

**Date: 20081003**

**Docket: A-7-06**

**Citation: 2008 FCA 291**

**CORAM: DESJARDINS J.A.  
NADON J.A.  
PELLETIER J.A.**

**BETWEEN:**

**LUC DÉRY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Decided without appearance of parties.

Judgment delivered at Ottawa, Ontario, on October 3, 2008.

**REASONS FOR JUDGMENT BY:**

**DESJARDINS J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
PELLETIER J.A.**

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**REASONS FOR JUDGMENT**

**DESJARDINS J.A.**

[1] The applicant, by way of an application for judicial review, is appealing two decisions (those dated July 18, 2005, and November 21, 2005) by Umpire R.J. Marin, who dismissed the applicant's appeal and upheld the Board of Referees' decision.

[2] The Umpire and the Board of Referees found that the amount of \$14,903.86 received by the applicant from a trustee in bankruptcy represented a payment of \$8,221.17 for vacation pay and a payment of \$6,682.69 for severance pay. The two amounts constituted earnings within the

meaning of section 35 of the *Employment Insurance Regulations*, S.O.R./96-332 (the Regulations), and these earnings were to be allocated in accordance with subsection 36(9) of the Regulations.

[3] The claimant was employed by the J. Ford Ltd. company from mid-September 2000 to June 29, 2001, on which date his employment was terminated because of company restructuring.

[4] On July 3, 2001, his former employer filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3. Some time later, the applicant filed a proof of claim with the trustee for the amount of \$72,923.10. This amount represented claims related to the applicant's interest in the Coopérative des papetiers de Portneuf, four weeks of vacation pay owing, two weeks of severance pay, six months of salary compensation, relocation assistance, a 4% bonus, a pension fund and wages for July 2001.

[5] The trustee wrote to the applicant on October 24, 2001, to inform him that his claim for \$72,923.10 was rejected in part and that the amount of \$14,903.86 was allowed.

[6] On February 10, 2002, the Canada Employment Insurance Commission sent the applicant a notice of overpayment in the amount of \$3,717.00.

[7] The applicant disputed the nature of this amount by claiming that the money had not been allocated to him as severance pay, but rather as "dividends" and that his accountant had informed

him that such a payment would not affect the employment benefits to which he was entitled (Respondent's Record, page 40).

[8] The applicant explains at page 5 of his memorandum that [TRANSLATION] "the question is whether Umpire Marin based his decision on erroneous findings that he made in a perverse or capricious manner or without regard for the material before him." The applicant submits, among other things, that according to the record, his former employer's accountant, Mr. B. L'Heureux, made a telephone statement on behalf of the employer in which, [TRANSLATION] "further to a proposal, the trustee . . . paid [the applicant] \$14,903.86 for his claim for vacation and severance pay" (Respondent's Record, page 39). However, according to the applicant, Mr. L'Heureux was not working for the trustee and did not have any access to the information indicated on the ROE Information Correction form (Respondent's Record, page 39). The applicant adds, [TRANSLATION] "Moreover, no evidence from the trustee was presented throughout the various hearings to confirm the facts presented by Exhibit number 6," that is, the exhibit containing Mr. L'Heureux's statement.

[9] Regarding the concept of "dividends," there is a document on record entitled [TRANSLATION] "Report under paragraph 50(10)(b) of the *Bankruptcy and Insolvency Act*," based on which the trustee drew up a proposal that was going to enable the creditors of the J. Ford Ltd. Company to receive [TRANSLATION] "a dividend" of nearly \$3,000,000 (Respondent's Record, page 38). According to exhibits 12.1 and 12.2 on record, the Office of the Superintendent of Bankruptcy Canada gives the following definition for the word "dividend" (Respondent's Record, pages 46-47):

What is an Unclaimed Dividend?

Dividends are amounts payable to individuals and businesses who have been creditors in either a bankruptcy or a proposal under the *Bankruptcy and Insolvency Act*. Dividends are disbursed to creditors by either a private-sector trustee or a proposal administrator. Normally, the distribution would take place upon the completion of a bankruptcy; however, in a proposal, dividends may be distributed at various intervals throughout its administration.

[Emphasis added.]

[10] However, as regards this application, the question that the Umpire and Board of Referees should have asked was whether the two amounts received from the trustee constituted earnings within the meaning of subsection 35(1) and paragraph 35(2)(a) of the Regulations, the relevant parts of which read as follows:

35. (1) The definitions in this subsection apply in this section.

...

“income” means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. ( revenu )

...

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings has occurred and the amount to be deducted from benefits payable under section 19 or subsection 21(3) or 22(5) of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

...

[Emphasis added.]

35. (1) Les définitions qui suivent s’appliquent au présent article.

...

«revenu» Tout revenu en espèces ou non que le prestataire reçoit ou recevra d’un employeur ou d’une autre personne, notamment un syndic de faillite. ( income )

...

(2) Sous réserve des autres dispositions du présent article, la rémunération qu’il faut prendre en compte pour déterminer s’il y a eu un arrêt de rémunération et fixer le montant à déduire des prestations à payer en vertu de l’article 19 ou des paragraphes 21(3) ou 22(5) de la Loi, ainsi que pour l’application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment:

a) les montants payables au prestataire, à titre de salaire, d’avantages ou autre rétribution, sur les montants réalisés provenant des biens de son employeur failli;

...

[Je souligne.]

[11] Both the Umpire and the Board of Referees found Mr. L'Heureux's statement establishing the nature of the amounts in issue to be credible. The applicant cannot cast doubt on the truthfulness of the accountant's statements through mere allegations in his memorandum of fact and law. This Court can only review the findings of fact based on the record as it stands.

[12] In fact, the applicant raised the same arguments before the Board of Referees, who dismissed them as follows (Board of Referees' decision, Respondent's Record, pages 107-108):

[TRANSLATION]

**Evidence at the hearing**

The claimant did not attend the hearing, but was represented by Michel Martel. Mr. Martel entered a document (Exhibit 25) that he had given to the Umpire in June 2004. He told us that the claimant had submitted a claim to the trustee (Exhibit 15) following the employer's bankruptcy. In the final settlement, the trustee paid the claimant \$14,903.86. The representative attempted to prove that this amount does not in any way constitute vacation pay because vacation pay is not a priority debt in bankruptcies. The amount is for items listed in the document entered, i.e., COOP and RRSP contributions, relocation assistance, and severance pay. The representative was unable to provide any evidence, although he had contacted the trustee, but without success.

[Emphasis added.]

The applicant therefore did not meet his burden of proof.

[13] For his part, the Umpire accepted Mr. L'Heureux's statement (see paragraph 3 of the Umpire's decision dated July 18, 2005, Respondent's Record, page 17). He then added,

[TRANSLATION] "Further investigation into why the claimant received these earnings is unnecessary."

[14] This Court cannot intervene in the findings of fact made by the Umpire and Board of Referees unless those findings were unreasonable, according to tests set out in case law

(*Budhai v. Canada (Attorney General)* (C.A.), [2002] FCA 298; *Dunsmuir v. New Brunswick*, 2008 SCC 9). The findings in this case are consistent with the evidence.

[15] The findings of law and the findings of mixed fact and law made by the Umpire and Board of Referees concerning the concept of earnings and their allocation and application in this case are also unassailable in that they are consistent with this Court’s jurisprudence (*Canada (Attorney General) v. Roch*, 2003 FCA 256, paragraph 34 et seq.; *Fédération des caisses populaires Desjardins de Montréal et de l’Ouest du Québec v. Canada*, 2001 FCA 27, paragraph 92, Noël J.A., dissenting, but not on this point).

[16] I would dismiss the application for judicial review.

[17] The respondent claims no costs.

“Alice Desjardins”

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J.A.

“I concur.  
M. Nadon J.A.”

“I concur.  
J.D. Denis Pelletier J.A.”

Certified true translation  
Tu-Quynh Trinh

**FEDERAL APPEAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** A-7-06

**STYLE OF CAUSE:** LUC DÉRY AND ATTORNEY  
GENERAL OF CANADA

**DECIDED WITHOUT APPEARANCE OF THE PARTIES**

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

**CONCURRED IN BY:** NADON J.A.  
PELLETIER J.A.

**DATED:** OCTOBER 3, 2008

**WRITTEN SUBMISSIONS:**

Luc Déry APPLICANT  
ON HIS OWN BEHALF

Pascale-Catherine Guay FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Luc Déry APPLICANT  
Sainte-Foy, Quebec ON HIS OWN BEHALF

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Ottawa, Ontario