Date: 20090504

Docket: A-416-08

Citation: 2009 FCA 141

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

YVES CARON

Respondent

Heard at Québec, Quebec, on May 4, 2009.

Judgment delivered from the Bench at Québec, Quebec, on May 4, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

Date: 20090504

Docket: A-416-08

Citation: 2009 FCA 141

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

YVES CARON

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Québec, Quebec, on May 4, 2009)

LÉTOURNEAU J.A.

[1] After issuing six disciplinary notices for absenteeism to the respondent, the employer decided to dismiss him: see the notices in question in the applicant's record, pages 53 to 66.

[2] In these notices, the respondent was informed that his absences were unjustified, that he had a duty to work, that the situation was intolerable and that [TRANSLATION] "definitive measures" would be taken. The respondent knew the employer's policy on absenteeism. He knew that he

would be dismissed: *ibidem*, at page 67, see the respondent's out-of-court statement in that regard, and at page 112 of the decision of the Board of Referees.

[3] The Employment Insurance Commission (the Commission) refused to pay the respondent unemployment benefits, relying on section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). This section disqualifies workers who lose their jobs because of their misconduct from receiving any benefits.

[4] A divided Board of Referees allowed the respondent's appeal of the Commission's decision. In reading the decision of the majority, it is clear that the decision-makers were somewhat confused about the legitimacy of the dismissal by the employer and the concept of misconduct within the meaning of the Act. In our opinion, this confusion tainted the decision of the Board of Referees, which, consciously or unconsciously, censured the employer's conduct. In *Attorney General of Canada v. McNamara*, 2007 FCA 107, at paragraph 23, this Court pointed out that "[t]here are, available to an employee wrongfully dismissed, remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits": see also *Attorney General of Canada v. Lee*, 2007 FCA 406, at paragraphs 4 to 6, *per* Justice Trudel.

[5] In *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36, which involved a dismissal for absenteeism, Justice Nadon wrote at paragraphs 14 and 32 of the reasons for his decision:

> [14] Thus, there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional.

> Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.
> . . .
>
> [32] There can be no disputing, in my view, that an employee's repeated failure to show up for work is a serious breach of the employment contract, all the more so when the employee has been warned by his employer that such a failure will result in his dismissal.

See also *Canada (Attorney General) v. Pearson*, 2006 FCA 199, at paragraphs 7, 17, 18 and 19.

[6] In his decision (see CUB 70755, at pages 9 and 10), the Umpire, by upholding the decision of the Board of Referees, endorsed two errors of law and one of fact committed by the Board of Referees, having a significant effect on the decision he made.

[7] First, the Board of Referees limited to twelve (12) months, as stipulated in the collective agreement, the retroactivity for disciplinary action following similar conduct: *ibidem*, at page 5, article 13.05. Yet, such a time limit does not exist for the purpose of misconduct under section 30 of the Act: see *Attorney General of Canada v. Hallée*, 2008 FCA 159, at paragraphs 2 and 11.

[8] Second, the Board did not consider that before July 7, 2005, the employer had two meetings with the respondent to discuss his absenteeism. These meetings were held on May 18 and September 16, 2004.

[9] The Board of Referees clearly erred when it stated that the defendant had not [TRANSLATION] "had similar problems since he was hired in October 2002", although the

documentary evidence on file reveals a similar problem prior to May 2005, which the employer saw as the starting point for the respondent's absenteeism. The Board failed to consider this evidence, thus committing an error of law.

[10] Lastly, the Board also misapprehended the facts when it stated that the whole thing began in May 2005, after the respondent was injured at work.

[11] We are satisfied, based on the evidence and the law on misconduct, that the Board of Referees would have held otherwise if it had not committed the errors the respondent alleges.

[12] It was the Umpire's duty to make the necessary corrections, which he failed to do.

[13] For these reasons, the application for judicial review will be allowed with costs, the decision of the Umpire will be set aside and the matter will be referred back to the Chief Umpire or his designate for redetermination on the basis that the Commission’s appeal should be allowed and the respondent disqualified from unemployment benefits as a result of his misconduct within the meaning of section 30 of the Act.

“Gilles Létourneau”

J.A.

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-416-08
(JUDICIAL REVIEW OF A DECISION OF UMPIRE GUY COULARD DATED JUNE 26, 2008, FILE NO. CUB 70755)	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. YVES CARON
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	May 4, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	LÉTOURNEAU J.A. BLAIS J.A. TRUDEL J.A.
DELIVERED FROM THE BENCH BY:	LÉTOURNEAU J.A.

APPEARANCES:

Pauline Leroux Chantal Labonté	FOR THE APPLICANT
Isabelle Lacas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Pépin et Roy, Attorneys Montréal, Quebec	FOR THE RESPONDENT