Citation: *Canada Employment Insurance Commission v. M. W.*, 2014 SSTAD 371

Appeal No. 2010-1857

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. W.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER:	Pierre LAFONTAINE
DATE OF DECISION:	December 16, 2014
TYPE AND DATE OF HEARING:	In person hearing held in Vancouver, BC, on October 28, 29, 2014 at 9h00 am (PacificTime)

DECISION

[1] The appeal is granted, the decision of the majority of the board of referees dated July 7, 2010 is rescinded, and the Respondent's appeal before the board of referees is dismissed.

INTRODUCTION

[2] On July 7, 2010, a majority of the board of referees determined that:

- The Respondent in this case had sufficient hours of insured employment to qualify for employment insurance benefits pursuant to section 7 of the *Employment Insurance Act* (the "*Act*").

[3] The Appellant appealed that decision to the Office of the Umpire on July 26, 2010.

TYPE OF HEARING

[4] The Tribunal held an in person hearing following a pre-hearing conference that took place by telephone on August 22, 2014. The parties then agreed to the procedural steps mentioned in the notice of hearing dated September 12, 2014. At the hearing, the Appellant was represented by Counsel Michael Stevenson. The Respondent was also present and represented by Counsel Amita Vulimiri.

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 sections 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 section 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 to 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.

ISSUES

[8] The issues before the Tribunal are:

i) Whether the board of referees erred in finding that the Respondent qualified for regular employment insurance benefits even though she did not meet the required number of hours during her qualifying period;

ii) Whether section 12 of the *Employment Insurance Regulations* (the "*Regulations"*) is ultra vires;

iii) Whether sections 7 of the *Act* and 12 of the *Regulations* violate the *Canadian Human Rights Act (*the *"CHRA")*;

iv) Whether sections 7 of the *Act* and 12 of the *Regulations* discriminate against persons on the basis of disability or perceived disability contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*");

v) If the impugned provisions do violate subsection 15(1) of the *Charter*, can the infringement be saved under section 1 of the *Charter*?

vi) Should the Tribunal find that sections 7 of the *Act* and 12 of the *Regulations* are discriminatory and not saved by section 1, what is the appropriate remedy?

ARGUMENTS

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

- The majority of the board of referees refused to exercise its jurisdiction and erred in law by failing to apply section 7 of the *Act*, when it allowed the Respondent's appeal in the "interest of natural justice" despite finding that the claimant "does not have the required number of insurable hours and therefore does not qualify";

- The majority of the board of referees erred in law because it has no authority to be flexible with the application of the *Act*, even in the most sympathetic of cases;

- The majority of the board of referees erred in law by disregarding the clear and unambiguous provisions of the *Act* and relevant case law;

- Not prescribing self-employment hours that relate to employment in the labour force does not mean that section 12 of the *Regulations* is *ultra vires* of its enabling legislation, section 7 of the *Act* specifically, or the *Act* as a whole;

- Section 12 of the *Act* simply operates to provide further specificity regarding prescribed hours that may be considered in relation to section 7(4) of the *Act* when determining when a claimant is a new entrant and re-entrant (NERE);

- If self-employment were to be included in the prescribed hours listed in section 12 of the *Regulations*, its inclusion would be at odds with the purpose of the provision and the *Act* in general;

- The Tribunal should decline to consider the Respondent's challenge under the *CHRA*;

- The Respondent's challenge is directed solely at the operation of sections 7 of the *Act* and 12 of the *Regulations* rather than a discriminatory practice in the provision of a service that would attract the protection of the *CHRA*;

- The nature of the Respondent's complaint falls outside of the scope of the *CHRA* and should not be entertained by the Tribunal;

- The Respondent has fallen short of the burden defined by the Supreme Court of Canada for successfully establishing an adverse effects discrimination claim;

- The Respondent has not proven, with evidence, a direct causal connection between one of her personal characteristics and the denial of benefits in this case;

- Any disadvantage that persons with disabilities may face is not caused by or contributed to by the impugned provisions;

- The Respondent has not established that the impugned provisions infringe subsection 15(1) of the *Charter*;

- In the event that the Tribunal concludes that sections 7 of the *Act* and 12 of the *Regulations* infringe subsection 15(1) of the *Charter*, the violation is justified under section 1 of the *Charter*.

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

- Section 12 of the *Regulations* is *ultra vires* because it is inconsistent with the specific authority delegated by Parliament in subsection 7(4) of the *Act* and because it conflicts with the purpose of the *Act* as a whole and of the NERE requirement in particular;

- Section 12 of the *Regulations* is *ultra vires* because it completely ignores self-employment;

- Paragraph 7(4)(c) of the *Act* does not give the Commission discretion to decide which workers should or should not be required to work 910 hours; rather, the Commission's duty is to determine what circumstances constitute "hours that relate to the employment in the labour force";

- Circumstances that may constitute "hours that relate to employment in the labour force" include all "employment" which means self-employment as well as contracts of service;

- Section 12 of the *Regulations* is *ultra vires*, not for what it does include but for what it omits;

- Subsections 7(3) and 7(4) of the *Act* and section 12 of the *Regulations* differentiated adversely against the Respondent on grounds of a disability contrary to section 5 of the *CHRA* by failing to recognize her self-employment during her labour force attachment period as hours that relate to employment in the labour force;

- If an administrative tribunal determines that a provision of its own legislation is in conflict with human rights legislation, it must disregard that provision in deciding the appeal;

- The Supreme Court of Canada has rejected the argument that a statutory tribunal could decline to decide a human rights issue that is within its jurisdiction if it is of the view that another body would be a more appropriate decision-maker;

- The Respondent suffered *prima facie* discrimination when she was classified as a re-entrant and denied regular benefits because she had fewer than 910 hours of insurable employment in her qualifying period;

- The discriminatory provisions do not have a *bona fide* justification;

- Subsections 7(3) and 7(4) of the *Act* and 12 of the *Regulations* resulted in a denial of the Respondent's right to equal benefit of the *Act* and discriminated against her on grounds of a disability contrary to subsection 15(1) of the *Charter*, by failing to recognize her self-employment in the labour force and thus subjecting her to the NERE requirement;

- The Appellant's own evidence indicates that persons with disabilities generally have a more difficult time finding employment than persons without disabilities;

- The majority of the board of referees made findings of fact that support the Respondent's contention that the denial of her application for benefits resulted from her disability;

- The Respondent was denied equal benefit of the *Act* in comparison with engineers and other professionals who do not have visible disabilities that adversely affect their ability to secure employment;

- For them, self-employment may be a matter of choice. For the Respondent, her disability took away any choice, resulting in a "no win situation" as the majority of the board of referees described it;

- Subjecting the Respondent to the NERE requirement because her disability caused her to be self-employed is discriminatory;

- The impugned provisions create a disadvantage by perpetuating prejudice or stereotyping;

- The impugned provisions have violated the Respondent's right to equal benefit of the *Act* and have discriminated against her contrary to section 15 of the *Charter* and cannot be saved under section 1 of the *Charter*.

STANDARD OF REVIEW

[11] The parties and the Tribunal agree that the applicable standard of review regarding questions of law is the standard of correctness and the standard of review applicable to questions of fact and mixed fact and law is reasonableness – *Canada (AG) v. White*, 2011, FCA 190, *Canada (AG) v. Romano*, 2008 FCA 117, *Stone v. Canada (AG)*, 2006 FCA 27.

ANALYSIS

<u>The facts and procedures:</u>

[12] The Respondent is a professional engineer. She was born in Krakow, Poland, and was 37 years old when she filed her claim for benefits on April 1, 2010.

[13] She earned a Bachelor's degree in 1997 at the University of Waterloo and a Master's degree at the University of British Columbia in 2000, both in civil engineering.

[14] She specialized whenever possible in environmental engineering and project management, which often requires personal contacts with colleagues, external clients, suppliers and other co-workers.

[15] She lives with severe childhood onset dystonia which is a permanent neurological condition that causes the muscles to contract and spasm involuntarily. The involuntary muscle contractions can force the body into repetitive and often twisting movements as well as irregular postures and can cause strained-sounding speech. Her condition can be in some ways distracting and disconcerting to someone who doesn't know the reason.

[16] Having great difficulties obtaining insurable employment in her field, in large part due to her dystonia and potential employer's perceptions on her ability to carry out her responsibilities, she eventually accepted several self-employment contracts initiated by

colleagues with organizations which knew the high quality of her work. During her labour force attachment period, she was self-employed and worked 777 hours primarily as a Program Development Consultant for the BC Institute of Technology and as an Organization and Program Infrastructure Development Consultant for the Vancouver Area Cycling Coalition.

[17] She was afterwards successful in obtaining work for Environment Canada in a temporary and part time position which commenced in September 2009 and concluded on March 31, 2010. She also worked for the BC Institute of Technology (BCIT) on a temporary and part time basis, commencing on December 12, 2009 and ending on February 26, 2010. She was credited with working 699 hours of insurable employment during her qualifying period, until she was laid off by BCIT in February and by Environment Canada at the end of March 2010.

[18] Her qualifying period for the purposes of assessing eligibility for EI benefits was the 52 weeks period preceding her application for benefits. In this period preceding her April 10, 2010 application, she had accumulated 699 hours of insurable employment. In the 52 week period immediately preceding her qualifying period, she had zero hours of insurable employment since her 777 hours of self-employment were not considered by the Commission. She was therefore denied her claim for regular employment benefits because she did not have any hours that relate to employment in the labour force as defined in sections 7 of the *Act* and 12 of the *Regulations* during her labour force attachment period, and was therefore subject to the 910 hours NERE requirement.

[19] The Respondent appealed the denial of her claim for regular benefits to the board of referees which ruled by a majority in her favor on July 7, 2010. The Appellant filed an appeal of the decision of the majority of the board on July 26, 2010 on the issue of sufficient hours to qualify for employment insurance benefits pursuant to section 7 of the *Act*.

[20] During the course of the Appellant's appeal, the Respondent challenged the validity of the NERE requirement or its applicability to her claim alleging that the relevant provisions of the *Act* infringe the *Charter*, are *ultra vires* and violate the *CHRA*.

[21] The Respondent continued to seek employment opportunities and in June 2011 was hired as a Physical Scientist to fill a temporary vacancy at Natural Resources Canada. She was able to secure another temporary assignment thus extending her term to March 1, 2013. She also received disability benefits from the *Canadian Pension Plan,* until her work trial ended, from June 2011 to November 2011.

i) Did the board of referees err in law in finding that the Respondent qualified for regular employment insurance benefits even though she did not meet the required number of hours during her qualifying period?

[22] When it allowed the appeal, the board of referees made the following findings:

> "The decision reached by the minority has arisen form the traditional case law. The claimant is considered to be a new entrant or a re entrant and required to have a least 910 hours of insurable employment. She does not have the required number of insurable hours and therefore does not qualify. In spite of the fact that the claimant worked albeit under "contract".
>
> The claimant explained her difficulty in securing permanent, full time employment. Employers view her visible neurological disability as a liability and as a result the claimant had had no choice but to accept "contract" work that jettisons her into the "self-employment" catchment and therefore not paying EI premiums.
>
> The Majority notes that existing legislation (and resulting case law) does not contemplate the limitation of "insurable earnings" employment available to physically disabled individuals.
>
> DECISION
>
> The claimant outlined the difficulties faced by the physically handicapped individuals, who are able only to obtain work under contract or self-employment. As such, the work they perform does not become insurable earnings. The claimant, regardless of intent, ends up in a "no win" situation. Given the above, the Majority, and in the interest of natural justice, the appeal is allowed."

[23] The Tribunal is of the opinion that the majority of the board of referees erred in law and made an incorrect decision when it determined that the Respondent qualified for regular employment insurance benefits even though she did not meet the required number of hours during her qualifying period.

[24] The Respondent needed 910 hours of insurable employment as specified by paragraph 7(3)(b) of the *Act* to qualify for employment insurance benefits. Unfortunately, she had accumulated only 699 hours of the required 910 hours of insurable employment. She therefore did not qualify for employment insurance benefits.

[25] The requirement of section 7 of the *Act* does not allow any discrepancy and provides no discretion to the board of referees nor the Tribunal to correct the lack of insurable hours to establish a claim even in the most sympathetic case– *Canada (AG) v Lévesque*, 2001 FCA 304.

ii) Is section 12 of the *Regulations ultra vires*?

[26] The Respondent argues that section 12 of the *Regulations* is *ultra vires* because it completely ignores self-employment. More precisely, section 12 fails to prescribe self-employment as "hours that relate to employment in the labour force" contrary to the purpose of the legislation and exceeds the Commission's regulatory authority in paragraph 7(4)(c) of the *Act*.

[27] The Appellant argues that not prescribing self-employment as "hours that relate to employment in the labour force" does not mean that section 12 of the *Regulations* is *ultra vires* of section 7 of the *Act* specifically, or the *Act* as a whole. Individuals who are engaged in a contract for service have always been excluded from insurable employment as they are typically self-employed, independent contractors. As the self- employed are in control of their own layoff decisions, their unemployment is not involuntary in nature and therefore fall outside the scope of the *Act* as an insurance program.

[28] The relevant provisions of the *Act* and *Regulations* read as follows:

INTERPRETATION

« Definitions

2. (1) In this Act, "insurable employment"
"insurable employment" has the meaning assigned by section 5; "insured person"
"insured person" means a person who is or has been employed in insurable employment;

INSURABLE EMPLOYMENT

Types of insurable employment

5. (1) Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

(b) employment in Canada as described in paragraph (a) by Her Majesty in right of Canada;

(c) service in the Canadian Forces or in a police force;

(d) employment included by regulations made under subsection (4) or (5);

QUALIFYING FOR BENEFITS

Benefits payable to persons who qualify

7. (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

Qualification requirement for new entrants and re-entrants

(3) An insured person who is a new entrant or a re-entrant to the labour force qualifies if the person

(a) has had an interruption of earnings from employment; and

(b) has had 910 or more hours of insurable employment in their qualifying period.

New entrants and re-entrants

(4) An insured person is a new entrant or a re-entrant to the labour force if, in the last 52 weeks before their qualifying period, the person has had fewer than 490

(a) hours of insurable employment;

(b) hours for which benefits have been paid or were payable to the person, calculated on the basis of 35 hours for each week of benefits;

(c) prescribed hours that relate to employment in the labour force; or

(d) hours comprised of any combination of those hours.

(e) employment in Canada of an individual as the sponsor or co-ordinator of an employment benefits project.

HOURS THAT RELATE TO EMPLOYMENT IN THE LABOUR FORCE

12. (1) For the purposes of paragraph 7(4)(c) of the *Act*, the number of prescribed hours for any of the following weeks is 35 hours:

(a) a week in respect of which a claimant has received or will receive

(i) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments,

(ii) under a wage-loss indemnity plan, any earnings by reason of illness, injury or quarantine, pregnancy, the care of a child or children referred to in subsection 23(1) of the Act or the care or support of a family member referred to in subsection 23.1(2) of the Act or of a critically ill child,

(iii) indemnity payments referred to in paragraph 35(2)(f),

(iv) earnings because of which, pursuant to section 19 of the Act, no benefits are payable to the claimant, or

(v) an income support grant payment under the Atlantic Groundfish Strategy, other than a grant payment to provide support for an early retirement;

(b) a week in which the claimant was

(i) attending a course or program of instruction or training to which the claimant was referred by the Commission or by an authority designated by the Commission,

(ii) Employed under the Self-employment employment benefit or the Job Creation Partnerships employment benefit established by the Commission under section 59 of the Act or under a similar benefit that is provided by a provincial government or other organization and is the subject of an agreement under section 63 of the Act,

(iii) prevented from establishing an interruption of earnings by virtue of the allocation of earnings pursuant to section 36,

(iv) serving a week of the waiting period, or

(v) serving a week of disqualification under section 28 of the Act or disqualified under section 30 of the Act for a week of unemployment for which benefits would otherwise be payable;

(c) a week of unemployment due to a stoppage of work attributable to a labour dispute at the factory, workshop or other premises at which the claimant was employed.

[29] To decide the present issue, the Tribunal must keep in mind that the words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament. It isn't enough to look just at the plain language of the specific statutory provision – *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

[30] The *Unemployment Insurance Act* and its successor legislation have been in place since 1940 and have evolved over time. At its inception, the fundamental purpose of unemployment insurance was to promote the economic and social security of Canadians (See: Hon. N.A. McLarty's address to the House of Commons, July 28, 1940, at page 1987 in Exhibit "B" to the Affidavit of Michael Duffy, May 31, 2012).

[31] The EI program is a key income security program for working Canadians. The principal objective of the EI program is to support labour market transitions by providing temporary income support to eligible insured persons who experience an interruption of earnings due to a loss of employment income as a result of a job loss, sickness, the birth or adoption of one or more children, or providing care or support to a gravely ill family member. It is not intended as a system of income reliance but a social insurance based on significant labour force attachment (Affidavit of Michael Duffy, May 31, 2012, at para. 9).

[32] The EI program is intended to benefit individuals engaged in insurable employment, as set out in section 5 of the *Act*. Insurable employment under the *Act* means employment under a contract of service whereby a worker agrees to provide his or her services to an employer for a salary or some other form of remuneration (Affidavit of Michael Duffy, May 31, 2012, at para. 10).

[33] The program is also financed entirely through employer and employee premiums. Like any other insurance program, EI pools risks so that a significant part of the cost of the loss of employment income is spread across workers and employers. The payment of

premiums however does not in itself give rights to receive benefits. A claimant must still meet the eligibility requirements established by law as is the case with any insurance policy to which one has subscribed to (Affidavit of Michael Duffy, May 31, 2012, at para. 11, 12, 13).

[34] All workers must have a significant attachment to the labour force before they can receive benefits. The income benefits portion of the EI program has been designed to provide a quick response to support eligible insured persons who experience an interruption of earnings due to an involuntary loss of employment income (Affidavit of Michael Duffy, May 31, 2012, para. 17, 19)

[35] To ensure that insurance principles applied to the UI program, jobs that would be provided coverage were only those where a true risk of unemployment existed. It was determined that self-employed workers would be excluded from coverage under the UI program (See: Hon. N.A. McLarty's address o the House of commons on July 26, 1940, Exhibit "B" to the Affidavit of Michael Duffy, May 31, 2012).

[36] As the self-employed do not work under an employer-employee relationship where the availability of work, workload and hours of work are outside of their control, it was determined that the insurability of such employment was outside the scope of UI (See: A Chronology of Response: The Evolution of Unemployment Insurance from 1940 to 1980, pages 7-11 Exhibit "G" to the Affidavit of Michael Duffy, May 31, 2012).

[37] The Gill Committee was later tasked with making recommendations for improvements to the program. The Gill Committee noted that the program had excluded from coverage individuals working in conditions where there was a lack of any employer-employee relationship and recommended that it remain that way (See: Report of the Committee of Inquiry in to the Unemployment Insurance Act, pages 1-17, 106-112, Exhibit "S" to the Affidavit of Michael Duffy, May 31, 2012).

[38] In 1968, the Cousineau report recommended that the system continue to exclude the self-employed. The report found that the self-employed should ultimately be excluded because they fall outside of the scope of the program and do not operate under a contract of

employment with another party (See: Report of the Study for Updating the Unemployment Insurance Programme, Vol. 2, Chapter VI, pages 13-15, Exhibit "H" to the Affidavit of Michael Duffy, May 31, 2012).

[39] In 1970, the *Unemployment Insurance in the 70's White Paper* recommended that the self-employed continue to be excluded under the new proposed scheme. The same issues were again cited as motivating factors for this recommendation, i.e. that the self- employed control their employment and unemployment, and that the *Act* was not intended to insure profitability of their business (See: Unemployment Insurance in the 70's, page 18. See Exhibit "J", Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration, September 15, 1970. See Exhibit "K", Report of the Standing Committee on Labour, Manpower and Immigration of the White Paper on Unemployment, Insurance Exhibit "I" to the Affidavit of Michael Duffy, May 31, 2012).

[40] Similarly, in 1981, the Task Force on Unemployment Insurance, titled *Unemployment Insurance in the 1980's* found that self-employed should continue to be excluded from the program. In making its recommendations for changes to the program design, the report noted specifically that any definition of insurable employment should insure "all dollars earned and hours worked under a master/servant relationship, with a contract of service and control." (See: Unemployment Insurance in the 1980's, page 73- 74, Exhibit "O", to the Affidavit of Michael Duffy, May 31, 2012).

[41] In 1986, the Forget Commission found that insuring the self-employed "would create very serious problems for the Unemployment Insurance program". In arriving at their recommendation that the self-employed should continue to be excluded, the Commission stressed that the risk of moral hazard associated with these workers is ultimately incompatible with the program (See: Commission of Inquiry on Unemployment Insurance: Report, pages 237-240 and 247 Exhibit "P" to the Affidavit of Michael Duffy, May 31, 2012).

[42] In 2009, the government tabled the *Fairness for the Self-Employed Act*, to extend the maternity, parental, sickness and compassionate care benefits to self-employed persons on a voluntary basis. However, EI regular benefits were still not extended to the self-employed.

[43] The basis of that position was that the self-employed are in control of their own layoff decisions, their unemployment is not involuntary in nature, and therefore is outside the scope of EI as an insurance program (See: Speech from the Throne, given to the House of Commons, on November 19, 2008, Exhibit "T" to the affidavit of Michael Duffy, May 31, 2012; Press release of the Department of Human Resources and Skills Development, November 3, 2009, Exhibit "U" to the Affidavit of Michael Duffy, May 31, 2012).

[44] Considering the history of the self-employed under the EI program and considering the words of the *Act* and the object of the *Act*, can the Tribunal conclude that section 12 of the *Regulations* is *ultra vires*?

[45] Subsection 2(1) of the *Act* specifies that an insured person is a person who is or has been employed in insurable employment. Paragraph 5(a) of the *Act* defines insurable employment to be employment in Canada by one or more employers, under any express or implied contract of service. This implies work performed under a master/servant relationship, with a contract of service and control of layoff decisions to the employer.

[46] Paragraph 7(4)(c) of the *Act* recognizes prescribed hours that relate to employment in the labour force for the purpose of determining whether an individual is a NERE and section 12 of the *Regulations* establishes the parameters set out in paragraph 7(4)(c) of the *Act* with respect to the prescribed hours (490) that relate to employment in the labour force.

[47] In view of the above, the Tribunal cannot come to the conclusion that not prescribing self-employment as hours that relate to employment in the labour force means that section 12 of the *Regulations* is ultra vires of section 7 of the *Act* specifically, or the *Act* as a whole.

[48] On the contrary, if self-employment were to be included in the prescribed hours listed in section 12 of the *Regulations*, said inclusion would be in clear contradiction with section 7 of the *Act* specifically, and the *Act* in general.

[49] The Tribunal finds that, read together, the statutory provisions and the *Regulations* form a harmonious scheme. The relevant objective and intention of the legislature – to exclude self-employment, except under certain specific conditions, is manifest on the face of the *Act* and in the intention of Parliament.

[50] In conclusion, the Tribunal finds that section 12 of the *Regulations* is intra vires of section 7 of the *Act,* and the *Act* as a whole.

iii) Do sections 7 of the *Act* and 12 of the *Regulations* violate the *Canadian Human Rights Act?*

[51] The present issue is brought pursuant to section 5 of the *CHRA*, which provides:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

[52] The Respondent submits that subsections 7(3) and 7(4) of the *Act* and section 12 of the *Regulations* differentiated adversely against her on grounds of a disability contrary to section 5 of the *CHRA*.

[53] The Respondent further submits that since the Tribunal has the authority to decide questions of law, it has the jurisdiction to decide human rights issues arising in the course of an appeal, and to grant appropriate remedies if discrimination is proven – *Tranchemontage v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513.

[54] The Appellant does not dispute the jurisdiction of the Tribunal to decide human rights issues. However, the Appellant takes the position that the Tribunal should decline to consider the Respondent's challenge under the *CHRA*.

[55] In support of its position, the Appellant argues that the Respondent's challenge is directed solely at the operation of section 7 of the *Act* and section 12 of the *Regulations* rather than a discriminatory practice in the provision of a service that would attract the protection of the *CHRA*. In these circumstances, the nature of the complaint falls outside of the scope of the *CHRA* and should not be entertained by the Tribunal.

[56] The Respondent replies that she is not only challenging the legislation. She contends that the ministerial action to exclude self-employment as "hours that relate to employment in the labour force" pursuant to the *Act* is a "service" within the meaning of the *CHRA*.]

[57] The Respondent relies on the decisions of the Federal Court of Appeal in *Canada (AG) v. Druken*, [1989] 2 FC 24 and the Canadian Human Rights Tribunal in *McAllister-Windsor v. HRDC*, CHRT 2001 CanLII 20691, to support her position that discrimination under the *Act* amounts to a denial of a service customarily available to the public.

[58] However, in a recent decision, *Public Service Alliance of Canada v. Canada (Revenue Agency)*, [2012] FCA 7 [*Murphy*], the Federal Court of Appeal revisited its decision in *Druken* and concluded:

> "[7] The decision of this Court *in Canada (Attorney General) v. Druken*, reflex, [1989] 2 F.C. 24 (F.C.A.) [*Druken*] was decided on the basis that the complaint in that case was directed at a discriminatory practice in the provision of a service within the meaning of section 5, a matter that was conceded by the Attorney General and therefore not argued (see the caveat expressed by Robertson J.A. in *Canada (Attorney General) v. McKenna*, 1998 CanLII 9098 (FCA), [1999] 1 F.C. 401 (C.A.), paras. 78 to 80). Despite this concession, a reading of the decision and the remedy granted (*Druken*, p. 29, letter a) make it clear that the complaint was directed solely at the operability of paragraphs 3(2)(c) and 4(3)(d) of the *Unemployment Insurance Act*, S.C. 1974-75-76, c. 80 and 4(3)(d) of the *Unemployment Insurance Regulations*, C.R.C., c. 1576), and, to that extent, for the reasons already given, such a complaint does not come within any of the practices that may form the object of a complaint under the CHRA."
>
> (Underlined by the undersigned)

[59] In dismissing the complaint in *Murphy*, the Court concluded that the alleged discrimination did not result from any ministerial action that might be viewed as a service. The attacks were directly aimed at the operability of provisions of the *Act* and therefore did not fall within any of the practices that may form the object of a complaint under the *CHRA*.

[60] In a recent decision, *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13 (CanLII), the position of the Federal Court of Appeal was followed by the Canadian Human Rights Tribunal:

"[143] *Heerspink*, *Craton*, *Larocque* and *Tranchemontage* support the Complainants and Commission's claim that human rights legislation has primacy over other inconsistent laws and, consequently, can render legislation that is in conflict with it inoperable. This is also consistent with federal human rights cases such as *Druken*, *Gonzalez*, *McAllister-Windsor* and *Uzoaba*, and other provincial human rights cases, that have used human rights legislation to render inconsistent legislation inoperable. However, while these cases support the primacy of human rights legislation and its ability to render legislation inoperable, there is no indication in these cases that the *Act* allows for complaints that challenge the wording of other laws.

[144] The basis of the conflict between legislation in *Heerspink*, *Craton* and *Larocque*, and the federal and provincial cases relied upon by the Complainants and Commission, were couched in "discrimination" complaints under the applicable human rights legislation in those cases. The complaints themselves were not challenges to the wording of other laws. A "discriminatory practice", within the meaning of the applicable legislation, was present.

[145] In this regard, subsection 40(1) of the *Act* provides that individuals may file a complaint if they have reasonable grounds for believing that a person has engaged in a discriminatory practice. Section 39 of the *Act* defines a "discriminatory practice" as any practice within the meaning of section 5 to 14.1 of the *Act*. There is no discriminatory practice in sections 5 to 14.1 that provides for the review of legislation for compliance with the *Act*.

[146] While the Commission pointed to section 2 and subsections 49(5) and 62(1) of the *Act* as demonstrating Parliament's intent that the *Act* apply to the wording of other federal legislation, those sections do not alter, modify or add to the discriminatory practices set out in sections 5 to 14.1 of the *Act*. While subsections 49(5) and 62(1) may speak to the primacy of the *Act* when in conflict with other federal legislation, again, the primacy of human rights legislation does not mean that there is an ability to challenge legislation under the *Act*, absent a discriminatory practice.

[147] Similarly, the inclusion and repeal of the former section 67 of the *Act* did not alter, modify or add to the discriminatory practices set out in sections 5 to 14.1 of the *Act*. In the same vein as subsection 62(1), the former section 67 of the *Act* functioned as a statutory exception to the possibility of the *Act* having primacy over the *Indian Act* and, therefore, rendering some of its provisions inoperable. However, again, the primacy of human rights legislation does not mean that the wording of other laws can be challenged under the *Act*, absent a discriminatory practice within the meaning of the *Act*.

[148] On the basis of the above reasoning, I do not find that *Murphy* is superseded by binding case law from the Supreme Court of Canada. Nor do I find authority to support the proposition that the *Act* allows for complaints challenging the discriminatory impact of other federal laws, absent a discriminatory practice within

the meaning of the *Act*. In my view, *Heerspink*, *Craton* and *Larocque*, and the federal and provincial cases relied upon by the Complainants and Commission, are actually consistent with the Federal Court of Appeal's decision in *Murphy*. Similar to the analysis in those cases, the Federal Court of Appeal required there to be a "service", within the meaning of section 5 of the *Act*, for the Tribunal to have jurisdiction. Also, the Federal Court of Appeal's comments in *Murphy* do not put in question the primacy of the *Act* when in conflict with other legislation.

[149] However, *Murphy* does clarify that a challenge to legislation, and nothing else, is not a service and, therefore, is not a discriminatory practice within the meaning or jurisdiction of the *Act*. Leading to *Murphy*, through cases like *Forward* and *Watkin*, the judicial understanding of the term "services", within the meaning of section 5 of the *Act*, has been clarified, consistent with the proper interpretive attitude toward human rights legislation espoused in *Heerspink*, *Craton*, *Action Travail des Femmes* and *Tranchemontagne* (see *Watkin* at para. 34). As mentioned above, neither the Complainants nor the Commission took issue with the general criteria currently used to determine whether conduct is with respect to a "service" within the meaning of section 5 of the *Act*.

[150] Having found the current complaint to be a challenge to legislation, and nothing else; that *Murphy* is not superseded by binding case law from the Supreme Court of Canada; and, that the *Act* does not allow for complaints challenging the discriminatory impact of other federal laws, absent a discriminatory practice within the meaning of the *Act*; therefore, as the Complainant's have not identified a discriminatory practice within the meaning of section 5 of the *Act*, this complaint is dismissed."

[61] This position was reiterated in another recent decision of the Canadian Human Rights Tribunal, *Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21 (CanLII):

"[71] The Commission claims that prior to the Federal Court of Appeal's decision in *Murphy*, a long line of case law within the federal human rights system had recognized the *Act* as having primacy over other inconsistent laws, consistent with the principles set out in cases like *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne*. In this regard, the Commission relies on the following cases: *Druken*; *Gonzalez*; *McAllister-Windsor; Canada (Attorney General) v. Uzoaba*, 1995 CanLII 3589 (FC), [1995] 2 F.C. 569 [Uzoaba]; the dissenting reasons of Dickson C.J. and Lamer J. in *Bhinder v. CN*, 1985 CanLII 19 (SCC), [1985] 2 S.C.R. 561 [*Bhinder*]; and, the dissenting reasons of McLachlin J. and L'Heureux-Dubé J. in *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 SCR 854 [*Cooper*].

[72] In the circumstances of this case, the Commission claims the Tribunal is faced with two contradictory lines of authority from higher decision-makers: (i) the Supreme Court of Canada jurisprudence, declaring that in the absence of a clear legislative statement to the contrary, human rights laws render other laws inoperable;

and, (ii) the Federal Court of Appeal decision in *Murphy*, finding the opposite. Under the principles of vertical stare decisis, the Commission argues the Tribunal must follow the principles established by the Supreme Court of Canada.

[73] The Tribunal has recently examined the Supreme Court of Canada jurisprudence dealing with the primacy of human rights legislation in light of the Federal Court of Appeal's decision in *Murphy*. In a decision dated May 24, 2013, Member Ed Lustig dismissed the complaints of Jeremy and Mardy Matson and Melody Schneider: *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13 (CanLII), [Matson]. The Matsons and Ms. Schneider, who are siblings, argued that due to their matrilineal Indian heritage, pursuant to which they were found eligible for registration under subsection 6(2) of the *Indian Act*, they were treated differently than others whose lineage was paternal and therefore registered under subsection 6(1) of the *Indian Act*. They maintained that the registration provisions in the *Indian Act*, as they are applied to them, were discriminatory on the basis of sex, family status, race, national origin and/or ethnic origin contrary to s. 5 of the *Act*.

(…)

[77] I do not propose to conduct this analysis again here. I have reviewed these decisions along with the Tribunal's reasons in detail and share the view that the above-stated Supreme Court of Canada jurisprudence and the *Murphy* decision are not in contradiction. I agree that human rights legislation, including the *Act*, has the ability to render inoperable other conflicting legislation pursuant to *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne* and supported by *Action Travail des Femmes*. However, this does not preclude the necessity for the existence of a discriminatory practice pursuant to the *Act*, thereby giving the Tribunal the jurisdiction to examine the complaint as expressed in *Murphy*.

[78] Contrary to the Commission's submissions, this view is also supported by the long line of federal cases which preceded *Murphy*. As detailed in my preceding analysis on the meaning of a "service" pursuant to section 5 of the *Act*, the cases in *Druken*, *Gonzalez* and *McAllister-Windsor* stood for the principle that benefits provided pursuant to the *Unemployment Insurance Act* and the *Citizenship Act* constituted a service under s. 5 of the *Act*. Along with *Gould*, *Watkin*, *Pankiw*, *McKenna* and *Forward*, they form part of the evolving jurisprudence that has helped to define the scope of section 5 of the *Act*. While the term "service" may have been conceived differently under *Druken*, *Gonzalez* and *McAllister-Windsor* then it was subsequently in *Murphy*, I do not read these cases as foregoing the jurisdictional requirement for the Tribunal to find the existence of a "discriminatory practice" within the meaning of the *Act*.

(…)

[109] Pursuant to section 10 of *the Indian Act*, bands have the ability to control their own membership in accordance with their own membership rules. Band

> membership, insofar as bands have indeed chosen to exercise that control, is therefore a regulated not by the *Indian Act* itself but by a set of rules as allowed by the legislation. A challenge to membership is, in this context, therefore not a challenge to legislation and as such, can more readily be considered as a "service", provided by the band, pursuant to section 5 of the *Act*. For reasons already stated, the same cannot be said of Indian registration, the terms of which are explicitly delineated in the *Indian Act*. As such, the scope of what does or does not constitute a "service" is not defined by the relationship between the individual and the state as argued by the Commission, but rather by the examining whether what is being challenged constitutes a direct attack on Parliament's act of legislating, something best achieved with the *Charter*, or an alleged discriminatory practice pursuant to section 5 of the *Act* and the above-stated reasons"

[62] Is the challenge brought by the Respondent a challenge to legislation, and nothing else? Is there an absence of service and, therefore, it is not a discriminatory practice within the meaning or jurisdiction of the CHRA?

[63] Following the decisions rendered in *Murphy*, *Andrews* and *Matson*, the Tribunal finds that the alleged discrimination did not result from any ministerial action that might be viewed as a "service" within the meaning of section 5 of the *CHRA* and that the attacks were directly aimed at the operability of provisions of the *Act* and do not fall within any of the practice that may form the object of a complaint under the *CHRA*.

[64] The Appellant had no discretion in the classification of the Respondent as a re-entrant to the workforce and to apply the NERE requirement accordingly based on the undisputed facts before it. It was a purely mathematical exercise.

[65] In the Federal Court of Appeal case, *Canada (AG) v. Lévesque*, 2001 FCA 304, the Court held that:

> "[2] The claimant accumulated 594 hours of work instead of the 595 hours required by subsection 7(2) of the *Employment Insurance Act*, S.C. 1996, c. 23. She was short one hour of work in order to fulfill the conditions required by that section if she was to be eligible for unemployment benefits. This requirement of the *Act* does not allow any discrepancy and provides no discretion. Neither the board of referees nor the umpire could remove the defect from the claim."

[66] In the Umpire decision *CUB 80061*, the Umpire upheld the decision of the board:

"The claimant, who stopped working because of an injury, was eventually denied benefits by the Commission since she had not accumulated any insurable hours of employment during her qualifying period (exhibit 5-3).

An appeal before the Board of Referees was dismissed (exhibit 11), the Board holding:

"The Board can find no evidence of insurable hours in the Appellant's qualifying period. The Board notes that the hours shown in Exhibit 3 are not in the qualifying period, and in any case were used to establish her claim for sickness benefits. The Board therefore finds as a fact that the Appellant has no insurable hours in her qualifying period and consequently does not qualify for benefits.

Under the *Act* and subsection 12 of the *Regulations*, this must be a purely mathematical exercise. The *Act* and case law are incontrovertible, as Justice Cullen stated in *CUB 23847*, "The restrictions on the Board's discretion, as well as my own, remain as stringent as if the deficiency was ten weeks or more.

There is no authority to alter the requirements of the *Act*, even in the most sympathetic of circumstances."

The claimant now appeals the Board's decision before the Umpire claiming a denial of natural justice (exhibit 12-2).

There is absolutely no evidence to support either the ground of appeal invoked or any other possible ground of appeal. The Board rendered the correct decision and there is no reason for the Umpire to intervene."

[67] And finally, in another Umpire decision *CUB 71814*, where the claimant fell short of the 910 hours NERE requirement, the Umpire stated that:

"[3] The claimant accumulated 447 insurable hours which was insufficient to qualify for benefits. She had worked within her qualifying period at an inn and accumulated 148.75 insurable hours; despite this combination of insurable hours, she still fell well short of the required 910 hours for a claimant who is an entrant or a re-entrant in the workforce within the meaning of the law.

[4] The claimant is a sympathetic person who candidly and eloquently shared her views of inequities in our Society with the Court and counsel. However, on the substantive matter of shortage of insurable hours, I regrettably cannot intervene since it is a strict application of the law, and I cannot deviate from it."

(Underlined by the undersigned)

[68] The Respondent needed 910 hours of insurable employment as specified by paragraph 7(3)(b) of the *Act* to qualify for employment insurance benefits. Unfortunately, she had accumulated only 699 hours of the required 910 hours of insurable employment. She therefore did not qualify for employment insurance benefits.

[69] Having found the current complaint to be a challenge to legislation, and nothing else; that the *CHRA* does not allow for complaints challenging the discriminatory impact of other federal laws, absent a discriminatory practice within the meaning of the *CHRA*; therefore, since the Respondent has not identified a discriminatory practice within the meaning of section 5 of the *CHRA*, this ground is dismissed.

iv) Do sections 7 of the *Act* and 12 of the *Regulations* discriminate against persons on the basis of disability or perceived disability contrary to subsection 15(1) of the *Charter?*

[70] The Respondent submits that subsections 7(3) and 7(4) of the *Act* and section 12 of the *Regulations* resulted in a denial of her right to equal benefit of the *Act* and discriminated against her on grounds of disability contrary to subsection 15(1) of the *Charter*, by failing to recognize her involuntary self-employment during her labour force attachment period as hours that relate to employment in the labour force and thus subjecting her to the 910 hours NERE requirement.

[71] She further submits that such discrimination cannot be demonstrably justified within the meaning of section 1 of the *Charter*.

[72] The Appellant is of the view that the Respondent has fallen short of the burden defined by the Supreme Court of Canada for successfully establishing an adverse effects discrimination claim. The Respondent has not proven, with evidence, a direct causal connection between one of her personal characteristics and the denial of benefits in this case.

[73] The jurisprudence establishes a two-part test for assessing a subsection 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[74] The first step in the subsection 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. Subsection 15(1) protects only against distinctions made on the basis of the enumerated grounds or grounds analogous to them.

[75] An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, at para. 13.

[76] However, a distinction based on an enumerated or analogous ground is not by itself sufficient to found a violation of subsection 15(1). At the second step, it must be shown that the law has a discriminatory impact in terms of prejudicing or stereotyping - *Whitler v. Canada (AG)*, 2011 SCC 12 [*Whitler*].

[77] The analysis of *Charter* rights is to be undertaken in a purposive and contextualized manner, where the central concern of subsection 15(1) is combatting discrimination defined in terms of perpetuating disadvantage and stereotyping. The Tribunal in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group – *Whitler*.

The statutory scheme

[78] The Tribunal previously proceeded with an extensive review of the statutory scheme when it determined that section 12 of the *Regulations* is *intra vires* of section 7 of the *Act* specifically, and the *Act* as a whole.

[79] However, the Tribunal wants to emphasize, as previous courts have done, that the EI system is a contributory scheme which provides social insurance for Canadians who suffer a loss of income as a result of a loss of their employment or who are unable to work by reason of illness, pregnancy and childbirth or parental responsibilities for a newborn or newly-adopted child.

Whether the Respondent suffered a differential treatment

[80] In *Charter* jurisprudence prior to *Withler*, the initial step of showing that the law in question has resulted in adverse distinction has included a comparison with the law's impact on a "comparator group" which lacks the discriminatory characteristic.

[81] The Respondent initially submitted that the comparator group by which to gauge the adverse distinction suffered by her would be professionals who must deal with peers, subordinates, superiors, clients, regulators and members of the public, but who do not have a visible impairment or physical condition that may be perceived as a disability with the potential to affect their ability to communicate orally with those individuals.

[82] The Respondent admitted that it had not been possible to produce statistical evidence regarding such a specialized group but is now of the position that this is no longer a mandatory part of proving a section 15 claim. She argues that once she establishes a distinction based on an enumerated or analogous ground such as disability, the claim should proceed to the second step of the *Charter* analysis.

[83] She relies on her non-contradicted evidence that it has been much more difficult for her to find suitable employment than it has been for other engineers who do not have a visible disability or perceived disability, and that as a result of being unable to find such suitable employment, she had no choice but to engage in self-employment during her labour force attachment period. Because her involuntary self-employment was not recognized by section 12 of the *Regulations* as a form of attachment to the labour force, she became subject to the 910 hour NERE qualifying requirement and was denied benefits.

[84] The effect of the NERE requirement she argues and its non-recognition of self-employment have resulted in an adverse distinction based on her disability.

[85] The Appellant however argues that the Supreme Court of Canada in *Withler* clearly indicated that, in circumstances where there is not simply a straightforward, facial distinction on the basis of an enumerated or analogous ground, establishing a distinction will be more difficult. The Court also indicated that for indirect discrimination cases, as is the present case, "the claimant will have more work to do at the first step".

[86] The Tribunal cannot help but notice the absence of evidence to support the Respondent's position. As pointed out by the Appellant, there is no statistical evidence to support a determination that:

- persons with disabilities are less likely to apply for EI benefits;
- persons with disabilities are less likely to receive EI benefits;
- persons with disabilities are more likely to be subject to the NERE provisions and required to work 910 hours in order to qualify for benefits;
- persons with disabilities are more likely to be self-employed;
- persons with disabilities who are subject to the NERE provision are any less likely than anyone else to meet the 910 hour threshold.

[87] Without adequate statistical data, the Tribunal cannot presume that the Respondent has been denied a benefit that was granted to others or carries a burden not carried by others, by reason of a personal characteristic that falls within the enumerated or analogous grounds of subsection 15(1).

[88] Notwithstanding that, the Tribunal is aware that an infringement of subsection 15(1) may be established by other means, and may exist even if there is no one similar to the claimant who is experiencing the same unfair treatment - *Law v. Canada, (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

[89] By definition, laws granting social benefits entail a differential treatment. In determining categories of beneficiaries and eligibility requirements, they treat differently the persons who are excluded from their scope of application and, as a result, are denied benefits – *Canada (AG) v. Lesiuk*, 2003 FCA 3.

[90] Although the Tribunal has doubts that there exists a causal relationship between the denial of benefits and the alleged characteristics, it is willing to accept, based on the evidence submitted by the Respondent, that she experienced differential treatment on account of her disability.

Whether the differential treatment suffered by the Respondent is based on enumerated or analogous grounds

[91] In this proceeding, the *Charter* ground in question is disability, and there can be no question that a distinction based on disability or perceived disability can form the basis for a section 15 challenge.

[92] This brings the Tribunal to the last stage of the subsection 15(1) analysis, namely whether the differential treatment discriminates against the Respondent.

Whether the differential treatment amounts to discrimination under subsection 15(1)

[93] The purpose of section 15 is to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration" - see *Law*, supra.

[94] It is the third stage of the subsection 15(1) analysis that is most directly involved with the concept of human dignity.

[95] The Supreme Court of Canada identified four contextual factors relevant to the third stage of the discrimination analysis: (i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability; (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual needs, capacity or circumstances of the claimant or others; (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society, and; (iv) the nature and scope of the interest affected by the impugned government activity - see *Law*, supra.

[96] The Respondent recognizes that reducing a basic eligibility requirement to meet the needs of some groups of claimants could theoretically lead to further reductions for other groups, and eventually to a situation in which EI benefits would become a form of social assistance available to anyone who needs them.

[97] However, the Respondent argues that exempting her from the NERE requirement by recognizing her involuntary self-employment as a form of attachment to the labour force would only mean that she would be eligible to receive the same amount and length of benefits on the same terms as other claimants in her region who worked the same number of hours and received the same earnings.

[98] Requiring NEREs to pay a higher "price" for EI benefits than all other claimants is prejudicial in itself, but when it is based on assumptions that they would otherwise take advantage of the system, and when it denies recognition of the value of their work, the only possible conclusion is that subjecting the Respondent to the NERE requirement because her disability caused her to be self-employed is discriminatory.

[99] The Appellant submits that the minimum eligibility requirements of the EI *Act* that are set out in section 7 of the *Act*, including the definition of and number of hours required of a NERE in order to qualify for benefits, are necessary components of an insurance scheme that requires parameters in order to operate. They serve to ensure that benefits are delivered to the target population as the objective is to ensure that those who receive benefits have a minimum level of workforce attachment, measured in insurable hours worked.

[100] The Appellant argues that the Respondent has failed to establish with evidence any disproportionate impact in the operation of the impugned provisions on the basis of disability. It is the Respondent's personal circumstances and work choices which has resulted in her failing to qualify for benefits. The Respondent would like her self-employment work recognized to allow her to meet the eligibility requirements of the *Act* in a manner not provided in the *Act*. In conclusion, the Respondent has not shown the purpose or effect of the provisions in question infringes subsection 15(1) of the *Charter*.

[101] The first of the contextual factors asks the Tribunal to consider the pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group.

[102] While it is surely true that persons with disabilities have historically faced barriers to their entry into the work force and that these barriers are rooted in stereotypes and

prejudices, it has not been demonstrated to the Tribunal that, in the context of unemployment insurance, there was a past and long history of disadvantages, stereotyping, vulnerability and prejudice caused by the NERE requirement.

[103] In fact, the evidence establishes that once persons with disabilities are in the labour force, their work patterns are very similar to those persons with no disabilities. The majority of women with disabilities (66%) who obtained a University degree participated in the labour force. 68.4% of persons with disabilities between the age of 35-44, the age range of the Respondent during the relevant period, participated in the labour force. The evidence demonstrates that persons with disabilities are actually more likely to receive EI benefits in the instance of job separation than persons with no disabilities.

[104] The NERE requirement does not create or reinforce a stereotype that persons with disabilities are not valuable assets to the labour force. Nor does this requirement affect the dignity of persons with disabilities by suggesting that their work is less worthy of recognition. Anyone who works the requisite number of insurable hours will qualify.

[105] In an adverse effects analysis like this one, the Tribunal must distinguish between effects which are wholly caused or contributed to by an impugned provision and those social circumstances which exist independently of the provision - *Symes v Canada*, [1993] 4 SCR 695, [1993] SCJ no 131 (QL) (SCC).

[106] In this context, the Tribunal does not find the effects of the employment insurance system as perpetuating a historic disadvantage that exacerbates or stereotypes the situation for persons with disabilities.

[107] The second of the contextual factors asks the Tribunal to look at the correspondence between the ground(s) and the actual needs, capacity or circumstances of the Respondent and others.

[108] The Tribunal finds that the EI program corresponds to the needs of the Respondent and persons with disabilities. The evidence submitted to the Tribunal demonstrates that persons with disabilities are more likely than persons with no disabilities to receive benefits from the EI program. The Tribunal cannot conclude from the evidence before it that persons

with disabilities are disadvantaged by the operation of the *Act*, even where they do face societal disadvantages because of their disabilities.

[109] The reason the self-employment hours of the Respondent were not recognized is not based on her disability or any additional burden encountered, or prejudice experienced by, persons with disabilities. It is because self-employment has consistently fallen outside the scope of the EI insurance scheme applicable to all Canadians.

[110] In addition, Parliament was conscious that some persons with disabilities would not qualify for EI benefits and that income would be needed from some other sources to offset the potential harm resulting from the exclusion. Looking at other ways of doing that, it provided for the Opportunities Fund for Persons with Disabilities in Canadian Society, the Working Income Tax Benefit that includes a special supplement for persons with disabilities, the Registered Disability Savings Plan and the *Canadian Pension Plan* disability benefit that was, in fact, successfully claimed by the Respondent for a period of time.

[111] The third contextual factor involves the consideration of the ameliorative nature of the legislation and is essentially relevant only in respect of situations of so-called reverse discrimination. The present case does not involve a claim of discrimination by an "advantaged" person.

[112] The fourth contextual factor asks the Tribunal to consider the nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that discrimination will be founded. In the present case, the consequences are neither severe nor overly localized for persons with disabilities. In fact, the evidence does not support localization at all. The differential treatment is between those who work fewer hours than the NERE requirement and those who meet this threshold. It is not localized on persons with disabilities in any significant manner.

[113] The Respondent is not excluded from participation in the EI program although she is a person with disabilities. The Tribunal took notice that the Respondent was in fact engaged in insurable employment during the course of the Appellant’s appeal. She will, like all

Canadians, be eligible for EI benefits in the future if she suffers an interruption of earnings and meets the requirements of the *Act*.

[114] In view of the above, the Tribunal finds that the Respondent has not discharged her onus of establishing on a balance of probabilities that her right under subsection 15(1) of the *Charter* has been infringed.

[115] The Tribunal will conclude by adopting these words of Létourneau J.A. in *Lesiuk*:

> "[51] I acknowledge Iacobucci J.'s comments in *Law*, supra, at paragraph 88, that it is not always necessary for the claimant to adduce evidence in order to show a violation of human dignity and that there will be cases where such a determination can be made on the basis of judicial notice and logical reasoning. However, I believe I would be stretching the concept of judicial notice beyond recognition and acting unfairly in this case if, on that sole basis, I were to conclude that a violation of human dignity exists in light of the historical, social, political and legal context of the respondent and in light of the new eligibility requirements for unemployment benefits. The acts underlying the respondent's context as well as the rationale for the enactment of the new eligibility requirements are too controversial to lend themselves to an exercise of such judicial power. It is not at all plainly obvious that the distinction at issue has the effect of demeaning the human dignity of the respondent or persons like her. The eligibility requirements are not a manifestation of a lack of respect or loss of dignity. They are an administratively necessary tool tailored to correspond to the requirements of a viable contributory insurance scheme."

CONCLUSION

[116] The appeal is granted, the decision of the majority of the board of referees dated July 7, 2010 is rescinded, and the Respondent's appeal before the board of referees is dismissed.

Pierre Lafontaine
Member, Appeal Division