Financial Services Commission of Ontario

Ontario

Commission des services financiers de l'Ontario

Appeal P16-00057

OFFICE OF THE DIRECTOR OF ARBITRATIONS

JOZEF KAZIMIERCZUK

Appellant

and

PEMBRIDGE INSURANCE COMPANY

Respondent

BEFORE: Edward Lee

REPRESENTATIVES: Roman Baber for Mr. Kazimierczuk
Brian Yung for Pembridge Insurance Company

HEARING DATE: August 11, 2017

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The Arbitrator's order of July 24, 2016 is confirmed and this appeal is dismissed.
2. If the parties are unable to agree about the legal expenses of this appeal, an expense hearing may be arranged in accordance with the *Dispute Resolution Practice Code*.

Edward Lee
Director's Delegate

October 16, 2017
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

The Appellant, Mr. Kazimierczuk, appeals the Arbitrator's preliminary issue decision of July 24, 2016. The Arbitrator ruled that Mr. Kazimierczuk was not entitled to receive a weekly income replacement (an "IRB"), because he was not receiving benefits under the *Employment Insurance Act* (Canada) ("EIA") at the time of the accident.

For reasons that follow, I find the Arbitrator did not err in his determination that the Appellant was not entitled to receive an IRB.

II. BACKGROUND

Mr. Kazimierczuk was injured in a motor vehicle accident on November 25, 2010. He applied for statutory accident benefits from Pembridge Insurance Company ("Pembridge"), and for arbitration after mediation failed to resolve disputes that arose regarding the benefits.

At the preliminary issue hearing, the question (apart from interest and expenses) that came before the Arbitrator was the following:

1. Is Mr. Kazimierczuk entitled to receive a weekly income replacement benefit?

The facts were not disputed. Mr. Kazimierczuk was terminated from his employment on March 1, 2010. As part of his termination package, he was paid a salary continuance that was to continue for eight months until November 2010. Mr. Kazimierczuk also applied for Employment Insurance benefits on March 2, 2010. Human Resources and Skills Development Canada ("HRSDC") informed Mr. Kazimierczuk they considered the separation monies as "earnings", and these "earnings" would be "deducted" from his EI benefits.[1]

[1]Tab G of Joint Document Brief

Mr. Kazimierczuk was in the midst of the two-week statutory waiting period of section 13 of the *Employment Insurance Act* ("*EIA*") when his accident occurred on November 25, 2010. No monies in the form of EI benefits were paid to Mr. Kazimierczuk until the week of December 4, 2010, some eight days *after* the date of his accident.

The Arbitrator applied section 5(1)(ii) of the *Schedule.*[2] Because Mr. Kazimierczuk was not employed at the time of the accident, and had not been employed for at least 26 weeks during the 52 weeks before the accident, he could only be eligible to receive IRBs if he "... was receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident."

The Arbitrator determined that according to section 13 of the *EIA*, a claimant is not entitled to receive EI benefits until *after* serving the two-week waiting period. Thus the Arbitrator ruled Mr. Kazimierczuk was not "receiving EIA benefits at the time of the accident." Accordingly, he was not entitled to receive an IRB under section 5(1)(ii) of the *Schedule.*

This is the ruling from which Mr. Kazimierczuk now appeals.

III. ARGUMENTS OF THE APPELLANT

1. The appellant argues the Arbitrator erred by failing to apply or misinterpreted section 9 of the *EIA*, which provides for the establishment of a benefit claim period. The Appellant states, "[I]t is readily apparent that an EI claimant may be within the claim benefit period (or "on claim") long before any payment is made."

I reject this argument. At page 8 of his decision, the Arbitrator made this finding:

> The provisions of the *EI Act* are clear and not in dispute. Mr. Kazimierczuk qualified for EI benefits and a *benefit period was established.* He was not entitled to receive EI benefits until he served a *two-week waiting period.* It was during this waiting period that he was involved in an accident that gave rise to his claim for accident benefits. [Italics mine]

[2] *The Statutory Accident Benefits Schedule — Accidents on or after November, 1, 1996,* Ontario Regulation 403/96, as amended.

Based on this paragraph, it is clear the Arbitrator correctly determined that both a benefit period and a waiting period had been established under sections 9 and 13 of the *EIA*. The Arbitrator accepted the uncontested evidence of the HRSDC document, "Pay History Details"[3], which showed a Benefit Period was commenced on February 28, 2010, and also specified a two-week Waiting Period from November 21, 2010 to December 4, 2010.

Nor did the Arbitrator fail to recognize that a benefit period may be established before a payment is made to an applicant. Section 13 of the *EIA* provides that a claimant "... is not entitled to be paid benefits in a benefit period until, *after* the beginning of the benefit period, the claimant has served a two week waiting period ...". [Italics mine]

Therefore, I do not find the Arbitrator erred or failed to apply or misinterpreted section 9 of the *EIA*.

2. The Arbitrator erred by using the word "received" interchangeably with "paid" in section 5(1)(ii) of the *Schedule*, which is the lynch pin legal issue in this case.

Essentially, the Appellant argues that even though he was "paid" nothing by EI from February 2010 until December 4, 2010, he was still "receiving" EI benefits during this time.

The Arbitrator rejected this argument and I find no error in his analysis. He makes his determinations at page 8 and 9 of his decision:

> Sub clause 5(1)(ii)(a) of the *Schedule* is clear. Mr. Kazimierczuk was not receiving EI benefits at the date of the accident (November 25, 2010). He was only entitled to receive EI benefits on December 4, 2010, i.e., after the expiry of the statutory two week waiting period.
>
> The phrase "was receiving benefits" as found in section 5(1) of the *Schedule* refers to an event that occurred in the past. Here, in order for Mr. Kazimierczuk to receive IRBs he had to have been receiving, i.e., was in receipt of benefits under the *EI Act*.

[3]Tab H of Joint Document Brief

> Mr. Kazimierczuk was in receipt of separation benefits from his employer from the date of the termination of his employment on March 1, 2010 until November 15, 2010 (the severance period).
>
> ...
>
> Mr. Kazimierczuk was not entitled to receive EI benefits until he used up the monies he received from his employer as a consequence of being terminated from employment. [emphasis mine]

The Arbitrator correctly determined Mr. Kazimierczuk had received no EI benefits until after December 4, 2010. The "Pay History Details"[4] presented to the Arbitrator showed no EI monies, or any other benefits, were paid to Mr. Kazimierczuk from February 28, 2010 until December 4, 2010.

Further, the "Pay History Details" document describes Mr. Kazimierczuk's status from February 28, 2010, to November 13, 2010, as "Not on claim." From November 14, 2010 to November 20, 2010, he is described as "Not payable-Allocated earnings." From November 21, 2010 to December 4, 2010, he is described as "Week of waiting period served." For every report week from February 28, 2010 to December 4, 2010, the amount of $0 is indicated.

It is only from December 5, 2010 and onward that the amount of $457.00 is indicated for each report week. The Appellant is described as being on "Regular benefits," from December 26, 2010 to February 19, 2012.

Therefore, I do not find the Arbitrator erred by using the words "paid" and "received" interchangeably.

[4] *Ibid.*

3. The arbitrator erred by failing "to consider that the reason Mr. Kazimierczuk was not paid EI benefits prior to the accident was that his termination pay was deducted from his benefits. The deduction utilized by HRSDC is set off of something (namely EI benefits) and cannot be off nothing. There had to be some sort of benefit to deduct off."

I reject this argument. First, the Arbitrator clearly recognized that Mr. Kazimierczuk had received termination pay in the form of a salary continuance. He also recognized how HRSDC had treated those monies. At page 10 of his decision the Arbitrator states the following:

> Mr. Kazimierczuk received a summary of payments made to him following the termination of employment that covered the pay period extending from March 5, 2010 to November 15, 2010. This document refers to "salary continuance for 8 months…"
>
> Mr. Kazimierczuk received a document from Service Canada called Supplementary Record of Claim, which states in part:
>
> > "Claimant is receiving a salary continuance so his employer will not issue him an ROE [record of employment] until that is finished. He was advised to submit a new application once the salary continuance is finished as that is considered insurable hours and earnings and to submit the ROE at that time.
>
> On October 7, 2010, Service Canada wrote Mr. Kazimierczuk a letter stating that he received separation monies from his employer in the amount of $39,321.98. "This total income before deductions is earnings that will be deducted from his benefits …."

Further, I do not find the Arbitrator erred by not considering that the salary continuance was being deducted from the EI benefits, or that a "set-off of EI benefits" had occurred.

The Appellant based much of his argument on the letter sent by Service Canada[5] that mentions that the separation monies will be "deducted" from the Appellant's benefits, but the same letter also states that the separation monies had been "allocated":

[5]Tab G of Joint Document Brief

> Since we are aware of these [separation] monies that you have received and they have already been *allocated*, please do not report this amount on your reports(s). You must however, report all other earnings and pension income you receive or may receive. [Italics mine]

Section 8(3) of the *Employment Insurance Act* provides for the "allocation" of some earnings:

> **Extension resulting from severance payments**
>
> (3) A qualifying period mentioned in paragraph (1)(a) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that
>
> (a) earnings paid because of the complete severance of their relationship with their former employer have been *allocated* to weeks in accordance with the regulations; and
>
> (b) The *allocation* has prevented them from establishing an interruption of earnings. [italics mine]

The Arbitrator correctly determined that Mr. Kazimierczuk's separation monies were paid as a result of the complete separation of his relationship with his former employer. The separation monies were allocated in accordance with the *EIA*. Contrary to the Appellant's argument, no actual set-off occurred. Nothing was deducted against benefits that would otherwise have been paid to Mr. Kazimierczuk.

This reasoning is supported by section 10(10)(b) of the *EIA,* which allows for an extension of the benefit period.

> **Extension of benefit period**
>
> (10)a claimant's benefit period is extended by the aggregate of any weeks during the benefit period for which the claimant proves, ... the claimant was not entitled to benefits because the claimant was
>
> (b) In receipt of earnings paid because of the complete severance of their relationship with their former employer;

Mr. Kazimierczuk was receiving separation monies until November 2010. Under the *EIA*, the effect of these "earnings" was to extend his benefit period by the aggregate of any weeks during which he was in receipt of these earnings. A claimant is "not entitled to benefits" during the weeks when he is in receipt of these earnings. Further, unless extended by section 10(10)(b), the length of the benefit period is 52 weeks.[6]

If the Appellant's argument were correct, his period benefit would have commenced in February 2010 and ended in February 2011 (according to section 10(2) *EIA*). Instead, the Pay History Details document[7] shows EI benefits were paid to Mr. Kazimierczuk until February 2012. His benefit period was extended well past the 52 weeks mandated in section 10(2) of the *EIA*.

Thus, I reject the Appellant's argument that the Arbitrator erred by not finding that some EI benefit had to have been paid to the Appellant to allow for a set-off, and that the Appellant was, in fact, 'receiving' EI benefits from the commencement of his benefit period, except that the EI benefits had been set-off by his salary continuance.

4. The Appellant submits the Arbitrator created a time continuum that does not exist

The Appellant makes the following argument: Under the *Schedule,* "... the receipt of income continuation does not equal employment. If the Appellant was not employed, nor was he "Receiving" EI benefits during the deduction period or two week waiting period then the appellant is left in a legal purgatory of some sort."

The Arbitrator's consideration of the two-week waiting period of the *EIA* is found at page 7 of his decision:

[6]Section 10(2) *Employment Insurance Act*

[7]*Ibid.*

Paragraph 1.8.0 of the Digest refers to the Waiting Period and reads as follows:

> The waiting period is a two-week period for which no benefit is paid to the claimant. This provision can be likened to the deductible clause in fire and automobile insurance policies under which the insured person is expected to share a part of the damages or loss.

Pembridge submitted that the waiting period is a "safeguard for the Government." The Applicant must share in the risk. It is only after the waiting period expires that an Applicant can receive EI benefits. The motor vehicle accident occurred within the waiting period at a time when Mr. Kazimierczuk was not receiving EI Benefits. He was not eligible to receive IRBs.

The parties agreed that Mr. Kazimierczuk was within the mandatory two-week waiting period at the time of his accident. I do not find the Arbitrator created a time continuum that does not exist. The two-week period is mandated by the operation of section 13 of the *EIA*. I find no error in the Arbitrator's ruling that the Appellant was not entitled to be paid benefits during this period.

5. The arbitrator erred by failing to consider public policy behind the employment insurance scheme, specifically that Applicants should not burden EI while they are receiving income continuation.

I reject this argument. It is unclear what duty an Arbitrator had to consider public policy, but as mentioned in the previous section, the Arbitrator clearly considered public policy by reviewing the Digest of Benefit Entitlement Principles underlying the employment insurance legislation.

Further, if the Appellant's argument were accepted, the first eight months of his fifty-two available weeks of EI benefits would have to be set off or deducted against the eight months of his salary continuance. It cannot be public policy that Parliament intended a claimant to be penalized a portion of his EI benefits merely because he had obtained a salary continuance from his former employer.

6. The appellant argues the Arbitrator erred by failing to apply a statutory ambiguity in favour of the Applicant, and ignored trite law that the *SAB*s are remedial, consumer protection legislation. They should be given a large and liberal construction that best attains its purpose of protecting the insured.

I reject this argument. In his decision, the Arbitrator determined that section 5(1)(ii)(a) is "clear."[8] Like the Arbitrator, I find no statutory ambiguity in section 5(1)(ii)(a) of the *Schedule*. Nor do I find that the word "received" should be given the interpretation sought by the Appellant.

Some of the basic principles of statutory interpretation are as follows:

> The starting point of every interpretative exercise is determining the ordinary meaning of the text. This is what Driedger means when he says the words of an act are to be read in their ordinary, grammatical sense." It is the meaning that spontaneously comes to the mind of a competent language user upon reading the text.[9]

One may be guided by three principles: "(1) words must be given their ordinary meaning; (2) words must be given the meaning they had on their day the statute was enacted; (3) adding to the terms of the stature or depriving them of effect, should be avoided."[10]

To determine the "ordinary meaning" of a word, one may refer to a dictionary. The *Concise Oxford Dictionary*[11] gives the following definitions for the word "receive":

1. Take or accept (something offered or given) into one's hands or possession.
2. Acquire, be provided with, or given.
3. Accept delivery of (something sent).

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[8]Page 8 of decision

[9]Ruth Sullivan, *Statutory Interpretation: Third Edition*, page 59, 2016 Irwin Law Inc.

[10]Pierre André Côté, *The Interpretation of Legislation in Canada*, 4th Edition, Carswell, page 277

[11]*Concise Oxford Dictionary*, Eighth Edition, Clarendon Press, 1990, at page 1001

In the present case, the Arbitrator gave the word "receiving" its ordinary, everyday meaning, as suggested by the authorities mentioned. Further, his interpretation was consistent with the dictionary definition which states that one "receives" when something offered or given is taken or accepted into one's hands or possession. Something must be acquired, provided with, or given. Delivery must be accepted.

The Appellant's interpretation would add words to the stature or deprive the meaning of the word "receive" altogether. In the present case, the Appellant took nothing into his hands or possession. He acquired nothing and was provided with nothing. He accepted delivery of nothing.

The Arbitrator correctly determined 5(1)(ii) of the *Schedule* to be clear and unambiguous. There was no ambiguity to resolve in favour of the Appellant.

The Arbitrator did not err in finding the Appellant was not receiving EI benefits at the time of the accident.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Edward Lee
Director's Delegate

October 16, 2017
Date

APPENDIX

Statutory Accident Benefits Schedule

5(1) The insurer shall pay an income replacement benefit to an insured person … if the insured person satisfies one or both of the following conditions:

1. The insured person,

   i. …

   ii. was not employed at the time of the accident but,

      A. was employed for at least 26 weeks during the 52 weeks before the accident or was receiving benefits under the *Employment Insurance Act (Canada)* at the time of the accident, [emphasis mine]

Employment Insurance Act

Benefit Period

Establishment of benefit period

9. When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

Waiting period

13. A claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

Extension resulting from severance payments

8. (3) A qualifying period mentioned in paragraph (1)(a) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that

(a) earnings paid because of the complete severance of their relationship with their former employer have been allocated to weeks in accordance with the regulations; and

(c) the allocation has prevented them from establishing an interruption of earnings.

Beginning of benefit period

10. (1) A benefit period begins on the later of

(a) the Sunday of the week in which the interruption of earnings occurs, and

(b) the Sunday of the week in which the initial claim for benefits is made.

Length of benefit period

(2) Except as otherwise provided in subsections (10) to (15) and section 24, the length of a benefit period is 52 weeks.

Extension of benefit period

10. (10) A claimant's benefit period is extended by the aggregate of any weeks during the benefit period for which the claimant proves, in such manner as the Commission may direct, that the claimant was not entitled to benefits because the claimant was

(a) confined in a jail, penitentiary or other similar institution;

(b) in receipt of earnings paid because of the complete severance of their relationship with their former employer;