Federal Court of Appeal | Cour d'appel fédérale

Date: 20120508

Docket: A-198-11

Citation: 2012 FCA 140

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

SURYAKANT KARELIA

Applicant

and

THE ATTORNEY GENERAL OF CANADA, ON BEHALF OF

THE MINISTER OF HUMAN RESOURCES AND SKILLS

DEVELOPMENT CANADA

Respondent

Heard at Toronto, Ontario, on May 2, 2012.

Judgment delivered at Ottawa, Ontario, on May 8, 2012.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: SHARLOW J.A
STRATAS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an application for judicial review of a decision of Umpire L.-P. Landry, dismissing an appeal from a decision of the Board of Referees (the Board) in which the Board upheld the Canada Employment Insurance Commission's (the Commission) finding that Mr. Karelia lost his employment due to misconduct, and thus was not eligible for employment insurance benefits. For the reasons that follow, I would dismiss the application for judicial review.

[2] Mr. Karelia was a long time employee of an automotive dealership in Toronto, who rose in time to the position of parts manager. One may conclude from this that he was, for most of his career, a satisfactory employee. However, in the spring of 2009, Mr. Karelia began missing work to such an extent that in mid-August of that year, the employer wrote him a letter setting out its dissatisfaction with his attendance and explaining the consequences that his absenteeism was having on the operations of the business. The last paragraph of the letter reads as follows:

> This letter will serve as written notice that your continued absence is unacceptable and that your continued employment with [the employer] is contingent on you attending work and carrying out your duties in an acceptable manner. An acceptable manner includes but is not limited to notifying [the employer] in advance of any medically necessary absences in advance so that suitable arrangements to cover your work duties can be made; a subsequent doctor's certificate to support the absence; immediate telephone notification when advance notice is not possible; and absent medical reasons or pre-approved absences, regular on time attendance at work.

[3] Following receipt of this letter, Mr. Karelia's attendance at work was satisfactory until December 2009 when he was again absent from work, from December 15th to December 18th, without prior approval and for reasons that the employer did not find particularly credible: see Respondent's Record, p.28. As a result, Mr. Karelia's employment was terminated on December 16th, 2009, though he was not given the letter of termination until he returned to the employer's premises on December 21st, 2009. At the same time, the employer provided Mr. Karelia with two months pay as a transitional measure.

[4] Mr. Karelia's explanation for his absence was that, for reasons that varied over time, he had decided to drive his daughter to Buffalo, New York, on December 14th, his scheduled day off, so that she could catch a cheap flight to England. He did not phone ahead to reserve a ticket, as he did

not believe that there would be a problem finding a flight. As it turns out, nothing was available on the 14th so his daughter was placed on a standby list. Nothing became available for either December 14th or December 15th. Mr. Karelia was however advised that a flight would be available from Kennedy airport in New York City on December 16th. A friend drove Mr. Karelia and his daughter to New York City, and she flew out on December 16th. On the way back to Buffalo to pick up Mr. Karelia's car, he and his friend got into a motor vehicle accident, which left the friend's car un-driveable. As a result, Mr. Karelia did not get back to Toronto until Saturday night.

[5] Mr. Karelia contacted a co-worker late in the evening on December 14th to say that he would not be at work the next day. He contacted the employer on the morning of the 15th to say that he was out of the country arranging travel for a family member and would be in later that day. He contacted the employer again on the 16th to say that he was still out of the country and would return to work later that day or the next morning: see Respondent's Record, p. 31. The minority opinion in the Board decision suggested that Mr. Karelia called his employer again on December 17th, but the employer's letter of termination does not confirm this: see Respondent's Record, p. 33.

[6] When Mr. Karelia was initially contacted by the Commission, he told the Commission investigator that on the evening of Friday, December 11th, his daughter had decided that she wanted to go to England to see his family. He said there was no emergency: see Respondent's Record, p. 29. When he appeared before the Board, however, Mr. Karelia said that the primary reason for the trip was for his daughter to get a medical check-up, indicating once again that there was no

emergency: see Respondent's Record, p. 46. In his Notice of Appeal to the Umpire, Mr. Karelia provided more information about the circumstances surrounding his daughter's trip. He wrote:

> My brother who lives in England called me on Sunday Dec. 13 and asked me to rush my daughter to England because this special priest/doctor/guru will be in England for that week and he could arrange a special appointment with him to take my daughter. We believed that once my daughter sees this priest she will be healed / relieved of many of her conditions.

[7] There is no indication in the record as to whether the events described in this Notice of Appeal were the subject of evidence before the Umpire.

[8] Following his termination, Mr. Karelia applied to the Commission for unemployment insurance. The Commission denied Mr. Karelia's claim for benefits on the basis that he had lost his employment due to his own misconduct and was therefore disqualified from receiving benefits pursuant to s. 30 of the *Employment Insurance Act*, S.C. 1996, c. 23. Mr. Karelia appealed to the Board. After setting out the facts, the Board referred to this Court's decision in *Canada (A.G.) v. Tucker*, [1986] 2 F.C. 329, [1986] F.C.J. No. 203, as authority for the proposition that misconduct must be wilful, deliberate, or so reckless that it approaches wilfulness. Applying this proposition to the facts of the case, the majority of the Board found that Mr. Karelia jeopardized his employment by making the deliberate decision to leave for Buffalo on his day off without giving himself more time, if needed, to get his daughter on a flight. In the view of the majority, this amounted to a wilful disregard for the employer's policy, which I take to mean the conditions imposed on Mr. Karelia in August 2009 by the employer following his absenteeism.

[9] The minority opinion of the Board found that the extenuating circumstances were such that Mr. Karelia's actions did not amount to wilful or reckless conduct. The dissenting member found that Mr. Karelia was justified in waiting in Buffalo for a standby flight and then driving to Kennedy airport to catch a flight there. In his view, Mr. Karelia, a twenty-seven year employee, "had no conclusive concerns that his job was in jeopardy": Board Decision, File No. 054-025, p. 12.

[10] Mr. Karelia appealed to the Umpire, who upheld the majority's decision.

[11] The Umpire reviewed the facts and found that there was no reason to intervene. No error of law had been shown and the evidence supported the Board's factual conclusions. He rejected submissions made on Mr. Karelia's behalf suggesting that extenuating circumstances should have led to a less severe penalty. The Umpire pointed out that the severity of the penalty is not a relevant consideration when determining whether conduct amounts to misconduct under s. 30 of the *Employment Insurance Act*.

[12] The standard of review that applies to an Umpire's decision is correctness on questions of law, and reasonableness with respect to the application of the law to the facts: see *Canada (Attorney General) v. Lemire*, 2010 FCA 314, [2010] F.C.J. No. 1429 [*Lemire*] at para. 8, *MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306, [2009] F.C.J. No. 1358 at para. 20 [*MacNeil*]. The determination of the standard to be applied by the Umpire to the Board's decision is a legal question, and as such, is reviewable by this Court on a standard of correctness: see *Lemire*, cited above, at para. 9, *MacNeil*, cited above, at para. 20.

[13] In this case, the Umpire correctly identified and applied the standard of review.

[14] Counsel for Mr. Karelia argued that the factual discrepancies between the Board's decision and the Umpire's decision were such that the Umpire should have returned the matter to the Board for another decision. In particular, he focussed on the Board's conclusion that the daughter's trip was not an emergency while the Umpire, according to counsel, recognized the urgent nature of the trip due to Mr. Karelia's brother's phone call on Sunday evening.

[15] In my view, the Board made no error in relying on Mr. Karelia's own evidence to the effect that there was no emergency. If Mr. Karelia had evidence of other facts that the Board ought to have considered, his remedy was under s. 120 of the *Employment Insurance Act*, which provides:

120. The Commission, a board of referees or the umpire may rescind or amend a decision given in any particular claim for benefit if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.	**120.** La Commission, un conseil arbitral ou le juge-arbitre peut annuler ou modifier toute décision relative à une demande particulière de prestations si on lui présente des faits nouveaux ou si, selon sa conviction, la décision a été rendue avant que soit connu un fait essentiel ou a été fondée sur une erreur relative à un tel fait.

[16] Whether the Board would have entertained a motion for reconsideration under this section on the basis of information that Mr. Karelia had in his possession all along is another question.

[17] However the Umpire did not err in failing to intervene with respect to the Board's finding of fact on this point.

[18] Counsel for Mr. Karelia also argued that this case is different from those where a claimant's dismissal was due to blameworthy conduct such as alcoholism, use of illicit drugs, or selling contraband cigarettes: see for instance *Lemire*, cited above, at para. 17, *Canada (Attorney General) v. Bigler*, 2009 FCA 91, [2009] F.C.J. No. 365 at paras. 7-8, *Canada (Attorney General) v. Marion*, 2002 FCA 185, [2002] F.C.J. No. 711 at paras. 2-3. He claimed that the conduct at the root of Mr. Karelia's dismissal was blameless, in that it was nothing more than a father's desire to do what was necessary for his family. As such, it should not be deemed wilful misconduct. With respect, this distinction is beside the point. The relevant conduct is the conduct related to one's employment. The Board found that Mr. Karelia conducted himself in a manner that showed wilful disregard for the employer's conditions regarding his attendance at work, and this led to his dismissal. There is ample evidence to support this conclusion. Moreover, the cases cited to us from other tribunals interpreting other statutory definitions of "misconduct" are of limited utility, as we are bound by the jurisprudence that has been developed by this Court. The Umpire therefore committed no error by failing to intervene.

[19] Finally, counsel argued that the Board and the Umpire erred in treating Mr. Karelia as though he had been dismissed for just cause, and letting this impact on the finding that he had engaged in wilful misconduct. Counsel suggested that the fact that Mr. Karelia was paid two

months salary upon termination, and the absence of progressive discipline pointed away from dismissal for just cause.

[20] It is not the function of the employment insurance system to make determinations about whether an employee has been dismissed for just cause. The only issue in this case is whether Mr. Karelia lost his employment by reason of his own wilful misconduct so as to disqualify him from the receipt of benefits. The jurisprudence is clear that misconduct and just cause for dismissal are distinct concepts: *Canada (Attorney General) v. McNamara*, 2007 FCA 107, [2007] F.C.J. No. 364 at para. 22, *Fakhari v. Canada (Attorney General)*, [1996] F.C.J. No. 653, 197 N.R. 300 at para. 3, *Canada (Attorney General) v. Jewell*, [1994] F.C.J. No. 1584, 175 N.R. 350 at paras. 6-7. The jurisprudence dealing with misconduct is substantially more unforgiving than the jurisprudence dealing with just cause. As a result, the arguments made with respect to just cause are not relevant when considering whether an applicant engaged in wilful misconduct with the meaning of the *Employment Insurance Act*.

[21] For all of these reasons, I would dismiss the appeal.

"J.D. Denis Pelletier"

J.A.

“I agree.
K. Sharlow J.A.”

“I agree.
David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-198-11
STYLE OF CAUSE:	**Suryakant Karelia v. The Attorney General of Canada, on behalf of The Minister of Human Resources and Skills Development Canada**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 2, 2012
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	SHARLOW & STRATAS JJ.A.
DATED:	May 8, 2012

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