Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Canada Employment Insurance Commission v. G. Z.*, 2016 SSTADEI 136

Tribunal File Number: AD-13-1183

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

G. Z.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal decision

DECISION BY:: Pierre Lafontaine

HEARD ON: February 23, 2016

DATE OF DECISION: March 10, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the board of referees dated June 3, 2013, on the issue of outside Canada is set aside and the file is returned to the General Division (Employment Section) for a new hearing on the issue of penalty.

INTRODUCTION

[2] On June 3, 2013, a board of referees determined that:

- A disentitlement was not imposed in accordance with section 37 of the *Employment Insurance Act* (the "*Act*") and section 55 of the *Employment Insurance Regulations* (the "*Regulations*");

- The imposition of a penalty was not justified in accordance with section 38 of the *Act* for making a misrepresentation by knowingly providing false or misleading information to the Appellant.

[3] The Appellant requested leave to appeal to the Appeal Division on June 11, 2013. Leave to appeal was granted 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] At the hearing, the Appellant was represented by Louise Laviolette and the Respondent was not present but represented by Renaud Dery.

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 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.

ISSUES

[7] The Tribunal must decide if the General Division erred in fact and in law when it concluded that a disentitlement was not imposed in accordance with section 37 of the *Act* and section 55 of the *Regulations* and that the imposition of a penalty was not justified in accordance with section 38 of the *Act*.

ARGUMENTS

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

- The board of referees erred in law when it allowed benefits to a period that the Respondent was outside Canada;

- The Federal Court of Appeal has confirmed that a claimant is subject to a disentitlement under section 37(b) of the *Act* while outside Canada unless she meets one of the exceptions under section 55(1) of the *Regulations*;

- The board of referees erred when it relied on a medical note from Israel (Exhibit 22.2) to allow the appeal. The Respondent's medical evidence fails to prove that her absence outside Canada was necessary to receive medical treatment, not available in Canada, in a hospital, medical clinic or similar facility as defined under section 55(1)(a) of the *Regulations*;

- On the issue of penalty, the board of referees allowed the appeal without making any finding of fact to support its decision;

- The Appellant has the sole discretion to decide whether a penalty should be imposed under section 38 of the *Act* and grounds for intervention exist only if the Appellant failed to exercise its discretion judicially;

- The Appellant exercised its discretion judicially when it determined that the Respondent was subject to a penalty under section 38 of the *Act* and that it has met its burden of proving on a balance of probabilities that the Respondent knew that the answers she was providing on her reports were false or misleading;

- The evidence reveals the Respondent answered "NO" and failed to declare her absence from Canada, from April 29 to June 4, 2010, when completing her reports asking her a simple and unambiguous question "Were you outside Canada…" ;

- In determining that the Respondent knowingly made false or misleading representations when she failed to declare her absence from Canada, the Appellant took into account that this was the Respondent's first offense and established a sick claim (mitigating factors) and consequently set the penalty at 20% of the overpayment amount created (Exhibit 13).

[9] The Respondent submits the following arguments against the appeal:

- She left for Israel to get treatment after she had tried without success different treatments in Canada;
- The treatments she received in Israel were very efficient and the acute psoriasis disappeared;
- She filed all the medical evidence in support of her position before the board of referees;
- The board of referees made no errors in fact or in law and the decision of the board should be maintained.

STANDARD OF REVIEW

[10] The Appellant submits that the applicable standard of review for questions of law is correctness - *Chaulk v. Canada (AG)*, 2012 FCA 190, *Martin v. Canada (AG)*, 2013 FCA 15.

[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 - *Chaulk v. Canada (AG)*, 2012 FCA 190, *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

<u>Outside Canada</u>

[13] There is no dispute that the Appellant was outside Canada from April 29 to June 4, 2010. She stated that she left the country for Paris and Tel Aviv to recover from a depression and treatment of psoriasis.

[14] A claimant is subject to a disentitlement under section 37(b) of the *Act* while outside Canada unless she meets one of the exceptions under section 55(1) of the *Regulations*.

[15] In the present case, the evidence before the board of referees demonstrates that the Respondent does not meet any of the exceptions of subsection 55(1) of the *Regulations*.

[16] The person who is outside Canada must in fact be undergoing medical treatment in a hospital, medical clinic or similar facility located in a country other than Canada, the treatment as such must be a medical treatment that is recognized by a scientific or medical authority and not readily available in the claimant's area of residence in Canada.

[17] Unfortunately for the Respondent, she did not demonstrate before the board of referees that she was outside of the country to undergo medical treatment that was not readily available in Canada.

[18] Accordingly, the Tribunal finds that the board of referees erred in deciding as it did. The appeal is allowed and the decision of the board of referees is set aside on the issue of outside Canada.

Penalty

[19] It appears clearly from the decision of the board of referees that the board did not apply the legal test regarding the issue of penalty and that the test was therefore not interpreted correctly.

[20] The appeal is allowed and the file is returned to the General Division (Employment Section) for a new hearing on the issue of penalty.

CONCLUSION

[21] The appeal is allowed.

[22] The decision of the board of referees dated June 3, 2013, is set aside on the issue of outside Canada.

[23] The disentitlement under section 37(b) of the *Act* is applicable for the entire absence, from April 29 to June 4, 2010.

[24] The file is returned to the General Division (Employment Section) for a new hearing on the issue of penalty.

Pierre Lafontaine
Member, Appeal Division