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

Citation: *Canada Employment Insurance Commission v. E. M.,* 2017 SSTADEI 39

Tribunal File Number: AD-15-1308

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

E. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: November 22, 2016

DATE OF DECISION: January 31, 2017

Canada

DECISION

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

INTRODUCTION

[2] Previously, a General Division member allowed the Respondent's appeal in part.

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

[4] A teleconference hearing was held. The Commission attended and made submissions, but the Respondent did not. As a Canada Post signature page in the file indicated that the Respondent had personally signed for the notice of hearing, I proceeded in his absence.

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 case involves whether or not the Respondent was available within the meaning of s. 18 of the *Employment Insurance Act* (Act) while out of Canada. It is not disputed that the Respondent was otherwise entitled to receive benefits.

[7] The Commission argues that the General Division member failed to state and apply the law regarding availability correctly, and also erred in fact, when he found that the Respondent was available for the two days just prior to the Respondent's return to Canada.

[8] The Respondent did not file any submissions, nor did he appear at the hearing before me.

[9] The facts of this case are not contested. The Respondent left Canada with his wife to visit her seriously ill father in a remote and unsafe area of Albania. The Respondent informed the Commission (found at GD3-21) that because of the remote location, he could not easily be reached by telephone and could not return to Canada within 48 hours if he received a job offer.

[10] Normally, according to s. 37 of the Act, being outside of Canada disentitles a claimant from receiving benefits. However, s. 55 of the *Employment Insurance Regulations* (Regulations) lists exceptions to this general rule. It is not disputed that the Respondent's trip met one of these exemptions, which entitled him to up to a seven-day absence from Canada "subject to section 18 of the Act".

[11] After considering his case, the Commission determined that because he could not easily be reached in Albania and could not return home within 48 hours if offered a job, he was not available. This meant that he was disentitled for the length of his absence from Canada.

[12] In his decision, the General Division member stated the general law and jurisprudence regarding availability, and determined (at paragraph 20) that "the

[Respondent], contrary to his general situation, was indeed in a position to come back to Canada within 48 hours."

[13] The member appears to have made this finding based upon the fact that since the Respondent's return date was pre-set, by definition the Respondent would be returning within that time 48 hours prior to his departure.

[14] Although questions of availability while benefiting from a s. 55 exemption are not that uncommon, the Federal Court of Appeal has considered the situation only once, in *Canada (Attorney General) v. Elyoumni*, 2013 FCA 151.

[15] In *Elyoumni*, the Court held that the availability of a claimant benefiting from an exemption under s. 55 of the Regulations must be assessed on a case by case basis instead of applying the usual rules regarding availability.

[16] The failure of the General Division member to consider and apply this case is an error of law which I am obligated to intervene to correct.

[17] I note that the Respondent did not attend the hearing held before me. I also note that the Respondent did not attend the earlier General Division hearing. Although I cannot say for certain, I suspect that if I ordered a new General Division hearing the Respondent would once again decline to appear. For this reason, and as the facts are not in dispute, I find that it is in the interests of justice for me to give the decision that the General Division member should have given.

[18] In *Elyoumni*, the Court found (at paragraphs 15 and 16) that:

> In the context of the present case, the claimant had to, at the very least, demonstrate that he had made arrangements so that he could be reached during his absence from Canada if he were offered a job.
>
> In this case, the claimant did not make any arrangements in order to be reached. This is why the Commission concluded that the claimant had not proven that he was available for work… In my opinion, the

> Commission was correct in finding that the claimant had not proved his availability…

[19] The facts of the case before me are clear, and very similar to those in *Elyoumni*. The Respondent could not be reached in Albania, nor could he return quickly if a job was offered to him. The Respondent, as noted above, by his own admission (and as found by the General Division member) took no steps to rectify this. He could, for example, have rented a satellite phone for use on his trip. But he did not.

[20] Based upon the above, I find that applying the jurisprudence of the Court to the uncontested findings of fact made by the General Division member allows for only one possible conclusion: that the Respondent had not shown his availability during the time in question.

[21] In closing, I note that the Commission agrees that the member correctly determined that the Commission erred by failing to apply *Canada (Attorney General) v. Picard*, 2014 FCA 46. Properly applied, this means that (in the circumstances of this case) the length of the Respondent's disentitlement must be reduced by one day.

CONCLUSION

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

Mark Borer

Member, Appeal Division