



[TRANSLATION]

Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 1164

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

## Decision

**Appellant:** S. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (405989) dated August 12, 2020 (issued by Service Canada)

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**Tribunal member:** Josée Langlois

**Type of hearing:** In person

**Hearing date:** November 1, 2022

**Decision date:** November 4, 2022

**File number:** GE-20-2005, GE-20-2006, and GE-20-2007

## **Decision**

[1] The appeal is dismissed.

[2] I find that the Appellant wasn't unemployed between March 22, 2018, and September 7, 2018, between May 20, 2019, and October 11, 2019, and between October 14, 2019, and January 3, 2020, because his periods of leave were part of his work schedule.

## **Overview**

[3] The Appellant works as a deckhand for X. During the relevant periods, he didn't have permanent employee status, but his work schedule alternated between 28 days of work and 28 days of leave.

[4] On August 12, 2020, the Canada Employment Insurance Commission (Commission) made three decisions, and it told the Appellant that it wasn't able to pay him benefits because he wasn't unemployed between March 22, 2018, and September 7, 2018, between May 20, 2019, and October 11, 2019, and between October 14, 2019, and January 3, 2020.

[5] The Appellant disagrees. He says that he wasn't a permanent employee and that he was available for work during each of those leave periods.

[6] I have to decide whether the Appellant was unemployed during the periods in question.

## **Preliminary matter**

[7] Even though the Tribunal agreed to adjourn the hearing and schedule it based on the Appellant's work schedule, the Appellant didn't attend the November 1, 2022, in-person hearing at the Sainte-Foy Service Canada Centre.

[8] On October 26, 2022, the Appellant had confirmed that he would be at the hearing. The Tribunal Registry wasn't able to reach him on the day of the hearing.

[9] Since I am satisfied that the parties received notice of the November 1, 2022, in-person hearing, I proceeded in their absence.

## Issue

[10] Were the Appellant's periods of leave part of his work schedule for each of the following periods: between March 22, 2018, and September 7, 2018, between May 20, 2019, and October 11, 2019, and between October 14, 2019, and January 3, 2020?

## Analysis

[11] When a worker qualifies under the *Employment Insurance Act* (Act), a benefit period can be established, and benefits can be paid to them for each week of unemployment that falls in the benefit period.<sup>1</sup>

[12] A week of unemployment for a worker is a week in which they don't work a full working week.<sup>2</sup>

[13] A period of planned leave must be considered a full working week in cases where a contract of employment provides periods of leave for persons who regularly work more hours than normal.<sup>3</sup>

[14] The Commission says that, during these periods, the Appellant was entitled to a period of leave after his periods of work on the ship. The Commission explains that, during his periods of work, the Appellant worked a greater number of hours than are normally worked by persons who work full-time elsewhere.

[15] It argues that being on a term contract of employment doesn't affect the Appellant's paid leave after a period of work, since all employees have the same work schedule.

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<sup>1</sup> Sections 7 and 9 of the *Employment Insurance Act* (Act).

<sup>2</sup> Section 11(1) of the Act.

<sup>3</sup> Section 11(4) of the Act.

[16] The Commission says that the Appellant wasn't unemployed during his periods of leave.

[17] On October 25, 2019, the Appellant sent the Commission copies of testimonials of sea service for the following periods: from March 22, 2018, to April 19, 2018, from May 17, 2018, to June 14, 2018, and from July 12, 2018, to August 3, 2018.

[18] According to the Appellant, a Commission employee told him that he had to report his periods of work only when he had actually worked. He says that he didn't pay union dues during those periods because he wasn't a permanent employee, so he didn't have lay days.

[19] He also sent the Commission a document with the posting for the position of deckhand at the Canadian Coast Guard. The document indicates, among other things, that deckhands work on the ship for a period of 14 to 42 days, followed by equivalent time off with pay.

[20] On January 10, 2020, the employer told the Commission that the Appellant worked as a deckhand from May 16, 2019, to December 30, 2019.<sup>4</sup> The employer's official then told the Commission that the Appellant has a non-standard schedule when working on ships. He works on a ship for 28 days and then has 28 days off. She explained that, because of this, he accumulates enough paid leave to receive earnings while on leave. She confirmed that there was no interruption and that the Appellant received earnings during each pay period from May 16, 2019, to December 30, 2019.

[21] The Commission then contacted the person in charge of payroll at the employer, who confirmed the amounts received as earnings for each week during that period.<sup>5</sup>

[22] An official at the employer also confirmed to the Commission that, based on his work schedule, if a new job offer isn't made to the Appellant 5 days after his 28 days off work, a Record of Employment is issued. The official then confirmed that the

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<sup>4</sup> GD3-19.

<sup>5</sup> GD3-19 and GD3-20.

employer [*sic*] has a term contract but is subject to the same rules when it comes to work schedules.

[23] The Appellant says that he is unemployed during the periods of leave that follow his 28 days of work. He says that he never knows whether he will be rehired after a period of work.

[24] Despite this situation, the Commission's file shows that there was no severance of the employment relationship during the Appellant's periods of leave between March 22, 2018, and April 19, 2018, between May 17, 2018, and June 14, 2018, and between July 12, 2018, and August 3, 2018.

[25] The Appellant works for 28 days and then has time off. He received earnings without interruption during these periods.

[26] When contacted by the Commission, the employer's official confirmed that the Appellant's schedule alternated between 28 days of work and 28 days of leave. He confirmed that the Appellant was a term employee but that the same rules applied to him when it came to periods of work and time off.

[27] The Commission's three files show that the employer issued a Record of Employment on June 26, 2019, indicating that the Appellant had stopped working on September 7, 2018, because of a shortage of work. For the other periods, no Record of Employment indicates that he stopped working.

[28] The testimonials of sea service sent to the Commission also show that, for the period from March 22, 2018, to August 3, 2018, the Appellant's work wasn't interrupted before September 7, 2018. His last period of work ended on August 3, 2018, and it was followed by time off with pay. The employer issued a Record of Employment indicating September 7, 2018, as the last day paid.

[29] This is about three benefit periods established as of October 1, 2017, as of January 13, 2019, and as of October 13, 2019. The facts show that the Appellant

worked between March 22, 2018, and September 7, 2018, between May 20, 2019, and October 11, 2019, and between October 14, 2019, and January 3, 2020. He alternated between periods of work and periods of paid leave.

[30] I understand the Appellant's explanations that he didn't have an indeterminate contract and wasn't unionized. I have also considered the documents he sent to the Tribunal on October 28, 2022, about a guaranteed extension of his contract of employment until his appointment on an indeterminate contract. That document is dated October 17, 2022.

[31] I have read that the Appellant doesn't consider that he has lay days after a period of work. But, according to the employer, "lay day" means [translation] "a day off work with pay to which a deckhand becomes entitled by working on the Lay-Day Crewing System for a number of days."<sup>6</sup>

[32] Even though the Appellant isn't unionized, the employer explained that the same rules applied to him when it came to work schedules.

[33] While I understand that, after a period of work, the Appellant doesn't know whether he will go back to work 28 days later, the employment relationship isn't severed during his periods of leave, which are planned after a long period working on the boat to give workers a break. The Appellant received earnings during these periods.

[34] A worker on compensatory leave for overtime already worked doesn't suffer a loss of income, regardless of whether they receive pay during this leave. During a period of leave in an alternating work/leave schedule, the worker's work hasn't been interrupted because they are still employed by their employer.<sup>7</sup>

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<sup>6</sup> File GE-20-2007, GD3-32.

<sup>7</sup> *Attorney General of Canada v Jean*, 2015 FCA 242.

[35] The Commission's file shows that the periods of leave are part of the Appellant's work schedule, that the employment relationship remains intact during these periods of leave, and that the Appellant received earnings during his periods of leave.

[36] Given the evidence, I find that the Appellant wasn't unemployed during the periods of leave between March 22, 2018, and September 7, 2018, between May 20, 2019, and October 11, 2019, and between October 14, 2019, and January 3, 2020.

[37] But, as the employer explained, if the Appellant isn't called back five days after the end of his time off, the employer issues a Record of Employment saying "shortage of work." The situation is different if the Appellant doesn't go back to work once his time off is over. That is what happened on September 7, 2018.

[38] But the Appellant doesn't stop working because of a shortage of work each time he is on leave. When he finishes a period of work, he is still employed by the employer. His periods of leave are part of his work schedule, and each period at issue saw him going back to his job for the next period of work. Even though he has a term contract of employment during these periods, the fact is that, when he finishes a period of work, the employment relationship remains intact.

[39] For these reasons, I find that the Appellant was employed and not unemployed for every week of leave during the three benefit periods in question.

[40] I have considered the Appellant's arguments, and I understand his disappointment because this situation resulted in an overpayment of benefits. Unfortunately, he can't get benefits when he has lay days or is on leave after a period of work; under the Act, benefits can't be paid for this situation.<sup>8</sup>

## **Conclusion**

[41] I find that the Appellant wasn't unemployed between March 22, 2018, and September 7, 2018, between May 20, 2019, and October 11, 2019, and between

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<sup>8</sup> Sections 9 and 11 of the Act.

October 14, 2019, and January 3, 2020, because his periods of leave were part of his work schedule.

[42] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section