

Date: 20090506

Docket: A-397-08

Citation: 2009 FCA 149

**CORAM: LÉTOURNEAU J.A.
BLAIS J.A.
TRUDEL J.A.**

BETWEEN:

PAUL-ANDRÉ BRULOTTE AND OTHER CO-APPLICANTS

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Québec, Quebec, on May 6, 2009.

Judgment delivered from the Bench at Québec, Quebec, on May 6, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Québec, Quebec, on May 6, 2009)

TRUDEL J.A.

[1] This is an application for judicial review of a decision by Umpire Marin (CUB 70719, dated June 30, 2008) dismissing the representative appeal filed by the applicant. The Umpire's decision, binding 118 other claimants (Applicant's Record, at pages 100 *et seq.*), specifically involves subsections (9) and (19) of section 36 of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations) relating to the allocation of earnings for benefit purposes.

[2] In the case at bar, we will refer only to the specific facts of the applicant's case, albeit keeping in mind that this is a test case the result of which on appeal will also apply to the claimants who agreed to participate in the representative appeal.

[3] On October 24, 2001, the applicant and his co-workers were laid off after their employer, Davie Yards Inc. (Davie), went bankrupt. Under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, they all acquired the status of preferred creditors in the Davie bankruptcy, being eligible for up to \$2000 each.

[4] After he was laid off, the applicant filed a claim for employment insurance benefits, resulting in the establishment of a benefit period for him, effective October 28, 2001.

[5] The lay-off also triggered section 36 of the Regulations as the laid-off employees were, under their collective agreement, entitled to certain benefits, such as statutory holidays and vacation pay (Respondent's Memorandum, page 3).

[6] The relevant subsections of section 36 read as follows:

(9) Subject to subsections (10) and (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the nature of the earnings or 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

(9) Sous réserve des paragraphes (10) et (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 nature de la rémunération et 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

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.

...

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed; and

(b) if they arise from a transaction, to the week in which the transaction occurs.

[Emphasis added]

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.

[...]

(19) La rémunération non visée aux paragraphes (1) à (18) est répartie :

a) si elle est reçue en échange de services, sur la période où ces services ont été fournis;

b) si elle résulte d'une opération, sur la semaine où l'opération a eu lieu.

[je souligne]

[7] The particularity of this case is that the employer's obligation to pay these earnings passed to the trustee named by the creditors in the Davie bankruptcy. The earnings were therefore paid by the trustee in the normal course of its administration of the bankruptcy. The applicant's earnings were paid on September 11, 2008 (affidavit of Diane Brunet: Applicant's Record, page 35 at paragraph 2).

[8] As the decision of the Commission which gave rise to this dispute reports, in accordance with section 46 of the *Employment Insurance Act*, S.C. 1985, c. 23, the trustee informed the Commission, in November 2006, that the applicant was entitled to a gross amount of \$1420.97 for unpaid vacation pay. As a result of the trustee's letter, the Commission notified the applicant that the income payable as a dividend constituted earnings to be deducted from the benefits received

based on the applicant's regular weekly wage fixed at \$840.40. The Commission thus decided that the applicant was not owed any benefits from October 28 to November 3, 2001, and that a balance of \$219 would be allocated to the week starting November 4, 2001. The Commission also added that any sum paid to the applicant by the trustee would be used to refund the Commission for the overpayment (Applicant's Record, page 91).

[9] This gave rise to the applicant's unsuccessful appeals to the Board of Referees and the Umpire, both of which confirmed the Commission's decision.

[10] Speaking on behalf of the Court, our colleague Justice Létourneau wrote as follows concerning subsection 36(9):

. . . the decisions of our Court are consistent on this point, and have taken on the character of a judicial policy that gives subsection 36(9) of the Regulations a practical and functional meaning, a meaning that reflects the intention of Parliament that vacation pay, paid or payable by reason of a lay-off or separation from an employment, be allocated to a number of weeks that begins with the week of the lay-off or separation. This is the intention of subsection 36(9) "regardless of the nature of the earnings or the period in respect of which the earnings are purported to be paid or payable." (*Sarrazin v. Canada*, 2006 FCA 313, at paragraph 7).

[11] This means that a payment made under subsection 36(9) of the Regulations covers "any part of the earnings that becomes due and payable at the time of termination of the contract of employment and the commencement of unemployment" (*Lemay v. Canada*, 2005 FCA 433 at paragraph 4).

[12] The applicant is not questioning this “judicial policy”. Instead he argues that the facts of the case trigger subsection 36(19) of the Regulations. According to the applicant, the transaction described in subsection 36(19) would be, in the case at bar, either the sale by the trustee, on October 14, 2006, of the debtor’s company to a third-party corporation (Applicant’s Memorandum at paragraph 42) or the trustee’s decision, a month later, to pay [TRANSLATION] “vacation dividends” to Davie’s employees or former employees (Applicant’s Memorandum at paragraph 38). We are of the view that this approach is incorrect.

[13] With regard to the allocation of the earnings, subsection 36(9) of the Regulations emphasizes the reason for which the earnings are paid and not the timing of that payment.

[14] Subsection 36(19) of the Regulations cannot apply in the circumstances given its suppletive nature and the fact that it is triggered only when none of subsections (1) to (18) apply.

[15] For all of those reasons, this application for judicial review will be dismissed with costs.

“Johanne Trudel”

J.A.

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-397-08

STYLE OF CAUSE: PAUL-ANDRÉ BRULOTTE AND
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CANADA

PLACE OF HEARING: Québec, Quebec

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DELIVERED FROM THE BENCH BY: TRUDEL J.A.

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