



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. B. v Canada Employment Insurance Commission*, 2018 SST 1177

Tribunal File Number: GE-18-2343

BETWEEN:

**A. B.**

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: Angela Ryan Bourgeois

HEARD ON: September 21, 2018

DATE OF DECISION: October 19, 2018

## **DECISION**

[1] The appeal is dismissed. The Appellant did not have an interruption of earnings, and therefore, does not qualify to receive benefits under the *Employment Insurance Act* (Act).

## **OVERVIEW**

[2] The Appellant works on a 28-day rotation. He works 28 days and then has 28 days off. During his 28 working days, he works 10 hours a day, 7 days a week. Although he used to receive pay for the first week or so of his days off, he no longer receives any pay during his 28 days off.

[3] The Canada Employment Insurance Commission (Commission) determined that during his 28 days off, the Appellant does not have an interruption of earnings, and therefore, since February 19, 2018, he has not qualified to receive benefits under the Act.

## **PRELIMINARY MATTERS**

[4] Although the Commission's initial decision letter indicated that they had imposed a penalty and had issued a notice of violation, upon reconsideration, the Commission reversed these decisions in favour of the Appellant. As such, these are not matters before me.

## **ISSUES**

[5] I must decide if the Appellant had an interruption of earnings. To do so, I must first decide:

- a) whether the Appellant regularly works a greater number of hours than are normally worked in a week by a person employed in full-time employment; and
- b) if so, whether the Appellant is entitled to time off to compensate for the extra time he works.

## **ANALYSIS**

[6] The relevant legislative provisions are reproduced in the Annex to this decision.

[7] In order to receive benefits, a claimant must prove that they had an interruption of earnings from employment.<sup>1</sup>

[8] When a claimant:

- a) regularly works a greater number of hours than are normally worked in a week by a person employed in full-time employment; and
- b) is entitled to a period of leave under an employment agreement to compensate for the extra time worked;

he is considered to have worked a full working week<sup>2</sup>, and not to have had an interruption of earnings, regardless of whether he is paid for the period of leave.<sup>3</sup>

**Does the Appellant regularly work a greater number of hours than are normally worked in a week by a person employed in full-time employment?**

[9] Yes. The Appellant regularly works more hours than are normally worked in a week of full-time employment.

[10] I find that during the weeks he is working, the Appellant regularly works 70 hours a week because he testified that he works 10 hours a day, seven days a week, and that this is his regular work schedule.

[11] I find that 70 hours a week is more hours than are normally worked in a week by a person employed in full-time employment (without consideration to job category or industry), which is about 40 hours a week.<sup>4</sup>

**Is the Appellant entitled to time off to compensate for the extra time he works?**

[12] Yes. The Appellant is entitled to time off because of the extra time he works. By agreement with his employer, the Appellant works 28 days on and then has 28 days off. I find

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<sup>1</sup> Section 7 of the Act

<sup>2</sup> Subsection 11(4) of the Act

<sup>3</sup> Section 2 of the Act and subsection 14(3) of the *Employment Insurance Regulations*

<sup>4</sup> *Canada (Attorney General) v. Jean*, 2015 FCA 242

that the purpose of the 28 days off is to compensate the Appellant for the extra hours he works during his 28 days of work.

**Did the Appellant have an interruption of earnings?**

[13] I find that the Appellant did not have an interruption of earnings.

[14] Because the Appellant regularly works more hours than are normally worked in a week of full-time employment, and because he is entitled to time off to compensate for the extra hours worked, under subsection 11(4) of the Act, he is considered to have worked a full working week during the weeks he is not working.

[15] According to subsection 14(3) of the *Employment Insurance Regulations* (Regulations), when a claimant is considered to have worked a full working week by operation of subsection 11(4) of the Act, he does not have an interruption of earnings during the period he is not working, even if he is not paid for that period.

[16] The Appellant pointed out that he has a unique schedule. Although he is a member of the union and falls within the collective agreement, he does not work the hours set out in the collective agreement, nor is he paid for his time off, as others under the collective agreement are.

[17] The Appellant argued that subsection 11(4) of the Act does not apply to his unique situation. In support of his argument, he distinguished the facts of his case from the Federal Court of Appeal case of *Canada (Attorney General) v. Jean*, 2015 FCA 242, where this subsection was applied.

[18] While the Appellant may work a rotation that is unique in his place of work, and while the facts of *Jean, supra*, are different from the facts before me, I must still apply the law as it is written. The fact that the Appellant is the only person who works his particular shift or is not paid for his days off, are not relevant considerations when applying subsection 11(4) of the Act. Once subsection 11(4) of the Act applies, subsection 14(3) of the Regulations must also apply.

[19] I recognize the Appellant's employer may issue records of employment at the start of each 28-day off period, and that the Appellant may be able to work at other employment during his days off. However, these are also not relevant considerations under the legislation.

[20] The Appellant regularly works more hours than normally worked in full-time employment, and he is entitled to time off as compensation for his extra hours of work. In these circumstances, under the Act, during his days off he is considered to have worked a full working week, and, as set out in the Regulations, this is not considered to be an interruption in his earnings from employment.

[21] Because the Appellant does not have an interruption in earnings from employment during his days off, from February 19, 2018, he is not entitled to receive benefits under the Act.

### **CONCLUSION**

[22] The appeal is dismissed.

Angela Ryan Bourgeois

Member, General Division - Employment Insurance Section

HEARD ON:	September 21, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	A. B., Appellant  Ronald E. Pizzo, Representative for the Appellant

## ANNEX

### THE LAW

#### *Employment Insurance Act*

**2 (1)** In this Act,

...

**interruption of earnings** means an interruption that occurs in the earnings of an insured person or a person to whom Part VII.1 applies at any time and in any circumstances determined by the regulations;

...

**7 (1)** Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

**(2)** An insured person qualifies if the person

**(a)** has had an interruption of earnings from employment; and

**(b)** has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

### TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

**(3) to (5)** [Repealed, 2016, c. 7, s. 209]

**(6)** An insured person is not qualified to receive benefits if it is jointly determined that the insured person must first exhaust or end benefit rights under the laws of another jurisdiction, as provided by Article VI of the *Agreement Between Canada and the United States Respecting Unemployment Insurance*, signed on March 6 and 12, 1942.

**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***

**14 (1)** Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.

**(2)** An interruption of earnings from an employment occurs in respect of an insured person at the beginning of a week in which a reduction in earnings that is more than 40% of the insured person's normal weekly earnings occurs because the insured person ceases to work in that employment by reason of illness, injury or quarantine, pregnancy, the need to care for a child or children referred to in subsection 23(1) of the Act or the need to provide care or support to a family member referred to in subsection 23.1(2) of the Act or to a critically ill child.

**(3)** A period of leave referred to in subsection 11(4) of the Act does not constitute an interruption of earnings, regardless of whether the person is remunerated for that period of leave.

**(4)** Where an insured person is employed under a contract of employment under which the usual remuneration is payable in respect of a period greater than a week, no interruption of earnings occurs during that period, regardless of the amount of work performed in the period and regardless of the time at which or the manner in which the remuneration is paid.

**(5)** An interruption of earnings in respect of an insured person occurs

**(a)** in the case of an insured person who is employed in the sale or purchase of real estate on a commission basis and holds a licence to sell real estate issued by a provincial authority, when

**(i)** the licence of the insured person is surrendered, suspended or revoked, or

**(ii)** the insured person ceases to work in that employment by reason of a circumstance referred to in subsection (2); and

**(b)** in the case of an insured person who is employed under a contract of employment and whose earnings from that employment consist mainly of commissions, when

**(i)** the insured person's contract of employment is terminated, or

**(ii)** the insured person ceases to work in that employment by reason of a circumstance referred to in subsection (2).

**(6)** A period of leave referred to in subsection 11(3) of the Act does not constitute an interruption of earnings, regardless of the time at which or the manner in which remuneration is paid.

**(7)** Where an insured person accepts less remunerative work with their employer and as a consequence receives a wage supplement under a provincial law intended to provide indemnity payments where the continuation of a person's work represents a physical danger to them, to their unborn child or to the child they are breast-feeding, an interruption of earnings occurs on the insured person's last day of work before the beginning of the less remunerative work.