Citation: *TG et al. v Canada Employment Insurance Commission*, 2024 SST 32

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Ian McRobbie
Respondent:	T. G.
Representative:	D. M.

Decision under appeal:	General Division decision dated March 31, 2023 (GE-21-2242)

Tribunal member:	Melanie Petrunia
Type of hearing:	Videoconference
Hearing date:	August 24, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	January 10, 2024
File number:	AD-23-386

Decision

[1] The appeal is allowed. The Claimant is not entitled to employment insurance (EI) benefits.

Overview

[2] The *Employment Insurance Act* (EI Act) says that claimants who are no longer working "because of a work stoppage attributable to a labour dispute" are not entitled to employment insurance (EI) benefits. This appeal is about the meaning of "work stoppage" as it is used in the EI Act.

[3] The Appellant, T. G. (Claimant) is a municipal employee and member of a union. She is the representative claimant in this group appeal. The Claimant and 73 of her co-workers applied for EI regular benefits after their employer imposed a lockout during a labour dispute.

[4] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to benefits because she was not working due to a work stoppage attributable to a labour dispute.

[5] The Claimant successfully appealed the Commission's decision to the Tribunal's General Division. The General Division found that there was a labour dispute, but that the Commission failed to prove there had been a work stoppage.

[6] The Commission is now appealing the General Division decision to the Appeal Division. It argues that the General Division misinterpreted the term "work stoppage" as it is used in the EI Act.

[7] I have decided that the General Division erred in its interpretation of a work stoppage under section 36 of the EI Act. I have also decided to give the decision that the General Division should have given, which is that the Claimant is not entitled to receive benefits.

Preliminary matters

[8] As mentioned above, the Claimant is the representative claimant in this group appeal. This appeal was joined with those of her 73 co-workers at the General Division. The parties agreed to provide evidence and arguments only in relation to her appeal and only one decision was issued that applied to all claimants. Similarly, the parties agreed that this appeal decision applies to all claimants in the group.

Issues

[9] The issues in this appeal are:

a) Did the General Division err in law in its interpretation of "work stoppage" under section 36 of the EI Act?

b) If so, how should the error be fixed?

Analysis

[10] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[1]

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- made an error of law in making its decision; or
- based its decision on an important mistake about the facts of the case.

[1] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[11] In this matter, the interpretation of a work stoppage in the context of the EI Act is a question of law.[2] This means that I have to decide whether the General Division's interpretation of "work stoppage" is right or wrong.

– The term 'work stoppage' under the legislation

[12] The law says that a person who loses or is unable to resume employment because of a work stoppage attributable to a labour dispute where they are employed is not entitled to benefits. The disentitlement ends when the work stoppage terminates, or the person becomes regularly employed somewhere else.

[13] The wording of the legislation is important to this appeal. The section reads:

> **Labour disputes**
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> 36 (1) Subject to the regulations, if a claimant loses an employment, or is unable to resume an employment, because of a work stoppage attributable to a labour dispute at the factory, workshop or other premises at which the claimant was employed, the claimant is not entitled to receive benefits until the earlier of
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> (a) the end of the work stoppage, and
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> (b) the day on which the claimant becomes regularly engaged elsewhere in insurable employment.[3]

[14] The EI Act defines "labour dispute" but not "work stoppage". The Employment Insurance Regulations (EI Regulations) address when a work stoppage terminates. This section states:

> **Termination of Work Stoppage**
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> **53 (1)** For the purposes of section 36 of the Act and subject to subsection (2), a stoppage of work at a factory, workshop or other premises is terminated when
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> **(a)** the work-force at the factory, workshop or other premises attains at least 85 per cent of its normal level; and

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[2] See CUB 15919 and *Canada (Attorney General) v Palmer,* 2008 CAF 372.

[3] *Employment Insurance Act*, section 36(1).

> **(b)** the level of activity in respect of the production of goods or services at the factory, workshop or other premises attains at least 85 per cent of its normal level.
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> **(2)** Where, in respect of a stoppage of work, an occurrence prevents the attainment of at least 85 per cent of the normal level of the work-force or activity in respect of the production of goods or services at a factory, workshop or other premises, the stoppage of work terminates
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> **(a)** if the occurrence is a discontinuance of business, a permanent restructuring of activity or an act of God, when the level of the work-force or of the activity attains at least 85 per cent of that normal level, with the normal level adjusted by taking that occurrence into account; and
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> **(b)** if the occurrence is a change in economic or market conditions or in technology, when
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> **(i)** there is a resumption of activity at the factory, workshop or other premises, and
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> **(ii)** the level of the work-force and of the activity attains at least 85 per cent of that normal level as adjusted by taking that occurrence into account.
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> **(3)** For the purposes of calculating the percentages referred to in subsections (1) and (2), no account shall be taken of exceptional or temporary measures taken by the employer before and during the stoppage of work for the purpose of offsetting the effects of the stoppage.

– Background

[15] The Claimant's union and the employer started negotiations for a new collective agreement on November 20, 2020.[4] Negotiations failed, and the employer applied for conciliation which was required under the provincial legislation governing bargaining for the worksite.[5]

[16] A conciliation report was signed on June 15, 2021, and the employer made a final offer on June 30, 2021. The General Division referred to this as Final Offer #1. The

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[4] General Division decision at para 18.
[5] General Division decision at para 20.

union responded with an offer marked Union #8. The employer came back with Final Offer #2.[6] The bargaining committee merged Union #8 and Final Offer #2 and presented it to the union membership for a vote.[7]

[17] The membership rejected the merged final offer prepared by the bargaining committee and a strike vote was taken. The membership voted 99% in favour of a strike.[8] The employer was advised of the rejection and the results of the strike vote on July 6, 2021.[9]

[18] On July 14, 2021, the employer wrote to the national union representative and the local union president advising that it would be locking out its employees at 5:00am the following day. The employer also posted the news of the lockout on its Facebook page that evening.[10]

– **The General Division decision**

[19] The General Division reviewed the chronology discussed above, in detail, and found that there was a labour dispute. It then considered whether there had been a work stoppage caused by this dispute.

[20] The General Division noted that the Commission has the burden of proving that there was a work stoppage.[11] Recognizing that the EI Act does not define “work stoppage”, the General Division considered section 53 of the EI Regulations concerning the termination of a work stoppage.[12]

[21] The Claimant had argued that there was no work stoppage because the employer continued to offer at least 85% of its normal services to the town.[13] It

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[6] General Division decision at para 22.
[7] General Division decision at para 23.
[8] General Division decision at para 23.
[9] General Division decision at para 24.
[10] General Division decision at para 25.
[11] General Division decision at para 32, citing a Canada Umpire Benefit (CUB) decision, CUB 15424.
[12] General Division decision at para 33.
[13] General Division decision at para 35.

continued to offer services using student employees, private contractors, special events staff, and existing management.

[22] The Commission argued that a work stoppage is not just a drop in production or level of services, but a disruption in the employer's normal course of business.[14] It said that the EI Regulations concerning the termination of a work stoppage provide that no account is to be taken of exceptional or temporary measures when calculating whether the work-force has attained 85% of its normal level, which would include the non-union staff and contracted workers used by the employer during the lockout.[15]

[23] The General Division found that the criteria used for determining when a work stoppage has ended, in the EI Regulations, is not relevant to whether a work stoppage has occurred or is ongoing. It found that it is required to consider all of the circumstances to determine whether a work stoppage has occurred, not just the degree of reduction in production.[16]

[24] Further to the General Division's determination on the relevance of the EI Regulations, it also found that exceptional and temporary measures are only excluded from consideration when looking at whether the work stoppage has terminated.[17] It stated that "work stoppage" refers to the employer's operations, not the employee's labour.[18]

[25] The General Division reviewed case law from the Federal Court of Appeal and Canadian Umpire Benefit (CUB) decisions. CUBs are decisions of the Umpire, a Federal Court Judge, which was the second level of appeal under the previous administrative appeal system for Employment Insurance matters. As the General

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[14] General Division decision at para 69.
[15] General Division decision at para 71.
[16] General Division decision at para 107.
[17] General Division decision at para 108.
[18] General Division decision at para 109, citing CUB 16553.

Division noted, it is not required to follow CUBs but may be persuaded by the reasoning.[19]

[26] The General Division found that these decisions support the principle that it is the level of an employer's operations that determine whether a work stoppage has occurred or is ongoing. It stated that the means through which an employer maintains operations is not determinative. There is no work stoppage where there is no interruption or appreciable reduction in operations.[20]

[27] The General Division found that there was no work stoppage at the Claimant's workplace because the operations of the municipality continued with little disruption from the lockout.[21]

[28] The General Division reviewed the evidence and testimony of the Claimant and others involved in the labour dispute. The parties do not take issue with the General Division's factual findings.

[29] The General Division made the following relevant factual findings in support of its conclusion that the employer's operations continued largely uninterrupted by the lockout:

a) The employer advised the public that it had taken measures to ensure the least disruption possible.

b) The witness testimony confirmed that the municipal services continued.

c) There was no disruption in recreational activities.

d) Capital works projects undertaken prior to the lockout continued, with some being competed during the lockout.

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[19] General Division decision at footnote 34.
[20] General Division decision at para 114.
[21] General Division decision at para 115.

e) The municipality continued to collect taxes and issue permits, but over the phone rather than in person.

f) Garbage collection continued without interruption, provided by a contractor arranged before the lockout.[22]

[30] The General Division noted that the employer discontinued fire dispatch services to a neighbouring municipality.[23] It found that 25% of the employer's workforce was not unionized and continued providing services, along with student employees during the summer months. The employer also relied on non-unionized event staff. Finally, the General Division stated that the employer reported overall savings during the lockout.[24]

– The Commission's appeal

[31] The Commission argues that the General Division made an error of law when it found that there was no work stoppage because there was no interruption or appreciable reduction in operations. It says that the General Division ignored the context and purpose of section 36 of the EI Act in its interpretation of "work stoppage."

[32] The Commission argues that the General Division failed to consider whether its interpretation of "work stoppage" aligned with the legislative purpose of preserving the neutrality of the EI program in labour disputes.

[33] According to the Commission, "work stoppage" should be broadly interpreted as it was intended to apply to situations where the employees and employer disagree about conditions of employment and the employee ceases to work as a result. The Commission relies on the following passage from the Supreme Court of Canada decision in *Caron*:

> […] a work stoppage due to a labour dispute always results from the fact that one or other of the parties to a contract of service does not wish to perform it. If it is the employer who feels this way, the stoppage is called a lockout; if it is the employees who refuse

[22] General Division decision at para 115.
[23] General Division decision at para 116.
[24] General Division decision at para 117.

> to provide their services, it is called a strike. In either case it is the lack of intent which is the essence of the work stoppage.[25]

[34] The Commission also argues that the General Division ignored the context provided by the EI Regulations when interpreting "work stoppage". It says that the EI Regulations speak directly to the issue of when a work stoppage terminates, but also provide guidance as to when a work stoppage occurs.

[35] The General Division was required to consider the text, context, and purpose of section 36 of the EI Act when it interpreted "work stoppage." The Commission argues that it looked only at the text and ignored the context and purpose.

[36] The Commission also argues that the General Division misinterpreted case law. It says that the General Division relied on an erroneous interpretation of the Federal Court of Appeal decision in *Attorney General v Simoneau* when it found that temporary or extraordinary measures are only taken into consideration when determining if a work stoppage has terminated.[26]

[37] The Commission points to the decision in CUB 13355 in which the Umpire relied on *Simoneau* and stated:

> There remains the question as to whether this termination of work was a "work stoppage". Clearly it was a cessation of work by the 1,100 union members. Without venturing any broad definitions of "work stoppage" it seems clear that a work stoppage is deemed to have occurred where a plant is either closed down as a result of the termination of work by some or all of its usual employees or where production is maintained only by extraordinary means. The mere maintenance of production by extraordinary means does not avoid a "work stoppage" within the meaning of the Act: see *A.G. of Canada v. Simoneau* [1982] 1 F.C. 469 (C.A.).[27]

[38] The General Division cited CUB 69098C in its decision but, the Commission argues, it did not follow the Umpire's guidance in that case. The Umpire had found that a work stoppage occurred. He states that temporary and extraordinary measures taken

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[25] *Caron v Canada (Employment and Immigration Commission)*, 1991 CanLII 108 (SCC) [*Caron*].
[26] See AD3-8, citing *Attorney General of Canada v Simoneau*, 1981 CanLII 4703 (FCA) [*Simoneau*].
[27] *Re: Wager*, CUB 13355.

before and during the stoppage could not be taken into account when determining whether service levels had fallen below 85%.[28]

[39] The Claimant argues that the General Division did not err in its interpretation of "work stoppage". She relies on the principle of neutrality as set out by the Supreme Court of Canada in *Hills v Canada (Attorney General)*[29] and says that employees who are the innocent victims of a labour dispute should not be coerced into accepting unfavourable working conditions for fear of not collecting benefits.[30]

[40] The Claimant says that the *Caron* decision concerned different facts and the existence of a work stoppage was not at issue, therefore the principles from that case are of limited relevance.

[41] The Claimant argues that the employer's normal course of business was not disrupted by the labour dispute. She says that the facts prove the employer did not suffer and continued with business as usual the same day as the lockout.

[42] The Claimant maintains that the General Division had all of the facts and submissions before it. It was open to the General Division to interpret "work stoppage" as it did, and it did not err when it applied its factual findings to this interpretation.

The General Division misinterpreted "work stoppage" in section 36 of the EI Act

[43] The General Division's interpretation of "work stoppage" is guided by the principles it took from case law. However, I find that the General Division misinterpreted the guidance from some of the cases it relied on and failed to address those cases which contradicted its interpretation.

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[28] See CUB 69098C.
[29] See *Hills v Canada (Attorney General)*, 1988 CanLII 67 (SCC) [*Hills*].
[30] See AD5-8.

[44] The General Division found that the criteria, set out in the EI Regulations, for determining when a work stoppage has ended, are not applicable to determining whether the work stoppage started or is ongoing.

[45] The General Division relied on the Federal Court of Appeal decision in *Attorney General of Canada v Daigneault*.[31] In that case, the Umpire had found that a business continued to function and that production continued at more than 85% of normal. The Federal Court of Appeal found that the Umpire was wrong in law in its determination that there was no work stoppage. The Court stated:

> When, as here, all the employees in a bargaining unit have in fact ceased working, that cessation of work may or may not constitute a work stoppage within the meaning of s 44, depending on the circumstances; but the fact that the cessation of work is reflected in a decrease in production of the business as a whole of less than 15 per cent is not a sufficient reason for concluding that there was not a work stoppage within the meaning of s 44.

[46] Based on the above finding by the Federal Court of Appeal, the General Division found that the overall circumstances must be considered when determining whether a work stoppage has occurred, not just whether production was reduced by more than 15%.[32]

[47] The General Division also relied on this statement from *Daigneault* for its finding that section 53(3) of the EI Regulations only applies when determining whether a work stoppage has ended. It found that the wording of section 53(3) makes it clear that the use of temporary or extraordinary measures is excluded from the calculation of 85% of production levels or work force when deciding whether a work stoppage has ended.

[48] The General Division found that the EI Regulations are not applicable to a determination of whether a work stoppage has started or is ongoing.

[49] I find that the *Daigneault* decision does not support the General Division's conclusion that section 53 of the EI Regulations does not apply when determining

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[31] *Attorney General of Canada v Daigneault*, 1979 CanLII 4132 (FCA) [*Daigneault*].
[32] General Division decision at para 107.

whether a work stoppage has occurred. The Court in that case found that it was an error of law to find there was no work stoppage because the level of production remained above 85%.

[50] The *Daigneault* decision pre-dates section 53 of the EI Regulations. The Courts and Umpires generally took the approach that a work stoppage was terminated when production levels or the number of employees reached 85% of the normal level. This approach was codified, to a certain extent, with the introduction of what is now section 53 of the EI Regulations.

[51] The *Daigneault* decision does not support the General Division's finding that the use of temporary or extraordinary measures is excluded from the calculation of 85% of production levels or work force only when deciding whether a work stoppage has ended. The reasons in that decision are brief and simply state that maintaining a production level above 85% doesn't necessarily mean that there has not been a work stoppage.

[52] I find that the General Division erred in its interpretation of this decision when it found that section 53 of the EI Regulations is not applicable. The decision does not speak to the relevance of temporary or extraordinary measures when deciding whether a work stoppage has occurred.

[53] The General Division also cited the Federal Court of Appeal decision in *Simoneau* as support for the proposition that it is only when determining whether a work stoppage has ended that temporary or extraordinary measures undertaken by an employer are considered.[33] Again, I find that this is a misinterpretation of *Simoneau*.

[54] *Simoneau* concerned a strike by the employees of a radio station. The Umpire found that the work stoppage terminated when the employer was broadcasting "almost

[33] See *Simoneau*.

normal" programming. It was able to resume this level of broadcasting using a computer which the Umpire referred to as "temporary and exceptional measures."[34]

[55] The Federal Court of Appeal found that the Umpire had erred in law. The Court referred the matter back to the Umpire, directing that the matter be decided:

> …on the assumption that the fact that an employer has managed to continue or resume operations does not mean that the work stoppage by his employees has terminated. (emphasis added)

[56] The circumstances in *Simoneau* concerned whether or not a work stoppage had ended. There was no disagreement in that case about the fact that there had been a work stoppage to begin with.

[57] This does not mean, however, that the Federal Court of Appeal found that temporary or extraordinary measures by an employer are only relevant when considering whether a work stoppage has ended. As indicated by the underlined statement, the Court clearly referred to an employer who manages to continue, not just later resume, operations. Again, this decision pre-dates section 53 of the EI Regulations.

[58] Several CUBs have relied on the *Simoneau* decision for the proposition that temporary or extraordinary measures are relevant to determining whether a work stoppage has occurred.

[59] In CUB 19727, Umpire Strayer cited *Simoneau* when he stated the following:

> In essence, the claimant argues that because management brought in substitute workers to keep the cinemas going, including his cinema, during the lockout means that there was no work stoppage. However, the jurisprudence is again clear that if work is maintained through extraordinary means and not by the return of the majority of the previous workers, then there is a "work stoppage".[35]

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[34] See *Simoneau* at p. 470.
[35] See CUB 19727 at page 2, footnote 1.

[60] In another decision from Umpire Strayer in CUB 13355, he also relied on *Simoneau* when he stated:

> Without venturing any broad definitions of "work stoppage" it seems clear that a work stoppage is deemed to have occurred where a plant is either closed down as a result of the termination of work by some or all of its usual employees or where production is maintained only by extraordinary means. The mere maintenance of production by extraordinary means does not avoid a "work stoppage" within the meaning of the Act: see *A.G. of Canada v. Simoneau* [1982] 1 F.C. 469 (C.A.).[36]

[61] CUB 15919 considered a representative appeal involving 87 workers who had been locked out by the employer. The employer maintained services using supervisor overtime and outside contractors. The Board of Referees found that there was no work stoppage.

[62] On appeal, Umpire Jerome relied on the definition of work stoppage in CUB 13355 and found that there was a work stoppage because extraordinary measures were taken to maintain pre-stoppage production levels.[37]

[63] In CUB 15424, Umpire Dube relied on *Simoneau* when he found that “a stoppage of work takes place if the employer must resort to exceptional measures to continue his activities.”[38]

[64] It is clear that the General Division erred in its interpretation of *Simoneau* when it found that temporary and extraordinary measures taken by an employer are only relevant to determining when a work stoppage ends.

[65] Finally, the General Division referred to CUB 69098C noting that the Umpire in that case found that a work stoppage had occurred and, in accordance with section 53(3) of the EI Regulations, no account could be taken of extraordinary or temporary measures taken by the employer.

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[36] See CUB 13355 at p. 2.
[37] See CUB 15919 at p. 1.
[38] See CUB 15424 at p. 2.

[66] Despite this reference to CUB 69098C, the General Division concluded:

> I am persuaded by the principles in the cited CUBs that it is the level of an employer's operations that determines whether a work stoppage has occurred or is ongoing. How the level of operations is achieved, whether achieved through temporary or extraordinary measures, is not determinative of the matter. In other words, regardless of the means used to maintain operations, where there is no interruption or appreciable reduction in operations there is no work stoppage.

[67] The General Division found that the employer's operations continued largely uninterrupted by the lockout. It did not make a finding as to whether this was due to extraordinary or temporary measures by the employer, but clearly found that it was irrelevant how the continuity was achieved.

[68] I find that the General Division based its determination of what constitutes a work stoppage on a misinterpretation of the case law.

[69] I also find that the General Division erred in its interpretation of "work stoppage". When interpreting legislation, the courts have said that the Tribunal must consider the text, context, and purpose of the legislation.[39] The General Division is not required to engage in a formal exercise of statutory interpretation, however, its interpretation must be consistent with the text, context and purpose.

The meaning of work stoppage in section 36

[70] The term "work stoppage" is not defined in the legislation. In the many years that section 36 of the EI Act and its predecessors have existed in the legislation, there has also not been a clear definition of "work stoppage" provided in the jurisprudence.

[71] The Federal Court of Appeal, in *Canada (Attorney General) v Palmer* [appeal of CUB 69098], returned the matter to the Chief Umpire, noting that the previous decision

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[39] See *Canada (Minister of Citizenship and Immigration)* v *Vavilov*, 2019 SCC 65 (*Vavilov*) at paragraph 121 where the Court held that "the administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue."

failed to address "the important issue of what constitutes a work stoppage, as a matter of law."[40]

[72] CUB 69098C followed the decision of the Federal Court of Appeal. In its decision, the Umpire stated:

> It was suggested by the Union I was required to approach and define the term 'work stoppage' to meet the directive of the Federal Court of Appeal. I am not satisfied the Court couched its decision in such a way. I am certainly required to make a finding in relation to work stoppage but I do not read the judgment of the Court as requiring I re-define the word 'work stoppage'. While true the expression is not defined in the Act or Regulations, there may be good reasons for the lack of a definition.
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> […]
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> I am satisfied the expression is context driven. I prefer to rely on what I still consider to be sound case law of the Federal Court of Appeal.
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> […]
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> There was a work stoppage, as set out in Caron, supra. It occurred when one of the parties failed to comply with its obligation. This is the essence of a work stoppage, attributable to a labour dispute. To embark on a new definition of 'work stoppage' could prove impractical.[41]

[73] I agree that a strict definition of "work stoppage" could be impractical and that the determination of whether or not a work stoppage has occurred will always be context driven. While the case law has not offered a clear definition, the following guidance is found in the jurisprudence:

- There is a work stoppage when work is maintained by extraordinary means and not by the return of the majority of workers.[42]

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[40] See *Canada (Attorney General) v Palmer,* 2008 CAF 372.
[41] See CUB 69098C at p. 10. The Umpire referenced the FCA decision in *Caron* here.
[42] See CUB 19727.

- A work stoppage can be the result of a strike or a lockout.[43]

- It is a question of intent and a result of one the parties of the contract refusing to perform.[44]

- Work stoppage refers to an employer's operations and not an individual's labour.[45]

- A work stoppage is deemed to have occurred when there has been a termination of work by some or all employees and production is only maintained by extraordinary means.[46]

- A work stoppage means that the normal operations of an employer's business cease.[47]

- A stoppage of work can be caused by the employer, employee or union.[48]

[74] I take from the case law that a work stoppage can result from a strike or lockout and occurs when the normal operations of an employer's business cease. When considering whether the normal operations have ceased, temporary or extraordinary measures by an employer to maintain services are not to be taken into account. Whether or not there has been a work stoppage is context driven.

[75] The intention of the parties is a key factor in determining whether a "work stoppage" has occurred or is ongoing. As the majority in the Federal Court of Appeal decision in *Caron* found:

> (…) what essentially characterizes the section 44 work stoppage and distinguishes it from the claimant's loss of employment is the aspect of "intent": a work stoppage due to a labour dispute always results from the fact that one or other of the parties to a contract of

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[43] See *Caron* and CUB 13355.
[44] See *Caron.*
[45] See CUB16553.
[46] See CUB 13355.
[47] *Létourneau v Canada Employment and Immigration Commission,* [1986] 2 F.C. 82.
[48] See CUB 17681.

> service does not wish to perform it. If it is the employer who feels this way, the stoppage is called a lockout; if it is the employees who refuse to provide their services, it is called a strike. In either case it is the lack of intent which is the essence of the work stoppage.[49]

[76] When the employees intentionally decide to stop working by going on strike, there has been a work stoppage. When the employer intentionally decides to prevent the employees from working by imposing a lockout, there has also been a work stoppage. When the parties resolve their dispute and end the strike or lockout, the work stoppage terminates even though not all employees may be able to return at once.

[77] This interpretation of "work stoppage" in section 36 is consistent with the text, context and purpose of the provision.

– **The text is clear**

[78] The language of section 36 of the EI Act, as set out earlier in this decision, is clear. There is nothing in the text of the section to suggest deviating from the ordinary meaning of the words.

> **Labour disputes**
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> 36 (1) Subject to the regulations, if a claimant loses an employment, or is unable to resume an employment, because of a work stoppage attributable to a labour dispute at the factory, workshop or other premises at which the claimant was employed, the claimant is not entitled to receive benefits until the earlier of
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> (a) the end of the work stoppage, and
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> (b) the day on which the claimant becomes regularly engaged elsewhere in insurable employment.[50]

[79] The words "work stoppage" in this section imply a cessation, or stopping, of work at the place of employment, that leads to the loss of employment. This cessation of work must be attributable to a labour dispute at the claimant's workplace.

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[49] See *Caron v Canada (Employment and Immigration Commission)*, 1988 CanLII 9429 (FCA) at p. 639.
[50] *Employment Insurance Act*, section 36(1).

[80] I find that the text of section 36 supports considering the EI Regulations in the interpretation of “work stoppage” and that section 53 of the EI Regulations provides important context. The section states, “subject to the regulations” and provides that a disentitlement will end when the work stoppage terminates. Similarly, section 53 of the EI Regulations references section 36 of the EI Act, showing that the two sections work together.

– **The context suggests excluding consideration of temporary or extraordinary measures**

[81] Section 53 of the EI Regulations sets out when a “work stoppage” has terminated for the purposes of section 36. Again, the text is important and I will repeat it here.

> **Termination of Work Stoppage**
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> 53 (1) For the purposes of section 36 of the Act and subject to subsection (2), a stoppage of work at a factory, workshop or other premises is terminated when
>
> (a) the work-force at the factory, workshop or other premises attains at least 85 per cent of its normal level; and
>
> (b) the level of activity in respect of the production of goods or services at the factory, workshop or other premises attains at least 85 per cent of its normal level.
>
> (2) Where, in respect of a stoppage of work, an occurrence prevents the attainment of at least 85 per cent of the normal level of the work-force or activity in respect of the production of goods or services at a factory, workshop or other premises, the stoppage of work terminates
>
> (a) if the occurrence is a discontinuance of business, a permanent restructuring of activity or an act of God, when the level of the work-force or of the activity attains at least 85 per cent of that normal level, with the normal level adjusted by taking that occurrence into account; and
>
> (b) if the occurrence is a change in economic or market conditions or in technology, when
>
> (i) there is a resumption of activity at the factory, workshop or other premises, and

> (ii) the level of the work-force and of the activity attains at least 85 per cent of that normal level as adjusted by taking that occurrence into account.
>
> (3) For the purposes of calculating the percentages referred to in subsections (1) and (2), no account shall be taken of exceptional or temporary measures taken by the employer before and during the stoppage of work for the purpose of offsetting the effects of the stoppage.

[82] The section states “for the purposes of section 36 of the Act” which suggests it is applicable to the entire section, not just section 36(1)(a). A key question in this appeal is whether section 53(3) is relevant only when determining whether a work stoppage has ended.

[83] The section makes it clear that exceptional or temporary measures taken by an employer before and during a work stoppage are not to be taken into account when calculating whether the workforce and level of activity have attained 85% of normal levels.

[84] It is illogical to suggest that such measures taken by an employer before a work stoppage to offset the effects of the stoppage, are not to be taken into account when determining whether the stoppage has terminated but can be taken into account when deciding whether the stoppage started in the first place.

[85] The illogic of this interpretation can be illustrated in the following example:

- Scenario 1 - A workplace experiences a clear reduction in workforce levels and production as the result of a strike or lockout, thus triggering a work stoppage. The employer puts into place temporary and exceptional measures to maintain services one week later which continue until the end of the labour dispute. It is only through these temporary and exceptional measures that the work continues.

- Scenario 2 – The same workplace, in anticipation or a strike or lockout, puts the same temporary and exceptional measures into place one week earlier. There is no reduction in workforce levels or production, only because of the temporary measures. These continue until the end of the labour dispute.

[86] If section 53(3) of the EI Regulations only applied to a determination of whether the stoppage terminated, under scenario 1 the work stoppage would not have terminated until the end of the labour dispute. Employees would be disentitled to benefits for the duration of the labour dispute.

[87] Under scenario 2, if section 53(3) was not applicable when determining whether the stoppage ever began, there would be no work stoppage and therefore no disentitlement for the duration of the labour dispute. There could be no termination of a work stoppage that never began. I find that this interpretation is inconsistent with the context and the legislative scheme.

[88] I find that the context supports excluding temporary and exceptional measures when determining whether there has been a reduction of the work force or production level, and therefore a work stoppage.

– **Purpose**

[89] The purpose of section 36 has been stated by the Supreme Court of Canada and affirmed by the Federal Court of Appeal: it is to maintain neutrality in labour disputes and avoid having an employer indirectly fund its employees during a labour dispute.[51] This purpose has been criticized, but no other purpose of the section has been suggested.

[90] The Claimant relies on the *Hills* decision in support of her position that a disentitlement in her situation punishes innocent victims of a labour dispute. She says that the Court in that case noted that such an approach could coerce employees into accepting unfavourable working conditions for fearing of being locked out and denied benefits.

[91] In *Hills*, the majority reviewed the history of the provision and noted that the original purpose "does not today enjoy much favour."[52] The *Hills* decision primarily concerned what was then section 44(2)(a) of the Act, now section 36(4). The section

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[51] See *Canada (Attorney General) v Valois*, [1986] 2 S.C.R. 439, *Hills* at p.537 and *Caron* at p. 640.
[52] See *Hills* at p. 539.

provides that the disentitlement does not apply when a claimant can prove that they are "not participating, financing or directly interested in" the labour dispute that caused the work stoppage.

[92] In *Hills*, the claimant belonged to a union and was laid off as the result of a strike by employees represented by a different local of the same union. The claimant did not receive strike pay but part of the dues he was required to pay to his union went to the pay for the striking members of the other local.

[93] The claimant in *Hills* was disentitled to benefits on the basis of section 44 (now section 36) of the Act and the Commission decided that he was unable to prove he was not financing the labour dispute. The Supreme Court of Canada considered whether the mandatory payment of union dues diverted to a strike fund amounts to financing a labour dispute.

[94] The majority found that disentitling the claimant, who did not receive strike pay, participate in the strike or stand to benefit from it, was inconsistent with the stated purpose of government neutrality.[53] However, Justice L'Heureux-Dube stated:

> One cannot quarrel with the fact that an active involvement in a labour dispute at the place of employment or a free and voluntary contribution by a claimant to a strike fund which supports a dispute at the place of employment would trigger the labour dispute disqualification.[54]

[95] I find that the comments of the Supreme Court of Canada regarding the purpose of maintaining neutrality are to be read in light of the focus in that case on the re-entitling provision in then section 44(2)(a). The comment above demonstrates the Court was not finding that those claimants who are directly involved in the labour dispute might not be subject to disentitlement.

[96] I find that it would be contrary to the intention of maintaining government neutrality in labour disputes if the Commission, or Tribunal, were required to determine

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[53] See *Hills* at p. 548.
[54] See *Hills* at p. 552.

whether a claimant who is locked-out or on strike is none-the-less an innocent victim of a labour dispute. This would involve weighing in on the merits of the parties' positions in a labour dispute which would not be maintaining neutrality.

[97] I find that the purpose of the section is maintained by excluding temporary and exceptional measures when determining whether there has been a work stoppage. These factors are clearly not to be taken into consideration when determining whether the work stoppage has terminated, and it is consistent to disregard them when deciding if the stoppage occurred at all.

[98] The General Division's interpretation of a "work stoppage" as an interruption or appreciable reduction in an employer's operations, regardless of the means used to maintain operations[55], is not consistent with the text, context or purpose of section 36 of the EI Act.

Remedy

[99] The parties agree that I should give the decision the General Division should have given, if I find that the General Division erred.[56]

[100] I agree. I find that this is an appropriate case in which to substitute my own decision. The facts are not in dispute and the parties had an opportunity to fully present their evidence before the General Division.

There was a work stoppage attributable to a labour dispute

[101] The Commission must show that the Claimant is not entitled to regular benefits by establishing the following:

(1) There was a labour dispute at the premises in question;

(2) The labour dispute caused a work stoppage there; and

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[55] General Division decision at para 114.

[56] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16 to 18.

(3) The claimant lost, or was unable to resume, their employment by reason of the work stoppage.[57]

[102] I find that the Commission has proven that there was a work stoppage caused by the labour dispute.

[103] The facts show that one of the parties, the employer, had the requisite lack of intent to fulfil the terms of its contract with the employees when it imposed the lockout. In its press release titled, “Town of Grand Falls-Windsor initiates work stoppage of unionized work force,” the employer explained that it had initiated job action and placed the employees on lock out status.[58]

[104] Following the lockout, the employees set up picket lines at the Town Hall, Public Works Depot, Parks and Recreation Depot and two arenas.[59] All union members on strike received strike pay.[60]

[105] There were 90 unionized employees in the bargaining unit that were locked out by the employer and 25 staff members excluded from the bargaining unit, comprised mostly of management positions.[61] There were also 25 seasonal employees who worked full-time from May to October.[62]

[106] The employer took the following steps in anticipation of a strike or lockout:

- Issued an RFP for electrical maintenance services “in preparation for a possible work stoppage”.[63]

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[57] See *White v Canada,* [1994] 2 FC 233.
[58] GD3-35.
[59] GD3-29.
[60] GD3-30.
[61] GD3-19.
[62] GD3-23.
[63] GD26-422 to 426.

- Prepared contracts for contractors to do the work of the unionized employees.[64]
- Had contractors onsite the day of the lockout.[65]
- Trained middle-managers and non-union employees to do dispatch relief.[66]
- Informed a nearby municipality that it would no longer be providing fire dispatch services.[67]
- Management asked for a list of duties for bargaining unit positions and learned how to do the work of these positions.[68]

[107] The employer in this case maintained services at or near the level it had prior to the lockout. This was done through use of management, contract workers, seasonal and non-union event staff. Approximately 75% of the municipal employees were part of the union and subject to the lockout.

[108] The employer contracted out garbage collection and some additional work ordinarily completed by members of the bargaining unit.[69] A contractor completed asphalt testing normally done by employees in the bargaining unit.[70] The Services Agreement provided that the either party could terminate the agreement for any reason.[71]

[109] I find that the steps taken by the employer, to have contractors and managers perform the job duties of employees who were locked out, were temporary and

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[64] GD26-400.
[65] GD26-488.
[66] GD26-488.
[67] GD26-489.
[68] GD26-489.
[69] See costs of work stoppage at GD26-430.
[70] See General Division decision at para 58 summarizing the evidence of TP.
[71] GD26-408.

therefore are not to be taken into account when determining whether there was a reduction in the work force and service levels.

[110] There was nothing in the agreement with contractors to suggest that the provision of services was intended to be permanent. Similarly, management performing the job duties of the locked-out employees is clearly a temporary measure.

[111] The evidence suggests that seasonal and casual employees were a part of the employer's ordinary work force.[72] The use of these workers during the lockout was not a temporary or exceptional measure.

[112] When the temporary measures are excluded from consideration, it is clear that the employer's normal course of business was disrupted. Due to the lockout, the regular work force was reduced by approximately 75%. If the additional seasonal employees are factored in, the workforce during the lockout was still well below 85% of normal.

[113] The employer's normal course of business was to have municipal services primarily provided by the unionized work force. While many of these services continued to be provided, it was temporarily through the use of managers and contractors.

[114] At the hearing, the Claimant argued that the employer continued to maintain operations through the use of managers, contractors, casual and seasonal employees until the end of the labour dispute and the return of the unionized workforce. This is consistent with the evidence.

[115] I find that the work stoppage terminated at the conclusion of the labour dispute when the unionized employees returned to the workplace. I see no evidence that the work stoppage terminated at any other time.

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[72] GD3-23.

Conclusion

[116] The appeal is allowed. The Claimant lost her employment as the result of a work stoppage attributable to a labour dispute and is not entitled to benefits.

Melanie Petrunia
Member, Appeal Division