

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

**Date: 20091014**

**Docket: A-629-08**

**Citation: 2009 FCA 294**

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

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**GEORGE CORTEZ**

**Respondent**

Heard at Toronto, Ontario, on October 14, 2009.

Order delivered from the Bench at Toronto, Ontario, on October 14, 2009.

REASONS FOR ORDER OF THE COURT BY:

SHARLOW J.A.

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**REASONS FOR ORDER OF THE COURT**

(Delivered from the Bench at Toronto, Ontario, on October 14, 2009)

**SHARLOW J.A.**

[1] This is an application for judicial review of a decision of an Umpire (CUB 71362) referring a matter back to the Board of Referees.

[2] The respondent Mr. Cortez was denied benefits under the *Employment Insurance Act* on the basis that he had lost his employment due to his own misconduct. Mr. Cortez appealed that decision to the Board, arguing that he had not quit or abandoned his employment. He lost his employment

because he had been incarcerated, as a result of which he was unable to report for work or contact his employer.

[3] The Board accepted the submissions of Mr. Cortez and allowed his appeal. The Crown then appealed to the Umpire.

[4] The Umpire agreed with the Board's conclusions, but also found that the issue that should have been before the Board was whether Mr. Cortez was available for work at the relevant time. The Umpire went on to say that the Board should reconsider that matter based on s. 18(a) of the *Employment Insurance Act*.

[5] We agree with the Crown that the Umpire erred in characterizing this as a case to which s. 18(a) could apply. That is the provision that precludes a claimant from being paid benefits for a working day in a benefit period for which the claimant was not available for work. That was clearly not the issue before the Board.

[6] Further, it seems to us that the Board, in allowing Mr. Cortez's appeal, applied the wrong test in determining whether there was misconduct on the part of Mr. Cortez.

[7] For these reasons, the application for judicial review will be allowed, the decision of the Umpire will be set aside, and this matter will be remitted to the Chief Umpire, or an Umpire that he designates, with a direction that this matter should be remitted to a differently constituted Board for

rehearing on the issue of whether Mr. Cortez lost his employment by reason of his own misconduct. Counsel for the Crown confirmed that at the rehearing before the Board, new evidence will be admissible.

"K. Sharlow"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-629-08

**AN APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE  
HONOURABLE MR. JUSTICE RICHE, UMPIRE, IN CUB 71362, DATED NOVEMBER  
14, 2008.**

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v.  
GEORGE CORTEZ

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 14, 2009

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

**DELIVERED FROM THE BENCH BY:** SHARLOW J.A.

**APPEARANCES:**

Rina M. Li FOR THE APPLICANT

George Cortez SELF-REPRESENTED

**SOLICITORS OF RECORD:**

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N/A (Self-represented) SELF-REPRESENTED