



Citation: *PG v Canada Employment Insurance Commission*, 2021 SST 457

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: P. G.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (421078) dated April 20, 2021
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference
Hearing date: May 26, 2021
Hearing participant: Appellant

Decision date: June 2, 2021
File number: GE-21-732

Decision

[1] The appeal is allowed.

[2] This means P. G., the Claimant, qualifies for Employment Insurance (EI) benefits because the Commission has not proven she is working more hours, days or shifts than someone in full-time employment and it has not proven that she works extra time to receive a period of leave.

Overview

[3] 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 8 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. The Claimant disagrees, she says that she has no other work during the week that she works one day and that she has received EI in the past for those weeks.

Issue

[4] I have to decide if the Claimant is deemed to have worked a full working week for those weeks that fall wholly or partly in a period of leave.

Analysis

[5] Employment Insurance pays benefits to individuals who are involuntarily separated from their employment and who are without work.¹

[6] Benefits are only payable to qualified claimants, for each week of unemployment that falls in their benefit period.² A week of unemployment is a week in which a claimant

¹ *Canadian Pacific Ltd. v. Attorney General of Canada* [1986] 1 S.C.R. 678. This is how I refer to the court's decisions that apply to this appeal.

² *Employment Insurance Act*, section 9. This is how I refer to the law that applies to this appeal.

does not work a full working week.³ A week means a period of seven consecutive days beginning on and including Sunday.⁴

[7] The law says that a claimant 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 they work a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment; and,

(b) they are entitled to the period of leave under an employment agreement to compensate for extra time worked.⁵

[8] This is because a claimant who is on compensatory leave for overtime already worked does not suffer a loss of income, regardless if they are paid or not paid during their leave; their employment has not been interrupted and they maintain their bond with their employer.⁶

[9] A claimant must meet both requirements of section 11(4) to be deemed to have worked a full working week during the period of leave and thereby be disentitled to EI benefits.⁷

[10] The Claimant testified that she works for a home care agency that assigns her to people who require care in their home. She was hired to work 8 hours a day from Monday to Saturday in one week and 8 hours on the Sunday in the next week. She is not scheduled to work from Monday to Saturday in one week and Sunday in the next week because there is another person assigned to care for the same person at that time. The Claimant said that when she was hired this was the work that was made available to her.

³ *Employment Insurance Act*, section 11(1)

⁴ *Employment Insurance Act*, section 2

⁵ *Employment Insurance Act*, section 11(4)

⁶ *Canada (AG) v. Jean*, 2015 FCA 242

⁷ *Attorney General of Canada v Merrigan*, 2004 FCA 253

[11] The Claimant testified that she is paid vacation pay with each paycheque. She is paid every two weeks. If she needs time off work she takes the time off without pay. The Claimant said that when the person she is caring for is not in their home, due to hospital visits or appointments, she does not work, nor is she paid. If the person no longer requires care the Claimant's employment will end.

[12] The Claimant testified that she was receiving EI benefits while she was working the same schedule. That claim was due to expire in February 2021. Her last day of work was Saturday, February 20, 2021. She was not scheduled to work on Sunday, February 21, 2021. She said she did not know when she would be working next. She asked her employer to issue a Record of Employment because she was without work for seven days. She got a call from her employer on February 27 or 28, 2021, asking that she come in to work on Monday, March 1, 2021.

[13] The Claimant submitted that she was unemployed during the weeks she was not working. She noted that the Commission said a regular work week was 40 hours a week. If she was employed for 40 hours a week that would mean she would be working 80 hours every two weeks. Instead, she is working 56 hours over the course of 2 weeks. The Claimant submitted that she has received EI benefits previously when she was employed on the same schedule.

[14] The Commission submitted that the first condition of section 11(4) of the *Employment Insurance Act* relates to the work itself and the second condition relates to an entitlement under an employment contract. When both conditions are present, it says the Claimant is not considered unemployed during any week in which a period of leave falls.

[15] The Commission submitted that the Claimant works a schedule of seven days on and seven days off. It says, during her seven days she works 56 hours. The Commission says in the Claimant's province the regulation has set 40 hours as the standard working hours in a week. The Commission submits that because the Claimant works 56 hours in her week of work, which is higher than the standard 40 hours, and

she gets a period of leave off, she is considered not unemployed under the *Employment Insurance Act* and *Employment Insurance Regulations*.

[16] The Commission submitted that the Claimant has failed to prove that she is unemployed because she has an established schedule of alternating periods of work and leave. It says that she works 56 hours in seven days and then has seven days off. The Commission says a normal work week in the Claimant's area is 40 hours.

[17] To be disentitled from receiving EI benefits the Claimant's employment must satisfy both conditions of section 11(4). Specifically, it must be shown that the Claimant (a) regularly worked a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment, and (b) was entitled to a period of leave under an employment agreement to compensate for the extra time worked.

[18] The law does not specify the number of hours, days or shifts that make up a full working week. I cannot make a distinction based on job category or industry for the purposes of the exclusion set out in section 11(4) of the *Employment Insurance Act*.⁸ The Commission said the Claimant is working 56 hours in one week. But I find that is not the case. For the purposes of the *Employment Insurance Act* a week begins on and includes Sunday.⁹ I accept the evidence, of the Claimant, given under affirmation directly to me, that she worked six days in one week (Monday to Saturday) and one day (Sunday) in the following week. That is not working seven days in a week within the meaning of the *Employment Insurance Act*.

[19] In order to make a determination under subsection 11(4) of the *Employment Insurance Act*, there must be evidence to show that the Claimant worked more than the usual number of hours than are normally worked in a week by persons employed in full-time employment.¹⁰

[20] The Court has refused to overturn a decision of an Umpire who refused to apply subsection 11(4) of the *Employment Insurance Act* because of a lack of evidence from

⁸ *Canada (Attorney General) v. Jean*, 2015 FCA 242

⁹ *Employment Insurance Act*, section 2

¹⁰ *Canada (Attorney General) v. Merrigan*, 2004 FCA 253

the Commission as to what constituted a normal work schedule. In that case, the work schedule was not disputed, but the comparison factor was not demonstrated.¹¹

[21] In this case, the Commission said that in the Claimant's province "the regulation" has set 40 hours as the standard working hours in a week. However, the Commission did not state which regulation it was relying upon to make this statement. The Commission also said that the Claimant was working more than the standard 40 hours. But, it has not provided any evidence of the number of hours, days or shifts worked in full-time employment in the Claimant's area of residence to support its statement. Accordingly, I find that, in the absence of some evidence on which to base a comparison, the Commission has not demonstrated 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.

[22] I find that the Commission has not demonstrated the Claimant meets the second requirement that she be entitled to the period of leave under an employment agreement to compensate her for the extra time worked. The Claimant was hired to work caring for a person from Monday to Saturday in one week and Sunday in the following week. The Claimant does not work and is not scheduled for work in the following week because another employee is working during the following week to care for the same person. She is required to be available to fill in for the other employee if that employee is unable to work. If the Claimant is not needed to provide care, she is not scheduled to work and does not get paid. The insurable earnings recorded in the Record of Employment vary from pay period to pay period. She is paid vacation pay with each bi-weekly paycheque. If she requires time off when scheduled to work, she is not paid for the time taken. The Claimant is paid for the hours that she works and there is no evidence worked hours are "banked" to be taken off as leave at a later date. Taking all of this evidence together, tells me that the Claimant does not work extra time in one week to compensate for leave in the following week because she is working what is available to her as

¹¹ *Canada (Attorney General) v. Buchanan*, 2003 FCA 51

scheduled and is not on a period of leave during the weeks she is not scheduled to work.

[23] In light of the forgoing, I find the Commission has failed to meet its burden of establishing the Claimant meets both of the requirements contained in section 11(4) to be deemed to have worked a full working week for those weeks that fall wholly or partly in a period of leave.

Conclusion

[24] The appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section