

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20091117

Docket: A-213-09

Citation: 2009 FCA 333

**CORAM : BLAIS C.J.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

LOLITA LASSONDE

Respondent

Heard at Montréal, Quebec, on November 17, 2009.

Delivered from the Bench at Montréal, Quebec, on November 17, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on November 17, 2009)

TRUDEL J.A.

[1] This is an application for judicial review of decision CUB 72148 of Umpire Maximilien Polak, who, like the Board of Referees, ruled that Lolita Lassonde had not lost her employment because of her own misconduct within the meaning of section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) and was therefore not disqualified from receiving benefits. In doing so, he dismissed the appeal of the Employment Insurance Commission.

[2] For nearly one and one-half years, Ms. Lassonde had held employment as a [TRANSLATION] “barmaid-beer server”. On November 7, 2007, her employer notified her that she was being dismissed for excessive consumption of alcohol during her hours of work (notice of dismissal, applicant’s appeal book, at page 45). Ms. Lassonde did not deny the incident, admitting that she did not remember what had happened (applicant’s appeal book, Umpire’s record, Exhibit 5, page 44). The respondent attended the hearing of this appeal and made submissions to the Court.

[3] In this case, the Board of Referees ruled that the alleged act was not wilful, noting that Ms. Lassonde attributed her alcohol consumption to “serious fatigue as a result of her spouse’s health problems” and that her employer had never given her a written warning about her work conduct (Board of Referees’ reasons for decision, applicant’s appeal book, at page 59).

[4] As far as the Umpire was concerned, he accepted the assessment of the facts made by the Board of Referees and concluded that there was evidence on which it could base its decision.

[5] We agree with the applicant that the Umpire repeated the error made by the Board of Referees and that he misdirected himself in law by ignoring the repeated rulings of our Court to the effect that

. . . 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. [*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, at paragraph 14; see also *Canada (Attorney General) v. Caron*, 2009 FCA 141 at paragraph 5.]

[6] The respondent's explanations for her behaviour are not determinative of the issue of misconduct as they were insufficient in themselves to refute the fact that her consumption of alcohol was wilful. The Umpire should have intervened to correct the Board of Referees' mistake in law. He did not do so. He accordingly made a mistake which warrants intervention by our Court.

[7] For these reasons, the application for judicial review will be allowed without costs, the Umpire's decision will be set aside and the matter will be returned to the Chief Umpire or his designate for rehearing, taking into consideration that Ms. Lassonde is disqualified from receiving benefits because of her misconduct.

“Johanne Trudel”

J.A.

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-213-09

(JUDICIAL REVIEW OF A DECISION OF UMPIRE MAXIMILIAN POLAK DATED MARCH 18, 2009, FILE NO. CUB 72148.)

STYLE OF CAUSE: The Attorney General of Canada
v. Lolita Lassonde

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 17, 2009

REASONS FOR JUDGEMENT OF THE COURT BY: BLAIS C.J.
NOËL J.A.
TRUDEL J.A.

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

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