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

Citation: *SG v Canada Employment Insurance Commission*, 2019 SST 1709

Tribunal File Number: GE-19-3243

BETWEEN:

S. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

DATE OF DECISION: November 20, 2019

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for employment insurance sickness benefits (sickness). She had a medical certificate stating she was unable to work for medical reasons as of March 4, 2018. The Respondent, the Canada Employment Insurance Commission (Commission), initially determined that her qualifying period was from March 5, 2017 to March 3, 2018, and that she had sufficient hours to establish her claim. She was paid 9 weeks of sickness benefits.

[2] However, the Commission subsequently reversed its decision and determined she was not, in fact, able establish her claim because she accumulated 590 hours of insurable employment during her qualifying period and needed 600 hours to qualify for sickness benefits. This meant the Appellant would have to repay the sickness benefits she had received. The Appellant appealed that decision to the Social Security Tribunal (Tribunal). On August 8, 2018, the Tribunal allowed her appeal and found that she did have sufficient hours to qualify by extending her qualifying period by 2 weeks so that it commenced on February 19, 2017.

[3] The Commission appealed that decision to the Appeal Division of the Tribunal, arguing that the Tribunal erred in its calculations for the Appellant's extended qualifying period. On August 27, 2019, the Appeal Division allowed the Commission's appeal and referred the matter back to the General Division for reconsideration.

ISSUE

[4] The Tribunal must decide whether the appeal should be summarily dismissed.

THE LAW

[5] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[6] Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[7] Subsection 93(1) of the *Employment Insurance Regulations* (EI Regulations) sets out the requirements that the Appellant must meet in order to be paid sickness benefits:

> a) there must be an interruption of earnings; and
>
> b) she must have accumulated 600 hours or more of insurable employment in the qualifying period.

[8] Subsection 8(1) of the *Employment Insurance* (EI Act) stipulates that, subject to subsections (2) to (7), 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 subsection 10(1), and
>
> 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 subsection 10(1).

[9] Subsection 8(2) of the EI Act allows a qualifying period to be extended if certain conditions are met. The conditions include where a person is incapable of work due to illness during the qualifying period provided for in subsection 8(1) of the EI Act.

EVIDENCE

[10] The Appellant seeks sickness benefits from her last paid day of work on March 4, 2018 (see application for benefits at GD3-6 and her Record of Employment at GD3-15).

[11] Her qualifying period is the 52-week period immediately preceding the commencement of her benefit period on March 4, 2018 – namely from March 5, 2017 to March 3, 2018.

[12] Canada Revenue Agency (CRA) has issued an insurability ruling for the number of insurable hours accumulated by the Appellant (see Ruling issued July 30, 2019 at RGD4-3 to RGD4-4).

[13] According to CRA's ruling, the Appellant accumulated 567.25 hours of insurable employment during her qualifying period between March 5, 2017 and March 3, 2018 (see RGD3-1 to RGD3-2).

[14] The Appellant's last day of work was actually February 18, 2018 (GD2-3), but her Record of Employment shows her as having been paid up to March 4, 2018 (GD3-15). According to the Appellant, her employer paid her "a type of bereavement recognition" (RGD4-7) for these 2 weeks because she was off work due to the death of her son.

[15] CRA ruled that 37.5 hours in her final pay period between February 20, 2018 and March 4, 2018 were insurable (see ruling at RG4-3).

[16] The Appellant has not appealed CRA's insurability ruling (see her statement at RGD4-9).

[17] The Appellant was advised in writing of the Tribunal's intention to summarily dismiss her appeal because she did not meet the statutory requirements to qualify for sickness benefits. Pursuant to section 22 of the *Social Security Tribunal Regulations*, she was given a reasonable period of time to make further submissions (RGD5). Her further submissions (RGD6) were received within the allowable time period and circulated to the Commission, who confirmed they had no further submissions in response.

SUBMISSIONS

[18] The Appellant submitted that:

a) CRA's insurability ruling is incorrect.

b) Her qualifying period is the 52 weeks between March 5, 2017 and March 3, 2018. But she is entitled to a 2-week extension of her qualifying period because she was not at work during the last 2 weeks.

c) She has 619.9 hours of insurable employment within the extended qualifying period, which is sufficient to establish her claim for sickness benefits.

[19] The Commission submitted that the Appellant must have accumulated 600 hours of insurable employment in her qualifying period to establish her claim for sickness benefits. Unfortunately, she only has 567.25 hours. There are no circumstances to support an extension of her qualifying period under subsection 8(2) of the EI Act. Therefore, she cannot establish a claim for sickness benefits as of March 4, 2018.

ANALYSIS

[20] The Appellant agrees that her qualifying period is the 52-week period from March 5, 2017 to March 3, 2018 (RGD6-4).

[21] The Appellant also agrees that she needs 600 hours of insurable employment in her qualifying period in order to be entitled to sickness benefits (RGD6-2 to RGD6-3).

[22] CRA has exclusive jurisdiction to determine the number of insurable hours or employment accumulated in any given period of employment.

[23] The Appellant has not appealed the insurability ruling issued by CRA on July 30, 2019 (at RGD4-3 to RGD4-4).

[24] Therefore, the insurability ruling by CRA is the definitive answer on the number of insurable hours of employment the Appellant accumulated during the periods of time CRA looked at.

[25] The Tribunal agrees with the Commission's analysis of the insurability ruling by CRA (at RGD3-1). The breakdown of insurable hours is as follows:

- March 5, 2017 to February 19, 2018: 537.25 hours
- February 20, 2018 to March 4, 2018: 37.5 hours
- The hours for Sunday March 4, 2018 should not be included, as that day is outside of the qualifying period. The employer reported that the Appellant worked 7.5 hours that day. Therefore, the total hours accumulated between March 5, 2017 and March 3, 2018 is 567.25 (574.75 - 7.5 = 567.25).

[26] The Tribunal cannot ignore CRA's insurability ruling or unilaterally amend it as suggested by the Appellant in RGD6.

[27] Based on CRA's ruling, the Appellant has insufficient hours in her qualifying period to establish a claim and, therefore, does not qualify for sickness benefits.

[28] Contrary to the Appellant's assertion that CRA confirmed she is eligible for an extension of her qualifying period (see her statement at RGD4-9), the insurability ruling does no such thing. It only quantifies the number of insurable hours of employment in a given period of time.

[29] The Appellant has not proven she is entitled to an extension of her qualifying period.

[30] The extension provided for in subsection 8(2) of the EI Act is only available where a claimant has a lack of insurable employment due to illness during their qualifying period. Therefore, the Appellant could only be entitled to an extension of her qualifying period if she was medically unable to work within her qualifying period ***and*** was not paid for the time she was off work.

[31] The Appellant argued she did not have insurable employment in the last 2 weeks of her qualifying period because she was not at work due to illness during these 2 weeks and was not paid wages. Rather, the employer paid her a bereavement allowance for the time she was off work. And this is why she believes she is entitled to a 2-week extension.

[32] CRA disagreed, and ruled that the Appellant had 37.5 hours of insurable employment in the last 2 weeks of her qualifying period.

[33] While the Appellant may not have been paid wages *per se*, she did receive money from her employer for those final 2 weeks of her qualifying period even though she was off work. Because she was remunerated by her employer for a period of leave, she is deemed to have worked in insurable employment during this time pursuant to subsection 10.1(1) of the EI Regulations. Because these 2 weeks were considered insurable, there is no basis for an extension of the Appellant's qualifying period under subsection 8(2) of the EI Act.

[34] Based on CRA's ruling, the Appellant is not entitled to an extension of her benefit period.

[35] As a result, the Tribunal cannot consider any hours of insurable employment she may have accumulated outside of the 52-week period between March 5, 2017 and March 3, 2018.

[36] The Appellant accumulated 567.25 hours of insurable employment between March 5, 2017 and March 3, 2018. She needs 600 hours to qualify for sickness benefits. The Tribunal therefore finds that the Appellant has insufficient hours of insurable employment in her qualifying period to establish a claim for sickness benefits.

[37] The Tribunal is extremely sympathetic to the Appellant's situation, especially the tragic loss of her son. The Tribunal also acknowledges the Appellant's justifiable frustration at having received sickness benefits that she must now repay.

[38] However, the Appellant must meet the statutory requirements to qualify for sickness benefits. Neither the EI Act nor the EI Regulations allow any discretion with respect to the number of hours a claimant requires in order to qualify for benefits, and the Tribunal does not have any discretion to vary the clear wording in the legislation, no matter how compelling the circumstances. The Federal Court of Appeal has confirmed the principle that the qualifying

requirements set out in the EI Act are not in the discretion of the decision maker to vary – even if a claimant is short only one (1) hour of meeting the qualifying conditions (*Attorney General (Canada) v. Lévesque, 2001 FCA 304*). This principle applies no matter how compelling the circumstances (*Pannu 2004 FCA 90*).

[39] Unfortunately for the Appellant, the Tribunal cannot alter or vary these requirements, and does not have jurisdiction to make an exception in her case so that she can receive sickness benefits from March 4, 2018.

[40] The failure of the Appellant's appeal is pre-ordained no matter what evidence or arguments might be presented at a hearing, and must be summarily dismissed pursuant to subsection 53(1) of the DESD Act.

CONCLUSION

[41] The appeal has no reasonable chance of success and is, therefore, summarily dismissed.

Teresa M. Day

Member, General Division - Employment Insurance Section