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

Citation: *T. W. v. Canada Employment Insurance Commission*, 2018 SST 109

Tribunal File Number: GE-18-157

BETWEEN:

**T. W.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## General Division – Employment Insurance Section

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DECISION BY: Catherine Shaw

DATE OF DECISION: March 15, 2018

Canada

## REASONS AND DECISION

### OVERVIEW

[1] The Appellant applied to the Canada Employment Insurance Commission (Respondent) for sickness benefits in September 2017. He was denied because the Respondent determined he had not worked sufficient insurable hours during his qualifying period and could not establish a benefit period. The Appellant was medically unable to work for a significant portion of the previous year, which he argues prevented him from accumulating enough hours to qualify for benefits. The Tribunal must decide whether the appeal should be summarily dismissed.

### DECISION

[2] The Tribunal finds that the appeal must be summarily dismissed as there is no reasonable chance of success.

### PRELIMINARY MATTERS

[3] The Appellant was advised in writing of the Tribunal's intention to proceed by way of summary dismissal and, under section 22 of the *Social Security Tribunal Regulations*, was given a reasonable period of time to make further submissions. On March 8, 2018, the Appellant provided additional submissions.

### ISSUE

[4] Does the appeal have a reasonable chance of success?

### ANALYSIS

[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.

**Does the appeal have a reasonable chance of success?**

[7] No. The Tribunal finds the appeal does not have a reasonable chance of success.

[8] The term "reasonable chance of success" is not defined in the *DESD Act*, so the Tribunal refers to the interpretation given by the Federal Court of Appeal where the legal test applied was whether it is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing (*Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147).

[9] Subsection 7(2) of the *Employment Insurance Act* (Act) sets out the number of hours of insurable employment required in a qualifying period to qualify for benefits. The minimum number of hours is based on the regional rate of unemployment that applies to the insured person. The Respondent submitted that, based on the Appellant's EI Economic Region and regional rate of unemployment for the period inclusive of his initial claim, the Appellant required 665 hours of insurable employment to qualify for regular benefits.

[10] Section 93 of the *Employment Insurance Regulations* (Regulations) states that a person claiming sickness benefits, who does not qualify to receive benefits under section 7 of the *Act*, qualifies to receive sickness benefits if he (a) had an interruption of earnings from employment, and (b) had 600 or more hours of insurable employment in his qualifying period.

[11] The Appellant filed a claim for sickness benefits on September 14, 2017. Based on the evidence, the Appellant accumulated 479 hours of insurable employment during his qualifying period (September 4, 2016 to August 19, 2017), which does not meet the required hours of insurable employment to qualify for benefits under subsection 7(2) of the *Act* or under section 93 of the *Regulations*.

[12] The qualifying period is determined under subsection 8(1) of the *Act* which provides that the qualifying period is the shorter of (a) the 52-week period immediately before the beginning of a benefit period, 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.

[13] The Respondent submitted evidence of the Appellant's previous benefit period, which commenced September 4, 2016. Accordingly, the Tribunal finds that the Respondent correctly determined the Appellant's qualifying period under paragraph 8(1)(b) of the *Act* as 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.

[14] A qualifying period can be extended under paragraph 8(2)(a) of the *Act* by the weeks for which a person is incapable of work because of a prescribed illness, injury, quarantine or pregnancy; however, it is only possible to extend a 52-week qualifying period. The Tribunal finds that an extension to the Appellant's qualifying period is not possible, as a qualifying period cannot be extended beyond the commencement of a previous benefit period. To allow such an extension would result in counting insurable weeks of employment twice and using them to again qualify for benefits. Once insurable weeks of employment are used to qualify for benefits, they may not be used again.

[15] The Appellant argues that he was unable to accumulate the required hours because he was medically unable to work during a significant portion of his qualifying period. He submits that he worked when he was physically capable of doing so and that the requirement of hours is unjust in his particular medical case.

[16] Given that there is no evidence to show that the Appellant had sufficient hours to qualify, the Tribunal sent notice of its intention to proceed by way of summary dismissal. In response to this notice, the Appellant provided additional submissions relating to his inability to work during his qualifying period due to his medical condition. No additional evidence was introduced suggesting the Appellant had sufficient insurable hours to qualify for benefits under the *Act*.

[17] The Tribunal is sympathetic to the Appellant's health challenges. However, the *Act* does not allow any discretion with respect to the number of hours an Appellant requires in order to qualify for benefits and the Tribunal does not have discretion to vary the clear wording in the legislation, no matter how compelling the circumstances. The qualifying requirements set out in the *Act* are not in the discretion of the decision maker to vary – even if the claimant is short one hour of meeting the qualifying conditions (*Canada (Attorney General) v. Lévesque*, 2001 FCA 304).

## CONCLUSION

[18] After reviewing the submissions of both the Appellant and the Respondent, the Tribunal finds that when applying the legal test for summary dismissal in this case it is plain and obvious that the appeal is clearly bound to fail, and as a result, the appeal has no reasonable chance of success.

[19] The appeal is summarily dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section