Citation: *O. L. v. Canada Employment Insurance Commission*, 2014 SSTAD 21

Appeal No: 2012-1779

BETWEEN:

O. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: March 27, 2014

DECISION: Appeal allowed

DECISION

[1] The appeal is allowed. The Appellant is entitled to receive benefits for 21 days while out of Canada, beginning August 17, 2009.

INTRODUCTION

[2] On August 27, 2012, a panel of the Board of Referees (the "Board") determined that the appeal of the Appellant from the previous determination of the Commission should be allowed in part. The Commission and the Appellant each appealed that decision to the Office of the Umpire, although the Commission cross-appeal was subsequently withdrawn.

[3] On April 1, 2013 the Appeal Division of the Social Security Tribunal became seized of any appeal not heard by an Umpire by that date.

[4] On September 10, 2013 a teleconference hearing was held. The Appellant attended and made submissions, but the Commission did not. As the Commission had received notice of the hearing, I proceeded in their absence.

[5] The standard of review for questions of law and jurisdiction is correctness.

[6] The standard of review for questions of fact and mixed fact and law is reasonableness.

ANALYSIS

[7] This is an unusual case, but the facts are not in dispute. It is agreed that the Appellant, while outside of Canada, conducted a job search and also took part in several job interviews. According to s.37(b) of the *Employment Insurance Act* ("the Act"), claimants may not receive benefits while outside of Canada, subject only to the exceptions set out in s.55 of the *Employment Insurance Regulations* ("the Regulations"). The Regulations state that a claimant conducting a job search is entitled to up to 14 days, while a claimant attending an interview is entitled to seven days.

[8] The Board, in its decision, held that the Appellant was entitled to 14 days of

benefits according to s.55 of the Regulations but could not combine these two exceptions.

[9] The Appellant admits that under s.55 of the current Regulations, combining these two exemptions is not permitted and he would only be entitled to the 14 days of benefits already awarded by the Board. However, he notes that the current regulations were not in force until several years after the time in question. He submits that there is jurisprudence to support the view that at that time he was entitled to combine s.55 exceptions, even if he would not be entitled to do so today.

[10] The Commission, in their written submissions, concedes that the regulation cited by the Board did not exist at the time the Appellant first claimed benefits. They nonetheless take the position that the Appellant is incorrect in his assertions, and cite several decisions of the Office of the Umpire to support this.

[11] During the hearing, my attention was drawn to *Canada (Attorney General) v. Walsh* (2008 FCA 220). In that case, the Federal Court of Appeal upheld the decision of the Umpire which held, in part, that:

> "At the hearing, I raised the issue of whether a claimant could benefit from two exceptions to disentitlement pursuant to subsection 55(1) of the *Regulations.* It is clear that had the claimant returned to Canada shortly after her father's death, she would have been entitled to return for his funeral thereby becoming entitled to the second exception to disentitlement. I therefore concluded that, given the circumstances, the claimant is entitled to benefits from the exceptions in both of these paragraphs…"

[12] In my view, the situation here is very much the same. If the Appellant had flown home and then returned he would have been entitled to a further seven days. It therefore follows from *Walsh* that the Appellant should be entitled to the combined 21 days of benefits. I note, however, that on October 20, 2011 the new Regulations discussed above came into force, effectively overriding *Walsh* as of that date.

[13] In coming to my determination, I considered the Umpire decisions submitted by the Commission. Decisions of the Office of the Umpire do not bind the Tribunal,

and because of the vast number of Umpire decisions made since the Act came into force decades ago Umpire decisions often contradict each other. Additionally, parties before me often cite only those decisions which are helpful to their case and ignore those which are not. In sum, Umpire decisions have not, in general, been of great assistance to me in my deliberations.

[14] Nevertheless, in this case the decisions presented are on point and decided after *Walsh* but before the amendment of the Regulations. As such, they could potentially be of assistance. Unfortunately, they all studiously ignore *Walsh* and make no reference to it whatsoever, not even to distinguish it. It may be that they were unaware of that case, but whatever the reason the fact remains that *Walsh* exists and is a decision of the Federal Court of Appeal. As the Commission has not made any submissions to suggest that *Walsh* should not apply, in my view I am bound by that decision.

[15] It is unfortunate that the Commission chose not to attend this teleconference hearing. The common law system is an adversarial system, and when one adversary declines to appear it can only be to their detriment. Written submissions, no matter how extensive, cannot cover every eventuality raised during an appeal. In this case, it would have been to the benefit of the Commission to address the jurisprudence presented by the Appellant and to supplement their relatively brief written submissions with additional oral argument. As they declined to do so, out of necessity I have made my decision with the evidence and case law available to me.

CONCLUSION

[16] Therefore, for the above reasons, the appeal is allowed. The Appellant is entitled to receive benefits for 21 days while out of Canada, beginning August 17, 2009.

Mark Borer
Member, Appeal Division