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

Citation: *N. G. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 18

Tribunal File Number: GE-16-2576

BETWEEN:

N. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: December 6, 2016

DATE OF DECISION: February 3, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of his appeal via teleconference. The Appellant's representative, W. G., Q.C. (Mr. W. G.), also attended via teleconference. Mr. W. G. identified himself as the father of the Appellant.

INTRODUCTION

[1] On April 10, 2015, the Appellant made an initial application for regular employment insurance benefits (EI benefits). On April 17, 2015, the Canada Employment Insurance Commission (Commission) denied the Appellant's claim because it determined he had accumulated 595 hours of insurable employment but required 630 hours to qualify for benefits.

[2] On April 30, 2015, the Appellant requested the Commission reconsider its decision, stating that he had received assurances from an agent at his local Service Canada office that he would receive EI benefits while taking his apprenticeship training. The Commission interviewed the Appellant and maintained its decision that he had insufficient hours of insurable employment to qualify for benefits.

[3] On June 25, 2015, the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal), but on November 19, 2015, the Tribunal dismissed the Appellant's appeal. The Appellant then appealed to the Appeal Division of the Tribunal. On June 24, 2016, the Appeal Division issued its decision allowing the Appellant's appeal and ordering the case be returned to the General Division of the Tribunal for a new hearing.

[4] The new hearing was held by teleconference because 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

[5] Whether the Appellant has sufficient hours of insurable employment to qualify for EI benefits.

EVIDENCE

[6] On April 10, 2015, the Appellant applied for regular EI benefits (GD3-3 to GD3-12). On his application, the Appellant indicated he would be attending apprenticeship training from April 13, 2015 until May 26, 2015 at “NBCC X” (GD3-3), and that he would be returning to his prior employment with “liberty mechanical” on June 1, 2015 (GD3-5). The Appellant gave his mailing address as X X X, X, New Brunswick and confirmed that his residential address was one and the same as his mailing address (GD3-4).

[7] A Record of Employment (ROE) was issued by “Shadow Creek Furniture & Supply Co Ltd/Dir” (referred to by the Appellant as “Liberty Mechanical”) (Liberty), which reported that the Appellant accumulated 595 hours of insurable employment as an air conditioning technician between January 5, 2015 and April 10, 2015 (GD3-13).

[8] The Commission considered the Appellant’s application and, based on his residence in the EI Economic Region of X-X region and in accordance with the regional rate of unemployment there (7.2 %), the Commission determined that the Appellant needed to accumulate 630 hours of insurable employment during his qualifying period, which was the period from July 27, 2014 to April 11, 2015 (GD3-14 to GD3-16).

[9] As the Appellant had only 595 hours according to the ROE from Liberty, the Commission denied the Appellant’s application for benefits because he did not have sufficient hours to establish a claim (GD3-17 to GD3-18). In its decision letter of April 17, 2015, the Commission specifically advised:

> “If you have additional hours of insurable employment between July 27, 2014 and April 11, 2015 that you did not provide on your application for benefits, you should provide a Record of Employment. This employment may help you qualify for benefits.” (GD3-17)

[10] On April 30, 2015, the Appellant asked the Commission reconsider its decision (GD3-18 to GD3-21). The Appellant gave his reason for requesting a reconsideration as follows:

> "I was told at your office in X by one of your employees that the apprenticeship benefits complete with code had nothing to do with regular benefits as I was concerned it would. She assured me it was separate and I would be fine! Had I known I wouldn't be eligible I would have continued to work and done my final block in the fall! I am 3 weeks into my course, I have payed *(sic)* my tuition, I have a daughter and many bills to pay. As I said this is my last block and am very stressed now learning I will have no funds. Please can you take a look at this and reconsider. After this I prob *(sic)* won't need EI benefits for a few years. All my blocks will be done and I have a company waiting for me to finish with lots of work. Thank you for your time and Please." (GD3-18 and GD3-21)

[11] An agent of the Commission telephoned the Appellant about his request for reconsideration on May 27, 2015 and documented their conversation in a Supplementary Record of Claim (GD3-22). The agent noted the Appellant's statement regarding his hours of insurable employment as follows:

> "Explained that in order to establish a claim for benefits, he requires 630 hours of insurable employment, whereas he has 595 hours.
>
> The claimant stated since he started his training he has been working a day a week for his employer and may have those 35 hours now, or close to it. Asked the claimant how long he has remaining in his course and he stated one week. Advised the claimant that while he may now have sufficient hours, it is not possible to retroactively pay benefits."

[12] The Commission therefore maintained its initial decision (GD3-23 to GD3-24).

[13] The Appellant appealed the reconsideration decision (GD2), and gave the following reasons for his appeal:

> "Spring 2015 planning to go to trade school – final block of the Refridgeration Tech Course. Boss said check if have enough hours to get EI while in school (I was laid off from Sept. to Jan.) Went to local EI office – asked one of the people who work behind the counter. Not new staff – have talked with her before. Told her I was laid off for over 4 months, asked if elegible *(sic)* – she said YES, regular and trade school benefits were TOTALLY SEPARATE, once you put in your apprenticeship code it would be treated different from regular. Then after I was a couple of weeks into course, I got a letter denying me EI. Apparently I was 35 hours short, but how else was I supposed to find out the rules? I asked at the EI office and I was misinformed. I could so easily have gone to the fall class if I had been told the correct information. For 7 WEEKS I had NO INCOME so I have had to borrow the money to pay my rent, child support payments, groceries, etc. while I was in school." (GD2-3)

[14] Following the dismissal of his appeal in the first instance, the Appellant sought leave to appeal to the Appeal Division of the Tribunal. In his Application Requesting Leave to Appeal to the Appeal Division (AD1), the following statement was made in Schedule A thereto:

> "The facts are as follows.
>
> For a period of time leading up to and including Friday April 10, 2015, the Appellant was ordinarily resident at X X X, X, NB X, where he lived as a guest of his maternal Grandfather J. E., the owner of that residence.
>
> Beginning on Saturday April, 11 2015, and continuously thereafter, for a period of eight weeks, to and including June 6, 2015, the Appellant was ordinarily resident at X X X, X, NB, X, where he lived as a guest of his parents, Mr. & Mrs. W. G., the owners of that residence. The Appellant took up residence at his parent's home to facilitate his attendance at his apprenticeship "block release" training course at the New Brunswick Community College campus in X, NB, some five kilometers distant from his parent's home, commencing Monday, April 13, 2015.
>
> The Appellant made an initial claim for benefits on Friday, April 10, 2015. The Appellant's "interruption of earnings" occurred on Monday, April 13, 2015, the first day he was unable to report for work with his employer because, simply put, he was in school." (AD1-5)

Following an analysis of the *Employment Insurance Regulations* (EI Regulations), the statement concludes:

> "In fact, in the week in which the Appellant's benefit period began, he was ordinarily resident in X, NB; this is "EI Economic Region 08 – X", where the unemployment rate was 10.4%. Section 7(2) of the Act provides that where the regional rate of unemployment is "more than 10% but not more than 11%, the required hours of insurable employment to qualify for benefits are 525 hours. The Appellant had 595 insurable hours. He qualifies for benefits." (AD1-6)

[15] In the Appellant's further submissions prior to the new hearing of his appeal (RGD3), the following additional information was provided:

> "On Friday, April 10, 2015, the Appellant was "ordinarily resident" at his maternal grandfather's home in X. He resided there as a guest. He paid no rent. He had no lease. He had no right to remain in that home one day longer than permitted by his grandfather.
>
> On Saturday, April 11, 2015 the Appellant moved from his grandfather's home in X to his parent's home in X, NB, where he became a guest of his parents and "ordinarily resident" in their home. He retained no "right" to return to his grandfather's home in X

at some later date. He made this move for practical, bona fide and legitimate reasons; to facilitate his attendance at the New Brunswick Community College in X, NB commencing Monday, April 13, 2015. He did not "…move deliberately to some area of high unemployment where (his) entitlement to benefits would be greater." That was the consequence of his move, not the purpose of his move." (RGD3-1 to RGD3-2).

At the Hearing

[16] The Appellant testified as follows:

(a) He was living in a common-law relationship with his girlfriend on Aberdeen Street in X until April 2014. In April 2014, he left that relationship and moved in with his widowed grandfather at X X X, X.

(b) As at April 2014, he was apprenticing as an HVAC technician with Liberty, (identified as the employer who issued the ROE at GD3-13).

(c) Liberty is located in X, NB. The employer's address on the ROE is "X", which the Appellant stated "is in X".

(d) His employment at Liberty was "occasional" in that he would work for a period and then get laid off either due to a shortage of work or to attend an apprentice training course.

(e) Liberty was the only employer he worked for during the entirety his apprenticeship training, which began in 2010 – 2011 and was on-going at the time he applied for EI benefits on April 10, 2015.

(f) He lived in X throughout his apprenticeship training, but for the periods of time he went to school in X for his "block training" courses.

(g) He attended a training course "about once a year", and each block of training was 7 – 10 weeks long. In April 2015, he attended his fourth "block release training" in X.

(h) His training was always held at New Brunswick Community College in Xs, which was the only location for his HVAC training. Each time he attended a

training course, he lived with his parents at X X X, X, which is on the outskirts of the town of X.

(i) X is approximately 160 km away from X.

(j) When he lived with his grandfather in X, he was not financially able to rent an apartment elsewhere. His status was a guest.

(k) When he lived at his parents in X, his status was also a guest.

(l) He did not pay rent to either his grandfather or parents, and there was no lease or contract or written understanding setting out his right to live at either location.

(m) When he lived with his grandfather, he contributed to the following expenses: property taxes, condo fees and utilities.

(n) When he lived with his parents, he paid nothing.

(o) He always bought his own groceries and had his own fridge for food in both locations.

(p) While he was in school, in addition to completing the courses, he needed to have hours of training. The 35 hours of insurable employment that he told the agent he worked during the course (see GD3-23) were "classroom hours" and not additional hours of work.

(q) When he mentioned paying "my rent" in his Notice of Appeal (see GD2-3), he was using "loose terminology" for the funds he was paying "to help out."

(r) He was still "helping out with my grandfather's utilities during the course".

(s) He travelled regularly on weekends and often returned to X to get his mail at his grandfather's house. He stated: "All of my belongings came with me when I moved to my parents', but I still had access to my grandfather's place in X."

(t) He returned to live with his grandfather at X X X, X within one (1) week of completing his “fourth block release” training on May 29, 2015.

SUBMISSIONS

[17] The Appellant submitted that, when his benefit period began, he was ordinarily resident in X, NB, in the EI Economic Region 08-X, where the regional rate of unemployment at the material time was 10.8%. He therefore needed 525 insurable hours to qualify for benefits. He had 595 insurable hours and thus he qualifies for benefits.

[18] The Appellant further submitted that the test for the applicable EI Economic Region refers only to where a claimant is “ordinarily resident” and not a “usual” or “permanent place of residence”. The Commission equates “ordinarily resident” with “permanent residence”, which is not fair or appropriate. In today’s economy, where mobility is required for individuals to take advantage of education and work opportunities, the term “ordinarily resident” should be given a modern definition and should be determined by ascertaining “where is he when he needs to be?” The Appellant submitted that, when he was working, he needed to be in X and he was ordinarily resident in X; when he was in school for training, he needed to be in Xs and he was ordinarily resident there (in X). The Appellant changed residences each time he needed to be attend training and was ordinarily resident in X while he was in school. When he finished his course, he moved back to X because that’s “where the jobs are”, but it was “conceivable” he could have found a job in Xs and remained there.

[19] The Commission submitted that the Appellant’s normal place of residence is X, New Brunswick and his stay in X, New Brunswick was purely temporary while he was attending training. As such, X cannot be considered the Appellant’s ordinary place of residence and X-X is the correct EI Economic Region for which his ability to qualify for EI benefits must be determined. The Commission further submitted that the Appellant’s qualifying period was established from July 27, 2014 to April 11, 2015 (GD4-3) and he needed the number of insured hours specified in paragraph 7(2)(b) of the *Employment Insurance Act* (EI Act), namely 630 hours based on the rate of unemployment of 7.2% in the region where he resided (X-X). As he accumulated only 595 hours of insurable employment in his qualifying period, he failed to meet the requirements to qualify for EI benefits.

ANALYSIS

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

[21] In order to receive EI benefits, a claimant must meet the requirements set out in section 7 of the EI Act, namely he must have experienced an interruption of earnings from employment and he must have accumulated a minimum number of hours of insurable employment during his qualifying period. The minimum number of hours required to qualify varies according to the regional rate of unemployment where the claimant is ordinarily resident.

[22] In the present case, there is no dispute that the Appellant is ***not*** a new entrant or re-entrant pursuant to subsection 7(4) of the EI Act (see GD4-3). As a result, subsection 7(2) of the EI Act applies to his claim and the Appellant must meet the minimum requirement for hours of insurable employment set out in the table in paragraph 7(2)(b) of the EI Act.

[23] The Commission considered the Appellant's ordinary place of residence to be X, New Brunswick, which is in the EI Economic Region of X-X, and where the unemployment rate was 7.2% in the week preceding his benefit period. On that basis, according to the table in paragraph 7(2)(b) of the EI Act, the Appellant required 630 hours of insurable employment to qualify for EI benefits. As there is no dispute that he accumulated only 595 hours of insurable employment in his qualifying period, the Commission found that the Appellant did not meet the requirements to qualify for benefits.

[24] The Appellant submitted that he was ordinarily resident in X, New Brunswick, which is in the EI Economic Region of X, and where the unemployment rate was 10.8% in the week preceding his benefit period. On that basis, according to the table in paragraph 7(2)(b) of the EI Act, the Appellant required only 525 hours of insurable employment to qualify for EI benefits, which he more than meets with his 595 hours.

[25] Subsection 10(1) of the EI Act provides that a claimant's benefit period begins on the later of ***either*** the Sunday of the week in which the interruption of earnings occurs ***or*** the Sunday of the week in which the initial claim for EI benefits is made. In accordance with subsection 14(1) of the EI Regulations, an interruption of earnings occurs when there has been (a) a separation from employment ***and*** (b) at least 7 consecutive days during which no work is

performed for the employer ***and*** (c) at least 7 consecutive days in which no earnings arising from that employment are allocated. An unpaid educational leave of absence constitutes an interruption of earnings (*CUB 23855*). In the present case, the Appellant's interruption of earnings commenced on April 17, 2015, seven (7) days after his last day of work at Liberty. The Sunday of the week of April 17, 2015 was April 12, 2015. He made his initial claim for EI benefits on April 10, 2015 and the Sunday of that week was April 5, 2015. The Appellant's benefit period therefore began on the later of those two Sundays, namely April 12, 2015.

[26] Paragraph 17(1.1)(a) of the EI Regulations provides that the regional rate of unemployment to be considered for purposes of determining if a claimant qualifies for EI benefits under section 7 of the EI Act is the rate of unemployment for the EI economic Region "in which the claimant was, during the week referred to in subsection 10(1) of the Act, ordinarily resident".

[27] The Tribunal must, therefore, make a finding as to where the Appellant was ordinarily resident during the week of April 12, 2015. For the reasons set out below, the Tribunal finds that the Appellant was ordinarily resident in X, New Brunswick at this time.

[28] Although the Appellant did not testify at the hearing as to the exact dates he lived with his parents for his block training starting in April 2015, the Tribunal accepts the dates identified in the Appellant's Application Requesting Leave to Appeal to the Appeal Division at AD1-5:

> "Beginning on Saturday April, 11 2015, and continuously thereafter, for a period of eight weeks, to and including June 6, 2015, the Appellant was ordinarily resident at X X X, X, NB, X, where he lived as a guest of his parents, Mr. & Mrs. W. G., the owners of that residence." (AD1-5)

[29] The Tribunal notes, that the Appellant's course ran for seven (7) weeks, but he appears to have stayed with his parents for an extra week beyond the course completion date, prior to returning to live and work in X. While there is no question that the Appellant was staying at his parents' home during the week of April 12, 2015, this fact alone is not determinative of the question of where he was ordinarily resident. The Tribunal also considered the following:

a) When the Appellant completed his initial application for EI benefits on April 10, 2015, he provided his X X X, X address for mailing purposes and confirmed that this was his residential address (GD3-4). The Appellant knew he was starting seven

   (7) weeks of block 4 training a mere three (3) days later at a Community College in Xs (see GD3-3), yet still identified his residential address as X.

b) When the Appellant completed his Request for Reconsideration on Thursday, April 30, 2015, he filed it at a Service Canada office in X the same day (see GD3-18) and confirmed his X X X, X address thereon. At this point, the Appellant was three (3) weeks into his course in Xs, yet was still utilizing his X address.

c) At the time of his Request for Reconsideration (April 30, 2015), the Appellant clearly knew he was going back to work for Liberty in X. The Appellant wrote:

   > "After this I prob *(sic)* won't need EI benefits for a few years. All my blocks will be done and I have a company waiting for me to finish with lots of work." (GD3-21).

   There is no job search evidence to support the submission that the Appellant could conceivably have found a job in Xs and remained there after finishing training in May 2015, and the submission is not only implausible, but not even remotely within the Appellant's obvious plans.

d) When the Appellant spoke with the Commission's agent regarding his request for reconsideration on May 27, 2015, he only had "one week" remaining in his course. The Appellant advised the agent that since he started his training (some six (6) weeks earlier), he had been working a day a week for his employer and may have accumulated the 35 hours he was short to qualify for EI benefits (GD3-22). The Appellant was not a

first- time recipient of EI benefits (see GD4-3 regarding a prior claim) and would have known an ROE would be required to prove any additional hours of insurable employment. It is unlikely the Appellant would have even mentioned working a day a week for his employer to the Commission's agent if these hours were, as testified, "classroom hours". It is more likely that the Appellant did, in fact, work occasionally for Liberty (in X) during the seven (7) weeks he was in block training.

e) In the Notice of Appeal filed by the Appellant on June 25, 2015, he stated that he had to borrow money "to pay my rent" for the seven (7) weeks he was in school (GD2-3). The only address he had ever provided in connection with his claim was the X X X, X address. By his own testimony, the Appellant contributed to his grandfather's property taxes, condo fees and utilities while residing at X X X, X – *and continued to do so while he was attending his training* - but paid nothing to his parents. The "rent" referred to by the Appellant could only have been for X X X, X. The fact that the Appellant tried to back-track at the hearing from his use of the term "rent" and suggest that it was "loose terminology" for payments he was making "to help out", does not change the character of the payments.

f) The Appellant subsequently stated that he was a guest of both his grandfather (in X) and his parents (in X). A guest might contribute food or send a thank you note, but a guest would not make ongoing payments towards the residence owner's property taxes, condo fees and utilities. While the Appellant could certainly be considered a guest when he resided with his parents, the evidence does not support that he was merely a guest when he resided with his grandfather.

g) It is undisputed that the Appellant took up residence at his parents' home in order to facilitate his attendance at a 7-week training course taking place in Xs (AD1-5 and RGD3-1).

h) The Appellant did not dispute the Commission's determination that he was ordinarily resident in X when he filed his initial appeal of the reconsideration decision (see GD2).

i) The Appellant did not dispute that determination until December 2015, when he applied for leave to appeal the Tribunal's original decision in this case and, with the benefit of

counsel, submitted that he was not ordinarily resident in X, but in X and, therefore, qualified for EI benefits. In accordance with the Federal Court of Appeal's decision in *Bellefleur v. Canada (AG), 2008 FCA 13*, the Tribunal gives more weight to the Appellant's initial, spontaneous statements identifying his residence as X X X, X than to subsequent statements made following an unfavourable decision on his claim.

j) By his own testimony, the Appellant lived and worked in X from the outset of his apprenticeship training in 2010-2011. The Appellant had a 5 year history of living and working in X interrupted only by an annual 7-10 week period for training in Xs.

k) The Appellant often returned to X during the seven (7) weeks of training and had access to his grandfather's home at X X X throughout that time.

l) Within one (1) week of completing his training, the Appellant returned to live at X X X, X and resumed his employment at Liberty.

[30] While the EI Act does not provide a definition of "ordinarily resident", it is helpful to consider the definition for "ordinarily resident" found in *Duhaime's Law Dictionary*:

> "The place where in the settled routine of an individual's life, he or she regularly, normally or customarily lives."

This definition has been adopted by both the Supreme Court of Canada (*Thomson v. MNR, [1946] SCR 209]*) and the Tax Court of Canada (*Mcfayden v. The Queen, (2000) 4 CTC 2573*). In *Mcfayden, supra*, Justice Garron adopted the analysis from *Thomson, supra* wherein Justice Rand considered the term "ordinarily resident" and wrote:

> "It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence."
>
> and
>
> "Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstances, but also accompanied by a sense of transitoriness and of return."

[31] In its plainest terms, the phrase “ordinarily resident” requires an analysis of the following question: Where did the Appellant make his home as at April 12, 2015? Considering all of the factors listed in paragraphs 29 and 30 above, the Tribunal finds that the Appellant’s home during the week of April 12, 2015 was in X and not X. While he may have been physically present in X during that week, the badges of residency clearly point to X. Furthermore, the two locations are easily distinguishable using the analysis in *Thomson, supra*: the Appellant’s customary mode of life occurred in X and his time in X was only temporary (8 weeks), exceptional in circumstances (to attend his final block release training session) and transitory (he always intended to return to his life in X and, in fact, did so immediately upon completion of his training).

[32] While the Appellant’s representative argued eloquently for a “modern” interpretation of the term “ordinarily resident”, the explicit use of this term in paragraph 17(1.1)(a) of the EI Regulations is to require a claimant to have a tangible connection to an EI Economic Region. The purpose of this requirement is to acknowledge the varying rates of unemployment across Canada and to prevent claimants from shopping for a favourable jurisdiction. It simply cannot be said that the Appellant’s brief, annual attendance at a training course in Xs, during which time he lived with his parents in X, establishes the connection required to be considered “ordinarily resident” there.

[33] The Tribunal therefore finds that the Appellant was ordinarily resident in X, New Brunswick in the week in which his benefit period began. The Tribunal further finds that the Appellant does not meet the requirements prescribed in paragraph 7(2)(b) of the EI Act because he required 630 hours of insurable employment in his qualifying period in order to qualify for EI benefits, and he accumulated only 595 hours.

CONCLUSION

[34] The Tribunal finds that the Appellant does not meet the requirements prescribed in subsection 7(2) of the EI Act to qualify for EI benefits and, therefore, cannot establish a claim for benefits.

[35] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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

(2) An insured person 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

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

(3) to (5) [Repealed, 2016, c. 7, s. 209]

(6) An insured person is not qualified to receive benefits if it is jointly determined that the insured person must first exhaust or end benefit rights under the laws of another jurisdiction, as provided by Article VI of the *Agreement Between Canada and the United States Respecting Unemployment Insurance*, signed on March 6 and 12, 1942.