A-130-96

MONTRÉAL, QUEBEC, THIS 4th DAY OF OCTOBER 1996

CORAM: **THE HONOURABLE MADAME JUSTICE DESJARDINS**
THE HONOURABLE MR. JUSTICE DÉCARY
THE HONOURABLE DEPUTY JUSTICE CHEVALIER

BETWEEN:

MICHEL MEUNIER,
1111 Arthur Lismer, # 809,
Montreal,

Applicant,

AND:

CANADA EMPLOYMENT AND
IMMIGRATION COMMISSION,
1441 St-Urbain,
Montréal,

-and-

ATTORNEY GENERAL OF CANADA,
200 René-Lévesque Blvd. West,
East Tower, 5th floor,
Montréal,

Respondents.

J U D G M E N T

This application for judicial review is allowed, the decision *a quo* is set aside and the matter is referred back to the Chief Umpire or to an umpire designated by him to be redetermined on the basis that, for the purposes of the application of subsection 28(1) of the *Unemployment Insurance Act*, it had not been established that the applicant lost his employment because of his own misconduct.

Alice Desjardins
J.A.

Certified true translation

C. Delon, LL.L.

A-130-96

CORAM: **DESJARDINS J.A.**
DÉCARY J.A.
CHEVALIER C.J.

BETWEEN:

MICHEL MEUNIER,

Applicant,

AND:

CANADA EMPLOYMENT AND
IMMIGRATION COMMISSION,

-and-

ATTORNEY GENERAL OF CANADA,

Respondents.

Hearing held at Montréal
on October 1 and 4, 1996

Judgment delivered at Montréal
on Friday, October 4, 1996

REASONS FOR JUDGMENT OF THE COURT BY: **DÉCARY J.A.**

A-130-96

CORAM: **THE HONOURABLE MADAME JUSTICE DESJARDINS**
THE HONOURABLE MR. JUSTICE DÉCARY
THE HONOURABLE DEPUTY JUSTICE CHEVALIER

BETWEEN: MICHEL MEUNIER,

Applicant,

AND:

CANADA EMPLOYMENT AND
IMMIGRATION COMMISSION,

-and-

ATTORNEY GENERAL OF CANADA,

Respondents.

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Montréal
on Friday, October 4, 1996)

DÉCARY J.A.

The applicant was a photographer with the *Journal de Montréal* at the time he was charged with sexual assault on two little girls, aged eight and nine years, respectively. As soon as the employer was informed of the charge, it decided to suspend the applicant, without pay, until the case had been decided. The applicant then applied for unemployment insurance benefits. The Commission stated that it was of the opinion that he had lost his employment by reason of misconduct (subsection 28(1) of the *Unemployment Insurance Act*[1]), and disqualified the applicant from receiving benefits for a period of twelve weeks (paragraph 30(*c*) of the Act, as it then read). A majority of the board of referees ("the board") affirmed the Commission's decision, as did the umpire.

[1] Subsection 28(1) reads as follows:
A claimant is disqualified from receiving benefits under this Part if he lost his employment by reason of his own misconduct or if he voluntarily left his employment without just cause.

It is settled that the misconduct referred in subsection 28(1) "is not a mere breach by the employee of any duty related to his employment; it is a breach of such scope that its author could normally foresee that it would be likely to result in his dismissal".[2] It is also settled that the burden is on the Commission to prove, on the balance of probabilities, that the section 28 conditions have been fulfilled.[3] And lastly, it is settled that "an objective assessment [is] needed sufficient to say that misconduct was in fact the cause of the loss of employment",[4] that an employer's mere assurance that it believes the conduct in question is misconduct will not be sufficient[5] and that "[f]or a board of referees to conclude that there was misconduct by an employee, it must have before it sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behaviour was reprehensible."[6]

2 *A.G. Canada v. Langlois*, A-94-95, February 21, 1996, unreported, Pratte J.A.

3 *Choinière v. Canada Employment and Immigration Commission*, A-471-95, May 28, 1996, unreported, Marceau J.A.

4 *Choinière*, *supra*.

5 *Fakhari v. A.G. Canada*, A-732-95, May 16, 1996, unreported, Robertson J.A.

6 *Joseph v. C.E.I.C.*, A-636-85, March 11, 1986, unreported, Pratte J.A.

In the instant case, the only evidence in the record that came from the employer is the suspension letter which the employer sent to the applicant at the time it learned that sexual assault charges had been laid. The following passage is of interest:

[TRANSLATION]

> The acts with which you are charged constitute serious and unacceptable wrongdoing on the part of an employee of the Journal de Montréal. Moreover, according to certain preliminary information, you used the name of the Journal de Montréal, directly or indirectly, in the commission of those acts. (Applicant's record, p. 21)

The employer refused to provide any further explanation, preferring to refer the Commission to the police officers in charge of the investigation, and did not even reply to the following question which the Commission put to it in writing: [TRANSLATION] "Was this outside working hours?" (Applicant's record, p. 19).

In the submissions made by the Commission to the board on April 7, 1992, it stated:

[TRANSLATION]

> In these circumstances, the value of the parties' statements had to be assessed. The employer was considered to be a responsible firm which acts in good faith. It cannot engage in making such accusations without first obtaining serious information. (Applicant's record, p. 31)

The board held a hearing on April 28, 1992. The record was not as complete as it would have liked, and so it adjourned to a later date, for the following reasons:

[TRANSLATION]

> Since it is impossible to question the employer concerning the charges made against its former employee, the Board of Referees asks that the Commission pursue the investigation concerning the reason for the separation from employment, and if possible to have a copy of the incident from the police station concerning the complaint which is in issue in this case. (Applicant's record, p. 44 - emphasis in the original)

On May 27, 1992, in reply to this request to do further investigation, the Commission forwarded the following additional submissions to the Commission:

[TRANSLATION]

> First, we are of the opinion that all the facts available in connection with the claimant's separation from employment are in the record (see, *inter alia*, Exhibits 4, 6 and 8). Both parties, the claimant and the employer, have provided their accounts and their views, and in our opinion nothing would be gained by pursuing the investigation.
>
> On the question of the police report, we would draw the board of referees' attention to the fact that it is not the Commission's policy to request a police report in cases involving criminal charges since the Commission does not have to establish the claimant's guilt. Its burden of proof is limited to establishing that the employer acted in good faith and on reasonable grounds when it dismissed the claimant. (Applicant's record, p. 45 - emphasis in the original)

On November 12, 1992, the board of referees rendered the following majority decision:

[TRANSLATION]

> The Chairperson and the Employer Representative are of the opinion that the criminal charge reported in the newspaper was the result of a preliminary investigation by the MUC which was required to base its decision on sufficient evidence to lay the charge. Given these facts, the employer was then able to establish that there had been misconduct on the part of its employee, and it took the necessary measures to protect its reputation by suspending him indefinitely.

The dissenting member, on the other hand, was of the opinion that neither the Commission nor the employer had proved the claimant's misconduct.

On November 30, 1995, the umpire made the decision *a quo*, from which we shall reproduce the following passage:

[TRANSLATION]

> It is clear that it is generally not sufficient that charges be laid. In the instant case, however, I am of the opinion that all the circumstances, taken as a whole, were entirely such as might constitute misconduct within the meaning of subsection 28(1) of the Act. It was therefore for the board of referees to decide whether there had in fact been misconduct. There is nothing in section 80 of the Act that compels me, or persuades me, to intervene.

We are compelled to observe that, essentially, the only evidence in the Commission's file was the employer's account of the facts, remarkably vague and speculative though that account was. In its written submissions to the board, the Commission stated that from the outset it accepted the employer's explanation because, in its view, it could not be that the employer, "a responsible firm which

acts in good faith", could have "[made] such accusations without first obtaining serious information". Not only did the Commission not seek to verify the nature and validity of the "preliminary information" on which the employer stated it had relied, but in addition, despite the board's request that it do further investigation, it deemed it pointless to pursue the investigation.

In our view, the Commission has not done its duty. In order to establish misconduct such as is penalized by section 28, and the connection between that misconduct and the employment, it is not sufficient to note that criminal charges have been laid which have not been proven at the time of the separation from employment, and to rely on speculation by the employer without doing any other verification. The consequences of loss of employment by reason of misconduct are serious. The Commission, and the board of referees and the umpire, cannot be allowed to be satisfied with the sole and unverified account of the facts given by the employer concerning actions that, at the time the employer makes its decision, are merely unproved allegations. Certainly, the Commission will be more easily able to discharge its burden if the employer made its decision, for example, after the preliminary inquiry had been held and, *a fortiori*, if it made the decision after the trial.

We therefore find that the Commission failed to discharge the burden of proving the applicant's misconduct within the meaning of section 28 of the Act, either before the board of referees or before the umpire.

The application for judicial review will be allowed, the decision *a quo* will be set aside and the matter will be referred back to the Chief Umpire or to an umpire designated by him to be redetermined on the basis that, for the purposes of the application of subsection 28(1) of the *Unemployment Insurance Act*, it had not been established that the applicant lost his employment by reason of his own misconduct.

Robert Décary
J.A.

Certified true translation

C. Delon, LL.L.

Federal Court of Canada

Court file No. A-130-96

BETWEEN

MICHEL MEUNIER,

Applicant,

— and —

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION ET AL.,

Respondents.

REASONS FOR JUDGMENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO:	A-130-96
STYLE OF CAUSE:	MICHEL MEUNIER, Applicant, **AND:** CANADA EMPLOYMENT AND IMMIGRATION COMMISSION, **AND:** ATTORNEY GENERAL OF CANADA, Respondents.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 1 and 4, 1996

REASONS FOR JUDGMENT OF THE COURT (DESJARDINS AND DÉCARY JJ.A. AND CHEVALIER D.J.)

DELIVERED FROM THE BENCH BY:	Décary J.A.
DATED:	October 4, 1996

APPEARANCES:

Marie Pépin	for the applicant
Francisco Couto	for the respondents

SOLICITORS OF RECORD:

SAUVÉ & ROY Montréal, Quebec	for the applicant
George Thomson Deputy Attorney General of Canada Ottawa, Ontario	for the respondents