Federal Court of Appeal

Cour d'appel fédérale

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ALEXANDER JESSO

Respondent

Judgment delivered at Ottawa, Ontario, on June 27, 2012, on motion in writing and without appearance of the parties.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

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

Federal Court
of Appeal

Cour d'appel
fédérale

Date: 20120627

Docket: A-365-11

Citation: 2012 FCA 196

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ALEXANDER JESSO

Respondent

REASONS FOR JUDGMENT

MAINVILLE J.A.

[1]   The applicant has brought a judicial review application challenging a decision of Umpire

Goulard made under the *Employment Insurance Act*, S.C. 1996, c. 23, and cited as CUB 77518. The

appellant now brings to this Court a pre-hearing motion seeking an order allowing the application

on consent of the parties.

[2]   As decided in *Canada (Attorney General) v. Goulet*, 2012 FCA 62, this Court cannot set

aside the decision of an umpire on the mere consent of the parties to the proceedings. In order to

obtain such a judgment, the motion record must set out the facts and the legal grounds that support

the application.

[3]   The principles which apply in such circumstances are set out in *Canada (Attorney General)*

v. Goulet, and they may be described as follows:

a. Although Rule 349 of the *Federal Courts Rules*, SOR/98-106 (the "Rules") allows for the reversal or variation of an order appealed from on the consent of the parties if the resultant judgment is one that could have been given on consent, that Rule appears in Part 6 of the Rules concerning appeals. No similar provision is found in Part 5 of the Rules concerning applications.

b. Under section 118 of the *Employment Insurance Act*, a decision by an umpire on appeal is final and is not subject to appeal or to review, except for judicial review under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. An umpire's decision cannot therefore be set aside on the mere consent of the parties since this would be contrary to Parliament's intention and to the principle of finality and stability of administrative decisions. A formal judicial intervention is thus required for this purpose.

c. Under Rule 55, the Court may, in special circumstances, summarily grant a judicial review application on joint motion of the parties where the parties can demonstrate an error on the part of the umpire which justifies such a conclusion.

d. However, for the purposes of such a summary judicial review proceeding, the Court is not bound by any consent of the parties with regard either to the judgment to be rendered or the applicable legal principles. Moreover, the reasons set out in a resulting judgment cannot bind the Court in subsequent proceedings, since that judgment is reached on an incomplete record and without the benefit of a counter-argument.

[4]   Consequently, in this case, Justice Gauthier J.A. issued a directive to the parties on May 4,

2012 seeking explanations as to how the umpire erred in law or in principle in his decision and the

legal basis on which this Court would be justified to quash his decision. Such explanations were

provided on May 18, 2012.

[5]   On the basis of the explanations provided, and after carefully reviewing the motion record and the umpire's decision, I am of the view that the judicial review application should be granted and the umpire's decision should be set aside.

[6]   The facts of this case are simple. The respondent, Mr. Jesso, received from the Canada Employment Insurance Commission (the "Commission") three notices of violation dated respectively May 23, 2006, November 18, 2008 and February 22, 2010. The respondent did not challenge any of these notices. As a result, the number of minimum hours required from the respondent to qualify for benefits under the *Employment Insurance Act* was increased to 910 hours.

[7]   When the respondent made a claim for benefits in February 2010 with only 600 qualifying hours, his claim was consequently refused by the Commission on the basis that he had not accumulated sufficient hours in order to qualify for benefits. The respondent appealed to a Board of Referees, which upheld the Commission's decision. However, the Board of Referees recommended that the Commission reconsider the notices of violation in light of special circumstances.

[8]   The respondent appealed to the umpire, who granted the appeal by setting aside the notices of violation and consequently waiving the penalty of increased qualifying hours. The umpire erred in so finding, since the notices of violations had not been appealed in a timely fashion and could not therefore be set aside by either the Board of Referees or the umpire. In deciding as he did, the umpire acted without jurisdiction and disregarded the rules of procedural fairness.

[9]   I would therefore (a) pursuant to Rule 55, exempt the parties with compliance with Rules

306 to 316, (b) allow the application for judicial review, (c) set aside the umpire's decision, and (d)

refer the matter back to the Chief Umpire, or his or her designate, for a new determination with a

direction to dismiss the appeal from the Board of Referees. There should be no order as to costs.

"Robert M. Mainville"
J.A.

"I agree.
        Johanne Gauthier J.A."

"I agree.
        Johanne Trudel J.A."