

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140129

Docket: A-558-12

Citation: 2014 FCA 22

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

BERNARD MAHER

Respondent

Heard at Québec, Quebec, on January 29, 2014.
Judgment delivered from the Bench at Québec, Quebec, on January 29, 2014.

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 Québec, Quebec, on January 29, 2014).

TRUDEL J.A.

[1] The Attorney General of Canada filed an application for judicial review against a decision by Umpire Blanchard, who, upholding the decision of the Board of Referees, held that the Employment Insurance Commission had erred in concluding that the respondent Bernard Maher was disqualified from receiving benefits because he had been dismissed from his employment for misconduct (CUB 80119).

[2] The evidence showed that the respondent, a ferry company employee, had been dismissed following several disciplinary sanctions that had been imposed on him for repeated lateness and absenteeism, including a five-day suspension in January 2010, a two-week suspension in June 2010, and a four-week suspension without pay in March 2011. One year earlier, in March 2010, the employer had specifically informed the respondent that he would be dismissed if a further breach occurred. Despite this warning, he was notified in March 2011 that he was being given one final chance to understand that he had no choice but to deal with his addiction and his repeated absences if he wished to keep his job.

[3] On November 8, 2011, the respondent failed to report for work and also opted not to inform the ship's captain of this, in the hope that the latter would not report the situation to his employer. This event led to the dismissal of the respondent, who had hoped that the employer would accept his explanation to the effect that the battery in his cell phone, which he also used as an alarm clock, had run down and that he had therefore failed to wake up in time to get to the departure dock.

[4] The respondent appealed the Commission's negative decision denying his claim for benefits. The Board of Referees found in his favour, holding that there had been no misconduct. The Board of Referees, noting that the respondent had admitted his fault, held that [TRANSLATION] "the psychological element was not present that morning. The claimant never intended to adversely affect the employer" (decision of the Board of Referees, Appeal Book, Applicant's Record at page 79). In support of its decision, the Board described the concept of misconduct as follows: [TRANSLATION] "To constitute misconduct, the conduct must have a

voluntary aspect or at least result from such carelessness or negligence that it can be said that the employee voluntarily decided not to consider the consequences of his actions on his job performance, and the claimant's conduct lacked this voluntary or intentional aspect" (*ibid.*).

[5] The Umpire also held that the Board of Referees had not erred in its interpretation of the facts and their application to the test applicable in this case.

[6] It is a well-established principle that "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). In this case, the respondent had received very harsh sanctions for failing to report to work. He had already received two warnings that any failure to meet his obligations as an employee would result in his dismissal. The previous day had been a difficult one, as he had been obliged to travel to Chicoutimi to appear in court. Despite this, he failed to take specific steps to ensure that he would be able to report to work. How can it be reasonably argued that this conduct was not so careless or negligent that the claimant could not have expected to be dismissed? We are all of the view that the Board erred in its application of the test to the facts in this case. It should have considered the nature of the breach in light of the respondent's entire file. It should have asked itself whether Mr. Maher, in light of his employment file as a whole, had conducted himself so carelessly that he could not have been unaware that his absence could result in his dismissal.

[7] For these reasons, the application will be allowed, the Umpire's decision will be set aside, and the matter will be referred back to the Chief Umpire or his designate for redetermination on the basis that the respondent is not entitled to benefits, having lost his employment because of his own misconduct.

"Johanne Trudel"

J.A.

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-558-12

STYLE OF CAUSE: THE ATTORNEY GENERAL OF
CANADA v. BERNARD MAHER

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: JANUARY 29, 2014

REASONS FOR JUDGMENT OF THE COURT BY: PELLETIER J.A.
TRUDEL J.A.
MAINVILLE J.A.

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

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