

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200702

Docket: A-340-18

Citation: 2020 FCA 114

[ENGLISH TRANSLATION]

**CORAM: BOIVIN J.A.
GLEASON J.A.
RIVOALEN J.A.**

BETWEEN:

9089-7679 QUÉBEC INC.

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
and AUDREY AUDETTE**

Respondents

Online videoconference hearing organized by the Registry,

on June 29, 2020.

Judgment delivered at Ottawa, Ontario, on July 2, 2020.

REASONS FOR JUDGMENT BY:

BOIVIN J.A.

CONCURRED IN BY:

**GLEASON J.A.
RIVOALEN J.A.**

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] Audrey Audette (the claimant) worked as a waitress for 9089-7679 Québec Inc. (the applicant) at the “Brasserie le Manoir” restaurant for a little over a year, until November 21, 2014, the date on which she was dismissed. She then filed an initial application for employment insurance benefits, which was approved by the Canada Employment Insurance Commission (the Commission) on January 9, 2015. As a result of allegations of misconduct made by the applicant,

Ms. Audette's payments were suspended. She filed an application for reconsideration to the Commission, which then changed its position in Ms. Audette's favour on the basis that there was insufficient information to conclude that she had lost her employment on the ground of misconduct. Dissatisfied with the Commission's decision, the applicant appealed to the General Division of the Social Security Tribunal (SST) on April 9, 2015.

[2] The applicant submits that it dismissed the claimant after having discovered irregularities in the Brasserie le Manoir's accounting around November 2014 (applicant's memorandum at paras. 2, 4–6, 9–12). More specifically, it submits that the claimant was responsible for these irregularities because she had repeatedly misappropriated orders paid in cash by attributing these orders to other servers who were not on duty at the time of the sales, with the cash register computer system used at the Brasserie le Manoir, which is known under the trademark "Maître'D" (applicant's memorandum at paras. 4–9; General Division's reasons at para. 105). On July 20, 2017, the General Division of SST (General Division) rendered its decision and upheld the Commission's decision. On September 14, 2018, the Appeal Division of the SST (Appeal Division) then dismissed the applicant's appeal from the General Division's decision on the ground that the General Division committed no error in finding that the applicant had not met its burden of proof in establishing that Ms. Audette was not entitled to the employment insurance benefits under the *Employment Insurance Act* (S.C. 1996, c. 23) section 30 (EIA) (2018 SST 900 at para. 23 (Appeal Division's reasons)).

[3] This Court has before it the applicant's application for judicial review of the Appeal Division's decision.

[4] To fully understand the factual context of this case, it is important to remember that, prior to the General Division's decision and that of the Appeal Division, the Court of Québec rendered a decision on March 31, 2017 (2017 QCCQ 3564) in a civil liability action involving the same parties, with the exception of the Commission, pursuant to which the Court of Québec found that Ms. Audette had committed fraud by misappropriating more than \$8,000 from the applicant using the above-mentioned scheme.

[5] Having considered the evidence before it, the General Division found that it was insufficient to conclude, on a balance of probabilities, that the claimant had committed the alleged misconduct; therefore, an exclusion should not be imposed under section 30 of the EIA (General Division's reasons at para. 124). It did not consider itself bound by the Court of Québec's judgment, as it did not have the same evidence (General Division's reasons at paras. 118, 121). The General Division attached very little weight and importance to the Court of Québec's judgment in its reasons. For its part, the Appeal Division succinctly noted that the General Division [TRANSLATION] "was in no way bound by the Court of Québec's decision" and that it [TRANSLATION] "was open to the General Division to ascertain and interpret the facts and to assess the issue that was before it" (Appeal Division's reasons at para. 17).

[6] However, it strikes me that, in the circumstances of this case, it was incumbent upon the Appeal Division to explain how it was [TRANSLATION] "open" to the General Division to disregard, as it did, the Court of Québec's decision with respect to the doctrine of *res judicata*, especially since this issue was the backdrop of the dispute at issue. Not only do the General Division and Appeal Division make explicit mention of the Court of Québec's decision in their

reasons, but the Attorney General refers to the [TRANSLATION] “earlier proceedings” in his memorandum and cites *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 SCR 657 without expanding further on the matter (Attorney General of Canada’s memorandum at para. 27).

[7] In my view and regardless of the standard of review, this Court is unable to properly proceed with its role as the reviewing court as a result of the Appeal Division’s lack of analysis of the doctrine of *res judicata* as regards the Court of Québec’s judgment (*Canadian National Railway Company v. Richardson International Limited*, 2020 FCA 20, 314 A.C.W.S. (3d) 414 at paras. 44, 53). In my view, this is sufficient to allow the applicant’s application.

[8] For these reasons, I would allow the application for judicial review with costs. Therefore, I would set aside the SST Appeal Division’s decision (2018 TSS 900) rendered on September 14, 2018. I would return the case to the same member of the Appeal Division so that he may dispose of the appeal on the basis of the doctrine of *res judicata* with respect to the Court of Québec’s decision.

“Richard Boivin”

J.A.

“I agree.

Mary J. L. Gleason J.A.”

“I agree.

Marianne Rivoalen, J.A.”

FEDERAL COURT OF APPEAL

COUNSEL OF RECORD

DOCKET: A-340-18

STYLE OF CAUSE: 9089-7679 QUÉBEC INC. v. THE
ATTORNEY GENERAL OF
CANADA AND
AUDREY AUDETTE

PLACE OF HEARING: BY ONLINE
VIDEOCONFERENCE

DATE OF HEARING: JUNE 29, 2020

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GLEASON J.A.
RIVOALEN J.A.

DATED: JULY 2, 2020

APPEARANCES:

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