

Federal Court



Cour fédérale

Date: 20091216

Docket: T-236-09

Citation: 2009 FC 1282

Ottawa, Ontario, December 16, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

OLYMPIA TILE INTERNATIONAL INC.

Applicant

and

**TANIA BENT and
THE ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] This matter began with Tania Bent's claim for employment insurance benefits (the Claim). The Employment Insurance Commission allowed the Claim and the Claim was upheld by a majority of the Board of Referees (the Board) after a three-day hearing (the Hearing).

[2] Ms. Bent's employer, Olympia Tile International Inc. (Olympia), appealed the Board's decision to the Umpire (the Appeal).

[3] During his consideration of the Appeal, the Umpire reviewed the transcripts of the Hearing. The transcripts he reviewed will be described as the Umpire's Transcripts. Following the review, he sent the Claim back to the Board for reconsideration with a direction that the reconsideration be conducted using transcripts (the Direction). The Board endeavoured to follow the Direction, but found itself unable to do so because the transcripts it reviewed were incomplete (the Board's Transcripts). The Board found that the Board's Transcripts were missing critical parts of the evidence of two important witnesses, Mr. Rosenberg and Ms. Sillers.

[4] The Board therefore issued a decision dated January 22, 2009 indicating that, contrary to the Direction, it would reconsider the Claim by way of a hearing *de novo* (the Decision).

THIS APPLICATION

[5] This application is for Judicial Review of the Decision on the basis that the Board declined to exercise jurisdiction when it refused to follow the Direction.

THE MOTION

[6] The Crown moves to strike the Notice of Application for Judicial Review on the grounds that instead of bringing this application, Olympia should have appealed the Decision to an Umpire under the statutory appeal process provided by the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). The Crown acknowledges that this Court has jurisdiction to entertain this application in unusual circumstances but says that none are present in this case.

THE UMPIRE'S DIRECTION

[7] In his decision, the Umpire said that he had considered the Umpire's Transcripts and concluded that they were sufficient to allow the Board to reach a decision. The Umpire therefore decided: that a hearing *de novo* was not necessary, that the Board should decide the Claim using transcripts, that the parties could make representations and that, while the Board could receive new evidence, it should only do so with good cause.

DISCUSSION

[8] On the face of the Decision, the Board appears to have declined jurisdiction. It did not follow the Direction even though the Umpire had concluded that the reconsideration could be conducted using transcripts. However, the Board's Decision appears justified, because the Board's

Transcripts are clearly incomplete. It is possible that the Umpire's Transcripts and the Board's Transcripts are not the same.

[9] Instead of appealing the Decision to another Umpire, the Applicant brought this application for Judicial Review. I am mindful of Mr. Justice Andrew Mackay's decision in *Gemby v. Canada (Human Resources)* (1999), 174 F.T.R. 117, in which he noted at paragraph 14 that, in unusual circumstances, an application for Judicial Review can be heard in spite of the statutory appeal process in the Act. Due to the possibility that there are two different transcripts of the Hearing, I have been persuaded to entertain this application.

[10] Accordingly, in consultation with counsel for both parties and having reviewed their letters of December 3, 2009, I make the following order:

ORDER

THIS COURT ORDERS that:

1. The motion to strike the Notice of Application for Judicial Review is dismissed;
2. The application for Judicial Review is allowed, the Decision is set aside, and the Board is to attempt to reconsider the Claim on an expedited basis using the Umpire's Transcripts;
3. The Office of the Umpire is to send the Umpire's Transcripts to the Board;

4. If, on review, the Board finds that the Umpire's Transcripts do not include sufficient evidence from Ms. Sillers and Mr. Rosenberg to allow it to decide the Claim, the Board may hear *de novo* evidence from only those two witnesses and the Umpire's Transcripts may be used to impeach them during their cross-examinations;
5. If the Board considers it necessary to hear from Ms. Sillers or Mr. Rosenberg *de novo* and they do not appear before the Board, the Board may rely on their evidence in the Umpire's Transcripts if the Board thinks it fair to do so;
6. The Board may receive agreed statements of facts and submissions from the parties;
7. The Board may hear new evidence, but should be reluctant to do so;
8. No order is made as to costs.

Sandra J. Simpson

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-236-09

STYLE OF CAUSE: OLYMPIA TILE INTERNATIONAL INC.

and

TANIA BENT and
THE ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: TORONTO

DATE OF HEARING: November 30, 2009

REASONS FOR : SIMPSON J.

DATED: December 16, 2009

APPEARANCES:

MR.COLBY LINTHWAITE
416-363-1800 EXT.300

FOR THE APPLICANT

MS.RINA M.LI
416-952-6331

FOR THE RESPONDENT
THE ATTORNEY GENERAL OF CANADA

FOR THE RESPONDENT
TANIA BENT

NO ONE APPEARING

SOLICITORS OF RECORD:

FRED TAYAR & ASSOCIATES
BARRISTERS & SOLICITORS
TORONTO

FOR THE APPLICANT