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

[TRANSLATION]

Citation: *J. P. v Canada Employment Insurance Commission*, 2020 SST 697

Tribunal File Number: GE-17-3886

BETWEEN:

J. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: August 3, 2020

DATE OF DECISION: August 11, 2020

Canada

[1] The appeal is dismissed.The Appellant has not demonstrated that the 104-week maximum period allowed to extend the qualifying period under section 8(7) of the Act treats him differently based on his mental disability and that it discriminates against him within the meaning of section 15(1) of the *Canadian Charter of Rights and Freedoms*.

OVERVIEW

[3] The Appellant applied for regular benefits on August 11, 2017. To establish a benefit period (the period during which benefits may be paid), a claimant must have accumulated in their qualifying period a minimum number of insurable hours of employment.[1] The Appellant's qualifying period was established from August 7, 2016, to August 5, 2017.

[4] Since the Appellant had accumulated only 441 insurable hours of employment during his qualifying period, and he needed 700 to establish a benefit period, the Canada Employment Insurance Commission (Commission) denied him Employment Insurance benefits.

[5] The Appellant disputes that decision, and he also filed a notice of constitutional challenge with the Tribunal.[2]

[6] The Appellant argues that section 8(7) of the Act, which limits the extension of the qualifying period to 104 weeks, is discriminatory under section 15 of the *Canadian Charter of Rights and Freedoms*.[3] He explains that this provision puts him at a disadvantage because of his mental health issues.

[7] Without the limitation imposed by section 8(7) of the Act, the Appellant says that he could have been entitled to receive benefits since he had accumulated 1,694 insurable hours of employment, taking into account the weeks before the 104-week qualifying period under the Act.

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[1] *Employment Insurance Act* (Act), s 7.
[2] *Social Security Tribunal Regulations* (Regulations), s 20(1)(a).
[3] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 (Charter).

[8] A benefit period was established in favour of the Appellant on August 21, 2015, beyond the 104-week period, but the Appellant argues that he has fulfilled his duty as a citizen and asks that the provision be adapted so that other people in his situation can have access to benefits.

[9] The Commission first asked that the constitutional challenge be dismissed, arguing that the question is theoretical and that the Appellant does not have the standing to act in the public interest because the decision could not be applied to his own case.

[10] The Commission states that a qualifying period cannot be established beyond the 104-week period and that, even if the qualifying period was extended to 104 weeks—from August 6, 2015, to August 5, 2017—a benefit period could not be established since the Appellant received Employment Insurance benefits during the extension period in question. It argues that, regardless of the Tribunal's decision about the validity of section 8(7) of the Act, the Appellant could not receive benefits.

[11] On March 2, 2020, the Tribunal's General Division made an interlocutory decision, finding that the question is not theoretical because the dispute is current and that the Appellant has a personal interest in the constitutional challenge. It refused the Commission's request to dismiss the constitutional challenge.

[12] I must determine whether the Appellant's constitutional challenge should be allowed.

ISSUES

[13] To determine whether the Appellant is being discriminated against, I must answer the following questions:

- Does the application of section 8(7) of the Act, which allows the qualifying period to be extended to a maximum of 104 weeks, discriminate against the Appellant based on his mental disability and therefore infringe on his right to equality guaranteed in section 15(1) of the Charter?

- If so, is the infringement justifiable under section 1 of the Charter? To determine this, I must also answer these questions:

- Does the objective of the legislation relate to pressing and substantial concerns?
- Is the means used to achieve the legislative objective reasonable and can it be justified in a free and democratic society?

PRELIMINARY MATTER

[14] Before the hearing, the Commission stated that it intended to be accompanied by two observers. The Appellant indicated that he was not comfortable with the presence of the two observers. He feared there would be [translation] “parallel” communication between these people at the hearing.

[15] The hearing scheduled by videoconference meant that the observers were at a distance from each other.

[16] The Appellant was provided information about the testimony he could give and the arguments he could provide in support of his file. I explained to the Appellant that personal information related to his health condition would not be detailed in the decision. These details are not relevant because the Commission does not dispute his mental disability.

[17] At the hearing, the Appellant accepted the presence of the two observers, an articling student with the Law Society of Ontario who attended the hearing for training purposes and a senior policy analyst from the Commission. The Appellant chose to give testimony, and I also note that decisions the Tribunal publishes are made anonymous to protect appellants’ personal information.

ANALYSIS

Does the application of section 8(7) of the Act, which allows the qualifying period to be extended to a maximum of 104 weeks, discriminate against the Appellant based on his mental disability and therefore infringe on his right to equality guaranteed in section 15(1) of the Charter?

The Appellant's application for benefits and the background to his situation

[18] Starting in 1984, the Appellant worked at X as a technician, first in electrical engineering and then in telematics. As the Commission's file shows, he was absent from work on a number of occasions due to sickness.[4] After an agreement reached with the employer, the Appellant ended up on leave without pay from January 9, 2017, to March 31, 2018, and he retired on April 1, 2018.

[19] Between April 2014 and January 2017, the Commission determined that the Appellant had accumulated 441 insurable hours of employment.[5]

[20] The Appellant applied for sickness benefits on August 21, 2015. The Commission determined that the Appellant had accumulated enough hours of insurable employment (1,038) during his extended qualifying period from August 18, 2013, to August 15, 2015, to establish a benefit period. He was paid 15 weeks of sickness benefits.

[21] The Appellant applied for benefits again on August 11, 2017. It is the outcome of this application that led the Appellant to constitutionally challenge section 8(7) of the Act. The Commission calculated that his qualifying period was from August 7, 2016, to August 5, 2017. It determined that the Appellant had accumulated 441 insurable hours of employment during this period, which was not enough to establish a benefit period.

[22] The Commission explains that, if it extended the qualifying period to 104 weeks—from August 6, 2015, to August 5, 2017—the Appellant would not have accumulated more insurable hours of employment. First, because he had not accumulated insurable hours of employment

[4] GD31-5.
[5] GD31-5.

between August 6, 2015, and August 5, 2016, and then because the hours accumulated up to August 15, 2015 (before August 6, 2015), were used to establish another benefit period.

[23] For that reason, the qualifying period could not start before August 15, 2015, because the hours accumulated before that date had already been used to establish the benefit period that began on August 21, 2015. In other words, the application of section 8(1) of the Act means that a period cannot be extended beyond the beginning of an earlier benefit period.

[24] The Commission refused the Appellant's application and informed him that it could not pay him benefits because he had to accumulate 700 insurable hours of employment during his qualifying period, and he had accumulated only 441.

[25] The Appellant argues that section 8(7) of the Act discriminates against him because of his mental disability.

Does section 8(7) create a distinction based on an enumerated or analogous ground?

[26] The Appellant must demonstrate that the Act creates a distinction based on an enumerated or analogous ground.

[27] He states that he lived through the Lac-Mégantic tragedy, had post-traumatic stress related to that incident, underwent numerous medical assessments, was a victim of a dispute between the union and his employer, and was unfairly dismissed.

[28] As he argues in his submissions, he experienced episodes of severe depression before 2015 as well as post-traumatic stress in 2014.[6] When he returned to work in November 2017, he explained that a lack of technical knowledge and performance anxiety prevented him from doing his job.

[29] The Appellant argues that his professional situation is cause for discrimination under section 8(7) of the Act.[7]

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[6] GD7-1 to GD7-180.
[7] GD10.

[30] He explains that his employer's behaviour and the wait times between arbitration sessions to resolve the problems between the employer and the union meant that he was discriminated against due to his unique situation.

[31] First, I note that his professional situation is not a ground enumerated under section 15 of the Charter. Furthermore, an "analogous ground" is a ground that is based on a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."[8]

[32] The Appellant also explains changes to his duties: In addition to telematics tasks, his employer gave him the responsibility of telephony tasks. The Appellant did not agree with his employer's decision. He submits that his employer did not consider his health condition and did not accommodate him in his duties.

[33] I note that the type of employment (specific sector or type of worker) also does not constitute an analogous ground. A distinction that essentially separates sectors of employment is not recognized as an analogous ground.[9]

[34] Because the Appellant's professional situation is not a personal characteristic, it is not recognized as an analogous ground.[10]

[35] However, mental disability is a ground enumerated in section 15 of the Charter. Mental disability is a disability of capacity. The Appellant explained that he lives consistently and regularly with the consequences of post-traumatic stress. He notes that the symptoms of his illness make him unable to control his emotions like before. When a situation is tense or stressful, the Appellant he [*sic*] feels anger or closes in on himself.[11] The Commission does not object to the Appellant's proposed definition of mental disability, and I accept the Appellant's definition.

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[8] The definition of analogous ground is explained in *Corbiere*, [1999] 2 SCR 203.
[9] This explanation about the employment sector is detailed in *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, [2007] 2 SCR 391.
[10] Explanations of analogous and recognized grounds can be found in the following decisions: *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989; *Baier v Alberta*, [2007] 2 SCR 673; and *Health Services and Support – Facilities Subsector Collective Bargaining Association v British Columbia*, [2007] 2 SCR 391.
[11] GD10-3.

[36] I recognize that the Appellant's mental disability is a ground enumerated in section 15(1) of the Charter.

[37] The Appellant must demonstrate that section 8(7) of the Act creates a distinction based on his mental disability.

The *Employment Insurance Act* and the extension of the qualifying period

[38] The *Employment Insurance Act* is a contributory scheme that provides insurance for workers when they lose their income.[12] Its purpose is to ensure the economic and social security of workers by compensating them for a certain period to assist them in returning to the labour market.[13] In this sense, the payment of benefits does not depend on the specific needs of applicants. Contributing to the Employment Insurance plan does not in itself give the right to receive benefits. To receive benefits, a worker must meet the eligibility criteria.[14]

[39] Section 7(2) of the Act determines the eligibility thresholds based on the insurable hours of employment worked (between 420 and 700 insurable hours of employment) and the regional rate of unemployment. The insurable hours of employment have to be accumulated during the qualifying period. Generally, that qualifying period corresponds to the 52 weeks immediately before the benefit period, but it can be longer or shorter.[15]

[40] The qualifying period can be extended when a person was not employed in insurable employment during the 52 weeks of their qualifying period because they were incapable of work due to illness, injury, quarantine, or pregnancy. Section 8(2) of the Act allows for an extension by the total of any weeks during the qualifying period that a person was incapable of work for one of those reasons. For some applicants, this extension allows them to accumulate enough insurable hours of employment to be entitled to benefits.

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[12] The context of the adoption of the *Employment Insurance Act* is explained in *Canada (Attorney General) v Lesiuk*, 2003 FCA 3.
[13] This objective is set out in *Canada (Attorney General) v Jean*, 2015 FCA 242.
[14] This principle is explained in *Martin v Canada (Attorney General)*, 2013 FCA 13.
[15] Act, s 8(1).

[41] Section 8(7) of the Act limits the extension of the qualifying period to 104 weeks. This provision indicates that "[n]o extension under any of subsections (2) to (4) may result in a qualifying period of more than 104 weeks."

Does the application of section 8(7) of the Act create a distinction based on the Appellant's mental disability?

[42] Section 15 of the Charter is focused on legislation that draws discriminatory distinctions—that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group.

[43] Section 15(1) of the Charter guarantees the right to equality, in particular for those who have a mental disability.

[44] Even if groups of people are treated differently, that situation does not necessarily constitute a violation of the rights guaranteed in section 15(1) of the Charter.[16] The Appellant must demonstrate that the Act denies benefits granted to others or imposes a burden that others do not have, due to a personal characteristic corresponding to an enumerated or analogous ground identified in section 15(1) of the Charter.[17]

[45] If the Appellant does not demonstrate that section 8(7) of the Act denies him access to a benefit granted to others based on his mental disability, I will refuse his application at the analysis stage.[18]

[46] According to the Appellant, the Act should consider exceptional situations and adapt to claimants. He explains that the Act should be more flexible to consider his rare and exceptional circumstances. He explains that, if he had not lived through the Lac-Mégantic tragedy, and if he had been able to return to his job, he would not have been discriminated against.

[47] To determine whether section 8(7) creates a distinction, the Appellant must demonstrate that this provision has a disproportionate effect on him because of his membership in a group of

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[16] This principle is explained in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222.
[17] The steps to follow to determine whether a provision is discriminatory are explained in *Québec (Attorney General) v Andrews*, 2013 SCC 5.
[18] As indicated in *Reference re Same-Sex Marriage*, [2004] 3 SCR 698.

individuals with a mental disability. He must present evidence demonstrating that it is the impugned provision, and not other circumstances, that is responsible for the effects of the application of the provision.[19]

[48] The Appellant explains that, even if section 8(2) of the Act allows for the extension of the qualifying period by the total of any weeks during the qualifying period that a person is incapable of work because of illness, he is disadvantaged by section 8(7) of the Act, which limits the extension to a maximum of 104 weeks. He argues that, because of his mental health issues and his employer's inaction, he cannot receive Employment Insurance benefits.[20]

[49] He explains that the maximum extension of the qualifying period to 104 weeks puts people who suffer from mental illness for an extended period at a disadvantage because they are systematically denied access to Employment Insurance benefits.[21]

[50] I understand the Appellant's explanations that his mental disability had an impact on his professional and financial situation. I also understand that these difficulties are beyond his control.[22]

[51] The Appellant outlines a combination of difficulties he has experienced, but he does not present evidence to establish a causal relationship between the enumerated ground—his mental disability—and the disadvantages of section 8(7) of the Act—the denial of benefits.

[52] I note that "intuition may well lead us to the conclusion that the provision has some disparate impact, but [...] there must be enough evidence to show a *prima facie* breach."[23] And I am of the view that that is not the case here.

[53] The unfortunate situations the Appellant experienced do not necessarily create a Charter distinction. The Appellant argues that section 8(7) of the Act does not consider the reality of workers and does not consider the fact that some illnesses may be caused by the labour market or

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[19] *Canada (Attorney General) v Lesiuk*, 2003 FCA 3.
[20] GD-10-9.
[21] GD10-9.
[22] GD10-2.
[23] This quote explains that the Appellant must demonstrate, with evidence, the alleged infringement: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.

by employer interference.[24] The Appellant has the onus of proving that it is precisely because of the enumerated ground that characterizes him that the impugned provision treats him differently, which he states is that people suffering from mental illness are systematically excluded from benefits when they are absent from work for a period of more than 104 weeks.

[54] The Appellant explains that he wants things to change for all claimants so that Employment Insurance benefits are more easily accessible. But he does not present evidence demonstrating that the application of section 8(7) of the Act makes it more difficult for people who are sick or have a mental disability to work or accumulate insurable hours of employment.

[55] In this sense, the evidence presented demonstrates that, if section 8(7) of the Act was not applied to his case, the Appellant's entitlement to benefits would not be different because the insurable hours of employment that he accumulated outside the maximum of 104 weeks cannot be used to establish a benefit period for his application presented on August 11, 2017. As the Commission demonstrated, the insurable hours of employment accumulated in 2014 were used to establish an earlier benefit period in 2015. The application of section 8(1) of the Act requires that a qualifying period cannot be extended beyond the beginning of the first day of an immediately preceding benefit period.

[56] The Commission indicated that, to establish a benefit period on August 21, 2015, it extended the Appellant's qualifying period, and the insurable hours of employment used were those accumulated between August 18, 2013, and August 15, 2015.

[57] This circumstance explains that a benefit period cannot be established in favour of the Appellant on August 11, 2017. Since the insurable hours of employment accumulated between August 18, 2013, and August 15, 2015, were already used to establish an earlier benefit period, they cannot be used to establish a second benefit period for his application presented on August 11, 2017, in accordance with section 8(1) of the Act.

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[24] Arguments of the Appellant's representative, who presented the brief on the constitutional challenge. These arguments are intended to demonstrate that there is infringement of the right to substantive equality, the second part of the test.

[58] Although the mental disability is a ground enumerated in section 15 of the Charter, the Appellant does not demonstrate that this ground distinguishes him when section 8(7) of the Act is applied to his case.

[59] He has not demonstrated that it is the impugned provision, and not other circumstances, that is responsible for the effects of the application of the provision.[25]

[60] There is no causal relationship between the Appellant's mental disability and the application of section 8(7) of the Act, which limits the calculation of insurable hours of employment determining the qualifying period to 104 weeks.

[61] The facts demonstrate that the main disadvantage to the Appellant is economic since he is not entitled to receive benefits despite the difficulties he has experienced. He also presented documents and arguments at the hearing explaining the consequences of his health issues on his financial and professional situation.[26]

[62] The Commission submits that the Appellant is asking to amend the Act and eliminate this eligibility requirement. It argues that the Appellant wants to amend this provision to allow every individual to receive benefits more easily based on their personal situation. It suggests that such arguments must be presented directly to Parliament and not to the Tribunal, since the Charter was not designed to amend legislation.

[63] The Appellant does raise issues around access to Employment Insurance benefits. He argues that the government should adopt more flexible measures making it easier for workers to access benefits, particularly those living with disabilities.[27] Although these arguments are human and compassionate, I agree that the chosen forum is not appropriate for this request.

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[25] *Canada (Attorney General) v Lesiuk*, 2003 FCA 3.
[26] GD42-1 to GD42-4.
[27] GD36-1 to GD36-4 and GD39-1 to GD39-9.

[64] In this sense, a distinction must be made between the effects that are caused in whole or in part by an impugned provision and the social circumstances that exist independently of the provision in question.[28]

[65] The Appellant has not demonstrated that the application of section 8(7) of the Act creates a distinction based on his mental disability. This provision applies to all claimants who benefit from an extension, but the Appellant has not demonstrated that individuals who have a mental disability are treated differently when this provision is applied to their case.[29] The Appellant has not demonstrated that people who have a mental disability have more difficulty accumulating the required insurable hours of employment. Therefore, section 8(7) of the Act does not affect people with a mental disability more than other Canadians.

[66] The Appellant has mental health issues, and I understand that this situation seriously affects his professional life and financial situation, but I cannot assume that the impugned provision is responsible for the alleged effects.

[67] Even though I understand that the Appellant contributed to the Employment Insurance plan and would like to receive benefits now that he needs them, as I already noted, this contributory scheme does not guarantee automatic entitlement to benefits.

[68] It is not clear that people who have a mental disability are treated differently when section 8(7) of the Act is applied. This provision does not prevent workers from qualifying to receive Employment Insurance benefits despite their health condition. The facts demonstrate that a benefit period was established on August 21, 2015, in favour of the Appellant by considering an extended qualifying period.

[69] The Appellant has not presented evidence that it is more difficult for people with mental health issues to accumulate insurable hours of employment even when they are absent from work for an extended period. In this sense, the Employment Insurance benefits system is designed to provide temporary assistance to workers to help them return to the labour market.

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[28] As indicated in *Symes v Canada (Attorney General)*, 1993 4 SCR 695.
[29] GD31-12.

[70] Finally, even though I gather from the Appellant's statements that, in the absence of post-traumatic stress, he may have returned to his job, and he would not have applied for benefits, there is no evidence of a distinction based on the Appellant's mental disability when section 8(7) is applied. The Appellant is of the view that the extension period allowed is not enough and that, if it was not limited, he could qualify since he would have accumulated enough insurable hours of employment. It is not so certain.

[71] The insurable hours of employment the Appellant accumulated in 2014 were used to establish an earlier benefit period in 2015, and it is the application of section 8(1) of the Act that prevents a qualifying period from being extended beyond the beginning of the first day of an immediately preceding benefit period.

[72] I have to make my decision based on the facts on file and the evidence submitted, not on hypothetical situations. The evidence on file demonstrates that the Appellant is not disqualified from a benefit that is given to others in the Act. The Appellant also did not present evidence of an historical disadvantage of a group he is a member of in relation to the impugned provision. In reality, every person who makes an application for benefits cannot use insurable hours of employment that were already used to establish a benefit period. And the 104-week maximum to establish the qualifying period is applied to every claimant.

[73] The Appellant is not disentitled to benefits because he has a mental disability, but because he does not meet the requirements of the relevant legislation.[30] There is no causal relationship between the denial of benefits and the Appellant's mental disability.

[74] I find that section 8(7) of the Act does not create a distinction for the Appellant because of his mental disability. This provision does not systematically exclude members of the group the Appellant belongs to.

[75] Since section 8(7) of the Act does not create a distinction based on the Appellant's mental disability, I do not have to decide whether its application perpetuates a disadvantage, a

[30] *Canada (Attorney General) v Lesiuk*, 2003 FCA 3.

prejudice, or gives rise to the application of stereotypes toward people who have mental disabilities.

CONCLUSION

[76] The Appellant has not demonstrated that the 104-week maximum period allowed to extend the qualifying period under section 8(7) of the Act treats him differently based on his mental disability and that it discriminates against him within the meaning of section 15(1) of the *Canadian Charter of Rights and Freedoms*.

[77] The appeal is dismissed.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	August 3, 2020
METHOD OF PROCEEDING :	Videoconference
APPEARANCES:	J. P., Appellant Suzette Bernard (counsel), Representative for the Commission