Federal Court of Appeal | Cour d'appel fédérale

Date: 20121129

Dockets: A-437-11
A-32-12

Citation: 2012 FCA 313

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

BETWEEN:

DEREK GREEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on October 11, 2012.

Judgment delivered at Ottawa, Ontario, on November 29, 2012.

REASONS FOR JUDGMENT BY: NADON J.A.

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

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REASONS FOR JUDGMENT

NADON J.A.

[1] Before us are applications for judicial review of two decisions of an umpire, Mr. Justice Marin, dated June 20, 2011 and October 31, 2011. By his first decision (CUB 77281), the umpire had to determine whether the Board of Referees ("the Board") had erred in concluding that the applicant did not have just cause, within the meaning of sections 29 and 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 ("the Act"), to leave his employment with W/Five Seismic Co. Ltd. ("Seismic") on December 17, 2009, and that he had not accumulated, since leaving that employment, the number of hours of insurable employment required by sections 7 and 7.1 of the

Act so as to qualify for insurance benefits. As he could not find any error in the Board's decision, the umpire accordingly dismissed the applicant's appeal.

[2] By his second decision (CUB 77281A), the umpire had to determine, on a motion brought by the applicant under section 120 of the Act, whether there were grounds for him to reconsider his decision of June 20, 2011. The umpire dismissed the motion because no new facts had been adduced by the applicant and he was satisfied that his first decision had not been "given without knowledge of, or based on a mistake as to some material fact".

[3] On November 17, 2011, the applicant filed an application for judicial review of the umpire's second decision. He subsequently brought an application to amend his judicial review proceedings so as include a review of the umpire's first decision and he also sought an extension of time to do so. On January 24, 2012, my colleague, Mainville J.A., allowed the applicant's application to amend and to extend the time do so, and he ordered a consolidation of both judicial review applications. Consequently, these Reasons will dispose of both applications. For the sake of clarity, I should point out that the applicant's judicial review application of the umpire's first decision bears Court file no. A-32-12, while the application for judicial review of the umpire's second decision bears file no. A-437-11.

The Facts

[4] On April 19, 2010, the applicant presented an application for benefits (his application was filed electronically) to the Employment Insurance Commission ("the Commission"). In this application, he indicated that his most recent employer had been Sourcex Geophysical Corp.

("Sourcex"), where he had worked from March 16 to March 29, 2010. He further indicated that he had worked for a number of employers prior to Sourcex, namely, Veritas Energy Services Inc. ("Veritas") from March 4 to March 11, 2010, Geostrata Resources Inc.("Geostrata") from February 10 to February 25, 2010, and Seismic from December 11 to December 17, 2009. Prior to working for Seismic, the applicant had worked for Geokinetics Exploration ("Geokinetics") from November 13 to November 27, 2008.

[5] With regard to his employment with Seismic, he indicated that he had quit that employment on December 17, 2009, because he had received a job offer or thought that he would be receiving one. More particularly, he indicated that after meeting with a representative of United Safety, he believed that he would be hired by that company and would commence work thereat on January 25, 2010.

[6] He also indicated that he expected his new job to be either permanent employment or to last longer than the job that he had left, and that he expected the number of hours worked per week would either be equal to or greater than his hours at Seismic. He also informed the Commission that in the previous two years, he had not at any time been unable to work for medical reasons.

[7] Following the filing of his application for benefits, the applicant informed the Commission, on May 10, 2010, that when he left Seismic on December 17, 2009, work at that company had ceased for the holidays because Seismic had been unable to obtain a contract which it had hoped to secure, adding that, in any event, his job at Seismic was "horrible".

[8] Upon inquiries by the Commission with the applicant's purported new employer, United Safety, a representative of that company informed the Commission of the following (Respondent's Record, page 30):

> … applicants have to go through training before they are offered a job. The training is unpaid. Hundreds of people apply. They have to be successful in the three parts of the program to be offered a job. The claimant [the applicant] failed the drugs and alcohol screening. He was given 60 days to reapply, would have had to go through training again, but he hasn't called back within that period.

[9] As a result of this information, the Commission decided that no benefits would be payable to the applicant because he had voluntarily left his employment with Seismic on December 17, 2009, without just cause within the meaning of the Act. In the Commission's view, voluntarily leaving his employment with Seismic was not the only reasonable alternative in his case.

[10] The applicant asked the Commission to reconsider its decision on the basis of new evidence, i.e. that he left Seismic because "he had a better job in the works with United Safety" (Respondent's Record, page 31), adding that although he had never actually worked for United Safety, he had been in training with them when he had failed the drug test. However, shortly thereafter, he had found employment with Geostrata where he worked from February 10 to February 25, 2010.

[11] On May 21, 2010, the applicant provided additional information to the Commission in the hope of convincing it to reconsider. More particularly, he informed the Commission that considering the working conditions and his wages, the risks that he was taking in performing his duties at Seismic were too high. He then went on to explain why the working conditions were not acceptable (Respondent's Record, pages 32-33):

> … I was required to continuously have to travel between shot points that are 60 metres apart, in order to do so I would have to drive an ATV and the wind in my face was giving me frost-bite. I would have to set up dynamite with a blasting cap inside of a hole. I would have to push the explosive down the hole with wooden poles, the poles are 50 feet long, I would have to go 10 feet at a time, as I was pushing it down the hole, often there were problems with the hole and I would have to push down harder and pull them back out. These poles are extremely heavy and in the winter they get covered in mud and I would to pull a 70-80 lb pole out of the ground. It felt like I was doing slave labor in -30 C degree weather. The basic duties of the job had to be done extremely fast. I would compare to running a marathon everyday, because the work that I had to do in the time that I had to do it was strenuous. I sued to do it in my 20s, but after a lifetime of doing this, I am having ligament damage all over my body. This was self-imposed physical abuse. This is a job where there are no days off. I did every day for 10-12 hours per day for 30 days in a row. My body was no longer conditioned for this kind of work. Each night I would go to sleep thinking that I would have to wake up and do the same kind of horrific work all over again. I never planned on keeping this job for long-term, I thought I could do it for a couple of weeks and it wouldn't be so bad. They were shutting down for the Christmas holidays anyways.

[12] On June 22, 2010, the Commission received additional information from United Safety concerning the applicant's purported employment with them in January 2010. United Safety's representative indicated that the applicant had indeed been recruited as a potential candidate for employment and that he had attended a training session from January 25 to 29, 2010, adding that the applicant would have been advised one or two weeks prior to the commencement of the training session that he had been recruited. United Safety's representative also explained to the Commission that the training session was a full-time matter and that the candidates were not paid during that time. The session itself included interviews, aptitude testing and classroom and practical evaluation. A successful candidate would then be offered immediate full-time employment with the company, but there was no guarantee that a candidate entering the training session would be offered employment at the end of the session.

[13] The Commission was also advised that the claimant had failed his drug screening test and, as a result, had not successfully passed the training session. Although the applicant's evaluation and marks were positive, the company could not confirm that he would, in the end, have been offered employment had he not failed the test, since the training session had yet to be completed.

[14] On June 23, 2010, the Commission advised Seismic that it had been informed by the applicant that work at Seismic had terminated around December 18, 2009, for the Christmas break and had resumed during the first week of January 2010. A Seismic representative indicated that that information was not true, as the company was very busy during the winter months and that it could not afford to shut down during the holidays, except for Christmas Day, Boxing Day and New Year's Day. All other days were normal working days. Seismic's representative also indicated that had the applicant not quit his employment, "he could have worked full-time continuously from December 17, right through until the spring shut-down" (Respondent's Record, page 44). Seismic's representative, upon further questioning by the Commission, indicated that had the applicant requested a leave of absence for a week in January 2010, leave might possibly have been given to him. Such a decision, however, would have been left to the discretion of the applicant's foreman.

[15] The above information was passed on to the applicant who disagreed with Seismic's representative. He reiterated that he had been told that the work site would be closed down for the holidays and that there might possibly be work for him in January. The applicant added that, in any event, as the working conditions with Seismic were too difficult, he would not have remained with them. He then stated his view that "he had full rights to walk away from his job" (Respondent's Record, page 45).

[16] On June 25, 2010, the Commission telephoned the applicant to inform him that Seismic was unable to confirm that their site was closed during the Christmas holidays, other than for the statutory holiday dates, and further informed him that his file would be forwarded to the Board of Referees for his appeal on the ground that he did not have just cause for leaving Seismic on December 17, 2009. Again, the applicant indicated that he disagreed and that he had had a reasonable assurance of work with United Safety when he left Seismic, acknowledging that he had left on December 17, 2009, because the work was too difficult.

[17] Also of relevance is Seismic's written response to a number of points made by the applicant prior to his hearing before the Board, and which were brought to its attention by the Commission. On July 23, 2010, Jason Slegel, the supervisor at Seismic, wrote to the Board, advising it that it would not have "any personnel in attendance at this hearing", but that Seismic would like to offer some comments regarding the position taken by the applicant. In particular, Mr. Slegel made the following points:

- the applicant worked for Seismic for six days only;
- although the job was, in fact, physically very difficult, a person in good physical condition could do the job, adding that many of the helpers doing the same job as the applicant were of the same age group, i.e. early 30s;
- although the applicant was being paid starting wages as he was a new employee, he could have increased his wages had he remained with the company longer so as to demonstrate that he could "competently do his job";

- Seismic only found out that the applicant had seen a doctor regarding pain in his knee when it had occasion to read the Board's Appeal Docket; at no time during his employment with the company had the applicant indicated that he had pain or that he had suffered injury in performing his job; when the applicant quit his job, he had told Seismic that "he was too old to do the job".

[18] The hearing before the Board took place in Calgary on August 3, 2010.

Decision of the Board of Referees

[19] After reviewing the entirety of the written record before it, including the applicant's employment and claim history (pages 89 to 94 of the Respondent's Record), the Board turned to the evidence adduced at the hearing, namely, the applicant's testimony. It noted that he testified that while driving with his supervisor on December 18, 2009, he informed him that he would not be returning to the job because he had had enough with the type of work that he had to perform for Seismic. The applicant, in the course of his testimony, also indicated that, in any event, there would have been no work for him at Seismic as the driller with whom he was working was returning to Prince Edward Island and the crew would not be resuming work until the first or second week of January 2010 when the next available contract would commence.

[20] The applicant further testified that the only reason he had taken the job with Seismic was that he was planning to obtain work with United Safety and that that job would not be available until January 2010. Since he needed money to undertake unpaid training with United Safety, he thought that working with Seismic for a short period of time would alleviate his financial needs.

[21] Finally, the Board noted the applicant's testimony that working conditions at Seismic were not very good and even unsafe. The Board also noted his testimony that his wages were insufficient, considering the nature of work he had to do.

[22] The Board then proceeded to make its findings of fact and apply the law to these findings. Specifically, the Board had to determine whether the applicant had voluntarily left his employment without just cause, and whether, following his departure from Seismic, he had accumulated a sufficient number of hours, as required by section 7 and 7.1 of the Act, so as to receive employment insurance benefits.

[23] With regard to the first issue, the Board found that the applicant had reasonable alternatives open to him other than quitting his job at Seismic. In the Board's view, the applicant could have kept his job at Seismic until he had obtained a definite offer of employment with another employer. It also found that the applicant had never engaged in any discussion with Seismic regarding his working conditions, his wages and any health issues. It further found that the applicant had left his job with Seismic a month prior to obtaining a confirmation from United Safety that he had been accepted into their training program, noting that no guarantee of employment was attached to his acceptance into the training program.

[24] The Board also found that had the applicant remained with Seismic for a month, he could have obtained a leave of absence in order to complete his training program obligations with United Safety.

[25] With regard to the applicant's claim that he could no longer work at Seismic because of his medical condition, the Board found as a fact that indeed the applicant had "an on going health situation with his knees", that "his working conditions in the field were not the best and rather primitive", and that he had no regularly scheduled breaks. However, in the Board's view, "his working conditions in themselves are not occupationally unsafe" (Respondent's Record, page 99). The Board then made a specific finding regarding a medical note of June 30, 2010, signed by Dr. A. Wladichuk, adduced by the applicant during the hearing, stating that the note did not support the appellant's contention that he was unable to do his work at Seismic because of health considerations. The Board was not satisfied that the applicant had demonstrated that he had quit his job at Seismic because of medical reasons, nor that he had proven that he had quit because of advice received from his doctor (Respondent's Record, page 100).

[26] Thus, in the Board's view, the applicant had been unable to show that "he had no reasonable alternative to leaving his position with Seismic when he did" (Respondent's Record, page 100). In the Board's view, he had simply made a personal decision to leave his employment, but in so doing, he did not have just cause to do so.

[27] The Board then turned to the second issue. It found that since the applicant was not a new entrant or re-entrant into the work force, he was consequently required to accumulate at least 665 hours of insurable employment after December 17, 2009, so as to qualify for insurance benefits. Since he had only accumulated 437 hours during the period of December 18, 2009, to the date of his

application for insurance benefits, i.e. April 19, 2010, he did not qualify for regular employment insurance benefits.

[28] As a result, the applicant's appeal from the Commission's decision was dismissed on both counts. This led to an appeal to the umpire. With regard to the question of whether the applicant had just cause to leave his employment at Seismic, the umpire simply adopted the Board's findings, which he reproduced at pages 2 to 6 of his decision. With regard to the second question, the umpire observed that the applicant had not accumulated the number of hours required by the Act. Consequently, he dismissed the applicant's appeal.

[29] As I indicated earlier, the applicant asked the umpire to reconsider his decision. The umpire concluded that he could not.

[30] I now turn to the applicant's judicial review application of the umpire's second decision.

Analysis

1. Did the Umpire Err in Law by Declining to Rescind or to Amend his First Decision?

[31] Pursuant to section 120 of the Act, an umpire may rescind or amend a decision when an applicant is able to adduce new facts or when the umpire is satisfied that his earlier decision "was given without knowledge of, or was based on a mistake as to some material fact".

[32] After setting out the relevant facts and the chronology of the events leading to the motion before him, and noting that when he heard the applicant's appeal from the Board's decision, he had

no transcript of the evidence given at the hearing before the Board, the umpire then addressed the applicant's request for reconsideration.

[33] The umpire began by referring to the applicant's 12-page letter of September 14, 2011, wherein the applicant set out the purported new evidence which justified his motion. The umpire opined, at page 4 of his decision, that the letter "basically repeats what was said earlier" and that it did not "bring any new facts forward, which could assist me in reconsidering my earlier decision". On the authority of this Court's decision in *R. v. Chan*, Court file A-185-94, the umpire concluded that there was no basis for him to reconsider his earlier decision. In his view, the information found in the applicant's letter did not constitute "new facts", and he found no mistake as to "some material fact". Consequently, he denied the applicant's motion for reconsideration and confirmed his earlier decision.

[34] Before us, the applicant says that the umpire erred in that, contrary to his determination, two notes from his doctor, dated June 30, 2010 and August 11, 2010, did constitute new evidence and, consequently, the umpire ought to have reconsidered his earlier decision. In my view, the umpire did not err in concluding as he did.

[35] The doctor's first note, dated June 30, 2010, was in evidence before the Board and, as I have already indicated, the Board dealt with it in its decision. Consequently, it cannot be considered as a "new fact". In any event, the medical note clearly does not support the proposition that the applicant left his job on December 17, 2009, because of pain in his knee. There can be no doubt that what the doctor actually said in his note was that he was informed by the applicant that that was the reason

why he left his employment. Also, presumably after examining the applicant, the doctor opined that the pain in the applicant's knee was likely due to "patellofemoral syndrome".

[36] In his second note, dated August 11, 2010, Dr. Wladichuk again confirmed that the pain in the applicant's knee was likely due to "patellofemoral syndrome" , writing that the applicant "is unable to (starting June 30) perform work that consists of heavy duties due to knee pain, likely patellofemoral syndrome".

[37] It is obvious that these medical notes do not specifically address the applicant's ability to perform the work for which he was engaged by Seismic in December 2009. Consequently, I am satisfied that the umpire did not err in his view that these notes did not constitute "new facts" and, therefore, could not serve as a basis for reconsidering his first decision.

[38] The applicant also argues that the umpire failed to consider the fact that the Commission had granted him medical employment insurance benefits for the claim period of April 4, 2010 to April 2, 2011, on the strength of the medical note of August 11, 2010. Again, I cannot conclude that the umpire erred in not considering this evidence as "new facts", since the note does not address what is at the heart of these proceedings, i.e. the reason or reasons why the applicant left his employment on December 17, 2009.

[39] The applicant further argues that the umpire ought to have considered as "new facts" the fact that prior to commencing work with Seismic, he had received a number of offers from other companies. While that may well be the case, I cannot see how these purported job offers can be

relevant to a determination of whether or not he left his employment with Seismic with just cause. In any event, there is no evidence that these job offers remained open to him after he commenced his employment with Seismic, or when he left that employment on December 17, 2009.

[40] Consequently, I see no error on the umpire's part in finding that the applicant had not presented "new facts" or that his decision had been given "without knowledge of, or was based on some mistake as to material facts" so as to allow him to reconsider his decision of June 20, 2011.

[41] I now turn to the applicant's judicial review application of the umpire's first decision which only challenges the Board's determination as to whether the applicant had "just cause" or not in leaving his employment with Seismic.

2. Did the umpire err in upholding the Board's decision that the applicant had left his employment with Seismic without "just cause" ?

[42] Section 30 of the Act disqualifies from benefits any claimant who voluntarily leaves his or her employment without just cause. As to what constitutes "just cause' subsection 29(c) provides that a claimant will have just cause in leaving his or her employment if he or she "had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:..". The subsection then goes on to list a number of circumstances which will constitute "just cause". In particular, of relevance to these proceedings are paragraphs 29(c)(vi) and (xiv), which, for ease of reference, I hereby reproduce:

29. (c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative	**29.** c) le prestataire est fondé à quitter volontairement son emploi ou à prendre congé si, compte tenu de toutes les circonstances, notamment de celles qui

to leaving or taking leave, having regard to all the circumstances, including any of the following:	sont énumérées ci-après, son départ ou son congé constitue la seule solution raisonnable dans son cas :
…	…
(iv) working conditions that constitute a danger to health and safety;	iv) conditions de travail dangereuses pour sa santé ou sa sécurité
…	…
(vi) reasonable assurance of another employment in the near future;	vi) assurance raisonnable d'un autre emploi dans un avenir immédiat,

[43] Although I have considerable sympathy for the applicant and recognize that the work he was engaged in at Seismic was extremely difficult, I have not been persuaded that the umpire erred in confirming the Board's decision which, in my view, does not reveal any error which would have allowed the umpired to intervene.

[44] The applicant makes two arguments as to why the finding that he left his employment with Seismic without just cause is erroneous. First, he says that he quit that employment because of the severe pain in his knee which Dr. Wladichuk confirmed in his medical notes of June 30, 2010 and August 11, 2010. Second, he says that he had a reasonable assurance of other employment in the near future, i.e. with United Safety, and that, in any event, he was assured of finding employment with other companies if that job opportunity did not materialize. Consequently, he had just cause to leave Seismic.

[45] With respect to his medical condition at the time of his departure from Seismic on December 17, 2010, he writes the following in his Memorandum of Fact and Law (Applicant's Record, pages 121 and 122):

> Had I returned to work for W5 after Christmas, I would have been expected to work 30 or more days in a row (barring any sort of work stoppage). I was in considerable pain after the 8 days I worked for them. I did not need a doctor to tell me why.
>
> The Board only mentions my knee pain despite the fact that I explained suffering from muscle and joint pain all over my body. I explained this to my doctor as well but he only identified my knee problem. I can only assume this is because patellofemoral syndrome is easier to diagnose with a physical exam (apparently my knee caps are looser than they should be) but it was enough for him to determine that. I quit my job due to pain from a medical problem. Although the Board does not disclose what medical expertise they are drawing on in suggesting that they are better informed than a doctor on medical matters, I submit that they are wrong.

[46] With respect to his assertion that he had a "reasonable assurance of other employment", he writes the following in his Memorandum (Applicant's Record, pages 122 and 123):

> The Board misrepresented my prospects for future employment, mainly by omitting key testimony. They focussed on the fact that the job I chose to [*sic*] persue did not materialize due to my having failed a drug test. The measure is whether or not I had a reasonable expectation to be employed. Therefore, did I have a reasonable expectation to pass the drug test? Although it is difficult to defend failing a drug test, I submit that my expectation to pass was reasonable. [Emphasis added]
>
> I failed due to trace amounts of marijuana being found in my system. As I am not a heavy smoker, most drug tests will not detect any in me as long as I haven't smoked any within the last week or so. Since it had been 3 or 4 weeks since any had entered my system, I felt quite confident. The problem was that it was not a usual drug test. My urine was taken to a lab for careful analysis. I was called by the doctor who administered the test and was told that I had failed. I asked him if he could tell me how much was there and he said "43.1 nanograms" rather proudly. When I asked him what kind of levels are found in other samples he told me it could be well into the thousands.
>
> What was completely omitted from the Board's decision was the fact that I had other job offers before ever working for W5. The oilfield is very seasonal in nature, with winter being the busy season, especially after Christmas. Before Christmas many drilling companies will have some work but will typically be fully staffed for what they have before the Christmas break.
>
> I had called a few drilling companies I knew to be good, looking for work, but they all told the same thing: that they didn't need me now but would love to have me work for them.

[47] The umpire, after a brief summary of the relevant facts, held that he could not find just cause in the applicant's departure from Seismic and indicated that he subscribed entirely to the Board's findings which he reproduced in his decision. The question before us is therefore whether the umpire was correct in refusing to intervene.

[48] Before turning to the Board's decision and my assessment thereof, I must necessarily point out that, like the umpire, we do not have the transcript of the evidence adduced before the Board. Consequently, we too must rely on the Board's decision with respect to that testimony. I also must point out that the applicant's submissions found at pages 121 to 123 of his Record, which I have reproduced above at paragraphs 45 and 46 do not constitute evidence either before us or before the Board. These submissions are what the applicant says he testified to before the Board, but unfortunately for him, we have no evidence of that being the case.

[49] First, the Board identified the relevant test with regard to "just cause" when it stated that the onus was on the Commission to show that the applicant had left his employment with Seismic voluntarily and that the applicant had to show that he had "just cause", in all of the circumstances, in leaving his employment. The Board then reviewed the evidence and made the findings which led to its ultimate conclusion. These findings appear hereinabove at paragraphs 23 to 26 of these Reasons.

[50] At page 13 of its decision (Respondent's Record, page 100), the Board dealt with the applicant's argument that his medical condition constituted "just cause" for quitting his job at Seismic on December 17, 2009. In the Board's view, that assertion was not credible. The Board wrote as follows:

> The medical statement from his doctor dated June 30, 2010 suggesting he was unable to work in December 2009 due to a right knee ailment is not credible or acceptable to this Board with regard to the Claimant's being unable in December 2009 to be able to perform his duties due to health considerations as he has not proven he had to quit his employment due to medical reasons nor was he recommended to do so by his doctor.

[51] The above passage must be read in the light of the Board's findings, found at page 12 of its decision, that it accepted as a fact that the applicant had problems with his knee, that his working conditions at Seismic were far from ideal, that he had no regularly scheduled breaks, but that his working conditions were not occupationally unsafe. My understanding of the Board's decision is that it accepted that the applicant had knee problems and that work at Seismic was physically very demanding. However, in the light of the evidence before it, the Board was not satisfied that his physical condition was such that he had no other alternative but quitting his job at Seismic.

[52] With respect to Dr. Wladichuk's note of June 30, 2010, I cannot say that the Board's conclusion in regard thereto is unreasonable. The Board's conclusion must necessarily be read in the light of the evidence available to it, i.e. that when quitting his employment at Seismic on December 17, 2009, the applicant did not inform his employer that he had pain in his knee, nor did he provide such information to the Commission when he filed his application for benefits in April 2010. There was also evidence before the Board that the applicant had taken the job at Seismic on a temporary basis only because he needed to fund the unpaid training which he would undertake with United Safety in January, thus suggesting that he had planned all along to leave Seismic at the earliest opportunity. Consequently, in my view, it was entirely open to the Board to conclude as it did that the applicant had not left Seismic for medical reasons.

[53] I now turn to the applicant's second submission on "just cause". Specifically, I will now address his submission that he had a reasonable assurance of other employment in the near future when he left Seismic.

[54] The Board dealt with this point at pages 12 and 13 of its decision (Respondent's Record, pages 99 and 100). At paragraphs 23 and following of these Reasons, I summarized the Board's findings as to why the applicant had a reasonable alternative available to him other than leaving his employment with Seismic. More particularly, the Board was of the view that the applicant could have remained with Seismic until "a definite offer of new employment had been secured", adding that the applicant had never discussed his working conditions, wages or any health issues with Seismic. Further, the Board found that he had left Seismic a month prior to obtaining confirmation from United Safety that he had been accepted into their training program and that no guarantee of employment had been given by United Safety. Consequently, the Board found that he had not left Seismic because he had a "reasonable assurance of another employment in the near future".

[55] On the evidence before it, there cannot be any doubt that these findings were entirely open to the Board. In particular, these findings coupled with the Board's finding that there was insufficient evidence to support the applicant's assertion that he had left Seismic for medical reasons are, in my view, entirely reasonable and, consequently, the applicant's challenge cannot succeed.

[56] I should perhaps say that I entirely agree with the Board that the applicant did not have a reasonable assurance of another employment when he left Seismic on December 17, 2009. At best, the applicant is entitled to say that he was confident of successfully completing the training program

at United Safety, including the drug test, and ultimately of obtaining a position with that company. That, however, is not sufficient for us to find that when he left Seismic, he had a reasonable assurance of employment with United Safety. The prospects were good, but there was no reasonable assurance that he would get the job. Both in *Canada (Attorney General of Canada) v. Lessard* (2002), 300 N.R. 354, and in *Canada (Attorney General of Canada) v. Shaw*, 2002 FCA 325, this Court determined that a conditional offer of employment did not constitute a "reasonable assurance of another employment in the near future". With respect, I cannot see how it could be otherwise, particularly in a case such as the one now before us where there was not even a conditional offer of employment.

[57] As I indicated at paragraph 44 of these Reasons, the applicant also argued that, in any event, he was certain that he could find employment with other companies if his endeavours to work for United Safety did not work out. Thus, in his view, that gave him just cause to leave Seismic.

[58] A careful review of the Board's decision clearly shows that the Board did not deal with that argument. However, on the record before us (I again point out that we do not have a transcript of the evidence before the Board), I am unable to determine whether or not that argument was in fact made before the Board. The record shows that he worked for Geostrata from February 10 to February 25, 2010, for Veritas from March 4 to March 11, 2010, and for Sourcex from March 16 to March 29, 2010. With regard to his employment with Sourcex and Geostrata, the respective records of employment show that he lost his employment with these companies due to a shortage of work. With regard to his employment with Veritas, the record of employment indicates that he quit that

employment. Although not entirely clear, the evidence appears to support the view that employment in the oil patch industry was seasonal and that it came to an end in early April of a given year.

[59] Be that as it may, I do not see how it can be said that in the circumstances of this case, the Board erred in not concluding that the applicant had a "reasonable assurance of another employment in the near future". It must be remembered that there was evidence before the Board that had the applicant remained with Seismic, he would have had work until the end of the season, i.e. the end of March or early April 2010. However, as his records of employment show, he only worked for five weeks between January and April 2010. I therefore do not see any basis on which to conclude that the Board erred in finding that when the applicant left Seismic, he had no "reasonable assurance of employment in the near future".

[60] In the end, what the judicial review application is all about is the applicant's disagreement with the Board's findings of fact. Unfortunately for him, it was not open to the umpire, nor is it open to us, to reassess the evidence that was before the Board unless we are satisfied that in concluding as it did, the Board erred in law or made findings of fact which were not supportable on the record before it. A careful reading of the Board's decision shows that it did not find the applicant's testimony entirely credible, considering that he gave different reasons, at different times, as to why he had quit his employment with Seismic. At first, the applicant said that he had quit because he was going to a new and better job with United Safety, adding later that he viewed his job at Seismic as a temporary one which would enable him to accumulate funds to get him through United Safety's unpaid training program. Later on, the applicant said that he had quit because he had pain in his knee and that working conditions at Seismic were horrible.

[61] It was the Board's prerogative to assess the applicant's evidence and to make the findings of fact which it felt were warranted in the circumstances. Again, although sympathetic to the applicant's plight, I have not been persuaded that there is any basis for us to intervene.

Disposition

[62] Consequently, I would dismiss the applicant's judicial review applications. However, in the particular circumstances of this case, I would make no order as to costs.

"M. Nadon"
J.A.

"I agree.
Johanne Gauthier J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	Calgary, Alberta
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REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	GAUTHIER J.A. MAINVILLE J.A.
DATED:	November 29, 2012

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