



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *MB v Canada Employment Insurance Commission*, 2020 SST 1238

Tribunal File Number: GE-20-1039

BETWEEN:

M. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: August 13, 2020

DATE OF DECISION: September 11, 2020

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] M. B. (Appellant) started working for the employer as a support worker in early 2018. She works 32 hours per week. She was laid off during the summer because of a shortage of work. She applied for Employment Insurance benefits every summer. A benefit period was established, and she received Employment Insurance benefits.

[3] When she returned to work, she continued to complete her claims for Employment Insurance benefits and to receive benefits.

[4] After investigating, the Commission¹ found that she was working [full] working weeks and that she was not entitled to Employment Insurance benefits. It assessed an overpayment. She was not available for work from December 4, 2019, to December 19, 2020. Also, she did not properly declare all her earnings. The Commission allocated the earnings to the weeks of unemployment.

[5] According to M. B., she may have made a mistake in her reports. She does not dispute the Commission's decision on that point.

[6] On the full working week issue, she argues that she is not a full-time employee when she works 32 hours per week.

[7] Lastly, she was available to find a job when she was receiving Employment Insurance benefits.

PRELIMINARY MATTERS

[8] At the hearing, M. B.'s representative tried to contact X to have him testify. After a few attempts, I suggested that the representative provide an affidavit from X. The representative and I agreed on a three-week deadline. I did not receive the affidavit on time, so I made the decision

¹ Employment Insurance Commission.

without it. In addition, M. B.'s representative submitted additional documents after the hearing. I allowed the Commission to make submissions. For these reasons, it took more than 14 days to make the decision.

[9] Moreover, M. B. challenged three decisions by the Commission. I joined the appeals so that they could be heard at the same time.²

[10] As part of the appeal process, at the representative's request, I asked the Commission for details about the full working week issue and the hours that had been considered. It presented its arguments and the work schedules used in the calculation.

ISSUES

1. Is it a week of unemployment when M. B. works 32 hours in a week?
2. Is the money earnings, and did the Commission correctly allocate the Appellant's employment income?
3. Was M. B. available for work?

ANALYSIS

1. Is it a week of unemployment when M. B. works 32 hours in a week?

[11] A benefit period is established for a person who qualifies, and benefits are payable to the person for each week of unemployment that falls in the benefit period.³

[12] A week [of unemployment is a week] in which the claimant does not work a full working week.⁴ A full working week is the number of hours, days, or shifts normally worked 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.⁵

² Section 13 of the *Social Security Tribunal Regulations* allows appeals to be joined.

³ Section 9 of the *Employment Insurance Act*.

⁴ Section 11(1) of the *Employment Insurance Act*.

⁵ Section 31(1) of the *Employment Insurance Regulations*.

[13] The principle is that, to be entitled to benefits, a claimant must be in the labour market and free of any commitment, occupation, or interest that might limit or reduce their opportunity or desire to return to the labour market.⁶

[14] I note that M. B. has a college background in working with offenders. She was hired as part of a project to help farmers in the Matapédia region. A number of local decision-makers have funded her wages. They have provided a grant to a non-profit organization that hired her.

[15] Under the agreement with the employer, she works 32 hours per week. She works with farmers in need. She is laid off during the summer. During this period, farmers are in the fields; they need less help.

[16] She started working for her employer in early 2018. On July 24, 2018, she was laid off because of a shortage of work. She applied for Employment Insurance benefits. The Commission established a benefit period.

[17] On August 6, 2018, she returned to work for her employer. She stopped working on February 7, 2019, and resumed her employment on February 11, 2019. She was laid off again on July 2, 2019, because of a shortage of work.

[18] On August 12, 2019, she returned to work. She was laid off on December 31, 2020, because of a lack of funding.

[19] When she returned to work for the employer, she continued to complete her reports to receive Employment Insurance. She was working 32 hours, and she was receiving Employment Insurance benefits.

[20] During an investigation by the Commission, the employer stated that M. B. was working full-time. The Commission obtained work schedule and hourly rate information for all employees. I note that the other employees work 27 hours per week.

[21] According to the Commission, the employer stated that M. B. had a contract of employment for 32 hours per week and that it considered this full-time work (GD3-19). It

⁶ *Marlowe v Canada (AG)*, 2009 FCA 102.

indicated that there were two employees working 32 hours and that even the other employees—who work 28 hours—were considered full-time employees.

[22] The Commission argues that she was working full working weeks, in accordance with section 31(1) of the *Employment Insurance Regulations* (Regulations), because that is the number of hours worked by the employer's other employees.

[23] According to the employer, her hourly rate was \$20.40, [which amounts to] \$652.80 for a 32-hour week.⁷

[24] The evidence is clear that M. B. [has] a contract of employment. In a week, she works the same number of hours for her employer as other full-time employees for that same employer.

[25] For her part, M. B. argues that she cannot be compared to the other employees, since she is part of a pilot project. She had a part-time job, and she was looking for a job to supplement the hours.

[26] If her witness had been there, he would have said that he worked more than 35 hours per week as a support worker.

[27] She also provided the 2018–2019 annual report of X to show that services are offered five days per week for 40 hours. So, a 32-hour schedule in M. B.'s field is not a full-time job.

[28] In my view, it is a full working week when M. B. works 32 hours in a week for her employer. In making my finding, I considered her testimony and the evidence on file.

[29] M. B.'s evidence does not support the finding that she does not work full working weeks. Her organization's employees work 32 or 27 hours per week. So, she needs to be compared to the organization's other employees.

[30] Concerning M. B.'s evidence, it does not convince me that a full working week in her field is 35 hours or more. The 2018–2019 annual report of the organization X merely states that

⁷ GD3-20.

services are offered Monday to Friday from 9 a.m. to 5 p.m. There is no specific schedule in connection with the employees.

[31] I want to clarify that this is not about availability. M. B. can say that she was looking for a job to supplement the hours, so she was available. This is about full weeks of unemployment.⁸

[32] I accept that M. B. started working for the employer in early 2018. She works 32 hours per week. In July 2008, she was laid off because of a shortage of work. When she returned to work, she continued to complete her claims to receive Employment Insurance benefits.

[33] At the hearing, she explained that a Service Canada agent had told her to complete her Employment Insurance claims because she was working less than 35 hours per week. So, she received benefits when she worked 32 hours per week for her employer.

[34] As a result, she received income from her employment and Employment Insurance benefits. However, the purpose of the *Employment Insurance Act* (Act) is to pay benefits to those who are truly unemployed. This was not the case for M. B. She received her wages for the 32 hours worked and Employment Insurance. Whereas before the period of unemployment, she received only her wages. So, she cannot receive her wages and Employment Insurance when she returns to work.

[35] The situation created an overpayment when she worked 32 hours per week or more. For the weeks she worked less than 32 hours, she was underpaid.

[36] With this in mind, I find that it is a [full] working week when she works more than 32 hours in a week.

2. Is the employment income earnings, and did the Commission correctly allocate the Appellant's employment income?

[37] For the purposes of the Act and Regulations, "earnings" are "whatever is earned by an employee as a result of his work," and there has to be a "sufficient connection" between the employment and the money received.⁹

⁸ *Dion v Attorney General of Canada*, 2002 FCA 458; see CUB 51844.

[38] I accept that M. B. worked for X from February 24, 2018, to December 22, 2018. She voluntarily left her job. She failed to declare to the Commission the hours worked for that employer. In her reports, she made some mistakes about her income from her employers.

[39] I understand that she does not dispute that the wages she received from those employers are earnings and that they have to be allocated to the weeks of unemployment.

[40] In my view, the wages are earnings, and the Commission allocated them correctly.

3. Was M. B. available for work between December 4, 2018, and December 19, 2018?

[41] To be entitled to Employment Insurance regular benefits, you have to prove that you are capable of and available for work but unable to find suitable employment.¹⁰ It is up to the Appellant to prove availability for work.¹¹

[42] Availability is assessed for each working day in a benefit period in which the claimant can prove that, on that day, they were capable of and available for work and unable to obtain suitable employment.¹²

[43] Availability for work [must] be determined by analyzing three factors: 1) the desire to return to the labour market as soon as a suitable job is available; 2) the expression of that desire through efforts to find a suitable job; and 3) not setting personal conditions that might unduly limit the chances of returning to the labour market. And the three factors must be considered in reaching a conclusion.¹³

[44] I accept that M. B. was working 32 hours per week for her employer. She was looking for a job to have a 40-hour week.

⁹ Section 35(2) of the *Employment Insurance Regulations*; section 35(7) of the *Employment Insurance Regulations*; *Canada (Attorney General) v Roch*, 2003 FCA 356.

¹⁰ Section 18(1)(a) of the *Employment Insurance Act*.

¹¹ *Canada (Attorney General) v Renaud*, 2007 FCA 328.

¹² *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

¹³ *Canada (Attorney General) v Boland*, 2004 FCA 251; *Faucher v Attorney General of Canada*, A-56-96.

1) *The desire to return to the labour market as soon as a suitable job is available*

[45] I find that M. B. has a job of 32 hours per week. She was looking for a part-time job. She was not going to leave her 32-hour-per-week job for another job.

[46] She looked for an eight-hour job to have 40 hours per week. It did not work out. She did not find another job.

[47] I am of the view that M. B. had a desire to return to the labour market as soon as a suitable job was available. She already had a suitable job.

2) *The expression of that desire through efforts to find a suitable job*

[48] M. P. B. says that she looked for a job. She had one or two interviews. She looked for a job in her field. She visited the specialized websites.

[49] In my view, M. B. made efforts to find a suitable job.

3) *Not setting personal conditions that might unduly limit the chances of returning to the labour market*

[50] I accept that M. B. was looking for a part-time job to supplement her 32-hour work schedule. It is difficult to find a job of a few hours per week.

[51] I note that she worked from December 4, 2018, to December 18, 2018. She received earnings for working 32 hours per week.

[52] In my view, she set personal conditions that might have unduly limited her chances of returning to the labour market. Her searching only for a part-time job of eight hours per week does not show availability to look for a job every day of the week. Showing availability requires being free of any commitment.¹⁴

[53] After analyzing the three factors, I find that M. B. was not available to find a job.

¹⁴ *Canada (Attorney General) v Gagnon*, 2005 FCA 321.

CONCLUSION

[54] I find that it is a full working week when M. B. works 32 hours or more in a week.

[55] I find that the income from her jobs is earnings and that the Commission allocated it correctly.

[56] I find that she was not available for work between December 4, 2029 [*sic*], and December 19, 2019.

[57] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	August 13, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	M. B., Appellant Alexis Deschênes (counsel), Representative for the Appellant