[TRANSLATION]

Citation: ***Canada Employment Insurance Commission v. R. G.,*** **2015 SSTAD 689**

Date: June 3, 2015

File number: AD-13-1250

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

R. G.

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[1] The appeal is allowed, the Board of Referees' decision dated June 12, 2013, is rescinded and the Respondent's appeal to the Board of Referees is dismissed.

INTRODUCTION

[2] On June 12, 2013, a Board of Referees found that:

> - The Respondent had accumulated a sufficient number of hours of insurable employment to be entitled to employment insurance benefits under section 7 of the *Employment Insurance Act* ("the *Act*").

[3] The Appellant filed an application for leave to appeal to the Appeal Division on July 2, 2013. The application for leave to appeal was allowed on January 16, 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] At the hearing, the Appellant was represented by Julie Meilleur. The Respondent was absent even though he had been duly sent a notice of hearing dated April 3, 2015.

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.

ISSUE

[7] The Tribunal must determine whether the Board of Referees erred in fact and in law in finding that the Respondent had accumulated a sufficient number of hours of insurable employment to be entitled to employment insurance benefits under section 7 of the *Act*.

ARGUMENTS

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

- The Board of Referees erred in law in cancelling the July 2012 sickness benefit period;

- The Board of Referees erred in finding that the Respondent had accumulated the number of hours of insurable employment required under section 7 of the *Act* to establish a claim in December 2012;

- The Respondent applied for sickness benefits. Since he was entitled to and he applied for those benefits, the Appellant paid him the benefits in August 2012;

- When the Respondent realized that he did not have enough hours to establish a claim for benefits in December 2012, he requested that his July 2012 benefit period be cancelled;

- The Respondent does not meet the criteria in subsection 10(6) of the *Act* for cancelling his July 2012 claim for benefits;

- According to the evidence on file, the Respondent accumulated a total of 562 hours of insurable employment during his qualifying period, namely July 22 to December 1, 2012, whereas a minimum of 700 hours was required;

- The Respondent said that one of the Appellant's officers had told him that she might be able to cancel his July 2012 benefit period. The Board allowed the Respondent's appeal, noting that he had been poorly advised by the Appellant and that the Appellant had not followed through on its own proposal to cancel the July 2012 claim for benefits;

- The Federal Court of Appeal has stated that the qualification requirements in section 7 of the *Act* cannot be changed, even on grounds of equity.

[9] The Respondent made no arguments against the Appellant's appeal.

STANDARDS OF REVIEW

[10] The Appellant submits that the Board of Referees erred in law in cancelling the July 2012 benefit period. The applicable standard of review in such a case is correctness: *Martens v. Canada (AG)*, 2008 FCA 240.

[11] The Board also erred in finding that the Respondent had accumulated the number of hours of insurable employment required under section 7 of the *Act* to establish a claim in December 2012. The applicable standard of review is reasonableness: *Hickey v. Canada (AG)*, 2008 FCA 330.

[12] 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. The standard of review applicable to questions of mixed fact and law is reasonableness: *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[13] In allowing the Respondent's appeal, the Board of Referees found as follows:

> [Translation]
>
> No matter how his hours are calculated, the claimant does not have enough hours to support a regular benefit period.
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> However, since the claimant was very poorly advised by the Commission, which also failed to follow through on its own proposal to cancel the July 2012 sickness benefit period.
>
> DECISION
>
> Accordingly, the members of the Board of Referees unanimously allow the claimant's appeal, cancel the claim for sickness benefits of July 22, 2012, and order the claimant, with his consent, to repay the $324.00 in sickness benefits he received. The Board of Referees finds that, at December 2, 2012, the claimant had accumulated more than 920 hours of insurable employment and was therefore entitled to regular benefits.

[14] With respect, the Board of Referees' decision cannot stand for the reasons set out below.

[15] Subsection 10(6) of the *Act* establishes the conditions under which the Appellant can cancel a benefit period. In this case, the July 2012 benefit period could not have been cancelled under paragraph 10(6)(*a*), since the Respondent had received benefits during that period. He had received $324 in sickness benefits.

[16] It could not have been cancelled under paragraph 10(6)(*b*) either, since the Respondent had not established a new benefit period beginning the first week for which benefits were paid or payable and had not shown that there was good cause for the delay in making the request for cancellation between July 2012 (when the sickness benefit period

was established) and December 2012 (when the Respondent made a claim for regular benefits).

[17] In addition, there is nothing in the evidence to support the Board of Referees' finding of fact that the Respondent was misinformed by the Appellant. How could the Appellant know in July 2012 that the Respondent would claim regular benefits in November 2012? Or that it failed to follow through on its proposal to cancel the claim for sickness benefits, since by the Respondent's own admission, an officer told him in November 2012 that he would check whether it [translation] "might" be possible to cancel the claim for sickness benefits (Exhibit 18-1).

[18] For the reasons stated above, the Tribunal finds that the Board of Referees erred in cancelling or ending the July 2012 sickness benefit period.

[19] According to the evidence on file, the Respondent accumulated a total 562 hours of insurable employment during his qualifying period, namely July 22 to December 1, 2012, whereas a minimum of 700 hours was required.

[20] Despite the Board of Referees' obvious sympathy for the Appellant, the *Act* allowed no discrepancy and gave it no discretion to remedy the defect: *Lévesque*, A-196-01. It is trite law that a Board of Referees is bound by the law and cannot simply apply equity in order to benefit a claimant: *Canada (AG) v. Hamm*, 2011 FCA 205.

CONCLUSION

[21] The appeal is allowed, the Board of Referees' decision dated June 12, 2013, is rescinded and the Respondent's appeal to the Board of Referees is dismissed.

Pierre Lafontaine
Member, Appeal Division