



[TRANSLATION]

Citation: *CM et al. v Canada Employment Insurance Commission and X*, 2022 SST 1727

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: C. M. *et al.*
Representative: Martin Savoie
Witnesses: C. M.
M. M.
Respondent: Canada Employment Insurance Commission
Added Party: X
Representative: Pierrick Bazinet (counsel)

Decisions under appeal: Canada Employment Insurance Commission
reconsideration decisions (issued by Service Canada)

Tribunal member: Charline Bourque
Type of hearing: Videoconference
Hearing date: ~~May 18, 2022~~
CORRIGENDUM DATE: **August 2, 2022**
Hearing participants: Appellants' representative
Witnesses
Added Party's representative
Decision date: July 14, 2022
File number: GE-20-2036 *et al.*

Decision

[1] The appeal is allowed.

[2] The Claimants weren't working full work weeks from July 21, 2019, to August 2, 2019. This means that they can receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimants were working full work weeks for the period from July 21, 2019, to August 2, 2019. The Commission considered that the Claimants were on scheduled vacation, which meant that they weren't unemployed. As a result, the Commission decided that she [sic] could not receive EI benefits.

[4] The Claimants disagree. They argue that they should receive EI benefits. They argue that they were unemployed because of a shortage of work due to the business shutting down.

Matters I have to consider first

[5] This appeal concerned 409 [108] Claimants¹ who were employees of X. In these 409 [108] files, the Commission decided the issue of week of unemployment. It disentitled the Claimants from receiving EI benefits from July 21, 2019, to August 3, 2019, because they weren't considered unemployed.

[6] The Claimants' representative was Martin Savoie. There was a single, joint hearing on May 18, 2022. The employer's representative, Pierrick Bazinet, was also there. He didn't make any arguments aside from saying that he supported his employees' position. Permanent union representative M. M. attended as a witness. C. M. was also there as a claimant and witness.

¹ The Claimants and corresponding file numbers are listed in the Appendix to this decision.

[7] So, I am writing a consolidated decision for the 409 [108] files dealing with this issue. I also note that, unless otherwise stated, 11 other files will be dealt with in separate decisions, given that the Commission made decisions on availability in those files. A separate hearing will take place for them later.

Issue

[8] Were the Claimants considered unemployed for the period from July 22, 2019, to August 2, 2019?

Analysis

Qualification requirements

[9] EI benefits are payable to an insured person who qualifies and makes an initial claim for benefits for each week of unemployment that falls in the benefit period.²

[10] So, I take into account that the Commission considers that the Claimants qualify to establish a claim for benefits. Specifically, the Commission takes the view that the Claimants had an interruption of earnings from employment and worked in insurable employment for the required insurable number [of hours].³ The Commission isn't arguing that the Claimants don't qualify.

Week of unemployment

[11] Once a claimant qualifies to establish a claim for benefits, benefits are payable to the claimant for each week they are unemployed.⁴

² See section 9 of the *Employment Insurance Act* (Act).

³ See section 7 of the Act, which sets out the requirements to qualify for benefits.

⁴ See section 9 of the Act.

[12] There are two criteria for determining whether a claimant is unemployed:

- a) The claimant must not work a full work week.⁵
- b) If a claimant's contract of service continues and the claimant receives or will receive their usual remuneration for a full work week, it isn't a week of unemployment, even though the claimant may be excused from performing their normal duties or doesn't have any duties to perform at that time.⁶

[13] For the first criterion, I agree that the Claimants didn't work a work week. The business is closed, and no work is being done there.⁷

[14] For the second criterion, I find that a claimant has to show that the contract of service doesn't continue **and** that they don't or won't receive their usual remuneration for a full work week.

– **Contract of service**

[15] The Commission takes the view that the contract of service continued when the business was closed, since the Claimant was expected to go back to work after the construction holidays. Based on sections 10.1(1) and 10.1(2) of the *Employment Insurance Regulations* (Regulations), this suggests that it is scheduled and paid vacation. So, the employee is deemed to have worked in insurable employment for the number of hours that they would normally have worked.

[16] I find that the Claimants' contracts of service continue during the two weeks the business is closed.

⁵ See section 11(1) of the Act.

⁶ See section 11(2) of the Act.

⁷ See section 11(1) of the Act.

[17] The Claimants are bound by a collective agreement. The agreement says that [translation] “[t]he Employer will shut down the plant during the two (2) weeks of Quebec’s summer construction holidays.”⁸

[18] The Claimants are also expected to go back to work after the two-week shutdown.

[19] It is possible to infer from section 11(2) of the *Employment Insurance Act* (Act) “that if a claimant is under a contract of service, but does not receive a full week’s pay, he does have a week of unemployment. This is the usual situation in cases of temporary lay-off: the contract of service continues, but there is an interruption of earnings, and the claimant is entitled to benefits if he otherwise qualifies for them. None of the exceptions in sections 29 to 33 of the Regulations applies to change the rule in subsection 11(2) in this case. The fact that a claimant is in a contract of service, that is, in insurable employment, does not by itself disentitle him to receive EI benefits.”⁹

[20] So, even though the Claimants were still under a contract of service with their employer, that doesn’t in itself mean that they weren’t unemployed. If they don’t receive their usual remuneration, they will be considered unemployed.

– **Usual remuneration for a full work week**

[21] The Regulations say that where an insured person is remunerated by the employer for a period of leave, the person is deemed to have worked in insurable employment for the number of hours that the person would have worked.¹⁰

[22] The Appellants’ representative says that the employer always shuts down for two weeks for the construction holidays. He describes this as a business shutdown, not a vacation period. So, the Claimants are unemployed, since they can’t work due to the business shutting down. He says that this period isn’t part of employees’ vacation time. He also says that they aren’t paid for this time off. The employer holds accrued vacation

⁸ See article 16.04 of the employer’s collective agreement.

⁹ See *TN v Canada Employment Insurance Commission*, 2019 SST 957.

¹⁰ See section 10 of the *Employment Insurance Regulations*.

pay in trust, and it is given to employees in July and December, in accordance with the collective agreement.

[23] In the Commission's view, the business shutdown is a paid and scheduled vacation period. So, it considers that the Claimants are deemed to have worked in insurable employment for the number of hours that they would normally have worked. This means that the employees would have received their usual remuneration for weeks of scheduled vacation, even though no duties were performed.

– **Vacation [pay] held in trust**

[24] First, I want to look at the issue of vacation [pay] held in trust.

[25] I consider that under the collective agreement, employees' vacation pay is set aside in trust each pay based on the percentage of vacation they are entitled to. Then, these moneys are paid out to employees in July and December each year.

[26] The Commission has confirmed that when the trust pays this vacation pay to employees, this money is considered savings, not earnings.¹¹

[27] The Commission has confirmed that this vacation pay isn't earnings at the time it is paid, since it is considered savings. In its view, the issue in this appeal is different because this is about counting the insurable hours associated with vacation periods, not about the allocation of earnings.¹²

[28] I agree that the allocation of earnings isn't at issue here. The vacation pay that the employees receive isn't earnings and is considered savings when the trust pays it out.

[29] In fact, the issue isn't whether the money that the trust pays to employees is earnings to be allocated within the meaning of the Regulations. The issue before me is

¹¹ See the entitlement division's letter that Service Canada issued on November 23, 2010 (GD3-83).

¹² See the Commission's arguments to the Tribunal (GD4-6 and GD4-7).

whether the Claimants receive their usual remuneration for the two-week shutdown during Quebec's construction holidays.

– **Did the Claimants receive their usual remuneration for the period from July 22, 2019, to August 2, 2019?**

[30] In my view, the Claimants didn't receive their usual remuneration for the period from July 22, 2019, to August 2, 2019. There is no indication that the Claimants were paid based on the earnings they would normally have received if the business hadn't shut down.

[31] First, the employer issued a Record of Employment (ROE) showing a last day paid of July 17, 2019. At that time, it also indicated a shortage of work.¹³ The employer would be acting in a manner contrary to the Act if it were to issue a ROE while the Claimants continue to receive earnings, since this ROE was issued because of the shortage of work related to the business shutdown.

[32] Second, under the agreement, vacation pay (the amount held in trust) is paid out twice a year, in January [*sic*] and July. This payment is made regardless of when the business shut downs.

[33] Lastly, even though I am of the view that the argument made by the Claimants' representative can't apply given how many years of seniority the Claimants have,¹⁴ I will repeat it all the same. The representative says that employees starting their jobs in April of this year would not have enough vacation days to receive their usual remuneration for the two-week shutdown.

[34] Because of this, I find that it hasn't been shown that the Claimants received their usual remuneration for the period from July 22, 2019, to August 2, 2019.

¹³ See the Record of Employment (GD3-15).

¹⁴ See the seniority list included with the collective agreement (GD3-64 to GD3-67).

– **Differed remuneration**

[35] I note that the Act says that a week or part of a week isn't a week of unemployment when:

- it is part of a period of leave from employment under an agreement between an employer and an employee
- [it] is part of a period of leave from employment during which the employee continues to be an employee of the employer
- the employee receives remuneration that was set aside, regardless of when it is paid¹⁵

[36] It isn't disputed that twice a year, the Claimants receive the savings accumulated in trust. The collective agreement does say that a payment is made [translation] "during the summer holidays [and] during the winter holidays."¹⁶

[37] Concerning the fact that the period of leave has to be part of an agreement, I note that the English version of the Act says "the employee [...] takes the period of leave" when referring to the period of leave.

[38] But, while there is a collective agreement and, as a result, an agreement for the two-week construction holiday shutdown, I would have difficulty in finding that the employee "takes" a period of leave at that time. This is because an employee would be unable to continue working when the business shuts down.

[39] In fact, the collective agreement says that [translation] "[t]he Employer will shut down the plant during the two (2) weeks of Quebec's summer construction holidays."¹⁷

[40] Also, despite the fact that the Claimant hasn't persuaded me that this period wasn't included in the number of vacation days he gets every year and that he

¹⁵ See section 11(3) of the Act.

¹⁶ See article 16.04 of the collective agreement.

¹⁷ See article 16.04 of the collective agreement (GD3-43).

confirmed this to be the case to the Commission,¹⁸ I note that the answers differ from one employee to another. So, on a careful reading of the collective agreement, I find that it neither confirms nor disproves this situation.

[41] In addition, I note that the employer has confirmed that employees don't request leave for this period.¹⁹ This means that they don't have a choice whether to work.

[42] So, I find, on a balance of probabilities, that it hasn't been shown that the Claimants received differed remuneration for the weeks from July 22, 2019, to August 2, 2019.

Conclusion

[43] I find that the Claimants were unemployed because, despite having a contract of service, they didn't receive their usual remuneration for the weeks from July 22, 2019, to August 2, 2019.

[44] This means that the appeal is allowed.

Charline Bourque
Member, General Division – Employment Insurance Section

¹⁸ See the Commission's Supplementary Record of Claim (GD3-75).

¹⁹ See the employer's answers in the questionnaire submitted by the Commission (GD3-72).

Appendix 1 – List of files/Claimants affected by this decision

GE-20-2106	A.	M.
GE-20-2010	B.	F.
GE-20-2013	B.	C.
GE-20-2109	B.	O.
GE-20-2167	B.	R.
GE-20-2125	I.	C.
GE-20-2110	I.	R.
GE-20-2158	B.	A.
GE-20-2172	B.	B.
GE-20-2211	O.	C.
GE-20-2067	B.	M.
GE-20-2064	B.	N.
GE-20-2133	B.	S.
GE-20-2223	O.	R.
GE-20-2035	B.	G.
GE-20-2065	R.	F.
GE-20-2136	B.	K.
GE-20-2135	C.	D.
GE-20-2138	C.	A.
GE-20-2079	H.	D.
GE-20-2140	L.	A.
GE-20-2213	L.	R.
GE-20-2146	C.	J.
GE-20--2130	O.	D.
GE-20-2162	C.	N.
GE-20-2169	D.	A.
GE-20--2113	D.	I.
GE-20-2134	D.	V.
GE-20-2152	D.	S.
GE-20-2179	D.	M.
GE-20-2156	D.	É.
GE-20-2107	D.	M.
GE-20-2141	U.	M.
GE-20-2212	F.	L.
GE-20-2219	F.	H.
GE-20-2137	F.	C.

GE-20-2170	G.	S.
GE-20-2066	G.	A.
GE-20-2173	G.	D.
GE-20-2132	G.	B.
GE-20-2128	I.	B.
GE-20-2073	G.	G.
GE-20-2041	G.	J.
GE-20-2174	G.	L.
GE-20-2240	G.	M.
GE-20-2183	I.	M.
GE-20-2120	I.	S.
GE-20-2184	R.	S.
GE-20-2022	O.	S.
GE-20-2124	G.	F.
GE-20-2121	O.	G.
GE-20-2175	G.	J.
GE-20-2119	G.	N.
GE-20-2214	L.	S.
GE-20-2012	L.	F.
GE-20-2151	A.	R.
GE-20-2221	A.	A.
GE-20-2147	V.	A.
GE-20-2139	L.	D.
GE-20-2117	L.	L.
GE-20-2070	L.	J.
GE-20-2037	L.	D.
GE-20-2178	L.	C.
GE-20-2148	O.	C.
GE-20-2116	M.	F.
GE-20-2036	M.	C.
GE-20-2111	M.	G.
GE-20-2242	M.	L.
GE-20-2144	M.	Y.
GE-20-2150	M.	J.
GE-20-2182	M.	R.
GE-20-2122	N.	G.
GE-20-2192	N.	P.

GE-20-2131	N.	S.
GE-20-2163	O.	S.
GE-20-2115	O.	M.
GE-20-2072	P.	D.
GE-20-2123	P.	J.
GE-20-2074	P.	M.
GE-20-2071	R.	M.
GE-20-2142	P.	D.
GE-20-2181	P.	C.
GE-20-2143	O.	C.
GE-20-2129	P.	A.
GE-20-2166	P.	G.
GE-20-2021	O.	J.
GE-20-2126	P.	L.
GE-20-2145	O.	M.
GE-20-2043	U.	M.
GE-20-2194	P.	P.
GE-20-2171	O.	P.
GE-20-2075	P.	S.
GE-20-2045	Q.	L.
GE-20-2160	B.	M.
GE-20-2159	R.	C.
GE-20-2127	R.	I.
GE-20-2149	S.	B.
GE-20-2077	S.	K.
GE-20-2014	T.	M.
GE-20-2176	N.	M.
GE-20-2161	T.	P.
GE-20-2165	T.	A.
GE-20-2112	T.	S.
GE-20-2076	U.	S.
GE-20-2168	V.	J.
GE-20-2118	V.	M.
GE-20-2069	V.	N.
GE-20-2177	E.	N.