[TRANSLATION]

Citation: *AC v Canada Employment Insurance Commission*, 2022 SST 266

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (445248) dated December 20, 2021 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	February 10, 2022
Hearing participant:	Appellant
Decision date:	March 4, 2022
File number:	GE-22-193

Decision

[1] The appeal is dismissed. I find that the disentitlement to Employment Insurance (EI) benefits imposed on the Appellant from August 16, 2021, for failing to show that she was unemployed, is justified.[1] This means that the Appellant does not qualify to receive EI benefits as of that date.

Overview

[2] From March 19, 2019, to August 14, 2021, the Appellant worked as a [translation] "home care provider" for the employer L. R. (employer).[2]

[3] On September 26, 2021, she made an initial claim for EI benefits.[3] She indicated that she had stopped working because of a "work-sharing agreement."[4] She provided a return-to-work date of August 22, 2021.[5] A benefit period was established effective August 15, 2021.[6]

[4] On November 18, 2021, the Canada Employment Insurance Commission (Commission) made a decision that appeared in the Appellant's EI account (My Service Canada Account), saying that she could not be paid EI benefits from August 16, 2021.[7] In that decision, the Commission indicated that, in its view, the Appellant was self-employed, working full weeks, or still receiving her salary when she was off work.[8]

[5] On December 2, 2021, after accessing her EI account on the Commission's website (My Service Canada Account) and seeing its November 18, 2021, decision, the Appellant requested a reconsideration of that decision.[9]

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[1] See sections 9, 11(1), and 11(4) of the *Employment Insurance Act* (Act).
[2] See GD3-7.
[3] See GD3-3 to GD3-19.
[4] See GD3-9.
[5] See GD3-7.
[6] See GD4-1.
[7] See GD2-26.
[8] See GD2-26.
[9] See GD3-27 to GD3-36.

[6] On December 20, 2021, the Commission informed her in writing that it was unable to pay her EI benefits from August 16, 2021, because it considered that she was working full weeks.[10]

[7] On December 20, 2021, after a reconsideration request, the Commission told her that it was upholding the November 18, 2021, decision (decision appearing in the Appellant's EI account) about weeks of unemployment (unemployment status). It explained to her that, given her work pattern, she was considered to be working full working weeks when she was off work.[11]

[8] The Appellant explains that she has worked a full week every other week since 2019. She says that she is ready, able, and willing to work during her weeks off. The Appellant indicates that she is looking for work. She says that she should be entitled to benefits. On January 13, 2022, the Appellant challenged the Commission's reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

Issues

[9] I have to decide whether the disentitlement to EI benefits imposed on the Appellant, for failing to show that she was unemployed, is justified.[12] To decide this, I have to answer the following questions:

- Does the Appellant work more hours than the number of hours normally worked in a week by full-time employees, and is she entitled to a period of leave under her employment contract?

[10] See GD3-26.
[11] See GD2-21, GD3-38, and GD3-39.
[12] See sections 9, 11(1), and 11(4) 11 [*sic*] of the Act.

Analysis

[10] When it comes to establishing a "benefit period," the *Employment Insurance Act* (Act) says that you can receive EI benefits for each week you are unemployed.[13]

[11] A "week of unemployment" for a claimant is "a week in which the claimant does not work a full working week."[14]

[12] You are considered to have worked a full week during each week that falls wholly or partly in a period of leave if in each week you regularly work a greater number of hours, days, or shifts than are normally worked in a week by full-time employees, and you are entitled to the period of leave under an employment agreement to compensate for the extra time worked.[15]

Does the Appellant work more hours than the number of hours normally worked in a week by full-time employees, and is she entitled to a period of leave under her employment contract?

[13] I find that, in her job, the Appellant regularly works more hours in a week than a full-time employee. Under her employment contract, the Appellant is also entitled to a scheduled period of leave.

[14] I find that the Appellant's weeks off are not weeks of unemployment.

[15] The Appellant's testimony and statements indicate the following:

a) Since she was hired in March 2019, the Appellant has worked a full week every other week as a [translation] "home care provider" for a person with a disability. She works Sunday to Saturday, inclusive, as shown by her work schedule and her work week calendar.[16]

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[13] Section 9 of the Act sets out this rule.
[14] See section 11(1) of the Act.
[15] See section 11(4) of the Act.
[16] See the document entitled [translation] "Home Care Provider Schedule," which indicates the Appellant's working hours from Sunday to Saturday, inclusive (GD2-13 or GD3-32). See also the calendars for the months of August 2021, September 2021, October 2021, and November 2021, where the Appellant

b) When she started her job, she worked 40 to 45 hours per week. Since around 2020, she has worked 90 to 92 hours per week, or about 13 hours per day. During her weeks off, another employee replaces her. During her weeks on, the other employee is on leave.[17]

c) This arrangement with the employer has existed from the beginning of her employment. She agreed to the employer's conditions of employment, including a schedule of seven days on, seven days off. There has been no break in the employment relationship. She still works for the employer in accordance with the conditions in place.

d) She says that she does not receive any earnings when she is off work, as shown by her pay stubs.[18]

e) Her employment situation is not that of someone who is self-employed, as the Commission indicated in its November 18, 2021, decision.[19]

f) The Appellant indicates that she is available for work. She says that she is ready, able, and willing to work on her weeks off. She says that she is still looking for a job.[20]

g) She explains that she applied for benefits when she had enough insurable hours to be able to get benefits. On her application, she indicated that she had stopped working because of a "work-sharing agreement."[21] She also indicated on her application that she was not part of a group of employees in

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indicates the weeks she worked (GD2-14 to GD2-17 and GD3-33 to GD3-36). See also GD2-8, GD3-22 to GD3-25, and GD3-27.
[17] See GD3-22 to GD3-25 and GD3-37.
[18] See the pay stubs from the employer L. R. indicating that the Appellant worked 92 hours per week during the following periods (pay periods): August 8 to 21, 2021; August 22, 2021, to September 4, 2021; and October 17 to 30, 2021—GD2-10 to GD2-12 and GD3-29 to GD3-31. See also GD2-8, GD3-27, and GD3-37.
[19] See GD2-8, GD2-26, GD2-27, GD3-27, and GD3-37.
[20] See GD3-24 and GD3-25.
[21] See GD3-9.

a work-sharing program and that she had not been given a reference code in that regard.[22]

h) She argues that she is entitled to benefits. She says that she has previously received benefits for her weeks off.[23]

[16] In this case, I find that, in the context of her work as a home care provider, the Appellant agreed with her conditions of employment.

[17] Among other things, those conditions provided that she would work, according to a fixed schedule, a seven-day working week every other week and that she would then have a week off before going back to work the following week. The Appellant agreed to the employer's conditions in this regard. She still works for the employer in accordance with these conditions.

[18] The Appellant's testimony and the evidence on file show that she works more hours in a week than someone in full-time employment because she has worked 7 days and 90 to 92 hours on a weekly basis since around 2020. This means that the Appellant works a greater number of hours, days, or shifts than are normally worked in a week by persons employed in full-time employment, as stated in the Act.[24]

[19] Under her employment contract, the Appellant is also entitled to a scheduled period of leave. Her weeks off are not weeks where she is unemployed because they are weeks of leave, under her employment agreement. The scheduled period of leave has to be considered a full working week under the Act.[25]

[20] I find that, during her weeks off, the employment relationship with her employer is not severed. At the hearing, the Appellant said that there had been no break in the employment relationship.

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[22] See GD3-10.
[23] See GD3-24 and GD3-25.
[24] See section 11(4) of the Act.
[25] See section 11(4) of the Act.

[21] The Federal Court of Appeal tells us that a claimant who has a schedule alternating between periods of work and periods of leave is considered to be employed during the periods of leave included in that schedule.[26]

[22] While the Appellant agues that she is available for work on her weeks off and that she is looking for a job, this situation does not change the fact that she first agreed to her employer's conditions of employment that included a schedule of one week on, one week off.

[23] I also note that the Appellant does not have a work-sharing agreement with the employer and the Commission.

[24] Although she mentioned having one, the Appellant also indicated that she had not been given a reference code to prove its existence.

[25] On this point, I note that the Commission explains in its arguments that this is not a case of work sharing, even though the Appellant mentioned having a work-sharing agreement and it was the reason the employer gave on the Record of Employment.[27] The Commission indicates that work sharing requires an agreement between it, the employer, and the employees involved.[28] It says that, when an employer applies for a work-sharing agreement, its approval is subject to certain conditions.[29] The Commission points out that, in this case, there is no evidence on file of such an agreement.[30]

[26] In summary, I find that the Appellant's employment situation meets the exception set out in the Act that she is considered to have worked full working weeks during her weeks off.[31]

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[26] The Federal Court of Appeal established or reiterated this principle in the following decisions: *Merrigan*, 2004 FCA 253; *Duguay*, A-75-95; and *Kieley*, A-708-92.
[27] See GD4-4.
[28] See GD4-4.
[29] See GD4-4.
[30] See GD4-4.
[31] See section 11(4) of the Act.

[27] This means that the Appellant cannot be considered unemployed during those weeks.[32]

[28] Her entitlement to benefits cannot be established as of August 16, 2021.[33]

Conclusion

[29] I find that the disentitlement to EI benefits imposed on the Appellant from August 16, 2021, for failing to show that she was unemployed, is justified.

[30] This means that the appeal is dismissed.

Normand Morin

Member, General Division – Employment Insurance Section

[32] See section 11(1) of the Act.
[33] See sections 9, 11(1), and 11(4) of the Act.