Citation: *A. T. v. Canada Employment Insurance Commission*, 2015 SSTAD 612

Appeal No. AD-13-1195

BETWEEN:

A. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER : Mark BORER

DATE OF DECISION : May 21, 2015

DECISION : Appeal allowed

DECISION

[1] The appeal is allowed. The Appellant is entitled to 29 weeks of benefits.

INTRODUCTION

[2] On December 2, 2013, a member of the General Division summarily dismissed the appeal of the Appellant against the previous determination of the Commission that he was only entitled to 27 weeks of benefits.

[3] In due course, the Appellant filed an appeal of that decision with the Appeal Division.

[4] On February 5, 2015, a teleconference hearing was held. The Appellant and the Commission each attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division 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.

[6] As previously determined by the Federal Court of Appeal in *Canada (Attorney General) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (Attorney General)*, 2012 FCA 190, and many other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for

questions of fact and mixed fact and law in employment insurance appeals is reasonableness.

ANALYSIS

[7] The initial determination of the Commission under appeal relates to whether or not the Appellant was paid the correct amount of weeks of benefits according to the *Employment Insurance Act* (the *Act*). For the reasons which follow, I find that in fact the Appellant is entitled to 29 weeks of benefits, rather than 27 as found by the Commission and the General Division member.

[8] It is not disputed that the Appellant has 1514 hours of insurable employment and that he therefore qualifies for benefits. It is also not disputed that the Appellant's benefit period began October 23, 2011.

[9] Until the appeal before me, it was uncontested that at the relevant time as set out in the *Act* the Appellant was ordinarily resident in Calgary. The Appellant now disputes this, but did not make this argument before the General Division member. I find no evidence in the docket to support this submission, and will not generally consider arguments not first made before the General Division. I find that this determination by the member was entirely reasonable and in my view it was also correct.

[10] The Commission, by consulting a chart reproduced in evidence at GD3-25 to GD3-27 and taking into account the above, determined that the regional rate of employment relevant to the Appellant was 6%. As such, they determined that the Appellant was entitled to 27 weeks of benefits according to Schedule I of the *Act*.

[11] The General Division member examined the evidence, and reached the same conclusion as the Commission. He then summarily dismissed the appeal.

[12] Unfortunately, the member did not correctly apply ss. 17(1) of the *Employment Insurance Regulations*. Had he done so, it would have been clear that the Appellant was indeed entitled to 29 weeks of benefits. I note that a similar conclusion was arrived at by

the Federal Court of Appeal in *Jewett*, cited above, in almost identical circumstances to the present case.

[13] Subsection 17(1) states that the regional rate of unemployment applicable to a claimant is the average of the seasonally adjusted monthly rates of unemployment for the last three-month period for which statistics were produced by Statistics Canada that precedes the first day of the benefit period.

[14] The chart provided by the Commission is titled "Monthly Seasonal Adjusted Unemployment Rates by Employment Insurance (EI) Economic Region". A highlighted figure, 6%, appears at the intersection on the chart of the "Calgary" row and the "2011 Oct 9/Nov 5" column.

[15] This is problematic in a number of ways.

[16] First, the chart does not state (and nowhere did the General Division member find) that the statistics were prepared by Statistics Canada, as required by the *Regulations*.

[17] Second, the chosen column is incorrect according to the *Regulations*. As noted above, the Appellant's benefit period began on October 23, 2011, and the rate is to be calculated using the period prior to that day. In this case, that would be the "2011 Sept 25/Oct 8" column. The column chosen, "2011 Oct 9/Nov 5", includes days after the benefit period began, and therefore does not comply with ss. 17(1).

[18] Third, although the heading of the chart makes clear that the unemployment rates listed are monthly, only one unemployment number has been highlighted. This is contrary to ss. 17(1), which states clearly that the unemployment rate to be considered is the average of the three monthly rates preceding the first day of the benefit period. In this case, the three correct columns read 5.9%, 6.2%, and 6.2%, averaging 6.1%.

[19] I find that the General Division member failed to properly state or apply the law, and thereby rendered an unreasonable decision.

[20] I note that the above erroneous application of ss. 17(1) occurs in many employment insurance files, but goes unremarked upon because it is rarely material to the result.

[21] In *Jewett*, the Federal Court of Appeal applied the law to the evidence before it and gave the decision that should have been given. I will do the same.

[22] I find that the correct unemployment rate that applies to the Appellant is 6.1%. As such, according to Schedule I of the *Act*, the Appellant is entitled to 29 weeks of benefits.

CONCLUSION

[23] For the above reasons, the appeal is allowed. The Appellant is entitled to 29 weeks of benefits.

Mark Borer
Member, Appeal Division