Federal Court of Appeal  Cour d'appel fédérale

Date: 20111020

Docket: A-14-11

Citation: 2011 FCA 285

CORAM: **PELLETIER J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

GASTON MARCOUX

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Québec, Quebec, on October 4, 2011.

Judgment delivered at Ottawa, Ontario, on October 20, 2011.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

FEDERAL COURT OF APPEAL

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Marcoux is applying for judicial review of CUB decision 72725A dated November 10, 2010, signed by Justice Montigny of the Federal Court, sitting as an Umpire. At issue is the nature of the benefits paid during the weeks the claimant stated he was unavailable to work without the Employment Insurance Commission (the Commission) requiring him to provide proof of his illness.

[2] Mr. Marcoux, who received regular employment insurance benefits during a benefit period starting November 12, 2006, claimed he was unavailable to work between March 25 and 31, 2007, and April 15 and 21, 2007, because he was ill. For those two weeks, therefore, he received sickness benefits. In April 2008, Mr. Marcoux asked the Commission to convert the benefits paid as sickness benefits to regular benefits on the grounds that he had not been sick in those two weeks. The Commission refused his request, finding that his original report was more credible than that made in support of his request.

[3] Mr. Marcoux appealed this decision before the Board of Referees. During the hearing of his appeal, Mr. Marcoux admitted that he had indeed been sick during the two weeks in question, but that, in any case, sickness benefits paid during a short illness are in fact regular benefits since the Commission did not require him to submit a medical certificate for those weeks. The Board of Referees dismissed Mr. Marcoux's appeal, noting that he had admitted to being sick during the weeks in question.

[4] Mr. Marcoux appealed the Board of Referee's decision to the Umpire. Before the Umpire, he attempted to challenge the constitutional validity of the Commission's policy of not requiring claimants to produce medical certificates for short illnesses. His argument earned him a postponement to allow him to prepare his case and to serve a notice of constitutional question under section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. After satisfying these requirements, Mr. Marcoux argued his case before the Umpire, who dismissed it.

[5] In short, the Umpire was of the opinion that Mr. Marcoux had not advanced any evidence that could support his constitutional arguments. In so finding, the Umpire gave effect to trite law that constitutional questions are not determined in a factual vacuum. Regarding Mr. Marcoux's request to have his sickness benefits converted into regular benefits, the Umpire ruled that the Board of Referee's decision was reasonable, given Mr. Marcoux's admission about his state of health.

[6] Before this Court, Mr. Marcoux described the abuse caused by the Commission's policy not to require a medical certificate when claimants report that they are unavailable to work for up to five weeks because they are sick. According to him, employment insurance claimant regulars take advantage of the Commission's policy to obtain benefits to which they are not entitled by lying about their health, while those unfamiliar with the system do not take advantage of the opportunity to benefit from lying.

[7] While not denying that some claimants may be abusing the policy, the Attorney General of Canada relies on subsection 50(10) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), to justify the Commission's policy, even though subsection 40(1) of the *Employment Insurance Regulations*, SOR/96-332, seems to require the production of a medical certificate. The relevant statutory provisions follow:

Employment Insurance Act	*Loi sur l'assurance-emploi*
18**.** A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the	18**.** Le prestataire n'est pas admissible au bénéfice des prestations pour tout jour ouvrable d'une période de prestations pour lequel il ne peut

claimant was

(*a*) capable of and available for work and unable to obtain suitable employment;

(*b*) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or

. . .

prouver qu'il était, ce jour-là :

a) soit capable de travailler et disponible à cette fin et incapable d'obtenir un emploi convenable;

b) soit incapable de travailler par suite d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement et aurait été sans cela disponible pour travailler;

…

Employment Insurance Regulation

40**.** (1) The information and evidence to be provided to the Commission by a claimant in order to prove inability to work because of illness, injury or quarantine under paragraph 18(*b*) or subsection 152.03(1) of the Act, is a medical certificate completed by a medical doctor or other medical professional attesting to the claimant's inability to work and stating the probable duration of the illness, injury or quarantine.

Règlement sur l'assurance-emploi

40**.** (1) Les renseignements et la preuve que le prestataire doit fournir à la Commission pour établir son incapacité de travailler par suite d'une maladie, d'une blessure ou d'une mise en quarantaine en application de l'alinéa 18*b*) ou du paragraphe 152.03(1) de la Loi consistent en un certificat établi par un médecin ou autre professionnel de la santé qui atteste cette incapacité et qui indique la durée probable de la maladie, de la blessure ou de la quarantaine.

Employment Insurance Act

(10) The Commission may waive or vary any of the conditions and requirements of this section or the regulations whenever in its opinion the circumstances warrant the waiver or variation for the benefit of a claimant or a class or group of claimants

Loi sur l'assurance-emploi

50(10) La Commission peut suspendre ou modifier les conditions ou exigences du présent article ou des règlements chaque fois que, à son avis, les circonstances le justifient pour le bien du prestataire ou un groupe ou une catégorie de prestataires.

[8] Mr. Marcoux states that there is no framework for the Commission's policy, meaning that it is vague and thus inconsistent with the rule of law. He asks that the Court declare the policy to be invalid and to add the weeks to which it applies (four, according to Mr. Marcoux) to the 15 weeks of sickness benefits provided for by the Act. This would mean that anyone claiming to be unavailable for work because he or she is sick would have to provide a medical certificate in support of his or her claim for sickness benefits; in return, however, claimants would be entitled to sickness benefits for 19 weeks.

[9] The Attorney General of Canada points out that Mr. Marcoux is asking the Court to amend the Act, which is not within its jurisdiction. Only Parliament has this power.

[10] Mr. Marcoux cannot criticize how the Commission exercised its discretion since he benefitted from it when he reported that he was unavailable for health reasons. Given his admission that he really was sick during the weeks in question, the Commission's decision not to convert his sickness benefits for the two weeks in question into regular benefits is unassailable.

[11] As for the legitimacy of the Commission's policy of not requiring a medical certificate from claimants in the case of a short illness, Mr. Marcoux has not satisfied the Court that subsection 50(10) is not capable of conferring that discretion on the Commission.

[12] Regarding the constitutional question raised by Mr. Marcoux, it is my opinion that it is not one. Mr. Marcoux is unable to specify which statute or provision infringes claimants' right to

equality. If the policy has no foundation in the Act, it is unlawful and the question of constitutionality does not arise. The Commission relies on subsection 50(10) of the Act to justify its policy. Mr. Marcoux was unable to satisfy us that the Commission is wrong. Mr. Marcoux's distinction between crafty claimants who abuse the system and naive claimants who do not know that they can abuse it cannot justify an argument of unequal treatment contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, for obvious reasons.

[13] I would therefore dismiss the application for judicial review. The Attorney General seeks the costs of this application. The Attorney General was right, and generally speaking, he would be entitled to costs. Mr. Marcoux has not satisfied the Court that the general rule does not apply. I would therefore award the Attorney General his costs, which I would set at $500, disbursements included.

"J.D. Denis Pelletier"
J.A.

"I agree.
Johanne Trudel J.A."

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

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-14-11
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CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A.
DATED:	October 20, 2011

APPEARANCES:

Gaston Marcoux	FOR THE APPLICANT (On his own behalf)
Pauline Leroux	FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A	FOR THE APPLICANT
Department of Justice Canada Montréal, Quebec	FOR THE RESPONDENT