

[TRANSLATION]

Citation: *K. B. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 101

Appeal No: GE-14-945

BETWEEN:

K. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Claude Durand

HEARING DATE: May 21, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal dismissed

PERSONS IN ATTENDANCE AND TYPE OF HEARING

Only the Appellant, K. B., participated in the hearing held by teleconference on May 2, 2014, for the reasons set out in the notice of hearing dated April 4, 2014.

DECISION

[1] The Tribunal dismisses the appeal.

INTRODUCTION

[2] In this case, the Canada Employment Insurance Commission (the Commission) refused to retroactively convert the Appellant's rate of special benefits.

[3] The Appellant disputed this decision, and the Commission upheld its initial decision following an administrative review.

[4] The Appellant submitted an appeal to the Social Security Tribunal.

ISSUE

[5] The Tribunal must determine whether the Commission correctly interpreted the provisions of subsections 152.09(1) and 152.09(2) of Part VII.1 of the *Employment Insurance Act* (the Act) by refusing to convert the benefit rate.

APPLICABLE LAW

[6] Bill C-56: *Fairness for the Self-Employed Act*

[7] Subsection 152.07(1) of the Act:

A self-employed person qualifies for benefits if:

(a) at least 12 months have expired since the day on which the person entered into an agreement referred to in subsection 152.02(1) with the Commission, or if a period has been prescribed for the purpose of this section, a period that is at least as long as that prescribed period has expired since that day;

(b) the agreement has not been terminated or deemed to have been terminated;

(c) the person has had an interruption of earnings from self-employment; and

(d) the person has had during their qualifying period an amount of self-employed earnings that is equal to or greater than the following amount:

- (i) \$6,000 or the amount fixed or determined in accordance with the regulations, if any, for that qualifying period, or
- (ii) if the person has accumulated a violation in the 260 weeks before making their initial claim for benefits, the amount referred to in this paragraph that would otherwise apply in respect of that self-employed person but for this subparagraph multiplied by

[8] Relevant sections of the *Employment Insurance Act* and Regulations

- (A) if the violation is a minor violation, 1.25 or the prescribed multiplier, if one has been prescribed,
- (B) if the violation is a serious violation, 1.5 or the prescribed multiplier, if one has been prescribed,
- (C) if the violation is a very serious violation, 1.75 or the prescribed multiplier, if one has been prescribed, or
- (D) if the violation is a subsequent violation, 2 or the prescribed multiplier, if one has been prescribed.

[9] Subsection 152.09(1) of the Act:

152.09 (1) If an individual qualifies for benefits under this Part as a self-employed person and for benefits under Part I as an insured person, the individual may receive benefits under one Part only and, to do so, the individual must, in the prescribed manner, at the time of making an initial claim for benefits, elect under which Part benefits are to be paid.

[10] Subsection 152.09(2) of the Act:

152.09 (2) The election is binding on the individual in respect of the initial claim for all benefits payable, for any of the following reasons, during the benefit period established in relation to the initial claim:

- (a) pregnancy;
- (b) caring for one or more new-born children of the self-employed person, or one or more children placed with the self-employed person for the purpose of adoption;
- (c) a prescribed illness, injury or quarantine;
- (d) providing care or support to one or more critically ill children of the self-employed person.

[11] Subsection 152.11(7) of the Act:

152.11 (7) Once a benefit period has been established for a self-employed person, the Commission may:

- (a) cancel the benefit period if it has ended and no benefits were paid or payable during the period; or
- (b) whether or not the period has ended, cancel at the request of the self-employed person that portion of the benefit period immediately before the first week for which benefits were paid or payable, if the self-employed person:

- (i) establishes under this Part — or establishes under Part 1, as an insured person — a new benefit period beginning the first week for which benefits were paid or payable, and
- (ii) shows that there was good cause for the delay in making the request throughout the period that begins on the day on which benefits were first paid or payable and ends on the day on which the request for cancellation was made.

EVIDENCE

The evidence on file shows that:

[12] The Appellant filed a claim for Employment Insurance benefits on May 3, 2013 (pages GD3-3 to GD3-21).

[13] Two Records of Employment were submitted in support of her claim for benefits (pages GD3-22 and GD3-23).

[14] When she completed her claim for benefits, the Appellant indicated that she wished to receive sickness benefits for self-employed workers (page GD3-3 and page GD3-5).

[15] She stated that she participated in the Employment Insurance program for self-employed workers (Page GD3-7). The income she received in the previous tax year was from self-employment income as well as insurable employment income (page GD3-8).

[16] She also confirmed that she had filed her income tax return for the previous tax year (page GD3-12) and that her net self-employment income was \$5,430.00 (page GD3-13).

[17] On May 21, 2013, the Appellant was informed that she could not receive Employment Insurance benefits for self-employed workers because she had to have accumulated \$6,342.00 in earnings from self-employment between January 1, 2012, and December 31, 2012, but that she had accumulated only \$5,430.00 (page GD3-24).

[18] On August 12, 2013, the Appellant filed a renewal claim for sickness benefits for self-employed workers (pages GD3-26 to GD3-40 and GD3-43). She also submitted an amended income tax return showing her net self-employment income to be \$6,342 (page GD3-25).

[19] In late August 2013, the Appellant also submitted an antedate request for the claim to start on June 23, 2013. She explained that she did not ask to antedate her claim to May 5, 2013, because she returned to work full-time from May 5, 2013, to June 21, 2013 (pages GD3-42 and 44).

[20] On September 23, 2013, the Commission notified the Appellant that her claim for self-employment special benefits had been granted (pages GD3-46 to GD3-47).

[21] On September 24, 2013, the Appellant contacted the Commission to say that she had requested self-employment benefits following a conversation with an Employment Insurance call centre agent.

[22] She then asked the Commission to check whether her rate would have been more advantageous if she had claimed benefits as a salaried worker without taking into account her self-employment income.

[23] The Commission contacted the citizen again to inform her that she would not have qualified for benefits as a salaried worker, as she had accumulated 562 hours of insurable employment, but needed 600 to be entitled to receive sickness benefits (pages GD3-48 and GD3-49).

[24] On December 6, 2013, the claimant again contacted the Commission to say that, by June 23, 2013, she had accumulated 622 hours of insurable employment (page GD-52).

[25] This was checked with the employer, who confirmed the insurable hours indicated by the Appellant (page GD3-53).

[26] On December 31, 2013, the Commission contacted the Appellant to inform her that, under subsection 152.09(1) of the Act, it was impossible to convert the claim for benefits as she had requested (page GD3-54).

The evidence submitted at the hearing as part of the Appellant's testimony essentially showed that:

[27] She taught physical education and was sometimes paid as a salaried worker by corporate clients and sometimes as a self-employed worker for clients whom she invoiced by the hour. She also worked as an accounting technician and charged in the same way.

[28] For her first claim for sickness benefits in April 2013, she contacted Employment Insurance to know whether she should make her claim as a self-employed worker or a salaried worker, since she had two types of jobs. She was told to make the claim as a self-employed worker and that her income as a salaried worker would be included in the calculation.

[29] No agent suggested that she make her claim as a salaried worker.

[30] She went back to work because she had no income and because waiting for Employment Insurance took too long.

[31] For her second claim, made on June 23, 2013, the initial claim was reactivated. From that moment, she lost over 21 days because of a delay in processing her claim.

[32] On September 23, 2013, she received the details regarding her benefits. She consulted the Service Canada website and realized that it would have been much more advantageous if she had been treated as a salaried worker.

SUBMISSIONS OF THE PARTIES

[33] The Appellant submitted several explanatory documents in support of her appeal (pages GD2-1 to GD2-20). In summary, she submitted the following:

- (a) She wants her claim to be converted to benefits for salaried workers and to receive the difference between what she received and what she should have received;
- (b) She did not actually elect the benefit type. She followed the recommendations of the Employment Insurance advisor. It was not her mistake, as she was the victim of an incorrect recommendation by the agent and is now paying the price;

- (c) Her claim was to start on June 23, 2013, but the agent reactivated her April 2013 claim rather than starting a new claim. This is a second error that penalizes her.

[34] The Respondent Commission submitted the following:

- (a) Under subsection 152.09(1), if an individual qualifies for benefits under this Part as a self-employed person and for benefits under Part I as an insured person, the individual may receive benefits under one Part only and, to do so, the individual must, in the prescribed manner, at the time of making an initial claim for benefits, elect under which Part benefits are to be paid;
- (b) Under subsection 152.09(2), the election is binding on the individual in respect of the initial claim for all benefits payable, for any of the following reasons, during the benefit period established in relation to the initial claim:
 - (a) pregnancy;
 - (b) caring for one or more new-born children of the self-employed person, or one or more children placed with the self-employed person for the purpose of adoption;
 - (c) a prescribed illness, injury or quarantine;
 - (d) providing care or support to one or more family members.
- (c) The facts on file show that the Appellant's request cannot be granted. She elected to claim self-employment benefits when she filed her claim in May 2013 (page GD3-3) and repeated this election when filing another claim in August 2013 (page GD3-26);
- (d) Subsection 152.09(1) of the Act states that an individual must make an election at the time of making an Employment Insurance claim. Subsection 152.09(2) states that this election is binding on the claimant;

(e) Moreover, her claim could not be cancelled under subsection 152.11(7) of the Act, as she had already been paid Employment Insurance benefits when she submitted her request. This final element is meant to be informative, given that the issue before the Tribunal in this case is the refusal to convert the benefits from Part VII.1 to Part I.

ANALYSIS

[35] In this case, I find that the Appellant actively tried to make her point, namely, that she was ill- or inadequately informed by a Commission officer when she filing her Employment Insurance claim, which resulted in her making the wrong choice by claiming self-employed benefits.

[36] The Appellant is now requesting that her benefits be converted retroactively.

[37] I have reviewed the documents, and it is clear that the election to claim self-employment special benefits is up to the claimant making the claim and that, subsequently, that election is binding on the claimant. This is required by subsections 152.09(1) and (2).

[38] In addition, the evidence shows that the Appellant was initially notified that her self-employment earnings were insufficient for her to qualify. She then took steps to have her 2012 income tax return amended. The Appellant cannot claim that her election was imposed on her; she took all the necessary steps to qualify for this type of benefit.

[39] I find that the Commission proceeded according to the standards with respect to the second claim for benefits made in August 2013—a renewal of the still effective claim made on May 3, 2013.

[40] Although the Appellant believes that she was incorrectly advised by a Commission officer and, despite the fact that the Appellant now believes that she has been penalized by her own decision to claim self-employment special benefits, the Appellant cannot claim rights that are not provided by the Act.

[41] The Tribunal finds that the Commission correctly applied the provisions of subsections 152.09(1) and (2) of the Act by refusing to retroactively convert the Appellant's Employment Insurance rate for special benefits.

CONCLUSION

[42] The appeal is dismissed.

A handwritten signature in black ink, appearing to read "C. Deuand". The signature is written in a cursive, flowing style.

Member, General Division

DATE OF REASONS: September 9, 2014