

Citation: *Canada Employment Insurance Commission v. T. K.*, 2014 SSTAD 32

Appeal No. 2012-0561

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**T. K.**

Respondent

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

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SOCIAL SECURITY TRIBUNAL MEMBER: Pierre LAFONTAINE

DATE OF DECISION: April 30, 2014

TYPE AND DATE OF HEARING: Telephone hearing held on April 22, 2014 at  
10h30 am (Pacific Central Time)

## **DECISION**

[1] The appeal is granted and the file returned to the General Division (Employment Insurance Section) for a new hearing on the issue of availability.

## **INTRODUCTION**

[2] On March 8, 2012, a panel of the board of referees determined that:

- The Respondent was available for work pursuant to section 18(b) of the *Employment Insurance Act* (the “Act”);
- The Respondent was entitled to an antedate pursuant to section 10(4) of the *Act*.

[3] The Appellant appealed that decision to the Office of the Umpire on March 26, 2012.

## **TYPE OF HEARING**

[4] The Tribunal held a telephone hearing for the reasons mentioned in the notice of hearing dated January 15, 2014. The Appellant, represented by Carol Robillard, was present at the hearing. The Respondent was absent but was represented by Mark O’Brien.

## **THE LAW**

[5] The Appeal Division of the Tribunal becomes seized of any appeal filed with, but not heard by, the Office of the Umpire before April 1, 2013, in accordance with section 266 and 267 of the *Jobs, Growth and Long-term Prosperity Act of 2012*. As of April 1, 2013, the Office of the Umpire had not decided whether to grant or dismiss the Appellant’s appeal. The appeal was transferred from the Office of the Umpire to the Appeal Division of the Social Security Tribunal (the “Tribunal”). Leave to appeal is deemed to have been granted by the Tribunal on April 1, 2013 in accordance with paragraph 268 of the *Jobs, Growth and Long-term Prosperity Act of 2012*.

[6] To ensure fairness, this matter will be examined based on 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 April 1, 2013.

[7] The only grounds of appeal presentable to the Tribunal mentioned in subsection 115(2) of the *Act*, immediately in effect prior to April 1, 2013, 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, 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.

## **ISSUE**

[8] The Tribunal must decide whether the board of referees erred in fact or in law when it concluded that the Respondent was available to work pursuant to section 18(b) of the *Act* and that she was entitled to an antedate pursuant to section 10(4) of the *Act*.

## **ARGUMENTS**

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

- The board of referees misapplied the provisions of s. 18(b) of the *Act*;
- Pursuant to s. 18(b) of the *Act*, to be entitled to sickness benefits a claimant must not only prove that they are unable to work due to illness but also that they would be otherwise available for work if not for the illness;

- The board of referees made its decision without regard to the material before it, namely that the Respondent was involved daily as part of her daughter's recovery.

[10] The Respondent submits the following arguments against the appeal:

- The board of referees gave regard to the material before it in coming to its decision and the Tribunal need not to intervene;
- The board of referees gave regard to the new evidence provided by the Respondent, namely supplementary letters provided by Dr. Macdonald and Dr. Wicholas and the Respondent's letter of submissions, in coming to its decision.

## **STANDARD OF REVIEW**

[11] The Appellant submits that the applicable standard of review for question of fact and law is reasonableness – *Martens v. Canada (A.G.)*, 2008 FCA 240.

[12] The Respondent made no representations to the Tribunal regarding the applicable standard of review.

[13] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees or an Umpire regarding questions of law is the standard of correctness - *Martens v. Canada (A.G.)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Canada (A.G.) v. Hallée*, 2008 FCA 159.

## ANALYSIS

[14] The relevant provision of the *Act* reads as

follows: “Availability for work, etc.

18. (1) A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

(a) capable of and available for work and unable to obtain suitable employment;

(b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work;”

[15] The Tribunal has no choice but to find that the board of referees did not apply the legal test on the issue of availability as per the prescriptions of section 18(b) of the *Act*. The board clearly failed to ask itself the relevant question: if the Respondent had not been ill, would she have otherwise been available for work?

[16] Furthermore, the board of referees exceeded its jurisdiction when it made a decision on the issue of antedate since no decision had been rendered by the Appellant on that issue – *Steel v. Canada (AG)*, 2011 FCA 153.

[17] For these reasons, the Tribunal returns the file to the General Division of the Tribunal (Employment Insurance section) so that a Member can proceed with a new hearing on the issue of availability.

[18] The Tribunal considers that it is preferable in the present file that the appreciation of the facts and the question of credibility be addressed by a Member of the General Division.

## **CONCLUSION**

[19] The appeal is granted and the file returned to the General Division (Employment Insurance Section) for a new hearing on the issue of availability.

[20] The Tribunal orders that the decision rendered by the board of referees on March 8, 2012 be withdrawn from the file.

*Pierre Lafontaine*

Member, Appeal Division