[TRANSLATION]

Citation: ***C. B. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1206**

Date: October 13, 2015
Date of amended decision: October 29, 2015
File number: AD-14-111

APPEAL DIVISION
AMENDED DECISION

Between:

C. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on October 8, 2015

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On January 3, 2014, the General Division of the Tribunal found that:

- The disentitlement imposed on the Appellant under section 37 of the *Employment Insurance Act* (the Act) and section 55 of the *Employment Insurance Regulations* (the Regulations) was warranted because he was outside Canada;

- The disentitlement imposed on the Appellant under section 18 of the Act was warranted because he failed to show that he was available for work;

- The imposition of an amended penalty was warranted under section 38 of the Act for committing an act or omission by knowingly making one or more false or misleading representations.

[3] On January 17, 2014, the Appellant filed an application for leave to appeal with the Appeal Division. Leave to appeal was granted on February 3, 2015.

TYPE OF HEARING

[4] The Tribunal determined that this appeal would proceed by teleconference 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 participate in the hearing, despite receiving the notice of hearing on July 13, 2015. The Respondent was represented by counsel Laurent ~~Beaudoin~~ Brisebois.

THE LAW

[6] In accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, 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 or order, whether or not the error appears on the face of the record; or
>
> (c) the General Division based its decision or order 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 determine whether the General Division erred in fact and in law in finding that:

- The disentitlement imposed on the Appellant under section 37 of the Act and section 55 of the Regulations was warranted because he was outside Canada;
- The disentitlement imposed on the Appellant under section 18 of the Act was warranted because he failed to prove that he was available for work;
- The imposition of an amended penalty was warranted under section 38 of the Act for committing an act or omission by knowingly making one or more false or misleading representations.

SUBMISSIONS

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

- The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction by not granting him the benefit of the doubt;

- He is entitled to the protections set out in sections 6 and 7 of the *Canadian Charter of Rights and Freedoms* (the Charter);

- The trip to Haiti was to develop his skills and gain labour market experience due to his extended absence from the labour market as a result of his disability (mental health);

- The Tribunal must take into account his mental disability, which has seriously affected him since around 2006, a direct result of his major depression due to the evidence indicated in his file. This led the community organizations responsible for his employment and social reintegration to propose this humanitarian and training trip, which was not a vacation;

- His mental health issue warrants granting him reasonable accommodations in this case;

- He strongly believes that his job search and his training to return to the labour market while on a humanitarian trip abroad were *bona fide* and suitable as a result of his exceptional situation;

- He was actually informed by the officer who provided the information session in which he participated at the Service Canada office on Jean Talon that he did indeed have the right to travel if the goal of the trip was to develop his skills;

- He submitted respectfully that the fact that it would be surprising that a Service Canada employee would give him incorrect information should have no impact on the fact that the employee did actually give him the incorrect information;

- He was available for work, but for a long time he had been the victim of social exclusion and discrimination;

- He volunteered for a star presidential candidate in Haiti as a political attaché, while producing immigration files. It was a commitment that he had to respect and fulfill;

- The four resumés that he sent out, which are included in his file, do not reflect at all the *bona fide* searches that he actually did;

- Most of the interviews and steps that he took in Haiti to find a job took place in person and/or by telephone/fax;

- He is entitled to have the overpayment amount of $3,357.00 reduced by at least the 14 days granted by the Regulations for a *bona fide* job search;

- If the Tribunal considers the exceptional facts on file, he should be entitled to receive the benefit of the Tribunal's discretion to exempt him from paying the alleged "overpayment" of $3,357.00 and the full penalty of $1,679.00 imposed after the amendments accepted by the Tribunal;

- He allegedly received "incorrect" information from a Service Canada employee, and even though the General Division questions this, he should naturally receive the benefit of the doubt;

- The desire to find a job grew during the trip. It was not the initial goal of his trip;

- The days when you are registered for an approved training program or a training or volunteer course to develop and sharpen your skills, you are still considered capable of and available for work. Therefore, you are entitled to receive Employment Insurance benefits;

- As indicated by the Tribunal, availability is a question of fact based on an assessment of the evidence. The assessment of the evidence as a whole clearly demonstrates that he showed that he was available for work for all the working days in his benefit period;

- He had and he still has the desire to return to the labour market as soon as a suitable job is offered, but he has not been offered a job through no fault of his own. He failed to find a suitable job for the reasons indicated in his appeal;

- His file shows that he made very reasonable and continuous efforts to develop his skills in order to find a suitable job as quickly as possible. His efforts led to the trip in question;

- He conducted a number of unsuccessful job searches before, during and after his trip in which he encountered the obstacles explained in his appeal, and he continued his searches after the trip, despite everything;

- The money that he received from Employment Insurance enabled him to survive under difficult conditions, to care for himself, to feed himself, and to drink potable and treated water. Natural things to which he was fully entitled and the last resort money that he received from EI were necessary in order for him to survive in Haiti and to complete his training and develop his skills;

- The Tribunal has discretion and must assess the file as a whole and not retain what only suits the Respondent;

- He had no choice but to provide the reports as the Respondent received them. He tried to reach Service Canada's 1-800 (toll-free) number to inform them that there was no option on the website for his category;

- He never tried to mislead the Respondent by making a false statement; it was a matter of survival and not of misleading anyone.

- The General Division did not exercise its discretion to stop all disciplinary procedures and/or penalties imposed on him, and not just to lower them by 40 or some other percentage, given the circumstances and all the evidence, the file, the new facts and the clarifications in his appeal.

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

- The General Division found that [translation] “the Appellant was outside Canada to do volunteer work in order to gain work experience.” Under paragraph 37(*b*) of the Act, this period outside the country renders him disentitled from receiving Employment Insurance benefits throughout his period of absence;

- In addition, the goal of this trip, which was to do humanitarian volunteer work in order to develop his skills, gain experience and help him re-enter the labour marker, did not enable him to [translation] “take advantage of the exceptions set out in section 55 of the Regulations”;

- This finding of the General Division is completely consistent with the Act, the Regulations and the applicable case law;

- Volunteering, supporting a political candidate and humanitarian aid are not included in the exceptions set out in the exhaustive list established by Parliament in section 55 of the Regulations (formerly section 54). It is not for the courts to re-examine Parliament’s choice;

- In addition, on page ADl-8 of his Notice of Appeal, the Appellant mentioned on the fly sections 6 and 7 of the Charter;

- In this case, the Appellant did not raise any constitutional arguments in his letter of appeal dated 21-08-2013, or in his [translation] “Inscription in appeal of the decision rendered on June 4, 2013”;

- In *Smith v. Canada (AG)*, the Federal Court of Appeal found that the disentitlement stipulated by the Act for being abroad does not violate the mobility rights established by subsection 6(1) of the Charter;

- The General Division rendered a reasonable decision when it found that the Appellant was not entitled to receive Employment Insurance benefits under the Act and the Regulations for the entire time that he chose to spend in Haiti volunteering in order to gain work experience;

- The General Division's finding that the Appellant failed to show that he conducted a "*bona fide* job search" within the meaning of paragraph 55(1)(*f*) of the Regulations from 08-08-2010 to 14-03-2011 is reasonable and warrants deference;

- The General Division referred to *Faucher*, which is frequently cited to state the principles governing the concept of the claimants' availability;

- In its reasons for decision, the General Division reviewed each of the three criteria, and the General Division's findings are not unreasonable;

- The General Division's finding of non-availability is reasonably supported by the evidence in the file and constitutes one of the acceptable outcomes in respect of the facts and law. In other words, without a determinative error of law, the Appeal Division must show deference to the determination of the General Division, which applied the correct legal criteria. It cannot simply substitute its own finding;

- The issue of the Appellant's availability is subordinate to the issue of the applicability of one of the exceptions set out by Parliament in section 55 of the Regulations. A claimant who travels abroad must be available and must fall under one of the exceptions set out by Parliament. These conditions are cumulative;

- When completing his Employment Insurance benefit reports, the Appellant stated that he was not outside Canada, which was inaccurate;

- The Appellant freely admitted that he was subjectively aware of the falseness of his statements and that he made them knowingly;

- The Appellant was fully aware of the inaccuracy of his statements and of the fact that in the short term, their impact would probably be for him to continue to illegitimately receive benefits, despite being outside the country;

- The General Division did not believe the Appellant's argument that he was informed by the Respondent's officer that he was eligible if the main goal of his trip was to develop skills, because the argument was not detailed enough;

- On the issue of credibility, the Appeal Division must show considerable deference toward the findings of the General Division, which received and heard the evidence;

- The General Division's decision confirming the imposition of a penalty for false statements is reasonable;

- It is clearly established in law that even if a claimant alleges that he was issued an overpayment as a result of incorrect information provided by the Commission, it is not a factor that can influence the decision of the Tribunal, which is bound by the Act as it reads and which does not have the jurisdiction to refuse to apply the Act.

STANDARDS OF REVIEW

[10] The Appellant did not make any submissions regarding the applicable standard of review in this case.

[11] The Respondent noted that the Federal Court of Appeal ruled that the applicable standard of review for questions of law is correctness and that the applicable standard of review for questions of mixed fact and law is reasonableness – *Atkinson v. Canada (AG)*, 2014 FCA 187.

[12] The Tribunal noted that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees (now the General Division) and an Umpire (now the Appeal Division) on questions of law is correctness – *Atkinson v. Canada (AG)*, 2014 FCA 187; *Martens v. Canada (AG*), 2008 FCA 240, and that the applicable standard of review for questions of mixed fact and law is reasonableness – *Atkinson v. Canada (AG)*, 2014 FCA 187; *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[13] The Tribunal proceeded with the hearing in the Appellant's absence since it was satisfied that the Appellant had received the notice of hearing on July 13, 2015.

[14] The Tribunal also reviewed many documents submitted by the Appellant in support of his appeal, in particular the CSST's decision dated January 13, 2014, the Commission des normes du travail's decision dated January 15, 2014, and the psychologist's report dated February 5, 2014.

[15] The Tribunal would like to note that the hearing before the Appeal Division is not a hearing *de novo* in which a party can submit, add or supplement evidence to obtain a new decision. The Appeal Division proceeds with a judicial review according to the limited powers granted to it by the *Department of Employment and Social Development Act*. This analysis will therefore concern the evidence as submitted to the General Division.

Absence from Canada

[16] When it dismissed the Appellant's appeal on the issue of his absence from Canada, the General Division found the following:

> [Translation]
> [27] The Appellant submitted an initial benefit claim on August 8, 2010. He acknowledged that he was outside Canada from November 25, 2010, to June 6, 2011.
>
> [28] Section 37 of the Act stipulates that a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada, unless the claimant falls under one of the exceptions set out in section 55 of the Regulations.
>
> [29] In this case, the Appellant was outside Canada to do volunteer work in order to gain work experience. He therefore does not fall under the exceptions set out in section 55 of the Regulations.
>
> [30] While the Appellant did submit some evidence of job searches conducted during the period when he was in Haiti, it is not enough to meet the requirements of section 55 of the Regulations. Moreover, sending out four resumés over a period of 10 months does not constitute a *bona fide* job search under paragraph 55(1)(*f*) of the Regulations.
>
> [31] While the Tribunal sympathizes with the Appellant's argument that it is commendable that he went to help the Haitians after the earthquake, section 37 of the Act clearly states that a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada.
>
> [32] The Tribunal therefore finds that the Appellant is not entitled to receive Employment Insurance benefits for the period in which he was outside Canada from November 25, 2010, to June 6, 2011, and that he does not fall under any of the exceptions set out in section 55 of the Regulations.

[17] The Appellant acknowledged that he was outside Canada from November 25, 2010, to June 6, 2011. He travelled to Haiti to develop his skills and gain labour market experience. He

volunteered for a star presidential candidate in Haiti as a political attaché, while producing immigration files.

[18] Paragraph 37(*b*) of the Act stipulates without ambiguity that a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada, unless the claimant falls under one of the exceptions set out in section 55 of the Regulations.

[19] Unfortunately for the Appellant, the goal of the trip, which was to do humanitarian volunteer work in order to develop his skills, gain experience and help him return to the labour market, does not place him under any of the exceptions in section 55 of the Regulations.

[20] The Appellant argued in his appeal that he conducted a *bona fide* job search while he was in Haiti and that he fell under the exception set out in paragraph 55(1)(*f*) of the Regulations.

[21] However, the General Division found that sending out four resumés over a 10-month period did not constitute a *bona fide* job search under paragraph 55(1)(*f*) of the Regulations. This finding takes into account the evidence of the Appellant's searches during the benefit period (GD2-20, GD2-145 to GD2-178) and is not unreasonable since the Appellant himself admitted that the main goal of his trip was to develop his skills and gain experience on the labour market.

[22] The Appellant also argued that, given the exceptional facts in his file, including the incorrect information received from the Respondent's officer, he is entitled to the benefit of the doubt and the Tribunal's discretion to exempt him from paying the overpayment and the penalty amended by the General Division.

[23] The Tribunal is of the view that the benefit of the doubt applies only if the evidence on each side of the issue is equally balanced and the case involves voluntary leaving or misconduct, as stipulated by subsection 49(2) of the Act. This is clearly not the case here.

[24] The Tribunal is also of the view that the relevant provisions of the Act and the Regulations are clear and unambiguous. Contrary to the Appellant's arguments, the Tribunal does not have the discretion to exclude the Appellant from the application of the legislation and Regulations enacted pursuant to the Act. Only Parliament can amend the Act and Regulations in place.

[25] Regarding the alleged error made by the Respondent's officer, the case law of the Federal Court of Appeal has clearly established than an amount received to which a claimant is not entitled, even following an error made by the Respondent, does not excuse the claimant from having to repay it – *Lanuzo v. Canada (AG)*, 2005 FCA 324.

[26] Regarding the Appellant's argument concerning the Charter, more specifically with respect to sections 6 and 7, the file does not show that the issue was raised properly before the General Division, and no notice was filed with the Tribunal in accordance with section 20 of the *Social Security Tribunal Regulations*. There is therefore no reason for the Tribunal to take into consideration the Appellant's argument.

[27] The Tribunal did not find any reason to intervene on the issue of the absence from Canada.

Availability

[28] When it dismissed the Appellant's appeal on the issue of availability, the General Division found the following:

> [Translation]
> [33] Availability is a question of fact that is based on an assessment of the evidence. The Appellant must show that he is available for work on any working day in a benefit period.
>
> [34] The Tribunal refers to the principles established in *Faucher v. Canada (Employment and Immigration)*, 1997 FCA 56. In this case, the Court established three criteria to assess to analyze a claimant's availability: the desire to return to the labour market as soon as a suitable job is offered, reasonable and continuous efforts to find a suitable job as quickly as possible, and not setting personal conditions that might unduly limit the chances of returning to the labour market.
>
> [35] In this case, the Tribunal assessed the Appellant's availability in light of the criteria established in *Faucher*. First, the Appellant must show the desire to return to the labour market as soon as a suitable job is offered. The Appellant did not submit sufficient evidence to show this desire. By leaving the country to do volunteer work, he failed to show his desire to return to the labour market in Canada. Moreover, the Tribunal is of the view that the claimant failed to show that he had the desire to return to the labour market as soon as possible.
>
> [36] Concerning the reasonable and continuous effort to find a suitable job as quickly as possible, the Tribunal notes that aside from his four job searches over a 10-month period,

> the Appellant did not conduct any other job searches. The Tribunal finds that the Appellant failed to show that he made continuous efforts to find a job.
>
> [37] Regarding the third criteria, the Tribunal finds that being in Haiti significantly limited his chances of finding a job in Canada.
>
> [38] While the Tribunal sympathizes with the special circumstances described by the Appellant and despite the fact that it is commendable to want to help Haitians with their immigration process, the Tribunal cannot disregard the requirements of the Act. The Tribunal refers to the FCA, which established that the burden of proof is on the Appellant to show that he is available for work on any working day of a benefit period (*Canada (Attorney General) v. Cloutier*, 2005 FCA 73). However, in this case, the evidence does not show that the Appellant discharged this burden of proof.

[29] In a recent decision, *Canada (AG) v. Elyoumni*, 2013 FCA 151, the Federal Court of Appeal specified the interpretation of subsection 18(1) of the Act and subsection 55(1) of the Regulations, and more specifically, how the former must be interpreted when applying the latter. The Court stated as follows:

> [13] The concept of availability in paragraph 18(1)(*a*) of the Act is not defined and must be interpreted contextually. Paragraph 55(1)(*a*) of the Regulations maintains a claimant's entitlement to benefits despite the claimant's being abroad—see section 37 of the Act—if the purpose of the trip is to attend the funeral of a member of the claimant's immediate family. This provision applies for a period of seven days.
>
> [14] In light of the principle that Parliament—more specifically, the Governor in Council—does not speak in vain, the legislation necessarily contemplated that claimants who avail themselves of this provision could remain available for the purposes of subsection 18(1) of the Act even if they are outside the country.
>
> [15] The availability of a claimant who benefits from the exception set out in subsection 55(1) of the Regulations is assessed on a case-by-case basis. In the context of the present case, the claimant had to, at the very least, demonstrate that he had made arrangements so that he could be reached during his absence from Canada if he was offered a job.

[30] The issue of a claimant's availability is therefore subordinate to the issue of the applicability of one of the exceptions set out by Parliament in section 55 of the Regulations. A claimant who travels abroad must be available and must fall under one of the exceptions set out by Parliament. These conditions are cumulative.

[31] As indicated by the Federal Court of Appeal, the notion of the availability of a claimant who benefits from the exception set out in subsection 55(1) of the Regulations is not defined and is assessed on a case-by-case basis.

[32] In this case, the Appellant does not fall under any of the exceptions set out in section 55 of the Regulations. The General Division nevertheless proceeded with assessing the Appellant's availability according to the three criteria established in *Faucher*.

The General Division reviewed each of the three criteria. It found that by leaving the country to do volunteer work, the Appellant failed to show his desire to return to the labour market in Canada, and that aside from his four job searches over a 10-month period, the Appellant did not conduct a *bona fide* job search during the benefit period, therefore calling into question the "continuity" of his efforts to find a job. Lastly, the General Division found that being in Haiti significantly limited his chances of finding employment.

[33] The Tribunal is of the view that the General Division's finding of non-availability is reasonably supported by the evidence in the files and constitutes one of the acceptable outcomes in respect of the facts and law.

[34] The Tribunal therefore does not have to intervene on the issue of availability.

Penalty

[35] When it dismissed with an amendment the Appellant's appeal on the issue of the penalty, the General Division found the following:

> [Translation]
> [39] To assess whether a penalty should be imposed, the Tribunal must determine whether a false or misleading representation was made, whether it was made knowingly and, where applicable, whether the Commission properly exercised its discretion when calculating the penalty amount.
>
> [40] In *Canada (Attorney General) v. Mootoo*, 2003 FCA 206, the FCA confirmed the principle according to which a false or misleading representation is made only when the claimants subjectively know that the information they have given or the representations they have made are false.

> [41] The reason indicated by the Appellant for failing to report his absence was that he needed the money to cover his accommodation in Haiti. In addition, he stated that a Service Canada employee told him that he could receive benefits while outside Canada, because he was doing an internship.
>
> [42] While the Tribunal sympathizes with the Appellant's difficult situation, he was responsible for informing the Commission of his trip outside Canada. The fact that he needed money to cover his accommodation did not enable him to disregard the eligibility requirements for Employment Insurance. Concerning the information received from the Service Canada employee, the Tribunal cannot rule on it because the details are unknown. However, the rules concerning the eligibility of claimants during a trip abroad are very clear and specific, and it would be surprising if a Service Canada employee provided incorrect information to that effect.
>
> [43] For the above reasons, the Tribunal is of the view that, on a balance of probabilities, the Appellant subjectively knew that he was making a false representation (*Canada (Attorney General) v. Mootoo*, 2003 FCA 206). In light of the facts in this matter, the Tribunal concludes that the claimant knowingly made false representations.
>
> [44] Having determined that the false or misleading representations were made knowingly, the Tribunal must assess whether the Commission exercised its discretion judiciously when calculating the penalty amount. In its decision, the Commission did not consider the mitigating circumstances when calculating the penalty.
>
> [45] According to the facts on file and the additional information presented at the hearing, the Appellant knew that the information he was providing was incorrect. However, his precarious financial situation and fragile mental health must be considered as mitigating circumstances. At the hearing, the Appellant made several clarifications regarding his very precarious financial situation. Considering this additional information, the Tribunal concludes that the Commission did not exercise its discretion judiciously when calculating the penalty amount in its decision. In drawing this conclusion, the Tribunal relies on *Kaur*, 2007 FCA 287: In order to establish if the Commission's decision was exercised in a judicially correct manner, this Court established in *Canada v. Dunham*, [1997] 1 F.C. 462 (F.C.A.) that the Board can rely not only on the evidence that was before the Commission, but also on the evidence put before the Board. The appeal from the Commission's decision to a Board of Referees constitutes a *de novo* hearing. Additional evidence can be introduced and the Board must make its own decision based on it.

[36] When completing his Employment Insurance benefit reports, the Appellant stated that he was not outside Canada, which was inaccurate. Once the false or misleading statement has been established by the Respondent, the General Division must take into consideration the Appellant's explanation to determine whether the false or misleading statement was made knowingly.

[37] The reasons indicated by the Appellant for failing to report his absence from the country were that he needed money to cover his accommodation in Haiti and he had no other options if he wanted to survive under Haiti's difficult conditions. In addition, he stated that a Service Canada employee told him that he could receive benefits while outside Canada because he was doing an internship.

[38] The Appellant's explanations are contradictory and the General Division clearly did not give them any credence. The Appellant stated that he did not report his absence from Canada because he needed money to survive in Haiti and he did not want his financial support to be cut. He also stated that he was informed that he was entitled to receive benefits because he was doing an internship. In addition, the General Division considered the Appellant's explanation of the incorrect information provided by an officer highly implausible given the simplicity of the rules for when a claimant is outside Canada.

[39] For quite some time the case law has consistently stated that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the General Division, which is better able to make a decision on it. The Tribunal will intervene only if it becomes clear that the General Division's finding on the issue is unreasonable, within the context of the evidence of the facts submitted to it to help it make a decision. The Tribunal does not find any reason to intervene in this case on the issue of credibility as assessed by the General Division.

[40] The General Division's decision on the issue of the penalty is reasonable and consistent with the legislative provisions and the case law. Nothing justifies the Tribunal's intervention in the issue.

CONCLUSION

[41] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division