Citation: ***Canada Employment Insurance Commission v. J. B.,*** **2015 SSTAD 674**

Date: June 2, 2015

File number: AD-14-230

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

J. B.

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Heard by Teleconference on May 25, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative for the Appellant	Carol Robillard
The Respondent	J. B.

INTRODUCTION

[1] The facts of this matter are not in dispute. The Respondent resided in Canada, and married a resident of the United States. In July 2013 the Respondent's wife applied for a visa to allow the Respondent to work in the United States. The Respondent moved to the United States to be with his wife in October 2013, prior to obtaining the work visa. The Respondent wished to work in the United States and took all customary and reasonable steps that he legally could to obtain work in the United States once he moved there. Because he did not have a work visa, however, no employer could offer him a job, nor could he apply for a job. The Respondent applied for Employment Insurance benefits after he left his job in Canada in October 2013. The Appellant found that the Respondent was disentitled to receive Employment Insurance benefits (EI) because he could not prove that he was available to work.

[2] The Respondent appealed this decision to the Social Security Tribunal. The General Division of the Social Security Tribunal held a teleconference hearing and on April 24, 2014 allowed the appeal.

[3] The Appellant was granted leave to appeal from this decision on the basis that the General Division may have erred in its application of the facts before it to the law regarding whether not having a work permit for the United States rendered the Respondent unavailable for work.

[4] This appeal proceeded by Teleconference based on the following considerations:

a) There were no issues of credibility;

b) The complexity of the issues under appeal, and the submissions of the parties; and

c) The fact that one of the parties resided outside of Canada.

I have carefully considered all of the written material and the oral arguments in reaching the decision in this matter.

ANALYSIS

[5] The Appellant submitted that the standard of review to be applied to the General Division decision in this matter is that of reasonableness. The Respondent made no submissions on this issue. The leading case on this is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal's own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law. As the issue in this appeal is one of mixed law and fact, I must decide if the General Division decision in this matter was reasonable.

[6] Both parties referred to the decision in *Faucher v. Attorney General of Canada* (A-56-96). This decision stated that an EI claimant must satisfy three criteria to be found available for work:

a) A wish to return to the labour market as soon as suitable employment is offered;

b) An indication of this wish by efforts to find suitable employment; and

c) An absence of personal conditions that unduly limit their chances of returning to the labour market.

The parties agreed and the General Division found that the Respondent satisfied the first two criteria listed above. The question to be determined on appeal was whether the General Division decision was unreasonable when it concluded that the Respondent's lack of a work visa was not a condition that unduly limited his chances of returning to the labour market.

[7] The Appellant argued that the requirement of a work visa was a condition precedent to being able to work in the United States and not merely a technicality. He could not be offered or apply for a job unless he had this visa. In addition, it argued that the Respondent chose to move to the United States prior to having this permit. These facts were not disputed.

[8] The Appellant also argued that this case should be distinguished from the decision of the Office of the Umpire that the General Division relied on in making its decision (CUB #13136). In that case and other decisions relied on in argument by the Respondent, the EI claimant had a work authorization that was restricted to one employer. If the claimant obtained work with another employer, as a matter of course, the authorization would be amended to permit the claimant to work at the new job. In contrast, in this case, the Respondent could not obtain any work at all until a visa was granted. I agree that the Respondent's circumstances are different than a claimant who has a work authorization. The General Division erred in relying on this decision to support its conclusion.

[9] The Respondent also sought to rely on Umpire decisions related to EI claimants who were guaranteed an ability to work in the United States under the North American Free Trade Agreement. These cases are not relevant. Unlike the EI claimants in those cases the Respondent had no guarantee of an ability to work in the United States without first obtaining a visa. The General Division decision did not refer to these cases, and made no error in not doing so.

[10] The Respondent argued that his choice to move to live in the United States with his wife was a personal choice, and this choice was sanctioned by the *Employment Insurance Act*, which does not disqualify claimants if they leave a job to be with their spouse. This is correct. The Federal Court of Appeal stated in *Canada (Attorney General) v. Paquet* (2013 FCA 48) that an EI claimant is not disqualified if he leaves work to move to be with a spouse. This is a separate issue, however, from being available for work. All claimants must also be available for work in order to be entitled to benefits. These statements are not contradictory.

[11] The Respondent also argued that the reason for the delay in his obtaining the work visa was beyond his control, and took longer to obtain than was reasonably anticipated. While I am sympathetic to the Respondent's plight, I am not persuaded by this argument. The *Employment Insurance Act* does not allow for any consideration of the reason that a claimant may be

unavailable for work. This argument also does not point to any error made by the General Division.

[12] In the *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)* decision (2011 SCC 62), the Supreme Court of Canada decided that when reviewing a decision to determine whether it was reasonable, the reasons should be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. In this case, I am persuaded, on a balance of probabilities, that the decision was not reasonable. It was clear that no employer could offer any work to the Respondent unless and until he had a work visa. In addition, the Respondent could not accept any work that was offered to him unless and until he had a work visa. This is entirely different from someone who was authorized to work in the United States, but only for one particular employer, or who had a guarantee of permission to work under the North American Free Trade Agreement. This Respondent had no such guarantees. It is not defensible on the facts and the law to conclude that the Respondent's ineligibility to work was a mere technicality under these circumstances. The lack of a work visa was a condition that unduly limited the Respondent's chances of returning to the workforce.

[13] For these reasons, the appeal is allowed.

REMEDY

[14] Section 59 of the *Department of Employment and Social Development Act* sets out what remedy the Appeal Division of the Tribunal may grant on appeal. In this case, the relevant facts are not in dispute. They are set out above. There were no issues of credibility of the parties, and both parties presented comprehensive written and oral submissions to support their positions. For these reasons it is appropriate in this case to give the decision that the General Division should have given. The Respondent was not disqualified from receiving EI benefits because he left his job in Canada to reside with his wife. However, the Respondent was not available for work because he did not have a valid work visa. For this reason he was disentitled to receive EI. Therefore his claim for EI benefits is refused.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) 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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

59. (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.