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

[TRANSLATION]

Citation: *L. D. v Canada Employment Insurance Commission*, 2019 SST 796

Tribunal File Number: GE-18-2433

BETWEEN:

L. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: January 10, 2019

DATE OF DECISION: February 14, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] L. D. (Appellant) has worked as general manager for XXX for a number of years. Each year, she is laid off around October because of a shortage of work. It is seasonal employment.

[3] The Appellant filed claims for Employment Insurance benefits in 2012, 2013, 2014, 2015, 2016, and 2017, and the Commission established benefit periods.

[4] In the winter, the Appellant occasionally works for the X and receives earnings.

[5] After an investigation conducted in 2017, the Commission determined that the Appellant had not stopped working for the X and that she had received earnings.

[6] In the Commission's view, the Appellant failed to prove that there was an interruption of earnings. As a result, the Commission cancelled the benefit periods for the six years. It established an overpayment of $43,506.

[7] In the Appellant's view, there was an interruption of earnings because she was laid off or separated from her employment with the X and had a period of seven (7) or more consecutive days during which no work was performed for that employer and in respect of which no earnings arising from that employment were payable.

ISSUE

Was there an interruption of earnings for each Employment Insurance benefit period established in 2012, 2013, 2014, 2015, 2016, and 2017?

ANALYSIS

[8] To be entitled to receive Employment Insurance benefits, a person must satisfy the requirements stated by the *Employment Insurance Act* (Act) to establish a benefit period.

[9] Principally, they must satisfy one of the conditions stated in section 7 of the Act. Section 7(2)(a) states that there must be an interruption of earnings arising from their employment. It is an essential condition for receiving Employment Insurance benefits.[1]

[10] Section 14(1) of the *Employment Insurance Regulations* (Regulations) defines an interruption of earnings as follows: "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."

[11] The Appellant must show on a balance of probabilities that she satisfies the three conditions, and they are cumulative.[2]

[12] The Tribunal will determine whether there was an interruption of earnings for each of the periods at issue.

Benefit Periods from October 26, 2012, to April 28, 2013; from November 3, 2013, to May 10, 2014; and from November 2, 2014, to May 9, 2015

[13] To show an interruption of earnings, the Appellant must therefore satisfy the three (3) conditions set out in section 14(1) of the Regulations:

1) she was laid off or separated from her employment with the X;

2) she did not work for seven consecutive days; and

3) she received no earnings from that employment.

[14] The Tribunal finds it necessary to first establish the context of the Appellant's work. To do this, the Tribunal considered the Appellant's employment contracts, the testimony at the hearing, and the information on file.

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[1] *Thériault v Canada (Attorney General)*, 2008 FCA 283.
[2] *Massé v Canada (Attorney General)*, 2007 FCA 82; *Canada (Attorney General) v Enns*, A-559-89.

[15] The X is a non-profit corporation that manages the XX in the Charlevoix region. It has 600 members.

[16] The Appellant is the X's general manager. The duration and conditions of the Appellant's work are governed by an initial employment contract for the years 2012 to 2014 and a second employment contract for the years 2015 to 2017.

[17] Therefore, the Appellant's conditions of employment are established in an agreement between the X and the Appellant. An initial agreement was signed in March 2012 between the parties. This agreement is valid for the years 2012 to 2015.

[18] In this context, the Tribunal will address the benefit periods from 2012 to 2015 since the same conditions of employment applied to the Appellant for those periods.

[19] The Tribunal also observed that it is noticeably the same evidence that applies to those three periods.

[20] The Tribunal will therefore decide whether the Appellant meets each of the conditions. The Tribunal would like to note that the Appellant must show that she satisfies the three (3) conditions.

1) She was laid off or separated from her employment with the X.

[21] The first employment contract states that the Appellant works full-time from April 15 to November 15 of each year. The contract provides for the payment of $1,000 for work performed between November 16 and April 14.

[22] For 2012, the Tribunal notes that the Appellant began working for the X on January 7, 2012.

[23] On October 26, 2012, she was laid off because of a shortage of work. The Appellant usually stops working after the hunting season ends. That date varies from year to year. Ministère de la Chasse, de la Pêche et de la Faune [the ministry of hunting, fishing, and wildlife] determines hunting periods.

[24] The Appellant filed a claim for benefits with the Commission, and a benefit period was established effective November 4, 2012.

[25] She reported $100 in income per week for the period from February 3, 2013, to April 13, 2013.

[26] For 2013, she began working on April 28, 2013. She was laid off on October 25, 2013. She filed a claim for benefits on November 4, 2013. The Commission established a benefit period effective November 3, 2013.

[27] She reported $103 in income per week for the period from January 19, 2014, to March 29, 2014.

[28] For 2014, the Appellant began working on April 6, 2014. She was laid off on October 31, 2014. She filed a claim for benefits, and a benefit period was established effective November 2, 2014.

[29] She reported $106 in income per week for the period from February 15, 2015, to April 25, 2015.

[30] As part of an investigation, the Commission obtained information from the Appellant, the chair of the X's board of directors, and a former member of the X.

[31] According to the Commission, there was no interruption of earnings because the Appellant failed to prove that she was laid off or separated from her employment with the X and that she did not work for seven consecutive days for which no earnings arising from that employment were payable or allocated.

[32] Therefore, the Appellant's employment contract states that she worked full-time from April 15 to November 15. As of November 16, she worked for a lump sum of $1,000 for tasks completed during the winter season.

[33] The Tribunal notes that, after the XX's closure, there are certain tasks to complete during the winter season.

[34] Therefore, the Appellant completed tasks during the winter season for the X. Furthermore, part of her employment contract states that she must complete tasks during the winter season in exchange for a lump sum of $1,000.

[35] As part of the investigation, the Appellant stated that she worked from her home after the X closed. She had one of the X's computers to answer emails. She could also answer telephone calls.

[36] The chair of the board of directors told the Commission that the Appellant worked four hours per week on average.

[37] The Appellant stated as part of the reconsideration and at the hearing that she worked only the hours reported to the Commission.

[38] The Appellant submitted a record of the hours worked for the X for each of the periods.

[39] The Appellant stated at the hearing that she gave her notes to the investigator, but that they are not in the Commission's file.

[40] The Appellant told the Tribunal that she answered the investigator's questions generally. As a result, the Appellant could have worked four hours per week on average without specifying the periods during the winter.

[41] The Appellant and the chair also stated that the dates indicated in the employment contract were for information purposes only; they do not know when the XX will stop operating each year.

[42] The Tribunal notes that, during the winter period, the Appellant answers emails after the season has ended. She may respond to requests from X members. She also participates in one or two boards of directors [*sic*] during that period. Finally, she helps organize the X's annual general meeting, which takes place in the spring.

[43] The Tribunal notes that the Appellant has a computer belonging to the X in her possession to complete her tasks during the winter. When she leaves the X's reception for the winter season, she takes the documents she will need for her work during the winter.

[44] The Tribunal notes from the Appellant's testimony at the hearing that she qualified the information the Commission obtained during the investigation. Furthermore, as part of the reconsideration request, the Appellant also qualified her remarks.

[45] Therefore, according to the Appellant, she answered the investigator's questions about her tasks generally.

[46] In the Commission's view, more weight must be given to the Appellant's initial statements than to the later ones made when she knew the consequences of her statements.

[47] The Federal Court of Appeal confirmed that the first responses given by interested people must be considered rather than those they give to justify themselves following the Commission's decision.[3]

[48] The Federal Court of Appeal also ruled that key evidence cannot be dismissed or rejected without explanation. In other words, the Tribunal must analyze all of the evidence, and if it decides to dismiss certain evidence or to not assign it the probative value that this evidence appears to reveal or convey, it must explain why.[4]

[49] The Tribunal assigns more probative value to the information the Appellant gave as part of the Commission's investigation than to the information given during her testimony before the Tribunal.

[50] The Tribunal notes that the investigator reread the Appellant's statements, and she said that she agreed with the statements.

[51] The Tribunal is of the view that the investigator's questions are not always general as the Appellant claims. Therefore, when the Appellant stated that she took the computer home to

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[3] *Lévesque v Canada (Attorney General)*, A-557-96.
[4] *Bellefleur v Canada (Attorney General)*, 2008 FCA 13; *McKinnon v Canada (Attorney General)*, 2010 FCA 250.

receive emails, that she could receive them once or twice a week, and that the undeclared hours were in fact worked voluntarily, she was not giving general responses regarding tasks she completes for the X.

[52] The Tribunal also notes that the Appellant's employment contract states that she remains employed by the X after the XX's closure.

[53] In this context, the Tribunal is of the view that the X expects the Appellant to continue performing tasks during the winter season. Furthermore, the employment contract provides for the payment of $1,000 during that period for the completion of certain tasks.

[54] The Appellant tried to show that the tasks were completed starting in January and that she was paid during that period.

[55] The Appellant did not satisfy the Tribunal that she was separated from her employment with the X. The Tribunal notes that the chair of the X expects the Appellant to be available during the winter season for the X's needs.

[56] As a result, the Tribunal finds that the Appellant was not separated from her employment with the X.

[57] Based on her employment contract, she remained employed by the X, even if there was a reduction in the hours of work. The Appellant's contract provided for compensation on an annual basis, which varied based on the tasks she completed for the X.[5]

[58] The Tribunal is also of the view that when the Appellant completed tasks voluntarily during the winter, she remained employed by the X.[6]

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[5] *Canada (Attorney General) v Verreault*, A-186-86.
[6] *Canada (Attorney General) v Perry*, 2006 FCA 258.

2) She did not work for seven consecutive days.

[59] The Tribunal notes that the Appellant first told the Commission that she worked from her home during the winter period. She could work four (4) hours per week. When the hours are not reported to the Commission, the work is voluntary.

[60] During her testimony before the Tribunal, the Appellant stated that, during the winter, she followed up on emails and telephone calls. After the season ends, there are few requests from members and non-members. If there is work to do, she will follow up. She organizes the members' general meeting. She may participate in one or two boards of directors [*sic*].

[61] The Tribunal observes that she gave it her notes concerning the 2012 to 2015 benefit period and that there are weeks where she did not record anything about the hours worked for the X. However, the Tribunal has difficulty reconciling the Appellant's personal notes with the statements made to the Commission. Furthermore, the Tribunal notes that the Appellant's testimony is rather vague regarding when she stops performing tasks for the X.

[62] The Tribunal notes from the Appellant's testimony during the hearing that she qualified the information the Commission obtained during the investigation. Furthermore, the Appellant also qualified her remarks as part of the reconsideration request.

[63] Therefore, in the Appellant's view, she answered the investigator's questions concerning her tasks generally. As a result, there was a period of seven consecutive days during which she did not work for the X.

[64] In this context, the Tribunal is of the view that it is likely that the Appellant did not work for the X for seven consecutive days. However, it is difficult, based on the Appellant's initial statements and the notes the Appellant provided during the hearing, to determine when she did not work for seven consecutive days. Is it during the holiday season when she informs the members that she will be out of the office? Is it after the XX's closure, when she has the X's computer in her possession to complete tasks during the winter?

3) She received no earnings for seven consecutive days.

[65] The Federal Court of Appeal defined earnings within the meaning of the Act and the Regulations as "whatever is earned by an employee as a result of his work, i.e. in return for his work," and there must be a "sufficient connection" between the employment and the sums received.[7]

[66] The Federal Court of Appeal[8] has held that the rules established in sections 35 and 36 of the Regulations concerning earnings apply when determining whether income constitutes earnings for the purposes of section 14(1) of the Regulations.

[67] The Federal Court of Appeal[9] has held that a benefit constitutes earnings. In this case, the Appellant worked for an outfitting business. She had year-round accommodations on her worksite, even when the outfitting business was closed.

[68] The Tribunal notes that the Appellant has a personal vehicle for her travel at work.

[69] The Tribunal also notes that, since 2012, the Appellant has used a truck belonging to the X for trips made in winter for the X. The truck is parked at the Appellant's home during the winter.

[70] The Tribunal notes that the Appellant is not the only one who uses the truck. Board members and some staff members can use it.

[71] The Tribunal also notes that the costs associated with the truck are assumed by the X.

[72] In the Commission's view, it is a benefit that the Appellant receives, and it must be considered earnings. Therefore, since the Appellant has the use of the truck during the winter, there was no interruption of earnings for seven consecutive days.

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[7] *Canada (Attorney General) v Roch*, 2003 FCA 356.
[8] *Swallowell v Canada (Attorney General)*, A-1195-84.
[9] *Massé v Canada (Attorney General)*, 2007 FCA 82.

[73] In the Appellant's view, she does not have exclusive use of the truck, so it is not a benefit.

[74] The Tribunal is of the view that it is a benefit for the Appellant, and that does not change because it is shared. A number of people may receive a benefit from the same object.

[75] It has been established that non-pecuniary benefits constitute earnings within the meaning of section 14(1) of the Regulations.[10]

[76] Therefore, the Appellant has at her disposal a truck whose expenses are completely assumed by the X. During the winter, the truck is parked at the Appellant's home. She uses it in the winter when she travels to complete tasks for the X.

[77] The Tribunal is of the view that the use of a truck belonging to the X constitutes earnings. As a result, the Appellant receives earnings that arise from her employment with the X.

Benefit Period from October 30, 2016, to April 29, 2017, and from October 29, 2017, to March 24, 2018

1) She was laid off or separated from her employment with the X.

[78] The Tribunal notes that a new employment contract between the parties was signed on May 10, 2015. The employment contract provides for earnings of $28,500 for a variable period of service between April 15 and November 15 of each year. The Appellant will attend board meetings, and she will organize the annual general meeting.

[79] For 2015, the Appellant began working on May 4, 2015. She stopped working on October 30, 2015. She filed a claim for benefits, and a benefit period was established effective November 2, 2015.

[80] For 2016, the Appellant began working on May 2, 2016. She stopped working on October 29, 2016. She filed a claim for benefits on November 21, 2016. A benefit period was established effective October 30, 2016.

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[10] *GD v Canada Employment Insurance Commission*, 2017 SSTADEI 158.

[81] For 2017, the Appellant began working on May 1, 2017. She stopped working on October 27, 2017. She filed a claim for benefits, and a period was established effective October 29, 2017.

[82] During the Commission's investigation, the Appellant stated that, because of the difficulties concerning the payment of the $1,000 during the winter, it was agreed that the earnings for work performed during the winter would be included.

[83] According to the Commission, the Appellant therefore continued to be employed by the X after the season ended.

[84] The Tribunal reproduces here an excerpt from an exchange between the Commission and the Appellant. The Tribunal would like to note that, during the investigation, the Appellant reread her statements, and a copy was given to her.

[85] Investigator's question: [translation] "Why is there no income in your reports for those periods? I see only the payment for 10 weeks during the winter as stated in the employment contract, but nothing between your last paid day in the fall and the beginning of this payment. For which tasks were you paid and for which were you volunteering during that period" [*sic*].

[86] Appellant's answer: [translation] "Well it's complicated. That's why the members of the board decided to adjust my salary as of 2015, because I still worked after the last paid day stated on my records of employment. But I was not paid right away. I was paid when I worked a bit more, for example, while organizing the AGM (annual general meeting), the ministry of wildlife subsidy projects (which were completed in the winter), as well as the federal student employment projects; or in the winter of 2013/14, I was trained on the new computer. I had to know how the computer worked so I could answer employees' questions when it was set up. I learned at home before the season began. With my new employment contract, my earnings for the work I do after my last paid day (stated on the Records of Employment), meaning in the winter, are included in the total earnings on the Record of Employment." [*sic*]

[87] The Tribunal notes, based on the board chair's testimony, that the X opens around May and closes in mid-October. The X's activities resume in February, including arrangements for the annual general meeting.

[88] The Tribunal also notes that the Appellant receives emails and calls, and then they are dealt with.

[89] According to the chair of the board, the Appellant works in the winter during transitional periods. As a result, she has to complete tasks when the X closes. She resumes working around February to handle requests for information from members and non-members. She also organizes the annual general meeting, which takes place in the spring.

[90] He also stated that the Appellant worked four hours per week on average. When he answered the investigator's questions, he established an average. He does not know how many hours the Appellant may work each week.

[91] The Tribunal notes that, based on the documents on file, the Appellant answered emails in November, December, and February. The Tribunal also notes that the Appellant mentioned that she was away during the holidays and returned in mid-January.

[92] The Tribunal notes that the Appellant tried to show that she worked only as of January of each year. However, the evidence shows instead that she answered emails starting in November. Furthermore, she told the Commission that she had a computer belonging to the employer in her home to complete her tasks during the winter.

[93] The Tribunal understands that the chair of the board does not fully know the tasks the Appellant completed during the winter season. However, he acknowledges that all of the hours worked are unpaid.

[94] The chair of the board also mentioned during his testimony that he does not require the Appellant to be available and that she can find employment elsewhere.

[95] However, the Appellant effectively continues to complete tasks for the X during the winter season, and she receives earnings accordingly. Moreover, she works voluntarily on some occasions.

[96] The Tribunal understands that there are fewer tasks in the winter, but the fact remains that the Appellant is employed by the X.

[97] In this context, the Tribunal is of the view that the Appellant remained employed by the X during the winter season. Furthermore, she told the Commission that she obtained a $7,000 raise with the new contract for reasons that include the tasks she completes during the winter.

2) She did not work for seven consecutive days.

[98] The Tribunal notes that the Appellant based her evidence mainly on the work stoppage for seven consecutive days.

[99] The Appellant's statements to the Commission show rather that, after the X's closure, she takes a computer that belongs to the X and documents she will need during the winter.

[100] The Appellant submitted notes concerning her tasks during the winter season. She argues that she did not work during the holidays and that her work was extended on one occasion because of a snowstorm. The Tribunal has difficulty reconciling her notes and her statements to the Commission.

[101] In this context, the Tribunal assigns greater weight to the Appellant's initial statements. Moreover, the chair confirmed some of the statements the Appellant made during the Commission's investigation. The Appellant's explanations at the hearing have not satisfied the Tribunal that the initial statements were general in nature.

[102] It is possible that the Appellant did not work for seven consecutive days, but the Tribunal is of the view that she remained employed by the X.

3) She received no earnings from that employment.

[103] The Tribunal notes that, for the 2015 to 2017 benefit periods, the Appellant still had the use of a truck.

[104] The Tribunal understands that the Appellant showed that she is not the only person to have that benefit. However, it is still a benefit even though it is shared with some board and staff members.

[105] Therefore, the Appellant has the use of a truck whose expenses are completely assumed by the employer. She told the Commission that she uses the truck to complete some of her tasks during the winter.

[106] Furthermore, as of 2017, the Appellant has had the use of a cell phone. The X pays for her cell phone plan. The Appellant tried to show that she rarely uses the cell phone for her employment in the winter. The goal is not to show what percentage of her use is for work purposes. The very fact that the cellphone is paid for by the X makes it earnings within the meaning of the Regulations.[11]

[107] The Tribunal is of the view that the Appellant has failed to show for each period that there was an interruption of earnings within the meaning of the Act and the Regulations.

CONCLUSION

[108] The Tribunal finds that there was no interruption of earnings for the years 2012, 2013, 2014, 2015, 2016, and 2017. Consequently, the benefit periods for each of those years are cancelled.

[11] *Supra* note 9; *MF v Canada Employment Insurance Commission*, 2018 SST 753.

[109] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	January 10, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	L. D., Appellant Marylou Leblanc-Tremblay (counsel), Representative for the Appellant