

Citation: *Canada Employment Insurance Commission v. K. H.*, 2015 SSTAD 1449

Appeal No. AD-13-1151

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**K. H.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal**

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SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: December 17, 2015

DECISION: Appeal allowed

## **DECISION**

[1] The appeal is allowed. The matter will be returned to the General Division for redetermination in accordance with these reasons.

## **INTRODUCTION**

[2] On June 6, 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 Commission attended and made submissions, but the Respondent did not. As I was satisfied that the Respondent received notice of the hearing, I proceeded regardless.

## **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 the unemployment rate applicable to the Respondent, and the ensuing number of insurable hours required to qualify for employment benefits.

[8] In their submissions, the Commission alleges that the Board erred in determining that the Respondent had enough hours to qualify for benefits, and also erred in fact in a number of different points in their decision. The Commission asks that their appeal be allowed and the decision of the Board be set aside.

[9] Although properly notified, the Respondent did not appear and made no written submissions.

[10] It is clear from the decision of the Board that they did not accept the evidence presented by the Commission regarding the unemployment rate. Unfortunately, it cannot be denied that in attempting to resolve this concern they failed to properly follow the correct provisions of the *Employment Insurance Act* and the related *Employment Insurance Regulations*. It was an error to conclude, as they did, that the Respondent had sufficient hours to qualify for benefits without following the correct jurisprudence.

[11] However, having said the above, I note that the concerns of the Board regarding the evidence presented by the Commission regarding the unemployment rate were well founded and indeed were shared by the Federal Court of Appeal in a very similar case.

[12] In the *Jewett* case, cited above, the Court set out in detail the correct method for determining the applicable unemployment rate and the ensuing number of required insurable hours.

[13] In oral argument before me, the Commission admitted that the evidence presented to the Board in this case was not in compliance with the decision of the Court in *Jewett*. As such, they agreed that it was not possible for me to make the correct determination as to the proper outcome without referring this file back to the General Division so that further and better evidence could be presented.

[14] As the Board decision is not in conformity with the law or the decision of the Federal Court of Appeal in *Jewett* and the evidence on file is not sufficient for me to render my own decision, this case must be returned to the General Division for redetermination. I further direct that *Jewett* be considered and followed.

### **CONCLUSION**

[15] For the above reasons, the appeal is allowed. The matter is returned to the General Division for redetermination in accordance with these reasons.

*Mark Borer*

Member, Appeal Division