

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140204

Docket: A-159-13

Citation: 2014 FCA 31

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

BETWEEN:

JOHN STAIKOS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 20, 2014.

Judgment delivered at Ottawa, Ontario, on February 4, 2014.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**SHARLOW J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an application for judicial review of the decision of the Umpire rendered on March 15, 2013 (CUB 80192A), in which he confirmed his earlier decision rendered on November 9, 2012 (CUB 80192). The Umpire overturned the decision of the Board of Referees and dismissed Mr. Staikos' appeal from the decision of the Employment Insurance Commission (Commission).

[2] As a result, the amount that Mr. Staikos had received from Ford Motor Company of Canada (Ford) on the termination of his employment with Ford, was included as earnings that were allocated to the weeks following this termination of employment. This allocation of earnings delayed his entitlement to benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 (*Act*) which he claimed after he was laid off by a subsequent employer. While the Umpire addressed the issue of whether the amount should have been allocated to the weeks following the termination of his employment with Ford, he did not address the argument of Mr. Staikos that such amount was not earnings for the purposes of section 19 of the *Act* as a result of the provisions of section 37 of the *Employment Insurance Regulations*, SOR/96-332 (*Regulations*). This is the ground upon which Mr. Staikos now seeks judicial review of the Umpire's decision.

[3] Mr. Staikos had been employed by Ford at its plant in St. Thomas, Ontario. Ford decided to close this plant and offered payments to employees who would lose their jobs as a result of this plant closure. Since Mr. Staikos had been an employee of Ford for more than 8 years, he had the option of accepting the Special Termination of Employment Program (which provided a lump sum payment of \$100,000 plus \$25,000 in lieu of a \$30,000 vehicle voucher as well as health care for 6 months), or remaining on layoff and receiving SUB, accruing up to 1.9 years of pension credits and receiving IMP for up to 52 weeks after the SUB payments were exhausted (CAW - St. Thomas Closure Agreement).

[4] The SUB is the Supplemental Unemployment Benefit program that had been established by Ford. Employees were allocated SUB credits based on the number of years that they were employed by Ford. It appears that Mr. Staikos had 104 SUB credits and therefore would have been entitled to 104 weeks of SUB payments (which would have been 65% of his gross pay minus any amount he would have received as employment insurance benefits).

[5] No explanation was provided for the “IMP” referred to above and it is not relevant in this case.

[6] Mr. Staikos was employed by Ford until March 18, 2011, when he left his job to work for General Dynamics Land Systems starting March 21, 2011. Since he had another job, Mr. Staikos chose the lump sum payout from Ford of \$125,000 (\$100,000 plus the cash in lieu of the vehicle voucher). His employment with General Dynamics Land Systems ended on March 16, 2012 when he was laid off because there was a shortage of work. He then applied for employment insurance benefits. The Commission determined that the \$125,000 payment and the vacation pay that were paid to Mr. Staikos by Ford were earnings for the purposes of section 36 of the *Regulations*, and that in accordance with this section of the *Regulations*, these amounts had to be allocated to the weeks following the end of his employment with Ford. Since Mr. Staikos had been earning approximately \$1,400 per week, these amounts were allocated to the weeks during the period of March 18, 2011 to November 24, 2012. Since the Commission also determined that these amounts were earnings for the purposes of section 19 of the *Act*, Mr. Staikos was not eligible to receive benefits under the *Act* until after the end of that period. The only amount that was in dispute before the Board of Referees or the Umpire is the \$125,000 lump sum payment.

[7] Mr. Staikos appealed to the Board of Referees. In the brief section of its decision entitled “Findings of Fact and Application of Law”, the Board of Referees stated that:

The Board finds as a fact that there is no reason to consider the monies paid to the claimant by Ford as the claimant did not file for EI benefits when he quit his job with Ford.

[8] Although identified as a finding of fact, this is a conclusion determined by applying the law to the facts. No explanation was provided for this conclusion. As a result, the Board of Referees determined that the only amount that was to be allocated to any weeks following the end of Mr. Staikos' employment with General Dynamics Land Systems under section 36 of the *Regulations*, was the \$583 that he had received as vacation pay from General Dynamics Land Systems.

[9] On appeal to the Umpire, the Umpire determined that the Commission had allocated the amount that Mr. Staikos had received from Ford correctly. He therefore allowed the appeal of the Commission from the decision of the Board of Referees and dismissed Mr. Staikos' appeal of the decision of the Commission. The Umpire based his decision on sections 35 and 36 of the *Regulations*. He did not address Mr. Staikos' argument related to section 37 of the *Regulations*. However, by dismissing Mr. Staikos' appeal from the decision of the Commission, he did not apply the provisions of section 37 of the *Regulations* to exclude the amount paid by Ford from earnings of Mr. Staikos for the purposes of section 19 of the *Act*.

[10] Subsection 36(9) of the *Regulations* provides that:

9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

(9) Sous réserve des paragraphes (10) à (11), toute rémunération payée ou payable au prestataire en raison de son licenciement ou de la cessation de son emploi est, abstraction faite de la période pour laquelle elle est présentée comme étant payée ou payable, répartie sur un nombre de semaines qui commence par la semaine du licenciement ou de la cessation d'emploi, de sorte que la rémunération totale tirée par lui de cet emploi dans chaque semaine consécutive, sauf la dernière, soit égale à sa rémunération hebdomadaire

normale provenant de cet emploi.

[11] Section 35 of the *Regulations* provides that earnings, (for the purposes relevant in this appeal), will be the income from any employment. Therefore, the amount of \$125,000 that Mr. Staikos had received from Ford was properly allocated to the weeks following the termination of his employment with Ford.

[12] Mr. Staikos' argument, however, is that the Umpire did not address whether the \$125,000 payment from Ford, or any portion thereof, was a payment from a Supplemental Unemployment Benefit Plan for the purposes of section 37 of the *Regulations* and therefore should not have been earnings for the purposes of section 19 of the *Act*. If the \$125,000 payment was not earnings for the purposes of section 19 of the *Act*, any allocation of the amount as provided in section 36 of the *Regulations* would not affect his entitlement to receive benefits under the *Act* following the loss of his employment with General Dynamics Land Systems.

[13] Mr. Staikos argued that if he had chosen the second option referred to above, he could have received the "SUB" payments. However, since Mr. Staikos did not choose this option, whether any amounts that he would have received under the SUB plan of Ford would have qualified as payments under a supplemental unemployment benefit plan for the purposes of section 37 of the *Regulations* is a moot point. Mr. Staikos' argument is that although he did not choose this second option, the lump sum payment (or a portion thereof) should be treated as payment to him of amounts that he otherwise would have received under the second option, and that such payment would be a payment under a supplemental unemployment benefit plan for the purposes of section 37 of the *Regulations*.

[14] Section 37 of the *Regulations* provides that:

37. (1) Subject to the other provisions of this section, payments received by a claimant as an insured person under a supplemental unemployment benefit plan are not earnings for the purposes of section 19, subsection 21(3), section 45 or 46, subsection 152.03(3) or section 152.18 of the Act.

(2) For the purpose of subsection (1), a supplemental unemployment benefit plan is a plan that

(a) identifies the group or groups of employees covered by the plan;

(b) covers any period of unemployment by reason of a temporary stoppage of work, training, illness, injury, quarantine or any combination of such reasons;

(c) requires employees to apply for and be in receipt of benefits in order to receive payments under the plan but may provide for payments to an employee who is not in receipt of benefits for the reason that the employee

(i) is serving the waiting period,

(ii) has insufficient hours of insurable employment to qualify for benefits, or

(iii) has received all of the benefits to which the employee is entitled;

37. (1) Sous réserve des autres dispositions du présent article, les sommes versées au prestataire à titre d'assuré dans le cadre d'un régime de prestations supplémentaires de chômage ne constituent pas une rémunération pour l'application de l'article 19, du paragraphe 21(3), des articles 45 et 46, du paragraphe 152.03(3) et de l'article 152.18 de la Loi.

(2) Pour l'application du paragraphe (1), le régime de prestations supplémentaires de chômage est un régime qui, à la fois :

a) définit le groupe ou les groupes d'employés couverts;

b) couvre toute période de chômage qui survient par suite d'un arrêt temporaire de travail, de la formation, d'une maladie, d'une blessure ou d'une mise en quarantaine, ou d'une combinaison de ces raisons;

c) exige que l'employé demande et reçoive des prestations afin de recevoir les versements prévus, mais peut permettre que des versements soient faits à l'employé qui ne reçoit pas de prestations pour l'une ou l'autre des raisons suivantes :

(i) son délai de carence s'écoule,

(ii) il n'a pas accumulé un nombre suffisant d'heures d'emploi assurable pour remplir les conditions requises pour recevoir des prestations,

(iii) il a reçu toutes les prestations auxquelles il a droit;

- (d) requires that the combined weekly payments received from the plan and the portion of the weekly benefit rate from that employment do not exceed 95 per cent of the employee's normal weekly earnings from that employment;
- (e) requires that payments under the plan be financed by the employer and that the employer keep separate accounts for those payments;
- (f) requires that, on termination of the plan, all remaining assets revert to the employer or be used for payments under the plan or for administrative costs of the plan;
- (g) requires that the plan be submitted to the Commission prior to its effective date and that written notice of any change to the plan be given to the Commission within 30 days after the effective date of the change;
- (h) provides that the employees have no vested right to payments under the plan, except to payments during a period of unemployment specified in the plan; and
- (i) provides that payments in respect of guaranteed annual remuneration or in respect of deferred remuneration or severance pay benefits are not reduced or increased by payments received under the plan.
- d) prévoit que les versements hebdomadaires combinés provenant, d'une part, du régime et, d'autre part, de la portion du taux de prestations hebdomadaires provenant de son emploi ne peuvent dépasser 95 pour cent de la rémunération hebdomadaire normale que l'employé tirait de son emploi;
- e) exige que l'employeur finance les versements prévus et tiene une comptabilité distincte pour ceux-ci;
- f) exige que, s'il y est mis fin, l'actif qui reste revienne à l'employeur ou soit utilisé pour effectuer les versements prévus par le régime ou régler les frais d'administration de celui-ci;
- g) exige qu'il soit soumis à la Commission avant la date de son entrée en vigueur et qu'un avis écrit de toute modification soit donné à la Commission dans les 30 jours suivant la date d'entrée en vigueur de celle-ci;
- h) précise que les employés n'ont aucun droit acquis aux versements prévus, sauf le droit aux versements pendant une période de chômage qui y est spécifiée;
- i) prévoit que les versements à l'égard de la rétribution annuelle garantie, de la rétribution différée ou des indemnités de départ ne sont ni augmentés ni diminués par les versements reçus dans le cadre du régime.

[15] Under subsection 37(1) of the *Regulations*, the only payments that are treated as earnings for the purposes of section 19 of the *Act*, (which is the section that would reduce the benefits that Mr. Staikos would otherwise receive under the *Act*), are payments under a Supplemental Unemployment Insurance Plan as described in subsection 37(2) of the *Regulations*. Therefore, any payment from any plan or arrangement that does not satisfy the conditions as set out in subsection 37(2) of the *Regulations*, would not be a payment under a supplemental unemployment insurance plan for the purposes of section 37 of the *Regulations*, and therefore would not qualify for the exclusion from earnings as provided in subsection 37(1) of the *Regulations*.

[16] Paragraph 37(2)(b) of the *Regulations* provides that a qualifying plan must be one that covers a period of unemployment that arises for the reasons as set out in that paragraph. Mr. Staikos left his job with Ford on March 18, 2011 because Ford was going to close the plant at which he was working. He started work with General Dynamics Land Systems on March 21, 2011. I take judicial notice of the fact that March 18, 2011 was a Friday and March 21, 2011 was the following Monday. Therefore Mr. Staikos was not unemployed immediately following the termination of his employment with Ford, and clearly the \$125,000 payment could not cover a period of unemployment from March 21, 2011 to March 16, 2012 as he was employed during this time. While he was unemployed following his lay off by General Dynamics Land Systems on March 16, 2012, this \$125,000 payment that Mr. Staikos had received from Ford as a result of the termination of his employment on March 18, 2011, would not satisfy the conditions of paragraph 37(2)(b) of the *Regulations*, as the reason that he was then unemployed was not because of a temporary stoppage of work by Ford, but because he was laid off by another employer.

[17] Therefore, the \$125,000 payment from Ford is not a payment from a supplemental unemployment insurance plan for the purposes of section 37 of the *Regulations*, and it was earnings for the purposes of section 19 of the *Act*. This amount had to be allocated to the weeks following the termination of his employment with Ford as provided in section 36 of the *Regulations*. As a result, since the amount of any benefit that Mr. Staikos would otherwise be entitled to receive under the *Act* for any particular period is reduced by the earnings of Mr. Staikos for that period as provided in section 19 of the *Act*, Mr. Staikos was not entitled to receive any benefits under the *Act* during this period which ended on November 24, 2012.

[18] I would, therefore, dismiss Mr. Staikos' application for judicial review, without costs, as none were sought.

"Wyman W. Webb"

J.A.

"I agree
K. Sharlow J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-159-13

STYLE OF CAUSE: JOHN STAIKOS v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 20, 2014

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: SHARLOW, NEAR J.J.A.

DATED: FEBRUARY 4, 2013

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