

[TRANSLATION]

Citation: *F. B. v. Canada Employment Insurance Commission*, 2015 SSTAD 684

Date: June 3, 2015

File number: AD-13-118

APPEAL DIVISION

Between:

F. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on June 2, 2015

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing on each issue.

INTRODUCTION

[2] On April 24, 2013, a Board of Referees found that:

- A disentitlement should be imposed on the Appellant under section 37 of the *Employment Insurance Act* ("the *Act*") and section 55 of the *Employment Insurance Regulations* ("the *Regulations*") because he had been outside Canada;
- The imposition of a penalty was justified under section 38 of the *Act*;
- The issuance of a notice of violation was justified under section 7.1 of the *Act*.

[3] The Appellant filed an application for leave to appeal to the Appeal Division on May 27, 2013. The application for leave to appeal was allowed on January 5, 2015.

FORM OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not one of the main issues;
- the cost-effectiveness and expediency of the hearing choice;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] During the hearing, the Appellant was present and the Respondent was represented by Manon Richardson.

THE LAW

[6] 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.

ISSUES

[7] The Tribunal must determine whether the Board of Referees erred in fact and in law in finding that:

- A disentitlement should be imposed on the Appellant under section 37 of the *Act* and section 55 of the *Regulations* because he had been outside Canada;
- The imposition of a penalty was justified under section 38 of the *Act*;
- The issuance of a notice of violation was justified under section 7.1 of the *Act*.

ARGUMENTS

[8] The Appellant's arguments in support of his appeal are as follows:

- The Board of Referees erred in its decision by failing to consider one of the grounds of exception under the *Act*, namely his active search for employment despite being outside Canada;
- His objective was to come back to Canada as soon as an offer of employment required him to attend an individual interview, and it was with that objective in

mind that he purchased an open ticket so he could be available at any time as required by employment insurance;

- He did not deliberately fail to indicate that he was outside Canada to take a vacation or defraud employment insurance;
- Being outside the country does not mean that the claimant is on vacation, and he can certify on his honour that he never wanted to defraud employment insurance but just wanted to support people at the end of their lives, who are now unfortunately deceased.

[9] The Respondent's arguments against the Appellant's appeal are as follows:

- The case law is consistent that disentitlement for being outside Canada is unavoidable unless one of the exceptions set out in subsection 55(1) of the *Regulations* applies;
- The Appellant did not meet the exception in paragraph 55(1)(b) or (d) of the *Regulations*, since cousins and grandparents are not considered members of the Appellant's immediate family under subsection 55(2) of the *Regulations*;
- The message on the reports is very clear. He is asked: "Were you outside Canada during the period of the report?" The Appellant answered no to a simple and precise question;
- The Respondent exercised its discretion judicially by serving a notice of violation on the Appellant;
- According to the case law, the Board of Referees has sole authority to assess the evidence and the testimony presented before it;
- In *Le Centre de valorisation des produits marins de Tourelle Inc.*, A-547-01, the Court stated that an Umpire's function is limited to deciding whether the view of facts taken by the Board of Referees was reasonably open to it on the record of the claimant.

STANDARDS OF REVIEW

[10] The parties made no submissions concerning the applicable standard of review.

[11] 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

[12] The Board of Referees had to rule and provide a justification on each issue before it. As the Appellant argues, however, the Board of Referees erred in its decision by failing to consider one of the grounds of exception raised by the Appellant, namely his active search for employment despite being outside Canada.

[13] On the issues relating to the penalty and notice of violation, the Tribunal is of the opinion that the Board of Referees' decision does not meet the requirements of the *Act*.

[14] The Board of Referees did not set out its findings of fact in support of its decision, but merely stated: [translation] "He made representations that he knew were false. The notice of violation served under section 7.1 of the *Act* following the penalty must be imposed on him, since he committed an act or omission."

[15] Failure to briefly but clearly state the essential facts on which the Board of Referees' decision is based constitutes an error of law (*Inkell v. Canada (AG)*, 2012 FCA 290). Moreover, the Board of Referees did not apply the appropriate tests, which means that those tests cannot have been properly interpreted. This is another error of law.

[16] For all these reasons, the Tribunal refers the matter back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a Member on each issue.

CONCLUSION

[17] The appeal is allowed and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a Member on each issue.

[18] The Tribunal orders that the Board of Referees' decision dated April 24, 2013, be removed from the file.

Pierre Lafontaine
Member, Appeal Division