

Citation: *Canada Employment Insurance Commission v. B. R.*, 2015 SSTAD 1288

Appeal No. AD-13-1178

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

B. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: November 5, 2015

DECISION: Appeal allowed

DECISION

[1] The appeal is allowed. The decision of the board of referees is rescinded and the determination of the Commission is restored.

INTRODUCTION

[2] On April 23, 2013, a panel of the board of referees (the Board) allowed the appeal of the Respondent against the previous determination of the Commission.

[3] In due course, the Commission filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On August 11, 2015, a teleconference hearing was held. The Respondent attended and made submissions, but the Commission did not.

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] This case involves the determination of how, if at all, a pension should be allocated in the Respondent's specific circumstances.

[8] In their submissions, the Commission alleges that the Board erred in determining that the Respondent's pension income did not need to be allocated. They note that in its decision the Board ignored the law on the basis that it was unfair towards the Respondent. The Commission asks that their appeal be allowed and the decision of the Board be set aside.

[9] The Board, in defending its view that the Respondent was "penalized by a Regulation that was not written to describe the case at hand" felt that "a more liberal interpretation should apply". In their view, this entitled them to allow the Respondent's appeal.

[10] It does not.

[11] Sections 35 and 36 of the *Employment Insurance Regulations* are clear that the Respondent's pension does constitute earnings and must be allocated in the manner submitted by the Commission, contrary to the conclusions of the Board.

[12] I note that the Board did correctly state (as did the Commission in their submissions) that in the circumstances of this case if the Respondent had accumulated enough hours to qualify for benefits after beginning to receive her pension, then the pension no longer constituted earnings to be allocated according to the *Regulations*. The Commission submits, and I find, that 420 insurable hours of employment are required.

[13] Reluctantly, the Board (and the Commission before them) found that the Respondent had not accumulated sufficient hours for this to be so.

[14] Based upon Exhibit 2.7, the Commission submitted (and the Board found) that the Respondent began to receive her pension on September 6, 2012. In exhibit 2.7, the Respondent states that she began to receive her pension on “06/09/12”. In response to my questions, however, the Respondent stated that the “trigger” for her pension was her 52nd birthday.

[15] The Respondent was born June 9, 1960.

[16] With good reason, the Board and the Commission relied upon Board Exhibit 2-7, which says that the date should be written day/month/year. Through inadvertence, however, the Respondent wrote the date month/day/year.

[17] To assist me in my deliberations, I asked that the Commission make submissions as to how many insurable hours the Respondent had accumulated after she began to receive her pension.

[18] After contacting the Employer for more information, the Commission submitted that the pension actually began on June 1, 2012, and that since that date the Respondent accumulated 415 insurable hours of employment.

[19] After examining the evidence in the file, I agree that this number is correct.

[20] Unfortunately, this is still less than the 420 hours required by law. I must therefore conclude, reluctantly, that the Respondent’s pension must be allocated according to the *Regulations*, as was previously determined by the Commission.

CONCLUSION

[21] For the above reasons, the appeal is allowed. The decision of the Board is rescinded and the determination of the Commission is restored.

Mark Borer

Member, Appeal Division