

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100223

Docket: A-67-09

Citation: 2010 FCA 60

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RÉJEAN LEBLANC

Respondent

Heard at Fredericton, New Brunswick, on February 23, 2010.

Judgment delivered from the Bench at Fredericton, New Brunswick, on February 23, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

PELLETIER J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Fredericton, New Brunswick, on February 23, 2010)

PELLETIER J.A.

[1] This is an application for judicial review of a decision of Umpire Goulard allowing the appeal of the respondent, Réjean Leblanc, and setting aside the decision of the Board of Referees. The Commission had denied Mr. Leblanc benefits because it found that he was not available to work, a decision that was upheld by the Board of Referees.

[2] Mr. Leblanc was an employee of Flynn Canada. He was unable to work for two weeks because of a fire that destroyed his house and all of his possessions, including his work clothes

and boots. Even though Mr. Leblanc wanted to go to work nonetheless, he was unable to do so because he did not have the proper clothing and could not get to his workplace, which was some distance from his house.

[3] The Commission denied his claim for benefits for the period in question because it found that he was not available within the meaning of section 18 of the *Employment Insurance Act*, S.C. 1996, c. 23. The Board of Referees dismissed his appeal. He appealed to the Umpire.

[4] At the appeal hearing, the Umpire noted that counsel for the Commission conceded that the Board of Referees had failed to take into account all of the facts and had thus erred in law. This observation by the Umpire is surprising, in light of the affidavit filed by that counsel in which she states under oath that she made no concession. There was therefore a misunderstanding.

[5] The Umpire relied on that concession to intervene and allow Mr. Leblanc's appeal, without considering the issue of whether, notwithstanding his desire to get to work, Mr. Leblanc was not available within the meaning of the Act because of obstacles preventing him from coming in to work. On this point, we affirm and adopt the comments of Umpire Forget in *Sarkis*, CUB 25057:

[TRANSLATION]

While availability implies that a person is motivated by a sincere desire to work, willingness to work is not in itself necessarily synonymous with availability. In order to decide whether or not an individual is available for work, one must

determine whether that individual is struggling with obstacles that are undermining his or her will to work. By obstacle, we mean any constraint of a nature to deprive someone of his or her free choice, such as family obligations or a lessening of the individual's physical strength. It goes without saying that a person may not be regarded as available when that person admits to not being available or is in a situation that prevents him or her from being available. Payment of benefit is subject to the availability of a person, not to the justification of his or her unavailability. Consequently, the mitigating circumstances and the sympathy one may feel for the claimant cannot shorten the period of disentitlement.

[6] For these reasons, the application for judicial review will be allowed, the Umpire's decision set aside and the matter referred back to the Chief Umpire or his designate for redetermination on the basis that the claimant was not available for work.

“J.D. Denis Pelletier”

J.A.

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-67-09

(APPEAL OF A DECISION OF UMPIRE GUY GOULARD DATED DECEMBER 11, 2008, CUB 71597)

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. RÉJEAN LEBLANC

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: February 23, 2010

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

DELIVERED FROM THE BENCH BY: PELLETIER J.A.

APPEARANCES:

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