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

Citation: *Canada Employment Insurance Commission v. C. P.*, 2016 SSTADEI 277

Tribunal File Number: AD-13-1172

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

C. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON May 10, 2016

DATE OF DECISION: May 27, 2016

Canada

DECISION

[1] The appeal is allowed. The decision of the board of referees is rescinded, and the determination of the Commission is restored.

INTRODUCTION

[2] On April 5, 2013, a panel of the board of referees (the Board) 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 May 10, 2016, a teleconference hearing was held. The Commission appeared and made submissions, but the Respondent did not. The notice of hearing was sent by courier as well as by regular mail to the last known address of the Respondent. Although the Canada Post signature card cannot be located, neither copy of the notice has been returned by Canada Post as undeliverable. I am therefore satisfied that the Respondent received notice of the hearing or, in the alternative, that the Tribunal has taken all reasonable steps to contact the Respondent.

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 [or the Board] failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division [or the Board] erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division [or the Board] 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 Board 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 note that the uncontested evidence indicates that the Respondent did not apply for an extension of his work permit prior to the permit's expiry. The Commission also argues that there is no evidence of any job search in the record. They ask that their appeal be allowed.

[8] Although the Respondent was in contact with the Tribunal in response to leave to appeal being granted, he made no submissions on the merits and did not appear at the Appeal Division hearing. However, before the Board he argued that as his Employer did not provide a market labour opinion (LMO) in a timely fashion, it was not his fault that he could not re-apply for his permit sooner.

[9] The relevant facts of this case are as follows.

[10] The Respondent was in possession of a valid work permit which was due to expire on January 5, 2013 (found at Exhibit AD2 – 16). On December 20, 2012, the Respondent's Employer requested a LMO from Service Canada. This LMO was not provided by Service Canada until February 2013 (found at Exhibit AD2 – 22), at which time the Respondent applied to have his permit extended. On March 19, 2013, however, the Respondent was told that due to his use of "an incorrect or outdated application form" his February 2013 application would not be considered (found at AD2 – 41).

[11] The record does not disclose what additional steps were taken, if any, but Citizenship and Immigration Canada (CIC) noted on March 19, 2013, that his temporary residence status would expire on April 24, 2013 (found at AD2 – 41 and also at AD2 - 27) unless the application was resubmitted.

[12] Meanwhile, the Respondent had applied for benefits to begin January 2013. Because he no longer had a valid work permit at that time the Commission determined he was not available and thus did not qualify, which has led to this appeal.

[13] In their decision, the Board 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.

[14] The Board then considered these factors and, finding that they were all present and that the Respondent had conducted a job search (although they did acknowledge that he could not legally work in Canada without a permit), determined that the Respondent was indeed available. In doing so, the Board cited a number of umpire decisions in support of its finding that unavailability is not intended to apply where it is caused by circumstances beyond the claimant's control. It then allowed the Respondent's appeal.

[15] With the utmost of respect to the Board, I cannot agree.

[16] First, 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.

[17] To the extent that the umpire decisions cited by the Board conflict with the above jurisprudence of the Court, they do not represent good law and should not be followed.

[18] Second, I note that the Respondent failed to re-apply 30 days before the expiry of his permit as requested by CIC on their webpage (reproduced at Exhibit AD2 – 23). I have no

doubt that this rule exists so that administrative issues such as using the wrong form or not having a LMO can be worked out in a timely fashion prior to the permit expiring.

[19] It may well be that the actions of his Employer contributed to the Respondent's difficulties. But this cannot change the fact that the Respondent was responsible for his own work permit.

[20] In fact, the Respondent applied almost a month after his permit had already expired. I must therefore attribute the failed renewal of the permit at least in part to his own actions, which had the eventual effect of limiting the chances (to zero, effectively) of returning to the Canadian labour market because he was not legally entitled to do so.

[21] Third, 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 availability provisions.

[22] Having made the above findings, it is an inescapable conclusion that the Respondent was not available for suitable employment as soon as he lost his work permit because beginning at that time he was not legally entitled to work in Canada.

[23] By finding to the contrary and by not properly considering and applying the above jurisprudence, the Board erred in law. As I am obligated to intervene to correct this, this appeal must succeed.

CONCLUSION

[24] For the above reasons, the appeal is allowed. The decision of the Board is rescinded, and the determination of the Commission is restored.

Mark Borer

Member, Appeal Division