

BOARD OF REFEREES
Employment Insurance

CONSEIL ARBITRAL
Assurance-emploi

Blair Cromwell
[REDACTED]
Bear River NS B0S 1B0

File number – Numéro de dossier
- [REDACTED]

Board of Referees Centre / Centre du
conseil arbitral
Kentville - Board Centre
495 Main St., 2nd Floor,
suite 1
Kentville NS B4N 3W5
Date 24-November-2010

NOTICE OF HEARING

The appeal filed by:
Blair Cromwell

regarding a claim for unemployment benefits
made by:
Blair Cromwell
will be heard by a Board of Referees on:

AVIS D'AUDIENCE

L'appel interjeté par:
Blair Cromwell

concernant la demande de prestations de
chômage déposée par:
Blair Cromwell
sera entendu par un conseil arbitral le:

Date Friday, 3-December- 2010	Time / Heure 10:15 AM	Location / Endroit Kentville Board Room 495 Main St., 2nd Floor, suite 1 Kentville NS B4N 3W5
---	---------------------------------	---

You have the right to attend this hearing. **Please bring two (2) pieces of identification.** If you are unclear as to how to proceed or you wish to attend but cannot appear on the scheduled date, then please contact the person identified below as soon as possible. Otherwise, this appeal will proceed as scheduled. The Commission's appeal submission to the Board of Referees is enclosed.

Vous avez le droit d'être présent/présente à l'audience. **Veillez apporter deux (2) pièces d'identité.** Si vous avez besoin de précisions quant à la façon de procéder ou vous voulez assister à l'audience mais ne pouvez vous présenter à la date prévue, veuillez communiquer avec la personne mentionnée ci-dessous dans les plus brefs délais. Autrement, cet appel sera entendu tel que prévu. Ci-joint la présentation du dossier d'appel à l'intention du conseil arbitral.

To avoid possible delays in obtaining a decision, please submit any additional information you wish to present prior to the Board of Referees hearing.

Si vous avez des renseignements additionnels à présenter, veuillez les soumettre avant la date d'audience afin d'éviter des délais possibles dans la prise de décision.

Please see the attached important message from the Board of Referees.

Veillez prendre connaissance du message important ci-joint du conseil arbitral.

Board of Referees Assistant –
Adjoint/Adjointe au conseil arbitral
shelley oakley

Telephone number(s) –
Numéro(s) de téléphone
1-902-527-5526

FAX number –
Numéro de télécopieur
1-902-527-5521

CONSEIL ARBITRAL
Assurance-emploi

BOARD OF REFEREES
Employment Insurance

File number / Numéro de dossier:-637-115

3-December-2010

RELATIVEMENT À l'appel interjeté par
Blair Cromwell

IN THE MATTER OF the appeal by
Blair Cromwell

Comment porter en appel une décision du
conseil arbitral

How to Appeal a Board of Referees'
Decision

En vertu de l'article 115 de la *Loi sur l'assurance-emploi* :

- un prestataire ou les autres personnes qui font l'objet de la décision de la Commission de l'assurance-emploi du Canada;
- son employeur;
- l'association dont le prestataire ou l'employeur est membre;
- ou la Commission

a le droit de porter en appel une décision du conseil arbitral devant un juge-arbitre.

Les seuls motifs d'appel devant un juge-arbitre sont les suivants :

- a) le conseil arbitral n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
- b) le conseil arbitral a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
- c) le conseil arbitral a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

En vertu de l'article 116 de la Loi, l'appel au juge-arbitre doit être formé dans les 60 jours de la communication de la décision du conseil arbitral ou dans le délai supplémentaire que le juge-arbitre peut accorder pour des raisons spéciales. En vertu de l'article 85 du *Règlement sur l'assurance-emploi*, un appel interjeté devant un juge-arbitre doit être :

- formulé par écrit; et
- envoyé au Centre Service Canada.

Les audiences au juge-arbitre sont ouvertes au public. Les décisions des juges-arbitres créent de la jurisprudence et sont de caractère public. Toutes ces décisions sont disponibles sur Internet à des fins de référence pour les conseils arbitraux et pour aider les appelants et leurs représentants à préparer leurs appels.

Veuillez visiter le site Web *Au service des appelants de l'assurance-emploi* www.ei-ae.gc.ca pour obtenir de plus amples renseignements sur le processus d'appel, pour obtenir le formulaire d'appel « Avis d'appel devant le juge-arbitre » ou pour consulter la jurisprudence. Sur la page d'accueil, la barre de menu verticale située à gauche contient un lien vers les Appels devant le juge-arbitre et Recherche de décisions rendues dans des cas similaires et la barre de menu verticale située à droite un lien vers la Bibliothèque de la jurisprudence.

Pour obtenir une copie papier du formulaire d'appel au juge-arbitre, vous pouvez aussi communiquer avec votre Centre Service Canada ou téléphoner à TÉLÉMESSAGE au 1-800-808-6352.

In accordance with Section 115 of the *Employment Insurance Act*:

- a claimant or other person who is the subject of a decision of the Canada Employment Insurance Commission;
- an employer of a claimant;
- an association of which the claimant or employer is a member; or
- the Commission

has the right to appeal a Board of Referees' decision to the Umpire.

The only grounds of appeal to the Umpire are that:

- a) the Board of Referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b) the Board of Referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- c) the Board of Referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

In accordance with Section 116 of the Act, the appeal to the Umpire must be brought within 60 days of the communication of the Board of Referees' decision or any longer period that the Umpire may allow for special reasons.

In accordance with Section 85 of the *Employment Insurance Regulations* the appeal must be:

- made in writing; and
- sent to your Service Canada Centre.

Umpire appeal hearings are open to the public. Umpire decisions create case law (jurisprudence) and are a matter of public record. All these decisions are available on the internet for reference by Boards of Referees and to assist appellants and their representatives with their appeals.

Visit the Serving Employment Insurance Appellants site at www.ei-ae.gc.ca to find out more about the appeal process, obtain the appeal form "Notice of Appeal to the Umpire" and consult the jurisprudence. On the home page, the vertical menu on the left contains a link to the Appeals to the Umpire and Researching Similar Cases and the vertical menu on the right contains a link to the Jurisprudence Library.

For a paper copy of the Umpire appeal form you can contact your Service Canada Centre or call TELEMESSAGES at 1-800-206-7218.

Canada

BOARD OF REFEREES
Employment Insurance

CONSEIL ARBITRAL
Assurance-emploi

Protected when completed - B
Protégé une fois rempli - B

*Kentville - Board Centre
495 Main St., 2nd Floor,
suite 1
Kentville NS B4N 3W5*

December 3, 2010

Blair Cromwell

Bear River NS B0S 1B0

Sir/Madam:

Enclosed is a copy of the decision which the Board of Referees rendered on December 3, 2010 in your case.

A copy of this decision is sent to anyone having a direct interest in your case.

Also enclosed is a leaflet explaining how to appeal a Board of Referees decision.

Yours truly,


Shelley Oakley
Board of Referees Assistant
1-902-527-5526

Enclosures

BOARD OF REFEREES
Employment Insurance

CONSEIL ARBITRAL
Assurance-emploi

BOARD OF REFEREES DECISION
DÉCISION DU CONSEIL ARBITRAL

Case number - Numéro de la cause

10-0091

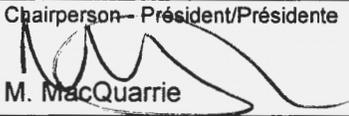
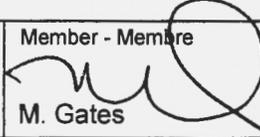
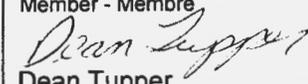
Name of appellant - Nom de l'appelant/appelante Blair Cromwell		File number - Numéro de dossier [REDACTED]
Service Canada Centre address - Adresse du Centre Service Canada 77 Dufferin St. PO Box 3100 Bridgewater NS B4V 3J1		Place of hearing - Endroit de l'audience Kentville Board Room 495 Main St., 2nd Floor, suite 1 Kentville NS B4N 3W5
Attending parties and witnesses heard during the hearing with their title, in-person, teleconference, videoconference or on the record Parties présentes et témoins entendus à l'audience ainsi que leur titre, en personne, téléconférence, vidéoconférence ou sur la foi du dossier Blair Cromwell - Claimant - The case was heard in Kentville, Nova Scotia on December 3, 2010. The claimant was present.		
Hearing audio recorded <input type="checkbox"/> Enregistrement de l'audience		Date 3-December-2010
DECISION OF THE BOARD OF REFEREES -- DÉCISION DU CONSEIL ARBITRAL		

ISSUE(S)

Whether or not the claimant lost his employment by reason of his own misconduct, pursuant to sections 29 and 30 of the Employment Insurance Act.

INFORMATION FROM THE DOCKET

- The claimant filed for regular Employment Insurance benefits on September 1, 2010.
- In his Fired (Dismissed) Questionnaire the claimant stated;
 - he was suspended without pay on July 1, 2010 pending the outcome of an internal HRM corporate investigation into allegations of defamation of character against senior management of HRM fire services.
 - On August 24, 2010 he was terminated as a result of that investigation.
 - He was found to be insolent, unapologetic, and did not have the ability to rehabilitate.

Chairperson - Président/Présidente  M. MacQuarrie	Member - Membre  M. Gates	Member - Membre  Dean Tupper
Date decision signed - Décision signée le 3-December-2010		Decision sent on - Date d'envoi de la décision 3-December-2010

PROTECTED WHEN COMPLETED - B
PROTÉGÉ UNE FOIS REMPLI - B

BOARD OF REFEREES
Employment Insurance

CONSEIL ARBITRAL
Assurance-emploi

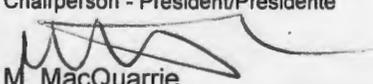
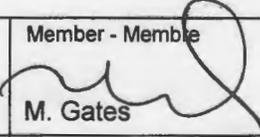
BOARD OF REFEREES DECISION
DÉCISION DU CONSEIL ARBITRAL

Case number - Numéro de la cause

10-0091

Name of appellant - Nom de l'appelant/appelante Blair Cromwell	File number - Numéro de dossier [REDACTED]
--	---

- He made anonymous comments in a public forum against senior management.
- These alleged defaming comments have yet to be proven in a court of law.
- He is an African Nova Scotian who has been exposed to a hostile work environment filled with harassment, retaliation and racism.
- He is not sure if there is a policy for employees regarding this type of misconduct.
- He spoke to his union representative, who supports his position and regards his termination as wrongful. A grievance has been filed.
- He has contacted Herbert Desmond of the NS Human Rights Commission.
- This is a form of retaliation for speaking out against senior fire service management in it's handling of racism within the fire service. This case is well documented and can be easily researched on the internet and through official avenues.
- An ROE was submitted showing the claimant worked for Halifax Regional Municipality from September 29, 1997 to August 24, 2010 earning 2310 insurable hours. The reason for separation was listed as Dismissal.
- The Commission spoke to [REDACTED] who stated;
 - The claimant was dismissed for making public remarks against HRM management to the point that it severed the employer/employee relationship.
 - A newspaper printed an article which was not favorable to management regarding bad management practices of the HRM fire dept. the claimant responded to the paper and made anonymous comments.
- The claimant was contacted who admitted to venting publically against his employer but he does not agree that it was a defamation of character and it has not been proven that it was a defamation of character.
- He also stated;
 - The comments he made were that they were incompetent and being bullies, and that there was racist activity within the fire department.

Chairperson - Président/Présidente  M. MacQuarrie	Member - Membre  M. Gates	Member - Membre  Dean Tupper
Date decision signed - Decision signée le 3-December-2010		Decision sent on - Date d'envoi de la décision 3-December-2010

PROTECTED WHEN COMPLETED - B
PROTÉGÉ UNE FOIS REMPLI - B

BOARD OF REFEREES

Employment Insurance

CONSEIL ARBITRAL

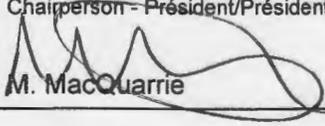
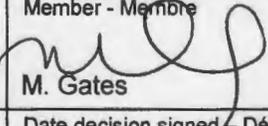
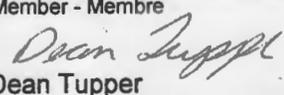
Assurance-emploi

BOARD OF REFEREES DECISION
DÉCISION DU CONSEIL ARBITRAL

Case number - Numéro de la cause
10-0091

Name of appellant - Nom de l'appelant/appelante Blair Cromwell	File number - Numéro de dossier [REDACTED]
--	--

- These were accurate statements.
- His employer is trying to silence him and the others and to prevent the participation in the Human Rights complaint.
- In his letter of appeal the claimant states;
 - HRM and HRM fire have been complicit in acts of racism and other abuses of authority that has had a negative effect on his well being and as a result of those acts, he has found himself in a situation of speaking out against his employer, which does not warrant "misconduct".
 - His comments were made in the context of "fair comment" and in the "public interest" protected by the Canadian Charter of Rights and Freedoms.
- The claimant submitted, with his letter of appeal, a copy of "The Struggle for Acceptance: The Black Experience in Halifax Regional Fire & Emergency" (Exhibit 7-3 to 7-17), "The Shebib Report"; censored (Exhibit 7-18 to 7-41), a copy of the complain made under the Nova Scotia Human Rights Commission (Exhibit 7-42 to 7-54), a copy of the complaint under the Nova Scotia Human Rights Commission in which he was the complainant (Exhibit 7-55 to 7-58), a copy of letters from Dr. [REDACTED] recommending he take time off for stress (Exhibit 7-59), as well as a copy of the court in the Supreme Court of Nova Scotia between William Mosher and Stephen Thurber and a group of Defendants including the claimant.
- The employer, Larry Williams was contacted who stated;
 - HRM advised the claimant was dismissed because the claimant's actions destroyed the employer/employee relationship.
 - The claimant was not dismissed for defamation of character against senior management of HRM service and therefore whether or not this has been proven is not an issue.
- A copy of the claimant's termination letter was submitted which stated;
 - The claimant stands behind most of the comments as the truth with three exceptions listed in Exhibit 11-5.

Chairperson - Président/Présidente  M. MacQuarrie	Member - Membre  M. Gates	Member - Membre  Dean Tupper
Date decision signed - Décision signée le 3-December-2010		Decision sent on - Date d'envoi de la décision 3-December-2010

PROTECTED WHEN COMPLETED - B
PROTÉGÉ UNE FOIS REMPLI - B

BOARD OF REFEREES
Employment Insurance

CONSEIL ARBITRAL
Assurance-emploi

BOARD OF REFEREES DECISION
DÉCISION DU CONSEIL ARBITRAL

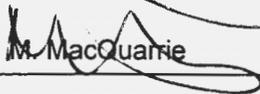
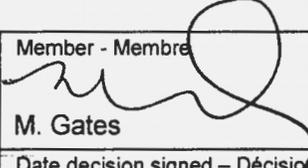
Case number - Numéro de la cause 10-0091
--

Name of appellant - Nom de l'appelant/appelante Blair Cromwell	File number - Numéro de dossier [REDACTED]
--	--

- The comments were made over a period of one year and therefore cannot be described as being made "in the heat of the moment".
- The misconduct that he had been found to have engaged in amounts to insolent and insubordinate behavior. His actions have undermined the authority of the management of HRFE and have irreparably severed the employment relationship.
- The claimant submitted a copy of a document from the River Academic Journal titled, "The Effects Racism-Related Stress on the Psychological and Physiological Well-being of Non Whites (exhibit 14-1 to 14-3).
- The claimant submitted a copy of a document entitled, "The Impact of the Tort of Defamation on Public Discourse about Racism" (Exhibit 15-1 to 15-13).

EVIDENCE AT THE HEARING

- The claimant provided the Board with a copy of, Administrative Order 41; Ethical Conduct Policy. It was submitted into evidence as exhibits 17-1 to 17-10.
- The claimant provided the Board with a copy of Halifax Regional Fire and Emergency Services Policy Manual. It was submitted into evidence as exhibits 18-1 to 18-12.
- The claimant provided the Board with a copy of Halifax Regional Municipality Workplace Rights: Anti-Harassment Policy March 2005, Updated October 11, 2006. It was submitted into evidence as exhibits 19-1 to 19-12.
- The claimant stated that his actions do not constitute misconduct. He was reacting, as a normal person would, to years of working in a poisonous hostile work environment.
- The claimant feels that the employer contacted, Larry Williams, is contradicting himself in Exhibit 8. Mr. Williams was a part of the original investigation and therefore knows why the claimant is being fired. It is the belief of the claimant, which he supports with documentation, that he was originally suspended from the

Chairperson - Président/Présidente  M. MacQuarrie	Member - Membre  M. Gates	Member - Membre  Dean Tupper
Date decision signed - Décision signée le 3-December-2010		Decision sent on - Date d'envoi de la décision 3-December-2010

PROTECTED WHEN COMPLETED - B
PROTÉGÉ UNE FOIS REMPLI - B

BOARD OF REFEREES
Employment Insurance

CONSEIL ARBITRAL
Assurance-emploi

BOARD OF REFEREES DECISION
DÉCISION DU CONSEIL ARBITRAL

Case number - Numéro de la cause
10-0091

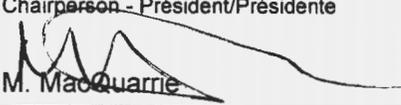
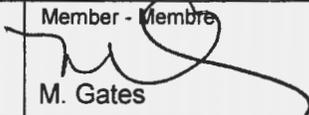
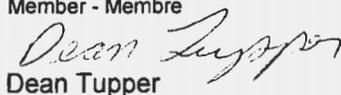
Name of appellant - Nom de l'appelant/appelante Blair Cromwell	File number - Numéro de dossier 
--	--

work place for making defamatory remarks as is stated in exhibit 13 but then in his conversation with the Commission found in exhibit 8 Mr. Williams stated that the claimant was not fired due to defamation but because his statements damaged the employee/employer relationship beyond repair.

- The claimant states it was not he who destroyed the employer/employee relationship, it was the employer through the harassment and racist remarks by, in particular, the two chiefs.
- The claimant refers to the policies stated in the exhibits he had provided which states that employees have the right to be treated with respect. It is his position that the employer did not adhere to these policies and therefore it was the employer who destroyed the relationship.
- The claimant told several stories in an effort to show incidents of racism and harassment which have occurred within the work force.
- The claimant takes full responsibility for making the comments he did on a public forum but feels he was reacting to a situation in which had not been created by him. He lashed out in a moment of weakness.
- At the time he wrote the comments he did not think of the consequences. He felt as though the management could probably figure out who made the comments in the Coast but felt they would not have the required legal proof needed to verify it was him. Therefore he did not consider being dismissed for making these comments.
- There is wide spread discontent within the fire department because of the two chiefs who are considered bullies, not just with the black firefighters.

FINDINGS OF FACT, APPLICATION OF LAW

Section 30(1) of the Employment Insurance Act states that a claimant is disqualified from receiving benefits because of "misconduct". Under Section 30(2), the disqualification will be indefinite if misconduct is proven. The case law has explained misconduct in more detail. The acts must be "willful or deliberate or so reckless as to approach willfulness"

Chairperson - Président/Présidente  M. MacQuarrie	Member - Membre  M. Gates	Member - Membre  Dean Tupper
Date decision signed - Décision signée le 3-December-2010		Decision sent on - Date d'envoi de la décision 3-December-2010

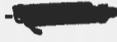
PROTECTED WHEN COMPLETED - B
PROTÉGÉ UNE FOIS REMPLI - B

BOARD OF REFEREES
Employment Insurance

CONSEIL ARBITRAL
Assurance-emploi

BOARD OF REFEREES DECISION
DÉCISION DU CONSEIL ARBITRAL

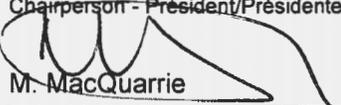
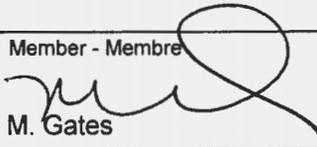
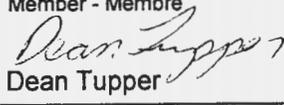
Case number - Numéro de la cause 10-0091
--

Name of appellant - Nom de l'appelant/appelante Blair Cromwell	File number - Numéro de dossier 
--	--

(**Tucker. A-381-85**). There must also be a causal relationship between the misconduct and the dismissal. Further, evidence of misconduct must be "sufficiently detailed" to permit the Board to decide the conduct in question was "reprehensible" (**M.L. Joseph, A-636-85**). The Board must decide if the claimant lost his employment because of the alleged offence, did the claimant commit the alleged offence, and does the alleged offence constitute misconduct.

Did the claimant lose his employment because of the alleged offence? In an interview with the Deputy Chief, Larry Williams, he stated the claimant was dismissed because his actions destroyed the employer/employee relationship. According to the Termination Letter the claimant committed misconduct in the form of insolence and insubordination. These behaviors undermined the authority of management and have irreparably severed the employment relationship. The claimant contests that he was dismissed for making alleged defamatory remarks. He was suspended "pending an investigation that he published defamatory comments concerning senior management of Fire and Emergency Services" (exhibit 13). The Termination Letter however, states that he was dismissed for destroying the employee/employer relationship. The Board feels the two documents contradict one another, however does find as a fact that the claimant lost his employment because the employer was able to prove the claimant did make these comments.

Did the claimant commit the alleged offense? It is undisputed by both the claimant and the employer. In the claimant's letter of appeal he stated his comments were made in the context of "fair comment" and in the "public interest". The letter of termination states that the claimant was given an opportunity to explain why he made each comment to which he stated they were not meant to be malicious. He did admit that he overstated some comments. Therefore the Board finds as a fact the claimant did commit the alleged offense.

Chairperson - Président/Présidente  M. MacQuarrie	Member - Membre  M. Gates	Member - Membre  Dean Tupper
Date decision signed - Décision signée le 3-December-2010		Decision sent on - Date d'envoi de la décision 3-December-2010

PROTECTED WHEN COMPLETED - B
PROTÉGÉ UNE FOIS REMPLI - B

BOARD OF REFEREES
Employment Insurance

CONSEIL ARBITRAL
Assurance-emploi

BOARD OF REFEREES DECISION
DÉCISION DU CONSEIL ARBITRAL

Case number - Numéro de la cause

10-0091

Name of appellant - Nom de l'appellant/appelante

Blair Cromwell

File number - Numéro de dossier

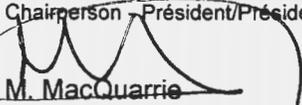
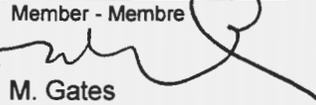
[REDACTED]

Did the claimant's actions constitute misconduct? The legal test for Employment Insurance cases of misconduct is not found in the Act. The test for misconduct is found in the Federal Court Decision of Tucker A-381-85. The test to be applied is "whether the act complained of was willful, or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects of his or her actions would have on job performance."

In today's case the Board listened to the credible testimony given by the claimant regarding the years of harassment within the work place and the efforts he made to rectify the situation which went unresolved. This caused a great deal of anxiety for him and he explained that when he had read comments made by Chief Thurber he "snapped". He contends that a reasonable person would have reacted the same way. The Board weighed the evidence of years of harassment and bullying from the workforce and the fact that the claimant used a private username when making such comments. It is the Boards findings that a reasonable person would not have felt he would have been fired for making such comments since they were made anonymously. The Board agrees with the claimant that the breakdown in the relationship was severed long before this incident and was not caused by the actions of the claimant. The Board does not feel his actions were of such a careless or negligent nature that one could say the employee willfully disregarded the effects of his or her actions.

DECISION

The Board unanimously allows the claimant's appeal.

<p>Chairperson - Président/Présidente</p>  <p>M. MacQuarrie</p>	<p>Member - Membre</p>  <p>M. Gates</p>	<p>Member - Membre</p>  <p>Dean Tupper</p>
<p>Date decision signed - Décision signée le</p> <p>3-December-2010</p>		<p>Decision sent on - Date d'envoi de la décision</p> <p>3-December-2010</p>

PROTECTED WHEN COMPLETED - B
PROTÉGÉ UNE FOIS REMPLI - B