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

[TRANSLATION]

Citation: *S. B. v Canada Employment Insurance Commission*, 2019 SST 573

Tribunal File Number: GE-18-1858

BETWEEN:

S. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: October 26, 2018, and April 26, 2019

DATE OF DECISION: April 30, 2019

DECISION

[1] The appeal is allowed.

[2] The Tribunal finds that the Appellant accumulated the required number of hours of insurable employment to establish an Employment Insurance benefit period under section 7 of the *Employment Insurance Act* (Act). The Appellant qualifies for benefits under section 7 of the Act.

[3] The Tribunal finds that the imposition of a non-pecuniary penalty on the Appellant, in the form of a warning for knowingly making a false or misleading statement, is not justified under sections 38 and 41.1 of the Act.

OVERVIEW

[4] The Appellant worked as a cashier-packer for the employer X (X or X or the employer), from June 1, 2017, to September 18, 2017, inclusive. On October 10, 2017, the Appellant filed a claim for Employment Insurance benefits effective September 24, 2017.

[5] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Appellant had not accumulated the required number of hours of insurable employment to be entitled to Employment Insurance benefits. The Commission also found that the Appellant had made a false or misleading statement by submitting a Record of Employment that he knew was erroneous, and a non-pecuniary penalty (warning letter) was imposed on him as a result. Following a ruling given by the Canada Revenue Agency (CRA) establishing that the Appellant had worked 666 hours during his period of employment from June 1, 2017, to September 18, 2017, which made him entitled to benefits, the Commission conceded the appeal on the issues.

[6] The Appellant argued that he had accumulated enough hours of work during his period of employment to be entitled to benefits. He stated that he did not make a false statement or fail to provide information to the Commission. On May 23, 2018, the Appellant challenged the Commission’s reconsideration decision. It is now being appealed to the Tribunal.

PRELIMINARY MATTERS

[7] The October 26, 2018, hearing was adjourned.

[8] At that hearing, the Appellant told the Tribunal that he was going to request a ruling from the Canada Revenue Agency (CRA) so that it could determine the number of hours of insurable employment he worked during his period of employment from June 1, 2017, to September 18, 2017, at the employer X (X or X) (GD6-1).

[9] The Tribunal then held the file in abeyance while it waited to receive a copy of the CRA's ruling. A copy of that ruling dated April 10, 2019, was sent to the Tribunal on April 12, 2019 (GD15-1 to GD15-3).

[10] On April 15, 2019, the appeal was removed from abeyance, and the hearing resumed on April 26, 2019.

[11] On October 26, 2018, the Appellant also told the Tribunal during the hearing that he was withdrawing his appeal on the issuing of a notice of violation to him because the Commission's reconsideration decision set aside the notice of violation in question.

[12] The Tribunal states that, for that reason, this decision addresses only the issue of the required number of hours of insurable employment for entitlement to Employment Insurance benefits (conditions required to receive benefits) and that of the false or misleading statement.

ISSUES

[13] The Tribunal must determine whether the Appellant qualifies for benefits under section 7 of the Act.

[14] To arrive at that conclusion, the Tribunal must address the following question:

a) Did the Appellant accumulate the required number of hours of insurable employment to be entitled to Employment Insurance benefits under section 7 of the Act, and does he therefore qualify for benefits?

[15] The Tribunal must also determine whether the imposition of a warning on the Appellant for committing an act or omission by knowingly making a false or misleading statement is justified under sections 38 and 41.1 of the Act.

[16] To arrive at that conclusion, the Tribunal must address the following questions:

a) Did the Appellant make a false or misleading statement?

b) If so, did the Appellant know that his statement was false or misleading?

c) Did the Commission exercise its discretion judicially when it imposed a penalty on the Appellant?

ANALYSIS

[17] The Court has determined that, when a Commission decision is appealed, the decision no longer falls within the Commission's jurisdiction and that any amendment after the decision has been appealed is null and void (*Wakelin*, A-748-98; *Poulin*, A-516-91; *Von Findenigg*, A-737-82).

Required Number of Hours of Insurable Employment

Did the Appellant accumulate the required number of hours of insurable employment to be entitled to Employment Insurance benefits under section 7 of the Act, and does he therefore qualify for benefits?

[18] Yes. The Tribunal finds that the Appellant accumulated enough hours of insurable employment to be entitled to Employment Insurance benefits under section 7 of the Act and that he qualifies to receive them.

[19] To be entitled to Employment Insurance benefits, a claimant must satisfy certain conditions described in section 7 of the Act. One of these conditions states that the claimant must have had, during their qualifying period, at least the number of hours of insurable employment set out in the table in section 7(2) of the Act based on the regional rate of unemployment that was applicable (section 7(2)(b) of the Act).

[20] The table provides the following information:

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

[21] Section 8(1) of the Act provides that 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 section 10(1); or (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 section 10(1).

[22] Section 10(1) of the Act states that a benefit period begins, depending on the case, on the later of (a) the Sunday of the week in which the interruption of earnings occurs, or b) the Sunday of the week in which the initial claim for benefits is made.

[23] Section 10(2) of the Act specifies that, except as otherwise provided in sections 10 to 15 and section 24, the length of a benefit period is 52 weeks.

[24] Section 90(1)(d) of the Act provides that the Commission can ask the Canada Revenue Agency (CRA) to make a ruling on the question of determining how many hours an insured person has had in insurable employment.

[25] Section 9.1 of the *Employment Insurance Regulations* (Regulations) indicates that, where a person's earnings are paid on an hourly basis, the person is considered to have worked in insurable employment for the number of hours that the person actually worked and for which the person was remunerated.

[26] In *Canada Employment Insurance Commission v SG* (2016 SSTADEI 519), the Tribunal's Appeal Division restated that case law has established that the Canada Revenue Agency (CRA) has exclusive jurisdiction to determine how many hours of insurable employment a claimant has for the purposes of the Act (*Romano*, 2008 FCA 117; *Didiodato*, 2002 FCA 345; *Haberman*, A-717-98).

[27] In this case, the Appellant qualifies for benefits under section 7 of the Act.

[28] The Commission indicated that it had established the Appellant's qualifying period as September 25, 2016, to September 23, 2017, under section 8(1)(a) of the Act (GD4-9).

[29] Based on the table in section 7(2) and on the 6.7% unemployment rate (from September 10, 2017, to October 7, 2017) in the Appellant's region of residence (Montréal region – economic region number 16), the Commission determined that the minimum number of hours of insurable employment required for the Appellant to be entitled to Employment Insurance benefits was 665 hours (GD3-27 and GD4-9).

[30] The evidence on file indicates that the Appellant accumulated 666 hours of insurable employment during his qualifying period (GD3-30, GD3-31, GD15-2, and GD15-3).

[31] In a ruling made on April 10, 2019, the Canada Revenue Agency (CRA) found that the Appellant had held insurable employment with the employer X (X or X) from June 1, 2017, to September 18, 2017, under section 5(1)(a) of the Act (GD15-2 and GD15-3).

[32] In its ruling, the CRA determined that the Appellant had completed 666 hours of insurable employment during that period, under section 10(2) of the Act and section 9.1 of the Regulations (GD15-2 and GD15-3).

[33] That ruling confirms the information that appears on the amended or replaced Record of Employment issued by the employer, dated November 3, 2017, and indicating that the Appellant worked June 1, 2017, to September 18, 2017, inclusive, and that he completed 666 insurable hours during the stated period (GD3-30 and GD3-31).

[34] In an additional argument presented on April 16, 2019, and following the CRA's ruling dated April 10, 2019, the Commission argued that, under section 90(1) of the Act, only the Canada Revenue Agency (CRA) is authorized to make a ruling on the number of hours of insurable employment (GD18-1).

[35] The Commission indicated that it conceded the issue on the question of the number of hours of insurable employment required to establish a benefit period (benefit period not established) (GD18-1).

[36] In summary, based on the evidence on file, the Tribunal considers the Appellant to have accumulated 666 hours of insurable employment during his qualifying period and that 665 hours of insurable employment are required for a claim to be established for him.

[37] The Tribunal finds that the Appellant has proven that he qualifies for benefits under section 7 of the Act.

[38] The appeal is allowed on this issue.

False or Misleading Statement

[39] The Court has confirmed the principle that a false or misleading statement is made only where claimants have subjective knowledge of the falsity of the information given or representations made by or about them (*Mootoo*, 2003 FCA 206; *Gates*, A-600-94).

[40] In *Purcell* (A-694-94), the Court stated, "The Board must decide on a balance of probabilities that the particular claimant subjectively knew that a false or misleading statement had been made. In other words, the standard is not what the so-called reasonable unemployment insurance claimant would know."

[41] In *Gagnon* (2004 FCA 351), the Court specified how the Commission may have just cause for setting guidelines for the imposition of penalties to guarantee some consistency nationally and avoid arbitrariness in such matters.

Did the Appellant make a false or misleading statement?

[42] No. In this case, the Tribunal does not consider the Appellant to have made a false or misleading statement by providing the Commission with a Record of Employment that he knew was erroneous, as the Commission argued (*Mootoo*, 2003 FCA 206; *Gates*, A-600-94; *Purcell*, A-694-94).

[43] The evidence shows that the amended or replaced Record of Employment issued by the employer and indicating that the Appellant had worked from June 1, 2017, to September 18, 2017, inclusive, and that he had accumulated 666 hours of insurable employment corresponds to the conclusion that the Canada Revenue Agency (CRA) reached in the ruling it made on April 10, 2019 (GD3-30, GD3-31, GD15-2, and GD15-3).

[44] The Commission indicated that it also conceded the issue on the question of the Appellant's false or misleading statement (GD18-1).

Did the Appellant know that his statement was false or misleading, and did the Commission exercise its discretion judicially when it imposed a penalty on him?

[45] In this case, since the Tribunal has determined that the Appellant did not make a false or misleading statement, there is therefore no need to assess whether he knew that his statement was false or misleading or whether the Commission exercised its discretion judicially when it imposed a penalty on the Appellant in the form of a warning letter (*Mootoo*, 2003 FCA 206; *Gates*, A-600-94; *Purcell*, A-694-94; *Gagnon*, 2004 FCA 351).

[46] The appeal on this aspect is allowed.

CONCLUSION

[47] The Tribunal finds that the Appellant qualifies to receive Employment Insurance benefits according to the terms of section 7 of the Act because he accumulated the required number of hours of insurable employment during his qualifying period.

[48] The Tribunal also finds that the imposition of the non-pecuniary penalty on the Appellant for committing an act or omission by knowingly making a false or misleading statement is not justified under sections 38 and 41.1 of the Act.

[49] The appeal is allowed on the two issues brought to its attention.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	October 26, 2018, and April 26, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	S. B., Appellant