Citation: ***D. D. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 208**

Date: November 30, 2015

File number: GE-15-1074

GENERAL DIVISION - Employment Insurance Section

Between:

D. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Eleni Palantzas, Member, General Division - Employment Insurance Section

Heard by Teleconference on October 19, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Ms. D. D., attended the hearing by teleconference.

INTRODUCTION

[1] The Claimant is a personal support worker employed by ParaMed Home Health Care (Extendicare) and is a member of the Ontario Public Service Employees Union (OPSEU) local X. She applied for employment insurance regular benefits on October 8, 2014 after having stopped working due to a strike effective September 2, 2014.

[2] On January 8, 2015 the Canada Employment Insurance Commission (Commission) determined that the Claimant lost her employment with the employer because of a work stoppage attributable to a labour dispute. The Commission therefore imposed a disentitlement to benefits effective October 7, 2014 pursuant to subsection 36(1) of the *Employment Insurance Act* (EI Act).

[3] On January 19, 2015 the Claimant requested that the Commission reconsider its decision however; on February 19, 2015 the Commission maintained its decision.

[4] On March 25, 2015, the Claimant appealed to the Social Security Tribunal of Canada (Tribunal), General Division.

[5] The hearing was held by teleconference given that the Claimant was going to be the only party in attendance, information in the file, including the need for additional information and, because the form of hearing respected the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[6] The Member must decide whether the Claimant should be disentitled to benefits from October 7, 2014 onward because she lost her employment due to a work stoppage attributable to a labour dispute pursuant to section 36 of the EI Act and section 53 of the EI Regulations.

THE LAW

[7] Section 2 of the EI Act defines a "labour dispute" as a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons.

[8] Subsection 36(1) of the EI Act stipulates that subject to the *Employment Insurance Regulations* (EI Regulations), if a claimant loses an employment, or is unable to resume an employment, because of a work stoppage attributable to a labour dispute at the factory, workshop or other premises at which the claimant was employed, the claimant is not entitled to receive benefits until the earlier of:

a) the end of the work stoppage, and

b) the day on which the claimant becomes regularly engaged elsewhere in insurable employment.

[9] Subsection 36(2) of the EI Act stipulates that the Commission may, with the approval of the Governor in Council, make regulations for determining the number of days of disentitlement in a week of a claimant who loses a part-time employment or is unable to resume a part-time employment because of the reason mentioned in subsection (1).

[10] Subsection 36(3) of the EI Act stipulates that a disentitlement under this section is suspended during any period for which the claimant:

a) establishes that the claimant is otherwise entitled to special benefits or benefits by virtue of section 25; and

b) establishes, in such manner as the Commission may direct, that before the work stoppage, the claimant had anticipated being absent from their employment because of any reason entitling them to those benefits and had begun making arrangements in relation to the absence.

[11] Subsection 36(4) of the EI Act stipulates that this section does not apply if a claimant proves that the claimant is not participating in, financing or directly interested in the labour dispute that caused the stoppage of work.

[12] Subsection 36(5) of the EI Act stipulates that if separate branches of work that are commonly carried on as separate businesses in separate premises are carried on in separate departments on the same premises, each department is, for the purpose of this section, a separate factory or workshop.

[13] Subsection 53(1) of the EI Regulations stipulates that for the purposes of section 36 of the Act and subject to subsection (2), a stoppage of work at a factory, workshop or other premises is terminated when:

a) the work-force at the factory, workshop or other premises attains at least 85 per cent of its normal level; and

b) the level of activity in respect of the production of goods or services at the factory, workshop or other premises attains at least 85 per cent of its normal level.

[14] Subsection 53(2) of the EI Regulations stipulates that where, in respect of a stoppage of work, an occurrence prevents the attainment of at least 85 per cent of the normal level of the work-force or activity in respect of the production of goods or services at a factory, workshop or other premises, the stoppage of work terminates

a) if the occurrence is a discontinuance of business, a permanent restructuring of activity or an act of God, when the level of the work-force or of the activity attains at least 85 per cent of that normal level, with the normal level adjusted by taking that occurrence into account; and

b) if the occurrence is a change in economic or market conditions or in technology, when

(i) there is a resumption of activity at the factory, workshop or other premises, and

(ii) the level of the work-force and of the activity attains at least 85 per cent of that normal level as adjusted by taking that occurrence into account.

[15] Subsection 53(3) of the EI Regulations stipulates that for the purposes of calculating the percentages referred to in subsections (1) and (2), no account shall be taken of exceptional or temporary measures taken by the employer before and during the stoppage of work for the purpose of offsetting the effects of the stoppage.

EVIDENCE

[16] On October 8, 2014, the Claimant applied for employment insurance regular benefits. The Claimant indicated that she was a personal care worker at ParaMed Home Health Care (Extendicare) and is a member of the Ontario Public Service Employees Union (OPSEU). The record of employment dated October 24, 2014 indicates that the Claimant lost her employment as of September 1, 2014 due to a strike or lockout (GD3-3 to GD3-16). The Claimant indicated that she was also employed with 'Access' from October 2, 2014 until October 7, 2014 (GD3-14).

[17] The Commission also obtained the following information about a work stoppage effective September 2, 2014 from the employer, union and the Claimant (GD3-18 to GD3-30):

- previous collective agreement expired December 31, 2012
- negotiations started January 20, 2014
- mediation occurred May 2014
- wages were the main unresolved issue
- strike notice is served August 18, 2014
- strike or work stoppage started September 2, 2014
- nurses (11), personal support workers (73), home support workers (5) and one clerk went on strike; formed picket lines at the X and X locations
- agreement reached = September 19, 2014 ratified = September 24, 2014
- pre-strike levels of their business have not been resumed; reduced by 75% due to the strike because they lost clients (referred elsewhere) so they are at only 20% resumption, the work stoppage therefore due to the labour dispute is ongoing

[18] On January 8, 2015 the Commission advised the Claimant that it was unable to pay her benefits effective September 2, 2014 (corrected to October 7, 2014) because she was unable to resume her employment because of a work stoppage attributable to a labour dispute (GD3-31).

[19] On January 19, 2015 the Claimant requested that the Commission reconsider its decision noting that after a strike of approximately 3 weeks she was back on the payroll with the employer as of September 30, 2014. The record of employment dated January 23, 2015 indicates that the Claimant worked for 2 hours between September 30, 2014 and November 24, 2014 and then was laid off due to shortage of work (GD3-32 to GD3-35).

[20] On February 19, 2015 the Commission maintained its decision and imposed an indefinite disentitlement until 85% of the work resumption target is met pursuant to subsection 36(1) of the EI Act and section 53 of the Regulations (GD3-36 to GD3-38).

[21] In her notice of appeal to the Tribunal, the Claimant indicated that she was on the payroll with the employer from September 29, 2014 until she was laid off with the employer on November 24, 2014 (provided pay stubs and a record of employment). She was subsequently employed with by G. H. Enterprises Ltd for 5 weeks from September 30, 2014 until she was laid off on October 31, 2014 (GD2).

[22] At the hearing, the Claimant testified that there was a strike that started on September 2, 2014 at both the X and X locations (she worked at the X location). The Claimant confirmed that she was, and is, a member of OPSEU local X. She participated on the picket line and confirmed that the collective agreement that was being negotiated applied to her including the issue of wages. She stated that she continues to be on the employer's list to return to work (recall).

[23] The Claimant testified that she has been working since the strike ended. From September 29, 2014 until October 31, 2014 she was employed with G. H. Enterprises Ltd. at a rate of $624.00/week. She also continues to work, on a part-time basis for Access Healthcare as of October 2, 2014 (for almost a year now). She explained that she continues to provide her employer with her hours of availability and is taking their safety courses on-line making herself available for this work as well.

[24] Regarding whether the employer/union have indicated/confirmed that the work stoppage is over, i.e. whether the work force/production have reached 85% of their normal levels, the Claimant stated that the employer has merged with another company (Reviere). The clients that were transferred out due to the strike are not being referred back to the employer and as a result, the employees of the 'old' ParaMed (employer) are not getting work.

SUBMISSIONS

[25] The Claimant submitted that she should be entitled to regular benefits from the date she was no longer employed with G. H. Enterprises Ltd. because her unemployment (stoppage of work) thereafter had nothing to do with the labour dispute (GD2-4).

[26] The Respondent submitted that the evidence shows that there was a labour dispute at the workplace where the Claimant was employed and a work stoppage occurred on September 2, 2014 when members of the said union commenced strike action. The work stoppage has not ended because a resumption of at least 85% of normal staffing and production levels as required under section 53 of the Regulations has not taken place to date. The Claimant has also not met the burden of proving that she has met the re-entitlement conditions under subsection 36(4) of the EI Act. A disentitlement was therefore imposed under the provisions of subsection 36(1)(a) of the Act; however, since the Claimant has become regularly engaged in other employment with G. H. Enterprises from September 29, 2014, the condition defined in paragraph 36(1)(b) of the Act is met (GD4-6). The Commission requests therefore that the Tribunal dismiss the Claimant's appeal with the modification to terminate the disentitlement on September 28, 2014.

ANALYSIS

[27] The issue to be decided herein is whether the Claimant should be entitled to benefits from October 6, 2014 onward because she lost her employment due to a work stoppage attributable to a labour dispute.

[28] According to subsection 36(1) of the EI Act and subject to the Regulations, a claimant is not entitled to receive benefits if:

1. the claimant loses an employment, or is unable to resume an employment,

2. because of a work stoppage,

3. attributable to a labour dispute,

4. at the factory, workshop or other premises at which the claimant was employed

Was there a labour dispute?

[29] The Member first considered that the onus lies with the Commission to demonstrate that a claimant is disentitled to benefits (Valois v. Canada [1986], 2 S.C.R. 439, Benedetti A-32-09). Whether the Commission has met its burden of demonstrating that a work stoppage is due to a labour dispute is a question of mixed fact and law. This determination depends on the application of the facts to the legal term "labour dispute" (Benedetti A-32-09, Lepage 2004 FCA 17; Stillo A-651-01).

[30] In order to address the issue of whether the work stoppage is attributable to a labour dispute pursuant to subsection 36(1) of the EI Act, it must first be established that there was a 'labour dispute' at the time of the work stoppage.

[31] The term "labour dispute" is clearly defined in the EI Act. Section 2 of the EI Act defines the term "labour dispute". It states that a "labour dispute" means a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons.

[32] The Member also considered relevant case law with respect to further clarification of what is meant by a "labour dispute". The Federal Court of Appeal for instance, has established that when employees and an employer are negotiating a collective agreement there is a labour dispute. It is held that the purpose of negotiations is to put an end to a disagreement where there is insistence of one party and resistance by the other regarding certain claims (Gionest A-787-81). The Member also considered that a labour dispute usually precedes a strike or a lockout, although it is not a prerequisite (CUB 17681). Plus, a labour dispute exists during the period that strike pay was received (CUB 17761). Whether a labour dispute exists is a question of fact (CUB 19156).

[33] In this case, it is undisputed evidence that for several months prior to the work stoppage the employer and employees were negotiating, and disagreeing on, the terms of a collective agreement that expired on December 31, 2012. Negotiations commenced on January 20, 2014, there was mediation in May 2014, there was disagreement regarding wages and the union served the employer with notice of a strike on August 18, 2014. It is undisputed evidence that the employees (nurses, personal support workers, home support workers and a clerk) went on strike and formed picket lines as of September 2, 2014 at the X and X locations.

[34] The Member finds therefore that there are key elements of a labour dispute, as defined in the case law, evident in this case. There is evidence of insistence by one party and resistance by the other with respect to specific terms of their employment, there was an impasse in the negotiations and the employees went on a legal strike. It is obvious therefore, that there was a dispute between the employer and the employees at the two locations connected with the terms and conditions of their employment, which by definition, in section 2 of the EI Act, is a labour dispute.

[35] The Member finds therefore that pursuant to section 2 of the EI Act, there was a labour dispute in existence at the X and X locations prior to the work stoppage on September 2, 2014.

Was the work stoppage attributable to the labour dispute?

[36] Having established that a labour dispute existed at the time of the work stoppage, the Member next considered whether the work stoppage was attributable to a labour dispute.

[37] The Federal Court has established that when there is a work stoppage during the negotiation of a new collective agreement, there is a clear causal connection between the labour dispute and the work stoppage. The existence of a causal connection between a labour dispute and a work stoppage is a question of law (Simoneau A-611-96, Dallaire et al. A-825-95). In this case, the parties were negotiating a new collective agreement at the time that the said employees went on strike, and work stopped. There is a clear causal connection therefore, between the labour dispute in this case and the work stoppage.

[38] The Member agrees with the Commission that at the time of the work stoppage, a labour dispute existed and a new collective agreement was being negotiated so there is a direct causal

connection between the work stoppage and the labour dispute. The Member finds therefore, that the work stoppage that occurred on September 2, 2014 is attributable to a labour dispute.

[39] The Member finds therefore that the Claimant should be disentitled to benefits from September 2, 2014 until one of the exceptions in section 36 of the EI Act is met.

End of the work stoppage/disentitlement

[40] According to subsection 36(1) of the EI Act, a claimant is disentitled to benefits until the earlier of (a) the end of the work stoppage and (b) the day on which the claimant becomes regularly engaged elsewhere in insurable employment.

[41] In this case, the evidence shows that, with respect to paragraph 36(1)(a) of the EI Act, by definition according to section 53 of the Regulations, the work stoppage has not ended at the employer, because they have as of yet, not reported to the Commission that both their work force and production have reached 85% of their normal (pre-strike) levels. At the hearing, the Claimant indicated that the employer has been gradually bringing employees back to work however, was unable to confirm whether the employer has reached 85% of its pre-strike levels. As such, the Member finds that the disentitlement to benefits could not be terminated for this reason since the condition in subsection 36(1)(a) of the EI Act has not been met.

[42] On the other hand however, with respect to paragraph 36(1)(b), the Claimant has provided evidence that as of September 29, 2014, she was regularly employed elsewhere. The Claimant testified that she worked for G. H. Enterprises Ltd. for 5 consecutive weeks at a consistent rate of pay ($624/week) from September 29, 2014 until October 31, 2014 and also continues to work, on a part-time basis for Access Healthcare as of October 2, 2014. The Claimant provided supporting evidence of her employment with G. H. Enterprises Ltd. (GD2-13). Further, the Member considered the Commission's submission that indeed the Claimant did become "regularly engaged" in insurable employment with G. H. Enterprises Ltd. that was firm, serious, and genuine; there was continuity in the employment and regularity in her pattern of work. The Member agrees, and finds that the condition to terminate the disentitlement as defined in paragraph 36(1)(b) of the Act was met on September 28, 2014 when the Claimant became regularly engaged in other insurable employment.

[43] The Member is supported by the Supreme Court of Canada in its *Abrahams* decision (Abrahams v. Canada (A.G.), [1983] 1 S.C.R. 2) which held that in order for the new employment to be "regular" there must be a fixed pattern, rather than a fixed period; it is not the duration of the hiring but the regularity of the work schedule. It can't be a day or two, here and there with no firm commitment by either the Claimant or the new employer. Regular employment need not be long-term so long as it is "regular during the period of its subsistence". As in this case, the Claimant worked consistently, on a fixed schedule and wage for 5 weeks and then was laid off. Although her new employment was of a relatively short duration, the Member finds that there was consistency and regularity in her work schedule so the condition in paragraph 36(1)(b) of the EI Act, is met.

[44] Also, the Federal Court of Appeal confirms the principle that once a claimant has lost his/her employment because of work stoppage attributable to a labour dispute, the disentitlement continues until one of the exceptions in the EI Act is met (Gadoury 2005 FCA 14).

[45] Finally, the Member also considered whether the Claimant can be re-entitled to benefits by meeting the requirements in subsection 36(4) of the EI Act. That is, section 36 of the EI Act does not apply if a claimant can prove that he/she is not participating in, financing or is directly interested in the labour dispute that caused the stoppage of work. In this case however, the Claimant testified that she was a member of OPSEU local X, that was negotiating a collective agreement of which the terms (including wages) would apply to her. The Member finds therefore, that she had a 'direct interest' in the labour dispute as she had something to gain from the outcome of that dispute (Black 2001 FCA 255). Further, the Claimant confirmed that she continues to be employed with the employer and remains a member of her union.

[46] The Member finds therefore that since the work stoppage was attributable to the labour dispute, and since the Claimant has not proven that she should be re-entitled to benefits under subsection 36(4) of the EI Act, the Claimant is disentitled to benefits effective September 2, 2014 until she met the condition of paragraph 36(1)(b) of the EI Act on September 28, 2014.

[47] The Member finds therefore that the Claimant should be disentitled to benefits from September 2, 2014 until September 28, 2014 because she lost her employment during this

period due to a work stoppage that is attributable to a labour dispute pursuant to section 36 of the EI Act.

CONCLUSION

[48] The appeal is dismissed with modification to the end date of the disentitlement.

Eleni Palantzas
Member, General Division - Employment Insurance Section