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

[TRANSLATION]

Citation: *M. B. v Canada Employment Insurance Commission*, 2019 SST 808

Tribunal File Number: GE-19-220

BETWEEN:

M. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Catherine Frenette

HEARD ON: March 15, 2019

DATE OF DECISION: March 26, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant began working for the employer on November 12, 1990. On January 11, 2018, the Appellant stopped working due to a labour dispute.

[3] The Appellant then worked for another employer from March 21, 2018, to April 25, 2018.

[4] The Appellant filed an initial claim for benefits on September 7, 2018. The Canada Employment Insurance Commission (Commission) denied the Appellant benefits because he lost his employment due to a labour dispute.

ISSUE

[5] The Appellant does not dispute the fact that he stopped working on January 11, 2018, due to a labour dispute with the employer. However, the Appellant submits that he was no longer disentitled as of March 21, 2018, because he became regularly engaged in insurable employment.

[6] Was the Appellant regularly engaged in insurable employment as of March 21, 2018, thus ending the disentitlement arising from his loss of employment due to a labour dispute?

ANALYSIS

[7] A claimant is not entitled to receive benefits if they lose their employment because of a work stoppage attributable to a labour dispute at the factory where they were employed (section 36(1) of the *Employment Insurance Act* (Act)).

[8] This disentitlement ends at the end of the work stoppage or the day on which the claimant becomes **regularly engaged** elsewhere in insurable employment (section 36(1) of the Act).

[9] A labour dispute is defined as a dispute between employers and employees "that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons" (section 2 of the Act).

[10] The Commission has the burden of proving that the Appellant is not entitled to benefits (*Canada (Attorney General) v Benedetti*, 2009 FCA 283).

Was the Appellant regularly engaged in insurable employment as of March 21, 2018, thus ending the disentitlement arising from his loss of employment due to a labour dispute?

[11] The Appellant worked for another employer from March 21, 2018, until April 25, 2018, when he stopped due to a work shortage.

[12] The Appellant explained that this employer told him when he was hired that he would work 40 hours per week. Therefore, the Appellant was ready to work 40 hours per week.

[13] The Appellant explained that he went to work every day and that his hours varied day to day. The Appellant explained that he did not have a paper schedule and that the employer had told him to come to work every day Monday to Friday. The Appellant explained that the employer would tell him to leave early because of the temperature or a shortage of work.

[14] The Record of Employment from this employer shows that the Appellant worked for six weeks and made between $100 and $416 per week for a total of 106 hours. The paystubs show the following hours worked per week:

- From March 18 to March 24, 2018: The Appellant worked 13.5 hours.

- From March 25 to 31, 2018: The Appellant worked 26 hours.

- From April 1 to April 7, 2018: The Appellant worked 15 hours.

- From April 8 to April 14, 2018: The Appellant worked 23.5 hours.

- From April 15 to April 21, 2018: The Appellant worked 6.25 hours.

- From April 22 to April 28, 2018: The Appellant worked 21. 25 hours.

[15] The evidence shows that the Appellant did not work 40 hours per week.

[16] The Appellant stated that one day the employer told him to do deliveries because there was less sandblasting to do. The employer told him that the next day he would see what he could do. The next day, the Appellant texted the employer to ask if he should go in to work at 4:00 p.m. The employer responded: [translation] “No need tonight. I’ll keep you posted.”

[17] The Appellant stated that, following that text message, he stopped going to work and the employer never called him back.

[18] The Appellant explained that, to benefit from a strike fund allocation, he had to picket for 10 hours every six days. The Appellant said he did not want to give up his allocation by not picketing, in solidarity. Picketing could occur during the day, night, evening, or on the weekend.

[19] The Appellant testified that the union established the picketing schedule well in advance. The Appellant could therefore ask to change his picketing time. The Appellant testified to both the Commission and the Tribunal that he would have changed his picketing schedule based on the possibility of full-time work. Therefore, the Appellant is of the view that his obligation to picket did not prevent him from working 40 hours per week.

[20] The employer told the Commission that employees were normally hired for 40 hours per week and that, if they did not work 40 hours, it was often due to a breakdown of machinery.

[21] The employer also noted that the Appellant was unavailable for work and was often absent because he had to do one or two days of picketing. The employer noted that hours were not guaranteed and that the Appellant worked based on the company’s needs.

[22] The employer confirmed that it had an agreement with the Appellant to let him picket and that occasionally he could miss work to picket if he was unable to find someone to replace him.

[23] The employer explained that when the Appellant left, it hired another employee to replace him. The employer does not know why the Appellant said he was waiting to be called back because that was not the case.

[24] As part of the request for reconsideration, the employer made clear to the Commission that the Appellant worked on call part time and did not have a written contract.

[25] The Appellant testified that he did not miss work due to picketing because he had an agreement with his employer. Furthermore, according to the Appellant, he had to do only one day of picketing every six days and could make arrangements with his colleagues to change his picketing schedule so as not to miss work.

[26] The Appellant testified that he told his employer that he could change his picketing schedule. In the beginning, he worked full days. The employer told him he would do sandblasting or sort parts.

[27] The Appellant does not know why his shifts were reduced. In his view, it was poor management on behalf of the employer.

[28] In the Commission's view, the evidence does not show that the Appellant held a regular employment. For a claimant to show they were regularly engaged in insurable employment they must demonstrate: 1) the firm, serious and genuine nature of the employment, 2) the continuity of the employment, and 3) the regularity of the work schedule. Therefore, in the Commission's view, the Appellant's disentitlement never ended.

[29] The Tribunal is of the view that the Appellant was not engaged in regular employment to end the disentitlement resulting from a labour dispute (section 36(1) of the Act).

[30] The Supreme Court of Canada decision *Abrahams v Attorney General of Canada*, [1983] 1SCR 2, found that for a claimant to be regularly engaged in employment "the required characteristic was not the duration of the hiring but the regularity of the work schedule."

[31] Therefore, the duration of employment is not determinative in making it regular; rather, the employment must be exercised for a sufficient duration to determine the regularity of the work schedule (*Abrahams, supra*; *Minister of Employment and Immigration v Roy*, [1986] 1 FC 193).

[32] The Tribunal finds inconsistencies between the Appellant's and the employer's versions of certain aspects of the evidence. However, these inconsistencies are not determinative because the important facts are undisputed.

[33] Indeed, both the Appellant's and the employer's evidence shows that the Appellant did not work regularly for the employer. The Appellant testified that he went to work and that his shift would end based on the employer's needs.

[34] Whether the Appellant did not work because of the temperature or because he was picketing, the legal test to be applied is whether the work schedule was regular (*Abrahams*, *supra*).

[35] Therefore, the Tribunal is of the view that the Appellant was disentitled from receiving benefits due to a labour dispute and that this disentitlement did not end when he was hired by another employer because the Appellant was not working regularly (section 36(1) of the Act; *Abrahams*, *supra*; *Roy*, *supra*).

CONCLUSION

[36] The appeal is dismissed.

Catherine Frenette
Member, General Division – Employment Insurance Section

HEARD ON:	March 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	M. B., Appellant