[TRANSLATION]

Citation: *F. R. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 149

Date: September 9, 2015

File number: GE-15-251
GE-15-255
GE-15-258

GENERAL DIVISION
Employment Insurance Section

Between:

F. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Aline Rouleau, Member, General Division, Employment Insurance Section

Hearing by teleconference on July 23, 2015 in Rimouski, Province of Quebec

REASONS AND DECISION

PERSONS IN ATTENDANCE AND FORM OF HEARING

[1] The Tribunal held a hearing by teleconference on July 23, 2015 for the reasons given in the Notice of Hearing dated June 11, 2015, namely, the complexity of the issue or issues under appeal, the fact that more than one party will be attending the hearing, the fact that more than one participant, such as a witness, could attend, the fact that the Appellants are represented and by reason of the availability of videoconferences in or near the locality where Appellants reside.

[2] The Appellant, D. G., was present and was represented by the partnership firm Édouard Côté of Guay, Côté Avocats.

[3] The Appellant, F. R., attended the hearing.

[4] The Commission Respondent did not attend the hearing.

[5] It was agreed that the files of Appellant F. R. (GE-15-251, GE-15-255 and GE-15-258) and Appellant D. G. (GE-15-379, GE-15-383 and GE-15-385) would be heard simultaneously.

[6] The appeals in all of the files named were heard on the basis of joint evidence with the parties' consent.

INTRODUCTION – STATEMENT OF FACTS AND PROCEEDINGS

[7] Appellants D. G. and F. R. are co-workers who were employed in the same department for the same employer during all of the periods at issue.

[8] Appellant D. G. had Employment Insurance benefit periods established commencing, respectively, April 1, 2012, March 30, 2013 and March 30, 2014

[9] Appellant F. R. had Employment Insurance benefit periods established commencing, respectively, June 17, 2012, June 16. 2013 and June 15, 2014.

[10] The Commission conducted an investigation in 2014 showing that the Appellants had received weeks of benefits during a period of leave granted by their Employer.

[11] The Commission determined that the Appellants were not unemployed during each of the benefit periods established because the weeks in which they were not employed, during these periods, were part of their work schedule. They could not be deemed to be unemployed. The Commission therefore imposed disentitlements to benefits effected at the start of each of these benefit periods.

[12] The Appellants filed an application for a review of the Commission's decisions regarding their unemployment status. The Commission upheld its initial decisions, hence this appeal before the Tribunal.

[13] A meeting was held on June 10, 2015 in preparation for the hearing at which the Appellants consented to joint hearing of their files.

ISSUES

[14] The objective is to determine whether a disentitlement could be imposed on the Appellants pursuant to ss. 9, 11(1) and 11(4) of the Employment Insurance Act (the "Act") concerning their unemployment status.

THE LAW

[15] Section 9 of the Employment Insurance Act provides that when an insured person who meets the conditions provided under section 7 of the Act for making a claim for benefits, benefits are payable to the person for each week of unemployment that falls in the benefit period.

[16] Under s. 11(1) of the Act, a week of unemployment is a week in which a claimant does not work a full working week.

[17] Subsection (4) of the same section 11 provides that an employee who regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employee in full-time employment, and who is later entitled to a period of leave, is deemed to have worked a full working week during each week that falls wholly or partly in such a period of leave.

EVIDENCE

Evidence in the files

Tribunal note: The reference numbers used for the documentary evidence are the same as those appearing in file GE-15-251 for Appellant F. R. and file GE15-379 for Appellant D. G., unless otherwise specified.

[18] On making her claims, Appellant F. R. stated that she worked for the employer Centre polyvalent des aînés et aînées de Rimouski, that her employment ended by reason of work-sharing, and that the date of her return to work was unknown to her (GD3-5 and GD3- 6).

[19] On making her claims, Appellant D. G. stated that she worked for the employer F. L.- Pavillon l'héritage from April 11, 2011 to March 31, 2012, and for the employer Centre polyvalent des aînés et aînées de Rimouski in the other periods at issue. She declared that her employment ended by reason of a shortage of work.

[20] The records of employment produced for Appellant F. R. show that they were issued at the employee's request and mention [translation] "seven days on – seven days off" (GD3-13).

[21] The record of employment produced by the employer F. L.- Pavillon l'héritage for Appellant D. G. (GD3-11) states "K" (other) as the reason for the separation from employment, and the breakdown of pay periods indicates alternating weeks, with a week of wages followed by a week without wages. The records of issued by the Centre polyvalent des aînés et aînées de Rimouski employer mention that they were issued at the employee's request, with the comment "7 days of work – 7 days on call" on one of them.

[22] The Executive Director of the Centre polyvalent des aînés et aînées de Rimouski employer, G. R., has been in his position since 2006, reported (GD3-14, GD3-16, GD3-74 and GD3-75):

a) The company operates two (2) residences, the St-Louis residence in Rimouski and L'Héritage residence in St-Anaclet. He has an assistant who works in St-Anaclet.

b) The two (2) Appellants are servers who work at the St-Anaclet residence, in operation since 2009. The Appellants have worked for the Centre polyvalent des aînés et aînées de Rimouski since 2012, given that the residence was operated by subcontractors before 2012.

c) Of all the employees at the St-Anaclet residences, only the Appellants have a schedule consisting of seven (7) on and (7) days off. They work from Monday to Sunday, eight (8) hours a day for 48 hours in one week, and eight (8) hours the other week. They alternate because only one server works at a time.

d) The Executive Director is the person who pays the wages based on the time sheets he receives by email from the Assistant Director, Ms. St-Pierre, who enters hours worked in the system and fills out records of employment. He knew that the Appellants banked their hours, which he would check approximately once a year to ensure they remained within acceptable limits. He also knew that they sometimes switched work hours to cover for each other in the event of absences, leave or weeks in which they were expecting unemployment, but he never paid much attention to it. He did not control the Appellant's banked hours, a task under the Assistant Director's responsibility.

e) He acknowledged that the first days of work shown on the records of employment of Appellant F. R. are incorrect, given that the hours worked and accumulated from June 17, 2012 to June 16, 2013 had not been entered in the system.

[23] The Assistant Director of the Centre polyvalent des aînés et aînées de Rimouski employer, M. S., on duty in St-Anaclet since April 1, 2009, states (GD3-19, GD3- 20 and GD3-73):

a) She is in charge of employee schedules and employee management. Prior to 2012, the Appellants worked for F. L., because the kitchen and dining room were a concession. For budget reasons, the residence took over management of the kitchen and dining room with the same employees. Work schedules and work hours remained the same.

b) The two (2) Appellants are employees assigned to the dining room and she approves their work hours. She sends the timesheets to Mr. G. R. so that he can prepare their wages.

c) The Appellants fill in their timesheets and enter notes concerning hours banked and hours paid. She approved the Appellants' requests for hours paid and/or hours accumulated.

d) She did not know that banking hours was not permitted for employment insurance purposes. She relied on what the Appellants told her when she entered hours in the bank to cover the first of second week of the employment insurance waiting period, for example.

e) She did not know that the Appellants switched hours on Sunday during the week they were awaiting their employment insurance. Since the work occurred on Sunday, she was not present to notice the situation. She became aware of the situation after meeting with the Commission on September 10, 2014.

f) She provided the Commission with a copy of the timesheets and corresponding pay stubs for the periods at issue for each of the Appellants (GD3-12 to GD3-64 and GD3-21 to GD3-70 for Appellant F. R.).

[24] The Appellant F. R. stated (GD3-17, GD3-18, GD3-71, GD3-72 and GD3-76):

a) For approximately the past four (4) years, her work schedule was from Monday to Sunday. She works eight (8) hours a day, except Sunday, when she works eight and a half (8.5) hours. Once her seven (7) day shift ends, another employee works seven (7) days. The days when she is not working are her days off. For specific leave or vacation leave, M. S., the Director, takes steps to find her a replacement.

b) She enters "job-sharing" on her claims for benefits because she checked with Service Canada and was to state this as the reason for her work stoppage.

c) She has worked with banked hours for years. During her waiting period weeks, her co-worker works her Sunday and enters the hours of work on her own timesheet. Her co-worker works eight (8) days in a row during the week in question. She does the same when it is her co-worker's turn to put in her employment insurance waiting period weeks. They functioned this way because they believed that they needed full weeks for their waiting period weeks. She acknowledges that she banked hours on July 15, 2012, and did not work from July 15 to 29, 2014 for that reason. Her co-worker worked these hours in return for the

hours she had worked for her in March and April 2014 during her waiting period weeks. She reports all of her hours of work and leave. She said that Director M. S. was aware that she and her colleague switched work hours during their waiting period weeks. Another reason she did so was to prevent her employer from having to pay too much overtime, which would otherwise be the case if she entered the hours she worked for her co-worker on her timesheet.

d) She had to be on-call for her employer during the seven (7) days that she was not working.

e) She did not work during the week scheduled in July 2012, 2013 and 2014 because she was on vacation. She applied for Employment Insurance benefits for these weeks because she did not know that she had to inform the Commission of her situation.

[25] The Appellant D. G. stated (GD3-68, GD3-71 GD3-72 and GD3-85):

a) She works as a server and is in charge of the dining room. She worked in the dining room for three (3) years when it was a concession, and now works for the owner of the Centre polyvalent des Aînés et Aînées de Rimouski.

b) In the very beginning, the staff included one full-time girl and one part-time girl. Because the part-time employee had few hours and because it was difficult to find someone willing to work part time, the employer suggested a 7/7 schedule: 7 days of work and 7 days off. She has worked by this schedule ever since, from Monday to Sunday. She works at least eight (8) hours a day, but sometimes longer depending on what needs to be done.

c) She reported a shortage of work on her claims for benefits at the suggestion of an agent at the Employment Insurance office.

d) When she requested a week of vacation, the week coincided with a week of work. She was available to work the previous week and the subsequent week. She also had to be on-call for her employer during her seven (7) days off.

e) During her waiting period weeks, she did not work. The other employee worked the hours scheduled, and vice versa, because they thought they could not work during their waiting period weeks. She acknowledged that she was paid for the hours worked by the other, but

when she did the same for her co-worker, everything evened out. The one would enter her hours in the other's timesheet and vice versa.

f) Since the investigation, her work schedule changed. She now works Wednesday to Tuesday, i.e., 32 hours in the first week and 24 hours in the second week, but still according to a 7/7 schedule.

[26] The Commission's decision to impose disentitlements generated a total overpayment of $10,698 for Appellant F. R. and a total overpayment of $14, 623 for Appellant D. G.

Evidence at the hearing

Testimony of Appellant D. G.

[27] Ms. D. G. explained that her employment relationship began in March 2009, when F. L. ran the kitchen and dining room concession at the St-Anaclet residence. At the time, there were 8 to 10 residents, compared to 32 to 35 currently. Back then, the residence was new and her co-worker, Appellant F. R., started work at the same location in May 2009, on a part-time basis. Ms. D. G. was paid weekly, regardless of the number of hours she worked. Every two (2) weeks, she worked five (5) days one week and four (4) days the next.

[28] A year after the opening, in March or April 2010, Ms. F. L. met with the Appellants individually to inform them that a 7/7 schedule would henceforward take effect, thus allowing them access to employment insurance benefits. They had no choice in the matter. The schedule was imposed on them, and they had to work from Monday to Sunday, forty-two (42) hours in six (6) days, and seven (7) hours in one (1) day during the shorter week. There was not enough work for two full-time employees. In 2012, the owner took back control of the concession and the same schedules remained in effect. In 2014, the work days of the schedule were modified. They had to work from Wednesday to Tuesday, but still for seven (7) days on and seven (7) days off.

[29] When she made her first claim for benefits in 2010, she went in person to the Employment Insurance office and explained her situation to the agent, who told her to enter "job-sharing" as the reason for her separation from employment. For her subsequent claims, starting in 2011, she

again went in person to the office, explained her situation and was told to enter "shortage of work."

Testimony of Appellant F. R.

[30] Ms. F. R. confirmed the comments Ms. D. G. made in her testimony, and added that the schedule had been imposed on them in 2010. No negotiation took place with the employer.

ARGUMENTS

[31] The Appellant's argued that:

a) Appellant F. R. said she did not look for another job because she had a job. She has to be on-call for her employer during her seven (7) days off. It would therefore be difficult for her to find a part-time job one week out of two, and she needs to rest after working seven (7) consecutive days.

b) In support of her request for a review, Appellant F. R. said that for several years, job-sharing had become a practice widely accepted by Employment Insurance. She submitted her claims in due and proper form, and her record of employment was completed correctly. Everything was submitted, examined and ultimately accepted by the Commission, allowing her to receive benefits. Now, she is faced with a notice of debt for past years. Neither she nor the employer was informed that this practice was no longer permitted. Had she known, she would probably have looked for another job.

c) She objects to the fact that the Commission reconsidered her claims over the past three years. She considers it unacceptable that she should be required to pay such a large amount because of a work schedule proposed by her former employer and reinstated by her new employer. Other employees of the employer received notification of the termination of benefits, but not a notice of debt.

d) Appellant D. G. pointed out that she had made her claims for benefit with the assistance of an agent. She told him that she worked a 7/7 schedule, and he said it was all right. She does not understand why she is not entitled to benefits when such benefits were paid to her, not to mention that the Commission took three (3) years to take steps to recover them from her.

Appellant D. G.'s representative said in the appeal notice that the Commission's decisions were unfounded in fact and in law, and that the evidence would show that the Appellant truly had been unemployed.

Submissions at the hearing

[32] Counsel Côté, representative, contends that:

a) The Commission refused to pay benefits to the Appellants for various periods. In reaching this decision, the Commission applied the provisions of s. 11(4) of the Act. On reading this section of the Act, we see that there are two (2) conditions governing its application. The Commission confirms this in its arguments at page GD4-6, namely, that the first condition pertains to the work itself, and the second, to an entitlement under an employment agreement. When both conditions are met, the claimant is deemed to be employed for the entire week that falls in a period of leave. A period of leave may be part of a work schedule, but is not necessarily a condition. S. 11(4) mentions a condition of an employment agreement.

b) The Appellants disagree with the Commission's interpretation and, to support their contentions, they cite the Digest of Benefit Entitlement Principles (DBEP) used by the Commission, more specifically, chapter 4, item 4.3.5 concerning lay days or periods of leave. Entitlement to a period of leave means having good reason to request or require a benefit. An agreement providing a period of leave cannot be assumed to exist. Evidence of such an agreement must be entered in the record. In the case or cases of the Appellants, such an agreement between them and the employer never existed. The schedule was imposed on them.

c) The Commission has no basis for making a comparison or evidence allowing it to purport that the Appellants worked more than a regular week of work. The situation of the one was comparable only to the other, and both had the same schedule.

d) *Merrigan* was mentioned to say that the Appellant's case includes no evidence allowing the all plication of s. 11(4) of the Act. The Appellant's contentions are also supported in *Buchanan*.

[33] The Commission Respondent argued that (GD4):

a) It was explained to Appellant F. R. that by reporting a shortage of work in her claim for benefit, whereas the record of employment mentioned "at the employee's request," she had not truly reflected the reality.

b) The Appellants were not considered to be unemployed since they were working a schedule of seven (7) days on, seven (7) days off. The period of leave was part of the work schedule. They were deemed to have worked a full working week during their agreement.

c) The Appellants acknowledge that their working conditions required them to remain available to work for their employer as the employer's needs required. The Appellants and the employer confirmed that they worked on a rotating basis. This shows that the weeks in which they did not work under their employment agreement were weeks of leave, within the meaning of s. 11(4) of the Act. These weeks were not weeks of unemployment.

d) The evidence in the files indicates that the Appellants' employment continued during periods of leave under their employment contract. The Commission gathered sufficient facts to prove that the periods in which the Appellants did not work and for which they received benefits were part of their 7/7 work schedule.

e) During the administrative review stage, the Commission unsuccessfully tried to contact Appellant D. G.'s representative for information. The Commission therefore had to contact this Appellant directly to conduct a review of her files.

f) The Commission's agent explained to Appellant D. G. that she had file her claim for benefit on the ground that she had no job, when in fact she was employed on an ongoing basis given her work schedule.

g) The jurisprudence supports the Commission's decisions, including *Canada (AG) v. Merrigan*, 2004 FCA 253 and *Canada (AG) v. Duguay*, A-75-95.

ANALYSIS

[34] Given that the facts are identical in the Appellants' cases, a common decision will be reached on the appeals and shall apply *mutatis mutandis* to both.

[35] First, we should review the principles set out in the Act and brought to light by the jurisprudence.

[36] In *Attorney General of Canada v. Buchanan*, 2003 FCA 51 (A-70-02), the Federal Court of Appeal affirmed the position of the Umpire, who called attention to a few basic concepts relevant to the application of s. 11(4) of the Act, saying that it was important to pay attention to the goal and objectives of the Act, and to the wording and purpose of 11(4) of the Act. The question was to determine whether the period in dispute was part of a "leave" to which the claimant was entitled under the working conditions agreed upon with the employer.

[37] Again in *Buchanan*, supra, the Umpire also addressed the evidence before him on the matter of whether the respondents "*regularly work a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment*." The Appellant had argued that he worked an average 42 hours a week whereas the provincial standard under the *Employment Standards Act of Prince Edward Island* specifies that a normal week of work is 48 hours a week. The Commission contends that the normal work week was 40 hours. The Umpire held that the Appellant's reference to the provincial standards was *"strong and cogent evidence"* undisputed by the Commission. The Federal Court of Appel said it agreed with the Umpire's decision that the Board had strong and cogent evidence to support its finding and also noted that the Board of Referees could not have concluded otherwise because there was no evidence that from the Commission that the normal number of hours worked by a person in full-time employment is 40 hours.

[38] The purpose of the Act is to "*compensate persons whose employment has terminated involuntarily and who are without work*" CEIC v. Gagnon (1988), 2 SCR 29. The objective of s. 11(4), as stated in various decisions by Umpires and as confirmed and upheld by the Federal Court of Appeal in *Kieley v. Commission,* A-708-92, is to prevent situations where a worker receives employment insurance benefits during a period in which the worker is already being

compensated based on a special work schedule. It confirms that s. 11(4) of the Act means that any period of leave is deemed to be a period of employment and that such leave does not constitute an interruption of earnings within the meaning of s. 14(3) of the Regulations.

[39] In *Deschambault v. The Minister of National Revenue (MNR)* 2001-03-16, the Tax Court of Canada analyzed the correct interpretation of section 2 and subsection7(2) of the Act and regulation 14(1) of the Regulations. To determine eligibility for employment insurance benefits resulting from an "interruption of earnings," we read that it must first be determined whether a claimant has been "laid off" or "separated" from employment, based on the facts at hand, including the claimant's conditions of employment and break in service caused by a shortage of work.

[40] The Tribunal pointed out that it has long been held that the absence of a written employment agreement cannot be used as evidence that no agreement exists between an employer and employee. A verbal agreement or contract is no less valid than a written agreement. Thus the facts brought as evidence will determine the content of such verbal agreement.

[41] A principle exists whereby an Act determines the baseline or general requirements of its application. Regulations associated with such an Act are passed to define certain applications or clarify the baseline criteria established. The sections of the *Employment Insurance Act* and the sections of the *Employment Insurance Regulations* are therefore interconnected. Thus:

a) Section 7 of the Act specifies the conditions to be met to qualify for the payment of Employment Insurance benefits by specifying that an insured person must have "*an interruption of earnings*" and the "*required number of hours of insurable employment*" during a "*qualifying period*."

b) Section 7 refers to s. 9 of the Act, which provides that benefits are payable for each "*week of unemployment"* that falls in the benefit period established.

c) Section 9 refers to s. 11 of the Act, which provides that a "*week of unemployment"* is a week in which the claimant does not work *"a full working week,"* and establishes a presumption in subsection (4) that an insured person is deemed to have worked "*a full*

working week" when the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment and when the person is entitled to the period of leave in compensation for extra time worked.

d) The Tribunal interprets s. 31 of the Regulations as a clarification of the definition of *" full working week"* of one employee compared to other employees belonging to the same team working for the same employer.

e) Section 7 of the Act also refers to s. 14 of the Regulations. Subsection 14(1) of the Regulations defines "*interruption of earnings"* that includes three components. The first component establishes that the insured person must have been *"laid off"* or *"separated from"* employment. The second component requires that an interruption of earnings must occur for a period of seven or more consecutive days, and the third component establishes that no earnings from the employment in question are payable or allocated.

[42] Section 14(3) of the Regulations specifies that that a "*period of leave"* referred to in subsection 11(4) of the Act does not constitute an "*interruption of earnings."*

[43] Having reviewed these principles, the Tribunal will move on to its analysis in light of the facts in evidence and the arguments raised.

<u>On the reconsideration of claims by the Commission</u>

[44] Section 52(1) of the Act authorizes the Commission to reconsider any claim for benefits. Such reconsideration may take place any time after a benefit period has been established provided it falls within thirty-six (36) months after the benefits have been paid or would have been payable. This reconsideration option need not require the presence of "fraud" by any means, but aims to ensure that Employment Insurance claimants do not receive benefits to which they are not entitled. The Commission proceeded with such reconsideration and gave its decisions on October 27, 2014. The thirty-six (36) month time limit provided in s. 52(1) covered the established benefit periods of the Appellants named in the present appeals.

[45] Moreover, by way of information, s. 52(5) of the Act provides for extending the time to reconsider a claim to seventy-two (72) months if the Commission believes that a false or misleading statement or representation has been made in connection with a claim. This was not the case of the Appellants herein.

On the Appellants' unemployment status

[46] It remains to be determined whether the weeks that follow the weeks in which the Appellants worked—these being alternating weeks commonly known as a "7/7" or "7 days on/7 days on call" schedule or "every-other-week employment" are periods of leave within the meaning of s. 11(4) of the Act.

[47] To do so, the Tribunal believes it must consider the terms "period of leave" in light of s. 14(1), which provides a three-part definition of an interruption of earnings. Although the term "laid off" used in this section does not apply exclusively to a permanent break in the employer and employee relationship, we also find the term "separated from employment" with the employer. The use of the word "or" opens the door to two possible alternatives, each of which may be applied independently or concurrently in respect of the other. Accordingly, an employee may be laid off and separated from employment with the employer, in which case the relationship would be permanently broken. An employee may be laid off but not separated from employment with the employer, as in the case of a temporary cessation of work by reason of a shortage of work or a temporary period of employer inactivity.

[48] But what happens in the event of a lay off not covered by ss. 29 and 30 of the Act, when the employer is not in a period of inactivity and when the amount of work remains unchanged? In our view, this reflects modifications made to work schedules, and the employees covered by such work schedule modifications are not separated from employment with their employer. However, we must not confuse matters and apply this interpretation to situations where an employer, with a constant volume of work, must meet its labour needs by offering a few hours a week to one employee, without changing the work schedules of other employees working for the same employer, in other words, part-time employment.

[49] This appears to be why s. 11(4) of the Act introduces the presumption that unemployment status does not apply during a period of leave that follows a period of work in which the insured person regularly works a greater number of hours than are normally worked in a week by persons in full-time employment. However, neither the Act nor the Regulations specify the number of hours normally worked by persons in full-time employment. This explains the importance of the evidence to be submitted.

[50] The employer and the Appellants admitted, without ever concealing, that a one week on/one week off schedule was in effect. The records of employment, time sheets and pay records are proof. The employer's Executive Director stated that the Appellants worked alternately, from Monday to Saturday, for eight (8) hours a day, for a total of 48 hours, and on Sunday for eight and a half (8.5) hours. Under this work schedule, each of the Appellants worked for approximately 56.5 hours followed by a period of leave lasting seven (7) days.

[51] Can we then determine that the Appellants worked a greater number of hours, days or shifts during their working week than the standard set in s. 11(4)? The Commission believes so, but did not offer any evidence of this standard, or take any position on what it sees as a number of hours, days or work shifts greater than what persons employed full time would normally work.

[52] Supported by *Buchanan*, supra, which determines that a provincial standard represented "strong and cogent evidence, the Tribunal referred to the Quebec *Act Respecting Labour Standards* which, by judicial knowledge, establishes the number of hours in the regular workweek of a full-time worker to be 40 hours. By working 48 hours a week followed by another 8.5 hours the next day, the Appellants exceeded the number of hours, days or work shifts that a person employed full-time would normally work in a week and, apparently, the week that followed was a necessary period of leave. According to s. 14(3) of the Regulations, this period of leave does not constitute an interruption of earnings and the Appellants did not separate from employment with their employer as required by s. 14(1) of the Regulations. Therefore, the Appellants were not unemployed at such times.

[53] The Appellants emphasized the fact that the employer had imposed the work schedule on them. Whether or not this schedule was imposed has no impact on the legislative provisions

that the Tribunal is required to apply. The claims for benefits establish a relationship between a claimant and the commission. The persons applying for benefits are personally and solely responsible for proving their entitlement to Employment Insurance benefits.

[54] The Appellants underscore that on the date of the hearing, their work schedule had been changed to cover the Wednesday of one week to the Tuesday of the next, with the result that they work 32 hours in one week and 24 hours in the other. In the Tribunal's opinion, because it must consider various information and the interactions between applicable provisions, that it would be far-fetched to claim to be unemployed because the Commission counts hours of work in a week from Sunday to Saturday, and therefore that a person is not working a greater number of hours each week than persons employed full-time would work.

[55] The Tribunal has had occasion to witness, regrettably, other disputes in the Appellants' region similar to that of the Appellants, and notes that these situations were often instigated by the employer. The agents of the Commission to whom the claimants turned did not warn them of this "dubious" practice in light of the rightful interpretation of provisions of the Act and its Regulations. More regrettable still is the fact that they seem to have given it their "blessing" or even encouragement. Many provisions are set out in the Act concerning "work sharing" but they apply only under precise conditions subject to a work agreement approved by a special or general direction of the Commission (see s. 24 of the Act).

<u>On the overpayments generated following the Commission's reconsiderations</u>

[56] In the Tribunal's opinion, the objections raised by the Appellants pertain more to the consequences of the Commission's reconsideration, namely, the overpayments generated, when the Commission had information about the work schedule established from the time the initial claims for benefits were submitted.

[57] Although the Act and Regulations, which the Tribunal is charged to apply, do not specifically address this matter, the Commission has adopted an administrative policy found in the "Digest of Benefit Entitlement Principles" at c. 17, entitled "Reconsideration, amendment of a decision, and error correction."

[58] At subsection 17.3.2.1 of the Digest, we read that the Commission will not impose a retroactive decision creating an overpayment unless one of the situations described in the Reconsideration Policy exists. Subparagraph 17.3.2.2 states that a Commission error occurs when the Commission had all of the relevant information needed to make a decision but disregarded the information. If the Commission incorrectly paid benefits, the error will be corrected currently and no overpayment will be created. In subparagraph 17.3.3, the Commission developed a policy to prevent the creation of overpayments when claimants received an overpayment of benefits through no fault of their own.

[59] In *Attorney General of Canada v. Gagnon*, 2004 FCA 351 (A-52-04), the Federal Court of Appeal referred to the Digest of Benefit Entitlement Principles and held that the Commission was correct to establish guidelines or policies in order to guarantee some consistency nationally and avoid arbitrariness, and that it cannot be criticized for referring to them.

[60] Herein, the Tribunal more specifically calls out the Commission for not referring to its policy on "Reconsideration, amendment of a decision, and error correction." The evidence on record clearly shows that a work schedule was in place when the Appellants filed their claims for benefit. The Commission was therefore in a position at the time to question each Appellant's entitlement under s. 11(4) of the Act.

[61] For the reasons given earlier, the Tribunal believes that although the Appellants cannot show that they were unemployed during the periods in dispute, they should not be required to repay the overpayment. Moreover, Appellant F. R. stated in her notice of appeal to the Tribunal that other employees of the Centre polyvalent des aînés et aînées de Rimouski had received a notice of termination of benefits but not a notice of debt. The Tribunal asks the Commission to verify this statement and act accordingly.

CONCLUSION

[62] The appeals in all of the files under this decision are dismissed. However, in the circumstances, the Tribunal very strongly recommends that the established overpayments be written off.

Aline Rouleau
Member, General Division - Employment Insurance Section