F ederal Court of A ppeal  Cour d'appel fédérale

**Date: 20101209**

**Docket: A-106-10**

**Citation: 2010 FCA 336**

**CORAM:** **SEXTON J.A.**
**EVANS J.A.**
**PELLETIER J.A.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**RAMDASS SOMWARU**

**Respondent**

Heard at Toronto, Ontario, on December 6, 2010.

Judgment delivered at Toronto, Ontario, on December 9, 2010.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: EVANS J.A.
PELLETIER J.A.

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**REASONS FOR JUDGMENT**

**SEXTON J.A.**

[1] This is an application for judicial review of the decision of Umpire Durocher (CUB 74046). Both the Board of Referees and the Umpire found that the respondent had good cause for delaying his application for benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act").

[2] In my view, this application should be allowed. The Umpire's finding that the respondent had good cause is unreasonable in light of this court's jurisprudence holding that a claimant is generally expected to take positive steps to ascertain his obligations under the Act.

[3] The respondent was forced to retire on December 31, 2008 because the factory at which he was employed shut down. He began to collect a pension. The respondent filed a claim for employment insurance benefits on March 31, 2009, effective to March 29, 2009. He requested that his claim be antedated to December 31, 2008. According to the respondent, he believed he could not receive employment insurance benefits while collecting a pension. When a friend informed him otherwise, he applied for benefits.

[4] Under subsection 10(4) of the Act, a claimant may antedate a claim for benefits where "good cause" existed for the entire length of the delay:

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| An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made. | Lorsque le prestataire présente une demande initiale de prestations après le premier jour où il remplissait les conditions requises pour la présenter, la demande doit être considérée comme ayant été présentée à une date antérieure si le prestataire démontre qu'à cette date antérieure il remplissait les conditions requises pour recevoir des prestations et qu'il avait, durant toute la période écoulée entre cette date antérieure et la date à laquelle il présente sa demande, un motif valable justifiant son retard. |

[5] The Canada Employment Insurance Commission denied the respondent's antedating request on the grounds that he had not shown good cause for the delay. The Board of Referees allowed the respondent's appeal, finding that "the claimant has acted in a reasonable manner in this issue".

[6] The Umpire dismissed the Commission's appeal of the Board of Referees' decision. Though the Commission argued that ignorance of the law did not constitute good cause for a late application, the Umpire held that "there are a number of cases where ignorance of the law was held to constitute good cause for antedating, when claimant did show that he acted as a reasonable and prudent person". He did not cite any cases in which ignorance of the law was accepted as good cause. According to the Umpire, a reasonable person could very well have shared the respondent's belief that collecting a pension precluded him from claiming employment insurance benefits.

[7] The only reason given by the respondent for the delay is that he was ignorant of the law. The issue is therefore whether a claimant who took no positive steps to verify his beliefs can rely on his ignorance of the law and good faith in claiming "good cause" under subsection 10(4).

[8] In *Canada v. Carry*, 2005 FCA 367 at paragraphs 4-5, Justice Linden rejected exactly that argument:

> The Umpire affirmed the decision of the Board on the basis that it was not unreasonable to hold that there was good cause in this case. The jurisprudence of this Court, however, clearly does not permit such a conclusion in this case in that a reasonable person is expected to take reasonably prompt steps to determine her entitlement to Employment Insurance benefits. Ignorance of the law and good faith, the reasons offered for the delay of nine months in this case, have been held to be insufficient to amount to good cause. (emphasis added)

[9] Justice Létourneau came to a similar conclusion in *Canada v. Bryce*, 2008 FCA 118 at paragraphs 12-13:

> On the facts of this case, in our opinion, it was not reasonably open to the Umpire to conclude as he did. Rather, a proper application of the legal tests to the facts leads to the conclusion that a person in the respondent's situation would have enquired about his rights and obligations and the steps that he should take to protect his claim for benefits. An obvious place to enquire would have been the Commission.
> We agree with counsel for the appellant that, in effect, the Umpire accepted as good cause for the delay the respondent's inexperience with the system and his reliance on his employer's advice when the respondent was no longer justified in doing so (emphasis added).

[10] The Umpire relied on Justice Marceau's comments in *Canada (Attorney-General) v. Albrecht*, [1985] 1 F.C. 710 (C.A.). However, Justice Marceau later clarified that decision in *Canada (Attorney-General) v. Caron* (1986), 69 N.R. 132 at paragraph 5 (C.A.):

> What the [Umpire's] decision says is simply that the respondent's error as to her situation and her right to receive unemployment insurance benefits together with her good faith constituted good cause…This is precisely the approach which must be rejected if the will of Parliament is not to be frustrated, and which has in fact been rejected in [*Pirotte v. Canada (Unemployment Insurance Commission)*, [1977] 1 F.C. 314] and *Albrecht*. It is worth repeating what the latter judgment said should be the appropriate principle: only by demonstrating that he did what a reasonable and prudent person would have done in the same circumstances, either to clarify the situation regarding his employment or to determine his rights and obligations under the provisions of the Unemployment Insurance Act, 1971, can a claimant, who failed to make his claim at the time he ceased to be employed and to receive a salary, establish a valid excuse for his delay and have his application considered retroactively. I suppose there could be cases in which inaction and submissiveness would be understandable regardless, but I feel that the circumstances would have to be very exceptional…(emphasis added).

[11] The law is therefore clear that, barring exceptional circumstances, a prospective claimant in the respondent's position is expected to "take reasonably prompt steps" to understand his obligations under the Act. Because the respondent took no such steps, it was unreasonable for the

Umpire to conclude that his belief he could not apply for benefits while collecting a pension constituted good cause for his delayed application. It cannot be said that the circumstances in this case were “exceptional”.

[12] For these reasons, the application for judicial review will be allowed without costs. The decision of the Umpire will be set aside and the matter referred back to the Chief Umpire, or the person that he designates, for a new determination on the basis that the appellant’s appeal to the Umpire from the Board of Referees’ decision shall be allowed.

"J. Edgar Sexton"
J.A.

“I agree
John M. Evans J.A."

“I agree
J.D. Denis Pelletier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-106-10 |

**(A JUDICIAL REVIEW FROM THE DECISION OF THE HONOURABLE JUSTICE DUROCHER, AS UMPIRE, DATED FEBRUARY 25, 2010, IN DOCKET NO. CUB 74046)**

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| **STYLE OF CAUSE:** | ATTORNEY GENERAL OF CANADA v. RAMDASS SOMWARU |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | December 6, 2010 |
| **REASONS FOR JUDGMENT BY:** | SEXTON J.A. |
| **CONCURRED IN BY:** | EVANS J.A.<br>PELLETIER J.A. |

**APPEARANCES:**

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|---|---|
| Derek Edwards | FOR THE APPLICANT |
| Ramdass Somwaru | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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