Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Canada Employment Insurance Commission v. A. R.*, 2016 SSTADEI 179

Tribunal File Number: AD-14-362

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: April 5, 2016

DECISION: Appeal allowed

Canada

DECISION

[1] The appeal is allowed. The decision of the General Division member is rescinded, and the determination of the Commission is restored.

INTRODUCTION

[2] On June 19, 2014, a General Division member allowed the Respondent's appeal against the previous determination of the Commission.

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

[4] On November 17, 2015, a teleconference hearing was held. Both the Commission and the Respondent attended 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 novel case hinges upon availability.

[7] The Commission submits that the General Division member erred by finding that the Respondent was available within the meaning of the *Employment Insurance Act* (the Act) even though at the time in question the Respondent was not legally permitted to work in Canada. They ask that their appeal be allowed.

[8] The Respondent argues that the General Division was right to find that it was not his fault that he did not have a valid work permit, as he did everything he was instructed to do but lost his permit regardless. As he did not act in any way to limit his own availability, he asks that the appeal be dismissed.

[9] The facts of this case are unusual.

[10] The Respondent was in possession of a valid work permit for a number of years. In 2011, he was convicted of a criminal offence but was assured that all was well with his work permit. For quite some time afterwards, this was true. But when the Respondent attempted to return from a trip to the United States his conviction was noted, he was denied entry to Canada, and his work permit was cancelled. Although it was eventually restored, he was let go in the meantime because he could not work legally, and applied for benefits. These benefits were denied by the Commission, which has led to this appeal.

[11] In his decision, the General Division member was sympathetic to the Respondent and noted, correctly, the test for availability set out in *Faucher v. Canada (Attorney General)*, A-56-96, that three factors must be analyzed:

> "the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market"

[12] The member then considered these factors and, finding that they were all present, determined that the Respondent was indeed available and allowed his appeal.

[13] With the utmost of respect to the General Division member, I cannot agree.

[14] First, I note that the Respondent lost his work permit as a result, albeit belated, of being convicted of a criminal offence. I must therefore attribute the eventual loss of the permit to the Respondent's initial unlawful action, which had the effect of limiting the chances (to zero, effectively) of returning to the Canadian labour market during the time in question.

[15] Second, I note the decision of the Federal Court of Appeal in *Vezina v. Canada (Attorney General)*, 2003 FCA 198, where the Court held that:

> "The question of availability is an objective one – whether a claimant is sufficiently available for suitable employment to be entitled to unemployment [now employment] insurance benefits – and it cannot depend on the particular reasons for the restrictions on availability however these may evoke sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it."

[16] To the extent that the Umpire decisions cited by the member (CUB 44956, CUB 13136, and CUB 14357, all three of which predate *Vezina*) conflict with the above jurisprudence of the Court, they no longer represent good law and should not be followed.

[17] Having said the above, I acknowledge (as did the parties) that this issue appears to be a novel one that has never been directly addressed by the Courts. But even leaving aside the two legal points discussed above, it must be admitted that to any outside observer it would appear highly illogical that someone who is not legally permitted to work in Canada could be considered available for work within the meaning of the Act and collect regular non-sickness benefits. This cannot have been, and in my view was not, Parliament's intention in drafting the Act.

[18] I am sympathetic to the Respondent. Although he had been convicted of a criminal offence, this had happened some time before and he thought himself free and clear. If he had been told of the potential consequence to his livelihood, he could have dealt with the appropriate authorities earlier and perhaps avoided the gap in his work permit coverage which ensued. But he was not. Perhaps this was not his fault, but it was his responsibility.

[19] On the facts of this case, I find that the Respondent was not sufficiently available for suitable employment, from the time that he lost his work permit until the time that it was restored to him, because he was not legally entitled to work in Canada during that time.

[20] By finding to the contrary and by not properly considering and applying the above jurisprudence, the General Division member erred such that I am required to intervene to correct his error.

[21] This appeal must succeed.

CONCLUSION

[22] For the above reasons, the appeal is allowed. The decision of the General Division member is rescinded, and the determination of the Commission is restored.

Mark Borer

Member, Appeal Division