Federal Court of Appeal  Cour d'appel fédérale

Date: 20131119

Dockets: A-223-12, A-169-12, A-170-12, A-171-12, A-172-12, A-173-12, A-174-12, A-175-12, A-176-12, A-177-12, A-178-12, A-179-12, A-180-12, A-181-12, A-182-12, A-184-12, A-185-12, A-186-12, A-188-12, A-189-12, A-190-12, A-197-12, A-198-12, A-199-12, A-200-12, A-201-12, A-202-12, A-203-12, A-204-12, A-205-12, A-206-12, A-207-12, A-208-12, A-209-12, A-210-12, A-211-12, A-212-12, A-213-12, A-214-12, A-215-12, A-216-12, A-217-12, A-218-12, A-219-12, A-220-12, A-221-12, A-222-12, A-224-12, A-225-12, A-226-12, A-227-12, A-228-12, A-229-12, A-230-12, A-231-12, A-232-12, A-233-12, A-234-12, A-235-12, A-236-12, A-237-12, A-238-12, A-239-12, A-240-12, A-241-12, A-242-12, A-243-12, A-244-12, A-245-12, A-246-12, A-247-12, A-248-12, A-249-12, A-250-12, A-251-12, A-252-12, A-253-12, A-254-12, A-255-12, A-256-12, A-257-12, A-258-12, A-259-12, A-260-12, A-261-12, A-262-12, A-263-12, A-264-12, A-265-12, A-266-12, A-267-12, A-268-12, A-269-12, A-270-12, A-271-12, A-272-12, A-273-12, A-274-12, A-275-12, A-276-12, A-277-12, A-279-12

Citation: 2013 FCA 264

CORAM: **EVANS J.A.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

GENARO CRUZ DE JESUS, AINSWORTH PUGH, AINSWORTH PUGH, ALBERTO MUNGUIA ALVAREZ, ARTURO HERNANDEZ GARCIA, ALVIN SOLOMON, BACILIO BAUTISTA HERNANDEZ, ANDRES GUZMAN SOSA, BLANCA ESTHELA CASILLAS, ANGELA ROSAS HERNANDEZ, BENITO HERNANDEZ GALINDO, ANTHONY VALENCE MILLS, BRANDFORD RUSSELL, ANTHONY WESTON,

BRANDFORD RUSSELL, ANTHONY WESTON, ARACELI MOLINA ZARATE, BURNETT CLARKE, CLAUDIUS GIVANS, CLAUDIUS GIVANS, COWANS JUNIOR ROY, GIL ALDACO OTHERO, EDGAR OLIVARES ESPEJEL, EVERTON DUNKELY, ELISHA STEELE, CRISPIN MARTINEZ PEREZ, GIL SALINAS GUTIERREZ, ERIKA CARREON ACOSTA, EVERTON WALTERS, ERROL ROWE, ESTANISLAO CASIRO MERCED, FELIPE SANCHEZ OTERO, GLENDON SANCHEZ, CRISTOBAL MUNUZ ORTIZ, ESTANISLAO CASIRO MERCED, HOWARD STONE, EUSEBIO DE LA C MOTA, CRISTOBAL MUNUZ ORTIZ, FRANCISO CASTILLION HERNANDEZ, GREGORIO PINA SANTIAGO, EUSEBIO MARC ACATITLA, EUSEBIO MARC ACATITLA, FREDY SANTOS REFUGIO, EUSEBIO MARC ACATITLA, HUMBERTO SALVADOR TORRES, GABINO ZAVALA CORRALES, GREGORIO PINA SANTIAGO, DAWNUS DUFF, IGNACIO CASTANEDA ZAMARRI, GALINDO GARCIA ALBINO, GUILLERMO MORALES, DAVID SPARKS, GERA CAMPBELL, DELVIN LEE CLEGHORN, IGNACIO CASTANEDA ZAMARRI, HECTOR MARTINEZ SANCHEZ, GIL ALDACO OTHERO, DENTON CUNNINGHAM, DELVIN LEE CLEGHORN, DERRICK SCARLETT, HENRY LENFORD, ISRAEL MENDEZ VELAZQUEZ, DERRICK SCARLETT, HORACE SMITH, JESUS MINERO CAHVANTZI, MIGUEL PINZON DE LA CRUZ, HOWARD STONE, JESUS MINERO CAHVANTZI, JOSE DEL ARELLANO GOMEZ, LEONCIO VASQUEZ-FLORES, JOSE GONZALEZ-HERNANDEZ, JOSE JORGE F. FIAGOSO MARTINEZ, LEROY JOHNSON, JOSE JUAN ANGUL ARIAS, JOSE MIGUEL AYALA VIAZGASA, JOSE ORTIZ MUNOZ, JOHN HAMILTON, LINDON CHARLES, JUAN RIOS OROZCO, JUNIOR CRAIG, JUNIOR CRAIG, LINDON CHARLES, LUCIO PENA VASQUEZ, JUNIOR LEVY, MARGARITO GONZALEZ SERRANO, MARIA SUAREZ SOSA, SAMUEL DUNCAN, MARK TAYLOR, MODESTO A. SILVA DURAN,

MERVYN PARRIS, ORVILLE MURDOCK, MICHAEL SWEENY, PARKES CLIFTON STEPHENSON, SERGIO TELLEZ ROJAS, PEDRO CRUZ LOPEZ, JOSE CARMONA HERNANDEZ, JOSE CASTILLO BLANCAS, REYNALDO RODRIGUEZ LOPEZ, RICARDO SALAZAR, RICARDO SALAZAR, RICKEY CHAITRAM, RUFINO SANCHEZ GONZALEZ

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario on October 16, 2013.

Judgment delivered at Ottawa, Ontario, on November 19, 2013.

REASONS FOR JUDGMENT BY: EVANS J.A.

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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20131119

Dockets: A-223-12, A-169-12, A-170-12, A-171-12, A-172-12, A-173-12, A-174-12, A-175-12, A-176-12, A-177-12, A-178-12, A-179-12, A-180-12, A-181-12, A-182-12, A-184-12, A-185-12, A-186-12, A-188-12, A-189-12, A-190-12, A-197-12, A-198-12, A-199-12, A-200-12, A-201-12, A-202-12, A-203-12, A-204-12, A-205-12, A-206-12, A-207-12, A-208-12, A-209-12, A-210-12, A-211-12, A-212-12, A-213-12, A-214-12, A-215-12, A-216-12, A-217-12, A-218-12, A-219-12, A-220-12, A-221-12, A-222-12, A-224-12, A-225-12, A-226-12, A-227-12, A-228-12, A-229-12, A-230-12, A-231-12, A-232-12, A-233-12, A-234-12, A-235-12, A-236-12, A-237-12, A-238-12, A-239-12, A-240-12, A-241-12, A-242-12, A-243-12, A-244-12, A-245-12, A-246-12, A-247-12, A-248-12, A-249-12, A-250-12, A-251-12, A-252-12, A-253-12, A-254-12, A-255-12, A-256-12, A-257-12, A-258-12, A-259-12, A-260-12, A-261-12, A-262-12, A-263-12, A-264-12, A-265-12, A-266-12, A-267-12, A-268-12, A-269-12, A-270-12, A-271-12, A-272-12, A-273-12, A-274-12, A-275-12, A-276-12, A-277-12, A-279-12

Citation: 2013 FCA 264

CORAM: **EVANS J.A.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

GENARO CRUZ DE JESUS, AINSWORTH PUGH, AINSWORTH PUGH, ALBERTO MUNGUIA ALVAREZ, ARTURO HERNANDEZ GARCIA, ALVIN SOLOMON, BACILIO BAUTISTA HERNANDEZ, ANDRES GUZMAN SOSA, BLANCA ESTHELA CASILLAS, ANGELA ROSAS HERNANDEZ, BENITO HERNANDEZ GALINDO, ANTHONY VALENCE MILLS, BRANDFORD RUSSELL, ANTHONY WESTON, BRANDFORD RUSSELL, ANTHONY WESTON, ARACELI MOLINA ZARATE, BURNETT

CLARKE, CLAUDIUS GIVANS, CLAUDIUS GIVANS, COWANS JUNIOR ROY, GIL ALDACO OTHERO, EDGAR OLIVARES ESPEJEL, EVERTON DUNKELY, ELISHA STEELE, CRISPIN MARTINEZ PEREZ, GIL SALINAS GUTIERREZ, ERIKA CARREON ACOSTA, EVERTON WALTERS, ERROL ROWE, ESTANISLAO CASIRO MERCED, FELIPE SANCHEZ OTERO, GLENDON SANCHEZ, CRISTOBAL MUNUZ ORTIZ, ESTANISLAO CASIRO MERCED, HOWARD STONE, EUSEBIO DE LA C MOTA, CRISTOBAL MUNUZ ORTIZ, FRANCISO CASTILLION HERNANDEZ, GREGORIO PINA SANTIAGO, EUSEBIO MARC ACATITLA, EUSEBIO MARC ACATITLA, FREDY SANTOS REFUGIO, EUSEBIO MARC ACATITLA, HUMBERTO SALVADOR TORRES, GABINO ZAVALA CORRALES, GREGORIO PINA SANTIAGO, DAWNUS DUFF, IGNACIO CASTANEDA ZAMARRI, GALINDO GARCIA ALBINO, GUILLERMO MORALES, DAVID SPARKS, GERA CAMPBELL, DELVIN LEE CLEGHORN, IGNACIO CASTANEDA ZAMARRI, HECTOR MARTINEZ SANCHEZ, GIL ALDACO OTHERO, DENTON CUNNINGHAM, DELVIN LEE CLEGHORN, DERRICK SCARLETT, HENRY LENFORD, ISRAEL MENDEZ VELAZQUEZ, DERRICK SCARLETT, HORACE SMITH, JESUS MINERO CAHVANTZI, MIGUEL PINZON DE LA CRUZ, HOWARD STONE, JESUS MINERO CAHVANTZI, JOSE DEL ARELLANO GOMEZ, LEONCIO VASQUEZ-FLORES, JOSE GONZALEZ-HERNANDEZ, JOSE JORGE F. FIAGOSO MARTINEZ, LEROY JOHNSON, JOSE JUAN ANGUL ARIAS, JOSE MIGUEL AYALA VIAZGASA, JOSE ORTIZ MUNOZ, JOHN HAMILTON, LINDON CHARLES, JUAN RIOS OROZCO, JUNIOR CRAIG, JUNIOR CRAIG, LINDON CHARLES, LUCIO PENA VASQUEZ, JUNIOR LEVY, MARGARITO GONZALEZ SERRANO, MARIA SUAREZ SOSA, SAMUEL DUNCAN, MARK TAYLOR, MODESTO A. SILVA DURAN, MERVYN PARRIS, ORVILLE MURDOCK, MICHAEL SWEENY, PARKES CLIFTON

STEPHENSON, SERGIO TELLEZ ROJAS, PEDRO CRUZ LOPEZ, JOSE CARMONA HERNANDEZ, JOSE CASTILLO BLANCAS, REYNALDO RODRIGUEZ LOPEZ, RICARDO SALAZAR, RICARDO SALAZAR, RICKEY CHAITRAM, RUFINO SANCHEZ GONZALEZ

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] Genaro Cruz de Jesus, a national of Mexico, was employed in Ontario as a farm worker under the Seasonal Agricultural Workers Program (SAWP) from April 12 to November 19, 2008. He has been coming to Canada as a seasonal farm worker for 24 years.

[2] On July 7, 2009 Mr Cruz de Jesus applied to the Employment Insurance Commission (Commission) for parental benefits for a child born on September 22, 2008. He also requested that his claim be antedated to commence on November 20, 2008. He only learned of his entitlement shortly before he made his application to the Commission in July.

[3] The Commission refused to antedate his claim, on the ground that his approximately eight-month delay in claiming parental benefits was excessive and he had not established good cause for the delay. Mr Cruz de Jesus appealed this decision to a board of referees (Board).

[4] In a decision dated November 9, 2009, the Board allowed the appeal. It held that Mr Cruz de Jesus had good cause for the delay because he had taken the steps that a reasonable person in his situation would have taken to clarify his entitlement to parental benefits.

[5] This same issue was raised in 101 other appeals to boards of referees by SAWP workers. Boards of referees dismissed 18 of these appeals and allowed all the others. The 18 unsuccessful claimants then appealed to the Office of the Umpire, and the Commission appealed the others.

[6] In a decision dated April 13, 2012 (*CUB 78850*), Umpire Goulard reversed the Board's decision to allow Mr Cruz de Jesus's appeal, and upheld the Commission's refusal to antedate his claim. The Umpire's single set of reasons applied to all 102 appeals. He allowed all the appeals by the Commission and dismissed the 18 appeals by claimants.

[7] Mr Cruz de Jesus has made an application for judicial review requesting that the Umpire's decision be set aside. Applications for judicial review have also been made by the claimants in the other 101 appeals. An Order of the Federal Court, dated September 18, 2012, designated Mr Cruz de Jesus's file as the lead application, and consolidated it with the other 101 applications for judicial review of the Umpire's decision brought by SAWP workers.

[8] In my opinion, the Umpire's decisions in all the appeals must be set aside for error of law. His principal error was to exclude as irrelevant to the question of delay the circumstances common to all the Applicants, and those particular to individuals, that boards of referees had found in most cases (including Mr Cruz de Jesus's) hindered SAWP workers' ability to take steps earlier to clarify their entitlements to employment insurance benefits.

[9] In my opinion, when assessing the existence of good cause for delay, boards of referees had been correct in law to take into account the impact of the work, and other, conditions of SAWP claimants on their ability to access information about their benefits. Hence, the task of the Umpire was to consider the findings of facts made by the boards of referees in each appeal in order to determine if the decision was reasonable in light of the evidence before them.

[10] Accordingly, for the reasons that follow, I would allow the consolidated applications for judicial review and remit the matters to a different Umpire to be re-determined individually in accordance with these reasons. The reasons for allowing Mr Cruz de Jesus's application also apply to the 101 applications consolidated with it, and accordingly a copy will be inserted into each file.

Factual background

[11] The SAWP has been in effect for many years and enables employers in the agricultural sector to recruit temporary workers from the time of crop planting to harvesting, typically from about April to November of each year. At the end of each season, the workers must return to their home countries.

[12] The countries participating in the SAWP in these cases are Mexico, Trinidad and Tobago, and Jamaica. The SAWP provides a valuable source of income for workers of limited skills who would not meet general immigration criteria. Liaison officers in the workers' countries of origin are responsible for their recruitment and selection, and arrange for the necessary documentation (visas, work permits and tax returns).

[13] The unique disadvantages in the Canadian labour market of agricultural workers as a whole, and migrant workers in particular, are well known: see for example, *Dunmore v. Ontario*, 2001 SCC 94, [2001] 3 S.C.R. 1016 at para. 41 (*per* Bastarache J.); *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3 at paras. 348-51 (*per* Abella J. dissenting). These disadvantages commonly include: ineligibility for many social benefits, including most unemployment insurance benefits; exclusion from many statutory protections of workers (including representation by a union); low educational level, functional illiteracy, and lack of knowledge of English or French; social isolation, and lack of access to telephones, computers, and urban centres; long and arduous working schedules with little free time; and fear of employer reprisal and deportation (Umpire's Reasons at pp. 3-4).

[14] Like other employees, SAWP workers have employment insurance contributions deducted from their pay cheques. Unlike most other employees, however, they are generally ineligible for benefits, including regular employment insurance benefits, because they leave Canada at the end of their seasonal employment, and cease to be available for work or present in Canada. Nonetheless, they are eligible for parental benefits, because eligibility for these benefits does not depend on a claimant's availability for work or presence in Canada: *Employment Insurance Act*, S.C. 1996, c.

23, subsection 23(1), and *Employment Insurance Regulations*, SOR/96-332, subsection 55(4) (Regulations).

[15] Although not applicable to any of the Applicants in the present proceedings, an amendment of the Regulations came into force on December 9, 2012. This effectively removes SAWP workers' eligibility for parental benefits by excluding claimants if the period of validity of their Social Insurance Number or Card has expired: *Regulations Amending the Employment Insurance Regulations*, SOR/2012-260, section 1 and subsection 4(1).

[16] Employment insurance contributors become eligible for parental benefits in the first week of unemployment following their child's birth. While there is no statutorily prescribed limitation within which those eligible must apply to receive benefits, they are expected to apply promptly. The Commission regards claims as timely if made within four weeks from the start of the interruption of earnings following the birth of the claimant's child: Service Canada, *Digest of Benefit Entitlement Principles* – Chapter 3; Antedates, at 3.1.1 (Service Canada, Antedates).

[17] The Commission does not regard a delay of up to six months as excessive and will normally antedate a claim made within this time: Applicants' Record, vol. 4, p. 1059. Thus, migrant workers who were eligible for parental benefits would normally have had their claims antedated to the first week of unemployment following their baby's birth if made within 6 months from that date. Further, the Commission must regard claims as having been made at an earlier date if claimants can establish that they had "good cause" for delaying their application throughout the entire period of the delay, within the meaning of subsection 10(4) of the *Employment Insurance Act*.

[18] Although SAWP workers had no statutory right to unionize, the United Food and Commercial Workers Union (union) set up Migrant Workers Support Centres in four provinces to assist them. The union opened a Centre in Virgil, Ontario in 2004, where most of the applicants in the present proceedings were assisted in completing the forms for claiming parental benefits.

[19] Partly, no doubt, because employees not resident in Canada are ineligible for most employment insurance benefits, the availability of parental benefits to SAWP workers was not widely known to employers, liaison officers or the union. Claims only started to be made from 2002 when the union first became aware that parental benefits were available to SAWP workers. At that time it was believed that parental benefits applied only with respect to children born after 2000. It was not until May 2009 that the union learned that SAWP workers were eligible for parental benefits for children born as early as 1990: Applicants' Record, vol. 8, p. 2651.

Decision of the Board of Referees

[20] After finding that Mr Cruz de Jesus had accumulated sufficient hours of insurable employment to be eligible for parental benefits, the Board made the following findings of fact.

> The Board finds as a fact that the claimant was severely hindered from finding out and understanding his rights and obligations regarding benefits because:
>
> 1) He is unable to read, write or comprehend English.
>
> 2) He feared losing his employment.
>
> 3) He did not have the time to access the information due to his heavy work schedule.
>
> 4) His employer did not readily issue an ROE [record of employment] unless requested and did not explain the deductions taken from his paycheck.

[21] Turning to the general conditions of SAWP workers, the Board stated:

> … migrant workers are in the most part isolated from the community. They have very long work schedules and are only able to go to the closest farming town for [a] few hours each week to get their bare living essentials.

The Board found that the isolation of SAWP workers prevented them from accessing government agencies to find out their employment insurance rights and responsibilities.

[22] Based on these findings and the statutory test of "good cause" as defined in *Canada (Attorney General)* v. *Albrecht*, [1985] 1 F.C. 710 (C.A.) (*Albrecht*), the Board unanimously concluded that

> … the claimant did what a reasonable person in his situation would have done given the exceptional circumstances surrounding migrant farm workers in Southern Ontario.

Decision of the Umpire

[23] The Umpire first explained (Reasons at p. 2) that claimants' counsel had divided the 102 appeals into three groups: first time claimants for children born after 2000 (including Mr Cruz de Jesus); first time claimants for children born before 2000; and subsequent claims for children born after 2000.

[24] The Umpire then summarized (Reasons at pp. 3-4) from the written submissions of the four lead claimants (including two from the second group) the long list of difficulties facing migrant agricultural workers that would tend to hinder their ability to ascertain their employment insurance entitlements. He noted that while not all of these difficulties applied to all claimants, several did.

[25] The Umpire recognized (Reasons at p. 10) that there were factual differences among the claimants, including those reflected in the three groups, and the widely differing lengths of the delay in individual cases. However, he stressed that there was one fact common to all claimants: none had taken any steps to inform themselves of their employment insurance rights and responsibilities before eventually completing their applications for benefits.

[26] The Umpire regarded (Reasons at pp. 9-10) the difficulties faced by SAWP workers as irrelevant to the only issue before him: did the claimants have good cause for their delay in applying for benefits so as to warrant an antedate of their claims? In any event, he stated, claimants' work conditions and, in some cases, an inability to speak, read or understand English or French, did not prevent them from making some efforts to obtain information about their eligibility for employment insurance benefits.

[27] He also held (Reasons at p. 11) that even if their employers or liaison officers had misinformed them about their eligibility for benefits, claimants could have made some inquiries about their entitlements.

[28] For these reasons, the Umpire held (Reasons at pp. 12-13) that the claimants had not established good cause for their delay. Accordingly, he allowed all the appeals by the Commission and dismissed the 18 appeals by claimants.

Legislation

[29] The only statutory provision directly relevant to these applications for judicial review is subsection 10(4) of the *Employment Insurance Act*, which provides as follows.

Late initial claims	Demande initiale tardive
(4) An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.	(4) Lorsque le prestataire présente une demande initiale de prestations après le premier jour où il remplissait les conditions requises pour la présenter, la demande doit être considérée comme ayant été présentée à une date antérieure si le prestataire démontre qu'à cette date antérieure il remplissait les conditions requises pour recevoir des prestations et qu'il avait, durant toute la période écoulée entre cette date antérieure et la date à laquelle il présente sa demande, un motif valable justifiant son retard.

Issues and Analysis

(i) *Standard of review*

[30] The law is well settled on the standards of review applicable to Umpires' decisions in employment insurance cases. The Court applies the correctness standard to questions of law, and the standard of reasonableness to questions of fact, and mixed fact and law: *Chaulk v. Canada (Attorney General)*, 2012 FCA 190 at paras. 23-31. In turn, Umpires must apply these same standards when deciding an appeal from a board of referees: *Budhai v. Canada (Attorney General)*, 2002 FCA 298, [2003] 2 F.C. 57 (*Budhai*).

[31] In the decision under review, the Umpire did not expressly identify an error in the Board's reasons on which he reversed its decision to allow Mr Cruz de Jesus's appeal. However, I infer from a comparison of the reasons of the Board and those of the Umpire that he disagreed with the Board on two points.

[32] In the view of the Umpire, the difficulties of the claimants' working conditions were irrelevant to whether they had good cause for delaying their claims, and the claimants could not, and did not, have good cause for delay because they had taken no steps earlier to inform themselves of their employment insurance rights.

[33] These propositions of law because they are of more general application and not limited to the facts of the present cases. As such, they are reviewable by both the Umpire and this Court on the standard of correctness.

(ii) *Did the Umpire exclude relevant considerations?*

[34] *Albrecht* is the leading authority on the meaning of "good cause" in subsection 10(4) of the *Employment Insurance Act*. Writing for the Court in that case, Marceau J.A. held (at 718) that a claimant's ignorance of his rights to employment insurance benefits only constitutes good cause so as to require the antedating of his claim if

> … he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act. This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test.
> [Emphasis added]

[35] As already noted, the Umpire regarded as irrelevant to the existence of "good cause" the difficulties facing migrant workers in accessing advice from either the Commission or the assistance centres that the union had established. In so holding, the Umpire failed to consider the entirety of Mr Cruz de Jesus's "situation". Without this, he could not properly determine if Mr Cruz de Jesus's failure to take steps earlier to clarify his rights was consistent with what a reasonable person in his situation would have done.

[36] By failing to take into account the general barriers facing SAWP workers in claiming employment insurance benefits, and those affecting Mr Cruz de Jesus in particular, the Umpire did not apply the subjective-objective test established in *Albrecht*. This was an error of law.

[37] The Umpire's failure to address the particular factual variations in each of the 102 appeals before him is also inconsistent with the teaching of *Albrecht* on "good cause" quoted above, namely that "each case must be judged on its own facts and to this extent no clear and easily applicable principle exists".

(iii) ***Can inaction ever constitute "good cause", and did it in these cases?***

[38] This Court has typically taken a strict view of what constitutes "good cause" for the purpose of subsection 10(4) of the *Employment Insurance Act*. A claimant's failure to take *any* steps to discover their rights and responsibilities in claiming employment insurance benefits will not normally constitute good cause for delaying an application to the Commission for benefits.

[39] Thus, in *Canada (Attorney General) v. Caron* (1986), 69 N.R. 132 (F.C.A.) (*Caron*) the Court stated that, as a general rule, the question is whether what a claimant *did* was what a reasonable and prudent person *would have done* in the same circumstances. However, writing for the Court, Marceau J.A. qualified the general rule by adding (at para. 5):

> I suppose that there could be exceptional circumstances in which inaction and submissiveness would be understandable regardless, but I feel that the circumstances would have to be exceptional.
> [Emphasis added]

[40] It is not altogether clear from his reasons whether the Umpire was of the view that a claimant's total inaction could ever constitute "good cause". The Umpire noted (Reasons at p. 7) a theme in the reasons of the boards of referees that had dismissed the 18 appeals, and in the reasons of dissenting board members in other appeals:

> … the claimants had to show that they had acted as reasonable persons and this required that they had taken some steps to inform themselves of their rights and obligations in regard to a claim for benefits. As the claimants had not done so, they were found not to have established good cause for their delay.

The Umpire repeated in his analysis that the claimants had done nothing to clarify their entitlement to benefits before they submitted their applications for both parental benefits and antedating, and hence were not entitled to have their claims antedated: Reasons at pp. 10 and 12.

[41] To the extent that these statements indicate that the Umpire regarded inaction as an automatic bar to antedating they are wrong in law. The Umpire ignored the qualification in *Caron* that in exceptional circumstances inaction can constitute good cause for delay.

[42] However, the Umpire also made observations that may suggest that he was aware that inaction could constitute good cause, but on these facts it did not. Thus, he stated (Reasons at p. 12)

that the claimants' working conditions and their lack of knowledge of English or French did not prevent them from making some efforts to obtain information about their eligibility for parental benefits. He noted, in particular, that they had been able to make all the arrangements to come to Canada and to return to their own countries at the end of the season. Further, he stated, they knew that employment insurance contributions were being deducted from their salaries.

[43] Nonetheless, even if the Umpire understood that he had to determine whether claimants had established that "exceptional circumstances" justified their inaction (a test his reasons do not expressly mention), his determination of the issue is flawed.

[44] First, some of the findings on which the Umpire based his conclusion that claimants' delay was not justified contradicted the finding by the Board that Mr Cruz de Jesus was "severely hindered" from ascertaining his employment insurance rights. The Board accepted his evidence that, only if requested, would his employer provide a record of employment, which contains information about employment insurance deductions; his employer never explained to him the deductions from his pay cheques; and, since Spanish was his only language, he did not understand "deductions terminology" and did not know "where the money goes to".

[45] An Umpire may only interfere with a board of referees' finding of either fact or, absent an extricable question of law, of mixed fact and law if that finding is unreasonable: *Budhai*. There is no indication in the present case that the Umpire gave any deference to the aspects of the Board's findings described above.

[46] Second, even if had it been open to the Umpire on an appeal to make independent findings of fact, there is no evidence in the record to support his finding that Mr Cruz de Jesus or other SAWP workers made all their own arrangements to come to and to leave Canada. On the contrary, a single travel agency appears to arrange workers' travel in accordance with SAWP guidelines: see Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity* (Toronto: Metcalf Institute, 2012) at 94.

[47] Third, if the Umpire understood that he had to determine whether claimants had established that "exceptional circumstances" justified their inaction, he erred by failing to consider the facts pertaining to individual claimants on a case by case basis, and to decide whether a board's decision was reasonable in light of the evidence before it in the particular case. The Umpire's passing references to the facts in some of the cases were insufficient to discharge this duty.

[48] In brief, the task of the Umpire was to examine the factual findings of the boards of referees in each case to determine if they could reasonably be said to constitute "exceptional circumstances" requiring the Commission to antedate the claim, despite the inaction of the claimant. Again, the question is whether a reasonable and prudent person in the particular claimant's situation would have remained inactive for the entire period of the delay.

(iv) ***delay, good cause, and the nature of the benefits claimed***

[49] The nature of the benefits in question (parental benefits in these cases) is relevant to a determination of whether a claimant took the steps that a reasonable person in his or her situation would have taken to inform themselves of their employment insurance entitlements.

[50] Most of the cases on the antedating of late applications have concerned claims for regular employment insurance benefits, which are only payable if the clamant is available for work. An important reason for the reluctance to antedate a claim for regular benefits when the claimant was unaware of his or he entitlement is that it would be difficult for the Commission to determine, long after the fact, if the claimant had been available for work during the entire benefit period: see, for example, *Canada (Attorney General) v. Brace*, 2008 FCA 118 at paras. 6-7.

[51] Since there was no requirement that a claimant for parental benefits be available for work during the benefit period, administrative difficulties of proving claims should not be factored into a determination of whether the claimant had good cause for the delay. Indeed, Service Canada, Antedates, Chapter 3 at 3.3.1 states:

> A slightly more lenient approach is applicable when the claim is one for special benefits [including parental benefits] as these claimants are not required to prove availability and there is not the same potential for prejudice to the Commission.

Conclusions

[52] For these reasons, I would allow Mr Cruz de Jesus's application for judicial review, set aside the decision of the Umpire and remit the matter to the Chief Umpire or delegate to be determined in accordance with these reasons. I would dispose of the other 101 consolidated applications in the same manner. Since costs were not requested, none are awarded.

"John M. Evans"

J.A.

"I agree
Johanne Gauthier J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-223-12

(APPEAL FROM A DECISION OF THE OFFICE OF THE UMPIRE DATED APRIL 13, 2012)

STYLE OF CAUSE:	GENARO CRUZ DE JESUS ET AL. v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 16, 2013
REASONS FOR JUDGMENT BY:	EVANS J.A.
	CONCURRED IN BY: NEAR J.A.
DATED:	NOVEMBER 19, 2013

APPEARANCES:

Jackie Esmonde Jennifer Pothier	FOR THE APPLICANTS
Derek Edwards	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackie Esmonde Income Security Advocacy Centre Toronto, Ontario	FOR THE APPLICANTS
Jennifer Pothier Niagara North Community Legal Assistance St. Catherines, Ontario	
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT