Federal Court of Appeal  Cour d'appel fédérale

Date: 20130117

Docket: A-136-12

Citation: 2013 FCA 12

CORAM: NADON J.A.
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

KIMBERLEY HUNTER

Respondent

Heard at Toronto, Ontario, on December 4, 2012.

Judgment delivered at Ottawa, Ontario, on January 17, 2013.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON J.A.

DISSENTING REASONS BY: NADON J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The Crown has applied for judicial review of a decision of Umpire Seniuk (CUB 78779). He upheld the decision of the Board of Referees that the respondent Kimberley Hunter qualified for parental benefits under subsection 23(1) of the *Employment Insurance Act*, S.C. 1996, c. 23, with respect to her grandchild. For the reasons that follow, I would dismiss the Crown's application.

[2] Subsection 23(1) reads as follows:

23. (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.	**23.** (1) Malgré l'article 18 mais sous réserve des autres dispositions du présent article, des prestations sont payables à un prestataire de la première catégorie qui veut prendre soin de son ou de ses nouveau-nés ou d'un ou plusieurs enfants placés chez lui en vue de leur adoption en conformité avec les lois régissant l'adoption dans la province où il réside.

[3] The facts are not in dispute. The Umpire summarized the facts and the Board's conclusions as follows:

> In arriving at its decision, the Board relied on the docket for the information that the mother (the daughter of the claimant) had given temporary care of [her] child to the claimant (exhibit 9.1). The Board also relied on that for evidence that the claimant's husband had been hospitalized and the father of the child was not involved with the child. The evidence at the hearing established further facts that the Board relied upon (exhibit 9.2). These facts include the following. The mother suffered from a permanent mental illness and the claimant is the sole provider for the child, her grandson. The child protection agency eventually apprehended the child, awarded the claimant care of the child and is working with the claimant for her to adopt her grandson. Relying on CUB 38323 and because the claimant had legal custody of the child and was filing for legal adoption (supported by the child protection agency), the Board allowed the appeal and found the claimant was entitled to parental benefits (exhibit 9.3).

[4] The Umpire was required to determine whether it was open to the Board of Referees to conclude on the evidence presented that Ms. Hunter's grandchild had been placed with her "for the purpose of adoption". After a careful and detailed review of the relevant jurisprudence and the evidence, he concluded that it was open to the Board to find that the statutory purpose test was met

in this case. The question before this Court is whether the Umpire correctly interpreted subsection 23(1) and properly applied the standard of reasonableness to the Board's findings of fact and its application of the facts to the law: *Budhai v. Canada (Attorney General) (C.A.)*, 2002 FCA 298, [2003] 2 F.C. 57 at paragraphs 47 and 48.

[5] Ms. Hunter's entitlement to benefits under subsection 23(1) depends upon the purpose for which her grandchild was placed with her. I agree with the Umpire that this is essentially a factual question. On the record before the Board, it could be answered only on the basis of Ms. Hunter's own evidence, which included a letter from a social worker employed by the provincial child protection agency. That letter is supportive of Ms. Hunter's factual assertions without quoting or purporting to describe the provisions of the provincial adoption law or process.

[6] In this Court, the Crown argued that Ms. Hunter's claim could not succeed because at the relevant time she had only "temporary legal custody" of her grandchild, and that the statutory purpose test is not met unless there is a court order (or something analogous to a court order) granting the claimant "permanent custody". To accept that argument would impose a judge-made precondition to eligibility for benefits under subsection 23(1) that is not stated or necessarily implied by its language. Parliament has chosen broad and general terms to describe the statutory purpose test in subsection 23(1). In my view, Parliament must be taken to have recognized that the placement of a child for the purpose of adoption may arise in a variety of circumstances.

[7] I appreciate that in some cases, a provincial law or documentation relating to the custody of a particular child (assuming such documentation is available in the face of confidentiality issues) may provide a conclusive answer to the factual question asked by subsection 23(1) as to the purpose of the child's placement. In this case, however, the Crown has provided no such documentation and only sparse references to the applicable provincial law. I have been able to find no provincial law that necessarily contradicts the Board's conclusion.

[8] In my view, the record discloses no basis upon which this Court can set aside the Umpire's conclusion that the Board's decision was reasonable. Therefore, I would dismiss the application for judicial review.

[9] Ms. Hunter has asked for her costs of this application on a solicitor and client basis, or alternatively on the basis of a lump sum which is less than solicitor and client costs but higher than costs on the highest tariff rate. It is argued that, in bringing this application for judicial review, the Crown is attempting to settle the interpretation of subsection 23(1) at the expense of a single claimant. At the hearing, the Court was provided with draft bills of costs on a solicitor and client basis, as well as on the basis of Column III and Column V of the tariff.

[10] There is no basis in the record of this case to conclude that the Crown's application for judicial review was motivated by anything other than an honest disagreement with the Umpire's decision. In the circumstances, and having reviewed the draft bills of costs prepared for Ms. Hunter

on the basis of Column III, I would award the costs of this application to her in the sum of $3,500 inclusive of all disbursements and tax.

"K. Sharlow"
J.A.

"I agree
Eleanor R. Dawson J.A."

NADON J.A. DISSENTING

[11] I cannot agree with my colleagues that we should dismiss the Attorney General of Canada's ("the applicant') application for judicial review. In my view, as there was no evidence whatsoever to support the Board of Referees' ("the Board") finding that the respondent's grandchild had been placed with her for the purpose of adoption, the umpire erred in failing to intervene. The umpire also erred in disregarding Parliament's clear intention in enacting subsection 23(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act"). I would therefore allow the application for judicial review.

The Facts

[12] A brief summary of the facts will be helpful in understanding why I cannot agree with my colleagues.

[13] In August 2011, the respondent established a claim for employment insurance benefits effective August 28, 2011, in which she indicated that she had been working for the Assiniboine Regional Health Authority. Her last day of work with her employer was July 13, 2011, and she was on paid sick leave until August 25, 2011.

[14] In her application, the respondent further indicated that she was applying for parental benefits so as to allow her to care for a child. Upon inquiry by the Canada Employment Insurance Commission ("the Commission") on August 25, 2011, the respondent indicated that the child was her grandchild whose father was in jail and whose mother, her daughter, was hospitalized.

[15] On the basis of the information available to it, the Commission determined that the respondent was not entitled to benefits. Accordingly, the Commission wrote to the respondent on September 13, 2011, advising her that:

> We are writing to inform you that we cannot pay you parental employment insurance benefits as of July 18, 2011.
>
> This is because you have not proven that a child has been placed with you for adoption.

[16] The Commission's decision was appealed by the respondent to the Board. On October 12, 2011, the Board allowed her appeal. After reviewing the information from the docket and the evidence given at the hearing by the respondent, the Board determined that the respondent qualified for parental benefits. In its view, "[t]he claimant [the respondent] is in the process, with CFS, of filing for legal adoption. At this time, the claimant has been awarded legal custody" (Board decision, page 3).

[17] This decision led to the Commission's appeal to the umpire who, on March 15, 2012, dismissed the appeal. Hence, the applicant's judicial review application which is now before us.

[18] The applicant says that the umpire erred both in fact and in law in dismissing its appeal. I agree for the following reasons.

The Umpire's Decision

[19] First, the umpire set out the basis upon which the Commission was appealing to him, *i.e.* that the appeal was "based on a distinction between a temporary and a permanent custody order, as well as the necessity of demonstrating the purpose of the custody at the time of the application for parental benefits" (Umpire's decision, page 2).

[20] Then, after reproducing subsection 23(1) of the Act, the umpire turned to the Umpire jurisprudence (CUBs) on the issue, which he reviewed at pages 3 to 8 of his decision. At page 8 of his decision, the umpire found that decisions such as CUB 38323 stood for the proposition that what was required to meet the requirements of section 23 of the Act was "tangible evidence to conclude that the child had been placed with the claimant for the purpose of adoption" and that documentary evidence, although sufficient, was not a requirement.

[21] With the above principle in mind, the umpire then turned to the Board's decision. First, he noted that the Board also took the view that documentary evidence, although sufficient, was not a necessary condition to meet the "tangible evidence" test. In that regard, he referred to page 3 of the Board's decision which I have reproduced above.

[22] The umpire then noted that the Board had been guided by the interpretation found in CUB 38323 that "legal custody (that is considered permanent, given the underlying facts in the docket) coupled with an intent to adopt is sufficient to establish an entitlement to benefits under this section of the Act".

[23] The umpire went on to indicate that although the Board did not set out the relevant facts in detail, it had adopted those which appeared in the docket. In his view, the essential facts were not in dispute. He summarized them as follows at page 10 of his decision:

> … The claimant's daughter suffers from schizophrenia and psychosis. She struggles with drug addition. Psychiatric and child apprehension agents were concerned the mother could not cope with the stress of child care, and she is currently not allowed to be alone with the child. The natural father and the mother intend to relinquish parental rights, but the mother's psychological condition must first be stabilized. In such a dynamic, unfolding situation it is unreasonable to expect that as of the date of child birth, the niceties of adoption proceedings can be in place, and they were not. It is not feasible for child protection agencies to move immediately to permanent apprehension status in such circumstances as these. But all projections for the future indicate that the infant will be adopted by the claimant. While that is the realistic projection, the reality is that the intent is to adopt and that the custody is essentially permanent.

[24] That excerpt is complemented by another portion of the umpire's decision; at page 2, he wrote:

> In arriving at its decision, the Board relied on the docket for the information that the mother (the daughter of the claimant) had given temporary care of the child to the claimant (exhibit 9.1). The Board also relied on that for evidence that the claimant's husband had been hospitalized and the father of the child was not involved with the child. The evidence at the hearing established further facts that the Board relied upon (exhibit 9.2). These facts include the following. The mother suffered from a permanent mental illness and the claimant is the sole provider for the child, her grandson. The child protection agency eventually apprehended the child, awarded the claimant care of the child and is working with the claimant for her to adopt her grandson. Relying on CUB 38323 and because the claimant had legal custody of the child and was filing for legal adoption (supported by the child protection agency), the Board allowed the appeal and found the claimant was entitled to parental benefits (exhibit 9.3).

[25] Thus, the gist of the Board's findings, which the umpire accepted, is that both the father and mother of the child do not wish to keep their parental rights, that the mother suffers from mental

illness, that the respondent is the sole provider for her grandson, that the child protection agency apprehended the child and awarded custody to the respondent, and that the agency "is working with the claimant for her to adopt her grandson".

[26] These facts led the umpire to opine that "[a]ll projections for the future indicate that the infant will be adopted by the claimant" and that "[w]hile that is the realistic projection, the reality is that the intent is to adopt and the custody is essentially permanent". In the umpire's view, the evidence clearly entitled the Board to conclude as it did.

Analysis

[27] In my view, the umpire's decision cannot stand. In concluding as he did, the umpire, like the Board, disregarded the evidence before him and disregarded also the clear requirements of subsection 23(1) of the Act. The subsection reads as follows:

23. (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.	**23.** (1) Malgré l'article 18 mais sous réserve des autres dispositions du présent article, des prestations sont payables à un prestataire de la première catégorie qui veut prendre soin de son ou de ses nouveau-nés ou d'un ou plusieurs enfants placés chez lui en vue de leur adoption en conformité avec les lois régissant l'adoption dans la province où il réside.
[Emphasis added]	[Je souligne]

[28] Subsection 23(1) provides, in clear terms, that benefits will be payable to a claimant who is caring for one or more children placed with him or her "for the purpose of adoption under the laws

governing adoption in the province in which the claimant resides". Thus, a claimant must show that, at the time of the placement, the purpose was adoption. Adoption, in the context of subsection 23(1), must necessarily mean legal adoption, since the provision states that the purpose of the placement is "adoption under the laws governing adoption in the province in which the claimant resides". Although the subsection does not require that a child be legally adopted at the time of the placement, there must be some evidence that those in charge of the placement, either the child and family services agency or the court, are placing the child with the claimant with the intent that the claimant will adopt the child. Whether or not the adoption ultimately occurs is, in my view, irrelevant at that stage.

[29] Consequently, not all placements of a child with a claimant will qualify for parental benefits. Adoption of a child by a claimant, in a legal sense, must be the true purpose of the placement. Other motives or purposes, although laudable, will not suffice. Thus, there must be sufficient evidence to demonstrate that the placement will lead or is intended to lead to adoption by a claimant.

[30] In making this statement, I do not intend to formulate a rigid test. On the contrary, the approach to the provision should be a flexible one and findings should necessarily be made on the basis of the facts in the record. However, an assessment of whether a placement has been made for the purpose of adoption necessarily remains an objective one. The fact that the claimant, as herein, says that she intends to adopt a child is only one piece of the puzzle. Obviously, if the claimant does not intend to adopt the child placed with her, then that is the end of the story. In any event, I need not dwell any further on this question as there is clearly insufficient evidence to support the view

that the child was placed with the respondent for the purpose of adoption. I will therefore take a closer look at the evidence so as to demonstrate that the Board's finding was not open to it.

[31] First, we have evidence with respect to the father and mother's intentions regarding their child. The father, in a note dated February 3, 2012, indicated that he was "[f]orfeiting all parental rights". As for the mother, there is a letter dated September 15, 2011, in which she gives her consent to her child being entrusted for care to her mother "until I am able to look after him on my own". Complementing this is a letter also dated September 15, 2011, in which the respondent indicates that her grandson was born on June 6, 2011, that he and his mother have lived with her from the time they left the hospital, that her daughter, who suffers from mental health problems, has been hospitalized for two months, and that because the child had been with her since July 11, 2011, she had to leave work to take care of him. The respondent also indicated that the child's father was not in the picture as he was in prison and that he had not been involved with his child, adding that "[t]he mother is not able to take care of the child <u>at this time</u> and requires treatment" [emphasis added].

[32] Also of relevance is a letter dated September 13, 2011, from the Brandon Regional Health Authority ("the Health Authority"), in which a doctor states that the mother's child "is unable to look after her child <u>at present</u> for medical reasons" [emphasis added].

[33] Of further relevance is a letter dated August 18, 2011, from Nancy Kolesar, a community mental health worker at the Center for Adult Psychiatry, Brandon Regional Health Authority, in

which Ms. Kolesar indicates that the respondent had been awarded care of her grandson pursuant to an apprehension order made by Child and Family Services of Western Manitoba ("CFS").

[34] There is also a letter from CFS, dated February 28, 2012, and written by Danuta Kosteckyj, rural family services worker, in which Mr. Kosteckyj states that the Agency placed the child with the respondent on August 5, 2011, and that the child remains, to date, in the respondent's care. After stating that the respondent "demonstrates a solid long-term commitment to provide care", and that her "commitment to the child and his care is absolute and permanent", Ms. Kosteckyj makes the following point: "[S]hould permanent care plans for the child be considered by the Agency, her application will be supported". In referring to the possibility of considering permanent care in the future, Ms. Kosteckyj makes it clear that CFS, at the time of writing the letter, had neither considered permanent care nor, as necessarily follows, adoption.

[35] That information, along with the testimony given by the respondent before the Board on October 12, 2011, is all the evidence that was before it when it rendered its decision. I now turn to the respondent's testimony.

[36] The respondent testified that her grandson had been placed with her on July 11, 2011, when her daughter, the mother of the child, had to be hospitalized for treatment. Her daughter remained in hospital for several months and afterwards, had received visitation rights of two hours a week under supervision. She further testified that her daughter "doesn't believe there is anything wrong with her" (Transcript, page 11). She also indicated that, in her view, her daughter was unable to look

after herself, "never mind looking after an infant" (Transcript, page 10). At page 11 of the transcript, the chair of the panel, Ms. Conibear, made the assertion that "[s]o the option for adopting him legally is not there because Kim [the mother] does not accept that she's not able to look after him" The respondent answered as follows: "It's not going to be up to her, whether she – he is going to be adopted by us or not. It's going to come down to CFS."

[37] Further on, at page 12 of the transcript, the respondent indicated that "although the paperwork hasn't been done for adoption, that does not necessarily mean that it is not going to occur". At page 16 of the transcript, the respondent went on to say that her daughter "exhibited schizophrenic behaviour".

[38] That is the totality of the evidence that was before the Board. Is it possible, on that evidence, to conclude that the child was placed with the respondent for the purpose of adoption? In my view, it is not possible.

[39] What the evidence reveals is that the child is in the care of the respondent on a temporary basis and not on a permanent one. Although the father does not appear to be interested in the welfare of his son, the mother has agreed to the child being placed with the respondent on a temporary basis. The mother's letter of September 15, 2012, makes it clear that she has not abandoned her rights with regard to the care of her child. In support of the view that the placement cannot be considered as a permanent one is the fact that the doctor from the Brandon Regional Health Authority, in his letter dated of September 13, 2011, stated that the mother "could not take

care of her child at present for medical reasons". In other words, there is no medical assessment of the mother's long-term ability to provide care for her child.

[40] It is in that context, *i.e.* that the mother was not able to take care of her child, that CFS took out an apprehension order so as to entrust the care of the child to the respondent. In other words, it was determined that the safety of the child required that he be placed with someone other than his mother. It is also revealing that in her letter of February 28, 2012, Ms. Kosteckyj of CFS makes it clear that the Agency had not yet given any thought to a permanent care plan for the child.

[41] In his summary of the facts at pages 10 of his decision, the umpire states that both the mother and father "intend to relinquish parental rights, but the mother's psychological condition must first be stabilized". In my respectful view, there is no evidence that the mother intends to relinquish her parental rights. On the contrary, she has only given custody to her mother on a temporary basis. Whether or not her medical condition improves, time will tell. However, on the record before us, it is impossible to make a judgment as to what will happen in the future. It must be remembered that the only medical evidence on file is the letter from the Health Authority which states that the mother cannot, at the present time, take care of her child. The letter is silent as to what may happen in the future and it is not for us, nor for the Board or the umpire, to speculate.

[42] I would also add that it is certainly not possible to say, as the umpire stated at page 10 of his decision, that the child will necessarily be adopted by the respondent. It is also not possible, in my respectful view, to say, as the umpire did, that the custody of the child was permanent.

[43] I have carefully read the respondent's testimony but, unfortunately, it does not add much to the evidence other than repeat what is already there. It is clear that the respondent is not optimistic about her daughter's future and that she is sincere and well-intentioned when she says that she intends to adopt her grandson. However, the plain fact is that at the time the child was placed with her, adoption under the laws of Manitoba was not the purpose of the placement. Placement of the child for the purpose of adoption may well occur in the future, but that has not yet taken place as it will obviously depend on the mother's medical condition and assessments.

[44] It is obvious that both the Board and the umpire had great sympathy for the respondent. And so do I. She is, like her grandson, a victim of tragic and sad circumstances which have forced her to leave her employment in order to take care of him. Unfortunately, it is not in our power, nor in that of the Board or the umpire, to disregard the clear legislative intent found in section 23 of the Act which requires that the placement be made for the purpose of adoption. In the matter before us, it is clear, in my respectful view, that the placement of the child was not, when it was made, for the purpose of adoption.

[45] In order for the Board and the umpire to conclude as they did, they had to, in effect, make determinations which were not theirs to make. Before CFS can consider adoption in this matter, certain issues must necessarily be resolved, *i.e.*: will the mother give her consent in the future to have her child adopted by the respondent?; will the mother be unable in the future, say within the next two years, to resume custody of her child?; and will CFS take legal steps, if the mother refuses to give her consent, to destitute her of her parental authority so as to place the child with the

respondent for the purpose of adoption? These questions, it seems to me, must be addressed by the authorities before they are to give any consideration to the possibility of placing the child with the applicant for adoption. On the record before us, these questions have not been resolved, but the Board and the umpire, by their respective decisions, have, for all intents and purposes, decided these questions against the mother and in favour of the respondent.

[46] This case is not one where the issue is whether we should interfere with the Board's factual findings. To the contrary, there is no evidence whatsoever to support the view that the child was placed with the applicant for the purpose of adoption, and this whether one takes a rigid or flexible approach to the words found in subsection 23(1) of the Act. In that respect, the decisions of the Board and the umpire bring to mind the words of Daniel Patrick Moynihan, who once famously said that "[E]veryone is entitled to his own opinion, but not his own facts".

[47] Consequently, the Board's decision is unreasonable both in fact and in law, and thus the umpire ought to have intervened.

[48] Before concluding, I wish to make it clear that in determining the issue before us, I did not consider the affidavit of the respondent, dated June 28, 2012, in which she sets out facts which were not before the Board, nor before the umpire. More particularly, the respondent speaks to facts which occurred after the umpire rendered his decision. I agree entirely with the applicant's position that since these facts were not before the Board or the umpire, we are not at liberty to consider them in

determining the application for judicial review (see: *Swain v. Canada (Attorney General)*, 2003 FCA 434).

Disposition

[49] I would therefore allow the application for judicial review, set aside the decision of the umpire, and refer the matter back to the umpire for redetermination on the basis that there is no evidence to support a finding that the placement of the child with the respondent was made for the purpose of adoption. In the circumstances, I would not make any order as to costs.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-136-12

APPEAL FROM A DECISION OF GERALD T.G. SENIUK, UMPIRE, DATED MARCH 15, 2012 (CUB NO. 78779).

STYLE OF CAUSE:	The Attorney General of Canada v. Kimberley Hunter
PLACE OF HEARING:	Toronto
DATE OF HEARING:	December 4, 2012
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	DAWSON J.A.
DISSENTING REASONS BY:	NADON J.A.
DATED:	January 17, 2013

APPEARANCES:

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