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

Citation: *B. L. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 50

Tribunal File Number: GE-16-4042

BETWEEN:

B. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Christopher Pike

HEARD ON: March 7, 2017

DATE OF DECISION: April 12, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant attended the hearing by teleconference. The Canada Employment Insurance Commission (Commission) received notice of the hearing electronically on December 30, 2016 but did not attend. The Tribunal is satisfied that the Commission received notice of hearing and proceeded in their absence pursuant to subsection 12(1) of the *Social Security Tribunal Regulations*.

INTRODUCTION

[2] The Appellant established a claim for benefits effective December 22, 2013. He accepted new employment on March 11, 2014 which involved a cycle of four weeks of work followed by two weeks off. He reported this to the Commission as a full-time, permanent position.

[3] In early November 2014 the Appellant sought to renew his claim. He also requested antedating of his claim to March 23, 2014 because the position turned out to be temporary.

[4] On December 19, 2014 the Commission determined the Appellant was not entitled to benefits for the period from March 11 to October 29, 2014 because he was not unemployed as defined in subsection 11(4) of the *Employment Insurance Act* (Act) during that period. The Commission also determined that the Appellant had not established "good cause" in explaining the reason for his delay in making his antedating claim.

[5] The Appellant requested reconsideration of this decision on February 18, 2015. The Commission informed the Appellant that they maintained their original decisions on March 17, 2015.

[6] The Appellant filed an appeal with the Tribunal, which made a decision dated July 8, 2015 based on the documentary record when the Appellant was unable to attend the hearing as scheduled because his mother had passed away.

[7] The Appellant appealed to the Appeal Division, which conducted a hearing on July 28, 2016. The Appeal Division's October 28, 2016 decision allowed the Appellant's appeal and remitted the matter to the General Division for a new hearing.

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

a) The complexity of the issues under appeal.

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

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

ISSUES

[9] The Appellant is appealing the Commission's decisions:

a) determining under subsection 11(4) of the Act that he failed to prove he had weeks of unemployment, and

b) denying his antedate request pursuant to subsection 10(4) of the Act.

EVIDENCE

[10] The Appellant is a baker who resides in Central Newfoundland and Labrador. He established a claim for benefits effective December 22, 2013.

[11] He found employment as a baker at a work camp in Nunavut starting March 11, 2014. When he accepted this employment, he understood the he had been offered a permanent, full-time position and advised the Commission accordingly. He understood he would work a cycle of four weeks on and two weeks off. The Appellant testified that once he started work, he learned that the job was temporary, not permanent.

[12] The Appellant worked cycles of four week on and two week off until October 29, 2014. The Appellant made a statement to the Commission on March 17, 2015 indicating that when he left his employer's work camp on October 29, 2014, he expected to return to work on November 16, 2014, but was called by his employer on November 11, 2014 and told he was

laid off. He was issued a Record of Employment dated November 23, 2014, which indicated his final pay period ended November 8, 2014.

[13] After he was laid off, the Appellant requested documentation from his employer describing the arrangement. They provided an undated letter which read in part:

> … We have two main camps und two construction camps. … All last spring and summer, with Iron Ore prices losing ground the camps were unstable, we would bring employee [sic] in for four weeks at a time, and when they go out. it would be uncertain if we need them again, but after two week [sic], if we did need them, we bring them back, but they were told when they go out, they might not be coming back and if they require ROE they would get them. This kept up until Oct. 29. 2014, and by Nov. 12, 2014 we knew that we didn't need them any more, and they were issued ROE. But each two weeks, when the employee [sic] go out, they were told, they could put out resumes anywhere, we had no hold on them, they were free to do what they want, and if they wasn't [sic] there when we wanted them, it was our lost [sic].

[14] The Appellant testified that he viewed this arrangement as meaning that each time he left the camp, there was no assurance he would return and for that reason his employment ceased with each departure.

[15] On his first trip home, the Appellant attempted to file his weekly report but was unable to do so because he had previously advised the Commission that he had secured permanent full-time employment. He established he would need to speak to a Service Canada representative to correct this information. He attempted to contact Service Canada by telephone to address this matter. He testified that he would spend 45 to 60 minutes on hold waiting for a representative to become available without making contact. He described one instance in which he waited two hours to make a connection which was then broken before he could complete his transaction.

[16] The Appellant noted that the Service Canada office nearest to his home in X, Newfoundland and Labrador, roughly 60 kilometers away. He estimated the time needed to travel there is approximately one hour. The Appellant testified that he did not have access to his family's only vehicle during the business day to make the trip to X because his wife needed it for her employment. He also noted the high cost of travelling to X by taxi from his home.

[17] The documentary record was somewhat ambiguous on the hours the Appellant worked. One document indicated he worked 21 hours a day for 21 straight days, an assertion which he apparently repeated in his hearing in the Appeal Division. In another document, the Appellant stated that he worked 12 hours a day for five days in a row. In his testimony in this hearing, the Appellant indicated he worked a cycle of four weeks on and two weeks off, and worked 12 hours each day he was at the work camp.

[18] The Appellant also testified that, depending on the weather, it would take two or three days to get home to Newfoundland and Labrador and a similar period to return to work. He also noted one trip which took five days. This time was part of his two weeks was off.

[19] The Appellant testified that each time he returned to Newfoundland and Labrador, he sought alternate employment. He stated that he applied at the Muskrat Falls and Bull Arm projects. He also sought work in Fort McMurray, Alberta and through his union. He also indicated that he was available for work throughout each trip home.

[20] The Appellant also testified that with the time required to travel to and from his work site he would generally have only one week at home out of six when he could put significant effort into his job search and his efforts to contact Service Canada to correct their records in relation to the nature of his employment.

[21] The Appellant confirmed that his Record of Employment shows that he was paid every two weeks. He noted that one paycheque in three was significantly larger than the other two. He stated this occurred because of the way his pay periods were distributed relative to his time in the camp. He testified that one of two smaller cheques was paid during the two week period he was away from the camp.

[22] After he was laid off, the Appellant resumed his efforts to claim benefits for the two week periods he was not at the work camp. He identified the periods in question as running:

a) from April 6 to 19, 2014,

b) from May 18 to 31, 2014,

c) from June 29 to July 12, 2014,

d) from August 10 to 23, 2014, and

e) from September 21 to October 4, 2014.

[23] The Appellant made his antedating request on November 12, 2014. Between November 12 and December 19, 2014, the Appellant communicated with the Commission, again pointing out that he had incorrectly informed them that the employment he had accepted in Mach 2014 was a permanent, full-time position and that he had been seeking to correct this since then. He also requested antedating for the period noted above. During this series of discussions, the Appellant stated at one point that he was seeking the opportunity to have the Commission's records show that his job was actually "part-time". The Appellant later told the Commission he meant to describe the position as "temporary".

[24] The Appellant testified that he finally made progress when he was able to travel to the Service Canada office in X in December 2014.

[25] The Appellant also testified that he had colleagues who reside in four different provinces who were in the same circumstances as him who received benefits during these two weeks of the cycle they were not working.

SUBMISSIONS

[26] The Appellant submitted that because there was no certainty he would be called back, each two week portion of his six week cycle was a period of unemployment. He submitted that he was unable to claim benefits starting in April 2014 because he had mistakenly registered his job as permanent when it was actually temporary. He asserted that he attempted to address this issue with the Commission during each period he was home, but could not do so due to ongoing difficulties with communicating with the Commission by telephone. He stated he was only able to begin the process of resolving this issue when he was able to personally visit the Service Canada office in X in December 2014.

[27] The Commission submitted that subsection 11(4) of the Act stipulates that where in each week an insured person

a) works a greater number of hours, days or shifts than are normally worked in a week by a person employed in full-time employment and

b) is entitled, pursuant to an employment agreement, to a period of leave as a result, the Appellant is considered to have worked a full working week during each week that falls wholly or partly in the period of leave.

[28] The Commission asserted that the first condition relates to the work itself and the second condition relates to an entitlement under an employment contract. When both conditions are present, the claimant is not considered unemployed during any week in which that period of leave falls.

[29] The Commission further submitted that if the Appellant wished to claim employment insurance benefits for an earlier period, he must first qualify at the earlier date and then must demonstrate that he had good cause for the entire period of the delay in making his claim. They asserted that the Appellant must demonstrate that he took the steps any reasonable person in the same situation would have taken to verify his rights and obligations under the Act.

[30] The Commission contends argued that the Appellant did not act like a reasonable person in his situation would have done to verify his rights and obligations under the Act.

ANALYSIS

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

Week of Unemployment

[32] The first issue to examine in this appeal with whether the Appellant was actually unemployed at the times he sought to make his claim as contemplated in subsection 11(4) of the Act.

[33] The Federal Court of Appeal assessed a claim similar to the Appellant's in *Canada (Attorney General) v. Jean*, 2015 FCA 242. The parties in *Jean* were long-distance truck drivers who worked one week out of two and worked 55 to 60 hours during the week which they worked. The Court provided the following guidance:

> [21] Section 9 of the *Act* stipulates that employment insurance benefits are payable for each week of unemployment. In turn, a week of unemployment is defined in subsection 11(1) of the *Act* as a week in which the claimant does not work a full working week.
>
> Subsections 11(2), (3) and (4), however, set out exceptions to this definition. Subsection 11(4) specifically provides that a period of planned leave must be considered a full working week in cases where a contract of employment provides periods of leave for persons who regularly work more hours than normal. The purpose of this provision is clear: to ensure that only workers whose work is interrupted may receive temporary benefits, in keeping with the spirit of a public insurance program based on the concept of social risk. A worker on compensatory leave for overtime already worked does not suffer a loss of income, regardless of whether he receives pay during this leave; his work has not been interrupted and he maintains his bond with the employer: see *Canada (Attorney General) v Foy*, 2003 FCA 51, at paragraph 8 [*Foy*].
>
> (Emphasis added)

[34] The Tribunal notes the that *Jean* decision was released by the Court after the General Division made its original decision in the Appellant's appeal in July 2015. The *Jean* decision is a binding precedent which the Tribunal must follow, assuming that the facts of the Appellant's case are substantially similar to those in *Jean.*

[35] Applied to this case, *Jean* requires the Tribunal to assess whether the Appellant was on compensatory leave for overtime already worked when he was on his two week period at home. If he was, then those weeks were not weeks of unemployment as defined in subsection 11(4). In assessing whether the Appellant's two weeks off were compensation for overtime worked during his four weeks cycle at the camp, the Tribunal must look at the general population and not make a "distinction based on job category or industry".

[36] The Appellant's evidence on his hours worked is ambiguous. He has stated at various times that his job required him to work 12 hours daily for 21 days, that he worked a 60 hour week and, in the hearing before this Tribunal, 12 hours daily for four weeks. The

correspondence from the employer indicates that the Appellant worked four weeks on the camp site. Considering all of this evidence, the Tribunal is therefore satisfied that the Appellant worked 12 hours daily for 28 days and then had two weeks off. The Tribunal finds that the Appellant worked 336 hours over the four week cycle, which amounts to 84 hours weekly.

[37] The Court in *Jean* was clear in stating that the Tribunal may not "make a distinction based on job category or industry for purposes of the exclusion set out in subsection 11(4) of the *Act*"; the Tribunal may only consider whether the conditions set in subsection 11(4) are present, namely whether the Appellant:

a) regularly worked a greater number of hours than are normally worked in a week by persons employed in full-time employment; and

b) was entitled to a period of leave under an employment agreement to compensate for the extra time worked.

[38] The *Jean* decision does not set a specific number of hours to guide the Tribunal in establishing when a claimant has worked "a greater number of hours than are normally worked in a week by persons employed in full-time employment". In this case, the Tribunal notes that many persons engaged in full-time employment work significantly fewer than 84 hours weekly, although it may be the norm for the industry in which the Appellant was employed. The Tribunal is therefore satisfied that the Appellant worked a "greater number of hours than are normally worked in a week by persons employed in full-time employment" for the purposes of subsection 11(4) of the Act.

[39] If the Appellant's employment was subject to a written contract, it was not made available to the Tribunal. The Appellant's evidence is that he was hired to work a cycle of four weeks in the camp and two weeks away. This is confirmed by the correspondence from his employer on the record and corroborated by the fact he was paid on a six week cycle until he was laid off on November 11, 2014.

[40] The Appellant's statement to the Commission on March 17, 2014 indicates that he expected to return to work on November 16, 2014, but was advised on November 11, 2014 that he was to be laid off. His Record of Employment indicates that the Appellant's final pay period

ended on November 8, 2014. These facts are also consistent with a cycle of four weeks of work followed by two weeks off.

[41] The Appellant asserted the correspondence from his employer showed his employment ended each time he departed from the work camp. With respect, the language used in the correspondence seems to suggest otherwise. On this point, correspondence reads:

> … We have two main camps und two construction camps. … All last spring and summer, with Iron Ore prices losing ground the camps were unstable, we would bring employee [sic] in for four weeks at a time, and when they go out. it would be uncertain if we need them again, but after two week [sic], if we did need them, we bring them back, but they were told when they go out, they might not be coming back and if they require ROE they would get them. This kept up until Oct. 29. 2014, and by Nov. 12, 2014 we knew that we didn't need them any more, and they were issued ROE. But each two weeks, when the employee [sic] go out, they were told, they could put out resumes anywhere, we had no hold on them, they were free to do what they want, and if they wasn't [sic] there when we wanted them, it was our lost [sic].

[42] This appears to more an acknowledgement by the employer that, due to the uncertainty about their long-term prospects, they accepted the risk that employees might look for work while they were away from the camp.

[43] Taken as a whole, the Appellant's 84 hour work week, his six week pay cycle, Record of Employment, and the correspondence from his employer proves n the balance of probabilities, and the Tribunal finds, that the two week period during which the Appellant was away from his employer's work camp was "a period of leave under an employment agreement to compensate for the extra time worked" to which he was entitled as contemplated in subsection 11(4) of the Act.

[44] Based on the foregoing, the Tribunal finds pursuant to subsection 11(4) that the Appellant was not unemployed during the two week periods when he was not at his employer's camp between March 11 and November 8, 2014, the last day of his final pay period.

Antedating

[45] The Tribunal notes that the Commission referred to subsection 10(4) of the Act in its submissions in relation to the Appellant's claim. Subsection 10(4) applies to initial claims for benefits. The documents which the Commission filed with the Tribunal indicate that they assessed the Appellant's claim as a renewal of the claim he submitted on December 31, 2013. Considering the evidence, the Tribunal is satisfied that the Appellant's claim was a renewal claim and should therefore be assessed under subsection 10(5) of the Act.

[46] Section 50 of the Act sets out a claimant's obligations to meet certain procedural requirements when making a claim for benefits. This section also gives the Commission discretion to waive or vary these procedural requirements if circumstances warrant.

[47] Section 26 of the Regulations provides that a claim for benefits for a week of unemployment in a benefit period is to be made within three weeks after the week for which benefits are claimed. However, if a claim has not been made for four or more consecutive weeks, then the claim is to be made within one week of the week for which benefits are being claimed.

[48] In certain circumstances subsection 10(5) of the Act permits the Commission to consider the Appellant's late claims as if they were made on an earlier day. This is often referred to as antedating the claim. The subsection requires that the Appellant must show "good cause" for the delay throughout the period, starting on the day to which antedating was requested and ending when the claim was made.

[49] The Appellant has the burden of proving these conditions (*Albrecht,* A-172-85). He must good cause for delaying his claim by proving that he acted as a reasonable and prudent person would have in similar circumstances, throughout the entire period of the delay (*Attorney General) v. Burke*, 2012 FCA 139; *Smith*, A-549-92.)

[50] The evidence shows the Appellant did not file weekly reports as required for the following periods:

a) from April 6 to 19, 2014,

b) from May 18 to 31, 2014,

c) from June 29 to July 12, 2014,

d) from August 10 to 23, 2014, and

e) from September 21 to October 4, 2014.

[51] The Tribunal notes that the Appellant's requested antedating to March 23, 2014. Considering the periods of unemployment which he has identified as being subject to his antedating request, the Tribunal is satisfied that April 6, 2014 is the earliest date to which he requested antedating. He made his antedating request on November 12, 2014. The Tribunal finds that period of delay which the Appellant must explain therefore runs from April 6, 2014 to November 12, 2014.

[52] The Appellant submitted that he could not submit his claims through the ordinary process because he had registered as having found full-time work when he was hired on March 11, 2014. He testified that once he discovered he might not be called back, he learned he would need to speak to a Commission employee to correct his before he could file a claim. He attempted to contact the Commission by telephone, but without success, during each of his times away from the work camp because of long wait times. He also stated that he was unable to travel to the Service Canada office in X because his wife needed their family vehicle for work.

[53] The Appellant also testified that with the transit time from his home in Newfoundland and Labrador to his workplace in Alberta, only one week of his two week cycle away from the work camp was available for him to address this issue. A reasonable step for a person in the Appellant's position to take in this circumstance would be to find a way to travel to X and address this matter in person. It may have been difficult or expensive to do so, considering the challenges which the Appellant described, but overcoming these barriers was, nevertheless, a reasonable step to take.

[54] Absent exceptional circumstances, a reasonable person is expected to take reasonably prompt steps to understand their entitlement to benefits and obligations under the Act (*Canada (Attorney General) v. Somwaru*, 2010 FCA 336).

[55] The Tribunal acknowledges that the fact that the Appellant had one week out of six during which he could attempt to contact the Commission to resolve the issues with his claim was a challenging circumstance. The communications challenges posed by his difficulties making a telephone connection and the difficulties were not insurmountable. The reasonable step of travelling to X was open to him, even if it was inconvenient for him to do so. The Tribunal finds that the challenges he faced to communicate with the Commission were not so great as to constitute an exceptional circumstance as explained in *Somwaru.*

[56] Considering all of the circumstances, the Appellant did not discharge his duty to make take the steps which a reasonable person in his circumstances ought to have taken to overcome the communication challenges he identified in order to make his claim within the required timeframes. He has therefore failed to meet his burden to prove that he acted as a reasonable and prudent person would have in similar circumstances throughout the entire period of the delay in filing his claim.

CONCLUSION

[57] The appeal is dismissed.

Christopher Pike
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

9 When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

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.

11 (1) A week of unemployment for a claimant is a week in which the claimant does not work a full working week.

(2) A week during which a claimant's contract of service continues and in respect of which the claimant receives or will receive their usual remuneration for a full working week is not a week of unemployment, even though the claimant may be excused from performing their normal duties or does not have any duties to perform at that time.

(3) A week or part of a week during a period of leave from employment is not a week of unemployment if the employee

> **(a)** takes the period of leave under an agreement with their employer;
>
> **(b)** continues to be an employee of the employer during the period; and
>
> **(c)** receives remuneration that was set aside during a period of work, regardless of when it is paid.

(4) An insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if

> **(a)** in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment; and
>
> **(b)** the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.