

**Date: 20071017**

**Docket: A-369-06**

**Citation: 2007 FCA 328**

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

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**RONNIE RENAUD**

**Respondent**

Hearing held at Montréal, Quebec, on October 11, 2007.

Judgment delivered at Ottawa, Ontario, on October 17, 2007.

**REASONS FOR JUDGMENT BY:**

**LÉTOURNEAU J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
TRUDEL J.A.**

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**Respondent**

**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

[1] This is an application for judicial review challenging a decision by the Umpire (CUB 64629A) dated June 19, 2006. In my view, this application for judicial review should be allowed for the following reasons.

## **RELEVANT FACTS**

[2] The respondent was present at the hearing but did not file a written memorandum.

Nonetheless, we allowed him to make submissions. He performed this task well.

[3] It is not necessary to repeat in detail the facts and procedural incidents in this case. Suffice it to say that the respondent filed two separate applications for employment insurance benefits. The first covered the period beginning September 15, 2002, and ending May 10, 2003; the second began on September 28, 2003. Although separate for purposes of assessing entitlement to the benefits and determining the amount of the benefits, the two applications for benefits were consolidated, at the respondent's request, for the appeal hearing before the Board of Referees. The following facts gave rise to the respondent's appeal.

[4] The respondent's employment was seasonal, which explains why the two applications for benefits were filed at roughly the same time of year in 2002 and 2003. In April 2004, the Employment Insurance Commission (Commission) learned that the respondent was the director of two companies, the Poissonnerie des Iles and the Homards du Cap des Iles. He was the directing mind of both until his retirement in the fall of 2003.

[5] Once the Commission became aware of this fact, which the respondent had failed to disclose, the issue of whether he was unemployed and available for work arose. The issue applied to both benefit periods.

[6] The Commission informed the respondent that was not entitled to the benefits he had received beginning September 15, 2002, because, in its view, he was neither unemployed nor available for work. This conclusion was based on the fact that the respondent had been occupied full-time managing his companies and had taken profits from them.

[7] The Commission also imposed a penalty of \$7,434 for the first benefit period, claiming that the respondent had knowingly filed seventeen false statements about his involvement in managing the companies. As permitted by the *Employment Insurance Act*, S.C. 1996, c. 23 (Act), the Commission doubled this penalty further to a notice of very serious violation.

### **BOARD OF REFEREES' HEARING**

[8] At the Board of Referees' hearing on January 18, 2005, the respondent submitted evidence, as mentioned earlier, that he had retired as director of the companies in the fall of 2003. This is set out in the two affidavits dated January 17, 2005, at pages 330 and 331, volume 2 of the respondent's record. One of the deponents replaced the respondent as the head of Poissonnerie des Iles Renaud, the other is the respondent's brother. The latter confirmed that his brother had been replaced as director of Homards du Cap des Iles and that he was no longer employed by the company.

[9] In its decision of January 18, 2005, the Board of Referees concluded that the respondent was unemployed for the two periods in question. It therefore allowed the respondent's appeal of the Commission's decision.

### **APPEAL TO UMPIRE**

[10] The Commission appealed the Board of Referees' decision. However, before the Umpire, the Commission withdrew the appeal dealing with the second benefit period established on September 28, 2003. Accordingly, only the first benefit period remained at issue. The Umpire therefore had to determine whether the Board of Referees had erred in finding that the respondent met the eligibility criteria for benefits, as set out in the Act, for the period beginning September 15, 2002.

### **APPLICANT'S SUBMISSIONS**

[11] Counsel for the applicant submits that the Umpire should have intervened. She argues that the Board of Referees accepted facts favourable to the respondent that occurred subsequent to the period in dispute and that only applied to the second benefit period, particularly the fact that the respondent had retired as director of the companies. She also alleges that both the Board of Referees and the Umpire, who confirmed the Board's decision, failed to consider relevant evidence about the only period then at issue.

### **DECISION**

[12] There is no doubt that the submissions of the Commission are correct.

[13] Although the two benefit periods were consolidated for purposes of the hearing before the Board of Referees, the Board had to determine whether the respondent was unemployed and available for work for each of the periods in question. It had to consider the facts and circumstances specific to each period. It could not assess the two periods as a whole because, as the evidence shows in this case, conditions and circumstances can change.

[14] It is clear from the Board of Referees' reasons that it spent some time on the facts and circumstances surrounding the second benefit period to make a determination that it applied indiscriminately to the first period. The Board did this without analyzing the facts and the evidence regarding the first benefit period and the respondent's involvement during that period in the day-to-day management and development of the companies he had founded. The evidence from the respondent's statements established that he was the director of the companies, [TRANSLATION] "the president with signing power for various documents" and that he negotiated contracts for loans and premises: see the respondent's statutory declaration, respondent's record, volume 1, page 18. The Board of Referees mentioned this evidence but did not consider or analyze it when making its decision.

[15] The following passages from the Board of Referees' decision clearly illustrate the Board's approach and the emphasis it put on the second benefit period:

[TRANSLATION]

Mr. Renaud maintained that the management company (Aéroculture Renaud) never took any of his time. In the summer of 2003, Pierre Sénécal was hired to replace Mr. Renaud in his duties (see affidavit from Mr. Sénécal). Beginning in the fall of

2003 and after that, the claimant performed only isolated tasks when required and these did not affect his availability (see affidavit from Danis Renaud).

[Emphasis added.]

- (a) the time devoted to the company. In this case, Mr. Renaud claims to spend approximately 75 hours a week (see Exhibit 2-1) during the high season but only residual time at other times. He also explained his withdrawal from the family companies as of 2003.
- (b) the nature and amount of capital and other resources invested. Both the family companies and the creation of his new company are serious projects that the claimant wanted to succeed. However, effective 2003, Mr. Renaud no longer really had any commitment toward Homard des Iles and La Poissonnerie des Iles Renaud. And the sole reason for incorporating Aéroculture Renaud was to acquire an investment loan.
- (c) the financial success or failure of the company. Mr. Renaud indicated that Poissonnerie des Iles Renaud had ceased operations and that Aéroculture Renaud was totally inactive.
- (d) maintaining the company. Mr. Renaud is only paying back the loan for Aéroculture Renaud and has no management authority for the other family companies.

[Emphasis added]

What about the period from September 15, 2002, to May 10, 2003? For all practical purposes, the decision is silent on this point.

[16] Continuing with the issue of the respondent's availability, the Board of Referees wrote at page 5 of its decision, applicant's record, volume 2, page 343:

[TRANSLATION]

In order to qualify for employment insurance benefits, Mr. Renaud must also be able to prove that he was capable of work and unable to find suitable employment (section 18(a) of the Act).

Therefore, the burden of proof is on the claimant. Availability is a question of fact that is based on the claimant's desire to return to the labour market as soon as he is offered suitable employment. This desire is shown through reasonable ongoing efforts to find suitable employment as quickly as possible (*Bois* A-31-00, *Cornelissen-O'Neil* A-652-93 and *Bertrand* A-631-81).

[Emphasis added.]

The Board of Referees stated that it was satisfied that the respondent had succeeded in proving his availability.

[17] The Board of Referees' reasons refer to a statement by the respondent in his application for benefits, but again the Board ignores this in making its decision. In this statement, the respondent indicated that he had done [TRANSLATION] "hardly any" job searches in 2002, 2003 and 2004: see applicant's record, volume 1, page 22. This statement by the respondent, along with the statement regarding his involvement in the management of the two companies during the first benefit period, should have been examined seriously by the Board to ascertain whether the respondent was unemployed and available for work.



[18] In his testimony before the Board of Referees, the respondent distanced himself from his previous statements and tried to downplay their significance. The Board of Referees found him to be credible. But the Board did not try in the slightest to explain why it disregarded the respondent's previous statements and preferred a version of the facts that was not just different, but apparently contradictory in some aspects.

[19] In short, the Board of Referees disregarded the documentary evidence in the record that suggested that the respondent operated a business and had not looked for work. This evidence discredited the respondent's testimony at the hearing. The Board of Referees was entitled, for valid reasons, to reject this evidence after weighing and assessing it but could not ignore it as the Board did, especially since this evidence and other evidence in the record went to the core of the issue of the respondent's unemployment status and availability: see *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, at paragraph 7; and *Maki v. Canada (Employment Insurance Commission)*, [1998] F.C.J. No. 1129, at paragraph 3.

[20] The Umpire justified his refusal to intervene in the Board of Referees' decision on the ground that unemployment status and availability are questions of fact and that [TRANSLATION] "the Board of Referees is responsible for examining and interpreting the facts": see page 2 of the Umpire's decision. But again, the Board of Referees must assess them and assess the correct ones, i.e., those that are relevant to the period in question. In my view, this did not happen here, and the Umpire should have intervened and ordered a new hearing. It is unfortunate that another hearing

must be held with the costs and inconvenience entailed, but absent an agreement, this is the only fair solution for the two parties.

## **CONCLUSION**

[21] For these reasons, the application for judicial review will be allowed without costs as the applicant requested. The decision of the Umpire will be set aside. The matter will be returned to the Chief Umpire or to his or her designate for rehearing by a differently constituted Board of Referees to determine:

- (a) whether the respondent was unemployed and available for work from September 15, 2002, to May 10, 2003; and
- (b) whether the respondent knowingly made false and misleading statements about this period, which resulted in the imposition of a penalty and a notice of very serious violation,

and the Board is to disregard the facts that occurred after May 10, 2003.

“Gilles Létourneau”

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J.A.

“I concur.  
J.D. Denis Pelletier, J.A.”

“I concur.  
Johanne Trudel, J.A.”

Certified true translation  
Mary Jo Egan, LLB

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-369-06

**STYLE OF CAUSE:** ATTORNEY GENERAL OF CANADA  
v. RONNIE RENAUD

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** October 11, 2007

**REASONS FOR JUDGMENT BY:** LÉTOURNEAU J.A.

**CONCURRED IN BY:** PELLETIER J.A.  
TRUDEL J.A.

**DATED:** October 17, 2007

**APPEARANCES:**

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FOR THE APPLICANT

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