Citation: ***A. K. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 109**

Date: June 16, 2015

File number: GE-15-1009

GENERAL DIVISION – Employment Insurance Section

Between:

A. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Joseph Wamback, Member, General Division - Employment Insurance Section

Heard by Teleconference on June 16, 2015, Toronto, Ontario.

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. K., the Appellant attended the teleconference.

INTRODUCTION

[1] The Appellant filed for regular benefits on July 2, 2013. She stated that her employment was not insurable as she was self-employed. The Appellant applied for regular benefits on November 29, 2013 stating her record of employment was requested from her employer. The Respondent created an interim record of employment and the Appellant received benefits. Canada Revenue Agency issued a ruling that the Appellant was self-employed and accumulated zero hours of insurable employment. The Respondent voided the interim claim and determined that the Appellant failed to qualify for benefits as she had no insurable hours of employment during her qualifying period. The Appellant requested reconsideration and the Respondent denied the request at the reconsideration level. The Respondent notified the Appellant that she is required to repay benefits she received as she did not qualify for benefits. The Appellant filed an appeal to the Tribunal and a hearing was scheduled.

a) The hearing was held by Teleconference due to the complexity of the issue under appeal.

ISSUE

[2] The Appellant is appealing the Respondent's decision resulting from her request for reconsideration under section 112 of the *Employment Insurance Act* (Act) regarding the decision as to whether she has sufficient hours of insured employment to establish a claim pursuant to section 7 of the Act.

THE LAW

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

Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

[4] Subsection 7(2) of the Act:

An insured person, other than a new entrant or a re-entrant to the labour force, qualifies if the person

(a) has had an interruption of earnings from employment; and

(b) has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person:

Table omitted for clarity

[5] Subsection 8(1) of the Act:

Subject to subsections (2) to (7), the qualifying period of an insured person is the shorter of

(a) the 52-week period immediately before the beginning of a benefit period under subsection 10(1), and

(b) the period that begins on the first day of an immediately preceding benefit period and with the end of the week before the beginning of a benefit period under subsection 10(1).

[6] Section 43 of the Act:

An appellant is liable to repay an amount paid by the Commission to the appellant as benefits

(a) for any period for which the appellant is disqualified; or

(b) to which the appellant is not entitled.

[7] Section 52 of the Act:

(1) Despite section 111, but subject to subsection (5), the Respondent may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

(2) If the Respondent decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Respondent must calculate the amount of the money and notify the appellant of its decision.

[8] Section 55 of the Act:

(1) The Respondent may, with the approval of the Governor in Council, make regulations for establishing how many hours of insurable employment a person has, including regulations providing that persons whose earnings are not paid on an hourly basis are deemed to have hours of insurable employment as established in accordance with the regulations.

(2) If the Respondent considers that it is not possible to apply the provisions of the Regulations, it may authorize an alternative method of establishing how many hours of insurable employment a person has.

(3) The Respondent may at any time alter the authorized method or rescind the authorization, subject to any conditions that it considers appropriate.

(4) The Respondent may enter into agreements with employers or employees to provide for alternative methods of establishing how many hours of insurable employment persons have and the Respondent may at any time rescind the agreements.

[9] Section 112 of the Act:

(1) An appellant or other person who is the subject of a decision of the Respondent, or the employer of the appellant, may make a request to the Respondent in the prescribed form and manner for a reconsideration of that decision at any time within

(a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Respondent may allow.

(2) The Respondent must reconsider its decision if a request is made under subsection (1).

(3) The Governor in Council may make regulations setting out the circumstances in which the Respondent may allow a longer period to make a request under subsection (1).

EVIDENCE

[10] The Appellant applied for regular benefits on July 2, 2013. She stated she worked for Moose Factory Island School Board from January 4, 2012 to April 17, 2013. She stated that her record of employment will not be issued because her employment is not insurable as she is self-employed.

[11] The Appellant provided a copy of a letter from her employer stating her contract with the Board expires on April 17, 2013 and the Board will not be renewing her contract and that the board will be posting for the Supervisory Officer position immediately. (GD3-19)

[12] The Appellant's employer advised that she received $69,000 in payment for services during 2012. (GD3-20)

[13] Then Appellant applied for regular benefits on November 29, 2013. She stated she worked for Moose Factory Island Public School Board from March 1, 2012 to May 1 2013. She stated that the record of employment has been or will be requested from her employer and will be submitted in the near future. (GD3-26)

[14] The Appellant requested her record of employment stating on December 4, 2013 she has not received it and has paid into the system since she was 18 years old and there should be no issues. (GD3-35)

[15] The Appellant provided her paystubs to the Respondent as proof her employment at Moose Factory Island District School Area Board was insurable. The paystubs indicated that the Appellant had paid Employment Insurance premiums from March 4, 2012, to April 30, 2013 (GD3-37 to GD3-41).

[16] The Appellant advised the Respondent that the employer was located on the Reserve and while she worked for the employer the school board was under the jurisdiction of the Ministry of Education. She believed the employer was in the process of moving away from the Ministry to operate under the Moose Factory Band (GD3-42)

[17] The Respondent sent the employer a written request on January 30, 2014, for the Appellant's missing record of employment. (GD3-43)

[18] The Respondent accepted Appellant's request for record of employment and created an interim record of employment, it indicated the Appellant had worked for Moose Factory Island District School Area Board and accumulated 2080 hours of insurable employment from April 3, 2012, to April 30, 2013 (GD3-44). The Respondent finalized the Appellant's claim on February 5, 2014. The Appellant's benefit rate was $501.00 and she was paid 20 weeks of regular benefits and 15 weeks of sickness benefits (GD3-60 to GD3-61).

[19] The Appellant advised the Respondent on February 13, 2014 that she had her record of employment and would fax it to the adjudicating agent (GD3-45). However, on February 14, 2014, the employer provided a letter dated February 12, 2014, which stated they did not issue a record of employment for the Appellant because she was not an employee. The employer provided a copy of the insurability ruling from the Canada Revenue Agency. The ruling was dated July 30, 2013, and had been addressed to the Appellant, stated that for the period from April 26, 2012 to April 17, 2013, her employment was not insurable because she was a self-employed worker. She was advised that she had 90 days to appeal the ruling in writing to the Chief of Appeals (GD3-46 to GD3-48).

[20] The Respondent notified the Appellant of the employer's statement and stated that she only found her record of employment from 2011 to 2012, and not for the last period of work. She stated that she did not receive a copy of the insurability ruling because her accountant gets all of her Canada Revenue Agency information. (GD3-49 to GD3-50).

[21] The Appellant contacted her accountant and became aware of the insurability ruling. The accountant had attempted to contact the Appellant in September 2013, but the Appellant did not respond because she was ill. The Appellant understood that her claim was based on the interim record of employment and since the employment was not insurable the benefits paid on her claim would result in an overpayment and would require repayment (GD3-50).

[22] As per the insurability ruling, the Appellant had performed self-employment for Moose Factory Island District School Area Board and accumulated no hours of insurable employment

(GD3-47 to GD3-48) from July 1, 2012, to June 29, 2013. As a result, the Respondent voided the interim record of employment and the claim was recalculated. Under Section 52 of the Act, the Respondent has the legal authority to revisit such decisions within a 36 month timeframe. In the case in hand, the claim was revised within 1 month of the initial benefits having been paid to the Appellant.

[23] The Respondent recalculated the claim and determined that the Appellant had failed to qualify to receive employment insurance benefits because she required 630 hours of insurable employment in the period between July 1, 2012, and June 29, 2013 (GD3-53 to GD3-59), whereas she had accumulated no hours (GD3-47 to GD3-48).

[24] The Appellant resided in the Central Ontario region and the rate of unemployment in this region was 7.4 (GD3-53 to GD3-59).

[25] On February 27, 2014, the Appellant was advised by the Respondent that her claim was recalculated and it created an overpayment (GD3-51). The Appellant's benefit rate was $501.00 and she was paid 8 weeks of regular benefits from June 16, 2013, to August 10, 2013. The Appellant was paid 15 weeks of sickness benefits from August 11, 2013, to November 23, 2013. The Appellant was paid another 12 weeks of regular benefits from December 1, 2013, to February 22, 2014. All of these benefits, for a total of (35 x $501.00) $17,535.00 now constitute an overpayment to which the Appellant is liable to repay (GD3-52).

[26] On December 2, 2014, the Respondent provided a letter from Employment and Social Development Canada dated November 15, 2014, which advised her that $14,735.00 was still owed on her overpayment. In addition, she provided a copy of her Ontario College of Teacher's Certificate of Qualifications as proof she was qualified to work as a Supervisory Officer in Ontario as of October 2009. She also included sections of the Ontario Education Act and the Ontario College of Teachers Legislation, which the Ontario Teacher's Pension Plan utilized, to further support that she was a full-time employee, Supervisory Officer, Director of Education, with the Moose Factory Island District School Area Board. Lastly, she provided an online reference on when to complete a T4 slip (GD3-62 to GD3-76).

[27] The Appellant argued that the Ontario Educational Law supersedes the employment contract and a T4, and the record of employment should have been issued regardless of the school board being on the First Nation Reserve land. The Appellant stated that she wrote to the Canada revenue Agency in March 2013, to determine if she was required to pay Goods and Services Tax and Harmonized Sales Tax, since she did not receive her T4 from the Moose Factory Island District School Area Board. She was informed, after a review of her employment contract, that she was not considered an employee and no T4 was provided. However, on October 17, 2014, the Ontario Teachers' Pension Plan had advised her that they concluded that she was an employee (GD3-64 to GD3-67).

[28] The Appellant made a request for reconsideration of the Respondent's decision on the question of her inability to establish a claim (GD3-77 to GD3-94). In support of her request for reconsideration, the Appellant resubmitted the documents which were received by the Respondent on December 2, 2014 (GD3-62 to GD3-76).

[29] The reconsideration agent contacted the Appellant and advised her to submit an appeal to the Canada Revenue Agency in regards to the insurability of her employment at Moose Factory Island District School Area Board (GD3-95). On January 7, 2015, the Appellant provided a copy of the insurability ruling dated July 30, 2013, and a copy of her appeal to the Canada Revenue Agency, which reiterated her statements in her request for reconsideration (GD3-96 to GD3- 112). The Appellant contacted the reconsideration agent and stated that the Canada Revenue Agency would not review the appeal as it was beyond the 90 day timeframe and they were required to follow their legislation (GD3-113).

[30] On February 23, 2015, the Respondent provided letters dated January 28, 2015, and February 10, 2015, both were addressed to the reconsideration agent, which requested the Respondent to submit an appeal to the Canada Revenue Agency in regards to the insurability ruling for her employment at Moose Factory Island District School Area Board (GD3-114 to GD3-116). In addition, she provided a letter dated January 20, 2015, from the Canada Revenue Agency, which approved her application for an extension of time to file an objection, for 2012 filed December 22, 2014. The extension would allow the Appeals Division of the Canada Revenue Agency to review her objection (GD3-117 to GD3-118). She provided medical

information and written statement, dated January 20, 2015, to support the reason for the delay in submitting her appeal to the Canada Revenue Agency (GD3-119 to GD3-125). She provided a letter dated April 26, 2013, which requested a Harmonized Sales Tax ruling on her employment at Moose Factory Island District School Area Board. She had included a list of invoices given to the employer (GD3-126 to GD3-127). Lastly, she provided a letter dated June 10, 2013, from the Canada Revenue Agency, which acknowledged receipt of her request for a ruling on the insurability of her employment with Moose Factory Island District School Area Board (GD3- 128). In addition, the Appellant resubmitted her insurability ruling from the Canada Revenue Agency (GD3-129).

[31] On March 2, 2015, the Appellant submitted information already received by the Respondent (GD3-130 to GD3-147).

[32] On March 3, 2015, the Respondent received further written information from the Appellant. She provided a letter dated January 16, 2015, from the Canada Revenue Agency, which stated that her appeal was filed late. The ruling letter was dated July 30, 2013, and the postmark on her appeal showed January 8, 2015, which was more than 90 days past the notification date. An appeal could only be accepted if it was received within 90 days from the date the person was notified of the ruling. There were no legislative provisions, which allowed the Respondent to request for an extension of time to file an appeal (GD3-148). In addition, the Canada Revenue Agency had responded to the Appellant's explanation for her appeal to the Canada Revenue Agency being filed late. They reiterated that, by law, the Canada Revenue Agency cannot accept an appeal which is filed late. She was advised to contact the Federal Court's general enquires time (GD3-149). Last, she resubmitted documents from her request for reconsideration (GD3-150 to GD3-163).

[33] The reconsideration agent contacted the Appellant and completed an Arm's Length checklist. The Appellant maintained that her employment at Moose Factory Island District School Area Board was insurable (GD3-164 to GD3-166). On March 8, 2015, the Respondent received a copy of the Appellant's employment contract for her work at Moose Factory Island District School Area Board (GD3-167 to GD3-177). On March 12, 2015, the reconsideration agent advised the Appellant that the Respondent would not be submitting the case to the

Manager or Coverage and Premium Policy or appealing Canada Revenue Agency's decision (GD3-178). The Appellant filed an appeal to the Tribunal. She argued that the Respondent had established a claim based on her paystubs. However, the Respondent had received erroneous information from the Canada Revenue Agency, which resulted in the overpayment on her claim. She argued that all Ontario Publicly Funded School Boards must adhere to the Ontario Education Act, which supersedes any school board contract. Her employer, Moose Factory Island District School Area Board, had violated the Ontario Education Act when they refused to issue her T4 and record of employment. The employer argued that since the school board office was on First Nation Reserve land, they are not required to issue the T4 or ROE (GD2-2 to GD2-7).

[34] The Appellant restated that she paid into Employment Insurance for numerous years and that demonstrated entitlement (GD2-2).

[35] The Appellant resubmitted documents from her request for reconsideration (GD2-9 to GD2- 60). She provided a record of employment from the Simcoe County District School Board; however, it only included employment from August 25, 2003, to July 31, 2010 (GD2-61).

[36] The Appellant advised the Tribunal during the hearing that she received the docket, read and understood its content. The member reviewed her documentation and the Appellant did not provide any additional submissions or documentation. The Appellant stated that she understood that the ruling by Canada revenue Agency cannot be interfered with by the Respondent or the Tribunal.

SUBMISSIONS

[37] The Appellant submitted that;

a) She disagrees with the ruling of the Canada Revenue Agency.

b) She has paid into the employment insurance program since she was 18 years old and believes she has demonstrated entitlement.

[38] The Respondent submitted that;

a) The Appellant failed to have the hours of insurable employment needed to establish a claim for benefits. Furthermore, the fact premiums have been paid to the employment insurance fund for a lengthy period (GD2-2) does not by itself give right to receive benefits. An insured person must prove they meet the entitlement conditions to receive regular employment insurance benefits before any benefits can be paid.

b) Subsection 7(2) of the Act stipulates that in order to qualify for employment insurance benefits, an insured person (a) must have experienced an interruption of earnings from employment, and (b) must also have acquired, in her qualifying period, at least the number of hours of insurable employment set out in the table within that subsection, in relation to the regional rate of unemployment where the person normally resides.

c) In this case, the Appellant's qualifying period was established from July 1, 2012, to June 29, 2013 pursuant to paragraph 8(1)(a) of the Act. Based upon the facts on file, the Respondent determined that the Appellant was not a new entrant or re-entrant because in accordance with subsection 7(4) of the Act she had at least 490 hours of labour force attachment in the 52 weeks preceding the qualifying period. Therefore the Appellant needed the number of insured hours specified in paragraph 7(2)(b) of the Act.

d) According to the Table in subsection 7(2) of the Act, the minimum requirement for the Appellant to qualify to receive employment insurance benefits was 630 hours based on the rate of unemployment of 7.4% in the region where she resided (GD3-53 to GD3-59). However, the evidence shows that the Appellant had accumulated no hours of insurable employment in her qualifying period (GD3-47 to GD3-48). Consequently, the Respondent maintains that the Appellant failed to demonstrate that she qualified to receive employment insurance benefits pursuant to subsection 7(2) of the Act.

e) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal confirmed the principle that the requirements under subsection 7(2) of the Act do not allow any discrepancy and provide no discretion. The Appellant argued that Moose Factory Island District School Area Board had violated the Ontario Education

Act when they refused to issue her T4 and ROE (GD2-2 to GD2-7). In addition, she maintained that the Canada Revenue Agency made the wrong decision which resulted in the overpayment on her claim for benefits. However, the Appellant failed to understand that the Canada Revenue Agency has exclusive jurisdiction to determine the number of hours an insured person has had in insurable employment. They determined that she had accumulated no hours of insurable employment in her qualifying period because she was self-employed (GD3-47 and GD3-48). The Appellant is disputing the insurability of her employment; however, Canada Revenue Agency has advised her that they will not be reviewing their decision that her employment was not insurable because she failed to submit her appeal to the Canada Revenue Agency within 90 days of written notification of the decision and the Act does not have any legislative provisions to allow an extension of time to file an appeal (GD3-148 to GD3-149).

f) In the case at hand, the Respondent had established a claim for employment insurance based on the Appellant's paystubs and request for record of employment. The Appellant signed the request for the record of employment, which indicated that she understood an overpayment of benefits might result from a new calculation of her claim and she must repay the resulting overpayment (GD3-35 to GD3-36). The Respondent became aware of the insurability ruling which stated her employment at Moose Factory Island District School Area Board was not insurable (GD3-47 and GD3-48). As a result, the interim was voided because she had no insurable hours of employment in her qualifying period.

g) Under sections 43 and 52 of the Act, such a recalculation has resulted in an overpayment to which the Appellant is legally liable. Neither the fact that the Appellant was unaware of the insurability ruling (GD3-50) nor her argument that the Canada Revenue Agency made the wrong decision on the insurability of her employment at Moose Factory Island District School Area Board (GD2-2) can detract from the recalculation of her claim and her legal obligation to return those benefits to which she was not entitled. In addition, in consideration of the weekly benefit rate, and the fact her employment was not insurable and she had no insurable hours in her qualifying period, the end result, in terms of no benefits being payable, and thus the value of the overpayment, remains unchanged.

ANALYSIS

[39] The issue before the Tribunal is whether or not the Appellant has sufficient hours of insured employment to establish a claim pursuant to section 7, 8 of the Act and section 93 of the Regulations.

[40] It is well established in the jurisprudence that an appellant is only entitled to benefits that are payable in conformity to the Act (Lévesque (A-196-01), Pannu (A-147-03) and Haile (A- 573-07)).

[41] In this case the facts are clear and not in dispute. The Appellant resides in the economic region of Central Ontario where the unemployment rate is 7.4 % when the Appellant applied for benefits. Section 17. (1) of the Regulations subsection (2), the regional rate of unemployment that applies to an appellant is the average of the seasonally adjusted monthly rates of unemployment for the last three-month period for which statistics were produced by Statistics Canada that precedes the week referred to in subsection 10(1) of the EI Act for the purposes of sections 7, 7.1, 12 and 14 and Part VIII of the EI Act, for the region in which the appellant was ordinarily resident in that week.

[42] The Tribunal finds as a fact that according to the table in subsection 7(2) of the Act, the minimum requirement was 630 hours based on the rate of unemployment of 7.4% in the region where the Appellant resided. The Canada Revenue Agency issued a ruling dated July 30, 2013 stating that the Appellant was self-employed and her services were neither insurable nor pensionable (GD3-97) The Tribunal finds that based on the aforementioned ruling that the Appellant accumulated zero hours of insurable employment in her qualifying period therefore failed to demonstrate that she would have qualified for regular benefits per section 7 of the Act. The Tribunal finds that the Appellant failed to demonstrate that she met the requirements to receive benefits, pursuant to subsection 7.2 of the Act which states she must have 630 hours of insurable hours of employment in her qualifying period to qualify for benefits.

[43] Although sympathetic to the Appellant , the Tribunal finds that she does not have sufficient hours of insurable employment to qualify for benefit

CONCLUSION

[44] The appeal is dismissed.

Joseph Wamback
Member, General Division - Employment Insurance Section