Citation: *Canada Employment Insurance Commission v. J. L.*, 2014 SSTAD 31

Appeal No. 2013-0412

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

J. L.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: April 23, 2014

DECISION: Appeal allowed

DECISION

[1] The appeal is allowed. This matter is returned to the General Division for reconsideration in accordance with these reasons.

INTRODUCTION

[2] On February 20, 2013, a panel of the Board of Referees determined that the appeal of the Respondent from the previous determination of the Commission should be allowed. On March 11, 2013 the Commission appealed that decision to the Office of the Umpire.

[3] On April 1, 2013 the Appeal Division of the Social Security Tribunal became seized of any appeal not heard by an Umpire by that date.

[4] On March 6, 2014 a teleconference hearing was held. Both the Appellant and the Respondent attended and made submissions.

THE LAW

[5] To ensure fairness, this matter will be examined based upon the Appellant's legitimate expectations at the time of the appeal to the Office of the Umpire. For this reason, the present appeal will be decided in accordance with the legislation in effect immediately prior to April 1, 2013.

[6] According to subsection 115(2) of the Employment Insurance Act ("the Act") which was in effect before April 1, 2013, the only grounds of appeal 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 on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[7] The standard of review for questions of law and jurisdiction is correctness.

[8] The standard of review for questions of fact and mixed fact and law is reasonableness.

ANALYSIS

[9] The facts of this case are somewhat unusual.

[10] The Respondent began attending a course of instruction and applied for benefits. After learning of the Respondent's history of working while attending school, the Commission initially allowed the claim. Approximately one month later, they further determined that although the Respondent was previously deemed to be available this was no longer the case and cancelled the previously allowed benefits as of that date. It is this second determination that the Respondent successfully appealed to the Board, as noted above.

[11] The Board, in a brief decision, summarized the evidence. They noted that the Respondent had worked during a previous culinary course and had made efforts to find work during her current course of instruction. For this reason, they concluded that the Respondent was available as defined by the Act and overturned the determination of the Commission.

[12] In appealing from the Board's decision, the written submissions of the Commission stated that the Board erred by ignoring the many pieces of evidence in the file that showed that the Respondent had limited her availability to part-time work and would not work for specified employers. The Commission also noted jurisprudence of the Federal Court of Appeal holding that there is a presumption of non-availability during a course of instruction that must be rebutted before benefits can be received.

[13] At the hearing before me, the Commission noted its determination that at the time of the initial application the Respondent was indeed entitled to benefits, and that the Commission continues to stand by that determination. The Commission also conceded that no material facts had changed between the initial determination and the second Commission determination that benefits should be ended.

[14] After hearing these concessions, I expressed some confusion. If the Commission position is that their initial determination of availability was correct and no material facts had changed in the time since that determination, what basis existed in law to rescind further benefits?

[15] In response to this, the Commission noted that their actions were in accordance with Commission policy and asked for a short period of time to send the Tribunal a decision of the Federal Court of Appeal validating this policy.

[16] I granted this request, and in due course was sent *Canada (Attorney General) v. Boland* (2004 FCA 251) which held, in part, as follows:

> "…he [the claimant] was enrolled in a three-year course of study… His application for benefits was approved **for a reasonable period of time** based upon his previous history of work while attending a course of instruction. He received benefits for a period of four months but was unable to find work. He was informed that, if he could not maintain his pattern of work, he would not be entitled to benefits.
>
> It is clear to us that [the claimant] was therefore not able to rebut the presumption… according to which a person involved in a course of full-time study is generally not available for work within the meaning of the Act."
>
> [emphasis added]

[17] Having reviewed this case, I find that it is indeed directly relevant to the situation at hand and that it offers a legal basis for the determination of the Commission. As it

was not considered or applied by the Board, it is my view that this matter should be returned to the General Division for reconsideration, with due regard given to *Boland*.

CONCLUSION

[18] For the above reasons, the appeal is allowed. This matter is returned to the General Division for reconsideration in accordance with these reasons.

Mark Borer
Member, Appeal Division