Federal Court of Appeal  Cour d'appel fédérale

Date: 20130919

Docket: A-562-12

Citation: 2013 FCA 222

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

BETWEEN:

DOUGLAS RODGER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on September 18, 2013.

Judgment delivered at Vancouver, British Columbia, on September 19, 2013

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Douglas Rodger seeks judicial review of two decisions of an Umpire. The first dismissed his appeal from the Board of Referee's (the Board) decision (CUB 79268) dismissing his appeal from the Commission's denial of his request to antedate his claim for benefits pursuant to subsection 10(4) of the *Employment Insurance Act* (S.C. 1996, c. 23) (the *Act*) because he had failed to establish good cause within the meaning of the said section. In the second decision, the Umpire dismissed the applicant's motion for reconsideration (CUB 79268A), pursuant to section 120 of the *Act*.

[2] For the reasons set out below, the application for judicial review should be dismissed.

THE FACTS

[3] The applicant was employed by Otto's Service Centre Ltd. of Ottawa from August 24, 2009 to August 13, 2010. His employer only issued his record of employment (ROE) on September 3, 2010. The ROE included a notice stipulating that "[i]f you delay in filing a claim for benefits more than 4 weeks after you stop working, you may lose benefits to which you would otherwise be entitled."

[4] On September 4, 2010, the applicant went to a Service Canada office to apply for employment insurance benefits (EI). Once there, he realized that there were a number of errors in his ROE. A Service Canada representative told him that he would have to get a new ROE. The applicant then spoke to another agent about the possibility of taking a full-time university course while receiving EI. Exactly what was said during this discussion is at the heart of the various proceedings in this file and will be dealt with when referring to the findings of the Board and the Umpire hereinafter. What is clear is that no application for EI was filed in 2010.

[5] In fact, it is only on April 27, 2011, upon completion of his course and upon receipt of a corrected ROE from his previous employer, dated April 27, 2011, that the applicant submitted an application for EI. On July 25, 2011, he requested that the Commission antedate his claim to August 26, 2010, pursuant to subsection 10(4) of the *Act*. On September 15, 2011, the Commission informed the applicant that his request had been denied because he did not have a "good cause" for

the delay in making his application. As such, the applicant did not qualify for EI as he had insufficient insurable hours in the qualifying period immediately preceding his April 27, 2011 application.

THE BOARD OF REFEREE'S DECISION

[6] On September 16, 2011, the applicant appealed the Commission's decision. In a letter attached to his notice of appeal, he explained why he believed that he had a good cause for the eight-month delay, and wrote in part,

> [4] … the justification for the good cause was the fact that I attended post-secondary training courses – full-time with mandatory attendance – without having any intention of searching for or obtaining work during the rigorous school schedule. Understanding that authorized training courses offered under the Employment Insurance's 'Red Seal' program would not include the courses that I chose to attend, under my own free will and volition, meant there was no point to apply for employment benefits at that time.
>
> [5] Why would I apply for benefits when I knew that I did not qualify to receive benefits until my courses had finished? The fact of the matter is: I was not searching for work and attending an unauthorized school/training course – two necessary conditions for clearance; which, upon review would disqualify me from employment insurance privilege. Thus, I find it to be reasonable to believe that since I was not entitled to benefits given the choice I had made, there was no point in engaging the EI system …
>
> [6] I plead that it was a mistake of law and acknowledge that submitting Records of Employment (ROE) documents before engaging in the eight month training program was the proper course of action. However, how can a lay person, having no detailed knowledge of the statute and regulations, occasion the opportunity to inform themselves of EI processes until they become enmeshed in an unjust decision process, as they are then forced to defend their actions? True, I unwittingly failed to comply with the statutory procedures for claiming benefits; but I did not intend to penalize myself by not submitting documents prior to the educational courses, something that could have easily been done. …

[7] In its decision dated October 11, 2011 the Board summarized the relevant evidence from the docket. It is worth noting the following extracts (page 2):

> The claimant said the delay was because the employer had made two errors on the ROE and it took time to correct it;
>
> The claimant didn't have time to put thought into claiming because he started an educational program and was also dealing with housing issues;
>
> The claimant didn't anticipate an 8 month delay to apply to EI until Apr 27, 2011.

[8] After referring to a number of new documents filed by the claimant at the hearing, the Board dealt, in some detail with the applicant's oral evidence, in particular what was said when he went to the Service Canada office on September 4, 2010. Among other things, the Board noted that:

> The claimant stated that the representative he spoke to told him he would have to get a new ROE. She did not apparently tell him that the Commission could help him with this if he continued to experience problems. The agent did not instruct him to establish a claim immediately even though the ROE was incorrect.
>
> The claimant then requested to speak to an agent. While speaking to the agent, the claimant discussed the possibility of taking a full time university course. He asked if he would be eligible for benefits if he did. The agent stated that he was 99% sure that the claimant would not qualify. He went on to inform the claimant of the "Red Seal" program of approved educational opportunities.
>
> The claimant stated that the agent scanned the incorrect ROE during the interview. The claimant stated that at no time did the agent instruct him to establish a claim. The claimant stated that he left the interview with the clear impression that he would not qualify for benefits if he took the university course. He also had the clear impression that he needed a corrected ROE before he could establish a claim.
>
> The claimant stated that he did not establish a claim through the electronic process because he didn't think he would get benefits while attending school and he was not made aware of the significance of not starting the process at that time.

[9] In its findings of fact, the Board also wrote that:

> The claimant acknowledged at the hearing that he had arrived at the conclusion that he would not qualify for benefits if he decided to take the university course. He stated that he then decided to take the course because he wanted to better himself. The claimant also stated at the hearing that he has learned a great deal more about Antedate and the need to show just cause for any delay in establishing a claim for benefits since reading the docket before the hearing.

[10] After referring to the applicable legal test to determine whether there was a good cause for the delay, the Board concluded that:

> While the Board is sympathetic to the apparent lack of insight into the process provided by the representatives as to the need to establish a claim in a timely manner, the Board finds as a fact that the claimant has not established *just cause* for the delay.

UMPIRE'S DECISION - CUB 79268

[11] In his letter dated December 4, 2011, summarizing the basis of his appeal from the Board's decision, the applicant stated that the Board misapplied the principles set out in the two cases cited in its decision, including *Canada (Attorney General) v. Albrecht*, [1985] 1 FC 710 (FCA). This last decision was cited by the applicant in his September 16, 2011 letter to the Board as setting the appropriate test to be applied: ignorance of the law does not constitute good cause unless an individual can show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the *Act*.

[12] As to what was said at the Service Canada office on September 4, 2010, the applicant simply states that:

> The representative informed that I could not receive unemployment benefits while in school, and also that I would need a re-issued ROE as the record I obtained was full of errors.

[13] The applicant then argued that he had attempted to fulfill his obligations by relying on the Service Canada representative's advice and, as any reasonable person, he could not foresee that he would receive inaccurate information.

[14] In his decision dated May 31, 2012, dismissing the appeal, the Umpire concluded that the Board did not err in law. There was no denial of natural justice and the conclusion of the Board was open to it on the evidence. In his view, it was a reasonable decision that complied with the legislation and the case law.

UMPIRE'S DECISION - CUB 79268A

[15] In his July 23, 2012 request for a reconsideration of the above mentioned decision based on new facts (section 120 of the *Act*), the applicant stated in part:

> … taken more broadly, the facts written to the Board were based on my limited understanding of the law, the act, and omitted the central issue. I didn't actually explain my version of the facts well. As the case has developed, and for justice to be served, one must recognize some overarching facts to help gain perspective, add context, and help explain my original submission further. I discussed these elements briefly with the Umpire during oral submissions; now it is time to rebuild my case with an improved, balanced understanding. The central crux of the issue, misinformation from an Employment Insurance agent, will be explained here. …
>
> However, at no point during that conversation was I informed of the importance to complete an online application, and, most importantly, that I would disqualify all future potential benefits at the conclusion of the eight month educational program. During that information session it was my understanding, based on a lengthy discussion, that benefits would not be issued to help support me through the educational program; but my claim would be accessible a the conclusion of the 8 month course with a new corrected ROE, if at that time a job search proved futile. In fact, my decision to return to school was based on the postponement of the benefits – the decision was based on misinformation. …
>
> I would like to reverse my original statement of claim to the Board, where I indicate I should not be entitled to benefits while in school. During the past 15 months of research into antedate and EI employee responsibilities, I would now ask the court to antedate case 11-1078 to August 13th, 2010. …
>
> … In my original submission of facts to the Board of Referees, I was asking for exactly what I was told by the EI agent: for EI qualification to begin at the conclusion of the educational courses. These new facts are not contradictory in my original submission of fact to the Board of Referees. The fact that I was not able to

> clearly articulate all the details of the case is not surprising, especially since it wasn't entirely clear to me what I was arguing for. [emphasis added]

[16] On August 12, 2010, the Umpire dismissed the request for reconsideration after accepting the Commission's argument that section 120 only provides "an opportunity to submit material facts that were not present at the time of the hearing." Here, the applicant was seeking an opportunity to reargue his case. The Umpire concluded that there was no basis for reconsideration under section 120.

APPLICATION FOR JUDICIAL REVIEW

[17] Having obtained permission to seek judicial review of these two distinct decisions in the same application, the applicant filed an affidavit in support of his application, dated February 5, 2013. In light of the preliminary objection raised by the respondent, it is worth reproducing the contested paragraphs:

> 5. The EI agent told me it would be no good to apply for benefits because the program I wanted to take would not be covered by EI-funded programs of study.
>
> 6. The EI agent informed me that my claim for benefits would be accessible at the conclusion of the educational program.
>
> 10. In accordance with the EI agent's explanation of proper administrative procedure. I decided to attend the training course of my choosing and postpone my admissibility of EI benefits.
>
> 19. I met with the Board of referees and gave all the information at my hearing on October 11, 2011. My oral testimony to the Board explained all conceivable elements of this case to ensure they found the error. I explained how an EI agent told me not to apply for benefits because the educational program I wanted to attend would not be covered, and that I could postpone my eligibility for benefits: I would only qualify on the first day after the courses had ended.

> 20. In a decision on October 11, 2011, the Board of referees refused to antedate my claim citing no just cause for delay (exhibit A). The tribunal record omitted the fact that I was told by an EI agent that I would only qualify after the educational program and that I could postpone my eligibility for benefits.

ISSUES

[18] As a preliminary issue, the respondent submits that the evidence in paragraphs 5, 6, 10, 19 and 20 of the applicant's affidavit "is not admissible and should not be given any weight to the extent that the evidence is inconsistent with the evidence that was before the Board and the Umpire."

[19] In his memorandum, the applicant listed five issues, the first two being whether the Board erred in its findings of fact and in law in its interpretation of subsection 10(4) of the *Act*.

[20] In the context of an application for judicial review of the Umpire's decision, it is not this Court's role to deal with the appeal from the Board's decision *de novo*.

[21] Thus, the real issues before us are:

i) whether the Umpire made a reviewable error in upholding the Board's decision that the applicant had not shown good cause for the delay pursuant to subsection 10(4) of the *Act*; and

ii) whether the Umpire erred in dismissing the applicant's request for reconsideration on the basis that there were no new material facts.

ANALYSIS

[22] Dealing first with the preliminary issue, it is evident that the applicant who represented himself throughout the process gained a better appreciation of the significance of certain elements relevant to his allegation that he was misinformed between the time he first filed his request to antedate his claim with the Commission and the time he filed his application for judicial review. However, the scope of the alleged misinformation by the EI agent also appears to have shifted, from the agent not informing him of the significance of not filing his claim in a timely manner (before the Board), to statements before this Court that the EI agent in fact advised him that it was no good to apply in September 2010, and that his claim for benefits would still be accessible in any event after he finished school.

[23] Clearly, if the contested paragraphs of the applicant's affidavit are meant to transform the agent's omission as to how the applicant could preserve his rights into an affirmation that the applicant did not need to file a claim in 2010 to preserve his right to access EI after his studies, I agree that these paragraphs cannot be considered.

[24] As explained by my colleague, Stratas J. in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraphs 19:

> … as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, 1999 CanLII 7628 (FCA), [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential

> purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court." [emphasis added]

[25] Discussing the permissible scope of affidavits submitted on judicial review, Stratas J. also noted that "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider."

[26] Even if a litigant does not totally understand the process in which he is engaged, or fails to appreciate the significance of particular evidence, this Court is limited to reviewing the decisions before it on the basis of the evidentiary record before the decision-maker (*Ray v. Canada*, 2003 FCA 317, [2003] 4 C.T.C. 206 at paragraph 5**).** This is not one of the rare situations where an exception can be made because, for example, the Court has to determine whether there was a breach of procedural fairness. The Umpire decided the appeal on the basis of the available evidentiary record which consisted of all the documents before the Board and the oral evidence referred to in the Board's decision as there was no transcript of the hearing. We must use the same record to review the Umpire's decision.

[27] As of the time he filed his first appeal before the Umpire, the applicant was attempting to retry his case on the merits. Unfortunately, the role of the Umpire was not to determine *de novo* his appeal from the decision of the Commission, nor as I mentioned earlier is it the role of this Court on judicial review to do so or to determine *de novo* the issues that were before the Umpire.

[28] This leads me to discuss the standard of review applicable to the issues before us.

[29] Whether a particular applicant had good cause to delay the filing of his claim within the meaning of subsection 10(4) of the *Act* is a question of mixed fact and law *(Canada (Attorney General) v*. Burke, 2012 FCA 139 at paragraph 9; *Canada (Attorney General) v*. *Bendetti*, 2009 FCA 283 at paragraph 9). The applicable standard of review in respect of such questions is reasonableness.

[30] The applicant argues that the Umpire made an extricable error of law which should be reviewed on the correctness standard. More particularly, while conceding that the Board identified the correct legal test, he alleges that the Umpire failed to appreciate that the Board did not apply that test to determine whether he had established good cause and that the Umpire failed to follow the binding precedents establishing that delay due to misinformation by the Commission constitutes good cause. I cannot agree that these are extricable questions of law.

[31] The question of whether the Board misapplied the test is a question of mixed fact and law.

[32] As for the so-called precedents, which are in fact other Umpire decisions, the applicant does not appreciate that these do not legally bind the Umpire. Applying the proper test to establish good cause to the particular circumstances of a case is a fact intensive exercise in respect of which previous decisions cannot be legally binding.

[33] With this in mind, I will proceed to examine the merits of this application. It is evident that the Board understood that the applicant failed to file a claim in September 2010, especially one

submitted through the electronic process, because he did not think that he would get benefits while attending school and because he was not made aware of the significance of not starting the process at that time.

[34] It is worth mentioning here that although the applicant in paragraph 23 of his affidavit states that he only learned after filing his appeal with the Umpire about the significance of filing an electronic claim prior to starting his studies, it is clear that this issue was indeed canvassed before the Board. It is also referred to in paragraph 6 of the applicant's letter to the Board, dated September 16, 2011.

[35] The Board was well aware that the Service Canada agent had failed to inform the applicant that he should have filed a claim in September 2010 if he intended to later seek EI after his studies. It expressly refers to this as "an apparent lack of insight into the process provided by the representative as to the need to establish a claim in a timely manner."

[36] But it is also clear that the Board viewed this omission as insufficient to justify the delay. It certainly did not find as a fact that the agent had provided the misleading advice that the applicant now seems to be putting forth – that is that there was no need to file anything. It did not characterize this "lack of insight" as a situation where the agent "misadvised" the applicant.

[37] Even if one were to consider the various iterations of the facts since then, the applicant's declared purpose for discussing with the second agent on September 4, 2010 was to determine

whether he could receive EI while studying. The advice he received in that respect was clearly accurate as the type of studies that he pursued did not entitle him to receive benefits while studying.

[38] We do not have the exact context in which the alleged further discussion as to the possibility of postponing the payment of EI occurred. There is no evidence that the applicant asked the agent whether or not he should file a claim immediately or only after his studies in order to access EI at a later date. In fact, at the hearing before us, the applicant acknowledged that he did not ask any specific question in such respect. His inquiry was more general. As submitted by the respondent, it would be difficult for any agent to address all possible hypotheses. I agree that here there was no basis to find that the agent had such a duty.

[39] In the circumstances, I agree with the Umpire that it was open to the Board to conclude as it did that the failure of the agent to give explicit directions to the applicant (the so-called apparent lack of insight), coupled with all the other information put forth to justify the delay does not constitute good cause. This is especially so considering the express notice on the ROE that a claim should be filed within four weeks.

[40] The Umpire's conclusion is perfectly in line with the reasonableness standard that he was required to apply, and which recognizes that there may be a range of possible and acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[41] In the eyes of the applicant, this result may appear unjustifiably harsh as he considers that he did all that he could do to inform himself. It is true that the duty imposed on claimants to promptly file their claim is very demanding and strict. However, there is a good reason for this. As explained in *Canada (Attorney General) v. Beaudin*, 2005 FCA 123, this requirement is essential to ensure the integrity of the system and to enable the Commission to make all the appropriate verifications for eligibility. This is particularly important when, as here, a claimant has voluntarily quit his job. As such, the exception provided at subsection 10(4) of the *Act* must be cautiously applied.

[42] I turn now to the second decision of the Umpire dealing with the application pursuant to section 120 of the *Act*. The other question of whether there are new material facts that justify the application of section 120 of the *Act* is again a factual inquiry, one that must also be reviewed on the reasonableness standard.

[43] As noted in *Canada (Attorney General) v. Chan*, [1994] 178 N.R. 372 (FCA) at paragraph 10 (*Chan*), reconsideration under this section of the *Act* should remain a "rare commodity", and an Umpire should be careful not to let the process be abused "by careless or ill-advised claimants". As unequivocally enunciated in *Chan*, a different or more detailed version of the facts already known to the claimant or a sudden realization of the consequences of certain facts are not new facts.

[44] As it is apparent from the excerpts reproduced at paragraph 15 above, there were no new material facts that justified the applicant's request for reconsideration. All the information that the applicant put before the Umpire in his request for reconsideration were facts which presumably were already known to him and which became relevant to his revised argument. This is simply not a

case that falls under section 120 of the *Act*. The Umpire had no choice but to dismiss the applicant's request.

CONCLUSION

[45] In my view, the Umpire made no reviewable errors in the two decisions under review. I would dismiss the appeal with costs in the amount of $250.00.

"Johanne Gauthier"

J.A.

"I agree
M. Nadon J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-562-12
STYLE OF CAUSE:	DOUGLAS RODGER v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 18, 2013
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	NADON J.A. PELLETIER J.A.
DATED:	SEPTEMBER 19, 2013

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