Federal Court of Appeal  Cour d'appel fédérale

Date: 20130410

Docket: A-422-12

Citation: 2013 FCA 97

CORAM: **SHARLOW J.A.**
DAWSON J.A.
WEBB J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GREGORY TERRION

Respondent

Heard at Toronto, Ontario, on April 10, 2013.

Judgment delivered at Toronto, Ontario, on April 10, 2013.

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Under the *Employment Insurance Act*, S.C. 1996, c.23 (Act), a worker's eligibility for employment insurance benefits is determined by reference to the number of hours of insurable employment the worker accrued during the applicable qualifying period. The applicable qualifying period is determined in the manner prescribed by section 8 of the Act. On this application for judicial review, only subsection 8(1) of the Act is engaged and only one question is raised by the claim for benefits at issue: when did the qualifying period for benefits commence under the Act?

[2] Subsection 8(1) provides:

8. (1) Subject to subsections (2) to (7), the qualifying period of an insured person is the shorter of	8. (1) Sous réserve des paragraphes (2) à (7), la période de référence d'un assuré est la plus courte des périodes suivantes :
(a) the 52-week period immediately before the beginning of a benefit period under subsection 10(1), and	a) la période de cinquante-deux semaines qui précède le début d'une période de prestations prévue au paragraphe 10(1);
(b) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period under subsection 10(1).	b) la période qui débute en même temps que la période de prestations précédente et se termine à la fin de la semaine précédant le début d'une période de prestations prévue au paragraphe 10(1).

[3] The respondent to this application, Mr. Terrion, applied for employment insurance benefits on March 7, 2012. If paragraph 8 (1)(a) applied to his claim for benefits, his qualifying period commenced on March 1, 2011. The Commission, however, was of the view that his qualifying period began on March 27, 2011. In its view, paragraph 8(1)(b) of the Act was engaged because Mr. Terrion had previously made a claim for benefits.

[4] Unfortunately, the Commission never communicated its reliance upon paragraph 8(1)(b) to Mr. Terrion. He was simply told that:

> You have accumulated 542 hours of insurable employment between March 27, 2011 and March 3, 2012 while according to the unemployment rate in your region, at the time of your filing, you needed 630 hours to qualify.

[5] Mr. Terrion appealed the refusal of benefits to the Board of Referees. He said in his notice of appeal that during the period from March 1, 2011 to March 3, 2012 he had accumulated 730 hours of insurable employment.

[6] In its responding submissions to the Board of Referees, the Commission made no reference to paragraph 8(1)(b) of the Act and made no reference to any prior claim to benefits or to any immediately preceding benefit period. The Commission provided no evidence with respect to any prior claimed benefits. The Commission simply declared as a fact, under the heading "Summary of relevant facts" that:

> The claimant filed a claim for employment insurance benefits on March 07, 2012 (Exhibit 2).
>
> The qualifying period on this claim is therefore March 27, 2011 to March 03, 2012.

[7] The Board of Referees unanimously allowed Mr. Terrion's appeal from the decision of the Commission and determined that the qualifying period began on March 1, 2011. Its reasons for this determination were expressed as follows:

> The claim cut off date suggested by the Commission is March 27, 2011. The Board sided with the claimant that 52 weeks prior to March 2, 2012, would include those particular hours.
>
> The chair of the Board of Referees discussed the question with the Business Expertise Advisor, Ingrid Nistico. She indicated that there had been a previous claim which would affect the date of qualification; however, without that evidence, the Board decided to accept the claimant's position.

[8] The Commission appealed this decision to an Umpire who upheld the decision of the Board of Referees (CUB 79553). The Umpire began his analysis by quoting subsection 8(1) of the Act. He then reasoned as follows:

> The claimant applied for benefits on March 7, 2012. His qualifying period would therefore include the 52 weeks prior to that date unless it was established that the claimant had previously established a period of benefits that ended during the 52 weeks prior to March 7, 2012. In the appeal docket, there was no evidence that such a period of benefits had been established. The only reference to such a claim was an allegation to this effect by a Business Expertise Advisor during the course of the hearing before the Board.
>
> The Board reviewed the appeal docket and found that there was no evidence before the Board to establish that a prior claim had been established during the 52 weeks prior to the filing of the claimant's claim on March 7, 2012. The Board concluded that all the hours of employment accumulated during that period could therefore be included in the determination of his entitlement to benefits. The Board found that during this period the claimant had accumulated the hours of employment required to establish a claim. The Board allowed the claimant's appeal.
>
> On appeal from the Board of Referees' decision, the Commission submitted that the Board erred in not accepting that a prior claim had been established by the claimant and that that claim had ended on March 27, 2011.
>
> I fully agree with the Board of Referees that the Commission had not presented any evidence to prove that a claim had previously been established and would have terminated on March 27, 2011. If such was the fact, it was incumbent on the Commission to present evidence to establish this.

[9] On this application for judicial review of the decision of the Umpire, the Attorney General acknowledges that Mr. Terrion accumulated the following hours of insurable employment:

Period	Hours
March 1, 2011 to March 25, 2011	188
July 18, 2011 to August 11, 2011	188
November 14, 2011 to December 13, 2011	131
December 13, 2011 to December 22, 2011	82
February 7, 2012 to March 3, 2012	141

[10] It follows that if Mr. Terrion's qualifying period commenced on March 1, 2011, he would have accumulated a total of 730 insurable hours and qualified for benefits under the Act. If, however, Mr. Terrion's qualifying period commenced on March 27, 2011, he would not qualify for

benefits because he would have accumulated 542 insurable hours of employment when he was required to accumulate 630 hours.

[11] The Attorney General argues that the Umpire erred in law in two respects.

[12] First, it is said that the Umpire erred by allowing the Board of Referees to determine Mr. Terrion's qualifying period, and therefore the number of insurable hours he accrued within the qualifying period. This is said to be in error of law because under section 90 of the Act only the Minister of National Revenue has the power to determine how many hours of insurable employment an insured person has accrued.

[13] Second, it is said that the Umpire erred by finding it was incumbent on the Commission to prove that Mr. Terrion had previously established a benefit period. This is said to be an error of law because, under subsection 49(1) of the Act, Mr. Terrion was obliged to prove he was eligible for benefits.

[14] For the following reasons, I am of the view the Umpire did not err as alleged.

[15] First, the Umpire did not allow the Board of Referees to calculate Mr. Terrion's hours of insurable employment. There was no dispute concerning the number of hours Mr. Terrion had accrued during each period of time. The only dispute was one of fact: had Mr. Terrion previously made a claim so as to make paragraph 8(1)(b) of the Act applicable when determining the commencement of his qualifying period? Counsel for the Attorney General agreed in oral argument

that whether a previous claim had been made was a question of fact the Board of Referees was entitled to determine.

[16] Second, the Umpire did not reverse the onus of proof. Mr. Terrion claimed 730 insurable hours of employment and his claim was supported by five records of employment. Through this evidence, Mr. Terrion discharged his burden of proof. He could not reasonably be expected to prove a negative fact - that he had not made a prior claim for benefits. The evidence of the existence of any such claim was available to the Commission. Mr. Terrion's evidence that he had accumulated 730 hours placed a persuasive burden on the Commission to produce some evidence to counter Mr. Terrion's evidence. The Commission was required to produce some evidence, not merely assert, that Mr. Terrion had previously made a claim for benefits so as to shorten the qualifying period. It failed to do so.

[17] For these reasons I would dismiss the application for judicial review.

"Eleanor R. Dawson"

J.A.

"I agree
K. Sharlow J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-422-12
(APPEAL FROM A DECISION OF THE UMPIRE, THE HONOURABLE MR. JUSTICE GUY GOULARD, DATED AUGUST 17, 2012, IN DOCKET NO. CUB 79553)	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. GREGORY TERRION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 10, 2013
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	SHARLOW J.A. WEBB J.A.
DATED:	April 10, 2013

APPEARANCES:

Derek Edwards	FOR THE APPLICANT
No appearance	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPLICANT
Self-Represented	FOR THE RESPONDENT