

Date: 20091208

Docket: A-43-09

Citation: 2009 FCA 365

**CORAM: SEXTON J.A.
EVANS J.A.
SHARLOW J.A.**

BETWEEN:

ROBERT MCLAUGHLIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on December 8, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on December 8, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT

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EVANS J.A.

[1] This is an application for judicial review by Robert McLaughlin to set aside a decision of Umpire Goulard (CUB 70731) allowing an appeal by the Canada Employment Insurance Commission (“Commission”) from a decision of a Board of Referees, dated November 8, 2007.

[2] In that decision, the Board allowed Mr McLaughlin's appeal from a decision by the Commission (i) reallocating undeclared earnings pursuant to subsection 36(4) of the *Employment Insurance Regulations*, SOR/96-332 ("Regulations"), to weeks between September 12 and October 29, 2005, which resulted in an overpayment of \$2,891; (ii) imposing a penalty on him of \$1,445 under section 38 of the *Employment Insurance Act*, S.C. 1996, c. 23 ("Act"), for knowingly making false and misleading statements regarding his employment and earnings when he was receiving benefits; and (iii) issuing a notice of violation under section 7.1 of the Act for providing false information to the Commission. The statutory provisions relevant to the disposition of this application are set out in an Appendix to these reasons.

[3] The Board allowed the appeal on the ground that the issue in dispute was whether Mr McLaughlin had received earnings, within the meaning of subsection 35(2) of the Regulations, with respect to employment by his employer, Graphite Specialty Products ("Graphite"), for the weeks of September 12 to October 29, 2005, which he had not declared. The employer's original record of employment ("ROE") had shown that Mr McLaughlin had started work with Graphite after October 29. However, an amended ROE was submitted by the employer on August 3, 2006, shortly after Mr McLaughlin's employment with Graphite was terminated, and showed that Mr McLaughlin had been paid \$680 per week for work done between September 12 and October 29.

[4] The employer's explanation of the discrepancy was that he had not shown earnings in the original ROE for those weeks in order to accommodate Mr McLaughlin who was in receipt of employment insurance benefits at that time. Mr McLaughlin said that he was not working for

Graphite before October 29, 2005 and suggested that the employer had amended the ROE as retaliation, because he had made a health and safety complaint about the employer to the employment standards office of the Ministry of Labour. The Board preferred the evidence of Mr McLaughlin, and his witnesses, to that of the employer, and allowed Mr McLaughlin's appeal.

[5] Before the Umpire, the Commission argued that the only issue properly before the Board was whether part of the post-October 29, 2005 earnings shown on the original ROE, on the basis of which the Commission had continued paying benefits to Mr McLaughlin, should be reallocated to the weeks prior to October 29, when, it was said, the service was rendered. The Commission submitted that the Board had no jurisdiction to determine whether Mr McLaughlin was in "insurable employment" in the weeks before October 29 because that was an issue on which there was a right of appeal to the Tax Court. The only question for the Board, counsel argued, was whether the Commission had properly reallocated the undeclared earnings.

[6] The Commission appears not to have submitted to the Board that it had no jurisdiction to determine if Mr McLaughlin had started working for Graphite before October 29. Nor had it requested a ruling from an officer of the CRA as to the date on which Mr McLaughlin's employment with Graphite started.

[7] The Umpire accepted the Commission's argument, adding that the Commission also lacked jurisdiction to determine when Mr McLaughlin started work with Graphite. The Umpire returned

the matter to the Commission to allow it to request a ruling from the CRA on the duration of Mr McLaughlin's employment by Graphite pursuant to paragraph 90(1)(b) and section 122 of the Act.

[8] We are all of the view that the Umpire erred in law by interpreting these sections as applying to the present case. It is well established that correctness is the standard of review applied to questions of law decided by an Umpire.

[9] Section 90 of the Act provides, among other things, that the Commission may request an officer of the CRA, authorized by the Minister of National Revenue, to make a ruling on the duration of an "insurable employment", including the date on which it began. Section 122 states that if a question specified in section 90 arises in the course of a claim for benefits, it shall be determined by an officer of the CRA as provided by section 90.

[10] The concepts of insurable earnings and insurable employment govern, among other things, the amount of an employee's employment insurance contributions, whether a claimant has qualified for benefits and if so, at what level and for what period of time. In the present case, the question of whether Mr McLaughlin was in receipt of earnings from Graphite in respect of service rendered before October 29 was relevant to whether he had ceased to be entitled to employment insurance benefits because he was in receipt of earnings from employment, not to the level or duration of benefits to which, for example, he would be entitled after his employment by Graphite was terminated. In other words, since this is not a question of insurability relating to the qualifying

period, but of entitlement to receive benefits, it is a matter for the Board and the Umpire, not the CRA and the Tax Court: see *Canada (Attorney General) v. D'Astoli* (1997), 223 N.R. 368 (F.C.A.).

[11] Counsel relied on *Canada (Attorney General) v. Tuomi* (A-110-99), and *Canada (Attorney General) v. Didiolato*, 2002 FCA 345, as authority for the proposition that the Board had no jurisdiction to decide the issue in dispute in the present case, namely whether Mr McLaughlin had received income from employment between September 12 and October 29, 2005. However, these cases concern the determination of hours of insurable employment to qualify for employment insurance benefits, not, as here, whether a claimant had received income that reduced the benefits to which the claimant was entitled.

[12] Finally, for the purpose of section 35 of the Regulations “employment” is defined in subsection 35(1) as including “any employment whether insurable or not insurable”. Hence, when subsection 35(2) states that “the entire income of a claimant arising out of any *employment*” is to be taken into account in calculating the amount to be deducted from benefits and for the purposes of section 46, “employment” is not limited to insurable employment. In contrast, paragraph 90(1)(b) of the Act refers only to the duration of “insurable employment”.

[13] For these reasons, the application for judicial review will be allowed, the Umpire’s decision set aside, and the matter remitted to a different Umpire to be redetermined on the basis that the

Board of Referees had jurisdiction to decide whether Mr McLaughlin was in receipt of earnings from Graphite for services rendered by him in the weeks of September 12 to October 29, 2005.

“John M. Evans”

J.A.

APPENDIX

Employment Insurance Act, S.C. 1996, c. 23

Increase in required hours

7.1 (1) The number of hours that an insured person, other than a new entrant or re-entrant to the labour force, requires under section 7 to qualify for benefits is increased to the number provided in the following table if the insured person accumulates one or more violations in the 260 weeks before making their initial claim for benefit.

...

Majoration du nombre d'heures d'emploi assurable requis

7.1 (1) Le nombre d'heures d'emploi assurable requis au titre de l'article 7 est majoré conformément au tableau qui suit, en fonction du taux régional de chômage applicable, à l'égard de l'assuré autre qu'une personne qui devient ou redevient membre de la population active s'il est responsable d'une ou de plusieurs violations au cours des deux cent soixante semaines précédant sa demande initiale de prestations.

[...]

Violations

7.1 (4) An insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person:

- (a) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39 or 65.1;

...

Violations

7.1 (4) Il y a violation lorsque le prestataire se voit donner un avis de violation parce que, selon le cas :

- (a) il a perpétré un ou plusieurs actes délictueux prévus à l'article 38, 39 ou 65.1 pour lesquels des pénalités lui ont été infligées au titre de l'un ou l'autre de ces articles, ou de l'article 41.1;

[...]

Classification of violations

7.1 (5) Except for violations for which a warning was imposed, each violation is classified as a minor, serious, very serious or subsequent violation as follows:

- (a) if the value of the violation is
 - (i) less than \$1,000, it is a minor violation,
 - (ii) \$1,000 or more, but less than \$5,000, it is

Qualification de la violation

7.1 (5) À l'exception des violations pour lesquelles un avertissement est donné, chaque violation est qualifiée de mineure, de grave, de très grave ou de subséquente, en fonction de ce qui suit :

- (a) elle est mineure, si sa valeur est inférieure à 1 000 \$, grave, si elle est inférieure à 5 000 \$, et très grave, si elle est de 5 000 \$ ou plus;
- (b) elle est subséquente si elle fait

- (iii) a serious violation, or \$5,000 or more, it is a very serious violation; and
- (b) if the notice of violation is issued within 260 weeks after the person accumulates another violation, it is a subsequent violation, even if the acts or omissions on which it is based occurred before the person accumulated the other violation.

l'objet d'un avis de violation donné dans les deux cent soixante semaines suivant une autre violation, même si l'acte délictueux sur lequel elle est fondée a été perpétré avant cette dernière.

Value of violations

7.1 (6) The value of a violation is the total of

- (a) the amount of the overpayment of benefits resulting from the acts or omissions on which the violation is based, and
- (b) if the claimant is disqualified or disentitled from receiving benefits, or the act or omission on which the violation is based relates to qualification requirements under section 7, the amount determined, subject to subsection (7), by multiplying the claimant's weekly rate of benefit by the average number of weeks of regular benefits, as determined under the regulations.

Valeur de la violation

7.1 (6) La valeur d'une violation correspond à la somme des montants suivants :

- (a) le versement excédentaire de prestations lié à l'acte délictueux sur lequel elle est fondée;
- (b) si le prestataire est exclu ou inadmissible au bénéfice des prestations, ou si l'acte délictueux en cause a trait aux conditions requises au titre de l'article 7, le montant obtenu, sous réserve du paragraphe (7), par multiplication de son taux de prestations hebdomadaires par le nombre moyen de semaines à l'égard desquelles des prestations régulières sont versées à un prestataire, déterminé conformément aux règlements.

Maximum

7.1 (7) The maximum amount to be determined under paragraph (6)(b) is the amount of benefits that could have been paid to the claimant if the claimant had not been disentitled or disqualified or had met the qualification requirements under section 7.

Maximum

7.1 (7) Le montant obtenu au titre de l'alinéa (6)b ne peut excéder le montant des prestations auxquelles le prestataire aurait eu droit s'il n'avait pas été exclu ou déclaré inadmissible ou s'il avait rempli les conditions requises au titre de l'article 7.

...

[...]

Penalty for claimants, etc.

38. (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

- (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
- (b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
- (c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;

...

Request for ruling

90. (1) An employer, an employee, a person claiming to be an employer or an employee or the Commission may request an officer of the Canada Revenue Agency authorized by the Minister to make a ruling on any of the following questions:

- (a) whether an employment is insurable;
- (b) how long an insurable employment lasts, including the dates on which it begins and ends;
- (c) what is the amount of any insurable earnings;

Pénalité : prestataire

38. (1) Lorsqu'elle prend connaissance de faits qui, à son avis, démontrent que le prestataire ou une personne agissant pour son compte a perpétré l'un des actes délictueux suivants, la Commission peut lui infliger une pénalité pour chacun de ces actes :

- (a) à l'occasion d'une demande de prestations, faire sciemment une déclaration fausse ou trompeuse;
- (b) étant requis en vertu de la présente loi ou des règlements de fournir des renseignements, faire une déclaration ou fournir un renseignement qu'on sait être faux ou trompeurs;
- (c) omettre sciemment de déclarer à la Commission tout ou partie de la rémunération reçue à l'égard de la période déterminée conformément aux règlements pour laquelle il a demandé des prestations;

[...]

Demande de décision

90. (1) La Commission, de même que tout employé, employeur ou personne prétendant être l'un ou l'autre, peut demander à un fonctionnaire de l'Agence du revenu du Canada autorisé par le ministre de rendre une décision sur les questions suivantes :

- (a) le fait qu'un emploi est assurable;
- (b) la détermination de la durée d'un emploi assurable, y compris ses dates de début et de fin;
- (c) la détermination de la rémunération assurable;

(d) how many hours an insured person has had in insurable employment;

...

(d) la détermination du nombre d'heures exercées dans le cadre d'un emploi assurable;

[...]

Determination of questions

122. If a question specified in section 90 arises in the consideration of a claim for benefits, it shall be determined by an authorized officer of the Canada Revenue Agency, as provided by that section.

Règlements des questions

122. Si, au cours de l'examen d'une demande de prestations, une question prévue à l'article 90 se pose, cette question est décidée par le fonctionnaire autorisé de l'Agence du revenu du Canada comme le prévoit cet article.

Employment Insurance Regulations, SOR/96-332

35. (1) The definitions in this subsection apply in this section.

“employment” means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

...

35. (1) Les définitions qui suivent s'appliquent au présent article.

« emploi »

(a) Tout emploi, assurable, non assurable ou exclu, faisant l'objet d'un contrat de louage de services exprès ou tacite ou de tout autre contrat de travail, abstraction faite des considérations suivantes :

[...]

35. (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings has occurred and the amount to be deducted from benefits payable under section 19 or subsection 21(3) or 22(5) of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a

35. (2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour déterminer s'il y a eu un arrêt de rémunération et fixer le montant à déduire des prestations à payer en vertu de l'article 19 ou des paragraphes 21(3) ou 22(5) de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment :

(a) les montants payables au prestataire, à titre de salaire, d'avantages ou autre rétribution, sur les montants réalisés provenant des biens de son employeur failli;

bankrupt employer;

...

36. (4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

[...]

36. (4) La rémunération payable au prestataire aux termes d'un contrat de travail en échange des services rendus est répartie sur la période pendant laquelle ces services ont été fournis.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-43-09

**(AN APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE UMPIRE,
DATED JULY 16, 2008, FROM COURT FILE NO.: CUB 70731, FROM MR JUSTICE
GOULARD)**

STYLE OF CAUSE: ROBERT MCLAUGHLIN v. THE
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 8, 2009

**REASONS FOR JUDGMENT OF
THE COURT BY:** (SEXTON, EVANS & SHARLOW
J.J.A.)

DELIVERED FROM THE BENCH BY: EVANS J.A.

APPEARANCES:

Robert McLaughlin FOR THE APPLICANT (SELF-
REPRESENTED)

Tania Nolet FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robert McLaughlin FOR THE APPLICANT (SELF-
REPRESENTED)
Markdale, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada