Citation: *D. S. v. Canada Employment Insurance Commission*, 2015 SSTAD 1486

Appeal No. AD-14-157

BETWEEN:

D. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: December 31, 2015

DECISION: Appeal allowed

DECISION

[1] The appeal is allowed. The Appellant is entitled to benefits.

INTRODUCTION

[2] On January 27, 2014, a General Division member dismissed the Appellant's appeal against the previous determination of the Commission.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On August 25, 2015, a teleconference hearing was held. The Appellant and the Commission each appeared and made submissions.

THE LAW

[5] According to 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, 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.

ANALYSIS

[6] This appeal concerns whether or not the Appellant should receive parental benefits notwithstanding the fact that he stopped working due to being locked out by his Employer.

[7] The Appellant argues that, contrary to the findings of the General Division member, he complied with all legislative and regulatory conditions for receiving his benefits. He notes that he made arrangements prior to the lockout as required by law, and points to a letter and an email from his wife's employer as proof of this. The Appellant asks that his appeal be allowed, and that he receive benefits.

[8] The Commission, in their submissions, supports the decision of the General Division member. They note that the Appellant at no time contacted his own Employer, which the Commission maintains is necessary to meet the conditions of the *Employment Insurance Act* (the *Act*). They ask that the appeal be dismissed.

[9] In his decision, the General Division member correctly noted that s. 36 of the *Act* applied. He then considered the arguments of the parties before finding that the Appellant had not made any arrangements with his Employer prior to the lockout. Because of this, the member concluded that the Appellant did not qualify for the exemption in ss. 36(3) and dismissed his appeal.

[10] The *Act* reads as follows:

> 36. (3) Suspension of disentitlement – A disentitlement under this section is suspended during any period for which the claimant
>
> (a) establishes that the claimant is otherwise entitled to special benefits or benefits by virtue of section 25; and
>
> (b) establishes, in such manner as the Commission may direct, that before the work stoppage, the claimant had anticipated being absent from their employment because of any reason entitling them to those benefits and had begun making arrangements in relation to the absence.

[11] The parties, in their oral submissions before me, readily agreed that this was a novel issue that does not appear to ever have been considered by the Courts. As my own research uncovered a number of decisions regarding other aspects of s. 36 but not ss. 36(3), I concur.

[12] The parties further agree that if the exemption in ss. 36(3) of the *Act* applies, the Appellant is entitled to benefits. They agree that the Appellant satisfies ss. 36(3)(a). They also broadly agree that the facts as presented to the General Division are not in dispute.

[13] The sole issue for me to determine is therefore whether or not the disentitlement called for by ss. 36(1) is suspended because of the exemption set out in ss. 36(3).

[14] As the General Division member held at paragraph 31 that the Appellant's disentitlement could not be suspended because the Appellant had not made any arrangements with his Employer prior to the start of the lockout to take a parental leave, this appeal hinges on whether or not the General Division member is correct that making arrangements with the Employer prior to the work stoppage is a requirement of ss. 36(3). This is a question of law, on which I owe no deference to the General Division member.

[15] In determining whether the General Division member was correct, I considered the arguments of the parties. But I also turned my mind to (and took judicial notice of) Chapter 8 of the Digest of Benefit Entitlement Principles (the Digest), published by the Commission and found on their webpage, which covers s. 36 of the *Act*. Although the Digest is not binding upon me, I believe that it can be of assistance in interpreting provisions in the *Act* which have not already been considered by the Courts as it reflects the administrative policy of the body established by Parliament to administer the *Act*.

[16] At 8.10.2, the Digest states in part that:

> To support the statement that arrangements with the employer were made, the claimant may submit for example, that he or she advised the employer before the stoppage of work of the anticipated absence, or had at that time requested authorization for the absence. Such arrangements by themselves do not demonstrate that the claimant fulfills the supplementary condition on all points.
>
> In fact, for the person who anticipates an absence from employment, these arrangements with the employer are, more often than not, the last thing the person does. Other arrangements, depending on the reasons for the absence from work, must be made and it is these arrangements that the claimant must furnish to Commission as proof that they were begun before the stoppage of work. **There is no requirement that the arrangements have been finalized**

before the stoppage of work. It must also be realized that a person may have begun making arrangements without saying a word to the employer. The fact that the claimant has absented him or herself from employment with or without the employer's authorization, or even, that the arrangements were made without the knowledge of the employer, is not pertinent.

[emphasis added]

[17] At 8.10.3, the Digest continues:

There is a need for more than a simple statement from the claimant that his or her absence from employment was anticipated and that arrangements to this effect had begun before the stoppage of work. It is essential that the claimant provide the relevant information, explanations and, when required, documents in support of such a statement, so that it could reasonably be concluded, on the weight of the evidence, that he or she fulfilled the supplementary condition.

…

For those who are caring for a newborn child, acceptable proof may be a confirmation from the employer that a leave for such an absence from employment had been anticipated and requested before the stoppage of work. A person could also demonstrate by the work history that the absence was anticipated and planned in order to take care of the newborn child, as had been the case for the earlier births. **Moreover, we could accept an unequivocal statement that demonstrates that all had been in place before the stoppage of work for the claimant to withdraw from the labour market for a certain period of time in order to care for the newborn child**.

…

Finally, a vague possibility of an absence, without further specifics is not sufficient to arrive at the conclusion that the absence was anticipated. It is necessary that the elements of anticipation, planning and organization be found to exist before the start of the stoppage of work in order for an absence to be considered as "anticipated" before the said stoppage. **The situation here is one where the claimant had begun making**

arrangements before the start of stoppage of work and the absence from employment had been one of the anticipated consequences.

[emphasis added]

[18] I note the comments of the Federal Court of Appeal in *Canada (Attorney General) v. Picard*, 2014 FCA 46, regarding the principles of statutory interpretation as they apply to the *Act*. I have especially considered the note of caution sounded by the Court at paragraph 21 regarding the acceptance of administrative policies such as the Digest.

[19] I also note that ss. 36(3) mandates that evidence be furnished by the Appellant "in such manner as the Commission may direct". Of course, the Commission in practice gives such directions while gathering information to determine the correct answer to almost all questions before it, not just ss. 36(3). However, as Parliament does not speak in vain I must conclude that Parliament intended that the Commission set out its views regarding this subsection in a reasonable, sensible, and uniform manner that could be relied upon in a general way by any claimant. The fact that the Commission in fact did set out their position in the Digest (as quoted above) fortifies me in my opinion.

[20] In the absence of binding jurisprudence from the Courts, I find that the reasonable, flexible, and sensible interpretation set out above in the Digest is indeed the correct approach to be taken in applying ss. 36(3). By interpreting the law in a contrary manner, the General Division member erred.

[21] Having found that the General Division member erred in law by misinterpreting ss. 36(3), his decision cannot stand. Because the facts of this case are not contested, however, a new hearing before the General Division is not necessary. Instead, I will give the decision that the member should have given.

[22] The uncontested evidence shows that the Appellant and his wife had been considering what steps to take to properly care for their newborn child. In late April 2013, they became aware of an impending labour dispute that was very likely to result in the Appellant being locked out of his employment on April 28, 2013. Prior to April 28, 2013, the Appellant's wife made and carried out concrete plans to return to work during the busy tax season (evidence of which is found at exhibit GD2 – 9 and 10), while the Appellant made plans to take parental leave from his own Employer.

[23] There can be no doubt that these plans were set in motion by the knowledge that the Appellant was very likely to be facing a lockout situation at the end of April, and that the Appellant did not inform his Employer of this prior to the lockout. I find, however, that this was not material as the Appellant and his wife had, in the words of the Digest, "begun making arrangements before the start of stoppage of work and the absence [of the Appellant] from employment had been one of the anticipated consequences".

[24] Finally, I observe that the Appellant's preparations included calling the Commission for advice, and that he has stated that he was told that contacting his Employer was not necessary. The Commission (and the General Division member) dismissed this by correctly observing that erroneous information given by a Commission employee does not bind the Commission.

[25] Although I cannot say for certain on what basis that advice was given, I suspect that that the Commission representative spoken to by the Appellant read the Digest and applied the information within to the Appellant's circumstances. I note that as I have endorsed the Digest's view of the law, the agent's advice has turned out to be correct after all.

[26] Therefore, based upon the above, I have no hesitation in concluding that the Appellant has established, in the manner set out by the Commission in the Digest, that prior to his work stoppage he had anticipated and begun making arrangements in relation to his absence.

CONCLUSION

[27] For the above reasons, the appeal is allowed. The Appellant is entitled to benefits.

Mark Borer
Member, Appeal Division