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

Citation: *DF v Canada Employment Insurance Commission*, 2020 SST 1011

Tribunal File Number: GE-20-2061

BETWEEN:

D. F.

Appellant (Claimant)

and

Canada Employment Insurance Commission

Respondent (Commission)

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Linda Bell

HEARD ON: November 9, 2020, and November 12, 2020

DATE OF DECISION: November 18, 2020

Canada

DECISION

[1] I am dismissing the appeal. The Claimant has not shown that he is entitled to an extension to his qualifying period.[1]

OVERVIEW

[2] When the Claimant's job ended on June 24, 2018, he received severance pay. He did not apply for EI benefits at that time. He began working for a different employer and that job ended on February 25, 2019. The Claimant applied for EI benefits on April 16, 2019. The Claimant's benefit period[2] was established effective February 24, 2019. The Commission determined that he qualified for 20 weeks of regular EI benefits.[3]

[3] The Claimant asked the Commission to start his benefit period earlier. This is called antedating. If his antedate request was approved it may have increased his hours of insurable employment in his qualifying period and increase his weeks of entitlement to EI benefits. The Commission refused his antedate request. The Claimant appealed that decision to the Social Security Tribunal (Tribunal). The Tribunal dismissed that appeal.

[4] Shortly afterwards, the Claimant asked the Commission to extend his qualifying period. The Commission says that the Claimant does not meet any of the requirements to extend his qualifying period.[4] The Claimant disagrees and says that he qualifies for an extension of his qualifying period because he was in receipt of severance pay[5] when his job ended on June 24, 2018. I must decide whether the Claimant qualifies for an extension to his qualifying period.

ISSUE

[5] Does the Claimant meet the requirements for an extension of his qualifying period?

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[1] Specifically, an extension of the qualifying period resulting from receipt of severance pay: section 8(3) of the *Employment Insurance Act* (*Act*).
[2] When a claimant qualifies for EI benefits they are payable for a week of unemployment that falls in the benefit period: section 9 of the *Act.*
[3] The weeks of benefits is calculated based on the regional rate of unemployment (RRU) and the hours of insurable employment in the qualifying period, as set out in Schedule 1 of the *Act*.
[4] See sections 8(2) and 8(3) of the *Act.*
[5] The Claimant says that he meets the requirements of paragraph 8(3)(a) because his employer paid him severance pay.

ANALYSIS

[6] Not everyone who stops working can be paid the maximum 45 weeks of EI benefits. Claimants have to prove[6] that they qualify for benefits.[7] In order to qualify, claimants need to have suffered an interruption of earnings and worked enough hours within a certain timeframe. [8] This timeframe is called the qualifying period.

[7] An interruption of earnings occurs when a claimant meets all three of the following components.[9]

> 1) They suffered a lay-off or separation from employment or a reduction in their work hours resulting in a prescribed reduction in earnings;
>
> 2) At least seven consecutive days during which no work is performed for that employer; **and**
>
> 3) At least seven consecutive days in which no earnings arising from that employment are allocated. [My emphasis added in bold text.]

[8] The number of weeks of EI benefits that a claimant is entitled to receive depends on the number of hours they have in their qualifying period and their regional rate of unemployment.[10]

[9] As noted above, the hours that are counted are the ones that the Claimant worked during his qualifying period. In general, the qualifying period is the 52 weeks before a claimant's benefit period starts.[11]

[10] The Commission decided that the Claimant's qualifying period was the usual 52 weeks from February 25, 2018, to February 23, 2019. The Claimant disagrees. He says that his

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[6] The Claimant has to prove this on a balance of probabilities which means it is more likely than not.
[7] Section 48 of the *Act*.
[8] Section 7 of the *Act*.
[9] *Canada (Attorney General) v Enns*, FCA A-559-89
[10] Section 12(2) of the *Act;* Schedule I of the *Act;* Paragraph 7(2)(b) of the *Act*; section 17 of the *Employment Insurance Regulations* (*Regulations*).
[11] Section 8 of the *Act*.

qualifying period should be extended by 20 weeks because he received severance pay when his job ended on June 24, 2018.

[11] Section 8 of the *Act* provides for an extension of the qualifying period.[12] The Claimant states that the Commission erred in their reconsideration decision because they considered his request for an extension of his qualifying period under section 8(2) of the *Act.* He says he asked for an extension under section 8(3) of the *Act* because he had received severance pay.

[12] The Claimant states that the Commission fabricated their statements in the summary of their September 18, 2020, telephone conversation.[13] Specifically where they say the Claimant is confusing an extension of the benefit period with an extension of the qualifying period. I do not see this as a fabrication. Rather, I find that the Commission's agent may have been confused with what the Claimant was requesting. When they were discussing the Claimant's receipt of severance pay, the agent appears to have confused the requirements for extending a benefit period with extending a qualifying period. The agent then refused his request for an extension of the qualifying period based entirely on the requirements set out in section 8(2) of the *Act.* The Claimant agrees that he does not meet any of the conditions set out in section 8(2) of the *Act.* The Claimant says he requested an extension of his qualifying period under section 8(3) of the *Act.*

[13] Section 8(3) of the *Act* provides for an extension of the qualifying period by the number of weeks where the claimant proves that during the qualifying period they,

a) received earnings because of a complete severance from their employment and those earnings are to be allocated to weeks in accordance with the *Regulations*, **and**

b) the allocation has prevented them from establishing an interruption of earnings. [My emphasis added in bold text.]

[14] As stated above, an interruption of earnings occurs when a claimant is separated from their employment, has a period of seven or more consecutive days during which no work is performed and in respect of which, no earnings arise from that employment.[14] Although

[12] See sections 8(2) and 8(3) of the *Act.*
[13] See GE3-23.
[14] See section 14(1) of the *Regulations.*

severance pay is considered earnings to be allocated,[15] it does not prevent an interruption of earnings from occurring.[16]

[15] To qualify for an extension under section 8(3) of the *Act*, the Claimant must meet the criteria in both 8(3)(a) and 8(3)(b), as set out above. There is no dispute that the Claimant meets the requirements of paragraph 8(3)(a) because he was separated from his employment on June 24, 2018, and his severance pay is earnings to be allocated. However, the Claimant does not meet the requirements of paragraph 8(3)(b) because the allocation of his earnings (severance pay) does not prevent him from establishing an interruption of earnings.[17] I see no evidence to dispute this. So I find as fact that that Claimant does not qualify for an extension to his qualifying period under section 8(3) of the *Act*.

[16] The Claimant says that his appeal should succeed because the spirit of the law is plain and clear, that severance pay extends the qualifying period. I disagree. The law clearly states that both 8(3)(a) and 8(3)(b) must be met. The Claimant asserts that the Commission relied on paragraph 8(3)(b) as a "legal loophole" to deny his request. He agrees that his circumstances create an interruption of earnings, "by definition," but he challenges the Commission to provide examples of when paragraph 8(3)(b) can be met. He requests that I order the Commission to provide the examples to him.

[17] As explained during the hearing, I do not have the authority to order the Commission to provide the Claimant with examples of when paragraph 8(3)(b) would be met. That said, in the interest of clarity, I have listed examples below.

[18] The first example relates to a plant shutdown where the Federal Court of Appeal (FCA) upheld the Board of Referees (BOR) decision that the claimant did not suffer an interruption of earnings until September 30, 1984.[18] That claimant submitted an application for EI benefits on August 2, 1984, stating his last day worked was July 31, 1984. The BOR determined that the claimant did not suffer an interruption of earnings when they stopped working on July 31, 1984. The employer had told all the employees on July 31, 1984, that the plant was closing down

[15] See section 35(2) of the *Regulations.*
[16] See section 35(6) of the *Regulations.*
[17] See 35(6) of the *Regulations.*
[18] *Canada (Attorney General) v Verreault*, [1986] FCA, A-186-86

effective September 30, 1984, at which time they would be dismissed. The employer considered that the employees were on leave as of July 31, 1984, and gave them cheques representing their salary for the leave period, up to September 30, 1984, plus vacation pay. The employees continued to benefit from the group insurance plan and to accumulate leave until September 30, 1984. The employer wrote a letter characterizing the salary paid to the employees for the period after July 31, 1984, as being severance pay. Despite that characterization, the FCA upheld the BOR decision that the claimant did not suffer an interruption of earnings until September 30, 1984.

[19] The second example is when a claimant's contract of employment may provide for payment for a period longer than a week, regardless of the amount of work completed during that period. No matter how or when the payment is made, there is no interruption of earnings during this period[19] For clarity, a claimant working as a stevedore is one who is guaranteed an income equivalent to forty weeks of work during the year. So, if the employer ceased to operate during that year and paid out the wages owed plus severance pay, the claimant would not incur an interruption of earnings until the end of the contract period.

[20] I do not accept the Claimant's argument that his appeal should succeed on the basis that the Commission's reconsideration decision is different from their statements to the Tribunal.[20] I must consider all evidence and submissions made by the Commission even if they submit new evidence or reasons for refusing the Claimant's request for an extension under section 8(3) of the *Act.* This is because appeals heard by the General Division of the Tribunal are *de novo,* which means both parties have the opportunity to present new evidence and arguments.

[21] Employment Insurance is an insurance plan and, like other insurance plans, claimants have to meet terms in order to get paid benefits. Determining the qualifying period is not a discretionary decision. The Commission does not have the power to vary the qualifying period or the requirements for an extension.[21] The Claimant must prove that he meets the requirements of

[19] See section 14(4) of the *Regulations.*
[20] See GE4-1 to GE4-8.
[21] *P.D. v Canada Employment Insurance Commission,* 2016 SSTADEI 439.

the *Act* to extend his qualifying period, which in this case he has not done. Although the Claimant's situation may be sympathetic, I cannot rewrite the law.[22]

CONCLUSION

[22] The Claimant does not qualify for an extension of his qualifying period. This means that the appeal is dismissed.

Linda Bell

Member, General Division - Employment Insurance Section

HEARD ON:	November 9, 2020, and November 12, 2020
METHOD OF PROCEEDING:	Zoom Video and Teleconference
APPEARANCES: November 9, 2020 Via Zoom Video November 12, 2020 Via Teleconference	 D. F., Appellant (Claimant) D. F., Appellant (Claimant)

[22] *Pannu v Canada (Attorney General)*, 2004 FCA 90.