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

Citation: *J. K. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 148

Tribunal File Number: GE-16-2140

BETWEEN:

J. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: November 3, 2016

DATE OF DECISION: November 24, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. K. (the Appellant)

INTRODUCTION

[1] The Appellant applied for Employment Insurance benefits (EI benefits) on October 26, 2015, and established an initial claim on October 25, 2015. The Appellant worked for "Devon Energy" until January 23, 2015. On February 22, 2016, the Appellant requested that his claim be antedated to January 25, 2015. The Canada Employment Insurance Commission (Commission) determined that the Appellant's claim for EI benefits could not start on January 25, 2015, because he did not prove that between January 25, 2015, and October 26, 2015, he had good cause to apply late for benefits. The Appellant requested a reconsideration of the Commission's decision, which was denied, and the Appellant appealed to the Social Security Tribunal (Tribunal). The Appellant's hearing scheduled for October 12, 2016, was adjourned and re-scheduled for November 3, 2016.

[2] The hearing was held by videoconference for the following reasons: The fact that the credibility may be a prevailing issue; and the availability of videoconference in the area where the Appellant resides.

ISSUE

[3] The issue is whether the Appellant's initial claim for benefits can be considered to have been made on an earlier day pursuant to subsection 10(4) of the EI Act.

THE LAW

[4] Subsection 10 (4) of the EI Act stipulates that a claim that is returned outside the time prescribed shall be regarded as having been made on an earlier day if the claimant shows that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the claim was made. The claimant must also show they qualified to receive benefits on the earlier day

[5] The Federal Court of Appeal (FCA) has affirmed that the legal test for "good cause" is whether, through the entire period of the delay, the claimant did what a reasonable person would have done to satisfy himself or herself as to their rights and obligations under the EI Act (*Kaler v. Attorney General of Canada*, 2011 FCA 266; *Persiiantsev v. Attorney General of Canada*, 2010 FCA 101; *Albrecht v. Attorney General of Canada*, A-172-85).

EVIDENCE

Documentary Evidence

[6] The Appellant applied for EI benefits on October 26, 2015, and established an initial claim on October 25, 2015.

[7] The Appellant indicated he worked for "Devon Energy" from January 7, 2013, to January 23, 2015.

[8] The Appellant's Record of Employment indicated he was laid off by the employer.

[9] On November 23, 2015, the Commission wrote to the Appellant and indicated that he had 516 hours of insurable employment between October 26, 2014, and October 24, 2015, and required 665 hours of insurable employment to qualify for benefits. The Commission explained that the Appellant failed to qualify for benefits effective October 25, 2015.

[10] On February 22, 2016, the Appellant requested that his claim be antedated to January 25, 2015. He wrote that he was not aware of the process at the time. He explained that he talked to the Human Resources with the employer and they never informed him about the timeframe to apply or the process involved. He also indicated that he had not expected to be off work for that long. He wrote that the oil price collapse (and the recession that ensued) had been beyond expectation.

[11] On February 23, 2016, the Commission wrote to the Appellant and explained that his EI benefits could not on January 25, 2015, because he did not prove that between January 25, 2015, and October 26, 2015, he had good cause to apply late for benefits.

[12] In a request for reconsideration (date stamped by Service Canada on March 21, 2016) the Appellant wrote that he wanted his EI benefits to start as of January 25, 2015, as opposed to October 26, 2015. He explained that the Employment Insurance (EI) process was not communicated to him by his employer or the "Government Agencies." He indicated that upon investigation he applied and would like his claim start date to be re-considered to January 25, 2015.

[13] On April 28, 2016, the Appellant spoke to the Commission and explained that he did not expect to be off work that long. He said he was looking for work and hitting the pavement hard. He indicated that he was in contact with a networking group and someone said he should apply for EI benefits and he did. He said he did not contact Service Canada to determine whether he would be eligible for EI benefits. He said his employer did not mention anything about applying for EI benefits after he was laid off. He said he did not refer to a Service Canada website.

[14] In a Notice of Appeal (date stamped by the Appellant on May 30, 2016) the Appellant wrote that was not familiar with the EI Program since he had not applied for benefits or utilized the program in the past. He explained that he was not aware of the application process and timeline. He explained that he inadvertently submitted his application beyond the designated time-frame. He indicated this was an oversight which had been detrimental financially to himself and his family. He explained that when he was laid off he immediately utilized the services of the outplacement agency which he continued to utilize today to assist in his job search. He explained that the conversation about Employment Insurance (and the associated process) was not part of the conversation with his employer, supervisor, or outplacement agency at the time of his termination of employment in January 2015. He indicated that it was not until a period of time afterwards with the continued downturn of the industry (and the continued dwindling of his family's financial resources) did he pursue and apply for EI benefits in October 2015.

[15] On October 12, 2016, the Tribunal asked the Commission if they could investigate whether the changes in the qualifying hours implemented by the Government of Canada in July 2016 would affect the Appellant.

[16] On October 14, 2016 the Commission responded to the Tribunal (Exhibit GD6-1) The Commission explained they had thoroughly reviewed the request by the Tribunal. They wrote

that regrettably the new legislation (Elimination of the NERE provisions) would not change their decision as the Appellant had insufficient hours to qualify for benefits. The Commission further explained that the Appellant did not act as reasonable person would have after his job ended and applied for EI benefits in a timely manner.

Oral Evidence from the Hearing

[17] The Appellant testified that he had been looking for work in the gas industry. He explained that it had been the largest recession witnessed in the oil industry. The Appellant provided supporting data and analysis on the recession in the oil industry. He said that the industry investment had been cut by $38 billion which affected many projects in Alberta. He further indicated that 100,000 jobs had been lost in the industry and commodity prices had dropped.

[18] The Appellant explained that he had been "personally impacted" by the downturn in the oil industry. He said the downturn had affected him and his family. He indicated that he had worked in the industry for 27-years and his job was eliminated at the front-end of the downturn. He explained that since he was laid off by the employer he had pursued employment opportunities regionally and internationally. He said that he investigated 200 job employment opportunities through contacts and networking. He explained that there were 15 opportunities brought forward, but they were waiting for funding. He said that his focus was to find employment inside or outside the industry. He further indicated his goal was to aggressively find employment.

[19] The Appellant testified that he had been overly optimistic on the depth and duration of the recession. He said he thought it would be a couple of months, but it had persisted for a year-and- a-half. He indicated that he did not receive any information from the employer's Human Resources about EI benefits. He said he had joined an outplacement agency within 7-days of his layoff from the employer. He testified that he was not familiar with the Employment Insurance "process." He said it was an oversight on his part as he had physical and emotional stress. He further indicated he had four children.

[20] The Appellant testified that three-weeks prior to his application date for EI benefits (October 26, 2015) he could not connect by telephone with Service Canada. He said he physically went to the Service Canada office after he received no response by telephone. He

explained that he was receiving counsel from a networking group. He said that in mid-September 205 he was told about applying for EI benefits. He testified that after he was laid off on in late January 2015 he was focused on getting to the workforce quickly. He said that his optimism was "distorted" in the early days of unemployment. He explained that he spent 40-hours per week looking for work. He said that it was five times more difficult and stressful than expected.

[21] The Appellant indicated that his layoff had an impact on his wife. He explained that his wife previously had surgery for skin cancer. He said his wife's health issues were amplified by his layoff and search for employment. He indicated that he first saw his Record of Employment in the Appeal Docket in August 2016. He said he was issued a severance package after his layoff from the employer. He said after his layoff he had contacted the employer's Human Resources about his health and medical benefits. He confirmed that his severance monies were issued to him as listed in his Record of Employment.

SUBMISSIONS

[22] The Appellant submitted that:

> a) Since he was laid off by the employer he had pursued employment opportunities regionally and internationally.
>
> b) He spent 40-hours per week looking for work.
>
> c) He had been overly optimistic on the depth and duration of the recession.
>
> d) He did not receive any information from the employer's Human Resources about EI benefits.
>
> e) He was not familiar with the Employment Insurance "process."
>
> f) It was an oversight on his part in not applying for EI benefits as he had physical and emotional stress.

> g) His wife previously had surgery for skin cancer and her health issues were amplified by his layoff and search for employment.

[23] The Respondent submitted that:

> a) The Appellant did not act like a "reasonable person" in his situation would have done to verify his rights and obligations under the EI Act.
>
> b) The Appellant stopped working on January 23, 2015, due to shortage of work and he delayed until October 26, 2015, before filing his application for benefits. It was considered the Appellant made a personal decision to delay filing a claim in hopes that he would become re-employed. While this was laudable it does not meet the requirement for good cause for the delay as the Appellant did not do what a prudent person in the same circumstances would have done, namely apply for benefits in a timely manner.
>
> c) The Appellant's ignorance of the law was no excuse as a person in need would be expected to enquire especially when one has gone without funds for over nine-months

ANALYSIS

[24] The relevant legislative provisions are reproduced in the Annex to this decision.

[25] The Tribunal must decide whether the Appellant's initial claim for benefits can be considered to have been made on an earlier day pursuant to subsection 10(4) of the EI Act.

[26] The Tribunal finds the Appellant applied for EI benefits on October 26, 2015, and established an initial claim on October 25, 2015.

[27] The Tribunal recognizes the Appellant worked for "Devon Energy" until January 23, 2015, and was laid off by the employer.

[28] The Tribunal finds that on February 22, 2016, the Appellant requested that his claim be antedated to January 25, 2015.

[29] The Tribunal realizes that on February 23, 2016, the Commission wrote to the Appellant and explained that his EI benefits could not on January 25, 2015, because he did not prove that between January 25, 2015, and October 26, 2015, he had good cause to apply late for benefits.

[30] The Tribunal does recognize the Appellant provided numerous reasons why he filed late for EI benefits. The Tribunal will address these submissions in a moment, but will initially emphasize the relevant EI legislation and legal test for an antedate. First: Subsection 10(4) of the EI Act states that:

> An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.

[31] Second: The Federal Court of Appeal (FCA) has affirmed that the legal test for "good cause" is whether, through the entire period of the delay, the claimant did what a reasonable person would have done to satisfy himself or herself as to their rights and obligations under the EI Act (*Kaler v. Attorney General of Canada*, 2011 FCA 266; *Persiiantsev v. Attorney General of Canada*, 2010 FCA 101; *Albrecht v. Attorney General of Canada*, A-172-85).

[32] The Tribunal recognizes the Appellant submitted that after his layoff he aggressively pursued employment. He further explained that he spent 40-hours per week looking for work. The Tribunal accepts that the Appellant was spending time looking for employment after his layoff and made this activity a top priority. Nevertheless, the Tribunal must apply the legal test to the evidence. In short: Did the Appellant have good cause for his nine-month delay in applying for benefits? In other words: Did the Appellant do what a reasonable person would have done to satisfy himself as to his rights and obligations under the EI Act? The Tribunal finds that a reasonable person would have made some contact with Service Canada about timelines and obligations in applying for EI benefits over his nine-month period of delay. Furthermore: The Tribunal finds that a reasonable and prudent person would have made some

inquiries with his employer's Human Resources with respect to information on EI benefits or what steps he need to take to apply for benefits.

[33] As cited above, the Tribunal accepts that the Appellant aggressively pursued employment after his layoff and was initially optimistic the recession in the oil industry would end. Nevertheless, the Tribunal wishes to emphasize that good cause must be shown "throughout the period beginning on the earlier day and ending on the day when the initial claim was made." In the Appellant's case, the delay in filing for EI benefits was nine-months and the Tribunal cannot conclude the Appellant showed good cause throughout the entire period of that delay.

[34] On the matter of the Appellant's seeking employment after his layoff, the Tribunal relies for guidance on the Federal Court of Appeal (*Shebib v. Attorney General of Canada*, 2003 FCA 88). In that decision, Justice Marshall Rothstein explained that: "Indeed, this Court has found that, as laudable as it might be, an intention not to claim employment insurance benefits and seek alternative employment is not good cause for delay."

[35] The Tribunal further realizes the Appellant submitted he was not familiar with the Employment Insurance "process" and did not receive any information from the employer's Human Resources about EI benefits. The Tribunal does recognize the Appellant had been employed in the oil industry for 27-years and never applied for EI benefits before. Nevertheless, the Tribunal finds that a reasonable and prudent person would have made some inquiries with Service Canada about EI benefits. In short: The Tribunal does not find anything that would have prevented the Appellant from making inquiries with Service Canada by telephone or in-person even though he was seeking employment in an aggressive manner.

[36] The Tribunal does realize the Appellant further testified that he did not apply for EI benefits due to an oversight on his part as he had physical and emotional stress. The Tribunal accepts that after his layoff the Appellant faced some physical and emotional stress. Nevertheless, the Tribunal finds the Appellant did not submit any medical documentation to indicate he was hospitalized or taking medication. Furthermore: The Appellant testified he was spending 40-hours per week looking for work and the Tribunal finds this pursuit of employment opportunities would indicate the Appellant was not prevented by medical issues from making inquiries as to his rights and obligations under the EI Act.

[37] During the hearing, the Appellant also explained that his wife previously underwent surgery for skin cancer and her health issues were amplified by his layoff and search for employment. The Tribunal accepts that after his layoff the Appellant faced some difficult family matters. Still, the Tribunal must apply the legal test to the evidence. As cited above, the Appellant must show "good cause" through the whole period of delay which was from January 25, 2015, to October 26, 2015. After reviewing all the evidence and submissions, the Tribunal finds that a reasonable and prudent person would have made some inquiries with Service Canada about his eligibility for EI benefits over this nine-month period of delay.

[38] The Tribunal certainly recognizes the Appellant pursued employment after his layoff and confronted a persistent recession in the oil industry that was unexpected. Nevertheless, the Tribunal must apply the EI legislation to the evidence. In short: The Tribunal cannot ignore, re-fashion, circumvent or re-write the EI Act even in the interest of compassion (*Knee v. Attorney General of Canada*, 2011 FCA 301).

[39] In the final analysis, the Tribunal finds the Appellant's initial claim for benefits cannot be considered to have been made on an earlier day, because he did not show there was good cause for the delay throughout the period beginning on the earlier day (January 25, 2015) and ending on the day when the initial claim was made (October 26, 2015) pursuant to subsection 10(4) of the EI Act.

CONCLUSION

[40] The appeal is dismissed.

Gerry McCarthy

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

10 (4) An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.