



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

(TRANSLATION)

Citation: *D. G. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 110

Tribunal File Number: GE-16-4494

BETWEEN:

**D. G.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division—Employment Insurance Section**

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DECISION BY: Charline Bourque

HEARD ON: June 20, 2017

DATE OF DECISION: July 13, 2017

## REASONS AND DECISION

### APPEARANCES

D. G., the claimant, participated in the teleconference hearing. She was accompanied by G. G., her sister, who was acting as a witness.

### INTRODUCTION

[1] The appellant filed a claim for employment insurance benefits starting on July 17, 2016. On September 14, 2016, the Canada Employment Insurance Commission (the Commission) informed the claimant that it could not pay her employment insurance benefits starting on August 26, 2016, because it considered the claimant to be working full weeks. In addition, the Commission stated that it could not pay her employment insurance benefits from June 28, 2016, to August 25, 2016, because it could not pay benefits during the school break.

[2] On November 3, 2016, in response to her request for reconsideration, the Commission informed the claimant that the decision regarding the week of unemployment was upheld. The Commission explained that the claimant had obtained a full-time *synthèse* [contract] from the Commission scolaire de X [X X X] for the period from August 26, 2016, to June 22, 2017, to monitor the rotations of participants in a vocational high school program. The claimant appealed that decision to the Social Security Tribunal of Canada (the Tribunal) on December 1, 2016.

[3] 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; and
- c) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

## ISSUE

[4] The claimant is appealing the Commission's decision regarding her disentanglement from receiving benefits under sections 9, 11 and 54(i) of the *Employment Insurance Act* (the Act) and section 31 of the *Employment Insurance Regulations* (the Regulations) because she was unable to prove that she was unemployed.

## EVIDENCE

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

- a) 2016/2017 rotation assignment (GD2-8).
- b) 2016-2017 availability statement and work preferences (GD2-9 to GD2-11).
- c) The claimant confirms that she had a teaching contract for the upcoming year from August 16, 2016, to June 22, 2017. She received the offer on June 2, 2016. It was a full-time contract (GD3-19).
- d) The claimant states that she had a teaching agreement and a *synthèse* (which could be amended) but she could be considered a contract teacher in the 2015/2016 school year. She had an agreement from September 2015 to December 2015 and from January 2016 to June 2016. She is paid by the hour; when she does not have a rotation, she is not paid. She teaches for the Commission scolaire de X at X X X X X-X-X [X-X-X X X]. She was offered a *synthèse* for the period from 26/08/16 to 19/12/16. The contract was offered around July. It was for the same school board and school. She does not have a teaching certificate. Her length of service is cumulative from one contract year to the next, as are her pension plan contributions.
- e) The employer confirms the information given in the initial conversation. The claimant was offered a *synthèse* for 720 hours of teaching, which is equivalent to full time. For a professional position, full time is 18 hours per week or more. It states that the claimant is paid by the hour, which means that she is not paid when she is not teaching. Still, by the end of the 720 hours, she has been paid the same amount. The difference is in the way in

which her hours are distributed over the year. One week she may do more teaching because the following week she will not have any. However, the pay is the same in the end. She was offered a 720-hour contract for the period from 26/08/16 to 22/06/17 (GD3-21).

- f) The claimant firmly states that she was not full time under her teaching agreement that started on 26/08/16. She worked three or four days per week for approximately 26 hours a week. And when she did not have a placement, she did not teach and was not paid. She does not agree that she is not entitled to employment insurance benefits during the school year. She also states that her agreement ended in December 2016 and not in June 2017 (GD3-22).
- g) The employer states that the claimant has had a full-time contract at X X X X X-X-X for a few years. She may not work every day of the week, but she works full time (GD3-27).
- h) The claimant states that she is an hourly paid teacher. She does not teach courses in the classroom; she is in charge of student rotations and travels with students such as orderlies. She asks for a full-time *synthèse*. The school board does not call them contracts, but rather *synthèses*. She works an average of four days per week except during three to four weeks a year when she has no monitoring to do and is not on the schedule. She has been with the Commission scolaire de X for 14 years. Her contract or *synthèse* covers the periods of August 26, 2016, to December 19, 2016, and January 6, 2017, to June 30, 2017. Unlike regular schools, there is no spring break. She received a request for availability on June 2, 2016, when her 2015/2016 *synthèse* was ending on June 30, 2016. The schedule of the *synthèse* was confirmed shortly before the rotations began. Correspondence was by email. Since becoming paid by the hour, she has never lacked work or *synthèses*. She may not work as a substitute or in other positions; she must remain available to the employer. She does not look for other employment for the weeks in which she has no work. Before, a number of years ago, she taught theory in the classroom, but she asked to be paid by the hour; it involves more responsibility but is much more interesting. She is not looking for a job other than the one she has, because it suits her. She states that, if she is not entitled to benefits, it will be necessary to treat all

hourly teachers in the same way because many of them are in this situation and many are entitled to benefits during the week. She has periods in which she has no monitoring but must remain fully available in case the school board asks her to complete her monitoring more quickly because they want the rotations to end sooner. She must then deal with the employer's request or, sometimes, the employer may assign additional monitoring to her. Since becoming paid by the hour, she asks for full-time *synthèses* and the school board is able to adjust the schedules as needed and she has never run out of work. She is paid approximately \$51.00 per hour for the hours she works on 720-hour *synthèses*. Her salary is adjusted based on the years of service she has accumulated for each *synthèse*. She does not have sick leave, vacation or statutory holidays. She does not have an office at the school board because she is not working at a school; she only monitors students during their rotation (GD3-28).

- i) The employer states that the claimant is considered the same as other contract teachers and from August 26, 2016, to June 22, 2017, she had a full-time *synthèse* and was required to monitor students in a health sciences program leading to a diploma of vocational studies (DEP). The target clientele is vocational high school and, if she does not have a teaching contract as the teachers do, it is through her own choice, because she refuses to seek her academic equivalency to teach. She has basic health training but does not want to complete the prerequisites to obtain a full-time contract and the same pay as a teacher (\$70,000.00). Schedules are arranged on the basis of nine-day schedules created by the school board according to the needs of the program depending on the rotation assignment. She does not necessarily always work five days a week but must be available at any time to respond to schedule change requests. The employer states that the claimant contacted it repeatedly to complain about not being entitled to benefits. The employer explained to her that she was considered full time and was not entitled to employment insurance benefits during the term of her contract unless her contract terminated prematurely (GD3-29).

[6] The evidence presented at the hearing through the appellant's testimony reveals the following:

- a) The claimant does not contest the decision regarding the school break. She is seeking entitlement to employment insurance benefits starting on August 26, 2016.
- b) The claimant is a professional teacher. She teaches and supervises rotations for orderlies and practical nurses. She is paid by the hour and not by the contract. She is available to the employer at any time. The employer tries to fill that availability, but sometimes the claimant is without work for two to three weeks per six-month period.
- c) The claimant maintains that she does not have contracts but *synthèses*. In June, she receives a *synthèse* for September to December. In early December, she receives a *synthèse* for January to June. The *synthèse* is a draft that may be amended. She has no work during certain weeks.
- d) The claimant must remain available to her employer and cannot find other work during those weeks. She has made a commitment to her employer to be available at any time.
- e) The claimant has 720-hour *synthèses*, and the employer tries to fill the 720 hours. Nonetheless, even if the employer fills the 720 hours, there are weeks in which she is without work. During those weeks, she would like to receive employment insurance benefits.
- f) In reference to page GD3-29, the claimant stated that she did not consider herself full time, but rather part time with almost full-time work.
- g) The claimant is paid by the hour, unlike contract teachers, whose wages are spread over the whole year.
- h) She has received benefits before and does not understand why she can no longer receive them, especially since colleagues who are in the same situation as she are entitled to benefits. She does not have a contract until June but receives a *synthèse* until December.

[7] The evidence presented at the hearing through the testimony of G. G., a witness, reveals the following:

- a) She agrees with the claimant's testimony.
- b) She states that the claimant must remain available to the employer when the claimant is not working because she may be called upon to be a substitute, since she has committed to being available at any time.

## **PARTIES' ARGUMENTS**

[8] The appellant submitted the following:

- a) The claimant disagrees with the Commission's decision. She states that she is not on contract. She is considered an hourly paid employee and should be entitled to benefits during periods in which she is not working.
- b) The claimant further states that her co-workers in the same situation are entitled to benefits.

[9] The respondent submitted the following:

- a) Employment insurance benefits are payable for a week of unemployment to claimants who are eligible to receive them. Section 11 of the Act defines a week of unemployment as a week in which the claimant does not work a full working week. Section 54(i) of the Act states that the Commission may make regulations imposing additional conditions and terms with respect to the payment and receipt of benefits and restricting the amount or period of benefits in relation to persons who by custom of their occupation, trade or industry or under their agreement with an employer are paid in whole or in part by the piece or on a basis other than time.
- b) In this case, the employer states that a professional employee working 18 hours per week or more is considered full time. The employer confirms that the claimant is paid by the hour, which means that she is not paid when she is not teaching. Ultimately, however, she is paid for 720 hours, as set out in the contract. The difference is in the way in which her hours are distributed over the year. One week she may do more teaching because the following week she will not have any. However, the pay is the same in the end. The

claimant was offered a 720-hour contract for August 26, 2016, to June 22, 2017 (GD3-21).

- c) As well, the employer states that the claimant is considered the same as other contract teachers and from August 26, 2016, to June 22, 2017, she had a full-time *synthèse* and was required to monitor students in a health sciences program leading to a diploma of vocational studies (DEP).
- d) The employer affirms that the claimant is considered a full-time employee and is not entitled to employment insurance benefits during the term of her contract unless her contract terminates prematurely (GD3-29).
- e) The claimant confirms that, despite having weeks with fewer hours of work, she is not looking for another job to fill those weeks, and she is not available for another position at the school board because her schedule may change at any time during the term of her *synthèse* depending on the needs of the program and because she must remain available to the employer. This situation is at odds with the eligibility criteria and confirms that the claimant is not unemployed but is completing a full-time contract.
- f) Consequently, based on an analysis the facts gathered, the Commission finds that the claimant has not shown that she was unemployed from August 26, 2016, to June 22, 2017, because she was bound to her employer by a full-time teaching contract involving 720 hours of teaching or monitoring.
- g) To answer the claimant's questions regarding the fact that she was able to submit employment insurance reports and regarding the information provided to her by the Commission's information service to the effect that she is eligible for 27 weeks, the Commission would like to clarify that the claimant meets the criteria to establish an employment insurance claim for benefits starting on July 17, 2016, but that it is the disentanglements imposed that prevent her from receiving any employment insurance payment.



- h) The Commission argues that the case law supports its decision. The Federal Court of Appeal has determined that a claimant who has a contract of employment, paid or unpaid, is not considered unemployed under section 11 of the Act or section 31 of the Regulations (*Dion v. Canada (AG)*, 2002 FCA 458).
- i) The Federal Court of Appeal has made the clarification that, in order for assistance or voluntary effort to be authentic, the applicant must not be able to derive any economic benefit. The test to distinguish work from volunteer work is whether the claimant expected to derive any financial benefit from the work arrangement and not some kind of benefit independent of the work arrangement (*Vinet v. Canada (AG)*, A-771-88; *Canada (AG) v. Greey*, 2009 FCA 296).

## **ANALYSIS**

*The relevant statutory provisions are appended to this decision.*

[10] The claimant disagrees with the Commission's decision. She states that she is not on contract. She is considered an hourly paid employee and should be entitled to benefits during periods in which she is not working, because she is then unemployed.

[11] The Tribunal notes that the claimant does not dispute the fact that she is not entitled to employment insurance benefits during the school break. The claimant states that she is seeking entitlement to employment insurance benefits starting on August 26, 2016.

[12] Section 9 of the Act reads as follows:

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.

[13] Section 11 of the Act reads as follows:

(1) A week of unemployment for a claimant is a week in which the claimant does not work a full working week.

(2) A week during which a claimant's contract of service continues and in respect of which the claimant receives or will receive their usual remuneration for a full working week is not a week of unemployment, even though the claimant may be excused from performing their normal duties or does not have any duties to perform at that time.

(3) A week or part of a week during a period of leave from employment is not a week of unemployment if the employee **(a)** takes the period of leave under an agreement with their employer; **(b)** continues to be an employee of the employer during the period; and **(c)** receives remuneration that was set aside during a period of work, regardless of when it is paid.

(4) An insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if **(a)** in each week 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 **(b)** the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.

[14] The Tribunal must determine whether the claimant is working a full working week since the claimant indicates that this is not the case for certain weeks because she does not receive any hours of work.

[15] The Commission argues that the employer states that a professional employee working 18 hours per week or more is considered full time. The employer confirms that the claimant is paid by the hour, which means that she is not paid when she is not teaching. Ultimately, however, she is paid for 720 hours, as set out in the contract. The difference is in the way in which her hours are distributed over the year. One week she may do more teaching because the following week she will not have any. However, the pay is the same in the end. The claimant was offered a 720-hour contract for August 26, 2016, to June 22, 2017. The claimant confirms that, despite having weeks with fewer hours of work, she is not looking for another job to fill

those weeks, and she is not available for another position at the school board because her schedule may change at any time during the term of her *synthèse* depending on the needs of the program and because she must remain available to the employer. This situation is at odds with the eligibility criteria and confirms that the claimant is not unemployed but is completing a full-time contract (GD4-6).

[16] The Tribunal is of the view that the claimant's situation is not similar to that presented in subsection 11(2) because, for the weeks during which the claimant does not work, she does not receive her usual compensation. The claimant and the employer have confirmed that the claimant was paid by the hour for the hours worked (GD3-21). The claimant confirmed that the employer normally offered her 720 hours of work and tried to fill those hours to the extent possible. The claimant confirmed that, if she worked fewer hours, she would be paid for the hours worked. Therefore, the Tribunal is of the view that the claimant does not necessarily receive the 720 hours of work planned. Moreover, she receives compensation based on hours worked. Consequently, during certain working weeks, she has no hours of work and receives no pay. This situation is reflected in the records of employment of the Commission scolaire de X since the claimant does not receive any earnings for certain weeks (GD3-17/18).

[17] The claimant has confirmed that she had to remain available to her employer at any time, even during the weeks she was not working. The Commission also notes this situation. Nevertheless, the Tribunal is of the opinion that the claimant's availability is a completely different issue on which the Commission did not rule. The Tribunal therefore does not have to consider this issue.

[18] With respect to subsection 11(3) of the Act, the Tribunal is of the opinion that the claimant's situation is not similar because it is not a period of leave for which the claimant receives, regardless of the time of payment, the portion of her remuneration that had been set aside.

[19] Finally, the Tribunal is of the opinion that the claimant's situation does not resemble that of subsection 11(4) of the Act because it is not true that (a) in each week the claimant 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 (b) the claimant is entitled to the period of leave under an employment agreement to compensate for the extra time worked. The claimant confirmed that she worked a schedule that usually matched that of other contract teachers. The employer confirmed that the claimant worked 18 hours per week, which, for a professional position, is full time (GD3-21).

[20] Therefore, under section 11 of the Act, the Tribunal is satisfied that the claimant does not work a full working week during certain periods of work. The Tribunal therefore refers to section 31 of the Regulations, which establishes the following:

(1) A full working week of a claimant, other than a claimant referred to in section 29 or 30, is the number of hours, days or shifts normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.

(2) When the number of hours, days or shifts referred to in subsection (1) is the number that is normally worked by persons in part-time employment and is less than the number of hours, days or shifts normally worked in a calendar week by persons employed in full-time employment in the employment that is closest in nature to the claimant's employment, the claimant is considered to have worked a full working week when the claimant has worked the number of hours, days or shifts that are normally worked by a person in full-time employment.

(3) The full working week of a claimant, other than a claimant referred to in section 29 or 30, who is remunerated on a piece, mileage or other unit rate is the number of days normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.

[21] As stated, the employer confirmed that the claimant normally worked 18-hour work weeks. The employer also confirmed that this number of hours was considered full-time employment (GD3-27).

[22] Therefore, based on the evidence and the submissions presented by the parties, the Tribunal is of the opinion that, when the claimant works fewer hours of work, including when she does not work any hours, she does not work a full working week. Consequently, the claimant is unemployed.

[23] The Tribunal notes that, while it understands the claimant's argument that her co-workers who are in the same situation are entitled to unemployment, the Tribunal cannot rule on this issue. The Tribunal can make a decision only in light of the circumstances before it and the circumstances specific to the claimant.

[24] The same applies to the employer's determination that the claimant should not be entitled to unemployment unless her contract terminates prematurely (GD3-29). The Tribunal is of the view that, despite its goodwill, the employer does not have to make this determination. This is a question that the Commission must answer and that may subsequently be determined by the Tribunal if it is appealed.

[25] Based on the evidence and the arguments presented by the parties, the Tribunal is satisfied that the claimant is unemployed when she does not work full weeks for her employer. The claimant is therefore entitled to employment insurance benefits during those weeks, starting on August 26, 2016.

#### **COMING INTO FORCE**

[26] The appeal is allowed.

*Charline Bourque*  
Member, General Division—Employment Insurance Section

## APPENDIX

### THE LAW

#### *Employment Insurance Act*

**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.

**11 (1)** A week of unemployment for a claimant is a week in which the claimant does not work a full working week.

**(2)** A week during which a claimant's contract of service continues and in respect of which the claimant receives or will receive their usual remuneration for a full working week is not a week of unemployment, even though the claimant may be excused from performing their normal duties or does not have any duties to perform at that time.

**(3)** A week or part of a week during a period of leave from employment is not a week of unemployment if the employee **(a)** takes the period of leave under an agreement with their employer; **(b)** continues to be an employee of the employer during the period; and **(c)** receives remuneration that was set aside during a period of work, regardless of when it is paid.

**(4)** An insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if **(a)** in each week 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 **(b)** the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.

#### *Employment Insurance Regulations*

**31 (1)** A full working week of a claimant, other than a claimant referred to in section 29 or 30, is the number of hours, days or shifts normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.

**(2)** When the number of hours, days or shifts referred to in subsection (1) is the number that is normally worked by persons in part-time employment and is less than the number of hours, days or shifts normally worked in a calendar week by persons employed in full-time employment in the employment that is closest in nature to the claimant's employment, the claimant is considered

to have worked a full working week when the claimant has worked the number of hours, days or shifts that are normally worked by a person in full-time employment.

**(3)** The full working week of a claimant, other than a claimant referred to in section 29 or 30, who is remunerated on a piece, mileage or other unit rate is the number of days normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.