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

[TRANSLATION]

Citation: *M. M. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 98

Tribunal File Number: GE-15-3852

BETWEEN:

M. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARING DATE: June 7, 2016

DATE OF DECISION: July 22, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. M., the claimant, participated in the hearing by teleconference.

INTRODUCTION

[1] The Appellant filed a claim for employment insurance benefits starting on February 22, 2015. On February 16, 2015, the Employment Insurance Commission of Canada (the "Commission") informed the claimant that it could not pay her employment insurance benefits effective June 8, 2015, because she had lost her employment as a result of a work stoppage attributable to a labour dispute. On October 29, 2015, in response to her request for reconsideration, the Commission informed the claimant that the decision rendered in connection with the labour dispute had been upheld. The claimant appealed that decision to the Social Security Tribunal of Canada (the "Tribunal") on November 24, 2015.

[2] This appeal was heard by teleconference for the following reasons:

a) The complexity of the issue or issues.

b) The information in the file, including the need for additional information;

c) This type of hearing respects the requirement under *the Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[3] The claimant is appealing the decision regarding a disentitlement that was imposed on her under subsection 36(1) of the Act because she lost an employment or was unable to resume an employment because of a work stoppage attributable to a labour dispute at the factory, workshop or other premises at which she was employed.

THE LAW

[4] Subsection 2(1) of the *Employment Insurance Act* (the "Act") provides the following definition for "labour dispute":

labour dispute means a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons;

[5] Section 38 of the Act states as follows:

(1) Subject to the regulations, if a claimant loses an employment, or is unable to resume an employment, because of a work stoppage attributable to a labour dispute at the factory, workshop or other premises at which the claimant was employed, the claimant is not entitled to receive benefits until the earlier of

(a) the end of the work stoppage, and

(b) the day on which the claimant becomes regularly engaged elsewhere in insurable employment.

(2) The Commission may, with the approval of the Governor in Council, make regulations for determining the number of days of disentitlement in a week of a claimant who loses a part-time employment or is unable to resume a part-time employment because of the reason mentioned in subsection (1).

(3) A disentitlement under this section is suspended during any period for which the claimant

(a) establishes that the claimant is otherwise entitled to special benefits or benefits by virtue of section 25; and

(b) establishes, in such manner as the Commission may direct, that before the work stoppage, the claimant had anticipated being absent from their employment because of any reason entitling them to those benefits and had begun making arrangements in relation to the absence.

(4) This section does not apply if a claimant proves that the claimant is not participating in, financing or directly interested in the labour dispute that caused the stoppage of work.

(5) If separate branches of work that are commonly carried on as separate businesses in separate premises are carried on in separate departments on the same premises, each department is, for the purpose of this section, a separate factory or workshop.

[6] Subsection 54(g) of the Act provides as follows:

The Commission may, with the approval of the Governor in Council, make regulations

> (g) setting out the circumstances that constitute the commencement or termination of a stoppage of work for the purposes of section 36;

[7] Section 53 of the *Employment Insurance Regulations* (the "Regulations") states as follows:

(1) For the purposes of section 36 of the Act and subject to subsection (2), a stoppage of work at a factory, workshop or other premises is terminated when :

> (a) the work-force at the factory, workshop or other premises attains at least 85 per cent of its normal level; and
>
> (b) the level of activity in respect of the production of goods or services at the factory, workshop or other premises attains at least 85 per cent of its normal level.

(2) Where, in respect of a stoppage of work, an occurrence prevents the attainment of at least 85 per cent of the normal level of the work-force or activity in respect of the production of goods or services at a factory, workshop or other premises, the stoppage of work terminates

> (a) if the occurrence is a discontinuance of business, a permanent restructuring of activity or an act of God, when the level of the work-force or of the activity attains at least 85 per cent of that normal level, with the normal level adjusted by taking that occurrence into account; and

(b) if the occurrence is a change in economic or market conditions or in technology, when

(i) here is a resumption of activity at the factory, workshop or other premises, and

(ii) the level of the work-force and of the activity attains at least 85 per cent of that normal level as adjusted by taking that occurrence into account.

(3) For the purposes of calculating the percentages referred to in subsections (1) and (2), no account shall be taken of exceptional or temporary measures taken by the employer before and during the stoppage of work for the purpose of offsetting the effects of the stoppage.

EVIDENCE

[8] The evidence in the file is as follows:

(a) Letter of resignation indicating that the claimant would not be returning to work after the labour dispute, effective April 26, 2015 (GD2-7).

(b) Declaration of strike at Delastek inc. effective April 1, 2015 (GD3-13).

(c) Investigation of commencement of stoppage of work – employer. The claimant had been on a work stoppage for medical reasons since February 18, 2015 (GD3-14 to GD3-22).

(d) Investigation of commencement of stoppage of work – union (GD3-23 to GD3-28).

(e) Collective agreement (GD3-29 to GD3-63).

(f) Record of employment from Delastek inc. indicating a last day of work of February 18, 2015 because of “illness or injury” (GD3-64).

(g) Record of employment from Quebec government indicating a work period from April 30, 2015, to June 5, 2015, because of a shortage of work (GD3-77).

(h) On October 28, 2015, the employer, the Quebec government, indicated that the claimant had held a casual position for less than a year, with no recall rights. The employer stated that the term of the contract was from April 30 to November 28, 2015. The contract ended on June 5, 2015, because of a shortage of work. It stated that the claimant had been working at a tree nursery and that there was no more work for her (GD3-84).

(i) On October 28, 2015, the claimant stated to the Commission that she was not participating in, financing or interested in the dispute. She added that she did not intend to return to Delastek after the dispute ended. She said that she had paid union dues on every paycheque and confirmed that she was a member of Unifor Local 2109. The claimant confirmed that she had attended union meetings and had exercised her right to vote. She paid the mandatory union dues only. She did not know whether she would be receiving a retroactive pay increase in the event of a retroactive salary adjustment. She stated that she had decided not to return to her employer Delastek when she started with her new employer on April 30, 2015. She never handed in her resignation. She left her job because she wanted to find another, more lucrative one, and she was also thinking about going back to school. The claimant said that when she accepted the position with the Conseil du Trésor she knew it was an indeterminate position that would only last a few weeks. She said that she had worked full time, 38.75 hours per week, at an hourly rate of $19 (GD3-85/86).

[9] As agreed at the hearing, the claimant submitted the following documents:

a) Notice of resignation dated December 1, 2015, indicating that the claimant was resigning voluntarily effective April 26, 2015 (GD6-1).

b) Pay stub for the period from November 29, 2015, to December 5, 2015 for outstanding vacation pay (GD6-2).

c) Amended record of employment indicating that the claimant handed in her resignation on December 1, 2015 (GD6-3).

d) Letter from Unifor dated November 17, 2015, indicating that the claimant had not received any strike pay since the labour dispute had started (GD6-4).

[10] The evidence submitted at the hearing through the Appellant's testimony revealed the following:

a) When she received the offer to work at the tree nursery, she decided not to return to her former employer, where there had been a strike since April 1.

b) She did not take part in the strike. She handed in her resignation and found another job. She looked for work and then went back to school.

c) She stated that she had inquired at the Service Canada call centre to find out whether she would be able to receive benefits after her job at the nursery and was told that she would be entitled, but that was not the case because of the dispute.

d) She stated that she was not connected with the strike and did not agree with it. She had a letter from the union indicating that she had not received any assistance from them.

e) She stated that she had resigned from Delastek, but she believed this had taken place prior to October. She stated that she had received her 4% but did not have a new record of employment. She handed in her letter of resignation in person and stated that it was effective as of April 26.

f) The job at the nursery was supposed to have lasted longer, from April 30 to November 28, but there had been some unanticipated layoffs. She worked for only five weeks. She went back to school on March 9, 2016.

g) She stated that she had been on a work stoppage at Delastek because of illness. She did not leave on a doctor's recommendation even though it was the situation at Delastek that was the reason for her work stoppage. Her doctor indicated that she was fit to return to work as of April 30, when she obtained the job at the nursery.

h) She did not resign from Delastek immediately because she did not see a need to, given that there was a labour dispute. She was not interested in this dispute and did not agree

with it, but all of the production employees were union members. She stated that the labour dispute was still going on.

i) She handed in her letter of resignation to the human resources department in person. She stated that she had not been able to go there immediately because the situation was rather volatile and some shoving had taken place. Moreover, she was being criticized for not picketing and was afraid that she might not be safe if she were to go there. She stated that injunctions against the union had been obtained and they could no longer picket within a certain distance of the factory. The owner then hired security guards and she was able to make an appointment with human resources and go there in person so that she could have access to the office.

j) She stated that when the Commission tried to reach her on September 2 and 4 her cell phone was no longer working because she had dropped it in water. When she obtained a new one the messages were no longer there and therefore she did not have them; otherwise, she would have called the Commission back.

PARTIES' ARGUMENTS

[11] The Appellant submitted as follows:

a) The claimant stated that she could prove she was not connected with the dispute at Delastek inc. She stated that she would soon be receiving a letter from Unifor confirming that she had never received any benefits from them.

b) She could also prove that she would not be returning to work at Delastek after the dispute (letter of resignation), that she had obtained a new job since then and that she was looking for a better one.

[12] The Respondent made the following submissions:

a) Because the case is currently under appeal with the Social Security Tribunal, the Commission was unable to verify the date on which the claimant could have sent her letter of resignation to the employer. The claimant advised the Commission on October 28, 2015, that she had not officially resigned, and the letter of resignation the

claimant provided is not dated. Therefore, it is impossible to accurately determine the date on which the claimant informed the employer that she was voluntarily leaving her employment.

b) The term “labour dispute” is defined in the Act as a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons.

c) A claimant who has lost an employment or is unable to resume an employment because of a work stoppage attributable to a labour dispute at a factory, workshop or other premises is not entitled to receive benefits. The disentitlement stops when the work stoppage ends or when the claimant becomes regularly engaged elsewhere in insurable employment. All of these provisions with respect to disentitlement will not apply if a claimant proves that he or she is not participating in, financing or directly interested in the labour dispute that caused the stoppage of work.

d) The legislation sets out the conditions that must be met for the purposes of the disentitlement provided for under subsection 36(1) of the Act in the following context:

1. the claimant lost an employment or was unable to resume an employment;

2. because of a stoppage of work;

3. attributable to a labour dispute;

4. at the factory, workshop or other premises at which the claimant was employed

e) In this case, the evidence in the file shows that there was a labour dispute at Delastek inc., the workplace where the claimant was working. The collective agreement was expiring on March 31, 2015. The first negotiations started on January 23, 2015.

f) The main issue in the dispute was the scope of the union certification and the entire monetary component. A conciliator was appointed. The negotiations, which started on January 23, 2015, did not result in an agreement between the two parties leading to the

renewal of the collective agreement. On April 1, 2015, a general strike began. It was established that there was a labour dispute, as referred to in subsection 36(1) of the Unemployment Insurance Act, at Delastek inc. in Grand-Mère (Pages GD3-13 to 63).

g) According to the Federal Court of Appeal, when the employees and an employer negotiate a collective agreement, there is a labour dispute (Gionest v. Canada (U.I.C.), A-787-81, Canada (A.G.) v. Simoneau, A-611-96).

h) Second, the labour dispute at issue here must necessarily be at the factory or other premises where the claimant was employed by the employer. The employer and the union confirmed that the only workplace of the employees affected by the work stoppage was the manufacturing plant in Grand-Mère.

i) In this case, the evidence is clear that the claimant could not resume her employment at Delastek inc. on June 8, 2015 because of a work stoppage attributable to the labour dispute. Accordingly, the conditions that call for disentitlement under subsection 36(1) of the Act were met.

j) The Commission argues that the jurisprudence supports its decision. The Federal Court of Appeal has confirmed the principle that disentitlement under subsection 36(1) of the Act applies when 1) there is a labour dispute at the claimant's workplace; 2) the labour dispute has caused the work stoppage at the claimant's workplace 3) the work stoppage caused the claimant's loss of employment (White v. Canada (A.G.), A-1037-92)

k) The Court has confirmed that, when a work stoppage arises during a labour dispute, there is a causal connection between the labour dispute and the work stoppage (Canada (A.G.) v. Simoneau, A 611-96, Dallaire v. Canada (A.G.), A-825-95 (leave to appeal was denied by the Supreme Court of Canada, 1996 .S.C.C.A. No. 598).

l) The Court has confirmed that these provisions also apply to any previous employment that a claimant cannot resume on a specific date because of a work stoppage attributable to a labour dispute (White v. Canada (A.G.), A-1037-92; Morrison v. C.E.I.C., A-209-89).

m) The Commission also stated that the claimant had not established that she was entitled to employment insurance benefits under subsection 36(4) of the Act.

n) As a member of Local 2109, the claimant is a party to the dispute. She is negotiating with the employer through her union representative.

o) The Commission maintains that the jurisprudence supports its decision. The Federal Court of Appeal has confirmed the principle that, once they are no longer entitled to receive benefits under subsection 36(1) of the Act, claimants have the burden of proving that they are entitled again under subsection 36(4) of the Act. (Black v. Canada (A.G.), 2001 FCA 255)

p) The Federal Court of Appeal has confirmed that, in order to determine whether a person is participating in a labour dispute or is an innocent bystander swept up in another's dispute, the conduct of the claimant and his or her bargaining agent must be considered. If a union has been actively involved in the labour dispute, its members cannot later claim that they are entitled to employment insurance benefits because they were not personally participating in the dispute, regardless of the degree of the union's involvement or its interest in the dispute, and of all the other surrounding circumstances. (Battista v. Canada (A.G.), 2004 FCA 241).

q) The Supreme Court of Canada has given a restrictive interpretation of the wording "financing a labour dispute". "Financing" means an active, direct, voluntary connection between the financing and the strike and a meaningful connection between the payment and the dispute. It requires a voluntary, intentional act of contribution by the claimant. Accordingly, the payment of mandatory union dues, which are placed in a fund from which strike pay is paid to striking employees, does not constitute financing within the meaning of the legislation since a claimant has no choice but to pay the dues to ensure membership in good standing in the union. (Hills v. Canada (A.G.), 1988 1 S.C.R. 513).

r) In this case, the evidence is clear that the claimant was unable to resume her employment on June 8, 2015, because of the labour dispute. The claimant retained her right of recall and would ultimately be recalled by the employer after the work stoppage,

which is still going on. Accordingly, the claimant became disentitled under subsection 36(1) of the Act until the conditions set out in subsection 36(1)(a) or subsection 36(1)(b) of the Act were met.

s) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal has confirmed that it is the cause of a claimant's loss of employment at the time the claimant became unemployed that makes him or her ineligible for benefits. Accordingly, once a claimant has lost his or her employment because of a work stoppage attributable to a labour dispute, the disentitlement remains until one of the situations identified in the Act arises, even if the labour dispute ceases to be the true cause of the unemployment (Canada (A.G.) v. Gadoury, 2004 FCA 14 (leave to appeal was denied by the Supreme Court of Canada, S.C.C. Docket No. 30815).

t) The Court has confirmed the principle that, unless the relationship between employees and the employer and the union is permanently severed, the conditions under subsection 36(4) of the Act have not been met (Canada (A.G.) v. Hurren, A-942-85).

u) In this case, the work stoppage has not ended, because a strike of indefinite duration is still going on at the employer Delastek inc.'s premises. Accordingly, the claimant remains subject to disentitlement under subsection 36(1) of the Act until the condition set out in section 53 of the Regulations has been met.

v) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal has affirmed that a work stoppage has ended once the conditions set out in the Regulations have been met. The Court has also confirmed that it lies with the Commission to evaluate the situation on the basis of the requirements of the Act and the Regulations. (Carole Oakes- Pepin v. Canada (A.G.), A-38-96)

w) Disentitlement under subsection 36(1) of the Act can terminate when a claimant becomes regularly engaged in insurable employment elsewhere.

x) The criteria for determining whether a claimant is regularly engaged are as follows: 1) the firm, serious and genuine nature of the employment, 2) the continuity of the employment, and 3) the regularity of the claimant's pattern of work.

y) In this case, the Commission asserts that the claimant's new employment did not meet the three criteria set out in paragraph 36(1)(b) of the Act because, although there was a contract with the employer the Quebec government – Conseil du Trésor (Grandes-Piles tree nursery) that was supposed to end on November 28, 2015, the claimant experienced a shortage of work on June 5, 2015. The claimant accumulated 198 hours of insurable employment with that employment.

z) Therefore, disentitlement under subsection 36(1) of the Act cannot be terminated before the end of the work stoppage at Delastek inc.

aa) The Commission submits that the jurisprudence supports its position. The Federal Court of Appeal has held that a claimant's new employment cannot be "token" employment or a "sham". The word "regularly" is to be used with the connotation of "continuity" rather than "casual" and "intermittent". What is required is a fixed pattern rather than a fixed period of employment. The focus in subsection 36(1)(b) of the Act is on "the regularity of the work schedule" (*Canada (A.G.) v. McKenzie*, A-1460-92).

bb) There is no doubt that the new employment was real and genuine and that there was a regular work schedule. However, one of the three inseparable criteria is the "continuity" of the employment. In this case, the employment ended earlier than anticipated, and no evidence was submitted to indicate that the circumstances were beyond the employer's control.

cc) For all these reasons, the Commission maintains that the disentitlement imposed in accordance with the provisions of subsection 36(1) of the Act cannot be terminated before any of the conditions set out in paragraphs 36(1)(a) or (b) of the Act have been met.

dd) In some circumstances, disentitlement under subsection 36(1) of the Act can be terminated when there has been a complete and final severance of the employer-employee relationship.

ee) However, it is not so much the nature of the severance that is determinative in itself and that confers entitlement to benefits, but rather evidence that the claimant is not

> participating in, financing or directly interested in the labour dispute. In this case, the Commission has determined that the claimant retained a relationship with her employer given that, as of October 28, 2015, no formal resignation had been submitted. Moreover, the letter of resignation that she submitted does not show a submission date or a signature. Furthermore, none of the legally mandated amounts have been paid, thereby supporting the assertion that there was no permanent termination of employment.

ANALYSIS

[13] Subsection 2(1) of the *Employment Insurance Act* (the "Act) defined "labour dispute" as a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons.

[14] Subsections 36(3) and (4) of the Act set out the reasons for which disentitlement because of a labour dispute can be suspended or be determined not to apply.

[15] Subsection 36(3) provides as follows:

> A disentitlement under this section is suspended during any period for which the claimant
>
> (a) establishes that the claimant is otherwise entitled to special benefits or benefits by virtue of section 25; and
>
> (b) establishes, in such manner as the Commission may direct, that before the work stoppage, the claimant had anticipated being absent from their employment because of any reason entitling them to those benefits and had begun making arrangements in relation to the absence.

[16] The claimant had been on a work stoppage for reasons of illness since February 19, 2015. She stated that she had been deemed fit for work effective April 30, 2015. The Tribunal notes that the claimant applied for special benefits and that she was paid sick benefits until April 25, 2015 (GD4-2).

[17] Therefore, the Tribunal is of the opinion that the disentitlement was suspended under subsection 36(3) of the Act from April 1, 2015, to April 25, 2015, since she was entitled to special benefits during that period.

[18] Subsection 36(4) states as follows:

> This section does not apply if a claimant proves that the claimant is not participating in, financing or directly interested in the labour dispute that caused the stoppage of work.

[19] The claimant stated that she was contesting the fact that she was disentitled to receive benefits since she did not agree with the dispute and was not participating in or financing it. She stated that she had found employment elsewhere and had resigned on April 26, 2015.

[20] In *Black*, the Court indicated that the onus was on the claimant to prove that he had not participated in a labour dispute and was not directly interested in it (*Black v. Canada (Employment Insurance Commission)* 2002 FCA 255, leave to appeal to the S.C.C. denied, [2001] S.C.C.R. No. 526).

[21] The Commission argues that as a member of Local 2109 the claimant is a party to the dispute. She is negotiating with the employer through her union representative.

[22] The Tribunal notes that the claimant has confirmed that she paid union dues, was a member of Unifor, section Local 2109, attended meetings and exercised her right to vote (GD3-85).

[23] She nevertheless indicated that she had resigned on April 26, 2015, and therefore did not participate in the dispute and had not done so from the beginning. She stated to the Commission that she had decided not to return to her employer as soon as she had obtained a new job but that she had not handed in her resignation (GD3-85).

[24] The Tribunal notes that the letter of resignation is dated December 1, 2015, but that the claimant indicated therein that her resignation was effective April 26, 2015 (GD6-1).
The Tribunal further notes that the amounts owing to the claimant because of the termination of her employment were shown on the stub for the paycheque issued for the period from November

29, 2015, to December 5, 2015 (GD6- 2). Lastly, the amended record of employment indicates that the claimant handed in her resignation on December 1, 2015 (GD6-3).

[25] The claimant explained that she had not been able to bring in her resignation letter sooner because of the environment at the employer's premises. She stated that she had been criticized by the union for not participating actively in the picketing. She stated that she had been afraid it might not be safe to go to meet with the person responsible at human resources. She asserted that two injunctions had been imposed to keep the strikers away from the employer's doors and that the employer had had to hire a security guard. It was not until the security guard had been hired and she was able to make an appointment with her employer that she could go to the workplace to hand in her resignation.

[26] In *Battista*, the Federal Court of Appeal confirmed that, in order to determine whether a person is participating in a labour dispute or is an innocent bystander swept up in another's dispute, the conduct of the claimant and his or her bargaining agent must be considered. If a union has been actively involved in the labour dispute, its members cannot later claim that they are entitled to employment insurance benefits because they were not personally participating in the dispute, regardless of the degree of the union's involvement or its interest in the dispute, and of all the other surrounding circumstances. (*Battista v. Canada (Attorney General),* 2004 FCA 241).

[27] With regard to financing, the claimant submitted a letter from the union indicating that she did not receive any strike pay from the union (GD6-4).

[28] The Supreme Court of Canada has given a restrictive interpretation of the wording "financing a labour dispute". "Financing" means an active, direct, voluntary connection between the financing and the strike and a meaningful connection between the payment and the dispute. It requires a voluntary, intentional act of contribution by the claimant. Accordingly, the payment of mandatory union dues, which are placed in a fund from which strike pay is paid to striking employees, does not constitute financing within the meaning of the legislation since a claimant has no choice but to pay the dues to ensure membership in good standing in the union. (*Hills v. Canada (A.G.),* 1988 1 S.C.R. 513).

[29] The claimant did not receive any strike pay from her union, and she intended to resign and not participate in the dispute. Nevertheless, given that she was a union member who was able to exercise her voting rights and who continued to be represented by that same union, the Tribunal cannot find that the claimant was not participating in the labour dispute or that she was not financing it when it began.

[30] In any event, the Tribunal is of the opinion that, from the time of her resignation on December 1, 2015, the claimant was no longer participating in the dispute, was no longer financing it and was no longer interested in it. The Tribunal is of the opinion that the claimant's resignation was effective as of that date. Although she had intended to resign long before that, she retained an employment relationship with the employer up to December 1, 2015, pursuant to subsection 36(4) of the Act.

[31] CUB 11403, confirmed by the Federal Court of Appeal (*Canada (Attorney General) v. Hurren*, FCA A-942-85), states as follows:

> Whether the claimant's retirement were "early" or "full and final", it was obviously absolute, in terms of severing ties with his employer and his union local. The claimant has indeed proved "that he meets all the conditions enumerated in section 44(2)" to quote Mr. Justice Pratte for a unanimous appeal division in a case curiously and improperly styled Attorney General of Canada v. The Umpire... [1977] 2 F.C. 696.

[32] Although the claimant's situation is not a retirement, the fact remains that her resignation terminated her employment relationship with her employer. She then waived the possibility of returning to her employer after the labour dispute ended. The Tribunal is therefore of the opinion that the disentitlement under subsection 36(4) of the Act does not apply effective December 1, 2015, since the claimant was no longer participating in the labour dispute, was not financing it and was no longer interested in it, having handed in her resignation on that date, i.e. December 1, 2015.

[33] Therefore, the issue that the Tribunal must consider is whether the claimant was disentitled from receiving employment insurance benefits because of a work stoppage attributable to a labour dispute.

[34] The Tribunal notes that the Commission determined that the claimant was disentitled from receiving employment insurance benefits, effective June 8, 2015, since she had lost her employment because of a work stoppage attributable to a labour dispute. The Commission explained that the claimant had submitted a renewal claim on June 25, 2015, and that the claim was automatically renewed through the electronic system. The claimant received benefits as of the renewal date, i.e. June 7, 2015, until September 12, 2015.

[35] The claimant is not contesting the fact that she stopped working because of a labour dispute at Delastek, where she was working. She indicated that a strike started on April 1, 2015, and that as of the hearing date it had not yet been resolved. However, when the strike began she was on a work stoppage because of illness. When she returned to work it was for another employer and she was fit to work effective April 30, 2015.

[36] Under subsection 36(1) of the Act, a claimant is not entitled to receive employment insurance benefits if the claimant has

1. lost an employment or is unable to resume an employment;

2. because of a work stoppage;

3. attributable to a labour dispute;

4. at the factory, workshop or other premises at which the claimant was employed.

[37] The Federal Court of Appeal has confirmed the principle that a disentitlement under subsection 36(1) of the Act applies when 1) there is a labour dispute at the claimant's workplace; 2) the labour dispute caused a work stoppage at the claimant's workplace and 3) the work stoppage caused the loss of the claimant's employment (*White v. Canada (A.G.)*, A-1037-92).

[38] The Court has confirmed that when a work stoppage occurs during a labour dispute there is a causal connection between the labour dispute and the work stoppage (*Canada (A.G.) v. Simoneau*, A-611- 96, *Dallaire v. Canada (A.G.)*, A-825-95.

[39] According to the Federal Court of Appeal, when employees and employer negotiate a collective agreement, there is a labour dispute (*Gionest v. Canada* (U.I.C.), A-787-81, *Canada (A.G.) v. Simoneau*, A-611-96).

[40] The first factor to be considered under subsection 36(1) is the fact that a claimant lost an employment or cannot resume an employment.

[41] The claimant went on a work stoppage because of illness as of February 18, 2015. At the hearing, she stated that she was fit to work effective April 30, 2015. The Tribunal finds that this date is confirmed by the fact that the claimant returned to work, for a new employer, on that date (GD3-77).

[42] The Tribunal is therefore satisfied that as of April 30, 2015, the claimant could not resume her employment at Delastek. The Tribunal took into consideration the fact that the Commission imposed a disentitlement effective June 8, 2015. Nevertheless, on the basis of the evidence and the parties' submissions, the Tribunal is of the opinion that the claimant was fit to return to work on April 30, 2015, and that as of that date she could not return to work because a strike had started on April 1, 2015 (GD3-13).

[43] The second and third factors to be considered are the work stoppage that is attributable to a labour dispute.

[44] "Labour dispute" is defined in subsection 2 (1) of the Act:

> ***labour dispute*** means a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons;

[45] The evidence shows that a strike began on April 1, 2015, because of union demands calling for amendment of the scope of the bargaining certificate, which was preventing negotiations from continuing. Monetary issues had not yet been discussed (GD3-15). The union confirmed that the strike had been called and that the issues pertained to the work of managers, employees and others (GD3-24). The collective agreement had expired on March 31, 2015, and a conciliator was appointed.

[46] The Tribunal is therefore satisfied that there is a work stoppage attributable to a labour dispute.

[47] The final factor to be considered is the fact that the labour dispute took place at the factory, workshop or other premises at which the claimant was employed.

[48] The evidence shows that the company had only one factory, located in Grand-Mère (GD3-14 and GD3-23).

[49] The Tribunal is thus satisfied that the labour dispute is taking place at the factory where the claimant was employed, as the company had only one address and only one production facility.

[50] The claimant is not contesting the fact that she could not work at Delastek because of a work stoppage attributable to a labour dispute that took place at the factory at which she was employed. Accordingly, on the basis of the evidence and the parties' submissions, the Tribunal is of the opinion that the existence of a labour dispute at Delastek inc. in Grand-Mère has been established pursuant to subsection 36(1) of the Act and that disentitlement applies because of a work stoppage attributable to a labour dispute effective April 1, 2015.

[51] Nevertheless, the Tribunal must take into consideration paragraphs 36(1)(a) and (b) of the Act, which specify the time when disentitlement ceases. Under those provisions, a claimant is not entitled to receive benefits until the earlier of

> (a) the end of the stoppage of work;
>
> (b) the day on which the claimant becomes regularly engaged elsewhere in insurable employment.

[52] The Federal Court of Appeal has confirmed that it is the cause of a claimant's loss of employment at the time the claimant became unemployed that makes him or her ineligible for benefits. Accordingly, once a claimant has lost his or her employment because of a work stoppage attributable to a labour dispute, the disentitlement remains until one of the situations identified in the Act arises, even if the labour dispute ceases to be the true cause of the unemployment (*Canada (A.G.) v. Gadoury*, 2005 FCA 14).

[53] The Tribunal is of the opinion that paragraph 36(1)(a) of the Act does not apply in the current situation since the claimant confirmed that the labour dispute had not yet ended as of the time of the hearing.

[54] Paragraph 36(1)(b) of the Act indicates that a claimant is not entitled to receive benefits until the day on which the claimant becomes regularly engaged elsewhere in insurable employment.

[55] The claimant stated that she had found other employment. She worked for the Quebec government from April 30, 2015, to June 5, 2015. She indicated that her employment ended early because of a shortage of work.

[56] For its part, the Commission asserts that the claimant's new employment did not meet the three criteria set out in subsection 36(1)(b) of the Act because, despite the existence of a contract with the employer the Quebec government (Grandes-Piles nursery) that was supposed to be in effect until November 28, 2015, the claimant experienced a shortage of work as of June 5, 2015. The claimant accumulated 198 hours of insurable employment with that employment.

[57] The Commission noted that there was no doubt that the new employment was real and genuine and that there was a regular work schedule. However, one of the three inseparable criteria is the "continuity" of the employment. In this case, the employment ended earlier than anticipated, and no evidence was submitted to indicate that the circumstances were beyond the employer's control.

[58] In *McKenzie*, the Federal Court of Appeal stated as follows:

> It is clear from the *Abrahams* case that implicit in the interpretation of paragraph 31(1)(c) is the fact that employment need not be long term. Duration is not a feature of paragraph 31(1)(c). What is required is "a fixed pattern rather than a fixed period of employment". The Court put emphasis on "the regularity of the work schedule". One must then ask: does the claimant have a real job or is it just a sham? Wilson J. excluded on-call employment and employment that would be "just a day or two here and there with no firm commitment by either the claimant or the new employer".

> In *Canada Employment and Immigration v. Roy*, our Court dealt with three claimants who had stopped working due to a labour dispute at a steel plant. The first, a stockroom clerk, was hired by his brother for a period of a little more than a week to do work on a shelter used by the latter in the summer to sell ice cream to passers-by. The work involved "doing painting, repairing the roof and making shelves". Both knew the work would be of a short duration but they did not know at the outset how long it would last. The second, an engine driver was hired for seventeen days as a truckman by a small soft drink distribution company. He worked for a total of sixty-five hours, spread evenly over three weeks. The third, a locksmith, found work as a labourer in a packing plant where he worked regularly from July 28, 1982 to October 6, 1982 until the end of the annual harvest and the shut-down of the company's packing operations. A majority of our Court concluded that all three held "regular" employment since what was important was not the duration of the employment, but its continuity, and the regularity of the work schedule imposed on the employee.
>
> Pratte J.A. stated at 197:
>
> ... Someone who has casual employment is therefore not engaged in it on a regular basis. When will casual employment be engaged in? - In my opinion, when a person is hired for so short a time that it is actually impossible to determine the regularity of the work schedule. (*Canada (Attorney General) v. McKenzie*, A-1460- 92).

[59] Therefore, the new employment could not be "token" employment or a "sham". Furthermore, the word "regularly" suggests continuity, as opposed to work that is casual and intermittent. What is required is a fixed pattern rather than a fixed period of employment. The focus of paragraph 36(1)(b) of the Act is on the regularity of the work schedule.

[60] *McKenzie* sets out three criteria that must be taken into consideration in determining whether a person has become regularly engaged in insurable employment elsewhere. The employment must be firm, serious and genuine, there must be continuity in time and the work schedule must be regular.

[61] The new employer, the Quebec government (tree nursery), has confirmed that the claimant held a casual position of less than a year, with no recall rights. The employer stated that the term of the contract was from April 30 to November 28, 2015. The contract ended on June 5, 2015, because of a shortage of work (GD3-84).

[62] Although this was a contract position, the Tribunal is of the opinion that the employment offered by the Quebec government was firm, serious and genuine. The employer indicated that it had hired the claimant for a period from April 30, 2015, to November 28 2015. The employer confirmed that the employment ended early because of a shortage of work. The employment was full time, at 38.75 hours per week (GD3-85).

[63] In *Malo*, the Court stated as follows:

> The Umpire concluded that “regularly” was used not with the connotation of duration of time but with the connotation of "continuity". It was to be contrasted with “casual” and “intermittent”. You would not be “regularly engaged” if, for example, you were simply on call to report in on such days as you were required. “Regularly”, he thought, required a fixed pattern rather than a fixed period of employment. Two days a week could be "regular" employment. A particular shift each day could be “regular” employment. The required characteristic was not the duration of the hiring but the regularity of the work schedule. It is implicit in this interpretation that the employment need not be long-term. It may be for the duration of the strike only as long as it is “regular” during the period of its subsistence. (*Malo v. C.E.I.C.*, FCA A-765-85).

[64] The Tribunal is of the opinion that the employment had continuity in time since it was supposed to last for approximately six months, according to a regular schedule. The fact that the employment ended early does not mean that it could not be determined to be regular employment.

[65] On the basis of the evidence submitted by the parties, the Tribunal is therefore of the opinion that the claimant became regularly engaged in insurable employment. The Tribunal is of the opinion that the disentitlement to employment insurance benefits ceased effective April 30,

2015, since on that day she became regularly engaged in insurable employment pursuant to paragraph 36 (1)(b) of the Act.

[66] On the basis of the evidence and the arguments submitted by the parties, the Tribunal is satisfied that the claimant was disentitled from receiving employment insurance benefits because of a labour dispute until the conditions set out in paragraphs 36(1)(a) or (b) of the Act had been met. Nevertheless, the disentitlement that was imposed ceases as of April 30, 2015, since the claimant became regularly engaged in insurable employment pursuant to paragraph 36 (1)(b) of the Act.

CONCLUSION

[67] On the basis of the evidence and the arguments submitted by the parties, the Tribunal is of the opinion that the existence of a labour dispute at Delastek inc. in Grand-Mère has been established pursuant to subsection 36(1) of the Act and that disentitlement applies because of a work stoppage attributable to a labour dispute effective April 1, 2015.

[68] The disentitlement is suspended under subsection 36(3) of the Act from April 1, 2015, to April 25, 2015, since the claimant was entitled to special benefits during that period.

[69] Furthermore, this disentitlement is maintained until the conditions set out in paragraphs 36(1)(a) or (b) of the Act have been met. The disentitlement imposed therefore ceases effective April 30, 2015, since the claimant became regularly engaged in insurable employment pursuant to paragraph 36 (1)(b) of the Act.

[70] Although the disentitlement ceased on April 30, 2015, because the claimant became regularly engaged in insurable employment pursuant to paragraph 36(1)(b) of the Act, the Tribunal is of the opinion that the disentitlement also would have ceased as of December 1, 2015, because of the claimant’s resignation given that she was no longer participating in the dispute, was no longer financing it and was no longer interested in it. Therefore, the disentitlement also would have ceased effective December 1, 2015, under subsection 36(4) of the Act.

[71] In summary, the disentitlement imposed because of a work stoppage attributable to a labour dispute was in effect from April 26, 2015, to April 29, 2015.

[72] The appeal is allowed in part.

Charline Bourque
Member, General Division – Employment Insurance Section