

Federal Court



Cour fédérale

Date: 20110207

Docket: T-1036-10

Citation: 2011 FC 137

Ottawa, Ontario, February 7, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JESSICA KATHRYN WEGENER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 18(1) of the *Federal Courts Act* (the *Act*) for judicial review of a June 2, 2010 decision of the Department of Human Resources and Skills Development Canada (HRSDC), in which it determined that it lacked jurisdiction to back-date the start date of the applicant's self-employment remittance of Employment Insurance premiums for Special Benefits.

[2] On January 1, 2010, the *Fairness for the Self-Employed Act*, 2009 S.C. (*FSE Act*), amended the *Employment Insurance Act*, S.C. 1971, c.48 (*EIA*). The effect of the amendment was to allow self-employed persons the opportunity of participating in certain aspects of the Employment Insurance scheme established by the *EIA*.

[3] The *EIA*, as amended, requires that self-employed persons who wish to participate in coverage for maternity, parental, sickness and compassionate leave benefits enter into an agreement with the Employment Insurance Commission (the Commission). By these agreements, self-employed persons commit to pay Employment Insurance (EI) premiums for the calendar year in which they elect coverage. Prior to qualifying for these “Special Benefits” self-employed persons who enter into an agreement must wait a minimum of twelve months from the date they enter into the agreement.

[4] As a transitional measure, self-employed persons who entered into agreements before April 1, 2010 were considered to have entered into their agreements as of January 1, 2010. Individuals who entered into an agreement after April 1, 2010 must wait twelve months prior to making a claim for benefits. There is no doubt that the agreement in question was entered into on April 11, 2010.

[5] The applicant, Ms. Wegener, intended to participate in this scheme. She started her own business and obtained all necessary documentation and business registration numbers. Ms. Wegener discussed her intention to enter into such an agreement over the phone with Service Canada personnel on two occasions between March 18, 2010 and March 19, 2010. Ms. Wegener

contends that she was informed by Service Canada personnel that she would have to wait an undefined amount of time before she could gain access to her account on-line while it was being updated with information pertaining to her recently established business. She further contends that they did not disclose to her the April 1, 2010 deadline in order to be eligible for January 2011 benefits. In consequence, Ms. Wegener did not enter into an agreement with the Commission until April 11, 2010.

[6] The Commission, for its part, submitted affidavit evidence indicating that Ms. Wegener had electronic access to her account without interruption from January 31, 2010, and that she had the option of submitting her agreement in traditional hard copy paper format.

[7] Ms. Wegener comes to this Court seeking an order: (i) directing the Commission to back-date her Agreement to April 1, 2010; or (ii) an order declaring that the Board of Referees has jurisdiction to rule on her eligibility to claim for special EI benefits.

[8] While the Court has sympathy for Ms. Wegener, who clearly demonstrated an intention to apply under the scheme, the Court has no jurisdiction to alter or give equitable relief from the clear language of Parliament. Section 152.07(1)(a) of the *EIA* establishes the twelve month waiting period:

Qualification requirements

152.07 (1) A self-employed person qualifies for benefits if

Conditions requises

152.07 (1) Le travailleur indépendant remplit les conditions requises pour recevoir des prestations si, à la fois:

(a) at least 12 months have expired since the day on which the person entered into an agreement referred to in subsection 152.02(1) with the Commission, or if a period has been prescribed for the purpose of this section, a period that is at least as long as that prescribed period has expired since that day;

a) il s'est écoulé une période de douze mois ou, le cas échéant, la période prévue par règlement, depuis la conclusion de l'accord prévu à l'alinéa 152.02(1)b) par lui et la Commission;

[9] The relief provided by the transitional provision is set forth in the *Fairness for the Self-Employed Act*, S.C. 57-58 Elizabeth II, c.33, s.19:

19. Despite paragraph 152.07(1)(a) of the *Employment Insurance Act*, a benefit period under Part VII.1 of that Act may begin on or after January 1, 2011 if the self-employed person to whom the benefit period relates has, during the period that begins on the later of the day on which this Act receives its royal assent and January 1, 2010 and ends on April 1, 2010, entered into an agreement referred to in subsection 152.02(1) of that Act.

19. Malgré l'alinéa 152.07(1)a) de la *Loi sur l'assurance-emploi*, une période de prestations prévue par la partie VII.1 de cette loi peut débuter dès le 1^{er} janvier 2011 pour un travailleur indépendant s'il a conclu un accord visé à l'alinéa 152.02(1)b) de cette loi au cours de la période commençant le 1^{er} janvier 2010 — ou, si elle est postérieure, à la date de sanction de la présente loi — et se terminant le 1^{er} avril 2010.

[10] As well, the Frequently Asked Questions on the Service Canada website indicates that the agreement needed to be entered into by April 1, 2010:

9. When can I enter into an agreement with the Commission to participate in the EI Measure for Self-Employed People?

If you are a self-employed Canadian, you will be able to enter into an agreement with the Commission through Service Canada starting on January 31, 2010.

If you enter into an agreement between January 31, 2010 and April 1, 2010, you will be able to make a claim for EI special benefits as early as January 2011. **This is a special start-up measure.** However, if you enter into an agreement with the Commission after April 1, 2010, you will have to wait 12 months from the date of your agreement before you will be able to make a claim for EI special benefits.

[11] There is no jurisdiction for the Court to amend, through a s.18.1 remedy, equitable relief, or otherwise, what Parliament has required; see for example *Canada (Attorney General) v Buors* [2002] FCA 372. That case, like that of Ms. Wegener's, involved a claim to recover an over-payment based on inaccurate information provided by the Commission. Noel J.A., speaking for the Federal Court of Appeal noted that there was no jurisdiction to waive a statutory requirement. To the same effect, Evans J.A., in *Canada (Attorney General) v Alaie*, 2003 FCA 416, noted that the Court cannot decide cases on the basis that a party might have been misled about benefits. The Court cannot refuse to apply the law, even on the grounds of equity.

[12] The Board of Referees does not have jurisdiction to back-date the agreement, or to order that it be back-dated. The decision not to back-date the claim for benefits is not a decision of the Commission *on a claim for benefits*, nor is it one which the Commission, as a matter of law, would be entitled to make. The entering into an agreement is a statutory precondition, along with other requirements, to being able to make a claim for benefits.

[13] The jurisprudence is clear that the jurisdiction of the Board of Referees is confined to appeals from decisions of the Commission regarding claims for benefits; *Canada (Attorney General) v Gauley* 2002 FCA 219; *Canada (Attorney General) v Mosher* 2002 FCA 355. For the reasons given above, even if, on a very broad interpretation of the words "claim for benefits" the

Board of Referees could be said to have jurisdiction to hear the request that the agreement be back-dated, it would not have jurisdiction to grant the remedy sought.

[14] Accordingly, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1036-10

STYLE OF CAUSE: JESSICA KATHRYN WEGENER v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: Toronto

DATE OF HEARING: January 12, 2011

REASONS FOR JUDGMENT: RENNIE J.

DATED: February 7, 2011

APPEARANCES:

Ms. Jessica Wegener,
Self-Representing Applicant

FOR THE APPLICANT

Mr. Benoit Laframboise

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ms. Jessica Wegener,
Self-Represented
Etobicoke, Ontario

FOR THE APPLICANT

Myles J. Kirvan,
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT