

Federal Court  
of Appeal



Canada

Cour d'appel  
fédérale

**Date: 20091118**

**Docket: A-176-09**

**Citation: 2009 FCA 336**

**CORAM: BLAIS C.J.  
NOËL J.A.  
TRUDEL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**JEAN-GUY ROBERGE**

**Respondent**

Hearing held at Montréal, Quebec, on November 18, 2009.

Judgment delivered from the bench at Montréal, Quebec, on November 18, 2009.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**TRUDEL J.A.**

Federal Court  
of Appeal



Canada

Cour d'appel  
fédérale

**Date: 20091118**

**Docket: A-176-09**

**Citation: 2009 FCA 336**

**CORAM: BLAIS C.J.  
NOËL J.A.  
TRUDEL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**JEAN-GUY ROBERGE**

**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the bench at Montréal, Quebec, on November 18, 2009)**

**TRUDEL J.A.**

[1] This is an application for judicial review of CUB decision No. 71960, dated February 9, 2009, by Umpire René Hurtubise, who, like the Board of Referees, decided that Mr. Roberge had not lost his employment because of his misconduct within the meaning of section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), and that he was therefore not disqualified from receiving benefits. Accordingly, he dismissed the Employment Insurance Commission's appeal. The respondent did not appear, nor did he file a memorandum with this Court.

[2] Mr. Roberge was employed as a door attendant, responsible for reception and security in a residential building. On September 30, 2007, he was caught sleeping in a model apartment during his shift. He was dismissed for breaching his duty of surveillance, as his employer considered his conduct unacceptable (applicant's record, Umpire's file, at page 41). Mr. Roberge admitted to the alleged facts, but in his claim he offered various justifications for his actions.

[3] The Board of Referees accepted the evidence that Mr. Roberge needed to take a break for health reasons and that [TRANSLATION] "despite the incongruity of the situation, the beneficiary's conduct did not constitute misconduct" within the meaning of the Act (Board of Referees' reasons, applicant's record, at page 56). The Umpire further noted that the door attendant position held by the beneficiary was not particularly well paid, implying that the consequences of the wrongful conduct should not be taken too seriously. He held that the Board of Referees had acted within its mandate and had [TRANSLATION] "exercised its (albeit limited) discretion to analyze the situation, that is, the record and testimony, and assess the credibility of the witness" (Umpire's decision, applicant's record, at page 8).

[4] We are of the view that the Umpire's decision contains errors of law justifying the intervention of this Court.

[5] First, "the role of the Board and the Umpire is not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the

employee amounted to misconduct within the meaning of the Act . . .” (*Canada (Attorney General) v. McNamara*, 2007 FCA 107, at paragraph 22).

[6] Moreover, before deferring to the Board of Referees’ assessment of the evidence, the Umpire must ask himself whether the Board has correctly applied the test for misconduct. He did not do so.

[7] In *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, at paragraph 14, our colleague Nadon J.A. wrote the following:

Thus, there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, 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 [see also *Canada (Attorney General) v. Caron*, 2009 FCA 141, at paragraph 5].

[8] We find that if the Umpire had reviewed the evidence before him with this test in mind, he would necessarily have found that the Board of Referees had committed an error of law by asking itself the wrong question. He would have therefore found it necessary to intervene as requested by the Commission.

[9] Accordingly, the application for judicial review shall be allowed without costs, the applicant having waived them. The Umpire's decision shall be set aside and the matter remitted to the Chief Umpire or his designate for redetermination on the basis that that Mr. Roberge is disqualified from receiving any benefits because of his misconduct.

“Johanne Trudel”

---

J.A.

Certified true translation  
Francie Gow, BCL, LLB

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-176-09

**(JUDICIAL REVIEW OF A DECISION BY UMPIRE RENÉ HURTUBISE, DATED  
FEBRUARY 9, 2009, FILE NO. CUB 71960.)**

**STYLE OF CAUSE:** Attorney General of Canada v. Jean-  
Guy Roberge

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 18, 2009

**REASONS FOR JUDGMENT OF THE COURT BY:** BLAIS C.J.  
NOËL J.A.  
TRUDEL J.A.

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

**APPEARANCES:**

Pauline Leroux

FOR THE APPLICANT

**SOLICITORS OF RECORD:**

John H. Sims, Q.C.  
Deputy Attorney General of Canada

FOR THE APPLICANT