Federal Court of Appeal | Cour d'appel fédérale

Date: 20131015

Docket: A-4-13

Citation: 2013 FCA 243

CORAM: **SHARLOW J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DERWIN JEWETT

Respondent

Hearing held by video-conference between Toronto and Thunder Bay, Ontario
on September 19, 2013

Judgment delivered at Ottawa, Ontario on October 15, 2013.

REASONS FOR JUDGMENT BY: THE COURT

Federal Court of Appeal  Cour d'appel fédérale

Date: 20131015

Docket: A-4-13

Citation: 2013 FCA 243

CORAM: **SHARLOW J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DERWIN JEWETT

Respondent

REASONS FOR JUDGMENT BY THE COURT

[1] The Attorney General of Canada has applied for judicial review of a decision of Umpire Goulard (CUB 80183) upholding the decision of the Board of Referees, which determined that the respondent Mr. Jewett had sufficient hours of insurable employment to qualify for employment insurance benefits under section 7 of the *Employment Insurance Act*, S.C. 1996, c. 23.

[2] It is well-established that an Umpire's interpretation of employment insurance legislation is a question of law, reviewable on the standard of correctness: *Chaulk v. Canada (Attorney General)*, 2012 FCA 190 at paragraph 26; *Canada (Attorney General) v. Trochimchuk*, 2011 FCA 268 at paragraph 7.

[3] The decision of the Umpire in this case was based on a legal analysis that relied on subsection 27(4) of the *Interpretation Act*, R.S.C. 1985, c. I-21. That provision deals with the computation of time "expressed to begin after or to be from a specified day". That provision is not engaged in this case, because all relevant time periods are specified clearly in the *Employment Insurance Act*. Therefore, it was an error of law for the Umpire to rely on the *Interpretation Act* in his analysis. However, we have concluded for the following reasons that the Umpire's decision that Mr. Jewett is entitled to the employment insurance benefits he claimed is sustainable.

[4] As explained below, the resolution of the debate about Mr. Jewett's entitlement to benefits depends largely on subsection 17(1) of the *Employment Insurance Regulations*, SOR/96-332. To understand the function of that provision, it is necessary to understand the key elements of the statutory scheme for the determination of employment insurance benefits.

[5] Section 9 of the *Employment Insurance Act* requires a "benefit period" to be established for a claimant for section 7 benefits. By virtue of subsection 10(1), a claimant's benefit period begins on the later of the Sunday of the week in which the claimant's interruption of earnings occurred, and the Sunday of the week in which the initial claim for benefits was made. For purposes of the

Employment Insurance Act, a week is defined as a period of 7 consecutive days beginning on and including Sunday (section 2).

[6] In this case there is no dispute about Mr. Jewett's benefit period. His interruption of earnings occurred on Friday, February 3, 2012 (in the week beginning Sunday, January 29 and ending Saturday, February 4). His initial claim for benefits was made on February 7, 2012 (in the week beginning Sunday February 5). The later of the two Sundays is Sunday, February 5. Therefore, according to subsection 10(1), his benefit period began on Sunday, February 5, 2012.

[7] A claimant's entitlement to section 7 benefits depends upon how many hours of insurable employment the claimant accumulated during the "qualifying period" as determined under section 8 of the *Employment Insurance Act*. It is undisputed in this case that Mr. Jewett's qualifying period is determined under paragraph 8(1)(*a*). According to that provision, his qualifying period is the 52 week period immediately before the beginning of his benefit period, or in other words, the 52 week period ending Saturday, February 4.

[8] The next step is to determine how many hours of insurable employment Mr. Jewett was required to accumulate during his qualifying period. According to paragraph 7(2)(*b*) of the *Employment Insurance Act*, Mr. Jewett qualifies for benefits if, during his qualifying period (the 52 weeks ending February 4, 2012), he had the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to him.

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

[9] It is undisputed that in Mr. Jewett's case, the relevant "region" is Thunder Bay. According to the table, if the Thunder Bay rate of unemployment applicable to Mr. Jewett was more than 6% but not more than 7%, the required number of insurable employment hours is 665. The Crown argues that this is the rate applicable to Mr. Jewett, and that he is not be eligible for section 7 benefits because he had only 633 insurable employment hours.

[10] If the Thunder Bay rate of unemployment applicable to Mr. Jewett was more than 7% but not more than 8%, the required number of insurable employment hours is 630. Mr. Jewett argues that this is the rate applicable to him, and because he had 633 insurable employment hours during his qualifying period, he is eligible for section 7 benefits.

[11] To determine who is correct, it is necessary to refer to subsection 17(1) of the *Regulations*. According to that provision, the regional rate of unemployment applicable to a claimant is the average of the seasonally adjusted monthly rates of unemployment for the last three-month period

for which statistics were produced by Statistics Canada that precedes the week referred to in subsection 10(1) of the *Employment Insurance Act*.

[12] As explained above, for Mr. Jewett, the week referred to in subsection 10(1) of the *Employment Insurance Act* is the week commencing Sunday, February 5, 2012. Therefore, the three month period to be chosen for the purpose of applying subsection 17(1) of the *Regulations* in respect of Mr. Jewett's claim must be a period that ends no later than Saturday, February 4, 2012.

[13] And so, the key question becomes this: what was the average of the seasonally adjusted monthly rates of unemployment for the last three-month period for which statistics were produced by Statistics Canada ending no later than Saturday, February 4, 2012? That is a factual question. To answer it, we must consider the record that was before the Umpire.

[14] The record contains a chart upon which the Crown relies to support the Commission's position that for the week commencing February 5, 2012 the applicable rate of unemployment is 6.2%. According to the Crown, that supports its conclusion that Mr. Jewett required 665 hours of insurable employment in order to qualify for benefits, which means that he does not qualify.

[15] The chart is largely illegible and it is not helpful in most respects. The record does not disclose who prepared it, or why, or how. There is no reference on the chart as to whether it complies with the requirements of subsection 17(1) of the *Regulations*, or whether it is based upon Statistics Canada's statistics. It is also not legible as to what dates the statistics set out in the chart refer to. The chart alone is not sufficient to provide an answer to the key question posed above.

[16] More importantly however, even if the chart were acceptable and sufficient proof, it does not address the correct period. As explained above, the relevant time period for the purpose of applying subsection 17(1) of the *Regulations* to Mr. Jewett's claim is the three month period ending no later than February 4, 2012, not the three month period commencing February 5, 2012 as the Crown has argued.

[17] Because the chart upon which the Crown relies cannot answer the key question, we must look elsewhere in the record. The only document capable of providing an answer is the document marked Exhibit A to the affidavit of Mr. Jewett dated March 11, 2013. Page 2 of that document indicates that for the period January 8, 2012 to February 4, 2012, the regional rate of unemployment for the region of Thunder Bay was 7.3%. It is undisputed that this page was obtained by Mr. Jewett from the Commission's own website. Although it contains nothing indicating that it is based on the data specified in subsection 17(1) of the *Regulations*, Mr. Jewett is implicitly inviting this Court to infer that it is evidence of the regional rate of unemployment that is relevant to the application of subsection 17(1) of the *Regulations* in relation to his claim.

[18] Overall, this Court is faced with inadequate proof of the applicable regional rate of unemployment. However, given the Crown's failure to adduce evidence on that point (evidence that is within its knowledge and control), it would not serve the interests of justice to remit this matter to the Umpire for better proof and require Mr. Jewett to navigate the administrative and judicial process for a second time.

[19] The best proof of the regional rate of unemployment is that found in the document relied upon by Mr. Jewett. It comes from the Commission's own website and may reasonably be interpreted as Mr. Jewett suggests. Therefore, this application will be determined accordingly.

[20] The application for judicial review will be dismissed with costs fixed at $800, inclusive of all disbursements and applicable taxes.

"K. Sharlow"
J.A.

"David Stratas"
J.A.

"D.G. Near"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-4-13
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. DERWIN JEWETT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 19, 2013
REASONS FOR JUDGMENT BY THE COURT:	SHARLOW, STRATAS, NEAR JJ.A.
DATED:	October 15, 2013

APPEARANCES:

Jim Kapches	FOR THE APPLICANT
Derwin Jewett	ON HIS OWN BEHALF

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPLICANT