Federal Court of Appeal  Cour d'appel fédérale

Date: 20130917

Docket: A-42-13

Citation: 2013 FCA 213

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

Abdelsalam AHMAT DJALABI

Respondent

Heard at Montréal, Quebec, on September 10, 2013.

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

REASONS FOR JUDGMENT BY: NOËL J.A.

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

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for judicial review of a decision rendered by Umpire L.-P. Landry (CUB 80268), who dismissed an appeal by the Canada Employment Insurance Commission (the Commission) from the decision of a Board of Referees allowing the appeal by Abdelsalam Ahmat Djalabi (the respondent or claimant) against a decision by the Commission to dismiss his claim for

benefits on the grounds that he had voluntarily left his employment without just cause within the meaning of sections 29 and 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

RELEVANT FACTS

[2] The respondent was employed by Bell Express Vu for seven years, until March 5, 2012. From March 6 to April 16, 2012, the respondent was incarcerated as a result of a complaint filed by his spouse that he had uttered death threats against her. On March 8, 2012, he received a letter from his employer informing him that his absence was unauthorized and asking him to appear at work and justify his absence.

[3] On March 16, 2012, while still incarcerated, the respondent contacted his manager to explain that he had no choice but to resign, given that he did not know when he would be released. His manager accepted his resignation without informing him of the possibility of requesting leave without pay.

[4] On March 16, 2012, the respondent was released after signing a recognizance under section 810 of the *Criminal Code*, R.S.C. (1985), c. C-46 (the *Criminal Code*), whereby he agreed to comply with a series of conditions, including not contacting his ex-spouse, for one year. On April 20, 2012, he filed a claim for Employment Insurance benefits with the Commission, which was to take effect as of April 15, 2012.

[5] In a letter dated May 16, 2012, the Commission informed the claimant that it was dismissing his claim on the grounds that he had voluntarily left his employment within the meaning of the Act, and without just cause.

[6] The respondent appealed from the decision to the Board of Referees.

BOARD OF REFEREES' DECISION

[7] According to the Board of Referees, the claimant was not responsible for his incarceration because he was acquitted of the charges against him (Reasons, at page 5). On the basis of this finding, the Board of Referees held that the claimant had voluntarily left his employment, but that he was justified in doing so in the light of all the circumstances.

[8] Some of the circumstances considered by the Board of Referees were the claimant's state of depression at the time, which diminished his ability to [TRANSLATION] "analyze events dispassionately and with all the necessary objectivity"; the claimant's conviction that he would be laid off if he did not resign and that he would struggle to find new employment with a criminal record; and his manager's failure to offer him leave without pay, reinforcing his impression that resigning was his only option (Reasons, at pages 4 and 5).

UMPIRE'S DECISION

[9] The Umpire dismissed the Commission's appeal. While acknowledging that the Board of Referees had erred in law in finding that the claimant had been acquitted of the offence for which he had been incarcerated, he held that a recognizance under section 810 of the *Criminal Code* is

equivalent to neither a conviction nor an acquittal; at most, it means that the complainant had reasonable grounds to fear for her safety (Reasons, at page 2).

[10] The real issue is whether the claimant voluntarily committed the acts that led to his incarceration, and therefore whether he voluntarily placed himself in a situation that would prevent him from keeping his employment (Reasons, at pages 2 and 3). In the Umpire's view, a recognizance is not a sufficient basis for a finding on a balance of probabilities that the claimant voluntarily committed the acts that resulted in his incarceration (Reasons, at page 3). The essence of his reasoning can be found in the following excerpt (*ibid.*):

> . . . in the absence of evidence established on a balance of probabilities showing that the claimant voluntarily committed acts that, consequently, prevented him from keeping his employment, one cannot find that there was misconduct or even a decision to voluntarily leave his employment. He was allegedly incarcerated at that time, through no fault of his own, for reasons that were not proven.

POSITIONS OF THE PARTIES

[11] The applicant submits that the Umpire raised the wrong question. He should have inquired whether [TRANSLATION] "in committing the act that led to his incarceration, did the respondent cause the risk to materialize, justifying his exclusion from benefits under the Act" (Applicant's Memorandum at paragraph 34).

[12] The applicant adds that the Board of Referees' decision was all the more unreasonable in the light of the fact that the claimant himself had chosen to terminate his employment out of fear of being dismissed and having his record tainted by a criminal conviction (Applicant's Memorandum

at paragraph 30). Such a choice does not constitute just cause within the meaning of the Act (Applicant's Memorandum at paragraph 31).

[13] In any case, the Umpire had evidence showing on a balance of probabilities that the claimant had indeed [TRANSLATION] "committed wrongdoing" (Applicant's Memorandum at paragraph 35). On the one hand, the respondent himself is challenging neither the fact that he uttered threats against his ex-spouse, nor the merits of his incarceration (Applicant's Memorandum at paragraph 37). On the other hand, the justice of the peace would not have issued the order had he not been at least persuaded on a balance of probabilities that threats had been uttered (Applicant's Memorandum and paragraph 40). The Umpire therefore erred in finding that the evidence did not establish on a balance of probabilities that the claimant had committed the acts that resulted in his incarceration.

[14] The respondent was present at the hearing before this Court, but as he did not produce a memorandum of fact and law, he had to limit himself to stating that he disagreed with the applicant's position and was seeking to have the application for judicial review dismissed.

ANALYSIS AND DECISION

[15] The Umpire did not mention the applicable standard of review anywhere in his decision. In the circumstances, it is up to this Court to determine the appropriate standard of review and to apply it by assessing the merits of the Umpire's decision.

[16] In my view, the standard of correctness should be applied to the Board of Referees' interpretation of the scope and implications of section 810 of the *Criminal Code*, since that is a question of law beyond the scope of its specialized expertise. However, the standard of reasonableness should be applied to the question of whether the claimant voluntarily committed the act that resulted in his loss of employment pursuant to section 30 of the Act, since it involves an application of the law to the facts.

[17] The Board of Referees held that the claimant [TRANSLATION] "had been acquitted of the charges against him" (Reasons, at page 5). The Umpire correctly held that this finding was an error of law. He nevertheless refused to intervene on the grounds that there was insufficient evidence to establish misconduct. In his view, a recognizance "does not constitute evidence established on a balance of probabilities of acts committed voluntarily by the claimant" (Reasons, at page 3).

[18] In reaching this conclusion, the Umpire failed to take into account the burden of proof to be met to in order for a recognizance order to be issued under section 810 of the *Criminal Code*: to issue the order, the justice of the peace must be "satisfied by the evidence adduced that the person on whose behalf the information was laid has reasonable grounds for his or her fears" [emphasis added]. The degree of persuasion required is the balance of probabilities: [TRANSLATION] "The case law largely recognizes that the burden of proof corresponding with the terms 'satisfied' in the English version and 'convaincu' in the French version is the balance of probabilities . . ." (*R. c. Lacerte*, 2011 QCCQ 2433 (CanLII) at paragraph 81).

[19] Contrary to what the Umpire has implied, the analysis leading to the issuance of a recognizance order is not merely subjective, i.e., based on the perception of the informant. There is also an objective dimension expressed by the terms "reasonable grounds". As set out at paragraph 52 of *R. v. Budreo*, [2000] O.J. No. 72 (ONCA),

> . . . The word "fear" or "fears" should not be considered in isolation but together with the modifying words in s. 810.1(1) "on reasonable grounds." Fear alone connotes a state of belief or an apprehension that a future event, thought to be undesirable, may or will occur. But "on reasonable grounds" lends objectivity to the apprehension. In other words, the phrase "fears on reasonable grounds" in s. 810.1(1) connotes a reasonably based sense of apprehension about a future event, or as Then J. put it, it "equates to a belief, objectively established, that the individual will commit an offence." [Footnotes omitted.]

[20] Therefore, while it does not establish beyond a reasonable doubt that a criminal offence has been committed, the recognizance is not without probative value. The very fact that a recognizance order has been issued presupposes that, on a balance of probabilities, the defendant has engaged in conduct causing the informant to fear for her safety.

[21] By requiring a conviction, the Umpire is applying a much more stringent test than that required by section 30 of the Act. According to the case law, the concept of misconduct does not require evidence of the elements of criminal liability: "It is not necessary for a behaviour to amount to misconduct under the Act that there be a wrongful intent. It is sufficient that the reprehensible act or omission complained of be made 'wilfully', i.e. consciously, deliberately or intentionally" (*Canada (Attorney General) v. Secours*, [1995] F.C.J. No. 210 (QL) at paragraph 2, as cited in *Canada (Attorney General) v. Pearson*, 2006 FCA 199 at paragraph 15). That is, an act is deliberate if "the claimant knew or ought to have known that the conduct was such as to impair the

performance of the duties owed to the employer and as a result dismissal was a real possibility" (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 at paragraph 14).

[22] Because the evidence shows, according to the applicable standard, that the claimant's conduct led to his incarceration and to the loss of his employment, it follows that the Board of Referees failed to take into account the evidence in reaching the opposite conclusion and that the Umpire should have intervened.

[23] For these reasons, I would allow the application for judicial review, set aside the Umpire's decision and refer the matter back to the Chief Umpire or his designate for redetermination on the basis that the Commission's appeal must be allowed on the grounds that the claimant voluntarily left his employment without just cause within the meaning of sections 29 and 30 of the Act.

"Marc Noël"

J.A.

"I agree.
Johanne Trudel, J.A."

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

Certified true translation
Francois Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

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