Federal Court of Appeal | Cour d'appel fédérale

Date: 20140217

Docket: A-3-13

Citation: 2014 FCA 46

CORAM: **SHARLOW J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DENISE PICARD

Respondent

Heard at Toronto, Ontario, on September 18, 2013.

Judgment delivered at Ottawa, Ontario, on February 17, 2014.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SHARLOW J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Attorney General applies for judicial review of the decision dated November 6, 2012 of the Umpire (decision CUB 80185). The Umpire decided that the Board of Referees erred in its interpretation and application of paragraph 37(*b*) of the *Employment Insurance Act*, S.C. 1996, c. 23.

[2] The central issue in this judicial review is the proper interpretation of paragraph 37(*b*) of the Act. Paragraph 37(*b*) provides that claimants are not entitled to receive employment benefits for "any period" during which they are outside of Canada. How is that period to be calculated?

[3] In this case, the claimant left Canada during the morning of the first day and returned during the evening of the second. The Umpire found that the first day does not count in the calculation of the period the claimant was outside of Canada but the second day does. In doing do, he disagreed with the Board of Referees. The Board found that neither day counts in the calculation.

[4] I reach the same result as the Umpire but for different reasons. Therefore, I would dismiss the application.

A. Standard of review

[5] The Umpire's decision turns upon the interpretation of paragraph 37(*b*) of the Act. The standard of review for such a decision has been satisfactorily determined in the jurisprudence: *Dunsmuir v*. *New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 62. The interpretation of paragraph 37(*b*) is a question of law reviewable on the standard of correctness: *De Jesus v*. *Canada (Attorney General)*, 2013 FCA 264 at paragraph 30; *Chaulk v*. *Canada (Attorney General)*, 2012 FCA 190 at paragraphs 23-31.

B. The legislative provision in issue

[6] Paragraph 37(*b*) provides that claimants for employment insurance benefits are not entitled to receive benefits for any period outside Canada. Specifically, paragraph 37(*b*) reads as follows:

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 :
…	…
(*b*) is not in Canada.	*b*) soit à l'étranger.

[7] But what is "any period"? The question is simple, but the answer is elusive. The facts of this case demonstrate why.

C. The basic facts of this case

[8] Ms. Picard became entitled to a renewal of employment insurance benefits effective July 3, 2011. During one week in July, for a short time, she was outside of Canada and unavailable for work.

[9] In particular, on Thursday July 21, 2011, Ms. Picard drove from Thunder Bay, Ontario to Duluth, Minnesota. She returned the next day.

[10] The evidence shows the specific times she was outside of Canada. She crossed the border into the United States around 10:50 am and returned across the border into Canada around 9:30 pm the next day.

[11] Under paragraph 37(*b*) Ms. Picard was "not entitled to receive benefits" for the "period" she was "not in Canada." In other words, a certain amount must be subtracted from the benefits to which she would have been entitled, but for her absence from Canada. The amount to be subtracted depends on the length of the "period."

D. The rival interpretations of paragraph 37(*b*) of the Act

[12] In this case, the "period" Ms. Picard was not in Canada potentially can be calculated in a number of different ways, affecting the amount of benefits to be withheld. Here are some possibilities:

- On two calendar days, Ms. Picard was outside of Canada. If "period" means any part of a calendar day on which a person is outside Canada, no matter how brief, then two calendar days of benefits must be subtracted.

- For over half of each of the two calendar days, Ms. Picard was outside of Canada. If "period" means a calendar day in which a person is outside Canada for most of the day, then two calendar days of benefits must be subtracted.

- Ms. Picard was outside of Canada for 34 hours, 40 minutes, or 1.4 days. If "period" means the exact period, expressed in fractions of a day, then 1.4 days of benefits must be subtracted.

- Rounded down to the nearest day, Ms. Picard was outside of Canada for one day. If "period" includes only whole days and not fractions of a day, then only one day must be subtracted.

- Ms. Picard was never outside of Canada for a complete calendar day. If "period" includes only complete calendar days, then no days should be subtracted.

E. Analysis

[13] The Umpire found that Ms. Picard was not entitled to one day of benefits. He reached this result by relying upon subsection 27(2) of the *Interpretation Act*, RS.C. 1985, c. I-21. Under that subsection, where a provision refers to a "number of days…between two events…the day on which the first event happens is excluded and the day on which the second event happens is included."

[14] In my view, subsection 27(2) of the *Interpretation Act* does not apply. Paragraph 37(*b*) does not refer to a "number of days…between two events." It refers simply to "any period."

[15] The proper approach to interpreting a provision such as paragraph 37(*b*) is well-established. We are to interpret paragraph 37(*b*) and, specifically, the word "period" in paragraph 37(*b*), in light

of the meaning of the word, the context of that word within the Act and the Act's overall purpose: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at paragraphs 20 to 23. The Supreme Court elaborated upon this in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at paragraph 10:

> The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole.

The Umpire erred in not following this approach.

[16] In following this approach, some other principles must also be kept front of mind:

- The Act "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C. 1985, c. I-21, section 12.

- The Act is designed to make benefits available quickly to those unemployed persons who qualify under it and so it should be liberally interpreted to achieve that end: *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2 at page 10. At the same time, an expectation under the Act is that a person be available and willing to work.

- The Act is "aimed at diverting issues relating to employment insurance from the court system into the more informal, specialized, efficient adjudicative mechanisms set up by Parliament": *Steel v. Canada (Attorney General)*, 2011 FCA 153 at paragraph 75; *Tembec Industries Inc. v. Berthelette*, 2012 FCA 156 at paragraph 58.

- Parliament decided to have this subject-matter handled within a specialized administrative regime, not the courts. In doing so, it sought the advantages associated with that administrative regime. Some of these, typically, are speed, efficiency, specialized decision-making and informality. Faced with an issue of legislative interpretation, the reviewing court must keep these objectives front of mind: *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724.

[17] On this last principle – the need to adopt interpretations that favour speed, efficiency, specialized decision-making and informality – the Court requires assistance. Without material placed in the record by those knowledgeable about the administrative regime – for example, through evidence placed before the administrative decision-makers or included in the reasons of the administrative decision-makers below – the Court is left to guess about which of several rival interpretations best furthers speed, efficiency, specialized decision-making and informality.

[18] The Court should not be left to guess about which interpretation best furthers administrative objectives. Nor should it be left to assume that those in the administrative regime have selected the interpretation that best furthers administrative objectives. That would be to blindly accept the interpretations adopted below, rather than subject them to reasonableness analysis, contrary to our role on judicial review: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227.

[19] In the record before us, there is scant information about which interpretation best favours the objectives of this administrative regime. Indeed, the only information of this sort appears in a paragraph in the Commission's representations to the Board of Referees.

[20] There, we see reference to the reasons behind a new administrative policy and some indication as to the content of that policy. The relevant passage is as follows:

> As of November 22, 2009, a new question was added to claimant's electronic reports. This question asks claimants: "Were you outside Canada during the period of this report?" As a direct result of the introduction of this question, the Commission was experiencing a significant number of enquiries from claimant's [sic] who are responding yes even if for a very short amount of time. As a result, a policy was put in place, in order not to penalize claimants who cross the border, and are out of Canada for 24 hours or less. Hence, the primary issue being addressed in this policy relates to those claimants leaving Canada and returning within the same day. Therefore, if a claimant leaves the country at the end of the day on a Friday but returns by Monday before the Friday departure time (24 "weekday" hours), they will not be disentitled for either day. As an example, a claimant could leave the country Friday at 3:30 pm but return to Canada Monday at 1:00 pm without disentitlement for either day. However, if a claimant leaves the country at noon on Friday and does not return until the afternoon of the following Monday, a disentitlement is appropriate for both days. They were out of Canada beyond 24 hours (excluding the weekend). The Commission would like to point out that this is not legislation, but only a policy that was put in place due to the significant amount of enquiries made by claimant's [sic] who were leaving the country for a short period of time.

[21] Caution must be used when examining administrative policies as part of the legislative interpretation exercise. Policies are not legislation. They are the view of the administrator acting under the legislation. That view is not necessarily the law. For this reason, administrators exercising legislative discretions cannot be fettered by their policies but, rather, must follow the legislation; similarly, administrators are free to depart from their policies in order to give effect to the legislation. See generally *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*,

[1997] 1 S.C.R. 1; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paragraph 75.

[22] Put another way, the words of the legislation, seen in their context with a view to the legislative purpose, must be the focus of the interpretative exercise. As part of this, where the legislative interpretation issue arises within a particular administrative regime set up by Parliament, unchallenged administrative policies can shed light on the purposes of speed, efficiency, specialized decision-making and informality sought to be achieved by that regime.

[23] Here, the policy tells us that an interpretation that would withhold benefits for fractions of days less than one whole day would cause administrative burden and might "penalize" claimants who are outside of Canada briefly. It also tells us that, as a practical matter, the Commission can ascertain the exact period a person was outside of Canada down to a fraction of a day – it is not an administrative burden to keep track of fractions. However, the policy shows that "disentitlements" are administratively calculated in terms of whole days, not fractions, perhaps suggesting that it is more efficient for the Commission to assess matters in terms of days, not fractions.

[24] From this, we may surmise that an interpretation that would disentitle a person from benefits for fractions of days, even less than a day, would not further administrative efficiency, an evident objective of this administrative regime.

[25] More importantly, the express words, design and architecture of the Act and regulations all support the view that the "period" in paragraph 37(*b*) is to be expressed only in whole days, not

fractions of days. The Act and the regulations speak to units of time graduated in periods of whole days, not fractions of days. It would take express wording in the Act to justify periods in paragraph 37(*b*) to be expressed in fractions of days, as opposed to whole days.

[26] Therefore, a person who is outside of Canada for a fraction of a complete day is not counted as a "period" outside of Canada under paragraph 37(*b*).

[27] But now we must return to Ms. Picard's situation. It will be recalled that she left Canada at 10:50 am and returned to Canada around 9:30 pm the next day. Disregarding fractions of days, she was away for a total of one day. But on each calendar day, she was away for only a fraction of a day – roughly 0.55 days on the first calendar day and 0.90 days on the second calendar day. Does this mean we should look at each calendar day and disregard the absence on each day as it was only for a fraction of a day?

[28] In my view, the answer is no. The absence on each calendar day should not be disregarded. The text of paragraph 37(*b*) speaks of "any period" outside of Canada, not "any period" of each calendar day. Further, the purpose of the provision is to ensure that a person is available and looking for work in Canada. A situation could be envisaged where a claimant is outside of Canada for almost two entire days – in substance, not available and looking for work in Canada on those days – and yet, because the claimant was never away for an entire calendar day, no benefits are withheld. This is contrary to the purpose of paragraph 37(*b*).

[29] In light of the foregoing, I conclude that the "period" in paragraph 37(*b*) of the Act is the period, expressed in complete, whole days, during which the claimant was outside of Canada. For this purpose, a complete, whole day does not necessarily mean a calendar day. Rather, it can include a continuous 24 hour period that straddles two calendar days.

[30] Applying this, it follows that Ms. Picard was outside of Canada for one complete, whole day. Therefore, under paragraph 37(*b*) of the Act, she is not entitled to receive one day of benefits. This is the result the Umpire reached, but for different reasons.

F. Proposed disposition

[31] For the foregoing reasons, I would dismiss the application.

"David Stratas"

J.A.

"I agree
K. Sharlow J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-3-13

APPEAL FOR THE JUDICIAL REVIEW OF THE HONOURABLE MR. JUSTICE GUY GOULARD, UMPIRE, DATED NOVEMBER 6, 2012, NO. CUB 80185

STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. DENISE PICARD
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 18, 2013
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	SHARLOW J.A. NEAR J.A.
DATED:	FEBRUARY 17, 2014

APPEARANCES:

Jim Kapches	FOR THE APPLICANT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPLICANT