Federal Court of Appeal

Cour d'appel fédérale

Date: 20111017

Docket: A-440-10

Citation: 2011 FCA 284

CORAM: **BLAIS C.J.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CAROL BERGERON

Respondent

Hearing held at Québec, Quebec on October 4, 2011.

Judgment delivered at Ottawa, Ontario, on October 17, 2011.

REASONS FOR JUDGMENT BY: BLAIS C.J.

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

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REASONS FOR JUDGMENT

BLAIS C.J.

[1] This is an application for judicial review filed by the Attorney General of Canada against a decision of the Umpire dated September 23, 2010, in favour of Carol Bergeron. In his decision, the Umpire found that it was reasonable for the Board of Referees, considering the evidence, to conclude that the respondent's conduct was not voluntary.

[2] I would allow the Attorney General's appeal.

RELEVANT FACTS

[3] Starting in summer 1977, the respondent received repeated warnings because of his frequent unjustified absences from work. These absences began in the month of July 2007 and continued until the end of November 2008.

[4] It appears from the file that on November 26, 2008, a psychiatrist diagnosed the respondent with major depression, as stated in the medical certificate, but nevertheless set the date for his return to work at December 1, 2008, just four days later.

[5] The respondent therefore went back to work on December 5, 2008, but the absenteeism problem resurfaced when the employer was unable to reach the respondent on December 30, 2008, and between January 2 and 4, 2009, to set his work schedule. This time, he was warned that he could be dismissed if he continued to be absent from work without a valid reason. Finally, the respondent again failed to report for work, twice, without authorization or valid reason, in the month of January. On February 3, 2009, the respondent showed up for work late and was dismissed that same day.

[6] After making an initial claim for regular benefits with the Employment Insurance Commission (Commission), the respondent was given a benefit period starting March 15, 2009.

[7] In his claim for benefits, the respondent admits that he was dismissed because of his repeated absences, adding that he was called back to work on January 6, 2009, and informed that he had to report to his employer or be subject to dismissal.

[8] In accordance with the usual procedures, the Commission contacted the employer for details on the circumstances giving rise to the dismissal. The employer's representative confirmed the respondent's numerous absences from work and the escalating series of warnings and suspensions between July 2007 and February 3, 2009, the day the respondent was dismissed.

[9] The respondent confirmed the employer's version to the Commission. He stated that he had acted this way because of his divorce, with which he had been unable to cope, and that he had missed work on several occasions because of his personal problems. On May 11, 2009, the Commission informed the respondent that it could not pay him Employment Insurance regular benefits from March 15, 2009, the beginning of the established benefit period, since he had lost his employment on February 3, 2009, because of his own misconduct. The Commission told the respondent that he could contact the Commission if he wished to inquire about his eligibility for special sickness benefits.

[10] The respondent did not attend his appeal hearing before the Board of Referees and did not adduce any new evidence regarding the facts.

[11] The respondent's representative filed a medical report, dated November 26, 2008, by a psychiatrist, the same one who, it will be recalled, had diagnosed the respondent with major depression and had recommended a return to work four days later, on December 1, 2008.

[12] On June 17, 2009, the Board of Referees allowed the respondent's appeal. According to the Board, the respondent's actions were neither wilful nor deliberate, since the employer was aware of the medical evidence of major depression and had not contradicted it.

[13] On September 23, 2010, the Umpire dismissed the Commission's appeal on the basis that it was not up to him to substitute his own findings of fact for those of the Board of Referees when the Board's findings were not unreasonable and were supported by the evidence.

ANALYSIS

[14] All of the parties agree on the chronology of events, and the employer and the respondent appear to agree on the grounds for the respondent's dismissal.

[15] When the respondent made his claim for benefits in March 2009, he simply stated that he had been dismissed for repeated absenteeism. He said nothing about his major depression.

[16] In fact, there was no mention of the diagnosis of [TRANSLATION] "major depression" until the respondent's representative raised it before the Board of Referees. The diagnosis stated that no follow-up by a specialist was required and that the respondent could return to work four days later, that is, on December 1, 2008.

[17] There is no evidence or testimony to the effect that after the return to work in December 2009, the respondent fell back into the state of major depression on which the Board of Referees relied to arrive at its conclusions.

[18] In its decision, the Board of Referees clearly stated as follows, at page 3:

> [TRANSLATION]
> The issue that the Board of Referees must consider is whether or not the claimant lost his employment because of his own misconduct under sections 29 and 30 of the *Employment Insurance Act*.
>
> For the alleged conduct to constitute misconduct within the meaning of section 30 of the Act, it must be wilful or deliberate or so reckless as to approach wilfulness. There must also be a causal relationship between the misconduct and the dismissal.
>
> In the present case, the claimant was dismissed because he had problems with absenteeism from work.

[19] In my view, up to this point, the Board correctly understood its fact-finding role.

[20] However, the Board of Referees continued its analysis as follows:

> [TRANSLATION]
> At the hearing, the claimant's representative filed a medical certificate stating that the claimant had been suffering from major depression since the month of November 2008. His employer was therefore aware of this fact.
>
> Given this medical evidence, which was not contradicted by the employer, the Board of Referees finds that the claimant's conduct was not wilful or deliberate. The alleged conduct had to be wilful or deliberate or so reckless as to approach wilfulness (*Tucker* A-381-85).
>
> The claimant did not lose his employment because of his own misconduct within the meaning of the Act.

[21] It can only be concluded that the Board of Referees gave the medical certificate a much broader interpretation than it truly has. In reality, this medical report accompanied a claim for Employment Insurance benefits for an absence from work in the month of November 2008. Although Dr. Rupert Lessard refers to major depression in his diagnosis, he describes the seriousness of the condition as [TRANSLATION] "medium", adding that the respondent's inability

to work stems from his family/marital problems. Later on, he states that no further consultations have been scheduled, and that the patient will be referred to a family doctor, not a psychiatrist, and will be fit to return to work four days later, on December 1, 2008.

[22] In my view, the employer did not have to contradict or respond to the medical evidence because the back-to-work date had been set and the respondent did in fact return to work.

[23] Clearly, the Board of Referees found that this diagnosis, even though it provided for a return to work on December 1, 2008, could lead to the conclusion that the claimant was still suffering from the major depression diagnosed in November 2008 and that the medical certificate proved that the respondent's conduct was neither wilful nor deliberate.

[24] In my view, this is not an inference made from the evidence but rather speculation as to the true significance of the document; the Board found that even though the medical certificate called for a return to work on December 1, 2008, the respondent's major depression persisted in the months that followed. In my opinion, the Board of Referees erred in giving the medical certificate such an overly broad interpretation.

[25] Although an appellate court rarely considers questions of fact, there can be no doubt that in the present case, there is a complete lack of evidence, and that extending the medical certificate for three months after the period specified in it is wholly unreasonable.

[26] In the absence of any evidence whatsoever, it was not open to the Board of Referees to find that the claimant had not lost his employment because of his own misconduct within the meaning of the Act.

[27] On appeal, the Umpire noted the dubious nature of the Board of Referees' finding of fact but concluded that it was not up to him to substitute his own finding of fact for that of the Board.

[28] In dismissing the appeal, the Umpire adopted the Board of Referees' error in fact, giving the medical certificate of November 26, 2008, a much broader interpretation. In the Umpire's view, it was open to the Board of Referees to find that the respondent's absences in January 2009 were concomitant with his major depression.

[29] In my opinion, the Umpire had a duty to intervene and quash the decision of the Board of Referees.

[30] The case law since *Tucker* is very clear: an act is deliberate where it is done consciously, wilfully or intentionally. As Justice Nadon wrote in *Mishibinijima*,

> . . . [p]ut another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.
>
> (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, paragraph 14, page 414)

[31] The facts in this case are crystal clear. The evidence in the record shows that the respondent received several verbal and written warnings for his repeated unauthorized absences over the months and weeks leading up to his dismissal.

[32] The respondent was aware that his numerous absences were unacceptable. He met with his union and his employer to discuss his personal problems and try to find a way to correct his absenteeism. The Umpire had a duty to make sure that the Board of Referees had correctly applied the legal test for determining whether or the misconduct was wilful. The Umpire should have found that the evidence did not support the respondent's argument and the respondent had lost his employment because of his misconduct.

[33] Our Court therefore has no choice but to intervene and allow the application for judicial review, quash the decision of the Umpire and refer the matter back to the Chief Umpire or his designate for redetermination on the basis that the respondent shall be excluded from receiving benefits because of his own misconduct within the meaning of section 30 of the *Employment Insurance Act*.

"Pierre Blais"

C.J.

"I agree,
J.D. Denis Pelletier J.A."

"I agree,
Robert M. Mainville J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-440-10
Application for judicial review of a decision of the Umpire dated September 23, 2010 (CUB 753-17).	
STYLE OF CAUSE:	AGC v. Carol Bergeron
PLACE OF HEARING::	Québec, Quebec
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REASONS FOR JUDGMENT BY:	BLAIS C.J.
CONCURRED IN BY:	PELLETIER J.A. MAINVILLE J.A.
DATED:	October 17, 2011

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