



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v. J. F.*, 2016 SSTADEI 128

Tribunal File Number: AD-13-1163

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

J. F.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal decision

DECISION BY: Pierre Lafontaine

HEARD ON: February 25, 2016

DATE OF DECISION: March 8, 2016

REASONS AND DECISION

DECISION

[1] The appeal is granted, the decision of the board of referees dated March 26, 2013, is rescinded and the appeal of the Respondent before the board of referees is dismissed.

INTRODUCTION

[2] On March 26, 2013, a board of referees determined that:

- The Respondent was entitled to an antedate and an early termination request pursuant to sections 10(4), 10 (8) and 10(9) of the *Employment Insurance Act* (the “Act”) and section 8(7) of the *Employment Insurance Regulations* (the “Regulations”).

[3] The Appellant requested leave to appeal to the Appeal Division on April 12, 2013. Leave to appeal was granted by the Appeal Division on July 30, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant, represented by Elena Kitova, was present at the hearing. The Respondent was not present at the hearing although he did receive the notice of hearing on September 25, 2015.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (the “*DESD Act*”) states that the only grounds of appeal are the following:

- 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, whether or not the error appears on the face of the record; or
- c. 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.

ISSUE

[7] The Tribunal must decide if the board of referees erred in fact and in law when it concluded that the Respondent was entitled to an antedate and an early termination request pursuant to sections 10(4), 10 (8) and 10(9) of the *Act* and section 8(7) of the *Regulations*.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- The relevant legislative provision for granting a claimant’s request for early termination of an existing benefit period is found under section 10 (8)(d) of the *Act*; not section 8(7) of the *Fishing Regulations*;
- The board erred in law when it granted the Respondent’s request on the basis that he met the provisions under section 8(7) of the *Fishing Regulations* and without applying the legal test under section 10(8)(d) of the *Act*;

- Pursuant to section 10(8)(d) of the *Act*, a request for an early termination of the benefit period can only be granted if the claimant immediately qualifies for a new claim under Part I of the *Act*; or as a self-employed person under Part VII.1 of the *Act*. Since fishing benefits are not included under these Parts of the *Act*, it follows that a regular benefit period cannot be terminated in favor of a fishing claim;
- Moreover, section 8(7) of the *Regulations Fishing* requires that a claimant not only accumulate sufficient fishing earnings to qualify for a fishing claim but also prove that he was not qualified under section 7 of the *Act* to receive benefits;
- In this case, there was no dispute that the Respondent qualified for regular benefits effective July 24, 2011 and that he had one week of regular entitlement remaining when he requested a fishing claim effective May 27, 2012. There was no dispute that his entitlement to regular benefits was not exhausted until July 21, 2012;
- Given the undisputed evidence, it was unreasonable for the board to conclude that the Respondent met the provisions of section 8(7) of the *Regulations Fishing* as of May 27, 2012;
- The Federal Court of Appeal has confirmed the principle that a board of referees cannot ignore the requirements of the *Act* and *Fishing Regulations* to qualify a claimant for benefits;
- A proper application of the legal test under section 10(8)(d) of the *Act* to the facts of this case leads to the reasonable conclusion that the Respondent's request for early termination of his regular benefit period could not be granted because he did not qualify for a new claim under Part I or Part VII.1 of the *Act* as of May 27, 2012;

- A proper application of the legal test under section 8(7) of the *Regulations Fishing* to the facts of this case leads to the reasonable conclusion that the Respondent did not qualify for fishing benefits as of May 27, 2012 because his entitlement under section 7 of the *Act* was still in effect until July 21, 2012;
- The board erred when it granted a retroactive termination of a regular benefit period in favor of a fishing claim in contravention of the *Act*;
- The Respondent requests that the Tribunal give the decision that the board should have given in accordance with subsection 59(1) of the *Department of Employment and Social Development Act*.

[9] The Respondent did not submit any arguments against the appeal.

STANDARD OF REVIEW

[10] The Appellant submits that the standard of review for questions of law is correctness and for questions of mixed fact and law, is reasonableness - *Canada (AG) v. Hallée*, 2008 FCA 159.

[11] The Respondent did not make any representations regarding the applicable standard of review.

[12] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees or an Umpire regarding questions of law is the standard of correctness - *Martens c. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Canada (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[13] The Tribunal proceeded with the appeal hearing in the absence of the Respondent since it was satisfied that he had received proper notice of the hearing on September 25, 2015, in accordance with section 12(1) of the *Social Security Tribunal Regulations*.

[14] When it allowed the appeal of the Respondent, the board of referees concluded that:

“As all provisions of Section 8(7) have been satisfied the Board concluded there was no reason to disallow the antedate request which in tum would allow benefits to the claimant for his winter fishing claim that was denied on his last application in Dec.2012.”

[15] Unfortunately for the Respondent, the decision of the board of referees cannot be maintained.

[16] The evidence before the board of referees demonstrates that the Respondent was on a claim for regular benefits. Once it ended, he then filed a claim for fishing benefits which he was benefits until the claim expired the week commencing December 9, 2012. The Respondent then filed a second claim for fishing benefits only to find out he did not have any insured fishing earnings in his qualifying period. He then requested to have his regular claim retroactively terminated to May 27, 2012, in order to allow him to have fishing earnings in a new qualifying period.

[17] Claimants who wish to claim employment insurance benefits for an earlier period must first qualify at the earlier date and then must demonstrate that they had good cause for the entire period of the delay in making their claim.

[18] In this case, the Respondent does not qualify for benefits on the earlier requested date. A fisher is not qualified to receive benefits as a fisher as long as that fisher is entitled to benefits from regular insurable earnings.

[19] Section 8(7) of the *Fishing Regulations* clearly states that in order to qualify for fishing benefits, a person must show they have no entitlement to regular benefits. In this case, the Respondent had entitlement to regular benefits until the week of 15-21 July 2012, so he was unable to start a fishing claim until after 21 July, 2012.

[20] Unfortunately for the Respondent and contrary to the conclusion of the board of referees, section 8(7) of the *Fishing Regulations* and section 10(8)(d) of the *Act* are quite clear in that a claim for regular benefits cannot be terminated in favour of a fishing claim. To do so would be in violation of the *Fishing Regulations* and the *Act*.

CONCLUSION

[21] The appeal is granted, the decision of the board of referees dated March 26, 2013, is rescinded and the appeal of the Respondent before the board of referees is dismissed.

Pierre Lafontaine

Member, Appeal Division