

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. C. T.*, 2014 SSTAD 29

Appeal No.: 2013-0348

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**C. T.**

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: April 15, 2014

TYPE AND DATE OF HEARING: Telephone hearing held on April 9, 2014 at  
10:30 a.m. Eastern Time

## **DECISION**

[1] The appeal is allowed in part.

## **INTRODUCTION**

[2] On February 12, 2013, a Board of Referees determined that:

- there was no cause to impose a disentitlement on the Respondent under section 37 of the *Employment Insurance Act* (the Act) and section 55 of the *Employment Insurance Regulations* (the Regulations);
- there was no cause to impose a disentitlement on the Respondent under paragraph 18(a) of the Act.

[3] The Appellant filed an appeal from the Board of Referees' decision to the Umpire on March 1, 2013.

## **TYPE OF HEARING**

[4] The Tribunal held a telephone hearing for the reasons indicated in the notice of hearing dated December 20, 2013. The Appellant, represented by Rachel Paquette, and the Respondent participated in the hearing.

## **THE LAW**

[5] The Appeal Division of the Social Security Tribunal (the Tribunal) hears appeals that were filed with the Office of the Umpire and not heard before April 1, 2013, in compliance with sections 266 and 267 of the *Jobs, Growth and Long-term Prosperity Act* of 2012. On April 1, 2013, the Umpire had not yet heard or rendered a decision on the Appellant's appeal. The appeal was transferred from the Office of the Umpire to the Tribunal's Appeal Division. 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] To ensure fairness, this appeal will be reviewed on the basis of the legitimate expectations of the Appellant at the time of filing its appeal to the Umpire. For this reason, the present appeal will be decided in accordance with the applicable provisions of the Act in effect immediately before April 1, 2013.

[7] 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**

[8] The Tribunal must decide whether the Board of Referees erred in fact and in law in determining that there was no cause to disentitle the Respondent from receiving benefits under section 37 of the Act, section 55 of the Regulations and paragraph 18(a) of the Act.

## **SUBMISSIONS**

[9] The Appellant submitted the following arguments in support of its appeal:

- According to subsection 37(b) of the Act, a claimant is not entitled to receive benefits while outside Canada, unless the claimant meets one of the requirements of subsection 55(1) of the Regulations.

- Section 55 of the Regulations provides that, subject to section 18 of the Act, a claimant is not disentitled from receiving benefits for the reason that the claimant is outside Canada.
- The Appellant determined that the Respondent was not available for work under section 18 of the Act for the duration of his stay in Romania.
- The Respondent indicated on his report cards that he was not ready, willing and able to work from October 2 to 17, 2012.
- The Respondent reconfirmed at the hearing before the Board of Referees that, had he received an offer of employment, he would not have been able to return to Canada.
- The Board of Referees failed to explain why it accepted or rejected certain evidence, which is an error of law.
- The Board of Referees clearly disregarded relevant evidence, which made its decision unreasonable.

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

- The Board of Referees did not err in fact or in law and did not act beyond or refuse to exercise its jurisdiction.
- The Board of Referees' decision is consistent with the legislation and with the Federal Court of Appeal decision in *Canada (AG) v. Walsh*, 2008 FCA 220.

## **STANDARDS OF REVIEW**

[11] The Appellant submitted that the standard of review applicable to a question of law is correctness. The standard of review applicable to a question of fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

[12] The Respondent did not make any arguments regarding the applicable standard of review.

[13] 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 (AG)*, 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**

[14] The facts on file are not in dispute.

[15] The Respondent was away from Canada from October 2 to 17, 2012, to attend his mother-in-law's funeral in Romania. He made arrangements to be reached for employment purposes, but could not return to the country within 48 hours if an offer of employment were received (Exhibit 5.1). It took him 60 hours to get to the funeral because of the distance he had to travel and the wait times in transferring between modes of transportation (Exhibit 10.5).

[16] The following statutory provisions are relevant to this case:

Section 37 of the Act:

Prison inmates and persons outside Canada

37. Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant:

(b) is not in Canada.

Section 55 of the Regulations:

55. (1) Subject to section 18 of the Act, a claimant who is not a self-employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada:

(b) for a period of not more than seven consecutive days to attend the funeral of a member of the claimant's immediate family or of one of the following persons, namely:

(2) For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the claimant's immediate family:

(a) the father and mother of the claimant or of the claimant's spouse or common-law partner;

[17] The Board of Referees stated the following when it allowed the Respondent's appeal:

[TRANSLATION]

"In light of the information in the docket, the Board of Referees finds that the claimant was outside Canada and that he met one of the requirements of section 55 of the Regulations.

In fact, section 55 of the Regulations extends benefits to a claimant who is outside Canada to attend the funeral of a member of the claimant's immediate family.

With respect to the issue of availability, the Board of Referees notes, however, that this section indicates "subject to section 18 of the Act." The case law (CUB 66891) seems to have interpreted this exception by obliging the claimant to prove "that he could have returned within 48 hours if he had received an offer of employment during his absence." The Board finds that this interpretation undermines the benefit accorded to the claimant in cases of bereavement.

How can one authorize an absence of seven days from the country to grieve a loss with one's family, when the claimant could be required to return promptly and even to miss the day of the funeral?

One must also take into account all the delays involved in travelling abroad.

The Board is of the opinion that section 55 of the Regulations cannot be circumvented in this manner.

In this case, the claimant should be able to benefit from a seven-day absence from Canada without losing his entitlement to benefits during that period.

The Board could not find the requirement to return within 48 hours anywhere other than in the above-mentioned decision.

The claimant, on very short notice, obtained a flight to the Netherlands, another flight to Romania and a long train ride to the funeral location.

In light of these facts and the wait times in transferring between modes of transportation, he surely could not return within 48 hours, as it took him 60 hours to get there.”

[18] In a recent decision, *Canada (AG) v. Elyoumni*, 2013 FCA 151, the Federal Court of Appeal clarified the interpretation of subsection 18(1) of the Act and subsection 55(1) of the Regulations, in particular how the first provision should be interpreted if the second provision applies. The Court stated the following:

[13] The concept of availability in paragraph 18(1)(a) of the Act is not defined and must be interpreted contextually. Paragraph 55(1)(a) of the Regulations maintains a claimant’s entitlement to benefits despite the claimant’s being abroad—see section 37 of the Act—if the purpose of the trip is to attend the funeral of a member of the claimant’s immediate family. This provision applies for a period of seven days.

[14] In light of the principle that Parliament—more specifically, the Governor in Council—does not speak in vain, the legislation necessarily contemplated that claimants who avail themselves of this provision could remain available for the purposes of subsection 18(1) of the Act even if they are outside the country.

[15] The availability of a claimant who benefits from the exception set out in subsection 55(1) of the Regulations is assessed on a case-by-case basis. In the context of the present case, the claimant had to, at the very least, demonstrate that he had made arrangements so that he could be reached during his absence from Canada if he was offered a job.

[19] The Tribunal finds that the Board of Referees did not benefit from the directions of the Federal Court of Appeal when it rendered its decision on February 12, 2013, because the Court’s decision was rendered on June 6, 2013.

[20] As stated by the Court, the concept of the availability of a claimant who benefits from the exception set out in subsection 55(1) of the Regulations is not defined and must be assessed on a case-by-case basis.

[21] In this context, the Tribunal finds that the evidence before the Board of Referees shows that the Respondent made arrangements to be reached during his absence from Canada in the event that he received an offer of employment (Exhibit 5.1). It was unreasonable, in the circumstances of this case, to require the Respondent to return to Canada within 48 hours of receiving an offer of employment.

[22] The Tribunal finds that the Board of Referees did not err in fact and in law when it determined that the Respondent had proven his availability for work within the meaning of paragraph 18(a) of the Act and that he was entitled to a period of seven days outside Canada under section 55(1)(b) of the Regulations.

[23] However, the Board of Referees erred in fact and in law when it failed to disentitle the Respondent from receiving benefits for the remainder of the period during which he was outside Canada in compliance with subsection 37(b) of the Act, given that no other exception set out in section 55 of the Regulations applied.

## **CONCLUSION**

[24] The appeal is allowed in part.

[25] The Respondent is entitled to receive benefits for a period of seven days outside Canada under paragraph 55(1)(b) of the Regulations.

[26] The Respondent is disentitled from receiving benefits for the remainder of the period during which he was outside Canada in compliance with subsection 37(b) of the Act.

*Pierre Lafontaine*  
Member, Appeal Division