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

Citation: *T. B. v. Canada Employment Insurance Commission*, 2017 SSTADEI 424

Tribunal File Number: AD-17-331

BETWEEN:

T. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: November 9, 2017

DATE OF DECISION: December 5, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

T. B., Appellant
Carole Robillard, Representative for the Respondent, the Canada Employment Insurance Commission

INTRODUCTION

[1] On February 13, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that there was no evidence that the Appellant was "not in Canada" during the period from October 23, 2010, to November 26, 2010, as originally determined by the Canada Employment Insurance Commission (Commission). It found that the Appellant was outside Canada from October 3, 2010, to October 26, 2010, and that he was therefore disentitled to benefits over this period, per section 37 of the *Employment Insurance Act* (Act).

[2] The General Division further determined that the Appellant was not outside Canada for the purpose of conducting a *bona fide* job search or to attend a *bona fide* interview and that he therefore did not meet any exceptions to his disentitlement for benefits under section 55 of the *Employment Insurance Regulations* (Regulations).

[3] The General Division also held that the Appellant was not available for work during both absences from Canada as required under section 18 of the Act. These include the period from October 2, 2010, until October 26, 2010, and from May 24, 2011, until June 17, 2011.

[4] The Appellant therefore remained responsible for an overpayment for the period from October 3, 2010, to October 26, 2010.

[5] In relation to the Appellant's subsequent visit to China, the General Division found that the Appellant was outside Canada from May 24, 2011, to June 17, 2011. The General Division did not interfere with the Commission's determination that he remained entitled to seven days of this period by reason of his attendance at the funeral of his wife's grandfather as per

subparagraph 55(1)(*b*)(i) of the Regulations. However, it once again found that the Appellant was not outside Canada to conduct a *bona fide* job search or to attend a *bona fide* interview. The General Division determined that the Appellant was still disentitled to benefits for the remainder of his absence, from June 1, 2011, to June 17, 2011.

[6] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on March 24, 2017, and leave to appeal was granted on June 1, 2017.

[7] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[8] Did the General Division err in fact or law in finding that the Appellant was disentitled to benefits for the entire absence from Canada, from October 3, 2010, to October 26, 2010?

[9] Did the General Division err in fact or law in finding that the Appellant was disentitled to benefits in his second absence from Canada, from June 1, 2011, to June 17, 2011?

THE LAW

[10] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the following are the only grounds of appeal:

> **(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.

[11] Section 13 of the Act states:

> A claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

[12] Subsection 18(1) of the Act states:

> A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was
>
> (a) capable of and available for work and unable to obtain suitable employment;
>
> (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
>
> (c) engaged in jury service

[13] Subsection 20(1) of the Act states:

> If a claimant is not entitled to receive benefits for a working day in their waiting period, an amount equal to 1/5 of their weekly rate of benefits for each such working day shall be deducted from the benefits payable for the three weeks described in subsection 19(1).

[14] Section 37 of the Act states:

> Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant
>
> (a) is an inmate of a prison or similar institution; or
>
> (b) is not in Canada

[15] Subsection 55(1) of the Regulations states:

> Subject to section 18 of the Act, a claimant who is not a self-employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada
>
> (a) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the claimant's area of residence in Canada, if the

hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(b) for a period of not more than seven consecutive days to attend the funeral of a member of the claimant's immediate family or of one of the following persons, namely,

(i) a grandparent of the claimant or of the claimant's spouse or common-law partner,
(ii) a grandchild of the claimant or of the claimant's spouse or common-law partner,
(iii) the spouse or common-law partner of the claimant's son or daughter or of the son or daughter of the claimant's spouse or common-law partner,
(iv) the spouse or common-law partner of a child of the claimant's father or mother or of a child of the spouse or common-law partner of the claimant's father or mother,
(v) a child of the father or mother of the claimant's spouse or common- law partner or a child of the spouse or common-law partner of the father or mother of the claimant's spouse or common-law partner,
(vi) an uncle or aunt of the claimant or of the claimant's spouse or common-law partner, and
(vii) a nephew or niece of the claimant or of the claimant's spouse or common-law partner;

(c) for a period of not more than seven consecutive days to accompany a member of the claimant's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(d) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;

(e) for a period of not more than seven consecutive days to attend a bona fide job interview; or

(f) for a period of not more than 14 consecutive days to conduct a bona fide job search.

SUBMISSIONS

[16] From the Appellant's handwritten annotations to pages of the General Division decision, I understand the Appellant to take issue with the General Division's finding that the Appellant was not available for work during his two visits to China and that he did not conduct a *bona fide* job search while in China in either case. The Appellant argues that the General Division did not fully appreciate the manner in which he made himself available or conducted his job search.

[17] The Appellant also submits that the General Division's calculation of the overpayment in respect of his second visit was based on the erroneous finding that he left Canada on May 24, 2011. He submitted in oral argument that the stamp in his passport indicating an entry into China on May 25, 2017, on which the General Division relied, may have been dated using a lunar calendar and may therefore be incorrect. The Appellant also argues that the General Division should require the Commission to obtain Canadian Border Security Agency records to confirm his departure from Canada.

[18] The Appellant also submits that the General Division failed to properly appreciate or calculate the time difference.

[19] I also understand the Appellant to argue that the General Division failed to take into consideration that he was not paid for the first two weeks of his benefit period in October 2010, and that he should therefore not be responsible for repaying benefits in respect of that period.

[20] The Appellant also argues that, in some fashion, the General Division decision is contrary to the direction of *Canada (Attorney General) v. Picard*, 2014 FCA 46 and might therefore be considered an error of law.

[21] The Appellant suggests that the General Division did not make decisions based on pure principles of law but did not otherwise elaborate.

[22] With respect to the Appellant's argument that the nature of his job search was sufficient to demonstrate his availability for work, the Respondent notes that the General Division is the trier of fact. It relied on *Faucher v. Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA), for the proposition that a claimant's willingness to work is insufficient to

establish a *bona fide* job search. The Respondent also argued that *Canada (Attorney General) v. Maughan*, 2012 FCA 35 points to the difficulty of establishing availability for work when a claimant has other obligations. In this case, the Appellant was travelling for a funeral and cultural ceremony on one of his trips to China, and for the purpose of getting married on the other trip.

[23] The Respondent noted that section 13 of the Act requires that a claimant serve out a waiting period and, that, in the event of a disentitlement, the waiting period is not served until after the disentitlement has ended.

[24] The Respondent supports the period of disentitlement calculated by the General Division for the second visit to China. It argues that the date stamp in the Appellant's passport was the only evidence by which the General Division could determine the Appellant's departure, and that it would not be possible for the Appellant to have left on the evening of May 25, 2011, and to have arrived in China on the same date. The Respondent notes that the onus is on the Appellant to provide evidence of his departure date.

ANALYSIS

Standard of Review

[25] The Respondent's reference to the reasonableness of the General Division decision suggests that it considers a standard of review analysis to be appropriate, although it does not specifically argue that I should apply the standards of review.

[26] The grounds of appeal set out in subsection 58(1) of the DESD Act are very similar to the usual grounds for judicial review, and this suggests that the standards of review might also apply here. However, recent case law from the Federal Court of Appeal has not insisted that the standards of review be applied, and I do not consider it to be necessary.

[27] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division but it indicated in *obiter* that it was not convinced that decisions of the Appeal Division should be subjected to a standard of review analysis. The Court observed that the Appeal Division has as

much expertise as the General Division and is therefore not required to show deference. Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review. Where the Appeal Division hears appeals pursuant to subsection 58(1) of the DESD Act, its mandate is conferred on it by sections 55 to 69 of that Act.

[28] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court found that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multi-level administrative framework, and that the standards of review should be applied only if the enabling statute provides for it. The enabling statute for administrative appeals of Employment Insurance decisions is the DESD Act and the DESD Act does not provide for a review according to the standards of review.

[29] I recognize that there are other decisions of the Federal Court of Appeal that appear to approve of the application of the standard of review (such as *Hurtubise v. Canada (Attorney General*, 2016 FCA 147; *Thibodeau v. Canada (Attorney General)*, 2015 FCA 167). Nonetheless, the Federal Court of Appeal does not appear to be of one mind on the applicability of standards of review to the final level of appeal in an administrative appeal process.

[30] I agree with the Court in *Jean* where it referred to one of the grounds of appeal set out in subsection 58(1) of the Act and noted, "There is no need to add to this wording the case law that has developed on judicial review." I will consider this appeal by referring to the grounds of appeal set out in the DESD Act only, and without reference to "reasonableness" or the standard of review.

Erroneous Finding of Fact

[31] The General Division found that the Appellant did not conduct a *bona fide* job search during either of his trips to China and, therefore, that the Appellant does not qualify to be exempted from 14 days of his absence from Canada for either trip. The General Division also found that the Appellant had not demonstrated that the purpose of either the first trip to attend a

funeral in China, or the second trip to be married in China, was to attend a *bona fide* interview. The Appellant has not identified any error of fact or law in these findings. As the Respondent rightly pointed out, the General Division is properly the finder of fact. I cannot interfere with a finding of fact unless I find it to be perverse or capricious or made without regard to the material before it. I appreciate that the Appellant is of the view that the extent and nature of his job search was sufficient to demonstrate his availability for work, but the General Division considered all the evidence and reached a different conclusion.

[32] The Appellant took exception to the manner in which the General Division calculated his disentitlement in the Appellant's second visit to China. The General Division found that the Appellant left Canada on the evening of May 24, 2011, because this had been the Appellant's original submission to the Commission [GD3-12 and GD3-15, now found in AD2—Part 1] and because this accorded with the May 25, 2011, stamp in his passport indicating his entry into China. The Appellant later testified that he left the evening of May 25, 2011, but I can find no fault in the General Division's conclusion that he could not have left Canada on the evening of May 25 and arrived in China on May 25. The General Division *rightly* understands that China is ahead of Canada [meaning the time zone difference would need to be *added* to the travel time].

[33] I do not find that the General Division's finding as to the number of days of disentitlement is based on an erroneous finding of fact. The finding that the Appellant left Canada on the evening of May 24, 2011, is neither perverse nor capricious and is based on the material that was before the General Division. The Appellant's recent argument that the Chinese passport stamp could have been based on a lunar calendar was simply speculation. Furthermore, the Respondent is correct that the General Division has no duty to investigate or to gather additional evidence, and the General Division has no authority to compel the Commission to seek or produce other evidence.

Error of Law

[34] I understand the Appellant to be arguing that that the General Division should have had regard to the fact that he did not actually receive any benefits in the first two weeks of his October 2010 visit to China, and that the declared overpayment should therefore be reduced by those two weeks. I am unclear whether the Appellant is arguing that the General Division

decision fails to comprehend that he did not receive benefits in those two weeks or whether he is arguing that the law was incorrectly applied to permit the Commission to claw back weeks of benefits equivalent to the time he was found to be disentitled [when he did not actually receive all those weeks of benefits].

[35] In either event—whether this argument is advanced as a factual error or as an error of law—the Respondent is correct that the waiting period cannot be served until after the disentitlement period. The waiting period would generally be the first two weeks of the benefit period immediately following the application for benefits. However, according to section 13 of the Act, a claimant is not entitled to be paid benefits until they have served a waiting period that begins with a week of unemployment *for which benefits would otherwise be payable*.

[36] The Appellant's waiting period originally coincided with the first two weeks of his trip. Since he was subsequently found to be disentitled during the entire period of his absence from Canada, benefits should not have been paid until after his return to Canada and after he had served out the waiting period in Canada. The overpayment would be calculated based on the benefits that he had actually been paid for weeks that he was outside Canada plus those benefits that he had been paid in the two weeks immediately following his return to Canada—the adjusted waiting period. It is therefore unnecessary for the General Division to take account of the fact that the Appellant had received no benefits during the first two weeks of his claim. The Appellant is still required to repay benefits equivalent to the entire time that he was disentitled. There is no error of law in this regard.

[37] I have found no reason to disturb the General Division's finding that the Appellant departed Canada on May 24, 2011, and I also find no reason to interfere with the General Division's calculations. The General Division's decision accepted the Appellant's evidence that he left in the evening and appropriately determined that this must have been the evening of May 24, 2011. The Appellant did not dispute that he also returned on the evening of June 17, 2017.

[38] It would appear that the General Division accepts that leaving in the evening and returning in the evening would translate into a certain number of entire 24-hour days and no partial days [following the *Picard* method of calculating disentitlement]: The evening of May 24 to the evening of May 25 would be the first day; the evening of May 25 to May 26 would be

the second day; and so on. I calculate that there are 24, 24-hour days from the evening of May 24, 2011, to the evening of June 17, 2011.

[39] The exception from disentitlement to attend the funeral, found in paragraph 55(1)(*b*) of the Regulations, is described only as a period of "seven consecutive days." *Picard* was addressed to the section 37 disentitlement and did not consider any of the exceptions found in section 55 of the Regulations. Nonetheless, I can see no reason to use a different method to calculate the days of exception from disentitlement than that which is used to calculate the days of disentitlement. The seven days of the funeral exception run from the evening of May 24 through to the evening of May 31. The disentitlement that remains is the seventeen consecutive 24-hour days that run from the evening of May 31, 2011, to the evening of June 17, 2011. This is effectively the same as the General Division's determination that the Appellant should be disentitled for the period from June 1, 2011, to and including June 17, 2011. I find that the General Division made no error of fact or law in calculating the disentitlement.

[40] CONCLUSION

[41] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division