[TRANSLATION]

Citation: ***Canada Employment Insurance Commission v. M. D.*****, 2015 SSTAD 892**

Date: July 20, 2015

File number: AD-13-1152

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

M. D.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on July 16, 2015

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the Board of Referee's decision of May 23, 2013, is set aside, and the Respondent's appeal to the Board of Referees is dismissed.

INTRODUCTION

[2] On May 23, 2013, a Board of Referees found that:

> - The Respondent had an interruption of earnings within the meaning of section 7 of the *Employment Insurance Act* (the Act) and section 14(1) of the *Employment Insurance Regulations* (the Regulations).

[3] On June 6, 2013, the Appellant submitted an application for leave to appeal the decision to the Appeal Division. On February 3, 2015, the application for leave to appeal was granted.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference 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] The Appellant, represented by Rachel Paquette, participated in the hearing, and the Respondent was absent.

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 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 or order, whether or not the error appears on the face of the record; or

(c) the General Division 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 issue is as follows:

- Did the General Division err in fact and in law in finding that the Respondent had an interruption of earnings within the meaning of section 7 of the Act and section 14(1) of the Regulations?

ARGUMENTS

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

- Under section 41(1) of the Regulations, an interruption of earnings occurs where, for at least seven consecutive days, the claimant performs no work for the employer and there are no earnings from the employment;

- The Board of Referees concluded that the Record of Employment issued by the employer indicated that the employment ceased because of a shortage of work and that the Respondent did not retain an employment relationship with her employer;

- The Appellant submits that 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, which constitutes an error of law under section 114(3) of the Act;

- The evidence in the docket does not support the Board's conclusion. Although the employer issued a Record of Employment, the Respondent still maintained that she worked on the basis of demand, that is, one or two days a week, and that the employer issued a Record of Employment at her request;

- The Respondent did not meet her burden of proof and failed to prove that she had had an interruption of earnings.

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

STANDARDS OF REVIEW

[10] The Appellant submits that the interpretation of the legislative provisions on interruptions of earnings is a question of law and the standard of review applicable is correctness (*Chaulk v. Canada (AG),* 2012 FCA 190) and that the application of those provisions to the facts in this case is a question of mixed fact and law and the standard of review applicable is reasonableness (*Martens v. Canada (AG), 2008 FCA 240*).

[11] The Respondent made no submissions to the Tribunal concerning the applicable standard of judicial review.

[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) and that 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 came to the following conclusion:

> [translation]
> The Board of Referees notes that the Appellant had an interruption of earnings for more than seven consecutive days. The evidence shows on a balance of probabilities that the Appellant ceased working for her employer. The Record of Employment produced in the docket under Exhibit 3 indicates that the Appellant did not retain an employment relationship with her employer. There is an inconsistency between the reasons indicated by the employer in exhibits 3 and 7 produced in the docket. The Board of Referees does not find the employer's statement to be credible. The work contract is no longer in effect. There is no indication that the Appellant's contract was not over. It has been shown that the termination of employment was due to a lack of work.

[14] With respect, the Board of Referees' decision cannot be upheld, and the Tribunal is justified in intervening. The Board of Referees rendered a decision without regard for the material before it.

[15] The evidence shows that, notwithstanding the Record of Employment issued by the employer, it did not meet two of the requirements for an interruption of earnings to occur within the meaning of subsection 14(1) of the Regulations: that, after termination of employment, the insured person be separated from the employment and have a period of seven or more consecutive days during which no work is performed for the employer.

[16] In this case, the Respondent, on her own admission, continued providing services to her employer one or two days a week (Exhibits AD2-21 and AD2-31). The employer even corroborated the Respondent's version, confirming that there had been no interruption of earnings for seven consecutive days (Exhibit AD2-17).

[17] For these reasons, the appeal is allowed, the Board of Referees' decision of May 23, 2013, is set aside, and the Respondent's appeal to the Board of Referees is dismissed.

CONCLUSION

[18] The appeal is allowed, the Board of Referees' decision of May 23, 2013, is set aside, and the Respondent's appeal to the Board of Referees is dismissed.

Pierre Lafontaine
Member, Appeal Division