Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *C. T. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 33

Tribunal File Number: GE-15-2200

BETWEEN:

C. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Aline Rouleau

HEARD ON: March 1, 2016

DATE OF DECISION: March 2, 2016

Canada

REASONS AND DECISION

PERSON IN ATTENDANCE AND FORM OF HEARING

[1] The Tribunal held a hearing by videoconference in Rimouski on March 1, 2016 for the reasons set out in the notice of hearing dated January 18, 2016, namely, the complexity of the issue and the availability of videoconferencing where the Appellant lives.

[2] The Appellant, C. T., was present at the hearing.

[3] The Respondent Commission was not present at the hearing.

INTRODUCTION – STATEMENT OF FACTS AND PROCEEDINGS

[4] The Appellant made an initial claim for sickness benefits that took effect on January 18, 2015 (GD3-3 to GD3-16).

[5] The Commission determined the Appellant's weekly benefit rate based on the information he provided when he completed his claim (GD3-10).

[6] Upon receipt of information from the Canada Revenue Agency (CRA) showing different earnings than those reported by the Appellant, the rate of benefits was recalculated and the new rate was lower.

[7] The Appellant filed a request for reconsideration of the Commission's decision regarding the calculation of his rate of weekly benefits (GD3-26 to GD3-29). The Commission upheld its decision (GD3-31 and GD3-32), which led to this appeal to the Tribunal (GD2-1 to GD2-1 to GD2-8 and GD2A-1 to GD2A-3).

ISSUE

[8] The issue is the calculation of the Appellant's weekly benefit rate under Part VII.1 of the *Employment Insurance Act* (the "Act") – Benefits for Self-Employed Persons (sections 152.01 *et seq*.).

THE LAW

[9] Part VII.1 of the *Employment Insurance Act*, in effect since January 2010, covers benefits for self-employed persons and more specifically, in the case before us, sections 152.01 to 152.34.

[10] Subsection 152.31(1) of the Act states:

152.31 (1) Subject to subsections (2) and (3), all the provisions of this Act, except sections 5 to 37, 48 and 56 to 65.2, that are not inconsistent with the provisions of this Part apply, with any modifications that the circumstances require, to this Part.

[11] Subsection 152.03(1) of the Act states:

152.03 (1) Subject to this Part, a self-employed person who ceases to work as a self-employed person because of a prescribed illness, injury or quarantine and who would be otherwise working, is entitled to receive benefits while unable to work as a self-employed person for that reason.

[12] Subsection 152.08(1) of the Act states that the qualifying period of a self-employed person is the year immediately before the year during which their benefit period begins.

[13] Subsection 152.16 of the Act reads as follows:

152.16 (1) The rate of weekly benefits payable to a self-employed person is 55% of the result obtained by dividing the aggregate of the amounts referred to in paragraphs (a) and (b) by 52:

(a) the amount of their self-employed earnings, determined under paragraph 152.01(2)(a), (b) or (c), as the case may be, for their qualifying period; and

(b) if they had insurable earnings from employment, including insurable earnings earned as a person to whom regulations made under Part VIII apply, for their qualifying period, the amount of those insurable earnings for that period, calculated without taking into account prescribed insurable earnings.

(2) Only the portion of the aggregate of the amounts referred to in paragraphs (1)(a) and (b) that does not exceed the maximum yearly insurable earnings as calculated under section 4 is to be taken into account for the purposes of subsection (1).

[14] Paragraph 152.01(2)(a) of the Act states:

152.1 (2) For the purpose of this Part, the amount of the self-employed earnings of a self-employed person for a year is,

(a) in the case of a self-employed person who is an individual referred to in paragraph (a) of the definition ***self-employed person*** in subsection (1), the amount that is the aggregate of,

(i) an amount equal to:

(A) their income for the year, computed under the *Income Tax Act*, from their businesses, other than a business more than fifty per cent of the gross revenue of which consisted of rent from land or buildings, minus

(B) all losses, computed under the *Income Tax Act*, sustained by the self-employed person in the year in carrying on the businesses they are engaged in,

[15] Subsection 152.28(1) reads as follows:

152.28 (1) Subject to this Part and except as otherwise provided by regulation made under subsection (2), the provisions of Divisions I and J of Part I of the *Income Tax Act* with respect to payment of tax, assessments, objections to assessments, appeals, interest, penalties and excess refunds, and the provisions of Part XV of that Act (except section 221) and subsections 248(7) and (11) of that Act apply, with any modifications that the circumstances require, in relation to any amount paid or payable as or on account of the premium for a year in respect of self-employed earnings as though that amount were an amount paid or payable as or on account of tax under that Act.

[16] Section 11.1 of the *Employment Insurance Regulations* (the "Regulations") stipulates:

11.1 (1) The amount of self-employed earnings referred to in subparagraph 152.07(1)(d)(i) of the Act shall be adjusted annually on a compound basis, beginning on January 1, 2012, by the ratio referred to in paragraph 4(2)(b) of the Act.

(2) If the ratio referred to in subsection (1) is less than 1.0 and would result in an adjusted amount of less than $6,000, the ratio is deemed to be 1.0.

(3) If the adjusted amount calculated in accordance with subsections (1) and (2) is not a multiple of one dollar, that amount shall be rounded down to the nearest dollar.

[17] Subsection 152.17(5) of the Act determines the maximum rate of weekly benefits:

(5) The maximum rate of weekly benefits that may be paid under this section is 55% of the maximum yearly insurable earnings, as calculated under section 4, divided by 52.

EVIDENCE

Evidence in the file

[18] When he completed his initial claim for benefits, the Appellant reported:

a) having entered into an agreement with the Commission to participate in the employment insurance program for self-employed persons (GD3-7);

b) in the previous taxation year, having received income only from self-employment (GD3-8);

c) that his net income from self-employment, as reported on his tax return, was $57,534 (GD3-10).

[19] Based on the information provided by the Appellant, the Commission determined that his rate of weekly benefits would be $524, informed the Appellant of that rate and then informed him that a new calculation might be made once the CRA had provided his actual self-employed earnings (GD3-17).

[20] On April 29, 2015, the CRA informed the Commission that the Appellant's actual earnings were $14,289 for the 2014 taxation year. The Commission recalculated the benefit rate, which was reduced to $151 per week. This new calculation generated an overpayment of $3,572 and a notice of the amount owing was sent to the Appellant (GD3-23). The Appellant was notified of the Commission's decision in writing (GD3-24 and GD3-25).

[21] At the time of the administrative review, the Commission informed the Appellant (GD3-30) no change was possible without a new reassessment from the CRA.

[22] With his letter of appeal (GD2-1 to GD2-8 and GD2A-1 to GD2A-3), the Appellant submitted a letter dated June 30, 2015 (GD2-6), addressed to the CRA, in which he advised the CRA that the Commission was waiting for it to provide data on his earnings because he considered that the information already provided was incomplete, inappropriate and vague. He also included a copy of his federal notice of assessment for the 2014 taxation year (GD2-7 and GD2-8).

[23] On September 22, 2015, the Tribunal informed the Appellant that his appeal would be held in abeyance until the assessment he had requested from the CRA was received.

[24] On November 19, 2015, the Tribunal received from the Appellant the response from the CRA (GD6-2), dated November 13, 2015, in which he was informed that the review of his 2014 tax return and benefits had been completed and that [translation] "no adjustment is required". In his accompanying letter (GD6-1), the Appellant stated that his total gross income was $55,967 as confirmed by the copy of notice of assessment that he included (GD6-3).

[25] The Appellant also received a letter dated November 20, 2015 from the CRA, which included Schedule 13 showing the calculation made (GD9-2 to GD9-4). [Note from the Tribunal: These documents were provided to the Tribunal but crossed in the exchange of information with the letter sent by the Tribunal mentioned in the paragraph below.]

[26] On November 24, 2015, the member of the Tribunal responsible for the file asked the Appellant to provide a copy of his 2014 federal tax return and in particular, Schedule 13 of that return covering his self-employed earnings (GD7).

[27] The Appellant provided the documents requested by the Tribunal (GD10-1 to GD10-38) and submitted his arguments. He stated that, before the final review of his appeal, he wanted to request a reconsideration of the CRA's decision of November 20, 2015 and again asked to hold the Tribunal's file in abeyance.

[28] On January 18, 2016, the Tribunal sent the notice of this hearing (GD1). The Appellant confirmed (GD11-1 to GD11-19) on January 28, 2016 that he would be present at the hearing called for March 1, 2016 and he attached a letter from the CRA, dated January 18, 2016 (GD11-4 and GD11-5) in which he is referred to the letter of November 20, 2015 and informed that employment insurance premiums on self-employed earnings are calculated on net income from self-employment. The CRA letter included Schedule 13 for the 2013 and 2014 taxation years (GD11-9 and GD11-12) on which it is indicated that net income not gross income must be used.

Evidence at the hearing

[29] At the hearing, the Appellant did not submit any new evidence or provide additional evidence to what was in the appeal file. In his testimony at the hearing, the Appellant argued as follows regarding the Commission's decision.

[30] The common meaning of the term "earnings" implies that it is gross earnings and not net earnings like the amount provided by the CRA to the Commission.

[31] He gave the example contained in the explanatory brochure provided and prepared by the Commission to calculate the benefit rate for self-employed persons.

[32] He mentioned having made his claim for benefits in 2013 on the basis of his gross earnings and that he received benefits calculated on that amount. Therefore, there is no reason for the calculation to be done differently for 2014.

[33] The provisions of the Act must be applied taking into account the context, the information available, the evolving society and the fact that people can only refer to what is available to them. He should not have to pay the price because the brochures available are incorrect and incomplete.

[34] He asked that he not be required to repay anything because he acted in good faith throughout this matter. Reasonable doubt should play in his favour.

PARTIES' ARGUMENTS

[35] In addition to the arguments presented during his testimony, the Appellant argued as follows:

a) He does not understand how the new calculation of his rate could have been established in that way because his yearly earnings are virtually the same from one tax year to the next.

b) The CRA's decision is incorrect and prejudicial to him. The Appellant asked that employment insurance follow its own calculation criteria and not those of the CRA which uses net income, which in his case are "nul and void". Clearly, the CRA does not want to respond

explicitly and clearly to his request but rather uses tax language that creates confusion and is prejudicial to him.

c) The CRA's conclusion on his net income from self-employment in 2014 has nothing to do with the issue of the calculation of his employment insurance benefits. What he was asking for was to establish his average weekly earnings for the purpose of calculating his benefits. He argued that the "EI Special Benefits for Self-Employed People" brochure, of which he provided a copy (GD9-8 to GD9-10), never mentions net income and that average weekly earnings refers to a gross amount. He stated that his average weekly earnings were $1,076.22 per week.

d) Average weekly earnings are defined in the employment insurance information document "EI Special Benefits for Self-Employed People" as follows: "If you are eligible for EI special benefits, you can expect to receive 55% of your average weekly earnings up to a defined annual limit."

e) Statistics Canada defines average weekly earnings as the data that includes overtime and corresponds to gross earnings before source deductions.

f) The CRA refers not only to net income but to the premiums paid for tax purposes, while his case involves gross income for the purpose of calculating the payment of benefits.

g) For the 2013 tax year, the benefits received were based on his gross income. Those payments were not based on his net income as is now proposed for the 2014 tax year. He would like an explanation of why the treatment in the 2013 and 2014 tax years is different.

h) He did not provide the Commission with an estimate of his earnings but rather with his tax return as confirmed on May 4, 2015 in his notice of assessment from the CRA.

i) The Commission stated that there is no case law related to this issue but admitted that the Federal Court confirmed the principle by which a claimant's benefits are based on average weekly earnings and not on net income.

j) He had read carefully the relevant sections of the *Employment Insurance Act*, the Regulations and the *Fairness for the Self-Employed Act*. There is no reference in that document to net income but rather to earnings, which means before the deduction of expenses inherent to self-employment.

[36] The Respondent Commission argued as follows (GD4-1 to GD4-10):

a) The base rate of benefits is 55% of the average weekly insurable earnings specified in section 11.1 of the Regulations. Calculation of the benefit rate for self-employed persons is based on the aggregate of all self-employed earnings in the previous calendar year.

b) The rate is determined by dividing the self-employed person's earnings in the previous calendar year by 52 and then multiplying that result by 55%. The qualifying period is always the calendar year immediately before the year during which the benefit period begins.

c) If the CRA has not had the opportunity to process a self-employed person's tax return and benefits and the self-employed person does not have the final amount of their earnings, they are asked to estimate their self-employed income after subtracting operating expenses for the previous tax year. The estimated amount is used to calculate the claim for benefits and clients are informed that they may have to repay benefits if the estimated earnings are higher than the actual income.

d) The self-employed person's actual earnings in the previous tax year are obtained from their tax return. In accordance with the *Income Tax Act*, that amount corresponds to the aggregate of their income minus their expenses and appears on Line 4 of Schedule 13 of their tax return.

e) In the Appellant's case, the Commission received information from the CRA on April 29, 2015 that his earnings for 2014 were $14,289. Consequently, that amount of $14,289 was divided by 52, producing average weekly insurable earnings of $274.78 to which the benefit percentage was applied, resulting in a rate of benefits of $151 per week.

f) The Commission had no choice but to use the amount assessed by the CRA and received through the information exchange system shown on Exhibit GD3-22.

g) There is currently no case law relating to the issue in this case because the legislation took effect on January 1, 2010, but the Federal Court of Appeal has stated the principle that adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning.

h) A claimant's benefit rate is based on weekly insurable earnings. The rate of benefits and method used to calculate those benefits is the same for all claimants, namely, 55% of weekly insurable earnings.

ANALYSIS

[37] In *Canada (A.G.) v. Knee, 2011 FCA 301*, the Federal Court of Appeal reiterates the principle by which adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning. Previous case law has confirmed on numerous occasions that the prescriptions of the Act may not be ignored.

[38] The issue here is to apply the legislative provisions regarding the calculation of the benefits payable to the Appellant as a self-employed person. The Tribunal does not have the power to render a decisions based on fairness as the Appellant wants when he claims that the brochures provided by Service Canada are incomplete, poorly prepared and poorly written and that he should not have to pay the price for that. The Tribunal points out that information from explanatory brochures may not be considered as legislative provisions. It is necessary to refer to the applicable statutes and regulations.

[39] Therefore, the Appellant argues primarily that his rate of benefits should be calculated on the basis of his gross income as a self-employed person for the 2014 tax year. As for the calculation made the previous year to determine his rate of benefits based on the data from his 2013 tax year, that is not the period currently in dispute and the Tribunal does not have the necessary data to comment on the calculations made at that time. However, it is appropriate to indicate that no amendments were made to the provisions applicable to calculating the rate of benefits of self-employed persons.

[40] Paragraph 152.01(2)(a) of the Act defines the earnings of a self-employed person as their income for the year, computed under the *Income Tax Act*. It is therefore necessary to refer to the *Income Tax Act* in order to then determine, pursuant to section 152.16, the rate of benefits to be paid.

[41] The Tribunal agrees that, in order to know what the Appellant's income is from his self-employment for the 2014 tax year under the *Income Tax Act*, it is necessary to refer to and have a good understanding of certain tax concepts, but they cannot be ignored. Thus, it is necessary to refer to his tax return for 2014 and more specifically, what he reported as income from his self-employment and on what he was taxed for that work.

[42] The Appellant provided the Tribunal with that tax return (GD10-5 to GD10-8). The Appellant argued that his income was $57,534. The Tribunal must point out that, for the purposes of the *Income Tax Act*, there are several types of income. Reading the Appellant's tax return, his total income for 2014 consists of four (4) types of income including income from self-employment. The aggregate of all the Appellant's income is $55,967 (GD10-6) but the earnings specific to his self-employment represent a gross amount of $37,354 which, after deduction of the expenses listed in Exhibit GD10-16, comes to a net amount of $14,289. He was taxed on his self-employed earnings using $14,289 as that amount. That amount represents his self-employed income for the purpose of the *Income Tax Act*.

[43] It might make it easier to understand if a parallel is drawn with an employment insurance claimant who is not subject to the conditions of a self-employed person: that claimant will receive benefits determined on the basis of his income from insurable employment under the Act. The rate of that claimant's benefits will not be calculated on income from his registered retirement savings plans or the Quebec Pension Plan. When referring to his 2014 tax return, the amount that the Appellant claims as his income from self-employment includes those types of income.

[44] The Appellant cannot seek to be taxed on his net income from self-employment, which was $14,289, but use the gross income of $37,354 from that self-employment to acquire benefits. Under section 152.16 of the *Employment Insurance Act*, the rate of weekly benefits is 55% of the Appellant's self-employed earnings, divided by 52. The Appellant's average weekly earnings are $14,289 ÷ 52 = $275 (rounded). For the purposes of the *Employment Insurance Act* and under the *Income Tax Act*, that later amount is the average weekly earnings for a claimant subject to the provisions applicable to benefits for self-employed persons. In the Appellant's case, there is no way to calculate his rate of benefits other than as $14,289 x 55% = $7,858 ÷ 52 = $151.

[45] For these reasons, the Commission correctly calculated the rate of benefits that the Appellant could receive once it had received the information from the CRA on the Appellant's self-employed income for the 2014 tax year under the *Income Tax Act*.

CONCLUSION

[46] The appeal is dismissed.

Aline Rouleau
Member, General Division
Employment Insurance Section