



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *J. R. v. Canada Employment Insurance Commission*, 2016 SSTA DEI 137

Tribunal File Number: AD-15-395

BETWEEN:

J. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal Decision

DECISION BY:: Pierre Lafontaine

HEARD ON: February 23, 2016

DATE OF DECISION: March 10, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for a new hearing.

INTRODUCTION

[2] On July 24, 2012, a Board of Referees found that:

- When filing his claim for benefits in 2008, the Applicant's place of residence was Verdun.

[3] On June 23, 2015, the Applicant filed an application for leave to appeal before the Appeal Division. An extension of time for filing the application for leave to appeal was granted on July 13, 2015.

TYPE OF HEARING

[4] The Tribunal determined that an in-person hearing of this appeal would be conducted for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not one of the main issues;
- the cost-effectiveness and expediency of the hearing choice;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant did not attend the hearing, but he was represented by counsel Gaël Morin-Greene. The Respondent was represented by Julie Meilleur.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

- (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

The Tribunal must determine if the Board of Referees erred in law when it found that the Appellant resided in Verdun when he filed his claim for benefits in 2008.

SUBMISSIONS

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

- The Board of Referees did not refer to the correct legal test in its decision.
- The Board of Referees referred only to the "residence" test in its decision. However, this "residence" test is not supported by case law. The "habitual residence" test should be used instead.
- The "habitual residence" test takes into account the claimant's life situation as a whole and, in addition to objective factors, also focuses on subjective factors.

- By accepting the use of an incorrect legal test, the Board of Referees was unable to conduct an objective and subjective overall assessment that is required in these cases.
- It was this overall assessment that the Board of Referees made in decision 10-0527 that allowed his appeal of a similar situation for a previous benefit period.
- In this case, the subjective factors have been presented by the Appellant's attorney. These subjective elements have not once been evaluated by the Board of Referees, which does not refer to this in its reasons.
- Furthermore, the Board of Referees' decision does not provide adequate reasons, in that it does not indicate why these elements were overlooked or not considered. In this manner, the decision deviates from the criteria stated by jurisprudence with regard to reason for decisions.

[9] The Respondent submitted the following arguments against the Appellant's appeal:

- The Board of Referees did not err in fact or in law and properly exercised its jurisdiction.
- The Appeal Division does not have the authority to retry a case or to substitute its discretionary power for that of the General Division. The Appeal Division's authority is limited by subsection 58(1) of the *Department of Employment and Social Development Act*.
- Unless the SST-GD failed to observe a principle of natural justice, erred in law or 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, and its decision is unreasonable, the Tribunal must dismiss the appeal.

- In this case, the Board of Referees had to decide on the issue of whether the Appellant had accumulated a sufficient number of insurable hours of employment to establish a benefit period on August 31, 2008.
- According to the evidence on file, Montreal was the Appellant's habitual place of residence during the week of the beginning of his benefit period. Therefore, based on the regional rate of unemployment during the period in question, the Appellant would have had to accumulate a minimum of 630 hours in his qualifying period in order to be eligible to receive benefits; however, he had accumulated 450 hours.
- The Board of Referees' decision, file number 10-0527, was submitted by the Appellant with his application for leave to appeal, and relates to the benefit period beginning on July 4, 2010, but does not apply to the present case.

STANDARDS OF REVIEW

[10] The parties submit, and the Tribunal agrees, that the applicable standard of review for a decision of a Board of Referees and an Umpire on questions of law is correctness – *Martens v. Canada (A.G.)*, 2008 FCA 240, and that the applicable standard of review for questions of mixed fact and law is reasonableness – *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

[11] This case is addressing only the establishment of the Appellant's habitual residence for the purposes of his initial claim for benefits beginning on August 31, 2008.

[12] The duration of the benefit period to which the Claimant is entitled is applicable to the unemployment rate in the region where he ordinarily resides. The term "place of habitual residence" is nonetheless not defined in the Act or the Regulations.

[13] The term "habitual residence" has been used by Parliament clearly to distinguish a permanent residence from a temporary one. The Tribunal is of the opinion that a claimant may have multiple places of residence, but only on usual place of residence.

[14] Moreover, the legal test used to determine "usual place of residence" implies the consideration of both subjective and objective facts, and must be applied to the situation that existed during the week in question.

[15] Based on the evidence, the Board did not take this legal test into account when it decided that [*translation*] "the Claimant's address when the claim for benefits took effect was...Verdun...", and that the "Claimant's place of residence was Verdun". This is not the test set out in the Regulations. Furthermore, the Board of Referees did not take both subjective and objective facts into consideration when it made its decision.

[16] For these reasons, the Tribunal refers the matter back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a Member.

CONCLUSION

[17] The appeal is allowed and the matter is referred back to the General Division for a new hearing.

[18] The Tribunal orders that the decision of the Board of Referees dated July 24, 2012, be withdrawn from the file.

Pierre Lafontaine

Member, Appeal Division