

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110510

Docket: A-385-10

Citation: 2011 FCA 161

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

DENISE GAGNÉ

Respondent

Heard at Québec, Quebec, on May 10, 2011.

Judgment delivered from the Bench at Québec, Quebec, on May 10, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Québec, Quebec, on May 10, 2011)

LÉTOURNEAU J.A.

[1] It is trite law that a worker who leaves his or her employment when there exists a reasonable alternative is disqualified from receiving Employment Insurance benefits pursuant to subsection 30(1) of the *Employment Insurance Act*, S.C. 1966, c. 23.

[2] In this case, the Board of Referees erred as to the issue. In CUB 75133, the Umpire upheld the decision of the Board of Referees, despite the fact that the evidence showed that the

respondent had asked her employer if she could leave her employment three weeks before the end of her contract in order to organize a trip she planned to take.

[3] The Board of Referees based its decision solely on the respondent's testimony at the hearing and disregarded, without providing any reasons for doing so, the respondent's initial, spontaneous statements indicating that she had left voluntarily without just cause. In disregarding the respondent's initial, spontaneous statements, the Board of Referees committed an error of law that the Umpire should have corrected but failed to correct: see *Canada (Attorney General) v. Renaud*, 2007 FCA 328; and *Boucher v. Canada (Attorney General)*, [1996] F.C.J. No. 1378.

[4] Moreover, the Employment Insurance Commission (the Commission) alleged that the respondent had not been available for work during the three-week period during which she was organizing her trip, therefore disentitling her to benefits pursuant to paragraph 18(a) and section 33 of the Act.

Disentitlement to Benefits

18. A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

(a) capable of and available for work and unable to obtain suitable employment;

...

33. (1) A claimant is not entitled to receive benefits if the claimant loses an employment because of their

Inadmissibilité aux prestations

18. Le prestataire n'est pas admissible au bénéfice des prestations pour tout jour ouvrable d'une période de prestations pour lequel il ne peut prouver qu'il était, ce jour-là :

a) soit capable de travailler et disponible à cette fin et incapable d'obtenir un emploi convenable;

[...]

33. (1) Le prestataire qui perd son emploi en raison de son inconduite ou qui le quitte volontairement sans

misconduct or voluntarily leaves without just cause within three weeks before

(a) the expiration of a term of employment, in the case of employment for a set term; or
(b) the day on which the claimant is to be laid off according to a notice already given by the employer to the claimant.

(2) The disentitlement lasts until the expiration of the term of employment or the day on which the claimant was to be laid off.

justification n'est pas admissible au bénéfice des prestations si cet événement se produit dans les trois semaines précédant :

a) la fin de son contrat de travail, si celui-ci est à durée déterminée;
b) la date de son licenciement, dans le cas où son employeur lui a déjà donné le préavis correspondant.

(2) Cette inadmissibilité dure, selon le cas, jusqu'à la fin de son contrat ou jusqu'au jour prévu pour son licenciement.

[5] The Umpire failed to consider these two provisions. Had he done so, he could not have reached the conclusion that he did.

[6] The Board of Referees also erroneously took into account the fact that the respondent had taken steps upon returning from her trip to find employment, when the period at issue regarding her lack of availability consisted of the three weeks prior to her departure on the trip that she had organized. It referred to facts arising after the period at issue to establish availability that did not exist during that period. This is an error of law.

[7] By failing to intervene, the Umpire endorsed the Board of Referees' error. Had he recognized it and applied the correct test for determining the respondent's availability, he would have had no choice but to find that, on her own admission, she was not available during the period at issue, from October 16, 2008, to November 7, 2008.

[8] For these reasons, the application for judicial review will be allowed without costs, since the respondent did not contest it. The Umpire's decision shall be set aside and the matter remitted to the Chief Umpire, or an Umpire that he designates, for a new determination on the basis that, for the period at issue, from October 16, 2008, to November 7, 2008, the respondent did not have just cause for voluntarily leaving her employment within the meaning of sections 29, 30 and 33 of the Act and was not available within the meaning of section 18 of the Act.

“Gilles Létourneau”

J.A.

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-385-10

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA
v. DENISE GAGNÉ

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: May 10, 2011

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PELLETIER J.A.
TRUDEL J.A.

DELIVERED FROM THE BENCH BY: LÉTOURNEAU J.A.

APPEARANCES:

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