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

Citation: *A. W. v. Canada Employment Insurance Commission*, 2016 SSTADEI 479

Tribunal File Number: AD-15-1

BETWEEN:

A. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: August 10, 2016

DATE OF DECISION: September 19, 2016

DECISION

[1] The appeal is allowed in part. The General Division decision is varied in accordance with these reasons.

INTRODUCTION

[2] Previously, 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 10, 2016, a teleconference hearing was held. The Appellant attended and made submissions by way of counsel, but the Commission did not. As I was satisfied that they received proper notice, I proceeded in their absence.

[5] Approximately 45 minutes into the hearing, the Commission contacted Tribunal staff and requested an adjournment. After the hearing, a written request was made in which the Commission explained that "[d]ue to a confusion [sic], the Commission could not attend the hearing".

[6] At the time of the initial communication the hearing was still in progress. I therefore asked the Appellant for oral submissions and permitted them to make further written submissions if they desired. In due course, the Appellant did so. The Appellant opposed the adjournment on a number of grounds, including the fact that they had been arguing their case for quite some time and that a previously scheduled hearing had been adjourned because of technical issues on the Tribunal's part.

[7] I continued the hearing without ruling on the Commission's request on the understanding that I would consider it after the Commission had formally made a written request and the Appellant had an opportunity to make the written submissions referred to above. At the time, it was my hope that the Commission would eventually join the teleconference and explain their request more fully, although this did not happen.

[8] The Commission made full written submissions on the merits in advance of the hearing, which I have considered. As such, adjournment or no, the Commission's position is already on the record. Because of this, and taking into account my disposition of the appeal, I find that the Commission will suffer minimal or no prejudice if the adjournment is refused.

[9] On the other hand, if an adjournment were granted the Appellant would be forced to re-argue the entire matter and the time already spent doing so at the August 10, 2016, hearing would be wasted. This would cause the Appellant to suffer substantial prejudice if the adjournment is granted.

[10] Having considered the above, I find that the interests of justice would best be served if the adjournment were refused. For this reason, I decline to exercise my discretion to grant the requested adjournment.

THE LAW

[11] 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

[12] This case hinges upon the correct application of the law of availability in situations where the claimant does not have a valid work permit.

[13] The Appellant, in detailed and well-reasoned arguments, submits that the General Division member erred by finding that he was not available within the meaning of the *Employment Insurance Act* (Act).

[14] Boiled down, these arguments are three fold. First, the Appellant submits that he fulfilled the test for availability as set out in *Faucher v. Canada (Employment and Immigration)*, A-56-96, and that the General Division member erred by not so finding. Second, he argued that the intention of Parliament in creating the Act was to ensure that claimants receive benefits in circumstances where unavailability is imposed upon them for circumstances that are beyond their control, and cited a number of umpire decisions to this effect. Third, he argued that the General Division erred in finding (at paragraph 32 of his decision) that he was unavailable because "a claimant must be actively seeking suitable employment, even if it appears reasonable for the claimant not to do so".

[15] The Commission argues that the General Division member was correct to dismiss the Appellant's appeal, as not having a work permit is a personal condition that prevents a claimant from being available for work as required by s. 18 of the Act. The Commission does note, however, that subsequent to the General Division decision the Appellant's work permit was restored. They submit that the previously indefinite disentitlement should therefore be ended the day the permit was restored (December 3, 2014).

[16] The facts of this case are unusual, but not disputed.

[17] The Appellant was in possession of a valid work permit and received approximately 10 renewals over the years. In 2013, however, the questions asked on the renewal form changed. Instead of asking whether or not the applicant was a member of a political group in his country of origin (a question that the Appellant always answered "yes"), the renewal form now asked whether or not the applicant was a member of a political group that used violence to achieve its goals. As the Appellant did not believe that his former group had done so, he answered "no".

[18] Unfortunately for the Appellant, officials at Citizenship and Immigration Canada (CIC) took exception to this answer. Without receiving any further information from the Appellant (although at least one unsuccessful attempt appears to have been made to reach him), they refused his application. The Appellant re-applied, this time more fully explaining the reasons for his answer, but encountered additional unrelated difficulties due to a recently increased application fee that he was not aware of. Eventually, both of these issues were overcome and the Appellant received a work permit and subsequently was granted Canadian permanent residency status. At all times, the Appellant was forthright about his membership in this group and, as evidenced by the eventual granting of permanent residence status, this membership was not ultimately deemed sufficient grounds to deny the Appellant permission to remain in Canada. There is no suggestion that the Appellant misled anyone during this process.

[19] During the time between the loss of his permit and its eventual restoration, the Appellant did not engage in an active job search. In the Appellant's view, this was justified by the fact that he had a guaranteed job waiting for him once he received his renewal, and also by the fact that even if he had done so he was not legally entitled to work in Canada in the absence of a valid work permit.

[20] In his decision, the General Division member correctly noted the basic test for availability set out in *Faucher*, 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"

[21] The member then considered these factors and, finding that the Appellant had not been looking for work, found that he had not proven his availability and dismissed his appeal. The member also found that the Appellant was not available for work until such time as he received a new work permit.

[22] Before going any further, I must express my agreement with the Appellant that the true issue was whether or not a claimant could be available (in the Appellant's circumstances) in the absence of a valid work permit and that given the Appellant's

circumstances a job search (or the lack thereof) was not determinative of whether or not the Appellant was available.

[23] That being said, I find myself in agreement with the ultimate conclusion reached by the General Division member, albeit for somewhat different reasons. In coming to this determination, I make several observations and findings.

[24] 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."

[25] Second, although an umpire decision (CUB 44956) cited by the Appellant at the hearing is indeed directly on point and has been followed by a number of other umpires, I note that it held that s. 18 of the Act was "not applicable in the circumstances under review".

[26] Section 18 of the Act states that claimants must be available for work in order to receive regular non-sickness employment insurance benefits. With the utmost of respect for the learned umpire, I decline to follow any decision which disregards this basic legal requirement or which conflicts with *Vezina*. I also note that I am not bound by umpire decisions in any case.

[27] Third, I note that the Respondent lost his work permit as a result of answering a question asked by CIC in manner that CIC was not satisfied with. While I recognize that the Appellant was not being intentionally deceitful in his response, his permit was refused because the CIC deemed the correct answer to be the opposite of the one provided by the Appellant.

[28] I must therefore attribute the eventual loss of the permit to the Appellant's own actions, which had the effect of limiting his chances (to zero, effectively) of returning to the Canadian labour market during the time in question. Because of this, it is not necessary for

me to address the difficulties encountered by the Appellant as a result of the sudden increase in the application fee, which occurred later.

[29] Fourth, I acknowledge (as did the parties) that this specific issue appears to be a novel one that has never been directly addressed by the Courts. But even leaving aside the 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.

[30] I am sympathetic to the Appellant. Although he applied in advance and provided what he thought was an accurate answer to the new CIC question, his permit renewal was denied. If he had been aware 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.

[31] Considering the above, the facts of the case, and the submissions of the parties, I find that the Appellant 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 as a result of his own actions he was not legally entitled to work in Canada during that time.

[32] The General Division decision is therefore varied accordingly.

CONCLUSION

[33] For the above reasons, the appeal is allowed in part. The decision of the General Division is varied in accordance with these reasons.

Mark Borer
Member, Appeal Division