

Date: 20080111

Docket: A-139-07

Citation: 2008 FCA 13

**CORAM: DÉCARY J.A.
LÉTOURNEAU J.A.
NADON J.A.**

BETWEEN:

**OBERDE BELLEFLEUR OP
CLINIQUE DENTAIRE O. BELLEFLEUR
(EMPLOYER)**

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Montréal, Quebec, on January 9, 2008.

Judgment delivered at Montréal, Quebec, on January 11, 2008.

REASONS FOR JUDGMENT:

LÉTOURNEAU J.A.

CONCURRED IN BY:

**DÉCARY J.A.
NADON J.A.**

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The employer is challenging through judicial review a decision by Umpire Goulard (CUB 66262A) allowing the appeal of the Employment Insurance Commission (Commission), setting aside the decision of the Board of Referees and referring the matter for rehearing before a differently constituted Board of Referees.

[2] By upholding the Umpire's decision, as I plan to do, it will be the second time that, for exactly the same reasons, the matter has been referred to a differently constituted Board of Referees (see the decision of Umpire Marin in CUB 62693). The resulting decision, not without significant and unfortunate costs for the parties and the system, will be the third that a Board of Referees will be called to make. I hope that this time it will be the correct one and that the Board of Referees will fully assume the important duties conferred to it by the *Employment Insurance Act*, S.C. 1996, c. 23.

[3] A Board of Referees must justify its determinations. When it is faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.

[4] In *Parks v. Canada (Attorney General)*, [1998] F.C.J. No. 770 (QL), at paragraphs 5 and 6, our Court reiterated the principle in these words, referring to subsection 79(2) of the *Unemployment Insurance Act*, now subsection 114(3):

5. We are all in agreement that the Board erred in law in failing to comply adequately with subsection 79(2). Specifically we are of the view that it was incumbent on the Board to state, at least briefly, that it rejected critical parts of the evidence of the applicant on grounds of credibility, and why it did so. In this case there was before the Board much written material from the employer of a hearsay nature. The affidavit evidence and oral statements of the claimant before the Board conflicted in various respects with this material. The Board simply states its conclusions without explaining why it preferred one version of events to the other

6. While we do not interpret subsection 79(2) to require a detailed statement of findings of fact, we are of the view that the Board of Referees, to comply with that subsection, must when there is an issue of credibility state at least briefly, as part of its "findings ... on

questions of fact material to the decision", that it rejects certain evidence on this basis and why. When it fails to do so it errs in law.

[5] In this case, the Umpire identified many contradictory statements (for example in regard to the place where the work was effected and in regard to the mode as well as the amount of the earnings) and extensive evidence that the Board of Referees failed to consider that proved to be relevant to assessing the employer's testimony: see page 2 of the Umpire's decision.

[6] The Umpire also alleged, in my view rightly so, that the Board of Referees had ignored the initial spontaneous statements made by claimant which were later changed and adjusted in accordance with the statements of other individuals: *ibidem*, at page 3. This fact raised a significant issue regarding credibility which the Board of Referees had the role and the duty to assess to then make a finding and, above all, justify it.

[7] Umpires Marin and Goulard adequately explain the shortcomings of the earlier decisions and identify the evidence to consider, in terms of letter and spirit. Here is no need to add anything more, except to reiterate that the Board of Referees must analyze all of the evidence, and if it decides to dismiss certain evidence or to not assign it the probative value that this evidence appears to reveal or convey, it must explain why.

[8] The applicant, who is representing himself, alleges that the rules of natural justice were breached as a result of the fact that Umpire Goulard allowed the Commission's objection to the applicant providing explanations regarding a statement by a witness made anonymously out of fear

of threats and reprisals from the employer. Allowing the objection had the effect, according to the applicant, of preventing him from being heard.

[9] The issue of the anonymous statement is not an issue that was raised for the first time before the Umpire. The Board of Referees had the issue before it. Indeed, at page 6 of the reasons of his decision, the Umpire criticized the Board of Referees for not explaining why it considered that the information obtained through this statement was limited and why the document did not appear convincing when this information specifically concerned the issue.

[10] In any event, the applicant will be able to submit his representations on the issue at the new hearing before the Board of Referees.

[11] For these reasons, I would dismiss the application for judicial review with costs.

“Gilles Létourneau”

J.A.

“I concur.
Robert Décary, J.A.”

“I concur.
Marc Nadon, J.A.”

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-139-07

STYLE OF CAUSE: OBERDE BELLEFLEUR OP CLINIQUE
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NADON J.A.

DATE OF REASONS: January 11, 2008

APPEARANCES:

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