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

Citation: *K. A. v Canada Employment Insurance Commission*, 2019 SST 271

Tribunal File Number: GE-18-3449

BETWEEN:

K. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: March 6, 2019

DATE OF DECISION: March 6, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] K. A. (the "Appellant") established a claim for regular Employment Insurance (EI) benefits effective May 13, 2018. He reported to the Canada Employment Insurance Commission (the "Respondent") that he was driving a truck on a schedule of one week of 72 hours of work and then one week off work. The Appellant was seeking benefits for his weeks off work. The Respondent determined the Appellant was not entitled to benefits from August 6, 2018 as he was deemed to be employed pursuant to section 11(4) of the *Employment Insurance Act* (Act).

ISSUE

[3] Should the Appellant be disentitled to benefits from August 6, 2018 for failing to prove he was unemployed?

ANALYSIS

[4] Benefits are only payable to qualified claimants, for each week of unemployment that falls in the benefit period (section 9 of the Act).

[5] Subsection 11(1) of the Act defines a week of unemployment as a week in which a claimant does not work a full working week.

[6] However, an exception to subsection 11(1) is set out in subsection 11(4) of the Act. Subsection 11(4) provides that 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.

[7] The Federal Court of Appeal has affirmed the principle that claimants who have a schedule rotating between periods of work and periods of leave are deemed to be employed

during the periods of leave included in such recognized schedules (*Canada (AG) v. Jean*, 2015 FCA 242 (CanLII), *Canada (AG) v. Merrigan*, 2004 FCA 253 (CanLII)).

Issue 1: Should the Appellant be disentitled to benefits from August 6, 2018 for failing to prove he was unemployed?

[8] Yes. The Appellant is disentitled to benefits from August 6, 2018 for failing to prove he was unemployed.

[9] The employer operates a trucking company. He provided information to the Respondent that he had 26 employees and most of them work 30 to 40 hours per week. He advised there were four employees that share alternate weeks of 72 hours because they cannot drive for a few days after they put in too many hours per week. There is no work available to these employees in their “week off”. The employer confirmed this was a verbal arrangement with these employees. He related because they have a government contract to fulfill, if the alternating driver was sick, he would expect the Appellant to come in and work for him but the Appellant was free to work elsewhere during his week off.

[10] The Appellant gave testimony that starting in April or May 2018, he began working on a one week on, one week off schedule with his employer. He is paid for a 12-hour day. He receives $190.00 per 12-hour day including vacation pay. He does not receive any overtime pay. The employer does not provide benefits. The Appellant explained that the driving run he does can take between 10 and ½ and 12 hours depending on weather and detours. He receives his pay every 2 weeks. The Appellant explained that he drives an evening shift. He starts work each day at 4 p.m. in the afternoon and arrives back home around 5 a.m. the next morning. His workweek starts Sunday afternoon and finishes the following Saturday morning. Then he is off work for a week.

[11] The Appellant testified that he follows this alternating schedule as he shares a truck with another driver. They are only allowed to drive 70 hours in a week. He explained that it would be very hard to begin another driving shift on a Sunday afternoon, after just having finished a shift on Saturday morning, as it would be really tiring. The Appellant explained that the employer has a contract with X so they are picking up and dropping off items for this customer.

[12] The Appellant testified that this rotating schedule has been the same fixed schedule for him since last May 2018. The Appellant testified that on occasion he has been asked by the employer to work during his week off because the driver he alternates with was sick or the employer had additional work. The Appellant testified that he looks for other work in his week off but it is very difficult to find work in the area he lives. The Appellant explained that if he happened to find other work during his week off and the employer asked him work at the same time, likely the employer would understand that he could not take on that extra work.

[13] The Appellant confirmed in his information to the Respondent that after his 72 hours of work, he is not allowed to drive for another 36 hours so he and the other employee rotate (GD3-17).

[14] The Appellant argues that his situation is no different from construction workers or road crews who might work long hours and then have no work, during which period they collect EI benefits. He gave an example where a construction crew might work for six months and then be laid off for 6 months and yet they can still collect benefits. He argues he essentially is working 6 months a year, given the week on and week off arrangement. The Appellant points out that even other truckers working with his own employer on schedules similar to his are receiving EI benefits in their time off. He assets it is unfair that he has been singled out.

[15] The Respondent argues that by reason of subsection 11(4) of the Act, the Appellant is considered to be employed. The Respondent asserts that the Appellant works six 12-hour shifts and works 72 hours in a week. He is entitled, by verbal agreement with his employer, to a week off. He is not entitled to any benefits with his employer and he is expected to work for the employer on his week off if he is needed. The Respondent submits that the Appellant meets both conditions in subsection 11(4) and he, therefore, is not considered to be unemployed.

[16] Subsection 11(4) stipulates that 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.

[17] In *Canada* (*AG) v. Jean*, *supra*, at issue was a similar situation to the Appellant's. The claimants were truck drivers who worked one week out of two and worked 55 to 60 hours during the week in which they worked. The Court determined that these claimants were not unemployed. In that regard, the Court stated the following with respect to subsection 11(4) of the Act:

> "The purpose of this provision is clear: to ensure that only workers whose work is interrupted may receive temporary benefits, in keeping with the spirit of a public insurance program based on the concept of social risk. A worker on compensatory leave for overtime already worked does not suffer a loss of income, regardless of whether he receives pay during this leave; his work has not been interrupted and he maintains his bond with the employer: see *Canada (Attorney General) v Foy*, 2003 FCA 51, at paragraph 8 [Foy]." (paragraph 21)

[18] The Court in *Canada (AG) v. Jean, supra* also rejected the claimants' contention that it was normal for truckers to work 55 to 60 hours per week such that the exclusion should not apply. The Court found the exclusion in subsection 11(4) of the Act cannot be applied differently, based on the hours usually worked by persons employed in full-time employment in a specific industry. To do so would create a disparity, where subsection 11(4) of the Act would not apply uniformly and would favour those workers in fields where the workweek is often longer, to the detriment of most workers, whose workweek is shorter.

[19] I find as a fact that the Appellant was working a greater number of hours than are normally worked in a week by a person employed in full-time employment. The Appellant testified that his driving route took about 10 and a half to 12 hours a day, depending on weather and detours. He was paid for 72 hours of work per week. His employer provided the same information to the Respondent. The legislation does not defined what a number of hours, days or shifts would amount to those normally worked in a week by persons employed in full-time employment. However, I am satisfied that most persons in full-time employment work less than 72 hours a week. In making this finding, I note that the truck drivers in the *Canada (AG) v. Jean, supra* case were only working 55 to 60 hours per week and the Court was satisfied that they were working more hours than those in full-time employment.

[20] I find as a fact that the Appellant was also entitled, pursuant to a verbal employment agreement with his employer, to a period of one-week leave to compensate for the extra time worked the prior week. The Appellant testified that he worked the one week on, one week off arrangement, as the other driver and he were able to share a truck. The Appellant testified that he is only allowed to drive the truck for 70 hours per week. As well, he explained that this schedule works out because his shift requires him to drive from Sunday evening to Friday evening, getting back home on Saturday morning. He related it would be very tiring to start driving again on the Sunday evening, having just gotten in on the Saturday morning.

[21] I find the Appellant's situation to be virtually identical to that of the claimants in the *Canada (AG) v. Jean, supra* case and I am bound to apply the law as set out in that case. I find, therefore, that the Appellant was deemed to have worked a full working week during his scheduled weeks off from August 6, 2018, pursuant to section 11(4) of the Act. He has not proven, therefore, that he was unemployed. As such, he is disentitled to benefits from August 6, 2018.

[22] With respect to the Appellant's argument that his situation is no different than construction workers, road crews or other workers that may work for long periods of time, then be off work during which time they collect benefits, while there is some similarity to those situations, the distinguishing feature is the Appellant is working a fixed schedule requiring more hours than normally worked in a week by persons employed in full-time employment. He is also entitled, pursuant to his verbal employment agreement, to the subsequent week off as a period of leave to compensate him for the extra time worked. His work schedule and compensatory leave are such that he comes squarely within the provisions of subsection 11(4) of the Act.

[23] I acknowledge the Appellant's frustration that he believes he has been singled out unfairly as other truckers working in a similar situation are in receipt of EI benefits on their periods off work. However, I can only decide the case in front of me and have no jurisdiction to comment on the eligibility of those other individuals.

CONCLUSION

[24] The appeal is dismissed.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	March 6, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. A., Appellant