

Citation: *K. P. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 78

Appeal #: GE-13-2164

BETWEEN:

K. P.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Simone Reinsch

HEARING DATE: July 23, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal is dismissed.

PERSONS IN ATTENDANCE

The teleconference hearing was solely attended by the Appellant.

DECISION

[1] The Member finds the number of weeks of benefit entitlement during his established benefit period was correctly calculated. The appeal is dismissed.

INTRODUCTION

[2] Subsequent to the Stanley Black & Decker plant closure, the Appellant filed a claim for regular benefits on August 10, 2010. The Appellant was paid severance pay until July 2013. The Appellant reactivated his claim for regular benefits on August 07, 2013. The Canada Employment Insurance Commission (Commission) allocated the severance pay until July 2013 at which time the Appellant was paid 7 weeks of regular benefits remaining during his extended benefit period of 104 weeks. On November 14, 2013, the Commission maintained the initial decision on the basis that the Appellant had received all the regular benefits to which he was entitled to receive in his benefit period.

[3] In his Notice of Appeal (NOA), on November 25, 2013, the Appellant indicated that the decision was incorrect because the Act is unfair and discriminates against long-tenured employees who have never received any benefits throughout their entire work life. A pre-hearing conference was held on March 18, 2014 for the purpose of issue clarification under subsection 20(1) of the *Social Security Tribunal (SST) Regulations*. However the Appellant failed to identify whether he wanted to pursue the constitutional validity of his case by the deadline date of June 17, 2014.

FORM OF HEARING

[4] After reviewing the evidence and submissions of the parties to the appeal, the Member decided to hold a hearing by way of telephone for the reasons provided in the Notice of Hearing dated June 27, 2014.

ISSUE

[5] The Appellant appeals, in accordance with section 12 of the *Employment Insurance Act* (Act), the number of weeks of benefit entitlement during his established benefit period.

THE LAW

[6] According to section 9 of the Act, when an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

[7] Subsection 10(1) of the Act states that a benefit period begins on the later of

- a) the Sunday of the week in which the interruption of earnings occurs, and
- b) the Sunday of the week in which the initial claim for benefits is made.

[8] Subsection 10(2) of the Act states that a benefit period, except as otherwise provided in subsections (10) to (15) and section 24, that the length of a benefit period is 52 weeks.

[9] In accordance to subsection 10(8) of the Act, a benefit period ends when any of the following first occurs:

- a) no further benefits are payable to the claimant in their benefit period, including for the reason that benefits have been paid for the maximum number of weeks for which benefits may be paid under section 12;
- b) the benefit period would otherwise end under this section; or c) [Repealed, 2002, c. 9, s.12)
- d) the claimant
 - i. requests that their benefits end,
 - ii. makes a new initial claim for benefits under this Part or Part VII.1, and

- iii. qualifies, as an insured person, to receive benefits under this Part or qualifies, as a self-employed person within the meaning of subsection 152.01(1), to receive under Part VII.1.

[10] Subsection 10(10) of the Act states that a claimant's benefit period is extended by the aggregate of any weeks during the benefit period for which the claimant proves, in such manner as the Commission may direct, that the claimant was not entitled to benefits because the claimant was

- a) confined in a jail, penitentiary or other similar institution;
- b) in receipt of earnings paid because of the complete severance of their relationship with their former employer;
- c) in receipt of workers' compensation payments for an illness or injury; or
- d) in receipt of payments under a provincial law on the basis of having ceased to work because continuing to work would have resulted in danger to the claimant, her unborn child or a child whom she was breast-feeding.

[11] In accordance with subsection 10(11) of the Act, a claimant's benefit period is extended by the aggregate of any weeks during an extension of a benefit period under subsection (10) for which the claimant proves, in such manner as the Commission may direct, that the claimant was not entitled to benefits because of a reason specified in that subsection.

[12] Subsection 10(12) of the Act states that a claimant's benefit period is extended by the aggregate of any weeks during an extension of a benefit period under subsection (10) for which the claimant proves, in such as the Commission may direct, that the claimant was not entitled to benefits because of a reason specified in that subsection.

[13] In accordance with subsection 10(12) of the Act, if the child or children referred to in subsection 23(1) are hospitalized during the period referred to in subsection 23(2), the

benefit period is extended by the number of weeks during which the child or children are hospitalized.

[14] In accordance with subsection 10(13) of the Act, if during a claimant's benefit period,

- a) regular benefits were not paid to the claimant,
- b) benefits were paid because of all of the reasons mentioned in paragraphs 12(3)(a), (b) and (c), and
- c) benefits were not paid for the maximum number of weeks established for the reasons mentioned in paragraphs 12(3)(a), (b) and (c),

the benefit period is extended so that benefits may be paid up to the maximum number of weeks available to the claimant for the reason mentioned in each of paragraphs 12(3)(a), (b) and (c).

[15] In accordance with subsection 10(13.1) of the Act, if, during a claimant's benefit period,

- a) regular benefits were not paid to the claimant,
- b) benefits were paid because of all of the reasons mentioned in paragraphs 12(3)(b), (c) and (d), and
- c) benefits were not paid for the maximum number of weeks established for the reasons mentioned in paragraphs 12(3)(b), (c) and (d),

the benefit period is extended so that benefits may be paid up to the maximum number of weeks available to the claimant for the reason mentioned in each of paragraphs 12(3)(b), (c) and (d).

[16] Subsection 10(13.2) of the Act states that if, during a claimant's benefit period,

- a) regular benefits were not paid to the claimant,

- b) benefits were paid because of all the reasons mentioned in paragraphs 12(3)(a), (b) and (d),

the benefit period is extended so that benefits may be paid up to the maximum number of weeks available to the claimant for the reason mentioned in each of paragraphs 12(3)(a), (b) and (d).

[17] In accordance with subsection 10(13.3) of the Act, if, during a claimant's benefit period,

- a) regular benefits were not paid to the claimant,
- b) benefits were paid because of all the reasons mention in subsection 12(3), and
- c) benefits were not paid for the maximum number of weeks established for the reasons mentioned in paragraphs 12(3)(a), (b), (c) and (d).

[18] Subsection 10(14) of the Act states that subject to subsection (15), no extension under any of subsections (10) to (13.3) may result in a benefit period of more than 104 weeks.

[19] Subsection 10(15) of the Act states that unless the benefit period is also extended under any of subsections (10) to (12.1),

- a) no extension under subsection (13) may result in a benefit period of more than 67 weeks;
- b) no extension under subsection (13.1) or (13.2) may result in a benefit period of more than 58 weeks; and
- c) no extension under subsection (13.3) may result in a benefit period of more than 73 weeks.

[20] According to subsection 12(1) of the Act, if a benefit period has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.

[21] Subsection 12(2) of the Act states that the maximum number of weeks for which benefits may be paid in a benefit period because of a reason other than those mentioned in subsection (3) shall be determined in accordance with the table in Schedule I by reference to the regional rate of unemployment that applies to the claimant and the number of hours of insurable employment of the claimant in their qualifying period.

[22] Section 13 of the Act states that 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.

[23] Subsection 35 (2) of the *Employment Insurance Regulations* (Regulations) , subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

- a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;
- b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
- c) payments a claimant has received or, on application, is entitled to receive under
 - i. a group wage-loss indemnity plan,

- ii. a paid sick, maternity or adoption leave plan,
 - iii. a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act, or
 - iv. a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act;
- d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;
- e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and
- f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for
- i. the claimant,
 - ii. the claimant's unborn child, or
 - iii. the child the claimant is breast-feeding.

[24] In accordance with subsection 36 (1) of the Regulations, subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the

manner described in this section and, for the purposes referred to subsection 35(2), shall be the earnings of the claimant for those weeks.

[25] Subsection 36(9) of the Regulations states that subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[26] Section 10 of the Regulations states, that subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

[27] Subsection 10.1 of the Regulations states that the allocation of the earnings paid or payable to claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

- a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;
- b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;
- c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and
- d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that

period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission, or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

- i. that is full-time,
- ii. that has a duration of at least 10 weeks or that costs at least \$5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,
- iii. for which the claimant assumes the entire cost, and
- iv. that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

EVIDENCE

[28] The Appellant began his long career as an engineer for Stanley Black & Decker on June 10, 1974.

[29] The Appellant filed an initial claim for regular benefits, on August 10, 2011.

[30] During the application process, the Appellant declared that his last day at Stanley Black & Decker was July 12, 2011.

[31] The Record of Employment (ROE), dated September 07, 2011, indicated that the Appellant had accumulated a total of 1416 insurable hours of employment during the period of September 12, 2010 and September 06, 2011. His final pay period ended September 10, 2011. The Appellant was laid-off from his work as an engineer.

[32] The September 2011 ROE, also indicated that the Appellant was paid:

- Y—Pay in lieu of Notice: \$8,954.64
- E—Severance Pay: \$53,000.16
- E—Severance Pay: \$63,895.50

[33] During a conversation with the Commission agent, on August 18, 2011, the Appellant stated that he would be receiving 8 weeks of pay in lieu of notice. The 8 weeks ended on September 08, 2011. Subsequently, the Appellant stated that he would be receiving a weekly severance allowance of \$1210.00 per week until July 12, 2013.

[34] The Commission established the benefit period commencement date as being September 11, 2011.

[35] In an initial decision letter, dated October 05, 2011, the Appellant was informed about the weekly allocation of earnings for the period of September 12, 2011 to July 27, 2012 would be \$1306.00. On July 30, 2012, the balance of \$1,088.00 would be deducted. Once eligible for benefits, the Appellant was informed that a two week waiting period would be required.

[36] On August 07, 2013, the Appellant reactivated the claim for regular benefits. The Appellant acknowledged not having worked since July 12, 2011, and being in receipt of severance pay until July 2013.

[37] On September 05, 2013, the Appellant requested an antedate to August 05, 2012 on the basis that he had been under the impression that the severance pay allocation would end in August 2013, but the October 2011 decision letter indicated August 2012.

[38] During a development call with the Commission agent, dated October 10, 2013, the Appellant stated that he received his last severance pay in July 2013.

[39] As a resident of Eastern Ontario, the Employment Insurance Rate for the period of September 11, 2011 to October 08, 2011 was 8.5%. The Appellant required 595 insurable hours of employment, and his weeks of entitlement amounted to 30 weeks.

[40] A revised ROE, dated October 11, 2013, indicated a total severance pay of \$116,895.66.

[41] Given the new information, the Commission's established the benefit period was extended by the maximum 52 weeks allowable. Thus the new benefit period extension yielded a benefit period of September 09, 2012 and September 07, 2013.

[42] In a decision letter, dated October 11, 2013, the Appellant was informed that the total amount of the severance pay was allocated in the period of September 11, 2011 to July 13, 2013.

[43] The Appellant received regular benefits from July 14, 2013 to September 07, 2013 at which time the benefits were ceased because the Appellant's benefit period was finished.

[44] The Appellant filed a request for reconsideration, on October 31, 2013, on the basis that he had only qualified and received one month of EI regular benefits. He stated that during his 37 year history, he had never drawn Employment Insurance Benefits. He attested he has been looking for work while in receipt of the severance payments.

[45] During a reconsideration development call, dated November 14, 2013, the Appellant confirmed that the issue to be reconsidered was the extension of the benefit period. He was verbally informed that the Commission's decision would be maintained because the Appellant's benefit period was extended to the maximum number of weeks under the Act. The benefit period ended September 07, 2013.

[46] The Commission confirmed their reconsideration decision in a letter dated November 14, 2013.

[47] The Tribunal received the Appellant's notice of appeal on November 25, 2013. The Appellant's believed that the decision was incorrect because the Act is unfair and

discriminates against long-tenured employees who have never received any benefits throughout their entire work life.

[48] The Appellant attended a pre-hearing conference, on March 18, 2014, for the purpose of issue clarification, clarifying subsection 20(1) of the SST Regulations, and confirmation of the next steps. The Appellant was given a deadline date of June 17, 2014 to make a determination as to whether he wanted to pursue his appeal as a constitutional challenge. However the Appellant did not make his wishes known by the deadline date.

Testimony

[49] The Appellant confirmed that the issue under appeal is the extension of benefit period which allow him the ability to collect a full 30 weeks of benefits following the end of the severance pay allocation.

[50] The Appellant stated that while he did not argue his case from a constitutional perspective, the Act is still unfair to long-tenured employees.

[51] He did not want to pursue the appeal from a constitutional perspective because he did not want to hire a lawyer.

[52] The Appellant still disputes the fairness of the law.

[53] The Appellant reiterated the statements that he had made in his notice of appeal.

[54] The Appellant declared that he is a resident of Eastern Ontario.

[55] Upon his departure from his long-tenured employment, at Black & Decker, the Appellant received a total of \$116, 895.66 in severance pay over a two year period (2011 to 2013).

[56] The Appellant attested that the weekly allocation of the severance pay was correct.

[57] The Appellant understood the requirement for the allocation of the severance pay. He stated he followed all the rules as dictated by the Act. He does not dispute the method used to allocate the monies.

[58] The Appellant acknowledged that his benefit period had been extended to 104 weeks and that based on the region of residence, he was entitled to 30 weeks of benefits.

[59] The Appellant does not dispute any of the facts presented in the Commission's representation, nor the information in the ROE, nor the allocation worksheet.

SUBMISSIONS

[60] The Claimant submitted that:

- a) He believed that the allocation of the severance pay, and the weeks of entitlement should be not be concurrent with each other.
- b) He contributed Employment Insurance premiums for a total of 37 years, and should be entitled to benefits.
- c) The Employment Insurance law is unfair to long-tenured employees.

[61] The Respondent submitted that:

- a) Within the confines of the length of the allocation, the Appellant was provided with the maximum number of benefit period extension weeks allowable under the Act.
- b) The Appellant's perception of unfairness does not have any bearing on the application of the law.
- c) The Commission is required to enforce and enact all aspects of the law equally to every citizen who makes an application for benefits.
- d) Based on the uncontested facts of the case, the Appellant received all the benefits he is entitled to receive.

ANALYSIS

[62] In accordance with subsection 12(1) of the Act, if a benefit period has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period. Subsection 12(2) of the Act, states that the maximum number of weeks for which benefits may be paid in a benefit period because of a reason other than those mentioned in subsection (3) shall be determined in accordance with Schedule 1 by reference to the regional rate of unemployment that applies to the claimant and the number of hours of insurable employment of the claimant in their qualifying period.

[63] Case law has held that the legislation does not allow for any administrative discretion in varying from the benefits periods set out in the Schedule 1 (CUB 73530). The Appellant attested that at the time of application, he was and continues to be a resident of Eastern Ontario. The Appellant does not dispute the accumulated number of insurable hours of employment in the qualifying period of September 12, 2010 and September 06, 2011. During his qualifying period the Appellant accumulated 1416 insurable hours of employment. The Appellant does not dispute the number of 30 entitlement weeks established using Schedule 1 under subsection 12(2) of the Act. Rather the Appellant contests the receipt of only 7 of the allowable 30 weeks of benefits under Schedule 1. The facts show that the Appellant received benefits for the period of July 14, 2013 to September 07, 2013 at which time the benefits were ceased because the Appellant's benefit period was finished. Upon review of the facts on file, the Appellant received the benefits to which he was entitled to receive within the confines set by the area of residence and the number of insurable hours of employment. The Tribunal does not have the administrative discretion to vary the established benefit period entitlement set out in Schedule 1.

[64] The Appellant disputes the length of the benefit period extension. He argued that he should be entitled to an extension of a benefit period to allow for the severance pay allocation, and subsequently 30 weeks of Employment Insurance regular benefits. In his opinion, the benefit period should extend from September 2011 to April 2014. He questioned the fairness of the method used to establish the benefit period. The facts on file

show that the benefit period commenced, in accordance with subsection 10(1)(b) of the Act, on the Sunday of the week in which the interruption of earnings occurred which was determined as September 11, 2011. Under the authority of subsection 10(2) of the Act, the length of the benefit period is 52 weeks. Thus the benefit period was established as being from September 11, 2011 to September 08, 2012. The Appellant provided proof that he was in receipt of severance pay, from his former employer, until July 2013. Furthermore under the authority of the subsection 35 and 36 of the Regulations, the severance pay was allocated. Subsection 10(10) of the Act was used to extend the Appellant's benefit period for 52 weeks from September 09, 2012 to September 07, 2013. But in accordance with subsection 10(14) of the Act, no extension under any of subsections (10) to (13.3) may result in a benefit period of more than 104 weeks. Thus the benefit period was complete on September 07, 2013 and no further extension could be permitted under the Act. The Appellant received seven weeks of EI benefits in his qualifying period in accordance with Schedule 1 under subsection 12(2) of the Act. The Tribunal concludes that the benefit period was correctly calculated within the confines of the legislation.

[65] The Appellant argued that the legislation used to calculate the benefit period is unfair to individuals who are long-tenured employees. The Appellant was given the opportunity to argue the constitutional validity of his case under subsection 20(1) of the SST Regulations, but the Appellant acknowledged that he forfeited the opportunity because he didn't want to embark on a prolonged legal process. As stated at the hearing, the Tribunal does not have the authority to change the legislation.

[66] The Appellant argued that as a long-tenured employee, who over the years has significantly contributed to the plan, he has not had the opportunity to draw upon any employment insurance benefits. The Appellant's employment steadfastness is truly remarkable. While the Member is empathic to the Appellant's plight, long term employment does not necessarily mean entitlement to benefits. The Member is supported in this conclusion by case law which had held that the purpose of EI benefits is available to those persons who qualify to receive them (CUB 23419).

CONCLUSION

[67] The appeal is dismissed.

Simone Reinsch
Member, General Division

DATED: July 25, 2014