

[TRANSLATION]

Citation: *C. B. v. Canada Employment Insurance Commission*, 2013 SSTAD 7

Appeal No. 2013-0063

BETWEEN:

**C. B.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal Decision**

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SOCIAL SECURITY TRIBUNAL  
MEMBER:

Pierre LAFONTAINE

DECISION DATE:

November 7, 2013

TYPE AND DATE OF HEARING:

Telephone hearing held November 5, 2013,  
at 1:00 p.m. Eastern Time

## DECISION

[1] The appeal is allowed and the matter is referred to the Tribunal's General Division (Employment Insurance Section) for a new hearing.

## INTRODUCTION

[2] On November 27, 2012, a Board of Referees determined that:

- The Appellant was not eligible, as a teacher, to receive Employment Insurance benefits during a non-teaching period under section 33 of the *Employment Insurance Regulations* (the Regulations).

[3] The Appellant filed an appeal from the Board of Referees' decision to the Umpire on January 9, 2013.

## FORM OF HEARING

[4] The Tribunal held a telephone hearing for the reasons indicated in the notice of hearing dated August 1, 2013. The Appellant and her representative, Counsel Jacques Beaudoin, and the Respondent, represented by counsel Joshua Wilner, attended the hearing.

## THE LAW

[5] This appeal was transferred from the Office of the Umpire to the Appeal Division of the Social Security Tribunal (the Tribunal), as leave to appeal from the decision is considered to have been granted by the Tribunal on April 1, 2013, in compliance with section 268 of the *Jobs, Growth and Long-term Prosperity Act* of 2012.

[6] The Tribunal's Appeal Division hears appeals that were filed with the Office of the Umpire and not heard before April 1, 2013, in compliance with section 266 and

subsection 267(1) of the *Jobs, Growth and Long-term Prosperity Act* of 2012.

[7] On April 1, 2013, the Umpire had not yet heard or rendered a decision on the Appellant's appeal. Therefore, the Appeal Division must now decide whether it will allow the appeal.

[8] To ensure fairness, this appeal will be reviewed on the basis of the legitimate expectations of the Appellant at the time of filing her appeal to the Umpire. For this reason, the present appeal will be decided in accordance with the applicable provisions of the Act that were in effect immediately before April 1, 2013.

[9] In compliance with subsection 115(2) of the Act, in effect at the time of the appeal, the only grounds of appeal are the following:

- (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.

## **ISSUE**

[10] The Tribunal must decide whether the Appellant's appeal should be allowed or dismissed.

## **SUBMISSIONS**

[11] The Appellant submitted the following arguments in support of her appeal:

- The Board of Referees erred in law by finding that section 33 of the Regulations applied to the Appellant's situation;
- The Appellant is not a teacher within the meaning of section 33 of the Regulations – *Canada (AG) v. Lafrenière*, 2013 FCA 175.
- In addition, the Board of Referees' finding is unreasonable in light of the facts in the docket;
- In addition, the Appellant's disentitlement should have started when the formal offer of employment was made by the employer.

[12] The Respondent submitted the following arguments to refute the Appellant's appeal:

- Section 33 of the Regulations applies to the Appellant, who is a teacher;
- The Appellant is not eligible to receive benefits during the non-teaching period because there was no clear break in the employment relationship;
- The decision *Canada (AG) v. Lafrenière*, 2013 FCA 175 does not apply in this case because that decision involved adult education centres and the Appellant was a teacher at a school for esthetics and electrolysis.
- The Board of Referees' decision is not based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

## **STANDARDS OF REVIEW**

[13] The Appellant submitted that the applicable standard of review for questions of mixed

fact and law is that of reasonableness – *Stone*, A-367-04; *Bazinet*, A-172-05.

[14] The Respondent submitted that the applicable standard of review for questions of mixed fact and law is that of reasonableness – *Stone*, A-367-04; *Bazinet*, A-172-05.

[15] The Tribunal noted that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees and an Umpire on a question of law is correctness – *Martens v. Canada (Attorney General)*, 2008 FCA 240. The applicable standard of review for questions of mixed fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

## **ANALYSIS**

[16] The Board of Referees ruled that the Appellant was not eligible to receive benefits under the exception set out in paragraph 33(2)(a) of the Regulations, which reads as follows:

33. (2) A claimant who was employed in teaching for any part of the claimant's qualifying period is not entitled to receive benefits, other than those payable under section 22 or 23 of the Act, for any week of unemployment that falls in any non-teaching period of the claimant unless

(a) the claimant's contract of employment for teaching has terminated;

[17] To make this finding, the Board of Referees focused on the issue of whether the non-teaching period constituted a clear break in the Appellant's employment – *Oliver et al*, A-811-00.

[18] However, it appears, upon reading the Board of Referees' decision, that the Board did not first determine whether the Appellant occupied a teaching job within the meaning of subsection 33(1) of the Regulations, which reads as follows:

33. (1) The definitions in this subsection apply in this section...

“teaching” means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school.

[19] Therefore, the Board of Referees had to determine whether section 33 of the Regulations applied in this case before determining whether there was reason to use one of the exceptions set out in the Regulations.

[20] More specifically, the Board had to determine whether the Appellant occupied a teaching job in a pre-elementary, an elementary or a secondary school, including a technical or vocational school – *Canada (AG) v. Lafrenière*, 2013 FCA 715.

[21] Therefore, the Board of Referees’ decision does not comply with the requirements of the Act or established case law. Consequently, the disputed decision is unreasonable and the appeal must be allowed.

[22] As a result, it is unnecessary for the Tribunal to analyze the other grounds of appeal raised by the Appellant.

[23] For these reasons, I return the matter to the Tribunal’s General Division (Employment Insurance Section) for a new hearing before a member.

## **CONCLUSION**

[24] The appeal is allowed and the matter is referred to the Tribunal’s General Division (Employment Insurance Section) for a new hearing before a member.

[25] The Tribunal orders that the Board of Referees’ decision dated November 27, 2012, be removed from the docket.

*Pierre Lafontaine*  
Member, Appeal Division