

Date: 20071002

Docket: A-473-06

Citation: 2007 FCA 312

**CORAM: NADON J.A.
SEXTON J.A.
SHARLOW J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

TRAVIS LARIVEE

Respondent

Heard at Toronto, Ontario, on October 2, 2007.

Judgment delivered from the Bench at Toronto, on October 2, 2007.

REASONS FOR JUDGMENT OF THE COURT BY:

SEXTON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on October 2, 2007)

SEXTON J.A.

[1] The Respondent was dismissed from his employment with the Monteith Correctional Complex. The reason given by the employer at the time for the dismissal was that the Respondent had committed a breach of trust. The Applicant argues that the breach of trust referred to, was the selling of contraband tobacco by the Respondent to the inmates of the Complex.

[2] The Respondent claimed employment benefits but the Commission determined that the Respondent lost his job due to his misconduct and therefore no benefits were payable.

[3] In the meantime the Respondent was arrested and charged with breach of trust.

[4] The Respondent appealed the Commissions' decision to the Board of Referees which allowed the Respondent's appeal.

[5] At the date of the hearing before the Board the charges against the Respondent had not proceeded to trial.

[6] The Board of Referees concluded that because the Respondent's case had not yet proceeded to trial, there was no proof of guilt.

[7] The Commission appealed the decision of the Board of Referees to an Umpire who dismissed the appeal.

[8] The Umpire agreed with the submissions of the Commissioner that they need not show that the claimant be convicted of a charge against him in order to establish that he had committed an act which constituted misconduct. However, the Umpire went on to say that the Commission had the onus of proving on a balance of probabilities that the claimants' action did constitute misconduct pursuant to the *Employment Insurance Act*.

[9] The Umpire concluded that the only evidence before the Board was that there were only vague admissions by the Respondent of selling tobacco. These admissions were hearsay and the Commission had requested a copy of the Respondent's admissions from the employer but none had been provided.

[10] The Umpire further found that the Commission presented no evidence as to what action on the Respondent's part would have constituted misconduct pursuant to the *Employment Insurance Act*.

[11] The determination of whether a claimant's action constitutes misconduct leading to termination of employment basically entails a review and determination of facts. In the present case we are unable to find that the Umpire erred in his conclusion that the Commission had not satisfied its onus of proving on a balance of probabilities that any action by the Respondent constituted misconduct.

[12] The application will therefore be dismissed.

"J. Edgar Sexton"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-473-06

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA
Applicant
and
TRAVIS LARIVÉE
Respondent

DATE OF HEARING: OCTOBER 2, 2007

PLACE OF HEARING: TORONTO, ONTARIO

**REASONS FOR JUDGMENT OF
THE COURT BY:** (NADON, SEXTON & SHARLOW, J.J.A.)

**DELIVERED FROM THE
BENCH BY:** SEXTON, J.A.

APPEARANCES:

DEREK EDWARDS FOR THE APPELLANT/
APPLICANT

NO ONE APPEARING FOR THE RESPONDENT

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C. FOR THE APPELLANT/
DEPUTY ATTORNEY GENERAL OF CANADA APPLICANT

NO ONE ON RECORD FOR THE RESPONDENT