

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20121114**

**Docket: A-280-12**

**Citation: 2012 FCA 290**

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

**BETWEEN:**

**MÉLANIE INKELL**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on November 14, 2012.

**REASONS FOR JUDGMENT BY:**

**NOËL J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
TRUDEL J.A.**

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**REASONS FOR JUDGMENT**

**NOËL J.A.**

[1] This is an application for judicial review of a decision by Umpire Hurtubise (CUB 78964), dated April 20, 2012, upholding an earlier decision by the Board of Referees (the Board) dated September 29, 2011.

[2] Both parties ask that the application for judicial review be allowed summarily on the ground that the Umpire failed in several respects to intervene when he should have.

[3] In my view, this application for judicial review should be allowed for the reasons set out below.

### **Eligibility**

[4] The Board of Referees ruled that the applicant was ineligible under sections 8 and 11 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), and section 30 of the *Employment Insurance Regulations* SOR/96-332 (the Regulations) because she failed to establish that she had been unemployed during the period from September 27, 2009, to January 15, 2010, as she was operating a business.

[5] However, the Board does not seem to have taken into account the principles set out in *Martens v. Canada (Attorney General)*, 2008 FCA 240 (*Martens*). It does not appear to have raised the question whether the extent of the applicant's engagement in her business during the benefit period, determined according to the factors listed at subsection 30(3) of the Regulations, was such that she could not rely on it as her principal means of livelihood. The Board simply set out its findings of fact in the light of the factors enumerated in subsection 30(3) of the Regulations without drawing any explicit conclusions as to the use of the test described in subsection 30(2).

[6] The Board also appears to have erred in its analysis in that it was supposed to deal with the issue of unemployment status and instead made findings as to the applicant's availability, and so it failed to decide the issue before it.

**Allocation of earnings from the applicant's business**

[7] With respect to the application of earnings from the applicant's business, the Board did not set out its findings of fact as required by subsection 114(3) of the Act, namely, whether the amounts from the applicant's business constituted earnings within the meaning of section 35 of the Regulations, as it should have done.

[8] The Board similarly erred with respect to the issue of whether the earnings under subsection 36(6) of the Regulations were correctly allocated by the Canada Employment Insurance Commission (the Commission), having even ignored the explanations provided by the Commission in Exhibits 45.12 and 45.13 of the appeal docket before the Umpire, before returning the docket to the Commission.

[9] In the circumstances, the Umpire should have overturned the Board's decision.

**Allocation of earnings from Distribution JMF 2010 Inc.**

[10] With respect to the allocation of earnings from the company Distribution JMF 2010 Inc., the Board did not set out its findings of fact as required by subsection 114(3) of the Act, namely, whether the earnings from Distribution JMF 2010 Inc. had been correctly allocated by the Commission pursuant to subsection 36(6) of the Regulations, having even ignored the explanations provided by the Commission in Exhibits 45.13 and 45.14 of the appeal docket before the Umpire, before returning the docket to the Commission.

[11] The Umpire should therefore have overturned the Board's decision.

### **Penalty**

[12] In the light of the errors described above, the penalty assessed against the applicant pursuant to section 38 of the Act must be redetermined by the Board once it has decided these issues.

### **Notice of violation**

[13] The same is true for the notice of violation issued pursuant to section 7.1 of the Act.

### **Decision**

[14] For these reasons, I would allow the application for judicial review and remit the matter to the Umpire in Chief or his designate for redetermination on the basis that the appeal must be allowed and the matter referred to another Board for a new hearing in accordance with the following instructions:

- (1) apply the objective test set out at subsection 30(2) of the Regulations and ask whether the extent of the applicant's participation in her business during the benefit period, determined according to each of the six (6) circumstances listed in subsection 30(3) of the Regulations, was such that she could not rely on it as her principal means of livelihood (*Martens*).
- (2) set out its material findings of fact by deciding the issues of the determination and allocation of earnings from the applicant's business between September 27, 2009, and January 15, 2010, pursuant to section 35 and subsection 36(6) of the Regulations.

- (3) set out its material findings of fact by deciding the issue of the allocation of earnings from Distribution JMF 2010 Inc. pursuant to subsection 36(6) of the Regulations.
- (4) determine whether the applicant knowingly made false or misleading representations once it has correctly determined issues (1), (2) and, in part, (3), namely:
  - whether the work in her company was more extensive than she had reported;
  - whether she failed to report earnings from her company;
  - whether she failed to report earnings made as a co-adventurer in Distribution JMF 2010 Inc.
- (5) apply the principle set out in *Gill v. Canada (Attorney General)*, 2010 FCA 182, to the effect that a notice of violation is not automatic.

“Marc Noël”

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J.A.

“I agree.

J.D. Denis Pelletier J.A.”

“I agree.

Johanne Trudel J.A.”

Certified true translation  
François Brunet, Revisor

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-280-12

**STYLE OF CAUSE:** MÉLANIE INKELL and THE  
ATTORNEY GENERAL OF  
CANADA

**DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**PLACE:** Ottawa, Ontario

**DATED:** November 14, 2012

**REASONS FOR JUDGMENT OF THE COURT BY:** Noël, Pelletier and Trudel JJ.A.

**DELIVERED BY:** Noël J.A.

**WRITTEN REPRESENTATIONS:**

Mélanie Inkell FOR THE APPLICANT  
(on her own behalf)

Chantal Labonté FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

N/A FOR THE APPLICANT

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada