



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: T. W. v Canada Employment Insurance Commission, 2018 SST 1171

Tribunal File Number: GE-18-1660

BETWEEN:

T. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: August 17, 2018

DATE OF DECISION: September 17, 2018

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant applied for parental benefits on December 31, 2017. The Appellant's grandson was born on December X, 2017. The Appellant stopped work on December 22, 2017 to care for her grandson and has been his primary caregiver since birth. Her intent is to be his caregiver until he is an adult. The Appellant has assumed all financial, educational and medical responsibility for her grandson. She is in the process of seeking legal custody of her grandson with the consent of both his biological parents. The Appellant's daughter is unable to care for her son due to developmental delay and other medical issues.

[3] The Respondent determined the Appellant was not entitled to parental benefits as her grandson had not been placed with her for the purpose of adoption under the laws governing adoption in the province in which the Appellant resides.

[4] The Appellant's position is that she has assumed full responsibility for her grandson's care and her intent is to continue to do so until he is an adult. She argues that she should be entitled to parental benefits in these circumstances.

ISSUE

[5] Issue 1: Is the Appellant is entitled to receive parental benefits pursuant to subsection 23(1) of the *Employment Insurance Act* (Act)?

ANALYSIS

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

[7] Subsection 23(1) of the Act provides that parental benefits are payable to a major attachment claimant to care for a one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.

[8] In order for a claimant to receive parental benefits under subsection 23(1), it must be proven that the child was placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides. This is a factual determination to be made on the evidence (*Canada (Attorney General) v. Hunter*, 2013 FCA 12).

Issue 1: Is the Appellant is entitled to receive parental benefits pursuant to subsection 23(1) of the Act?

[9] No. The Tribunal finds the Appellant is not entitled to parental benefits. The Tribunal is not satisfied, on the evidence presented, that the Appellant has proven that her grandson was placed with her for the purpose of adoption under the laws governing adoption in Ontario. While the Tribunal has absolutely no doubt that the Appellant's intention is to seek and obtain sole custody of her grandson and to remain his caregiver until he is an adult, that alone, without an intent to legally adopt him, is not sufficient to meet the requirements of subsection 23(1) of the Act.

[10] The Appellant argues that she has been her grandson's primary caregiver since birth. She has assumed all parental responsibilities over him and will continue to do so throughout his life. She is seeking legal custody of her grandson with the consent of the parents. She submits that she should, therefore, be entitled to parental benefits.

[11] The Respondent's position is that the Appellant stated to the Respondent that she has no intention of adopting her grandson and she provided no evidence that she has begun the adoption process. As such, she does not meet the requirements of subsection 23(1) of the Act.

[12] The *Hunter* case has shed some light on the meaning of subsection 23(1) of the Act. The facts in the *Hunter* case were somewhat similar to the Appellant's situation. A grandmother was the sole provider for her grandson. A child protection agency had awarded her care. At the initial appeal level, the Board of Referees determined that the Appellant had legal custody of the child and was filing for legal adoption which was supported by the child protection agency. The claimant had provided evidence in that regard and her assertions were supported by a letter from a child protection agency. The letter did not, however, quote or describe any provisions of provincial adoption law or process. The Board of Referees allowed the claimant's appeal,

finding she was entitled to parental benefits. An appeal was brought to the Umpire of that decision. The Umpire found that it was open to the Board of Referees to conclude on the evidence presented, that the claimant's grandchild had been placed with her for the purpose of adoption. The Ministry of Attorney General then filed for judicial review of that decision to the Federal Court of Appeal, arguing that the claimant was not eligible for benefits because at the relevant time, she only had temporary legal custody of her grandchild and the statutory purpose test was not met unless there was a court order or something analogous to a court order granting the claimant permanent custody.

[13] The Federal Court of Appeal rejected that position, stating that Parliament has chosen broad and general terms to describe the statutory test in subsection 23(1) and that Parliament must be taken to have recognized that placement of a child for the purpose of adoption may arise in a variety of circumstances. The Court went on to say that in some cases a provincial law or documentation relating to the custody of a child may provide a conclusive answer to the factual question asked by subsection 23(1) as to the purpose of the child's placement. The Court found that the record disclosed no basis upon which the Court could set aside the Umpire's decision that the Board of Referees decision was reasonable.

[14] The Tribunal reads the *Hunter* decision to mean that the factual question to be answered under subsection 23(1) is whether the placement of the child was for the purpose of adoption under the laws governing adoption in the province in which the claimant resides. The statutory test does not require any specific documentation such as a court order granting permanent custody to prove this. The question must be answered by reviewing all the evidence. This means that not all placements of a child with a caregiver will qualify for parental benefits. There must be evidence upon which a factual finding can be made that the purpose of the placement is adoption in the legal sense (under the laws governing adoption in the province in which the claimant resides). In the *Hunter* case, it was determined there was such evidence.

[15] The Tribunal is not satisfied on the evidence before it, that the Appellant's grandchild was placed with her for the purpose of adoption under the laws governing adoption in Ontario. Rather, the evidence supports the conclusion that the Appellant's grandson was placed with her for the purpose of a custody arrangement and that she did not have the intention of following that

in the future with a legal adoption. Custody is not the same thing as adoption. These are two legally distinct concepts. Adoption involved the extinguishment of existing parental rights and the legal assumption of parental rights and responsibilities by the new parent. While the distinction may not seem relevant in the day-to-day functioning between the caregiver and the child, at law the distinction is significant. With adoption the child ceases to be a child of the natural parent and becomes a child of the adoptive parent. In Ontario, the legal process for adoption is set out in the *Child, Youth and Family Services Act 2017*, previously the *Child and Family Services Act* (repealed April 30, 2018). The statute sets out a formal process to be followed to adopt a child.

[16] In reaching the conclusion that the Appellant has not proven the placement was for the purpose of adoption, the Tribunal has had regard to the documentary evidence on file. The Appellant has filed a copy of her custody application confirming her intention to obtain legal custody of her grandson. The documents indicate that both biological parents consent to the Appellant's application. There is nothing, however, in this documentation indicating that adoption is being sought by the Appellant. That, however, is not unexpected, given the age of the child.

[17] The Tribunal has considered whether the documentation from the child protection agency, Family and Children's Services Niagara, suggests an intention on the part of the Appellant to adopt her grandson at some point. This documentation, however, only confirms that the Appellant is seeking custody of her grandson with their approval. There is no indication that adoption is being sought or is intended to be sought in the future. A Letter from Family and Children's Services Niagara dated February 15, 2018 confirms that the Appellant has been her grandchild's primary caregiver since birth on December X, 2017 and that a formal kin placement through Family and Children's Services Niagara has been initiated but is not complete. A letter dated August 8, 2018 from the same agency states that "it is my understanding that you have applied for custody of Z.. The Society is in support of this plan as it successfully mitigates the identified protection concerns. The Court has requested disclosure from the Society, which is anticipated to be completed at the end of August 2018." The letter goes on to confirm that the Appellant has been actively engaged with numerous service providers for her grandson.

[18] The Tribunal has next considered the Appellant's own information concerning the purpose of her grandson's placement and finds it does not support a finding that the purpose of the placement was for adoption.

[19] The Respondent's notes of conversations between the Appellant and the Respondent reflect intent of the Appellant to seek custody but not adoption. The January 29, 2018 notes indicate the Appellant advised the Respondent she is seeking custody of her grandson. The notes of a February 22, 2018 conversation confirm that the Appellant advised the Respondent she is seeking custody but does not intend to adopt. In that regard, the notes state that the Appellant advised the Respondent that she was working on custody, that the matter had to go through the courts and it was a lengthy process. The Appellant was asked by the Respondent if her intent is to adopt her grandchild. The notes indicate the Appellant's response to be in the negative:

“She does not intend to adopt because the hope is that when the child is 13 years of age, her daughter may be able to manage the care of the child at that time. The client stated that her daughter is developmentally delayed and is unable to care for a baby. She does not want to adopt and remove the possibility of her daughter being the child's caregiver at a later time.”

[20] The Tribunal finds the above discussion significant. These notes indicate that the Appellant had considered the possibility of adoption but did not want to pursue it to potentially remove the possibility of her daughter being the child's caregiver at a later time.

[21] The Respondent's notes of a further conversation on March 27, 2018 indicate that the Appellant advised that she was to go to court on April 30, 2018 to seek permanent custody of her grandson. She explained that her daughter is special needs and has developmental difficulties and never will be able to provide care for the child. The Appellant was asked if she intended to adopt her grandchild. She confirmed she was seeking custody in her court proceeding but also related that she is committed to her grandson for the rest of his life.

[22] The Tribunal finds the Appellant's expressed intent to the Respondent was that she was seeking custody of her grandson and intended to care for him on a permanent basis but she did

not intend to adopt him out of concern that doing so would potentially remove her daughter's ability to be a caregiver at a later time.

[23] The Tribunal found the Appellant's testimony to reflect the same sentiment. Her testimony does not support a finding that the placement of her grandson was for the purpose of adoption under the laws of Ontario. The Tribunal appreciates that the Appellant's grandson is only a baby and that seeking custody is the first step. However, the Tribunal is not satisfied that the Appellant has an intention of adopting her grandson in the future.

[24] The Appellant testified that she had been working in a hospital as a housekeeper and intended to return to that work on September 13, 2017. She had arranged caregivers to look after her grandson when she is at work. The Appellant explained that her daughter has a developmental delay. Physically she is 22 but mentally she is like a 12 year old and as such, she cannot take on the responsibility of the child. The Appellant wanted her grandson to stay in their family and not to be taken into care. As such, the Appellant contacted Family and Children's Services Niagara before her grandson was born and advised that she wanted to be responsible for her grandson. The agency was supportive of that.

[25] The Appellant gave evidence that she has been to court a number of times relating to her custody application. She is awaiting certain documents and is anticipating shortly attending a non-contested hearing to resolve the issue. The biological parents are not contesting the matter. The Appellant related that she has done everything she can to get custody and she wants to care for her grandson the rest of his life.

[26] The Appellant testified that her daughter lives with her and will continue to play a role with her son. The Appellant said she is called "Nana" and not "Mum". She related her grandson knows his "Mum" and that "I will never change that. I am not going to take that away from her because she has all rights to that." The Appellant went on to explain that her concern was for her grandson's safety. Her daughter cannot be by herself with him. She is on medication and has various medical issues.

[27] The Tribunal asked the Appellant if she intended to adopt her grandson. She said the courts told her that she did not have to adopt her son. She just needed custody of him. She said

the Respondent told her she needed to get custody of her grandson but not adoption to qualify for benefits.

[28] The Tribunal member questioned the Appellant about the conversation in which she expressed to the Respondent that she did not intend to adopt her grandson. The Appellant related that she thought getting custody and adoption was the same thing. She related that the Respondent told her once she got custody, she would be entitled to benefits.

[29] The Tribunal member asked the Appellant if the child protection agency ever discussed adoption with her. She said the plan was that her grandson was to be in her care until he was old enough to move out. The Appellant explained that the agency knows he is in good care. She takes her grandson to various health appointments and is staying on top of things with him.

[30] At the end of the hearing, the Appellant said that she is intending to adopt her grandson at a later point. She thought custody would be enough but if that is what she has to do to make sure she has legal rights for grandson, she does not have a problem with doing that.

[31] The Tribunal is not satisfied that the Appellant's statement at the end of the hearing that she is intending to adopt her grandson at a later point is credible. This statement is in contradiction to her prior statement to the Respondent and also in contradiction to her own earlier testimony that she was not going to change or take away her daughter's rights to her son.

[32] The Appellant's counsel submitted that the Appellant has acted admirably and done everything she can get to get custody. He argues she has full care and is seeking custody and so she is adopting her grandson. He also suggests there may be a misunderstanding on the Appellant's part as to what adoption means in that she may believe it precludes her daughter in playing a role in parenting. He submits that although the proceedings are for custody now but it is her intention to adopt later.

[33] The Tribunal agrees that the Appellant has acted admirably and done all she can to get custody. Respectfully, the Tribunal does not agree that seeking and obtaining custody and having intent to care for her grandson until he is an adult equates to a placement for the purpose of adoption under the laws governing adoption in Ontario. Subsection 23(1) clearly contemplates an intent to pursue the legal process of adoption. The section does not refer simply

to “adoption” which could then potentially include a de facto adoption. Rather, subsection 23(1) qualifies the word “adoption” with the requirement that the placement must be for the purpose of adoption *under the laws of the province in which the claimant resides*. The *Hunter* case makes clear that no specific documents are required to meet this test. However, there must be sufficient evidence to make a factual finding that the purpose of the placement was for adoption under the laws of Ontario.

[34] The Tribunal is unable to find that the Appellant’s grandson was placed with her for the purpose of adoption under the laws of Ontario. The Tribunal agrees the Appellant may be confused about what adoption means. However, her information to the Respondent and also her oral testimony suggest a reluctance to extinguish her daughter’s parental rights. Having considered the evidence from the child protection agency, the court application and the Appellant’s own testimony, the Tribunal is not satisfied that the Appellant’s grandchild was placed with her for the purpose of adoption under the laws governing adoption in Ontario. The Appellant’s case is distinguishable on its facts from the *Hunter* case. In the *Hunter* case, there was convincing evidence of the claimant’s intention to adopt her grandchild at a later date.

[35] The Appellant is clearly doing her utmost to care for her grandson and to provide him with all his needs. She is obviously a hardworking, caring and committed individual. The difficulty the Tribunal faces is that subsection 23(1) does not provide benefits for every situation where an individual is acting in the role of a parent. Unfortunately, this places individuals such as the Appellant in a difficult situation. However, the legislation is clear that to obtain parental benefits, the facts must support a finding that the placement is for the purpose of adoption under the laws of Ontario. The evidence in this case does not support such a finding.

CONCLUSION

[36] The appeal is dismissed.

Charlotte McQuade
Member, General Division - Employment Insurance Section

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| HEARD ON: | August 17, 2018 |
| METHOD OF PROCEEDING: | Videoconference |
| APPEARANCES: | T. W., Appellant Terry Kirby, Representative for the Appellant |

ANNEX

THE LAW

Employment Insurance Act

23 (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.