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

Citation: *L. M. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 119

Tribunal File Number: GE-16-823

BETWEEN:

L. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: August 26, 2016

DATE OF DECISION: September 20, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Ms. L. M., the Appellant (claimant) along with her spouse, Mr. E. M. attended the hearing.

INTRODUCTION

[1] On November 2, 2014 the Appellant established a claim for employment insurance sickness benefits. On December 8, 2014 the Appellant contacted Service Canada to amend her reports. On December 15, 2014 the Canada Employment Insurance Commission (Commission) determined the Appellant benefits were maternity and not sickness, however the decision was never communicated to the Appellant. On December 8, 2015 the Appellant contacted the Commission regarding her benefits that had been stopped. On December 17, 2015 the Appellant made a request for reconsideration. On January 27, 2016 the Commission maintained the decision of Sickness benefits – Otherwise available. On February 29, 2016 the Appellant filed an appeal with the *Social Security Tribunal of Canada* (Tribunal).

[2] On June 22, 2016 the Appellant contacted the Tribunal as she had missed the hearing on June 21, 2016 due to circumstances at work and requested an adjournment. The Tribunal granted an adjournment and a hearing was rescheduled for August 26, 2016.

[3] The hearing was held by Teleconference for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The fact that the credibility is not anticipated to be a prevailing issue.

c) The fact that the appellant will be the only party in attendance.

d) The information in the file, including the need for additional information.

e) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] The Tribunal must decide whether a disentitlement should be imposed as the Appellant was unable to establish that if not for illness or injury she would been available for work pursuant to subsection 18(b) of the *Employment Insurance Act* (Act).

THE LAW

[5] Subsections 18 (b) of the Act states a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work.

EVIDENCE

[6] On November 7, 2014 the Appellant indicated on her application for employment insurance benefits she was applying for sickness benefits. She was indicated she was pregnant with an expected date of birth of January 9, 2015. She stated she made an arrangement with her employer for her maternity leave to start on October 30, 2014. She indicated she would like to have her parental benefits to start immediately following her maternity benefits for the 35 weeks. On her exit she indicated the reason for separation was illness, injury or surgery (GD3-3 to GD3- 14).

[7] A record of employment (ROE) indicates the Appellant was employed with Group 2 X from February 1, 2014 to October 30, 2014 and indicates Maternity for the reason the ROE was issued (GD3-21).

[8] A medical note dated November 6, 2014 indicates the Appellant was advised to stop working for medical reasons (GD3-23).

[9] On December 8, 2014 the Appellant contacted Service Canada to amend her reports for the period starting November 2, 2014 to the week beginning November 30, 2014 as during this period the Appellant declared not available and did not report sick days (GD3-27 to GD3-29).

[10] On December 15, 2014 the Commission responded internally to the request stating that reports not input as sickness as maternity has to start from BPC. Client had pre-arranged maternity start date with the employer (GD3-30).

[11] On December 15, 2014 the Commission contacted the employer who stated that they had an email from the employee dated September 27, 2014 requesting that she would be starting her maternity leave as of November 3, 2014 (GD3-31).

[12] On December 17, 2015 the Appellant made a request for reconsideration. She stated that in September 2014 she as unable to perform her work duties due to complications with her pregnancy. She stated she spoke to her employer and that she would go on maternity leave in November and would use up what she had left for holidays and sick time until then. She stated initially her employer told her she wasn't eligible for maternity leave as they had looked at X employment standards and not X. She stated that Canada Revenue Agency (CRA) informed her that she was in fact entitled to maternity benefits as well as sick benefits. She stated that she had also seen two doctors who advised her not to return to work and she has a medical note dated November 6, 2014. She stated she explained her situation to Service Canada who informed her she would receive sick benefits until the baby was born, then would receive 18 weeks of maternity and 35 weeks of parental leave. She stated at no time prior to December 4, 2015 was she informed that the original date that she wrote her maternity leave letter to her employer had a bearing on her sickness benefits. She stated in fact when she filed her reports she believed she was to receive sick benefits rather than maternity leave. She stated she was told by an agent that she would have to contact them when the baby was born to change her benefits from sickness to maternity which she did the week of January 18, 2015 the week of the birth. She stated she was shocked in November 2015 when her EI payments were discontinued. She stated she attended a Service Canada office on December 4, 2015 and was told that her claim had been changed which was unbeknownst to her. She included the medical note dated November 6, 2014 (GD3-32 to GD3-35).

[13] On January 27, 2016 the Commission contacted the Appellant and advised her that she was not eligible for sickness benefits because she indicated on her application that she had made an arrangement with her employer to start her maternity leave on October 30, 2014 and

the employer confirmed they had an email that she would be starting her maternity leave on November 3, 2014. Therefore the Appellant has failed to prove that had she not been sick she would have been working. The Appellant stated that she had some problems with her employer and just wanted to get out of there as soon as possible. She stated that she was not well enough to continue working for medical reasons. She stated both her and her mother were told that she could file for maternity benefits and then apply for medical benefits later because she didn't have a note from her doctor when she stopped working, which she did once she stopped working. She stated that here ROE does state she will return November 2, 2015 however she believed she could change this at any time because she wasn't sure if she would take a full year or go back sooner as her partner was thinking of taking some of the parental leave. The Appellant stated that it was conveyed to her that she would receive sickness benefits and then her claim be changed to maternity. She was misinformed by Service Canada and that now she will lose out of weeks of entitlement after being told she was getting sickness benefits (GD3-36 to GD3-37).

[14] On January 27, 2016 the Commission notified the Appellant the original decision was maintained and provided her with the information on appealing to the Tribunal (GD3-38 to Gd3- 39).

[15] On February 16, 2016 the Appellant's mother contacted Service Canada providing clarification of the information previously provided. She stated that the Appellant was suffering from complication relating to her pregnancy. She stated that the Appellant was worried about a maternity leave with her employer due to her short tenure and she didn't want to leave her employer in a lurch as they were very busy. She stated the Appellant was unable to get a diagnosis from her own doctor so she sought another doctor who advised her she should not be working. She sated the notice given was in consideration of her employer's needs and was based on how much longer the Appellant felt she would be capable of working given her worsening health conditions (GD3-40).

[16] On February 29, 2016 the Appellant filed a Notice of Appeal stating that she was informed in January that the answer she made on her initial application inferred that when she informed her employer that she was going to take an early maternity leave and would have

otherwise been available to work. She stated that this is absolutely not the case; she pushed herself as long as she could and due to the health of her baby and herself she could not work again until after the baby was born. She stated she was never advised (by the Commission) that she had been denied sickness benefits until her payments to her account stopped until January 2016. The Appellant included a detailed account of her health issues, medical evidence, her dealings with Service Canada and the events leading up to her appeal (GD2-1 to GD2-9).

EVIDENCE AT THE HEARING

[17] The Appellant stated that late in September she spoke to her boss regarding the complications she was experiencing with her pregnancy and that she was becoming too sick to perform her duties. She stated during the discussion she told her boss that she would try and get through another month. She stated that she worked in X but head office was in X and her boss told her she wouldn't be eligible for maternity leave; however she contacted Service Canada who advised her she was. She stated she was not aware she could have requested a sick leave and that she hadn't worked for this employer long and was afraid to ask if there were any other options available to her.

[18] The Appellant stated that she was told by the Service Canada agent that she would be eligible for sickness benefits and she needed to provide a medical note. She stated they told her she would be eligible for 15 weeks of sickness benefits, 15 weeks of maternity and 35 weeks of parental leave. She stated she was told to advise them of the birth of the baby and her claim would be changed. She stated that she went in person to Service Canada a week after the baby was born and they advised her that the changes were made. She stated at no time then, or following was she told she was not or had not been eligible for sickness benefits. She stated it wasn't until her benefits stopped in November 2015 that she contacted Service Canada and was then informed of this.

[19] The Appellant stated she feel it very unfair that she applied or sickness benefits, answered the questions correctly and was not informed she was not eligible.

[20] The Appellant stated that her employer was very well aware that her health was the reason she was not able to continue to perform her duties, however she never communicated

this this to the Human Resources Department that was in X, and she did not have the ability to do so. She stated when they told her she wasn't eligible for a maternity leave and that they couldn't guarantee her job she was feeling insecure and wasn't about to ask for extra time off.

SUBMISSIONS

[21] The Appellant submitted that:

a) She applied for sickness benefits on the recommendation of the Service Canada agent;

b) She provided a medical note stating she was told to leave her employment;

c) Her boss was very well aware of the fact she had to leave her employment earlier because of her medical complications with her pregnancy;

d) She agreed to an early maternity leave however it was because she was afraid to ask for more sick time in fear her returning to the employment would be comprised;

e) There was a miscommunication between herself, her boss and the HR Department that was located in another province;

f) She was misinformed by the Commission as well as they neglected to inform her at the time she was in contact with them at the beginning of the claim that the code on the ROE determined she was not eligible for sickness benefits; and

g) She was never informed by the Commission until her benefits stopped and enquired a year later.

[22] The Respondent submitted that:

a) The Commission maintains that both the employer and the Appellant indicate a leave for maternity reasons was pre-arranged to start November 2, 2014. However the Appellant did not request maternity benefits, rather she requested sickness benefits prior to her maternity benefits and subsequently provided medical documentation supporting the fact that she was advised to discontinue work for medical reasons;

b) The Commission submits that in order to be eligible for sickness benefits, the Appellant must establish that she is unable to work and if it was not for her illness, she would have been available for work;

c) The Commission argues that the Appellant failed to prove that she would have been working or available to work because, as she stated she just wanted to leave the employer as quickly as possible and therefore informed them she wanted to start her maternity leave which was subsequently approved by the employer;

d) The Commission argues that the hard evidence supports the fact the Appellant pre-arranged a leave for maternity reasons with a return to work date, therefore is not considered otherwise available. It is clear, despite the Appellant's argument she was unable to work due to medical reasons this was not the arrangement made with the employer, nor was it the employer's understanding why she stopped working. It stands, that is it were not for the Appellant's medical condition, she would still not be at work because she had arranged a maternity leave of absence; and

e) There is no dispute that the Appellant was unable to continue working due to medical reasons, her medical note attests to that fact. However, as stated above, being incapable of working due to medical reasons is only one of two conditions to be met in order for medical benefits to be paid. Although the Appellant as satisfied the first condition, she has failed to satisfy the second condition since the evidence clearly shows the Appellant was not otherwise available.

ANALYSIS

[23] Subsections 18 (b) of the Act states a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work.

[24] The Tribunal must ask itself the relevant question: if the Appellant had not been ill, would she have otherwise been available for work.

[25] The Respondent presents the argument that both the employer and the Appellant indicate a leave for maternity reasons was pre-arranged to start November 2, 2014. However the Appellant did not request maternity benefits, rather she requested sickness benefits prior to her maternity benefits and subsequently provided medical documentation supporting the fact that she was advised to discontinue work for medical reasons.

[26] The Appellant presents the argument that she was not aware that she could have requested a sickness leave from her employer instead of a maternity leave at the time. She testified that there were extenuating circumstances around her having to leave her employment prematurely. She testified that she had been very forthcoming with her direct boss and she was aware of the Appellant's health situation. The Appellant testified that her boss initially told her she wouldn't be eligible for maternity benefits and they could not guarantee her employment following the birth of the baby. She stated that this left her feeling insecure along with the fact she had not worked there long. She testified that she told her employer she would try and work as long as she could, but subsequently made the decision to agree to a maternity leave to start on November 2, 2014.

[27] The Tribunal finds from the evidence on the file that the ROE indicates the Appellant left for maternity leave and she would return to work on November 2, 2015, however the Appellant provided oral testimony that there were extenuating circumstances that led her to the necessity to agree to take an early than anticipated maternity leave, as she began to experience issues with her health and caused by the pregnancy.

[28] The Tribunal finds from the Appellant's evidence that she was not aware she could have asked her employer to leave the employment early due to illness and she believed the only option she has available to her was to agree to take her maternity leave.

[29] The Tribunal finds from the Appellant's evidence on the file and from her oral testimony that her employer had not been forthcoming as she had been told initially been told she would not be eligible for a maternity leave and therefore could not guarantee she could return to her employment, which the Tribunal finds would provide cause for the Appellant to feel apprehensive to seek out other options that may have been available to her.

[30] The Tribunal finds from the evidence on the file and from the Appellant's oral evidence that upon her conversation with Service Canada that she was informed that there were other options available to her, as such receiving sickness benefits prior to maternity benefits. The Tribunal finds the evidence clearly supports that the Appellant acted on the advice of Service Canada when she made her initial application for sickness benefits and not for maternity benefits.

[31] The Tribunal finds the evidence is clear that the Appellant was truthful and forthcoming in her answers and in the fact that she had agreed with her employer that she would take an early maternity leave because she has exhausted all her vacation and sick time with the employer. The Tribunal finds the evidence supports that there was no reason for the Appellant to believe that the information she received from Service Canada at the time of her application, or subsequently when she requested her initial reports be amended, or when, upon the direction from Service Canada, report the birth of her baby to change what she believed to be from sickness to maternity benefits to not be correct. The Tribunal finds there is no evidence on the file to show why the Commission failed to provide the correct information, or to inform the Appellant at any time during this process but only subsequently to her calling them once her benefits stopped coming.

[32] The Tribunal finds from the Commission's submission where they stated "However the Appellant did not request maternity benefits, rather she requested sickness benefits prior to her maternity benefits and subsequently provided medical documentation supporting the fact that she was advised to discontinue work for medical reasons" should substantiate that the Appellant was in fact sick and not available for work, and she was not aware that what was indicated on her ROE would have an implication on her benefits for sickness benefits.

[33] The Tribunal finds from the Appellant's oral evidence that had she known this to be the case she could have requested an amended ROE from her employer.

[34] The Respondent presents the argument that that the Appellant failed to prove that she would have been working or available to work because, as she stated she just wanted to leave the employer as quickly as possible and therefore informed them she wanted to start her maternity leave which was subsequently approved by the employer.

[35] The Appellant presents the argument that her direct boss was aware of her health situation and the difficulties she was experiencing completing her duties, which was having a negative impact in the workplace. She testified that she was sick and unable to continue. She testified that she didn't feel she had any other option and that in the best interests of the employer agreeing to leave early was the answer.

[36] The Tribunal finds that the Commission failed to investigate any of the Appellant's statements regarding the reasons she took a much earlier maternity leave than when she had expected. The evidence supports the Commission made one call to the employer and to confirm that the Appellant was on a maternity leave. The Tribunal finds the evidence clearly supports that there were extenuating circumstances that should have been investigated and that the oral statements provided by the Appellant should have been considered over one single hearsay statement from the person from head office in X that issued the record of employment.

[37] The Respondent presents the argument that there is no dispute that the Appellant was unable to continue working due to medical reasons, her medical note attests to that fact. However, as stated above, being incapable of working due to medical reasons is only one of two conditions to be met in order for medical benefits to be paid. Although the Appellant as satisfied the first condition, she has failed to satisfy the second condition since the evidence clearly shows the Appellant was not otherwise available.

[38] The Tribunal finds that the Appellant has provided evidence to support that there were extenuating circumstances surrounding her decision to agree to take an early maternity leave, when in fact she should have requested a medical leave from her employer, which then the ROE would have indicated she left for illness/injury which the evidence clearly shows is the reason and is undisputed from the Commission. The Tribunal finds that had the Appellant not been experiencing medical complications she would not have agreed to the early maternity leave and thus been still working.

[39] The Tribunal finds that although there is jurisprudence to support that claimants who are in receipt of maternity benefits when she becomes ill was not entitled to benefits under s.18(b) as she would not otherwise been available to work since she was already on maternity/parental benefits; however this is not the case before us.

[40] The Tribunal finds that the Appellant did not initially apply for maternity/parental benefits but applied for sickness benefits, and she was never informed that her claim was not being processed as such until her payments stopped in November 2015, a year later. The Tribunal finds that the evidence clearly supports that Appellant was ill prior and that her employer should have issued a record of employment indicated illness/injury. The facts clearly demonstrate that there was the Appellant's lack of knowledge of the employment insurance program and the benefits she was entitled to, along with the miscommunication with the employer.

[41] The Tribunal relies on CUB 79390A where Umpire Goulard states: In CUB 77039, Justice Marin dealt with a case where the facts and issue were basically the same as in the case at bar. In an extremely well developed decision, Justice Marin concluded as follow:

"The Employment Insurance Act has undergone several changes over the years. Its original purpose, to provide income for those who suffer an involuntary loss of employment, has long been overtaken by social changes in a rapidly evolving Canadian society. The introduction of compassionate leave, allowing claimants to leave Canada for a limited time under grounds enumerated in Regulation 55 are only two modifications propelled solely on social grounds. I note in each case the Regulation states clearly 'Subject to s. 18'. Certainly the values protected are not more important than those which would be protected if sickness leave was available to claimants who become gravely sick, immediately after or before their maternal/parental benefits.

*I conclude maternal/parental benefits ought to be interpreted as if the provisions of the Act were preceded by the words '**Notwithstanding the provisions of s. 18'**, to give full force and effect to the will of Parliament. If the Commission were to give a more liberal interpretation to the provisions of the Act in relation to women who are able to establish a serious illness at the end of their maternal/parental leave, its approach would be consistent with the will of elected officials. It would certainly not open the floodgates to an extremely large number of claimants but would offer minimum comfort and solace to a small, hard hit sector of society which already qualified for special benefits.*

Alternatively, it can recommend appropriate legislation to give full force and effect to the legislative spirit of Bill C-49 in relation to maternal/parental benefits.

The claimant was entitled and ought to have been given the benefits applied for." I fully agree with Justice Marin's reasoning and decision which I adopt.

Accordingly, the claimant's appeal is allowed and the Board of Referees' decision is set aside.

[42] The Tribunal finds a disentitlement should not be imposed as the Appellant was able to establish that if not for illness or injury she would been available for work pursuant to subsection 18(b) of Act.

CONCLUSION

[43] The appeal is allowed.

Teresa Jaenen

Member, General Division - Employment Insurance Section