

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131029

Docket: A-453-12

Citation: 2013 FCA 255

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

BETWEEN:

TERRENCE CECIL ROBINSON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Fredericton, New Brunswick, on October 28, 2013.

Judgment delivered at Halifax, Nova Scotia, on October 29, 2013.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**STRATAS J.A.
NEAR J.A.**



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REASONS FOR JUDGMENT

WEBB J.A.

[1] The applicant applied for judicial review of the decision of the Umpire under the *Employment Insurance Act*, S.C. 1996, c. 23 (the *Act*) dated August 23, 2012. As a preliminary matter the Crown noted that the applicant had not identified the correct respondent. The applicant had identified the Canada Employment Insurance Commission and the Honourable Diane Finley, P.C., M.P., Minister of Human Resources and Skills Development as the respondents. Under Rule 303(2) of the *Federal Courts Rules*, the respondent should be the Attorney General of Canada.

Accordingly, at the outset of the hearing, the style of cause of the proceeding was amended to change the respondent to the Attorney General of Canada.

[2] The applicant was laid off from his job at Zebra Studios Inc. in April 2009 and he received an amount as severance pay. Shortly after he was laid off the applicant attended at a Canada Employment Insurance Commission (Commission) office in Toronto to apply for employment insurance benefits (benefits). The applicant told the person with whom he met that he had been laid off and had received a severance payment and provided the cheque stub for the severance payment cheque. He was told that he would have to wait to apply for benefits since he had received a severance payment. After the applicant's initial visit to the Commission office he received his record of employment. He took this to the Commission office together with a copy of his bank statement showing the amount that he had also received as vacation pay.

[3] Even though the applicant had informed the Commission that he had received a severance payment and an amount for vacation pay, on a subsequent visit to the Commission office in Toronto in June 2009 he was informed that he would qualify immediately for benefits and a new application (prepared on the instructions of the Commission) was antedated to April 2009. When the applicant received cheques for the period from April 2009 to June 2009 he tried to return the cheques to the Commission as the applicant knew that he had to wait to collect benefits because he had received a severance payment. He was informed that he could not return the cheques.

[4] However, the Commission then attempted to calculate how the severance pay and vacation pay should be allocated under the *Act* and the *Employment Insurance Regulations*. In calculating the

number of weeks that the applicant would have to wait to collect benefits, the Commission used the wrong amount as the average of his normal weekly earnings from his employment. The Commission based its calculation on his total pay (including his severance amount) and determined that his average normal weekly earnings were \$1,731. The applicant's average normal weekly earnings were \$961.53.

[5] Since the Commission had used an amount that was greater than his average normal weekly earnings, the number of weeks to which the severance and vacation pay were to be allocated was less than the number of weeks than it would have been if the correct amount would have been used. In any event, even though the waiting period was incorrect, the Commission still determined that the applicant had received benefits for weeks for which he should not have received benefits and determined that the applicant had a debt to the Commission. That debt has been repaid.

[6] The applicant discovered the error with respect to his average normal weekly earnings and reported this error to the Commission. The Commission again made a determination of how the severance pay and vacation pay should have been allocated, but this time used the correct amount as the applicant's average normal weekly earnings. The revised determination was that the applicant should have waited another 11 weeks before he began collecting benefits. This final determination coincided with the initial determination made by the applicant.

[7] Since the applicant had started to receive benefits 11 weeks before he should have started to receive such benefits, he had received benefits for a period during which he should not have received benefits. However, the period for which he was entitled to receive benefits was extended

by 11 weeks. Therefore he was found to still be entitled to receive benefits for 52 weeks, but the timing for the payment was delayed because he had received severance pay and vacation pay. The applicant appealed this final determination by the Commission to the Board of Referees.

[8] The Board of Referees dismissed his appeal on the basis that although the Commission had made several errors, the final determination was correct based on the *Act* and the *Employment Insurance Regulations*. While the applicant agrees that the final determination was correct (which was the determination that the applicant had initially made), he was very upset that he had received incorrect information from the Commission and that it took the Commission several attempts to reach this final conclusion. He was also upset that the Commission had problems locating his files and the documents that he had provided to the Commission.

[9] The applicant appealed this decision of the Board of Referees to the Umpire who dismissed his appeal. Although the Umpire dismissed the applicant's appeal, he was obviously sympathetic to the applicant's plight as the Umpire stated in his reasons that:

I do repeat, however, the final statement in CUB 53919:

I sympathize with the claimant in this matter. There is no doubt that she finds herself in a difficult financial situation as a result of errors by the Commission but I am bound by the applicable legislation. I can only repeat the Board's request that the Commission consider the possibility of a total or partial write-off of the overpayment or at least provide the claimant with the most reasonable reimbursement plan.

[10] The applicant has applied to this Court for judicial review of the decision of the Umpire. As noted by Justice Layden-Stevenson, writing on behalf of this Court in *Attorney General of Canada v. Trochimchuk*, 2011 FCA 268:

7....The standard of review applicable to a decision of an Umpire is correctness on questions of law and reasonableness on the application of the law to the facts: *MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306, 396 N.R. 157; *Mac v. Canada (A.G.)*, 2008 FCA 184, 380 N.R. 203; *Canada (A.G.) v. Sveinson*, 2001 FCA 315, [2002] 2 F.C. 205.

[11] In this case it is clear (as acknowledged by counsel for the respondent) that the applicant did nothing wrong. The applicant tried to correct the errors that he knew the Commission was making and even attempted to return the cheques to the Commission that the applicant knew he should not have received. However, the only issue in this judicial review application is whether the Umpire correctly determined the questions of law and whether his application of the facts to the law was reasonable. In this case, it seems to me that the Commission finally determined the allocation of the severance amount and the vacation pay correctly in accordance with the provisions of the *Act* and the *Employment Insurance Regulations*. Since this final determination was the decision that was appealed to the Board of Referees and the Umpire, there is no basis for this Court to interfere with the decision of the Umpire.

[12] As a result, the application for judicial review is dismissed, without costs.

"Wyman W. Webb"

J.A.

"I agree,
David Stratas J.A."

"I agree,
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-453-12

STYLE OF CAUSE: TERRENCE CECIL ROBINSON v.
THE ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: FREDERICTON,
NEW BRUNSWICK

DATE OF HEARING: OCTOBER 28, 2013

REASONS FOR JUDGMENT BY:
WEBB J.A.

CONCURRED IN BY:
STRATAS J.A.
NEAR J.A.

DATED: OCTOBER 29, 2013

APPEARANCES:

TERRENCE C. ROBINSON FOR THE APPELLANT
(ON HIS OWN BEHALF)

JULIEN S. MATTE FOR THE RESPONDENT

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