

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130606

Docket: A-359-12

Citation: 2013 FCA 151

**CORAM: NOËL J.A.
TRUDEL J.A.
MAINVILLE J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

Mohammed ELYOUMNI

Respondent

Heard at Montréal, Quebec, on May 29, 2013.

Judgment delivered at Ottawa, Ontario, on June 6, 2013.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**TRUDEL J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for judicial review of a decision by Umpire L.-P. Landry (the Umpire) dismissing the appeal of the Employment Insurance Commission (the Commission) from the Board of Referees' decision that Mohammed Elyoumni (the claimant) was entitled to benefits under paragraph 55(1)(b) of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations), while he was abroad for his father's funeral. This case solely concerns the interpretation of

subsection 18(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), and subsection 55(1) of the Regulations, and more specifically how the first provision should be interpreted if the second applies.

BACKGROUND

[2] The Commission initially determined that the claimant was not entitled to receive benefits from May 23, 2011, to June 3, 2011, on the ground that he was outside the country and that he had not made [TRANSLATION] “arrangements in order to be reached for employment” (Decision of the Commission, Applicant’s Record, p. 38). The claimant appealed this decision before the Board of Referees, which set aside the Commission’s decision. Like the Commission, the Board of Referees noted that the claimant had not made the necessary arrangements in order to be reached while he was abroad (Decision of the Board of Referees, Applicant’s Record, pp. 52 and 53). It concluded, however, that the claimant was entitled to benefits for the first week since he fell within the scope of paragraph 55(1)(b) of the Regulations.

[3] The Commission’s appeal of this decision was subsequently dismissed by the Umpire.

[4] Subsection 18(1) of the Act and paragraph 55(1)(b) of the Regulations read as follows:

18. (1) 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

18. (1) Le prestataire n’est pas admissible au bénéfice des prestations pour tout jour ouvrable d’une période de prestations pour lequel il ne peut prouver qu’il était, ce jour-là :

(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.

a) soit capable de travailler et disponible à cette fin et incapable d'obtenir un emploi convenable;

b) soit incapable de travailler par suite d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement et aurait été sans cela disponible pour travailler;

c) soit en train d'exercer les fonctions de juré.

55. (1) 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

...

(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,

...

55. (1) Sous réserve de l'article 18 de la Loi, le prestataire qui n'est pas un travailleur indépendant n'est pas inadmissible au bénéfice des prestations du fait qu'il est à l'étranger pour l'un des motifs suivants :

[...]

b) assister, pendant une période ne dépassant pas 7 jours consécutifs, aux funérailles d'un proche parent ou des personnes suivantes :

[...]

[Emphasis added.]

[5] It is also useful to reproduce section 37 of the Act, as it allows us to better understand the effect of paragraph 55(1)(b) of the Regulations:

37. Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

37. Sauf dans les cas prévus par règlement, le prestataire n'est pas admissible au bénéfice des prestations pour toute période pendant laquelle il

est :

(a) is an inmate of a prison or similar institution; or

a) soit détenu dans une prison ou un établissement semblable;

(b) is not in Canada.

b) soit à l'étranger.

DECISION OF THE UMPIRE

[6] According to the Umpire, it goes without saying that a claimant who is outside Canada for a certain time to attend a funeral cannot at the same time be available for work in Canada (Decision of the Umpire, Applicant's Record, p. 8). Thus confronted with the application of both paragraph 55(1)(b) and subsection 18(1), he resolved this apparent conflict in the following manner (Decision of the Umpire, Applicant's Record, pp. 9 and 10):

[TRANSLATION]

I interpret section 18 as follows in relation to paragraph 55(1)(b) of the Regulations. To receive benefits during the period set out in the Regulations, the claimant must be entitled to receive benefits before leaving the country. Before leaving, the claimant must be unemployed, looking for employment, and available for and able to work. If the claimant meets these conditions before leaving, the effect of the Regulations is that the claimant will be entitled to receive benefits for seven days even if, during that period, the claimant is obviously not available for work or able to respond to an offer of employment in Canada. Similarly, the claimant cannot be required to seek employment while absent from Canada.

[7] The Umpire therefore dismissed the Commission's appeal.

POSITIONS OF THE PARTIES

[8] The Commission contends that the applicable standard of review is that of correctness (Applicant's Memorandum, para. 12) and that the Umpire erred in law in his interpretation of subsection 18(1) of the Act and paragraph 55(1)(b) of the Regulations. The Commission emphasizes that the phrase "Subject to section 18 of the Act" that appears at the beginning of subsection 55(1) indicates that, to benefit from this provision, claimants must also satisfy the requirements of section 18 (Applicant's Memorandum, para. 16).

[9] The Commission submits, moreover, that the Umpire erred in concluding that the claimant's being available before his departure sufficed for him to benefit from subsection 55(1), when section 18 of the Act requires claimants to prove their availability for every working day in a benefit period (Applicant's Memorandum, para. 19).

[10] The claimant attended the hearing but did not file a memorandum.

ANALYSIS AND DECISION

[11] The Umpire's interpretation clearly does not take into account the phrase "Subject to section 18 of the Act" at the beginning of subsection 55(1) of the Regulations. As these words indicate, what had to be done here was to give effect to subsection 55(1) while at the same time meeting the requirements of section 18.

[12] According to the Umpire, these provisions are irreconcilable since a claimant cannot at the same time be outside Canada under subsection 55(1) of the Regulations and be available for work in Canada as required by subsection 18(1) of the Act (Decision of the Umpire, Applicant's Record, p. 10). In my opinion, the Umpire erred since the introductory words of subsection 55(1) of the Regulations indicate that these provisions must be read together.

[13] The concept of availability in paragraph 18(1)(a) of the Act is not defined and must be interpreted contextually. Paragraph 55(1)(a) of the Regulations maintains a claimant's entitlement to benefits despite the claimant's being abroad—see section 37 of the Act—if the purpose of the trip is to attend the funeral of a member of the claimant's immediate family. This provision applies for a period of seven days.

[14] In light of the principle that Parliament—more specifically, the Governor in Council—does not speak in vain, the legislation necessarily contemplated that claimants who avail themselves of this provision could remain available for the purposes of subsection 18(1) of the Act even if they are outside the country.

[15] The availability of a claimant who benefits from the exception set out in subsection 55(1) of the Regulations is assessed on a case-by-case basis. 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 was offered a job.

[16] 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 (Decision of the Commission, Applicant's Record, p. 38) and the Board of Referees concluded that he was not available under subsection 18(1) of the Act (Decision of the Board of Referees, Applicant's Record, p. 53). In my opinion, the Commission was correct in finding that the claimant had not proved his availability, and the Umpire erred in refusing to intervene.

[17] I would therefore allow the application for judicial review, set aside the decision of the Umpire and refer the matter back to the Chief Umpire or his designate for redetermination on the basis that the claimant was not available for work from May 23, 2011, to June 5, 2011.

“Marc Noël”

J.A.

“I agree.

Johanne Trudel J.A.”

“I agree.

Robert M. Mainville J.A.”

Certified true translation

Erich Klein

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-359-12

**APPEAL FROM A DECISION OF UMPIRE L.-P. LANDRY DATED JUNE 13, 2012,
CUB NO. 79343.**

STYLE OF CAUSE: THE ATTORNEY GENERAL
OF CANADA v. Mohammed
ELYOUMNI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 29, 2013

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: TRUDEL J.A.
MAINVILLE J.A.

DATED: June 6, 2013

APPEARANCES:

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SOLICITORS OF RECORD:

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