

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20101215

Docket: A-109-10

Citation: 2010 FCA 349

**CORAM: DAWSON J.A.
LAYDEN-STEVENSON J.A.
STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DARLENE CYRENNE

Respondent

Heard at Toronto, Ontario, on December 15, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on December 15, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on December 15, 2010)

LAYDEN-STEVENSON J.A.

[1] The Attorney General of Canada (the Crown) seeks judicial review of Umpire Durocher's decision dismissing its appeal from the decision of the Board of Referees (the board) under the provisions of the *Employment Insurance Act*, S.C. 1996, c. 23. We are of the view that the Crown's application must be dismissed.

[2] In its written submissions, the Crown contends that the Umpire erred by not intervening in the board's decision because the board failed to properly apply the test regarding availability for work and more particularly the presumption of non-availability in the case of full-time students. We do not find this argument persuasive. It is clear to us that both the board and the Umpire appreciated the presumption of non-availability and that the presumption could be rebutted through proof of exceptional circumstances: *Landry v. Canada (Deputy A.G.)* (1992), 152 N.R. 164 at paras. 2, 3 (F.C.A.); *Canada v. Gagnon*, 2005 FCA 321, 345 N.R. 188 at para. 8. The Crown's submission, although couched in terms of the board's understanding of the legal test, basically relates to the board's appreciation and weighing of the evidence.

[3] In oral submissions, the Crown suggests that the board's reasons were inadequate. In our view, the board, in comprehensive reasons, reviewed the evidence before it and concluded that the claimant was credible. The board gave reasons for discounting the statements in the training questionnaire in favour of the oral testimony. It is evident, from its reasons, that the board accepted the totality of the claimant's evidence, including her evidence regarding a number of exceptional circumstances, as sufficient to rebut the presumption of non-availability.

[4] The Crown disagrees with that conclusion. As the Umpire described it, the Crown takes the position that the board "should not have believed [the claimant] as to her availability statements." The Umpire reviewed the record and the board's reasons and concluded that the board did not err in its assessment of the claimant's credibility or the statements regarding her availability for work. Specifically, the Umpire determined that there was evidence on the record to support the board's

decision and that it was not for the Umpire to substitute his views for those of the board on factual issues when its decision is reasonable and based on evidence. We agree with the Umpire's assessment in this respect.

[5] In our view, on the record, the board's determinations fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, see:

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 at para. 47. In the circumstances, the Umpire correctly concluded that his intervention was not warranted.

[6] For these reasons, the application for judicial review will be dismissed.

“Carolyn Layden-Stevenson”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-109-10

**(AN APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF JUSTICE
DUROCHER AS UMPIRE , OF A DECISION DATED FEBRUARY 25, 2010, IN FILE NO.:
CUB 74064)**

STYLE OF CAUSE: *ATTORNEY GENERAL OF CANADA
v. DARLENE CYRENNE*

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 15, 2010

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON,
LAYDEN-STEVENSON and
STRATAS J.J.A.

DELIVERED FROM THE BENCH BY: LAYDEN-STEVENSON J.A.

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