

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110624

Docket: A-462-10

Citation: 2011 FCA 212

**CORAM: NADON J.A.
EVANS J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

MANUELA MASIC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia on May 30, 2011.

Judgment delivered at Ottawa, Ontario, on June 24, 2011.

REASONS FOR JUDGMENT BY:

LAYDEN-STEVENSON J.A.

CONCURRED IN BY:

**NADON J.A.
EVANS J.A.**

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The Employment Insurance Commission (the Commission), pursuant to subsection 30(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), denied Manuela Masic's request for employment insurance benefits. The Board of Referees (the Board) dismissed an appeal of the Commission's decision and held that Ms. Masic was dismissed from her employment because of her misconduct. Umpire Seniuk dismissed an appeal from the Board's decision and held that the Board "did not commit a reviewable error in either fact or in law and there is nothing therefore which would warrant the interference of an Umpire with its decision."

[2] Ms. Masic now applies to this Court for judicial review of the Umpire's decision dismissing her appeal. At the hearing of this application Ms. Masic was self-represented; the respondent was represented by counsel. The parties presented their respective oral arguments. During the hearing it became apparent that the Court did not have before it the complete record from the Office of the Umpire. Consequently, it issued a direction requiring that counsel for the respondent obtain the record and provide it to the Court and to Ms. Masic. The record has now been received. Nothing arises from the record that would require further submissions from the parties. For the reasons that follow, I am of the view that Ms. Masic's application should be dismissed. For ease of reference, Ms. Masic is understood to be a "claimant."

Background

[3] Ms. Masic was employed as a cash room operator by G4S Cash Services Limited where she received and counted cash deposits, collected from her employer's clients, and entered the amounts on a computerized system. On May 5, 2009, there was a discrepancy of \$3,000 between the amount collected from a client and the final figure entered on Ms. Masic's computer. Following a security investigation, her employment was terminated on May 14, 2009.

Misconduct Under the Act

[4] Subsection 30(1) of the Act provides that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of misconduct, or voluntarily left any employment without just cause. Misconduct requires an element of wilfulness: *Canada (Attorney General) v. Tucker*, [1986] 2 F.C. 329 (C.A.). Misconduct is considered to be wilful if the acts

which led to the dismissal were conscious, deliberate or intentional. That is, the claimant knew or ought to have known that the conduct was such as to impair the performance of the duties owed to the employer and as a result dismissal was a real possibility: *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36. A causal link between the misconduct and the dismissal is required. The misconduct must not be an excuse or pretext for dismissal; it must cause the loss of employment: *Canada (Attorney General) v. Brissette* (1993), [1994] 1 F.C. 684 (C.A.). No criminal or penal conviction is required to establish misconduct: *Canada (Attorney General) v. Granstrom*, 2003 FCA 485.

Standard of Review

[5] On an application for judicial review, the task of this Court is to determine whether the Umpire erred in identifying and applying the standard of review applicable to the decision of the Board. Before deferring to the Board's assessment of the evidence, the Umpire had to be satisfied that the Board correctly interpreted the legal test for misconduct. Absent an error in its interpretation of the legal test, the Board's application of the facts to the law is a question of mixed fact and law reviewable on a standard of review of reasonableness: *Budhai v. Canada (Attorney General)*, 2002 FCA 298; *Mac v. Canada (Attorney General)*, 2008 FCA 184.

Analysis

[6] Based on his summary of the relevant jurisprudence, I am satisfied the Umpire adopted and applied the correct legal test for misconduct in reviewing the Board's decision. In concluding that

the Board did not commit a reviewable error in fact or law, the Umpire was satisfied that the Board correctly interpreted the legal test. I agree with the Umpire in this respect.

[7] Notably, Ms. Masic has not identified any specific errors on the part of the Umpire. Rather, she asserts, without more, that the Board and the Umpire erred in reaching a finding of misconduct. Much of her argument is directed to her employer's refusal to release the video of her actions on the evening giving rise to the dismissal. The remainder of her argument is devoted to various allegations of bad faith on the part of her former employer.

[8] The Board found that Ms. Masic had failed to inform and consult her supervisor as required, failed to follow proper procedure in entering amounts of money, and failed to report that she had "minused out" \$3,000 from the deposit. In its view, Ms. Masic's mishandling of \$3,000 constituted a "breach of such scope that it was so reckless as to constitute misconduct."

[9] The record before the Board included the employer's itemized comments regarding the specific workplace procedures that had allegedly been breached by Ms. Masic. The Board, after familiarizing itself with the processing details involved, heard from the employer, the Commission and Ms. Masic. As noted earlier, it correctly identified the legal test for misconduct and made its factual determinations. The Board's findings were reasonably open to it on the evidence before it. In my view, the video would not have influenced its conclusion.

[10] Contrary to Ms. Masic's suggestion, the employer's letter of termination was not premised on alleged theft, but on the basis that Ms. Masic was responsible for the missing funds, had not provided a reasonable explanation regarding the funds, and on the basis of her dishonesty. The Board's determination with respect to mishandling the money is consistent with the employer's stated reason for dismissal.

[11] As for the allegation of bad faith, there is nothing in the record to indicate any prior history of hostile relations between Ms. Masic and her employer. Indeed there is no evidence that the employer's decision to terminate Ms. Masic's employment was based on facts other than those related to her actions on the evening in question.

[12] Since the Board's findings of fact were reasonably open to it, the Umpire did not err in declining to intervene. Consequently, I would dismiss the application for judicial review. The respondent did not request costs. Therefore, I would not award costs.

"Carolyn Layden-Stevenson"

J.A.

"I agree
M. Nadon J.A."

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-462-10

STYLE OF CAUSE: MASIC v AGC

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: May 30, 2011

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: NADON J.A.
EVANS J.A.

DATED: June 24, 2011

APPEARANCES:

Self-Represented

FOR THE APPLICANT

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FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan
Deputy Attorney General of Canada

FOR THE RESPONDENT