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

Citation: *Canada Employment Insurance Commission v S. G.*, 2019 SST 839

Tribunal File Number: AD-18-564

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

S. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: September 5, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, S. G. (Claimant), was denied sickness benefits because the Respondent, the Canada Employment Insurance Commission (Commission) calculated she did not have sufficient insurable hours. At one point, the Commission had written the Claimant that she did have sufficient hours but it recalculated and changed its decision after the Claimant asked it to reconsider.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which extended her qualifying period because it found that she had no insurable hours in her final pay period. It then found that the Claimant had sufficient hours within that extended qualifying period. The Commission appealed to the Appeal Division.

[4] The appeal is allowed. The General Division erred in law by calculating hours within the extended qualifying period in a manner that included hours associated with the non-insurable earnings.

ISSUES

[5] Did the General Division err in law by extending the Claimant's qualifying period by two weeks without deducting the hours that had been attributed to her last pay period?

[6] Did the General Division find that the Claimant's insurable hours were sufficient based only on its extension of the qualifying period and without considering the evidence that the claimant had periods of vacation within her qualifying period that could result in additional insurable hours?

ANALYSIS

General principles

[7] The Appeal Division may intervene in a decision of the General Division, only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] The only grounds of appeal are as follows:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record, or;
c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Issue 1: Did the General Division err in law by extending the Claimant's qualifying period by two weeks without deducting the hours that had been attributed to her last pay period?

[9] The Commission determined that the Claimant's qualifying period ran from March 5, 2017, to March 3, 2018, and that she had a total of 590 hours of insurable employment, which was less than the minimum of 600 hours required for sickness benefits. At that time, the Commission had not requested a ruling from the Canada Revenue Agency (CRA) as to the number of hours that were insurable.

[10] Although the General Division did not have the benefit of a CRA ruling, it determined that the payment that the Claimant received in her final pay period as recorded in her Record of Employment (ROE) did not represent wages for hours worked. It accepted the Claimant's evidence that the employer made this final payment as a form of bereavement allowance.

[11] The General Division further found that the Claimant did not have insurable hours during this period because she was incapable of working due to illness and that this meant that she her

qualifying period should be extended under section 8(2)(a) of the *Employment Insurance Act* (EI Act). The General Division extended the Claimant's qualifying period so that it started two weeks earlier, on February 19, 2017.

[12] Having extended the qualifying period, the General Division added in the 29.9 hours from February 19, 2017, to March 4, 2017, to the total of 590 hours of insurable employment, and then calculated that the new total would exceed the minimum of 600 hours of insurable employment. When it did this, it did not reduce the total number of hours of insurable employment for the qualifying period by the number of hours to which it attributed the "bereavement pay".

[13] According to her ROE, 37.5 hours of work was associated with the Claimant's last pay period. According to the allocation work sheet,[1] the Claimant had 15.5 hours of insurable employment in the week from February 18, 2018, to February 24, 2018, and she had 15.57 hours of insurable employment in the week from February 25, 2018, to March 3, 2018. This would suggest that the total number of insurable hours in the final period was 31.07 hours.

[14] Since the basis for extending the qualifying period by two weeks was the Claimant's lack of insurable employment in the final two-week pay period, the General Division should have deducted the hours that the Commission had considered insurable from the final pay period.

[15] Regardless of whether the number of insurable hours erroneously retained was 37.5 hours of insurable hours (from the ROE) or 31.07 hours (from the work sheet), the adjusted total would fall below the threshold of 600 insurable hours. The Claimant would not have qualified for sickness benefits if the General Division had made the appropriate deduction.

[16] It was an error of law under section 58(1)(b) of the DESD Act for the General Division to extend the Claimant's pay period under section 8(1)(a) of the EI Act while retaining within the qualifying period insurable hour total the "non-insurable" hours by which it justified the extension.

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[1] GD3-36

Issue 2: Did the General Division find that the Claimant's insurable hours were sufficient based only on its extension of the qualifying period and without considering the evidence that the claimant had periods of vacation within her qualifying period that could result in additional insurable hours?

[17] The Commission is the appellant in this matter but, at the Appeal Division hearing, the Claimant raised the issue of unpaid vacation hours as hours of insurable earnings. The Claimant stated that the General Division had not included as hours of insurable earnings the hours associated with her unpaid vacation.

[18] There was evidence before the General Division that the employer described the Claimant's vacation periods as nil pay periods in the roes. However, the employer also described the vacation periods as "unpaid".[2] There is nothing on the record before the General Division, including the Claimant's testimony, suggesting that the Claimant was actually paid for the vacation represented by the nil pay periods.

[19] Section 10.1(1) of the *Employment Insurance Regulations* (Regulations) states as follows:

> Where an insured person is remunerated by the employer for a period of paid leave, the person is deemed to have worked in insurable employment for the number of hours that the person would normally have worked and for which the person would normally have been remunerated during that period.

[20] The Claimant's vacation periods could not be considered insurable under section 10(1) of the Regulations, unless the employer paid her for the time that she took off. *At the Appeal Division*, the Claimant insisted that the employer paid her for this vacation time, by adding it to each regular paycheque. However, the evidence before the General Division did not suggest that the Claimant was paid for the vacation periods. This is new evidence that was not before the General Division, and the Appeal Division cannot now consider it.[3]

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[2] GD3-32
[3] Mette v. Canada (Attorney General) 2016 FCA 276

[21] The General Division did not err under section 58(1)(c) of the DESD Act by failing to consider that the Claimant had nil periods during her qualifying period, when the only evidence before the General Division was that these were **unpaid** nil periods.

CONCLUSION

[22] The appeal is allowed. The matter is referred back to the General Division for reconsideration in accordance with my authority under section 59 DESD Act.

[23] I note that the Commission has obtained a ruling from the CRA since the date of the General Division decision that confirms that the Claimant has 605 hours of insurable employment. However, this total relates to the number of hours within the *extended* qualifying period, including the hours in the Claimant's final pay period, which the CRA considered insurable.

[24] The Commission confirmed to the Appeal Division that it had not raised the Claimant's concern about the omission of paid vacation hours with the CRA and it did not ask the CRA to consider whether the Claimant's vacation "nil" periods were insurable.

[25] The General Division should be aware that the Claimant has confirmed to the Appeal Division that she expects to appeal the CRA ruling (and may have already done so). She intends to argue to the CRA that she was paid for the two nil vacation periods and that she should be deemed to have accrued insurable hours in those periods.

Stephen Bergen
Member, Appeal Division

HEARD ON:	March 25, 2019; August 27, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. G., Appellant Rachel Paquette, Representative for the Respondent