



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. A. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 98

Tribunal File Number: GE-16-3368

BETWEEN:

E. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: May 2, 2017

DATE OF DECISION: June 26, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Mr. E. A., did not attend the hearing. His son and representative, Mr. B. A., student and Law Society member (unremunerated), attended the hearing to represent the Claimant and make submissions.

OVERVIEW

[1] On February 2, 2015, the Claimant applied for employment insurance regular benefits after having been laid off from his employment. The Canada Employment Insurance Commission (Commission) determined that the Claimant qualified for regular benefits and established a benefit period effective January 11, 2015. The Claimant was not entitled to benefits for the first two week waiting period and then was subsequently paid from January 25, 2015 until he returned to his regular employment on March 22, 2015.

[2] On October 4, 2015, the Claimant submitted a renewal claim and requested that his benefits be converted to sickness benefits. He also requested that the waiting period he had initially served from January 11, 2015 until January 24, 2015 be waived because he met the requirements of subsection 40(6) of the *Employment Insurance Regulations* (Regulations). The Commission determined that the Claimant met the entitlement requirements for sickness benefits and paid the Claimant 12 weeks of employment insurance sickness benefits. The Commission however, disagreed that the two week waiting period should be retroactively waived.

[3] The Member agrees with the Commission that the Claimant must serve the two week waiting period from January 11, 2015 to January 26, 2015 according to section 13 of the *Employment Insurance Act* (EI Act). Second, the Member finds that the Claimant did not meet the requirements of subsection 40(6) of the Regulations so the waiting period cannot be waived. Specifically, the Member notes that according to paragraph 40(6)(a) of the Regulations the determination is made at the time a claimant 'qualifies' to receive benefits in that benefit period by reason of an interruption of earnings as described in subsection 14(2) or section 14.01 of the Regulations. In this case, the Claimant qualified for benefits on January 11, 2015 and the

interruption of earnings was for reasons as described in section 14(1) of the Regulations, not subsection 14(2) as is required in paragraph 40(6)(a) of the Regulations.

EVIDENCE

[4] On October 3, 2014, the Claimant was laid off from his employment due to a shortage of work. He applied for employment insurance regular benefits on February 6, 2015 and a benefit period was established effective January 11, 2015 to January 9, 2016. The Claimant's two weeks waiting period was served during the period of January 11, 2015 to January 24, 2015. The Claimant subsequently received eight weeks of regular benefits from January 25, 2015 to March 21, 2015. He returned to his regular employment on March 22, 2015.

[5] The Claimant was off work again on October 2, 2015 due to illness. He requested that his regular benefits be converted to sickness benefits effective October 4, 2015. A medical certificate was submitted indicating that the Claimant was unable to work from October 5, 2015 until February 1, 2016 (GD3-30).

[6] The Claimant received 'paid sick leave' (PSL) or 'wage loss insurance' (WLI) from October 7, 2015 to October 17, 2015 as per the collective agreement (GD3-29 and GD3-38). The two weeks of wage loss insurance was allocated to his benefit period from October 4, 2015 to October 17, 2015. The Claimant subsequently received 12 weeks of employment insurance sickness benefits thereafter from October 18, 2015 until the end of the benefit period on January 9, 2016 (GD3-32).

[7] The Claimant also provided supporting documentation regarding a subsequent injury and the establishment of another benefit period effective March 27, 2016. The employer paid a PSL/WLI for the first two weeks from March 28, 2016 to April 9, 2017 (GD3-36 to GD3-42).

[8] The Claimant provided written submissions and requested that the Commission reconsider its decision to not waive the waiting period for the benefit period established January 11, 2015. The Claimant's representative argued that just as in his subsequent claim established effective March 27, 2016 (not this appeal); the Claimant's waiting period should have been waived for the benefit period established on January 11, 2015 and which was renewed on October 7, 2015. He noted that regardless of the order in which the Claimant received benefits in this period i.e. that he first received regular benefits from January 11, 2015 to March 22,

2015 and then received sickness benefits upon renewal on October 4, 2015 is irrelevant. He submitted that the Claimant provided evidence of (a) he had an interruption of earnings due to his inability to work and (b) receiving SLP/WLI from his employer. He therefore should not have been required to serve a waiting period having met the requirements of subsection 40(6) of the Regulations (GD2-6 to GD2-9, GD3-33 and GD3-34, GD3-43 to GD3-46).

[9] The Claimant's representative requested the opportunity to make further submissions after the hearing. He was provided until May 26, 2017 (3 weeks). The Tribunal did not receive any further evidence or submissions.

SUBMISSIONS

[10] The Claimant submitted that the waiting period for the benefit period established January 11, 2015 to January 9, 2016 should be waived pursuant to section 40 of the Regulations because the Claimant met the two requirements of subsection 40(6) of the Regulations. The Claimant had an interruption of earnings in accordance with subsection 14(2), ceased to work due to sickness and he received sick leave pay from his employer. The Claimant's representative submitted that subsection 40(6) of the Regulations allows for the waiving of the waiting period regardless of the order in which benefits were paid.

[11] At the hearing, the Claimant's representative submitted that there's some ambiguity in the legislation, as such, common law principles of statutory interpretation require a liberal construction of legislative provisions granting benefits (GD2-9). Further, the wording "may waive the waiting period" allows for discretion by the Commission where it is advantageous to the Claimant to have the waiting period waived.

[12] The Commission submitted that it correctly determined that the Claimant must serve a waiting period at the beginning of his claim from January 11, 2015 to January 26, 2015 pursuant to section 13 of the EI Act. Further, it submitted that the waiting period could not be retroactively waived just because later in the same benefit period he claimed and received sickness benefits. The Commission submitted that the Claimant did not meet the two criteria required in subsection 40(6) of the Regulations in order for the waiting period to be waived.

ANALYSIS

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

[14] The Claimant disputes the fact that the Commission did not waive the waiting period for the benefit period established from January 11, 2015 to January 9, 2016. The Claimant subsequently qualified for, and a benefit period was established, a second time from March 27, 2016 to April 7, 2017 during which time the waiting period was waived. The Claimant referred to this latter benefit period to show that the same consideration should have been given to his first benefit period. The issue herein is with respect to the first benefit period only.

[15] Section 13 of the EI Act stipulates that a claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period and after the claimant has served a two week waiting period.

[16] The Federal Court of Appeal has confirmed that section 13 of the EI Act applies to all benefits, including special benefits, unless an exception is met under such subsections as 23(5) or 22(4) of the EI Act or section 40(6) of the Regulations (Vasiliadis A-499-01).

[17] The Member finds therefore, that the Commission correctly determined that the Claimant must serve a two week waiting period from January 11, 2015 to January 24, 2015 pursuant to section 13 of the EI Act. Further, for the reasons to follow, the Commission correctly established that the Claimant does not meet the exception in subsection 40(6) of the Regulations to waive the waiting period.

[18] The Member first considered that subsection 7(2) of the EI Act stipulates that 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. Further, section 9 stipulates that when an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established.

[19] In this case, the Claimant 'qualified' for benefits pursuant to section 7 of the EI Act and a benefit period was established pursuant to section 9 of the EI Act effective January 11, 2015. The Member agrees with the Commission that pursuant to section 13 of the EI Act, the Claimant was not entitled to be paid benefits until after he served a two week waiting period from January 11, 2015 until January 24, 2015. The Commission subsequently paid

employment insurance regular benefits for eight weeks from January 25, 2015 until March 21, 2015 when the Claimant returned to work.

[20] The Claimant's representative submitted that the Claimant met the two requirements prescribed in subsection 40(6) of Regulations noting that he had an interruption of earnings in accordance with subsection 14(2) and he received sick leave pay from his employer. He further submitted that subsection 40(6) of the Regulations allows for the waiving of the waiting period regardless of the order in which benefits were paid.

[21] The Member disagrees with the Claimant's representative that the Claimant has met the said requirements and his interpretation of this provision. The Member notes that according to subsection 40(6) of the Regulations, the Commission may waive the waiting period in respect of the benefit period of a claimant if two conditions are met (a) the claimant qualifies to receive benefits in that benefit period by reason of an interruption of earnings as described in subsection 14(2) or section 14.01, and (b) after the claimant ceased to work, allowances, payments or other moneys are payable to the claimant by the claimant's employer or former employer as sick leave pay.

[22] In this case, the Member agrees with the Commission, and finds that the waiting period for the benefit period established from January 11, 2015 to January 9, 2016 cannot be waived because the requirement in paragraph 40(6)(a) of the Regulations was not met. The Claimant 'qualified' to receive benefits on January 11, 2015 because he had an interruption of earnings as described in subsection 14(1) of the Regulations, not subsection 14(2) of the Regulations, as is required in paragraph 40(6)(a) of the Regulations in order for the waiting period to be waived.

[23] Further, the Member understands the Claimant's position that on October 4, 2015, the Claimant had an interruption of earnings again when he was off work due to sickness. The Claimant however did not have to 'qualify' for benefits again since he had already met the entitlement criteria for section 7 of the EI Act and a benefit period had been established on January 11, 2015. On October 4, 2015, the Claimant only had to prove his ongoing entitlement to benefits, i.e. he had to prove that he was entitled to receive sickness benefits by meeting the criteria in paragraph 18(1)(b) of the EI Act and section 40 of the Regulations. It is undisputed evidence that the Claimant met these requirements and as a result, he was paid 12 weeks of sickness benefits from October 4, 2015 to January 9, 2016.

[24] Further, the Member disagrees with the Claimant's representative that there is ambiguity in the legislation and finds that section 13 of the EI Act and the exception in subsection 40(6) of the Regulations are clear. The Member understands that the Claimant was hoping that there was some room for discretion by the Tribunal regarding the requirement to serve the two week waiting period by considering that it would be advantageous to the Claimant. The Member however, notes that it is not within the Tribunal's jurisdiction to change, amend, or otherwise apply the EI Act other than as prescribed. Having not met the exception in section 40(6) of the Regulations, the Claimant must serve the prescribed two week waiting period regardless of whether he applied to renew and convert his benefits later in the benefit period.

[25] The Member is supported by the Supreme Court of Canada's consistent ruling, which stands for the principle that "a judge is bound by the law. He cannot refuse to apply it, even on grounds of equity" (*Granger v. Canada (CEIC)*, [1989] 1 S.C.R. 141, paragraph 9).

[26] The Member finds therefore, that the Claimant must serve the two week waiting period from January 11, 2015 to January 24, 2015 pursuant to section 13 of the EI Act and consideration of subsection 40(6) of the Regulations.

CONCLUSION

[27] The appeal is dismissed.

Eleni Palantzas
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Subsection 7(2) of the EI Act stipulates that 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.

Section 9 of the EI Act stipulates that 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.

Subsection 18(1)(b) of the EI Act stipulates that 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 unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work.

Section 13 of the EI Act stipulates that a claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

Subsection 14 (1) of the Regulations stipulates that subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.

Subsection 14(2) of the Regulations stipulates that an interruption of earnings from an employment occurs in respect of an insured person at the beginning of a week in which a reduction in earnings that is more than 40% of the insured person's normal weekly earnings

occurs because the insured person ceases to work in that employment by reason of illness, injury or quarantine, pregnancy, the need to care for a child or children referred to in subsection 23(1) of the Act or the need to provide care or support to a family member referred to in subsection 23.1(2) of the Act or to a critically ill child.

Subsection 40(1) of the Regulations stipulates that the information and evidence to be provided to the Commission by a claimant in order to prove inability to work because of illness, injury or quarantine under paragraph 18(1)(b) or subsection 152.03(1) of the Act, is a medical certificate completed by a medical doctor or other medical professional attesting to the claimant's inability to work and stating the probable duration of the illness, injury or quarantine.

Subsection 40(6) of the Regulations stipulates that the Commission may waive the waiting period in respect of the benefit period of a claimant if:

(a) the claimant qualifies to receive benefits in that benefit period by reason of an interruption of earnings as described in subsection 14(2) or section 14.01; and

(b) after the claimant ceased to work, allowances, payments or other moneys are payable to the claimant by the claimant's employer or former employer as sick leave pay.