[TRANSLATION]

Citation: *O. L. v. Canada Employment Insurance Commission*, 2015 SSTAD 618

Date: May 22, 2015

File number: AD-13-124

APPEAL DIVISION

Between:

O. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on May 19, 2015

DECISION

[1] The Tribunal dismisses the appeal with a variation and imposes a disentitlement on the Appellant starting on May 9, 2011.

INTRODUCTION

[2] On March 7, 2013, a Board of Referees found that:

> - The disentitlement imposed under sections 9 and 11 of the *Employment Insurance Act* ("the *Act*") and section 30 of the *Employment Insurance Regulations* ("the *Regulations*") was justified because the Appellant had not proved that he was unemployed.

[3] The Appellant filed an application for leave to appeal to the Appeal Division on May 2, 2013. The application for leave to appeal was allowed on January 5, 2015.

ISSUE

[4] The Tribunal must determine whether the Board of Referees erred in fact and in law in finding that a disentitlement should be imposed under sections 9 and 11 of the *Act* and section 30 of the *Regulations* because the Appellant had not proved that he was unemployed.

THE LAW

[5] Under subsection 58(1) of the *Department of Employment and Social Development Act*, 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 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.

STANDARDS OF REVIEW

[6] The Appellant made no submissions concerning the applicable standard of review.

[7] The Respondent submits that the interpretation of the test in subsection 30(2) of the *Regulations* is a question of law. The decision concerning the appropriate treatment of this question should therefore be reviewed on the standard of correctness. The proper application of the legal test is a question of mixed fact and law and must be reviewed on the standard of reasonableness (*Martens v. Canada (AG)*, 2008 FCA 240).

[8] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions of law is correctness (*Martens v. Canada (AG)*, 2008 FCA 240) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

ANALYSIS

[9] The Appellant is appealing the Board of Referees' decision on the basis of ground (*c*) in subsection 58(1) of the *DHRSD Act*. In his view, 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 (Page AD1-3).

[10] On appeal, the Respondent is now in agreement with the Appellant's position that the Board of Referees' interpretation and application of the six factors set out in subsection 30(3) of the *Regulations*, particularly the time spent factor, are not justified by the evidence.

[11] The Respondent recommends dismissing the Appellant's appeal with a variation and imposing a disentitlement on the Appellant starting on May 9, 2011. The Appellant accepts the Respondent's recommendation.

[12] Having regard to the arguments in support of the Appellant's appeal and to the Respondent's position on appeal, and after reviewing the file, the Tribunal agrees that the appeal should be dismissed with the proposed variation.

CONCLUSION

[13] The Tribunal dismisses the appeal with a variation and imposes a disentitlement on the Appellant starting on May 9, 2011.

Pierre Lafontaine
Member, Appeal Division