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

Citation: *K. C. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 119

Tribunal File Number: GE-16-1983

BETWEEN:

K. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Me Dominique Bellemare, Vice-Chair, Employment Insurance Section- General Division

DATE OF DECISION: September 13, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant filed her appeal with the Tribunal on May 17, 2016. She is appealing a reconsideration decision issued by the Respondent (Commission) on May 3, 2016, confirming their initial decision of March 30, 2016. The initial decision of the Commission was to the effect that the Appellant could not have a benefit period established as she did not accumulate enough hours to qualify. The Appellant raised a Chart5er argument to the effect that she was in receipt of Sickness Benefits from the Employment Insurance Program, then received sickness benefits from a private health plan. She raised the fact that this was due to her mental health situation and that this constituted discrimination.

[2] On September 22, 2016, the Tribunal held a prehearing conference during which it explained the Charter Challenge Process to the Appellant. On November 2, 2016, the Tribunal issued an interlocutory decision and Order stating all the steps and conditions that the parties must follow. Following the Appellant's filing of her submissions, the Commission filed a motion to dismiss the Charter Process as the Appellant did not follow and respect the condition of the Order issued on November 2, 2016. After offering the Appellant a three-month period to file submissions in response to the Commission's motion to dismiss on July 20, 2017, the Tribunal granted the motion to dismiss filed by the commission. The Appellant did not file submissions.

[3] On July 27, 2017, the Tribunal sent to the Appellant a letter of intention to summarily dismiss the Appellant's appeal. The Appellant was given a deadline expiring on August 28, 2017, to file submissions to that effect. The Tribunal did not receive any submissions to its letter of intention to summarily dismiss. As per Section 19 of the Social Security Tribunal's Regulations, any decision or document sent by regular mail by the Tribunal is deemed to have been received within 10 days of its mailing to a party. She has previously received her full file prior to the prehearing conference of September 22, 2017, and she confirmed during the prehearing conference that she had received her full file. Therefore, the Tribunal is satisfied that the Appellant has received her file, the interlocutory decision to grant the motion to dismiss filed by the Commission and the Letter of intent to summarily dismiss her appeal, and it can now render its decision.

ISSUE

[4] The Tribunal must decide whether the appeal should be summarily dismissed.

THE LAW

[5] **Subsection 53(1)** of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[6] **Section 22 of the *Social Security Tribunal Regulations*** states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[7] **Subsection 7(1) of the Act**:

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

[8] **Subsection 7(2) of the Act**:

(2) An insured person, other than a new entrant or a re-entrant to the labour force, 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

[9] **Subsection 7(4) of the Act**:

(4) An insured person is a new entrant or re-entrant to the labour force if, during the last 52 weeks before their qualifying period, the person has had fewer than 490

(a) hours of insurable employment;

(b) hours for which benefits have been paid or were payable to the person, calculated on the basis of 35 hours for each week of benefits;

(c) prescribed hours that relate to employment in the labour force; or

(d) hours comprised of any combination of those hours.

[10] **Subsection 8(1) of the Act**:

(1) Subject to subsections (2) to (7), the qualifying period of an insured person is the shorter of

(a) the 52-week period immediately before the beginning of a benefit period under subsection 10(1), and

(b) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period under subsection 10(1).

[11] **Subsection 10 of the Act**:

(6) Once a benefit period has been established for a claimant, the Commission may

(a) cancel the benefit period if it has ended and no benefits were paid or payable during the period

EVIDENCE

Documentary evidence

[12] We find in the file the usual documentation, such as the Initial Application for Benefits dated February 7, 2016; the record of employment for the period going from October 23, 2013, to September 9, 2014; the evidence from the Appellant stating why she did not have sufficient hours and medical notes; the initial decision called “notice of insufficient hours” dated March 30, 2016; the request for reconsideration, as well as the reconsideration decisions dated May 3, 2016.

SUBMISSIONS

[13] The Appellant did not file any submissions on the question of the Summary Dismissal. She also did not file any submission in support of the lack of Qualification, other than Charter arguments who have been dismissed on July 20, 2017, by the Tribunal. Also, in the file, the Appellant sent an argument to the effect that

[14] The Respondent submitted that:

a) Subsection 7(2) of the Act stipulates that in order to qualify for employment insurance benefits, an insured person (a) must have experienced an interruption of earnings from employment, and (b) must

also have acquired, in her qualifying period, at least the number of hours of insurable employment set out in the table within that subsection, in relation to the regional rate of unemployment where the person normally resides. In this case, the Appellant's qualifying period was established from September 7, 2014, to February 6, 2016, pursuant to paragraph 8(1)(b) of the Act because the claimant qualified for a previous benefit period effective September 7, 2014.

b) Based upon the facts on the file, the Commission determined that the Appellant was not a new entrant or re-entrant because in accordance with subsection 7(4) of the Act she had at least 490 hours of labour force attachment in the 52 weeks preceding the qualifying period. Therefore the claimant needed the number of insured hours specified in paragraph 7(2)(b) of the Act. According to the Table in subsection 7(2) of the Act, the minimum requirement for the Appellant to qualify to receive employment insurance benefits was 595 hours based on the rate of unemployment of 8.6% in the region where she resided. However, the evidence shows that the Appellant had accumulated only 8 hours of insurable employment in her qualifying period. Consequently, the Commission maintains that the Appellant failed to demonstrate that she qualified to receive employment insurance benefits pursuant to subsection 7(2) of the Act.

c) The legislation covers various types of unemployment situations and various types of benefits, such as:

1. regular benefits;

2. sickness benefits;

3. maternity benefits;

4. parental benefits;

5. compassionate care benefits;

6. parents of critically ill children benefits;

7. fishing benefits and

8. developmental program benefits.

d) It is important to note that the Employment Insurance Act brings together, in a single statute, provisions for income support to eligible unemployed persons whether they be regular or special benefits. The qualifying period is the 52 weeks immediately preceding the commencement of the benefit period. In this case, the Appellant's initial qualifying period ran from February 8, 2015, to February 6, 2016. In her qualifying period the claimant was incapable of work due to illness (and was not receiving EI sickness benefits) from January 4 to December 31, 2015, so it was possible to extend her qualifying period. However, the qualifying period may never be extended beyond the commencement date of any prior benefit period. In this case, a benefit period was established starting September 7, 2014 (the Appellant received 15 weeks of sickness benefits) so the qualifying period for the claim starting February 7, 2016, could not be extended to reach the maximum of 104 weeks.

e) The Appellant's last day paid by the employer was September 8, 2014, and her qualifying period ran from September 7, 2014, to February 6, 2016. In those 74 weeks, the Appellant only has 8 hours of insurable employment. To go back the full 104 weeks, the prior benefit period (the one starting September 7, 2014) needs to be cancelled so that it is deemed to have never existed.

f) When a benefit period or a portion of a benefit period is cancelled, it is as if it had not existed. Often, this is to the claimant's advantage, for example in providing a longer qualifying period or in selecting a more advantageous commencement date for a new benefit period. But, according to 10(6) (a) of the EI Act, the Commission may cancel the

benefit period if it has ended and no benefits were paid or payable during the period. The Appellant received 15 weeks of sickness benefits from September 7 to December 20, 2014; a total of $6,675. The claimant's insurable earnings from October 14, 2013, to September 6, 2014, were used to establish the claim starting in 2014. Unfortunately, the same hours cannot be used again to establish the new claim for 2016.

g) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal confirmed the principle that the requirements under subsection 7(2) of the Act do not allow any discrepancy and provide no discretion, see ***Canada (AG) v. Lévesque***, 2001 FCA 304. The Federal Court of Appeal confirmed the principle that subsection 8(1) of the Act provides for two possible qualifying periods. It specifically requires that the shorter of the two possibilities be chosen as the applicable qualifying period, see ***Long v. Canada (AG)***, 2011 FCA 99. The Court further confirmed the principle that hours accumulated outside the qualifying period cannot be used to qualify the claimant for benefits, see ***Haile v. Canada (AG)***, 2008 FCA 193. The Commission wishes to remind the Tribunal that the Federal Court of Appeal has reaffirmed that CRA has exclusive jurisdiction to determine the number of hours an insured person has had in insurable employment pursuant to section 90.1 of the Act formerly section 122 of the Act), see ***Canada (AG) v. Didiodato***, 2002 FCA 345.

ANALYSIS

[15] Subsection 53(1) of the DHRSD Act states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[16] In this case, the Appellant was advised in writing of the Tribunal's intent to summarily dismiss the appeal and, pursuant to Section 22 of the SST Regulations, the Appellant was given notice in writing of this intention and was provided a reasonable period of time to make submissions. The Appellant did not file any submissions.

[17] The Tribunal considered that in order for the Appellant to receive regular benefits she must meet the requirements of section 7 of the Act. Since the Commission determined that the Appellant had more than 595 hours of insurable employment during the last 52 weeks before the qualifying period, she is not a new entrant or re-entrant to the labour force pursuant to subsection 7(4) of the Act. The Appellant must therefore satisfy the requirements of subsection 7(2) of the Act to qualify for regular benefits.

[18] The Tribunal considered that according to subsection 7(2) of the Act, the Claimant must show that she (a) had an interruption of earnings from employment; and (b) she had acquired, during her qualifying period, at least the number of insurable hours of employment set out in the table provided in that subsection, in relation to the regional rate of unemployment where she normally resides.

[19] The Tribunal finds that since the Appellant lives in the economic region of Montréal where the unemployment rate was 8.6% the week preceding the benefit period, she requires 595 hours of insurable employment pursuant to paragraph 7(2)(b) of the Act. It is undisputed evidence that the Appellant has accumulated only 8 hours of insurable employment in her qualifying period.

[20] The Tribunal is sympathetic to the Appellant's circumstances, especially her health situation, and finds it very unfortunate that the employer could not accommodate her limited return to work, however it is clear that the Appellant does not have the minimum number of hours required to qualify for regular benefits pursuant to subsection 7(2) of the EI Act.

[21] Further, the Tribunal notes that case law confirms the principle that the minimal requirements as set out in section 7 of the EI Act are not in the discretion of the decision maker to vary even if a claimant is short one hour of meeting the qualifying conditions, see ***Lévesque***, supra. The Tribunal can interpret the law, but it cannot modify it.

[22] The Tribunal therefore finds that the Appellant's appeal has no reasonable chance of success.

CONCLUSION

The Tribunal finds that the appeal has no reasonable chance of success; therefore the appeal is summarily dismissed.

Me Dominique Bellemare
Vice-Chair, General Division - Employment Insurance Section