file no. A-1001-96).

umpire, and it is in respect of that decision that the applicant is seeking judicial review.

Before the umpire, counsel for the respondent argued that the Commission could not rely on section 43 of the Regulations and conclude that the claimant was a self-employed worker or was engaged in the operation of a business on his own account once the Minister had decided, under subsection 61(3) of the Act, that the claimant was employed in insurable employment, which "... implied the conclusion that the respondent was employed in employment ...". This is what the Court had held in *Venditelli*:

> [TRANSLATION] In accordance with subsection 75(3) [*now subsection 61(3)*] of the *Unemployment Insurance Act*, the Unemployment Insurance Commission asked the Minister of National Revenue to determine the question of whether the respondent was employed in insurable employment. Counsel for the applicant admitted that the decision was that this was the case. The determination of that question implied the conclusion that the respondent "was employed in employment", which means that he was an "employee". Accordingly, it cannot be concluded that he was engaged in the operation of a business on his own account. The Commission did not appeal the determination of the question by the Minister, and in our view the Commission is bound by his decision. Accordingly, having regard to the uncontested facts of the case, the respondent was entitled to a favourable decision on his claim for benefit.

Based on that decision, the umpire found for the claimant. He held that [TRANSLATION] "... the Minister's decision implied the conclusion that at the relevant time the claimant was employed, and this rules out the possibility that he was at the same time a self-employed contractor." Stating that he was then bound by the decision of this Court, the umpire concluded "... that it was not open to the Commission, and accordingly to the board of referees, to conclude that the claimant was a self-employed contractor at the relevant time" (A.R., p. 13). It is precisely that interpretation that was recently repudiated in *Thibault*, in which Hugessen J.A., writing for the Court, decided as follows:

> The applicant contends that because, as a business operator, he held an insurable employment, the Commission could not apply subsection 43(1) of the Regulations to his case to except him from receipt of benefits. This argument is untenable. Insurability of employment is, of course, an essential term of eligibility, but it is not a guarantee thereof. If the decision of this Court in *Venditelli* is capable of bearing such an interpretation (which we doubt), it should not be followed.

Accordingly, counsel for the respondent argued that the determination by the Minister of National Revenue concerning the insurability of the claimant's employment is binding on the Commission in terms of his entitlement to benefit, at least with respect to whether he was unemployed (sections 8 and 10 of the Act and subsection 43(1) of the Regulations), and that the rule established in *Venditelli* should be restored.

I believe that this interpretation is the result of a misunderstanding of the Act and of how it operates. First, we would note, to summarize, that the Commission must perform two different operations in respect of a person who claims unemployment insurance benefits: determine whether the claimant was employed in insurable employment during his or her qualifying period, and establish a benefit period for the claimant during which his or her entitlement will be verified.

Under Part I of the Act, unemployment insurance benefits are payable to an insured person who qualifies to receive those benefits (section 6). One of the requirements that must be met is that he or she, first, have been employed in insurable employment for a certain number of weeks during the qualifying period. However, where a question as to the insurability of the claimant's employment arises when a claim for benefits is made, we must then refer to Part III of the Act. Under subsection 61(3) of the Act, the Commission, the employee in question or the employer may apply to the Minister of National Revenue for determination of a question, *inter alia*, concerning whether a person was employed in insurable employment and the length of that employment (section 52). That decision may be appealed to the Tax Court of Canada (section 70). We would note that in the instant case the Minister determined, upon application by the claimant, that the claimant had been employed in insurable employment from March 25, 1991 to March 12, 1992. Once that question is determined, the Commission must establish the benefit period for the claimant and thereupon benefit is payable to him or her for each week of unemployment that falls in that period (section 8). Section 10 provides that a week of unemployment is a week in which the claimant does not work a full working week, and section 43 of the Regulations creates a presumption that a worker who is engaged in the operation of a business on his or her own account or in partnership or a co-adventure shall be regarded as working a full working week, unless the claimant establishes that the employment is so minor in extent that a person would not normally follow it as a principal means of livelihood.

As this brief review shows, insurability of employment and entitlement to benefits are two factors that the Commission must evaluate in respect of two separate periods. However, Parliament intended the analysis of each of these factors to be subject to separate rules, which must not be confused, "the process for determining the insurability of employment [being] unrelated to that for determining entitlement to benefit".[5] While the question of insurability must be determined by the Minister of National Revenue — and the Tax Court of Canada, if there is an appeal — and relates to the qualifying period, on the other hand, where a question of entitlement to benefit arises, it must be decided by the Commission itself — and the board of referees, if there is an appeal — and relates to the benefit period. The determination made with respect to insurability cannot be binding on the Commission with respect to that question, and not when it comes to decide entitlement to benefit.

For these reasons, I would allow the application for judicial review, set aside the decision of the umpire and refer the case back to the Chief Umpire to be decided on the assumption that the decision of the board of referees approving the decision of the Commission must be restored.

PIERRE DENAULT

J.F.C.C.

"I concur

Robert Décary, J.A."

"I concur

François Chevalier, D.J."

Certified true translation

C. Delon, LL.L.

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5 *Jocelyn Daoust v. Minister of National Revenue*, A-108-96, October 1, 1996 (unreported).

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO:	A-999-96
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DATED:	Friday, October 24, 1997

APPEARANCES:

Carole Bureau	for the applicant
Robert Pillo	for the respondent

SOLICITORS OF RECORD:

George Thomson Deputy Attorney General of Canada Ottawa, Ontario	for the respondent
Robert Pillo Montréal, Quebec	for the respondent