

Date: 20090318

Docket: A-62-08

Citation: 2009 FCA 91

**CORAM: EVANS J.A.
RYER J.A.
TRUDEL J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

RONALD BIGLER

Respondent

Heard at Winnipeg, Manitoba, on March 17, 2009.

Judgment delivered at Winnipeg, Manitoba, on March 18, 2009.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

**EVANS J.A.
RYER J.A.**

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] The Employment Insurance Commission (the Commission) denied Mr. Bigler regular employment insurance benefits because it found that he had left his employment or been dismissed for misconduct. Consequently, pursuant to sections 29 and 30 of the *Employment Insurance Act*, S.C. 1996, c.23 (the Act), it imposed on Mr. Bigler (the respondent or claimant) an indefinite disqualification for regular benefits. The Board of Referees (the Board) disagreed and found that the respondent's conduct was a symptom of his alcoholism, and not wilful misconduct as he "did not leave his employment but rather an illness prevented him from going to work and contacting the

employer about the illness" (applicant's record at page 118). Umpire Goulard agreed with the Board (CUB 69656).

[2] This is the Commission's application for judicial review of the Umpire's decision. Mr. Bigler was not in front of the Umpire, but he had appeared in front of the Board and was permitted to make oral submissions at the hearing of this application for judicial review, despite the absence of a respondent's record.

[3] Misconduct, under section 30 of the Act, has been defined as conduct that is wilful, meaning conscious, deliberate or intentional. When an employee has been dismissed for alcoholism-related misconduct, he or she will not be disqualified from receiving unemployment benefits pursuant to subsection 30(1), if both the fact of the alcoholism and the involuntariness of the conduct in question are established.

[4] The relevant facts are straightforward. The respondent's employment was terminated on June 2, 2006 because he had failed to report to work or to contact his employer from June 3, 2006 to June 13, 2006. The evidence revealed that the respondent had gone on a drinking binge from June 3rd to June 8th. On the 9th, he admitted himself into a detox program where he remained for 10 days. The employer had assumed that the respondent had abandoned his employment but was willing to discuss the possibility of his reinstatement once the respondent had received a clean bill of health. Unfortunately, several health issues deprived the respondent of that opportunity.

[5] The key evidentiary findings supporting the Board's decision that the "claimant's conduct was not wilful but simply a symptom of his illness" (Board's decision, applicant's record at page 118) were as follows:

The Board found that the claimant was let go by the employer. He was clearly ill during the 1 week period that he was away from work and did not notify his employer of his absence from work because of his illness. The claimant has a history of mental illness and has been diagnosed as an isolation drinker, meaning that when he becomes depressed and binge drinks he completely isolates himself from the rest of society. His shame of his behaviour is such that it prevents him from speaking or contacting others. In this case, the landlord forced his way into the claimant's apartment and took charge of the situation, forcing the claimant to get help. (*Ibid.*)

[6] The Umpire accepted the Board's view that "the claimant suffered from a serious problem of alcoholism which led him to act the way he did" (Umpire's decision, applicant's record at page 18) and upheld its decision stating that "although in the case at bar there is no medical report to confirm that the claimant suffered from alcoholism, this can be deducted from the evidence" (*ibid.*) (emphasis added). Having said this, the Umpire concluded that the Board's decision was entirely compatible with the evidence presented, and was therefore not unreasonable. I disagree.

[7] The Board's finding that the claimant was an alcoholic was not dispositive of the issue as it was not in itself sufficient to displace the voluntariness of his consumption of alcohol and to make the exclusion contained in subsection 30(1) of the Act inapplicable to the respondent.

[8] There was no medical evidence relating to the respondent's alcoholism or to whether the circumstances in which Mr. Bigler started to drink following his mother's death effectively made his consumption of alcohol at that time involuntary.

[9] Although sympathetic to the respondent's plight, I am of the view that the Umpire committed a reviewable error when he dismissed the Commission's appeal, and upheld the Board's decision. I agree with the applicant that in the case at bar, there was no evidence to support the Board's conclusion that the claimant's action were not wilful.

[10] Consequently, I would allow the application for judicial review without costs, set aside the Umpire's decision and refer the matter back to the Chief Umpire or an Umpire designated by him for redetermination in accordance with these reasons.

"Johanne Trudel"

J.A.

"I agree
John M. Evans J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-62-08

STYLE OF CAUSE: The Attorney General of Canada
v. Ronald Bigler

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: March 17, 2009

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: EVANS J.A.
RYER J.A.

DATED: March 18, 2009

APPEARANCES:

Kim Palichuk

FOR THE APPLICANT

Ronald Bigler

SELF-REPRESENTED
RESPONDENT

SOLICITORS OF RECORD:

Department of Justice
Edmonton Office Prairie Region

FOR THE APPLICANT

FOR THE RESPONDENT