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

Citation: *J. S. v Canada Employment Insurance Commission*, 2019 SST 1531

Tribunal File Number: GE-17-276

BETWEEN:

J. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Takis Pappas

HEARD ON: June 12, 2018

DATE OF DECISION: June 7, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant filed an initial claim for employment insurance benefits on May 1, 2011. She submitted a Record of Employment (ROE) that stated that she worked from March 7, 2011 to April 29, 2011 and accumulated 312.3 hours of insurable employment.[1] She also submitted an ROE from X that stated that she worked from September 23, 2010 to April 23, 2011 and accumulated 626.25 hours of insurable employment.[2]

[3] The Appellant served the two week waiting period from May 1 to 14, 2011 and then received ten weeks of regular benefits for the period of May 15, 2011 to July 23, 2011.[3] The Appellant converted her claim to sickness benefits and submitted a medical certificate stating that she was ill from July 19, 2011 to September 18, 2011.[4] The Appellant received eight weeks of sickness benefits for the period of July 24, 2011 to September 17, 2011 which was followed by an additional eight weeks of regular benefits from March 4, 2012 to April 28, 2012.[5] In total, the Appellant received a combined twenty-six weeks of benefits at a weekly benefit rate of $258.

[4] An investigation by Service Canada revealed that records of employment issued under the name of X were suspect and this included the record of employment used by the Appellant.[6]

[5] The Respondent notified the Appellant that her employment with X was not legitimate and consequently she failed to prove that she qualified to receive employment insurance benefits. The Respondent notified Appellant that she no longer had sufficient insurable hours to establish a benefit period effective from May 1, 2011,[7] resulting in an overpayment of $6,708.[8]

---

[1] (GD3-19)
[2] (GD3-20 to GD3-21)
[3] (GD3- 95)
[4] (GD3-22)
[5] (GD3-95)
[6] (GD3-19)
[7] (GD3-59 to GD3-60)
[8] (GD3-69 to GD3-70)

[6] The Respondent also imposed a penalty of $468 because she knowingly made one misrepresentation with respect to her claim for benefits.[9]

[7] In her request for reconsideration, the Appellant argued that she was not involved in the preparation of, and had not altered her ROE and that it was Canada Revenue Agency's (CRA) to check the validity of the ROE before approving her employment insurance . She further stated that if X made a mistake or issued a fake ROE then he should punished, not her.

[8] On December 14, 2016, the Respondent denied the Appellant's request for reconsideration because she did not have sufficient hours of insured employment to qualify for employment insurance benefits according to section 7, 48, 49 of the *Employment Insurance Act* (the Act) and subsection 14(1) of the *Employment insurance Regulations* (the Regulations); and the imposition of a penalty according to sections 38 of the Act for making a misrepresentation by knowingly providing false or misleading information to the Respondent. The Respondent considered the Appellant's inability to work due to illness and financial hardship and modified the penalty amount to $398.00.[10]

ISSUES

[9] Issue #1: Should the Appellant's benefit period, established May 1, 2011, be cancelled?

[10] Issue #2: Should a penalty be imposed on the Appellant because she made a misrepresentation by knowingly providing false or misleading information to the Respondent?

ANALYSIS

Issue #1: Should the Appellant's benefit period, established May 1, 2011, be cancelled?

[11] The Act provides that in order for a claimant to receive regular benefits he/she must meet the requirements of section 7 of the Act in order to establish a benefit period under section 9 of the Act.

[9] (GD3-61 to GD3-68)
[10] (GD3-90 to GD3-93)

[12] Section 48 of the Act states that a claimant is not entitled to benefits until he/she makes a claim for benefits and provides information in the form directed by the Commission who in turn, makes a decision on whether the claimant qua1ifies to receive benefits.

[13] Section 49 of the Act states that a claimant is not entitled to benefits until the claimant proves that he/she meets the requirements to receive benefits and that no circumstances exist to disqualify him/her from receiving the benefits.

[14] Yes. The Appellant's benefit period, established May 1, 2011, should be cancelled.

[15] The Appellant submitted that she was not involved in the preparation of, and had not altered her ROE and that it was Canada Revenue Agency's (CRA) to check the validity of the ROE before approving her benefits. The Appellant further argued that if X made a mistake or issued a fake ROE then he should punished, not her. The Appellant further confirmed her period of employment with X from March 7, 2011 to April 29, 2011 for 312 insurable hours. The Appellant provided a copy of her 2011 T4 Statement of Remuneration Paid, her Record of Employment, and pay stubs from X covering the period March 7, 2011 to April 29, 2011. As well, the Appellant submitted her income tax Notice of Assessment and also a letter stating that her husband was in receipt of Canada Pension Plan (CPP) Disability Benefits since May 2016.[11]

[16] At the hearing, I asked the Appellant certain questions. She stated that her work was typing and filling, account preparation, and data entry. She could not tell me what computer program she was using to do this work. She could not tell me what the content or subject of the letters was. She could not remember any names of any clients. She could not tell me the name of the person that helped her obtain the job. Although she worked at the employer's residence, she could not remember the employer wife's name. The Appellant's husband stated that they are both sick and diabetic, and he is very upset because he feels they are being harassed by the Respondent and the Tribunal, based on the questions they are being asked.

[17] The Respondent submitted that that there are several inconsistencies and irregularities in

[11] (GD3-71 to GD3-79)

the information and evidence obtained regarding the Appellant's alleged employment with X.

- The Appellant selected her job title on the application for benefits as "income tax return preparer".[12] The employer also issued the ROE citing the Appellant's occupation as "Tax Preparer".[13] Yet, the Appellant has confirmed that she never conducted any tax preparation work within this employment and that she has no prior experience or qualifications in regards to tax preparation.[14] Neither the Appellant nor her husband could provide any explanation as to why she had selected "income tax return preparer" as her job title when questioned by the Respondent.[15]

- The Appellant initially declared that her employment with X was not steady work and that she was paid in cash and was unsure if premiums were being deducted from her earnings, because she was not given any pay stubs.[16] The Appellant's husband further confirmed that this employment was not steady and was primarily considered part time.[17] However, contradictory to her original declaration that she was not given pay stubs, the Appellant proceeded to submit pay stubs from the employer covering the pay periods of March 7, 2011 to April 29, 2011.[18]

- The pay stubs submitted by the Appellant consistently shows that the Appellant worked 80 hours per bi-weekly pay period that would suggest an average of 40 hours per week.[19] The ROE also shows that the Appellant had accumulated a total of 312.30 insurable hours (rounded up to 313) across a period of work of 8 weeks (March 7 – April 29, 2011) which results in an average of 39.13 hours per week (313 hours / 8 weeks = 39.125 hours/week). The Respondent contends that this pay stub and ROE evidence establish that the Appellant was primarily working full time hours with an average of close to 40 hours per week, which does not align with the Appellant's declarations that this was not

[12] (GD3-9)
[13] (GD3-19; GD3-75; GD2-11)
[14] (GD3-56 to GD3-58; GD3-87 to GD3-88)
[15] (GD3-56 to GD3-58; GD3-87 to GD3-88)
[16] (GD3-56 to GD3-58; GD3-87 to GD3-88)
[17] (GD3-87 to GD3-88)
[18] (GD3-77 to GD3-78; GD3-84 to GD3-85)
[19] (GD3-77 to GD3-78; GD3-84 to GD3-85)

steady employment and was primarily part time only.

- The pay stubs submitted by the Appellant also show that there was no federal tax being deducted from the Appellant's earnings. These pay stubs also show that out of the four bi-weekly pay periods during which the Appellant worked, Canada Pension Plan (CPP) premiums were only deducted during one pay cycle (pay period ending April 29, 2011). Additionally, the employer's bi-weekly pay periods appear to start on a Monday and end two Sundays later (pay period end dates March 20, 2011; April 3, 2011; April 22, 2011). However, the Appellant's final pay period shows a pay period end date of Friday, April 29, 2011 which is the same dated listed on the ROE as the Appellant's last day of work.[20]

- An employee's last day of work should have no bearing on the consistent pay period cycle, which in this case the final pay period would be expected to end on Sunday, May 1, 2011 to remain consistent with the earlier pay period end dates.[21] Normal payroll practices within insurable employment include deducting federal tax and CPP premiums in each and every pay period. The Respondent contends that these pay stub irregularities further diminish the legitimacy of this alleged employment, especially considering the nature of the employer's business in the accounting field that would suggest that the employer would be familiar with and knowledgeable of regular payroll procedures and pay period dates.

- The Appellant also provided inconsistent statements when questioned in regards to what hours/times she would work for X. She initially suggested she worked for X steadily during the day. When questioned how she worked during the day while also holding daytime employment with X, the Appellant changed her answer to suggest she worked in the evenings. The Appellant then confirmed that she had never worked for X during the weekdays. The Appellant further suggested she worked for X for 8 hours in the evenings but then changed this statement to suggest she only worked until 8pm or 9pm, which would imply that she worked less than 8 hours in the evenings, and that she did not remember what hours she would work on the weekend days.[22] The Respondent contends

[20] (GD3-77 to GD3-78; GD3-84 to GD3-85; GD3-19)
[21] (GD3-77 to GD3-78; GD3-84 to GD3-85)
[22] (GD3-56 to GD3-58)

that the Appellant has been unable to provide any reasonable explanation to corroborate the full time nature of this employment as implied by the pay stubs and ROE evidence, or how she sometimes worked simultaneous hours between both X and X.

- The Appellant further acknowledged that she had been referred to X for help after having stopped working for X and realizing she did not have sufficient hours to qualify for benefits (GD3-56 to GD3-58). However, neither the Appellant nor her husband could recall the name of the "guy" who had referred them to X or the nature of how they knew this "guy" (GD3-87 to GD3-88).

- The Appellant could only provide a vague description of her duties while employed with X suggesting that she would do paperwork for X's clients regarding their expenses and income, and also some typing work. The Appellant could not recall if X's clients were businesses, individuals, or a combination of both. The Appellant also could not identify any of the common forms/documents she handled within the course of this employment.[23] The Respondent contends that any reasonable person who was legitimately employed in this employment would be able to identify or recall the types of clients they served (i.e. individual or business) as well as identify some of the common forms/documents used throughout their regular duties. The Appellant's vague responses in this regard only further support the Respondent's position that the Appellant's alleged employment with X never existed.

- The owner of X, Mr. G. B., has formally been issued a fine and period of probation by the Ontario Court of Justice as a result of six counts of non-compliance for failing to provide information to the Respondent.[24] The Respondent would also like to identify that Mr. B. will be answering to twenty-seven (27) charges of issuing false Records of Employment during a hearing scheduled from February 13-17, 2017.

[18] I carefully examined both of the party's submissions. I accept and assign more weight to

[23] (GD3-87 to GD3-88)
[24] (GD3-99 to GD3-128)

the Respondent's clear and cogent evidence.

[19] I cannot accept the Appellant's submissions as truthful. There are too many inconsistencies in the testimony the Appellant provided. As the Respondent submitted, she could not identify any of the common forms/documents she handled within the course of her employment. Any reasonable person who was legitimately employed in this employment would be able to identify or recall the types of clients they served (i.e. individual or business) as well as identify some of the common forms/documents used throughout their regular duties and the type of computer software they used. The Appellant's vague responses in this regard only further support the fact that the Appellant's alleged employment with X never existed.

[20] I find that the Appellant's benefit period from May 1, 2011 is voided because the evidence before me indicates that on the balance of probabilities, the Appellant's alleged employment with X was false and non-existent. Therefore, the Appellant failed to prove that she accumulated the required 910 insurable hours of employment during her qualifying period (May 2, 2010 to April 30, 2011) to qualify for regular benefits according to section 7 of the Act because she only accumulated 627 insurable hours with her other employer, X.

[21] Although I understands the Appellant's financial situation when she stated that she cannot repay the overpayment, the Act does not confer upon me the power to depart from its provisions, for any reason, no matter how compelling the circumstances.[25]

[25] (Granger v. Canada Employment and Immigration Commission, A-684-85)

Issue #2: Should a penalty be imposed on the Appellant because she made a misrepresentation by knowingly providing false or misleading information to the Respondent?

[22] It is well-established case law that the initial onus is on the Respondent to prove that the Appellant knowingly made a false or misleading statement or representations before it can impose a penalty according to section 38 of the Act.

[23] The Federal Court of Appeal confirmed the principle, that for a finding of misrepresentation, claimants must have subjective knowledge that the representations made by them, or on their behalf, were false.[26]

[24] Yes. I find that penalty should be imposed on the Appellant because she made misrepresentations by knowingly providing false or misleading information to the Respondent.

[25] I accept the Respondent's submission and find that the Appellant submitted a false Record of Employment from X; submitted an application for benefits identifying false employment with X; and made misleading declarations to the Respondent alleging that she had worked for X from March 7, 2011 to April 29, 2011.

[26] In assessing the amount of the penalty, I find that the Respondent exercised its discretionary authority to impose a monetary penalty in a judicious manner because all relevant circumstances have been considered and all irrelevant circumstances have been ignored. There is no evidence of any other mitigating circumstances that the Respondent has not already given consideration to. The penalty amount is $398.00.

[26] (*Mootoo v. Canada (AG)*, 2003 FCA 206; *Canada (AG) v. Gates*, A-600-94)

CONCLUSION

[27] The appeal is dismissed.

Takis Pappas

Member, General Division - Employment Insurance Section

HEARD ON:	June 12, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	J. S., Appellant R. S., Representative for the Appellant