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

Citation: *D. C. v. Canada Employment Insurance Commission,* 2016 SSTADEI 214

Tribunal File Number: AD-15-1055

BETWEEN:

D. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: April 19, 2016

DECISION: Appeal dismissed

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] This is an appeal from a decision of a member of the General Division. It concerns a disentitlement for being out of Canada during two separate periods and whether or not the Appellant was available during those two periods.

[3] After leave to appeal to the Appeal Division was granted, a teleconference hearing took place. The Appellant and the Commission each appeared and made submissions.

THE LAW

[4] 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

[5] This case hinges on the correct interpretation of the exemptions to the general disentitlement to receive benefits imposed for being outside of Canada, as stated in paras. 55(1)(e) and (f) of the Employment Insurance Regulations.

[6] The Appellant submits that the General Division member erred by not finding that he was available during the first of two separate trips he took outside of Canada. The Appellant also submits that he met the exemptions set out in the Regulations. He does not appeal against the finding that he was available during the second absence from Canada, as this finding was in his favour. He asks that his appeal be allowed and that he receive benefits during the periods he was outside of Canada.

[7] The Commission, for its part, supports the entirety of the member's decision and asks that the appeal be dismissed.

[8] The parties agree, as do I, that in general claimants are barred from receiving benefits if they are outside of Canada due to the operation of s. 37 of the *Employment Insurance Act* (the Act). The parties further agree, as do I, that ss. 55(1) of the Regulations sets out a number of specific exemptions that if met allow a claimant to receive benefits regardless for a specified period. It is also not disputed that a claimant must also be available within the meaning of the Act during the time in question even if they meet one or more of the ss. 55(1) exemptions, although availability is no longer a live issue in this file.

[9] Paragraph 55(1)(e) permits a claimant to receive benefits for seven days if the claimant was outside Canada "to attend a *bona fide* job interview".

[10] Paragraph 55(1)(f) permits a claimant to receive benefits for 14 days if the claimant was outside Canada "to conduct a *bona fide* job search".

[11] With regards to the first trip outside of Canada, the General Division member found (at paragraphs 20 and 26) that the Appellant stayed at a resort, did not attend a job interview, and did not present any proof of "any sustained effort to find new employment". The member then found that the Appellant was not available and also did not meet the exemptions found in the Regulations during that first trip. He did note, however, that *Canada (Attorney General) v. Picard*, 2014 FCA 46, must be applied and that doing so would result in the disentitlement from the first trip being reduced by one day.

[12] After hearing the arguments of the parties regarding the above trip, I find myself in agreement with the Commission that this portion of the appeal cannot succeed. I am not persuaded that the General Division member made any error in the above findings, and indeed I fully agree with those findings. I also agree with the member that *Picard* must be applied in the manner he stated.

[13] More complex, however, are the legal and factual issues surrounding the second trip.

[14] With regards to the second trip, the member found (at paragraph 27) that the Appellant was in a "non-vacation" mode, and "even had during his stay an interview…which led him to a new job". The member also found that the Appellant "was in active search". He then concluded that the Appellant was available.

[15] As noted above, the above finding is not under appeal.

[16] Then, the member correctly noted that *Picard* had not been applied to this trip either, and that doing so would result in the disentitlement for the trip being reduced by one day. However, in his analysis (at paragraph 22) of whether or not the second trip met one of the s. 55 exemptions, the member found that it did not.

[17] In discussing this, he stated that:

> "…to apply, the interview must be conducted in another country for a job in that country. To attend a job interview by electronic means for a job in Canada does not fall within the exception as per [para.] 55(1)(e). In other words, a claimant cannot leave Canada to apply for a job in Canada."

[18] With the utmost of respect, I cannot agree with this formulation of the law. I note that the above paragraph appears to conflate paras. 55(1)(e) which covers interviews and (f) which covers job searches. Whether or not a claimant is entitled to leave Canada to apply for a job in Canada is not related to the question of whether or not he is entitled to attend a job interview by electronic means for a job in Canada.

[19] I also note that if the blanket provisions contained in the above paragraph were to be followed, a claimant attending an interview for a job in Canada at a company with its human resources department located in the United States could not receive benefits during the time spent attending that interview in the United States. This would make little sense given the overall purpose of the Act and this provision.

[20] That being said, I note that Parliament does not speak in vain and that it used very specific language in defining the scope of the 55(1)(e) and (f) exceptions. Subsection 50(8) of the Act for example, which also deals with job searches, permits the Commission to require a claimant to make "reasonable and customary efforts to obtain suitable employment". This stands in contrast to paras. 55(1)(e) and (f), both of which use the phrase "*bona fide*" to describe the required efforts to be taken.

[21] The Latin words "*bona fide"* meaning "real or genuine" and "in good faith" used in this context mean that the job interview or job search referred to in the Regulations must be something other than the usual "reasonable and customary effort". Indeed, it would appear that Parliament intended to introduce a subjective element which requires not only a normal job search or interview, but also that this interview or job search be genuine and undertaken in good faith. This is a higher standard than that found in the general availability provisions found elsewhere in the Act.

[22] The reason for this is not hard to see. I have no doubt that Parliament wished to avoid any situation where an unemployed Canadian travels for personal reasons outside Canada while avoiding the s. 37 disentitlement simply by virtue of applying for a few jobs by electronic means.

[23] While the resulting exemptions in paras. 55(1)(e) and (f) are difficult to qualify for, they should not be limited by Tribunal members beyond the language used by Parliament.

[24] I note however, that it remains true that to qualify for the two s. 55 exemptions while outside of Canada (in addition to the requirement that the interview or search be *bona fide*) a claimant must be outside of Canada **primarily** for the purpose of attending a job interview

and/or conducting a job search. This is true because the Regulations say that any such absence must be “to attend” an interview or “to conduct” a search.

[25] This is not to say that the absence must have been **initially** intended for the purpose of attending an interview or looking for a job, just that the claimant must be outside of Canada **during the time in question** primarily for that purpose. In previous cases I have applied this formulation to a number of other s. 55 exemptions, and I see no reason why I should not also do so here.

[26] However, even though I have found that the correct law was not applied, I find that the proper application of the law to the facts inevitably results in the same conclusion ultimately reached by the General Division member.

[27] The uncontested evidence indicates (and the member found) that the Appellant had left Canada for the purpose of attending a trade show. Although I accept (as did the member) that the Appellant made attempts to find work, he did not recall (as noted by the member in paragraph 15 of his decision), the specifics of this search. While this may have meant that the Appellant could be considered available, it does not constitute proof that the Appellant was outside of Canada for the primary purpose of a *bona fide* job search.

[28] Likewise, it is not disputed that the Appellant attended an interview with a Canadian company by electronic means while outside of Canada. I agree with the Appellant that this was a *bona fide* interview, as evidenced by the fact that the Appellant was subsequently hired by that company. However, this interview could have been conducted from anywhere in the world, as the employer and the interviewers were physically located in Canada. I therefore am unable to find that at the time in question the Appellant’s primary purpose in being outside Canada was to attend the interview.

[29] Indeed, as the Appellant does not dispute that the primary purpose of this trip was to attend a trade show it follows that any other activities undertaken were secondary to this purpose.

[30] Finally, although not raised during the hearing, I wish to express my emphatic agreement with the General Division member that a claimant travelling outside of Canada does not need permission from the Commission before doing so. Although this may be a wise precaution to minimize any future Commission objections, it is not required by the Regulations.

[31] As I have reached the same ultimate conclusions as the General Division member, albeit for different reasons, the Appellant's appeal cannot succeed.

CONCLUSION

[32] For the above reasons, the appeal is dismissed.

Mark Borer
Member, Appeal Division