

**[TRANSLATION]**

**Citation: *B. B. v. Canada Employment Insurance Commission*, 2015 SSTAD 1207**

**Date: October 13, 2015**

**File number: AD-13-688**

**APPEAL DIVISION**

**Between:**

**B. B.**

**Appellant**

**and**

**Canada Employment Insurance Commission**

**Respondent**

**Decision by: Shu Tai Cheng, Member, Appeal Division**

**Hearing held by teleconference on August 7, 2015**

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

Appellant: B. B.

Representative for the Appellant: Hans Marotte

Representative for the Respondent: Elena Kitova

### **INTRODUCTION**

[1] On March 26, 2013, the Board of Referees determined that employment insurance benefits were not payable.

[2] An application for leave to appeal to the Appeal Division was filed on April 22, 2013 and leave to appeal was granted on April 16, 2015.

[3] This appeal proceeded as a teleconference hearing for the following reasons:

- (a) The complexity of the issue or issues.
- (b) The need to proceed as informally and quickly as possible in accordance with the criteria in the Social Security Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

### **ISSUE**

[4] The Tribunal must determine whether it should dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division or confirm, rescind or vary the decision.

### **SUBMISSIONS**

[5] In support of the appeal, the Appellant submits that the Board of Referees erred in law and in fact in making its decision. The Board of Referees did not consider the concept of credibility or analyze whether the Appellant made representations that he knew were false.

[6] In support of the dismissal of the appeal, the Respondent submits that the Board of Referees' decision is well founded and that the Board met the claimant in person to determine his credibility.

## **THE LAW AND ANALYSIS**

### **Standard of review**

[7] The Respondent submits that:

- (a) The applicable standard of review for questions of fact and questions of mixed fact and law is reasonableness.
- (b) Since the main issue involves the application of the law to the facts (and is therefore a question of mixed fact and law), the applicable standard of review in this case is reasonableness.

[8] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a Tribunal decision on questions of jurisdiction or law is correctness:

*Dunsmuir v. New Brunswick*, 2008 SCC 9, cited by *Atkinson v. Canada (AG)*, 2013 FCA 187.

The standard of review applicable to questions of mixed fact and law is reasonableness:

*Atkinson v. Canada (AG)*, 2013 FCA 187.

### **Legislative provisions**

[9] Subsection 53(1) of the *Department of Employment and Social Development Act* provides that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[10] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal to the Appeal Division 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.

[11] For the purposes of this analysis, a decision of the Board of Referees is considered to be a decision of the General Division.

[12] The Tribunal's Appeal Division must be able to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is an error of law, fact or jurisdiction that may lead to the setting aside of the decision attacked.

### **Decision of the Board of Referees**

[13] The Board of Referees' decision notes:

[Translation]

#### FINDINGS OF FACT. APPLICATION OF THE LAW

##### Outside Canada

1. Was the claimant outside Canada?
2. For what period was the claimant outside Canada?
3. Does the claimant meet one of the exceptions set out in section 55 of the Employment Insurance Regulations?
4. Does a disentitlement apply?

The claimant told the Commission that his brother had died in the spring of 2011. He said that he had left the country to take care of the funeral. The claimant said that he was prepared to give the Commission a document proving his brother's death. The members of the Board of Referees think that the Commission believed the claimant's version with respect to his brother's death, since in Exhibit 9, the Commission determined that it should reduce his penalty by 10% because he had just lost his brother.

The Board members are of the view that, if he was given a penalty reduction for his brother's death, the Commission should give him seven days to attend the funeral of a member of his immediate family, namely his brother, under section 55(1)(b)(i) of the Regulations.

## Penalty

1. Did the claimant, any other person acting for the claimant or an employer commit any of the acts or omissions listed in sections 38 and 39 of the Employment Insurance Act?
2. Did that person do so knowingly?
3. In determining the penalty amount, did the Commission exercise its discretion judicially? If not, what penalty amount would be appropriate and why (mitigating circumstances)?
4. Was the penalty imposed within the specified limit?

The claimant's former spouse stated that she had provided her former spouse's reports without worrying too much about the answers she gave. He had told her to answer yes or no almost everywhere. The members of the Board of Referees think that the question asked was clear and that the answer in the circumstances should have been simple, namely, were you outside Canada? In the claimant's case, YES.

The members of the Board of Referees believe that the claimant, through his former spouse, made representations that he knew were false. The penalties as described by the Commission in Exhibit 9, if the Commission finds that the claimant was indeed at his brother's funeral, must apply.

The claimant would also like to know why his benefits were cut four weeks before the end of his predetermined benefit period.

[14] The Board of Referees' analysis of whether the claimant had made a representation that he knew was false or misleading consisted of one sentence: "The members of the Board of Referees believe that the claimant, through his former spouse, made representations that he knew were false".

[15] The Federal Court of Appeal has held that, where it is apparent from the evidence that an applicant incorrectly answered the simple questions posed in the report cards, the burden shifts to the applicant to explain why those incorrect answers were given: for example, *Canada v. Purcell* [1996] 1 F.C. 644, and *Nangle v. Canada*, 2003 FCA 210.

[16] Here, the claimant provided an explanation for his incorrect answer, but the Board of Referees did not consider that explanation in its decision.

[17] The Board of Referees found that the representation was false and immediately concluded that the claimant had made it knowing that it was false, but the Board did not consider the question of whether the claimant had knowingly made the representation.

[18] The Commission submitted that it did not bear the burden of establishing that the claimant intended to mislead, and I agree. However, since the claimant had provided an explanation for his incorrect answer, the Board of Referees should have considered the explanation to determine whether the claimant had knowingly made the representation.

### **Error of the Board of Referees**

[19] Section 38 of the *Employment Insurance Act* requires that the claimant have made a representation that he knew was false. It is not enough to determine that the representation was false, as the Board of Referees did.

[20] By concluding that the claimant had made the representation knowing that it was false simply because the representation was false, the Board of Referees erred in law in making its decision.

[21] An error of law is reviewable on the standard of correctness.

[22] Since the Board of Referees erred in law, I am allowing the appeal. It is appropriate to refer the matter back to the Tribunal's General Division.

### **CONCLUSION**

[23] The appeal is allowed and the matter is referred back to the Tribunal's General Division for reconsideration in accordance with these reasons.

*Shu-Tai Cheng*  
Member, Appeal Division