Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20091020

Docket: A-200-09

Citation: 2009 FCA 303

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PATRICK JOLIN

Respondent

Hearing held at Montréal, Quebec, on October 20, 2009.

Judgment delivered from the Bench at Montréal, Quebec, on October 20, 2009.

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

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20091020

Docket: A-200-09

Citation: 2009 FCA 303

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PATRICK JOLIN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on October 20, 2009)

PELLETIER J.A.

[1] This is an application for judicial review of a decision of Judge Maximilien Polak sitting as an umpire dismissing the appeal of the Employment Insurance Commission on the ground that the Board of Referees had not erred in concluding that Mr. Jolin's conduct in leaving his workplace as he did on April 22, 2008, was not misconduct within the meaning of section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23.

[2] The respondent, Mr. Jolin, filed no memorandum and was not present at the hearing.

[3] The facts may be briefly summarized as follows. Mr. Jolin was an employee at Supra formules d'affaires inc. When he arrived at work at 5:25 a.m. on April 22, 2008, the press he was to work on was broken, and no spare parts were available. Rather than wait for his supervisor to arrive at 7:45 a.m., he left a message for his employer stating that he was going home because he was angry and not feeling well. The employer called him around 10 a.m. and told him that he disagreed with Mr. Jolin's decision to leave the workplace. Mr. Jolin expected a suspension, but, when the employer called him back around 5 p.m., it was to dismiss him.

[4] Mr. Jolin made a claim for benefits, and a benefit period was established for him. The Commission later informed him that it was unable to pay him the benefits, as he had lost his employment because of his misconduct. Mr. Jolin appealed that decision to the Board of Referees. The Board of Referees allowed his appeal on the ground that the alleged conduct was not a serious breach that would lead Mr. Jolin to believe that he could be dismissed.

[5] The Umpire dismissed the Commission's appeal, stating that he had trouble accepting or understanding [TRANSLATION] "refusal to work" as a reason for dismissing an employee with 10 years of service. In his view, the Board of Referees had not erred in fact or in law.

[6] The application of the definition of “misconduct” within the meaning of the *Employment Insurance Act* to the facts of this case is a question of mixed fact and law that is reviewable on the standard of reasonableness. The Board of Referees must also stay within the bounds of its jurisdiction, and any decision that is outside of the Board’s jurisdiction is reviewable on the standard of correctness. If the Board of Referees exceeds its jurisdiction, the Umpire must intervene to correct this error of law.

[7] In *Canada (Attorney General) v. Marion*, [2002] F.C.J. No. 711, Justice Létourneau, writing for this Court, noted that the Board is not authorized to determine “whether the severity of the penalty imposed by the employer was justified or whether the employee’s conduct was a valid ground for dismissal”. The question that the Board must ask is whether the claimant’s conduct amounted to misconduct within the meaning of the Act.

[8] In this case, the Board of Referees found that Mr. Jolin’s conduct did not justify his dismissal. It was of the opinion that leaving the workplace did not amount to insubordination, that Mr. Jolin was not required to remove the defective part as argued by the employer because there were mechanics assigned to that task, and that Mr. Jolin had no reason to believe that he could be dismissed because he had left his workplace without authorization.

[9] The Umpire could not accept that an employee with 10 years of service could be dismissed because of a [TRANSLATION] “refusal to work”.

[10] In *Mishibinijima v. Canada (Attorney General)*, [2007] F.C.J. No. 169, at paragraph 14, this Court determined the meaning of "misconduct" for the purposes of the Act:

> 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.

[11] Here, there is no doubt that the claimant's conduct was wilful and that the claimant knew that this conduct could lead to serious disciplinary consequences. In fact, he expected to be suspended. That the disciplinary sanction was harsher than the one the claimant expected does not mean that his conduct was not misconduct.

[12] The Board of Referees exceeded its jurisdiction in ruling on the justification of the claimant's dismissal, an error that the Umpire had to correct. Consequently, the application for judicial review will be allowed, the Umpire's decision set aside and the matter referred back to the Chief Umpire or his designate for redetermination on the basis that Mr. Jolin must be disqualified from receiving benefits because of his misconduct within the meaning of section 30 of the *Employment Insurance Act*.

"J.D. Denis Pelletier"
J.A.

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-200-09
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. PATRICK JOLIN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 20, 2009
REASONS OF JUDGMENT OF THE COURT BY:	NOËL, PELLETIER, TRUDEL JJ.A.
DELIVERED FROM THE BENCH BY:	PELLETIER J.A.

APPEARANCES:

Pauline Leroux Chantal Labonté	FOR THE APPLICANT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Véronique Coutin St-Alphonse-de-Granby, Quebec	FOR THE RESPONDENT