Citation: *Canada Employment Insurance Commission v PG*, 2021 SST 456

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Angèle Fricker
Respondent:	P. G.

Decision under appeal:	General Division decision dated June 2, 2021 (GE-21-732)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	August 26, 2021
Hearing participants:	Appellant's representative Respondent
Decision date:	September 1, 2021
File number:	AD-21-218

Decision

[1] The Commission's appeal is allowed.

Overview

[2] The Claimant is employed as a Personal Care Attendant. She works from Monday to Saturday in one week and Sunday in the other week. She applied for regular EI benefits when she stopped working on a Saturday and did not work for the following eight days. The Commission decided that it could not pay the Claimant EI benefits because she was not unemployed during the weeks she was not working. After an unsuccessful request for reconsideration, the Claimant appealed the Commission's decision to the General Division.

[3] The General Division determined that the Claimant did not work extra time in one week to compensate for leave in the following week because she was working the available schedule. It also determined that the Claimant was not on a period of leave during the weeks she was not scheduled to work.

[4] The General Division concluded that the Commission had failed to meet its burden of establishing the Claimant met both of the requirements contained in section 11(4) of the *Employment Insurance Act* (EI Act) to be deemed to have worked a full working week for those weeks that fall wholly or partly in a period of leave.

[5] The Appeal Division granted the Commission leave to appeal of the General Division's decision. The Commission submits that the General Division erred in fact or in law in its interpretation of section 11(4) of the EI Act.

[6] I must decide whether the General Division made an error in fact or in law in its interpretation of section 11(4) of the EI Act.

[7] I am allowing the Commission's appeal.

Issue

[8] Did the General Division make an error in fact or in law when it concluded that the Commission had failed to prove the requirements contained in section 11(4) of the EI Act to be deemed to have worked a full working week for those weeks that fall wholly or partly in a period of leave?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division make an error in fact or in law when it concluded that the Commission had failed to prove the requirements contained in section 11(4) of the EI Act to be deemed to have worked a full working week for those weeks that fall wholly or partly in a period of leave?

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[1] *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.
[2] *Idem*.

[12] The General Division had to decide whether the Claimant is by law deemed to have worked a full working week for those weeks that fall wholly or partly in a period of leave.

[13] The General Division determined that the Claimant did not work extra time in one week to compensate for leave in the following week because she was working the available schedule. It also determined that the Claimant was not on a period of leave during the weeks she was not scheduled to work.

[14] The Commission submits that the General Division ignored the employer's statement, as well as the Claimant's, confirming that there is an agreement between them that she will be given extra time off because she works hours, days or shifts in excess of those normally worked by a person in full-time employment.

[15] The Commission further submits that the evidence shows that the Claimant's job is to provide home care to one client in particular, and that another employee assumes those functions while the Claimant is off work for seven days, supporting a conclusion that she is entitled to a period of leave after working seven consecutive days.

[16] The Commission finally submits that there is a consistent line of authority that a situation where employees work on a rotating basis, relieving one another in turn, as in the claimant's case, does not constitute unemployment during the non-working period.

[17] During an interview, the employer declared to the Commission that the Claimant requested her record of employment. The employer also declared that there was no shortage of work but that the Claimant had a schedule for seven days on and seven days off. During her seven days on, she worked 56 hours.[3]

[3] See GD3-18.

[18] The Claimant confirmed the employer's declaration that she had a schedule for seven days on and seven days off. She further declared that this schedule had been going on for years.[4]

[19] The General Division determined that no evidence was presented by the Commission to support its position that in the Claimant's province, the regulation has set 40 hours as the standard working hours in a week. It found that, in the absence of some evidence on which to base a comparison, the Commission had not demonstrated the first requirement that the Claimant was working greater than the usual number of hours, days or shifts that are normally worked by persons employed in full-time employment.

[20] The General Division also found that the Commission did not demonstrate the Claimant met the second requirement that she be entitled to the period of leave under an employment agreement to compensate her for the extra time worked.

[21] In *Jean*, a recent case raising the same issues, the Federal Court of Appeal stated that although reference to provincial laws may be a relevant indication for interpretation and application of section 11(4) of the EI Act, it did not want to consider it a decisive criterion.[5]

[22] The Court noted that there are a host of legislative and regulatory provisions that govern hours of work for a range of purposes (minimum standards, rates of pay, mandatory leave, etc.) and that therefore stipulate various systems depending on the nature of the jobs. The Court gave instruction to refrain from mechanically equating any of these systems out of context with the exception set out in section 11(4) of the EI Act.[6]

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[4] See GD3-19.
[5] *Canada (Attorney General) v Jean*, par. 28.
[6] *Idem.*

[23] The Court reiterated that employment insurance is a social measure for the purpose of compensating unemployed workers for their loss of employment income and ensuring their economic and social security for a time, thus assisting them in returning to the labour market. Therefore, when deciding whether a person is on leave, one must be consistent with the spirit of the legislation and the objective pursued by the legislator.[7]

[24] In the present case, it is clear that there was an agreement between the Claimant and her employer that she would work 56 hours for seven consecutive days and be off the next seven days. Although there was no shortage of work, the Claimant did not work and was not scheduled for work in the seven days off because another employee was working during that week to care for the same person. The Claimant's rotating schedule continued for years and she maintained her bond with the employer. She also admitted not having applied to work elsewhere for a prolonged time.[8]

[25] The Federal Court of Appeal has established that claimants who have a schedule that includes periods of work and of leave are deemed to be employed during the leave periods that are part of this established schedule.[9]

[26] For these reasons, I am of the view that the General Division erred in law in its interpretation of section 11(4) of the EI Act and misapplied the Federal Court of Appeal case law.

Remedy

[27] Considering that both parties had the chance to present their case before the General Division, I will render the decision that should have been given by the General Division.[10]

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[7] *Canada (Attorney General) v Jean*, par. 26.
[8] See GD3-22.
[9] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Canada (Attorney General) v Merrigan*, 2004 FCA 253; *Canada (Attorney General) v Duguay*, A-75-95.
[10] Pursuant to section 59(1) of the DESD Act.

[28] The undisputed evidence shows that the Claimant regularly worked seven consecutive days (56 hours) and then received seven consecutive days off. Although there was no shortage of work, the Claimant did not work and was not scheduled for work in the following week because another employee was working during the following week to care for the same person. This schedule has been in place for years. Accordingly, her employment with her employer was continuous. She also did not make sufficient efforts to find other employment.

[29] I find that the seven consecutive days off were provided under the employment agreement as weeks off within the meaning of section 11(4) of the EI Act. The employer and the Claimant accepted the rotating schedule. Therefore, the evidence before the General Division shows that the weeks off were not weeks of unemployment.

[30] For these reasons, I will allow the Commission's appeal.

Conclusion

[31] The Commission's appeal is allowed.

Pierre Lafontaine
Member, Appeal Division