Citation: *TG et al. v Canada Employment Insurance Commission*, 2023 SST 1871

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Representative Appellant (GE-22-2242)
Representative:	D. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Ian McRobbie

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (434542) dated October 4, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	In person
Hearing date:	January 25 and 26, 2023
Hearing participants:	Representative Appellant Appellant's representative Respondent's representative
Decision date:	March 31, 2023
File number:	GA-1-72 (filed in GE-21-2170)

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] While the Canada Employment Insurance Commission (Commission) has proven there was a labour dispute it has not proven there was a work stoppage. This means the Appellant is not disentitled from receiving Employment Insurance (EI) benefits.

Overview

[3] The Appellant, a member of union, is one of 74 coworkers appealing the Commission's decision they are not entitled to employment insurance (EI) benefits. She was working for a municipality when she was locked out by her employer on July 15, 2021. The Appellant's union and the employer started negotiating in November 2020 for the renewal of a Collective Agreement due to expire on December 31, 2020.

[4] The Commission determined the Appellant was not working due to a work stoppage attributable to a labour dispute. So, it disentitled the Appellant from receiving employment insurance (EI) benefits for this reason.

[5] The Appellant disagrees. She says she lost her employment in anticipation of a work stoppage. The Appellant says the employer took steps prior to the lockout to ensure its operations would continue as usual and the employer did continue its operations without interruption.

[6] The 74 appeals were joined together as a group appeal under the *Social Security Tribunal Regulations*.[1] The parties agreed the appeals of the 74 members of the group appeal would be heard by way of a representative appeal.[2]

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[1] Both section 13 of the *Social Security Tribunal Regulations* (in effect until December 5, 2022) and section 35 of the *Social Security Tribunal Rules of Procedure* (in effect as of December 5, 2022) say I may deal with two or more appeals together if the appeals raise a common question and joining the appeals is not unfair to the parties.

[2] The parties to the appeal are the Commission and the Appellants. This agreement was reached during pre-hearing conferences I held with the parties.

[7] The representative for the members of the group chose this appeal (GE-22-2242) to be heard as the representative appeal for the group. The parties provided evidence and arguments only in relation to this appeal, and that evidence and argument is considered to be the same for all appellants. I am only issuing one decision. This decision applies to all of the appellants in the group.[3]

Matters I considered first

– The hearing was held in person

[8] The hearing for this appeal was held in person over two days, January 25 and 26, 2023. I decided to hold the hearing in person because both parties to the appeal advised they would be attending the hearing and witnesses would be called to provide evidence.

– The employer is not an added party to the appeal

[9] Sometimes the Tribunal sends an appellant's former employer a letter asking if they want to be added as a party to an appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[10] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to these appeals, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Issue

[11] Is the Appellant disentitled from receiving EI benefits because she lost her employment or was unable to resume her employment due to a work stoppage attributable to a labor dispute?

[3] The Appellants are identified by their Tribunal file number as listed in Appendix A attached to this decision.

Analysis

[12] The law says you cannot receive EI benefits if you are not working because of a work stoppage due to a labour dispute at the place you were employed.[4]

[13] The Commission has to demonstrate a claimant is disentitled to benefits.[5]

[14] There are some exceptions in law that set out the reasons where a disentitlement can be suspended or would not apply.[6]

[15] To decide this appeal, I must first decide if there was a labour dispute. If there was a labour dispute, then I must decide whether there was a work stoppage attributable to that labour dispute and whether the Appellant was not working due to the work stoppage.[7]

– **Was there a labour dispute?**

[16] Yes, there was a labour dispute. The reasons for my finding follow.

[17] A "labour dispute" is defined by the EI Act as a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons.[8]

[18] The Appellant testified that the union and the employer started negotiations for a new Collective Agreement on November 20, 2020. The municipality hired an external consultant to conduct negotiations on their behalf.

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[4] Section 36(1) of the *Employment Insurance Act* (EI Act). This decision paraphrases the legislation for plain language purposes.
[5] *Canada (Attorney General) v Benedetti*, 2009 FCA 283. This is how I refer to the court's decisions that apply to the circumstances of this appeal.
[6] Section 36(3) and section 36(4) of the EI Act.
[7] It is an error to ask whether a claimant lost their employment by reason of a labour dispute. The decision-maker must ask whether the claimant lost their employment by reason of a stoppage of work attributable to a labour dispute. (*White v Canada,* [1994] 2 FC 233)
[8] Section 2(1) of the EI Act.

[19] B. B.,[9] affirmed to give evidence, testified he was on the union bargaining committee. He attended the negotiations. At the first meeting, the employer made opening remarks to the effect the Collective Agreement was very good but now it was time to "take it back." B. B. said negotiations went on for a long time but there weren't many meetings. B. B. testified the union's National Representative told the union bargaining committee the employer contacted the provincial department of labour's conciliator to see when the conciliator would be available. The municipality applied for conciliation.

[20] The Appellant clarified that the provincial legislation governing collective bargaining for their work site required a conciliation process. Once the conciliation process was complete, the conciliation officer would write a conciliation report for the minister. When the minister signed the report, seven days had to pass before the employees could strike or the employer could lock out.

[21] The Appellant testified the minister signed the conciliation report on June 15, 2021. The employer made Final Offer #1 on June 30, 2021.[10] The union asked if it could respond to the offer. The employer's consultant responded, "don't waste your time."

[22] Later, the conciliation officer contacted the union to see if they wanted to make an offer to the employer. It did so and gave the employer an offer marked Union #8 with the notation "response to final offer." The Appellant testified the employer came back with Final Offer #2 and asked that it be brought to the union membership for a vote.

[23] The Appellant testified the bargaining committee merged Union #8 with the employer's Final Offer #2 and brought that document to the union membership for a vote. The offer was rejected by the membership. The next step was to take strike vote. The membership voted 99% in favour of a strike.

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[9] I have used the Appellants' initials to identify them in this decision for clarity and to limit the use of personal information.

[10] I am calling the employer's June 30, 202 offer "Final Offer #1" because a second final offer was made at a later date.

[24] On July 6, 2021, the National Union Representative emailed the municipality's Chief Financial Officer that the union membership had unanimously rejected Final Offer #2 and 99% of the membership were in favour of a strike. The National Union Representative concluded the email with "As always, we are prepared to negotiate a fair and reasonable agreement."

[25] The municipality sent a letter to the National Union Representative, the local union president and made a post on its Facebook page at 9:00 p.m. on July 14, 2021 that it would be locking out its employees at 5:00 a.m. the following day.

[26] Case law, that is decisions of the court which I am bound to follow, has said the parties negotiating a collective agreement are considered in disagreement. If they were in agreement, negotiations would not be necessary.[11]

[27] I find that, on a balance of probabilities, the employer and its employees were engaged in a labour dispute. The employees, including the Appellant, were represented by a union. The union and the employer were engaged in negotiations for several months for the renewal of the Collective Agreement governing the terms and conditions of the employees' employment.

[28] The evidence, in particular, the employer's opening remarks at negotiations that it was time to "take back" from the Collective Agreement, the employer making two final offers as part of the bargaining process and the union's rejection of the employer's Final Offer #2, tells me the parties to the Collective Agreement were unable to reach an agreement on the employees' terms and conditions of employment. This means there was a dispute between the employer and its employees connected with their employment and the terms or conditions of employment. As a result, I find that the there was a labour dispute within the meaning of the EI Act and *Employment Insurance Regulations* (EI Regulations).

[11] *Gionest v. U.I.C.*, [1983] 1 F.C. 832

[29] The union's strike vote and the employer's decision to lock out the employees are not determinative of a labour dispute but are, in my opinion, an outcome of the labour dispute.

[30] Having decided that, in the circumstances of this appeal, there was a labour dispute, I must now decide if there was a "work stoppage" caused by the labour dispute.

– **Was there a work stoppage caused by the labour dispute?**

[31] No, there was no work stoppage caused by the labour dispute. The reasons for my finding follow.

[32] The Commission has the burden to prove there was a work stoppage.[12]

[33] The term "work stoppage" is not defined by the EI Act. Instead, the EI Regulations have criteria to determine when a work stoppage has ended. Those criteria are when the work-force attains at least 85% of its normal level and the level of activity in respect of production or services undertaken at the workplace attains at least 85% of its normal activity.[13] The EI Regulations say for the purposes of calculating the 85% 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.[14]

[34] The EI Regulations also provide for when "an occurrence" such as the closure of the business or an act of God prevents the attainment of the 85%.[15] These are not the circumstances in this case.

– **The evidence**

[35] The Appellant's Representative argued there was no work stoppage because the employer continued to offer services to the town at a level near or above 85% of its

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[12] A CUB is a Canada Umpire Benefit (CUB) decision. Although I am not bound by CUBs, I am relying on the principle in CUB 15424, because it is consistent with *White v Canada,* [1994] 2 FC 233
[13] Section 53(1) of the EI Regulations.
[14] Section 53(3) of the EI Regulations.
[15] Section 53(2) of the EI Regulations.

normal services. It did so through a combination of existing management, student employees, special events staff, and private contractors.

[36] The Appellant explained the employer started to prepare for the lock-out during negotiations. The Appellant's Representative highlighted the actions the employer took during negotiations and prior to July 15, 2021 as detailed by the Appellant in her request for reconsideration. He noted the employer's management asked for lists of duties for each bargaining unit position, was learning how to do the work of the bargaining unit, learning how to disable key fobs, ordered extra barricades at the bulk garbage drop off. On July 13, 2021 the municipality gave notice to a neighbouring municipality that it would not be providing fire dispatch service.

[37] The Appellant's Representative also highlighted that prior to July 15, 2021 overtime was submitted daily instead of weekly, students were being trained on certain software, contractors were entering town facilities through back doors, employees were instructed tasks had to be finished within the day, fertilizer and lime typically applied in the month of May was not applied, road salt was ordered and delivered earlier than usual, two managers completed forklift training, and the Occupational Health and Safety officer, a union position, was shadowed by a manager.

[38] The Appellant referred to a "Services Agreement" the municipality circulated to various heavy equipment contractors on May 25, 2021 prior to the conciliation process starting.[16] She noted that a clause in the Services Agreement stated, "The Contractor shall not assign any of work requested by the town or employ any existing employee of the [municipality] that is involved in the Work Stoppage. This includes any permanent, seasonal or casual employee with the [municipality]." The Appellant said the Collective Agreement has no prohibition against bargaining unit members working elsewhere and provides for up to six months of leave without pay to allow employees to work elsewhere.

[16] See page GD26-400 in the appeal file.

[39] The Appellant noted the municipality issued a request for quotes for Electrical Maintenance Services on June 21, 2021. The successful bidder would be responsible for emergency call in for immediate repairs 24/7 and inspection, maintenance and servicing of all electrical equipment as identified.[17] The request for quotes listed 21 structures, lift stations and street lights as the municipality's infrastructure. The quote states "This RFP is in preparation for a possible work stoppage between the [municipality] and [union local]." The Appellant said the work contained in the request for quotes was typically performed by members of the bargaining unit.

[40] The Appellant's Representative said a security firm from a neighbouring province was hired. She said security guards were in place from the first day of the lockout. Contactors, primarily responsible for garbage collection, were in place prior the strike and started to work on the day of the lockout.

[41] B. B. said that on July 14, 2021 employees were asked to put the keys to the employer's premises and vehicles into marked baggies and give them to the foreman. They expected to have the keys returned to them the following day.

[42] The Appellant testified she and other members of the bargaining unit were at the work site at 9:00 p.m. on July 14, 2021. They stood outside the employer's depots and watched as the employer removed equipment and vehicles from both depots. The Appellant was not aware the employer had already emailed unionized employees and issued a public advisory on Facebook advising of a work stoppage the next day. The Appellant did not receive the employer's email about the lockout at the time it was sent or the Facebook message about the lockout at the time it was posted. Other employees, unaware of the messages from the municipality, arrived at work on the morning of July 15, 2021 only to be told they were locked out.

[43] On the evening of July 14, 2021 the municipality issued a public advisory. The advisory stated that as of 5:00 a.m. on July 15, 2021, there would be a work stoppage of the unionized workforce. The advisory said, "For our residents, it is imperative for the

[17] See page GD26-422 in the appeal file.

[municipality] to keep the impact of this work stoppage minimal." The advisory goes on to state:

- The municipality will maintain essential services like garbage and recyclable collection, fire services, water and sewer operations and road maintenance.

- All playgrounds except [two named] playgrounds will be closed, the splashpad will continue to operate as normal and all sports fields will remain open.

- Indoor recreation facilities will remain open, with entry restricted to participants of scheduled sports.

- A [named] gymnastics club will continue to operate at the stadium

- All summer recreation programs will continue as normal

- The municipality's offices would be closed to the public and hours of operation available to the public by telephone will be 10:00 a.m. to 3:00 p.m.

- Tax collection and permit processing will continue, but must be done by telephone, mail or on-line banking; and

- Council meetings will continue as normal.

[44] The Appellant testified with respect to the playgrounds operating during the lockout. She said that there were five playgrounds located in the municipality. One of the playgrounds located in a small green space remained opened. Of the two closed playgrounds, one was located in an older section of the municipality and was not used and the other had one piece of equipment, it too was not used.

[45] The Appellant testified with respect to the recreation facilities operating during the strike. The sports fields that remained open included the tennis courts, a skateboard park, the soccer field, three baseball fields and three softball fields. These all continued to operate as normal. The lawns for these facilities were mowed at 6:00

a.m. She said the indoor recreation facilities that remained open included two stadiums, the ski hut, the buildings located on the soccer fields and baseball field. She said there was no restriction on persons entering these premises. Parents continued to drop off and pick up their children. The recreation programs, like Mommy and Me, the arts programs for children and summer recreation programs continued to be offered. These facilities and services were offered through students and non-unionized event staff.

[46] The Appellant testified anything that needed to be done at the Town Hall could be addressed by phone. The Town Hall had been open prior to the lockout but only limited numbers were allowed to enter the building due to COVID-19 restrictions. Taxes could be paid by credit card over the phone. Land titles and permits were all being processed and issued by others whereas the work had previously been done by members of the union.

[47] When I asked what services were missing from the municipality's advisory, the Appellant replied that street repairs and capping were missing but were carried out by contractors. Capital projects were not listed, but all went ahead. Tax certificates, name changes and grants were not listed. Minutes of meetings were not listed but were done. There were some cheques left to be paid later after the lockout. Non-unionized employees were at the fire hall doing 12-hour shifts and also doing financial work as well.

[48] R. S., affirmed to give evidence, is a member of the union. He testified he showed up for work on July 15, 2021. The employer's truck, that he would normally use to perform his work, was not where it was usually located. He called the foreman and was told there's a lockout and you are not to go into work.

[49] B. B. serves as a relief fire dispatcher. He said there was an email sent out in the first week of July 2021 about filling fire dispatcher positions. Unionized fire dispatchers were sent the email in error. The email showed middle managers were scheduled from mid-July 2020 onward to do the work of the unionized fire dispatchers.

[50] The Appellant testified the municipality continued to hold its council meetings virtually instead of in person. The union engaged in secondary picketing at the councillor's homes.

[51] The Appellant submitted a breakdown of the Costs of the 2021 Work Stoppage prepared by the Municipality.[18] Labour costs were $165,917, Maintenance, Materials and parts totaled $3,677, professional fees (including consulting fees) cost $70,674, tipping fees were $13,722, supplies and communications material cost $3,592, garbage collection performed by contractors cost $704,698, water and sewer work cost $27,410, the stadium cost $10,133, and landscaping cost $5,606. These costs totaled $1,005,428.[19] Security costs, including accommodations totalled $114,542.[20] The municipality reported direct savings of $1,634,422 in labour costs, $162,291 for group insurance and $105,505 for pension. Direct savings totaled $1,902,218. The net surplus was reported as $782,218.

[52] In the notes to the Costs of the 2021 Work Stoppage, the municipality reported the actual surplus for 2021 was $1,286,962 because this amount included indirect savings related to the work stoppage such as fuel purchases, parts for the fleet that were not in use, supplies, safety clothing, leave accumulation amounts and other Mandatory Employment Related Costs. That means the indirect savings from the work stoppage, as reported by the municipality, were $504,744. This amount is in addition to the direct savings of $782,248 as reported by the municipality. This means the total direct and indirect savings from the work stoppage were $1,286,962. In effect, the municipality was able to pay for the costs of providing services during the lockout and have additional funds left over, in the form of a surplus, once the lockout ended.

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[18] See page GD26-430 in the appeal file

[19] The municipality included legal and consulting fees of $70,674 and tipping fees of $13,722. In my opinion, tipping fees (for garbage) would be paid regardless of who collected and brought the garbage to a regional waste site. Consulting and professional fees do not relate to the provision of services normally provided by the municipality. Nonetheless, I have included them here to reflect the amounts reported by the municipality.

[20] The Appellant testified some security performed some of the work of municipal enforcement officers.

[53] In support of her position, the Appellant submitted publicly available disbursement reports for the municipality showing the amounts paid to contractors, the security firm, a law firm for services rendered during the lockout.

[54] The Collective Agreement entered into evidence includes a list of the classifications in the bargaining unit and a list of positions excluded from the bargaining unit. The employer reported to the Commission there were 90 unionized employees in the bargaining unit affected by the lockout. The list of unionized employees the employer provided to the Commission by the employer totals 80. The employer said there were 25 staff members excluded from the union. The excluded positions were 16 to 17 management positions, 1 economic developer, 1 executive assistant, 1 deputy town clerk, 1 communications officer and 1 human resources officer. The employer told the Commission services continued to be offered by management, non-union employees and contractors for garbage collection.

[55] The Appellant testified there is a ratio of 1 supervisor to 3 bargaining unit employees.

[56] The Appellant testified that in addition to management and non-union employees, there were two engineering students completing work terms, summer students did recreation work, emptied garbage cans, picked up garbage, grant workers and special events staff were also employed to pick up garbage. The Appellant submitted an hourly report for casual seniority employees. The report covers annual hours for each year from 2019 to 2022. In 2019 and 2020 the employees worked between 3,756 and 3,872.50 hours respectively. In 2021 the employees worked 3,559.50 hours.

[57] T. P., affirmed to give evidence, is a member of the union and is a construction inspector for the municipality. His job is to oversee the work of contractors hired to complete capital works projects in the municipality. Capital projects are undertaken by contractors. He testified that work completed at a stadium, a water and sewer contract was overseen by the two engineering students as part of their work term.

[58] T. P. explained that certain capital projects would have some work carried out by contractors and some work carried out by the municipality. For example, the contractor would be responsible for paving while the municipality would be responsible for curb and gutter, sidewalks and water mains. He said one paving contract, already in place prior to the lockout, was completed during the lockout. A contractor completed the asphalt testing that normally would be done by members of the bargaining unit. The safety plans submitted by contractors continued to be reviewed. In T. P.'s view nothing lacked in the work that went ahead. When T. P. returned to work all projects were completed.

[59] The Appellant testified the work of inside employees related to finance, taxes, collections, receivables, minutes, was mostly completed during the lockout. With respect to her own job the Appellant submitted a copy of her job description. She noted that of her 14 job duties listed, some were performed prior to the lockout and all except two of her duties were performed during the lockout by managerial staff.

[60] The Appellant referred to a strike at another municipality in the province. That municipality is four to five times the size of her municipality. She noted the other municipality managed an 11-week strike utilizing management employees. It did not hire any additional employees to replace bargaining unit members.

[61] The Appellant's Representative submitted that on the evidence presented the employer's normal operations continued and did not cease. He said the employer took measures to ensure operations continued. The Appellant's Representative argued the evidence is clear the Appellants were not locked out and new employees hired but it was a case of employees being hired before the lockout. He said the evidence shows the employer hired workers prior to the lockout. The lockout occurred at 5:00 a.m. on July 15, 2021. At that time the employer had the security firm's employees in place and the contractor for garbage collection in place.

[62] The Appellant testified the union set up information pickets at certain employer sites. The bargaining unit members sat in chairs talking to people entering the worksites. They did slow down garbage collection by standing around garbage cans on

the sidewalk but did not stop the garbage truck itself. She noted that a national baseball tournament hosted in the municipality went ahead. There was no picketing or information pickets at any recreational sites.

[63] The Appellant testified the strike pay received by herself and union members during the lockout comes from the national union. It is funded by dues of 1.5% of wages paid by the union members. It is non-taxable income. The strike pay started at $300 a week and then went to $450 by week 10 or 11 of the lockout.

– **The Commission's submissions**

[64] Prior to the hearing the Commission provided a written submission. This submission was shared with the Appellant and the Appellant's Representative. I have taken the written submission into consideration in reaching my decision.

[65] The Commission's Representative argued the Appellant's evidence and submissions show additional detail of the lockout but do not change the final conclusion of the appeal. He said the thrust of the evidence concerns the acrimonious relationship between the union and the employer. He noted there was evidence of steps taken by the employer prior to the lockout, such as requiring employees to turn in keys to employer equipment, to mitigate the effect of the lockout. The Commission's Representative noted that during the lockout the employer replaced unionized labour with contract labour. And, he noted, T. P. said that capital projects, started prior to the lockout, were completed.

[66] The Commission's Representative submitted the test to be applied to this appeal comes from *White v Canada,* [1994] 2 FC 233 (*White*) and has three steps: the existence of a labour dispute, a work stoppage caused by the labour dispute, and employment lost due to the work stoppage. He argued all three of these tests have been met.

[67] I have already found a labour dispute existed, so I will only recount the Commission's submissions on the other two aspects of the test.[21]

[68] The Commission's Representative submitted the criteria that the work stoppage be caused by the labour dispute has been met. He said the chain of causation is there as well. The Commission's Representative says case law defines the term "work stoppage" and that typically, a strike or a lockout is considered a work stoppage. As well, the Commission's Representative noted CUBs give meaning to the term "work stoppage."[22]

[69] The Commission's Representative said that a work stoppage is not just a drop in production or activities. Production does not fit the context of a municipality. He said a work stoppage is a disruption in the employer's normal course of business. To see if there has been a disruption in normal course of business there must be an analysis. The disruption relates to the who is doing the work - employees no longer working as they normally do, replacement workers.

[70] In support of this position, the Commission's Representative submitted *Attorney General of Canada v. Daigneault*, A-340-79 (*Daigenault*). He noted that the umpire in reaching a decision on whether a work stoppage had occurred relied on the fact that the business had continued to operate at over 85% of normal.[23] The Commission's Representative suggested that a work stoppage is a question of fact to be determined. In *Daigneault*, he noted the FCA has said to look at the whole picture, the disruption of the employer's business. It is not just the number to be considered.

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[21] The Commission's Representative submitted there was a labour dispute from at least July 15, 2021 leading up to November and could be extended back to December 2020 when the Collective Agreement expired. He said the entire period of bargaining can be a labour dispute. The Commission's Representative noted the courts had found that collective bargaining is a dispute related to the terms and conditions of employment. An impasse is also a labour dispute. Section 2(1)(a) of the EI Act defines a labour dispute as any dispute related to terms and conditions of employment. So, the Commission Representative submits this criteria is met.

[22] Here the Commission's Representative referred to paragraph 14 of the Commission's written submission to the Tribunal, coded as GD19 in the appeal file.

[23] The Federal Court of Appeal (FCA) found that a cessation of work may or may not constitute a work stoppage depending on the circumstances and the fact that the "cessation of work is reflected in a decrease in production of the business as a whole of less than 85% is not a sufficient reason for concluding that there was not a work stoppage."

[71] The Commission's Representative noted section 53 of the EI Regulations speaks in terms of when a work stoppage ends. This is the only guidance of when a work stoppage ends. He stated that Parliament knows in these types of situations where an employer is dealing with a strike or lockout an employer is going to hire workers. To that end, the EI Regulations say in calculating the 85% no account is to be taken of **exceptional or temporary measures**. (emphasis added) This means, the Commission's Representative said, Parliament recognized that it is not just exceptional measures but **temporary** measures that cannot be taken into account. (emphasis added) There is no termination of a work stoppage because other workers are hired. The Commission is of the view the facts establish there was a work stoppage, which was the July 15, 2021 lockout. Hiring others to do union labour was a temporary measure and therefore does not mean there was no work stoppage.

[72] The Commission's Representative submitted it has established the chain of causality between the labour dispute and the work stoppage. It has provided case law to show where there is a labour dispute there is a presumption the work stoppage was caused by the labour dispute.[24] The evidence of the labour dispute from December 2020 to July 15, 2021 and the employer's letter of July 14, 2021 to the union's National Representative show the employer lockout was caused by the employer's perception of unsuccessful negotiations. The Commission's Representative noted while the Appellant's witnesses have provided a different perspective on the nature of negotiations that is not enough to rebut the presumption.

[73] The Commission's Representative submitted the final criteria, that the work stoppage has to interrupt the Appellant's employment, has been met. The Appellant's EI application and the letter attached to the Appellant's request for reconsideration show the Appellant lost work due to the work stoppage.

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[24] Here, the Commission's Representative referred to footnote 34 in the Commission's written submission coded GD-19 in the appeal file. With specific mention of CUB 18287, CUB 18285 and *Canada (Attorney General) v Simoneau*, A-611-96

[74] The Commission's Representative submitted having met the three tests is enough to disentitle the Appellant from receiving EI benefits. The onus then shifts to the Appellant to show an exemption to disentitlement exists.

[75] The Commission's Representative submitted that *JF v Canada Employment Insurance Commission*, 2018 SST 804, (*JF*), was a deeply flawed decision as there were a number of errors in the decision. He noted the decision is not binding on the Tribunal. In *JF*, the employer locked out its employees. The employees appealed the Commission's decision to not pay them EI benefits because it said they lost their employment due a work stoppage caused by a labour dispute. The Tribunal's General Division (GD) allowed the appeal.

[76] In *JF,* the employer appealed the GD's decision to the Tribunal's Appeal Division (AD).[25] The Commission's Representative noted the AD granted the employer leave to appeal (which means the employer's appeal of the GD's decision would be heard by the AD on the merits) on the basis the employer had a reasonable chance of success based on the errors in law in the GD's decision, in particular the GD's conclusion there was no labour dispute because the strike vote had not been sanctioned by the union's head office and relying on the 85% threshold of production to show there had been no work stoppage.[26]

[77] The Commission's Representative noted that in reaching its decision in *JF*, the AD relied on *Canada (Attorney General) v Guillemette*, A-342-79, (*Guillemette*), which says a labour dispute is not limited to a strike and may be initiated by the employer by way of a lockout.

[78] The Commission's Representative said in *JF,* the GD misinterpreted *Létourneau v Canada Employment and Immigration Commission,* [1986] 2 F.C. 82, (*Létourneau),* when it seemed to say that it could not rely on the "85% test" but then went on to say

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[25] See *X v. Canada Employment Insurance Commission*, 2019 SST 383.
[26] In *JF* the employer declined to participate in the GD hearing. When the GD's decision was released, the employer appealed the GD's decision to the AD. The AD's leave to appeal decision was appealed to the Federal Court by JF. The Federal Court overturned the AD's decision granting leave to appeal and returned it to the AD for redetermination (See *Francis v. Canada (Attorney General)*, 2020 FC 642.)

because there was no drop below 85% there was no work stoppage. He noted the GD quoted from *Hills v Canada (Attorney General)*, [1988] 1 S.C.R. 513, (*Hills*) about government neutrality in a labour dispute. The Commission's Representative said it appears in *JF* the GD used the quote from *Hills* to justify its finding. But, the Commission's Representative said, the Supreme Court in *Hills* was actually looking at whether the operation of section 36 of the EI Act was meeting the purposes of neutrality – by having an employer finance a strike against itself.

[79] The Commission's Representative said *White* also looked at the intent of Parliament with respect to section 36(1) of the EI Act. The point is, he said, there have been no amendments to section 36 of the EI Act so the policy basis for the section remains the same. He noted the AD's decision, granting leave to appeal, was appealed to the Federal Court by JF (the appellant). The FC found the AD's decision to be unreasonable and remitted it back for redetermination by the AD.[27] The employer then withdrew its appeal.[28]

[80] The Commission's Representative said he highlighted *JF* because the Appellants in this appeal have suggested *JF* is a valid decision. The Commission's Representative says that is erroneous. He said whether a party decides to appeal a decision is complex and he does not think the choice to not appeal means a decision is good law, especially when the GD's decisions are not binding. The Commission's Representative suggested that no consideration be given to whether a party to the *JF* appeal has chosen to appeal or not appeal the GD decision.

[81] The Commission's Representative said there is a possibility in exceptional cases there can be a loss of employment in anticipation of a work stoppage but that is not what occurred in this case. He referred to a case cited in "The 2022 Annotated Employment Insurance Act" where, with negotiations on the horizon, an employer laid off employees in advance of an upcoming labour dispute or work stoppage.[29] There are

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[27] See *Francis v. Canada (Attorney General)*, 2020 FC 642
[28] The Tribunal file number for the appeal at the AD was AD-18-680. The employer withdrew its appeal on August 18, 2020.
[29] See Lavender, T. Stephen, *The 2022 Annotated Employment Insurance Act*. Thompson Reuters, 2021.

also cases where claimants may foresee a labour dispute occurring in the future and the employees remove themselves from the workplace. The key point in both of those scenarios is that the work stoppage has not occurred, it is hypothetical and on the horizon. The Commission's Representative said he was providing these two examples to show what might be an exceptional circumstance.

[82] The Commission's Representative concluded his submissions by noting the *White* test was fact based and each of the tests had been met by the Commission in this case. Having met the three tests, he said, the onus is now on the Appellant to establish an exception to the disentitlement.

– **The Appellant's submissions**

[83] After the hearing the Appellant provided a written copy of their oral submission made at the hearing. This submission was shared with the Commission. I have taken the written copy of the submission into consideration in reaching my decision.

[84] The Appellant's Representative submitted that with respect to *Daigneault*, prior to the Court's decision, there were two CUBs on the issue of whether a work stoppage had occurred. CUB 5266B was issued on April 27, 1977. The employer and employees were in conflict over how to return a wage increase as ordered by the Anti Inflation Board. In CUB 5266B, the Umpire found there was neither a strike nor a lockout because the business continued operating and production continued to be more than 85%.

[85] The FCA, on October 11, 1979, determined the Umpire's decision on CUB 5226B was wrong in law, because of "the fact that a 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."[30] The FCA quashed the decision of the Umpire and the case was referred back to be decided again by him.

[30] See *Attorney General of Canada v. Daigneault*, A-340-79

[86] CUB 5266C, the Umpire's second CUB, was issued on October 23, 1979. In that decision, the Umpire noted that given the FCA's decision, he was forced to conclude there was a work stoppage. This finding meant he was then required to determine if the work stoppage was attributable to a labour dispute. The Umpire determined the difference of opinion between the employer and the employees about how to implement the decision of the Anti Inflation Board created a labour dispute between the employer and the union. As the appellant was a unionized employee, consequently the stoppage of work was attributable to a labour dispute. This meant Daigneault was not entitled to receive EI benefits.

[87] The Appellant's Representative submitted the background of the CUBs also had to be taken into consideration when reading the FCA decision on *Daigneault.* It was not clear if the employees walked off the job or were dismissed. He noted that in this appeal before me there is evidence that, prior to collective agreement negotiations starting, the employer went out of its way not just to replace a section of workers but to replace all workers. The mayor of the municipality stated there would be "operations as normal." So, the Appellant's Representative asked, where did the stoppage of work occur?

[88] The Appellant's Representative noted CUB 5226B stated one section of the workforce walked off the job. He said that is not the case here where the municipality took action in all departments to lock out all employees. The employer relied on managers, supervisors, students, and contractors to do the work of all staff. The total replacement of the workforce was done to force the workers to accept unacceptable conditions of employment. By replacing all of the employees, the work continued as if there was no lockout.

[89] The Appellant's Representative noted there was nothing in *Daigneault* that speaks to a collective agreement, a strike or a lockout. The Umpire's use of the 85% rule to say there was no work stoppage through the employer's reliance on managers and postponing any repairs are different than the circumstances in this case. In this case of the municipality's operations, even with a dismissal of every union employee,

everything was covered off. All actions were taken by the municipality and the consultant, hired to conduct negotiations, prior to the negotiations even beginning. As a result, he says, *Daigneault* does not apply to this appeal.

[90] The Appellant's Representative submitted that in *JF* the GD found, based on the evidence and jurisprudence, the employees were laid off in anticipation of the work stoppage. He noted the finding in *JF* was there was no work stoppage. And, this is why, the Appellant's Representative argued, because those incidents in *JF* were so similar to the incidents in this appeal, the Appellant relies on the interpretation of the law in *JF*.

[91] The Appellant's Representative said, in response to the Commission's argument that *JF* was a flawed decision, that if *JF* was so flawed and cannot be relied on why did the Commission decide not to appeal it? It is the Appellant's position that in the absence of an appeal on *JF* the decision remains "good law."

[92] The Appellant's Representative submitted with respect to exceptional circumstances, the Appellant disagrees with the statement of no work stoppage when there was a labour dispute. And, because the union takes a strike vote it is not indicative that there will be a strike. The Appellant's Representative said the strike vote was a negotiating tactic. The Appellant testified a National Union Representative said that it is up to the party whose offer was rejected to come back to negotiations. He said the employer used the excuse of the union not exercising its right to strike. But, he says, this is a good way to show the union did not intend to go on strike. However, the employer had everything ready to go. It was not a case of hiring others once a strike began.

[93] The Appellant's Representative said the stoppage of work as described in *Daigneault* is problematic. The employer replaced the whole workforce. Morally that might not be right. But to say there is no stoppage of work is correct: there was no stoppage of work because everything was taken care of. In this case, the mayor said operations would continue.

[94] The Appellant's Representative submitted the 85% rule normally applies when determining if the stoppage of work has ended. The municipality's Director of Corporate Services sent information to the Commission when the stoppage of work ended. The Commission relies on that information to make a determination of when the stoppage of work ended.

[95] The Appellant's Representative said there was no decrease in the level of services provided by the municipality. It cannot be measured in the number of widgets that are produced because this is an employer who provides services to the public. He noted the municipality's labour relations were governed by the provincial labour relations act. There was no provision for essential services or designated employees in that act. The employer was able to fully replace its workers.

[96] The Appellant's Representative submitted a work stoppage in the context of a labour dispute cannot be defined in the work of individual employees but is defined in the operations of the employer. A work stoppage is a breakdown in normal operations of the business. He said if a dispute has a marked effect on operations there is a work stoppage. But, in the case of this municipality, all operations continued.

[97] The Appellant's Representative said they have submitted evidence to show the employer laid off its employees in anticipation of the work stoppage. In the strike which occurred in another municipality, as described by the Appellant, services were provided on an as needed basis and services did not continue as normal. That is different than the circumstances in this appeal, where the employer replaced the workers and continued its services as normal.

[98] With respect to *JF*, the Appellant's Representative noted the AD gave leave to the employer to appeal the GD's decision. The Federal Court disagreed and said the employer did not have the right to be heard. As a result, with no further appeal it will never be known if *JF* is a flawed decision.

[99] With respect to *Daigneault*, the Appellant's Representative noted it was only part of the employer's operations that were shut down unlike the situation in this case. So, in his view*, Daigneault* is not applicable to this appeal.

[100] With respect to *Guillemette*, the Appellant's Representative noted this decision was not applicable to this appeal because the employer had to shut down its operations. That did not happen in this appeal.

[101] The Appellant's Representative said *JF* is applicable to this appeal. He highlighted the quote from *Hills*, at paragraph 54 of the *JF* decision where in *Hills* the Supreme Court said "it is justifiable to give a liberal interpretation of provisions pertaining to the reeligibility for benefits" to allow for the benefit of doubt to be applied in this decision. The Appellant's Representative said the finding in *JF*, that JF lost his employment because he was laid off in anticipation of a work stoppage, should apply to the Appellant in this case. In addition, in this case there was no stoppage of work at the municipality, because the employer's operations continued as normal.

– **The Commission's rebuttal submissions**[31]

[102] In rebuttal, the Commission submitted with respect to *Daignault*, the decisions in the CUBs do not affect what the Court said. It is the point of law in the Federal Court's decision that is binding on the Tribunal.

– **My findings**

[103] I find, on a balance of probabilities, the Commission has failed to meet its burden of proving the Appellant's loss of employment was caused by a work stoppage attributable to a labour dispute.

[31] At the hearing on January 26, 2023, I decided the Commission could make a rebuttal submission in response to the Appellant's submissions. I based my decision on my interpretation the *Social Security Tribunal Rules of Procedure* (*Rules*) which say I must hear an appeal in a way that allows parties to participate fully in the appeal process and considers all of the parties' evidence and arguments. The *Rules* also say that I decide the order for the parties to present evidence or arguments.

[104] To disentitle a claimant from receiving EI benefits, a work stoppage is essential to the loss of employment.[32] The Commission has failed to prove there was a work stoppage.

[105] In the absence of a work stoppage, the reason the employer stopped employing the Appellant is not relevant to this matter.[33]

[106] As stated above, the Commission has the burden to prove there was a work stoppage. The EI Regulations only set out criteria to determine when a work stoppage has **ended**.

[107] In my opinion, the criteria used to determine when a stoppage of work is ended is not applicable to determining when a work stoppage begins or whether it is ongoing. In forming my opinion, I am relying on *Daignault*. I note that *Daignault,* was decided when s. 36 was numbered s. 44. In *Daignault*, the Court of Appeal found that "cessation of work may or may not constitute a work stoppage within the meaning of section 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 percent is not sufficient reason for concluding that there was not a work stoppage." (my emphasis added). I take from the Court's finding, that the analysis of whether a work stoppage has occurred within the meaning of the EI Act and EI Regulations requires me to look at the circumstances and not simply rely on whether there was a reduction in production of more than 15%.

[108] This also means, in my opinion, section 53(3) of the EI Regulations which states when calculating the 85% "no account shall be taken of exceptional or temporary measures taken by the employer during the stoppage of work for the purpose of offsetting the effects of the stoppage" is only applicable when determining whether a stoppage of work has ended. This is because the EI Regulation clearly states these

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[32] See section 31, EI Act and *Létourneau v Canada Employment and Immigration Commission,* [1986] 2 F.C. 82

[33] See *Létourneau v Canada Employment and Immigration Commission,* [1986] 2 F.C. 82 which uses the term "dismissed"

factors are to be taken into account for the percentage calculation used to determine when a work stoppage terminates and not when it starts or whether it is ongoing.

[109] The term “work stoppage” does not refer to the employee’s labour, but rather to the employer’s operations.[34]

[110] In CUB 39839 in September 1991, expecting a strike to be called in December 1991, a charter airline laid off the majority of the unionized flight attendants during the slow season. It then set about hiring replacement workers who were non-unionized. The airline continued its operations and saw an improvement in business. The Umpire found that there was no stoppage of work in that case and the employer’s actions did not constitute extraordinary or exceptional measures.

[111] The Umpire said “It was obvious that it was business as usual for the company, even though the employer and the flight attendants were embroiled in a dispute. By hiring and training replacement employees, the employer took the measures to ensure that operations would continue.” As a result, he found this constituted the dismissal of a complete sector of the firm and that the claimants did not lose their employment due to a work stoppage resulting from a labour dispute.[35]

[112] In *Attorney General of Canada v. Simoneau*, [1982] 1 F.C. 469 (F.C.A.), the employees had gone on strike in January 1977, and the strike was still ongoing in October 1977. Yet, the Umpire found the stoppage of work ended in the spring of 1977 because the employer, by resorting to “temporary and exceptional measures” was able to continue broadcasting by using a computer. The Court of Appeal found the Umpire made an error with this determination and returned the decision to the Umpire to be decided by him “on the assumption that the fact that an employer has managed to continue or resume operations during a labour dispute does not mean that the work stoppage by his employees has terminated.” In *Simoneau,* the issue to be determined was when the work stoppage ended and not, as in the appeal before me, if a work

[34] Although I am not bound by CUBs, I am relying on the principle in CUB 16553, because I am persuaded it is a suitable test to determine if a work stoppage exists.
[35] CUB 39839

stoppage existed. I take from *Simoneau,* it is only when determining whether a stoppage of work has terminated that the temporary and extraordinary measures undertaken to continue operations are taken into consideration.

[113] CUB 69098C concerns a strike which was followed by a lockout at a telecommunications company. In that case, the negotiations were protracted and the employer spent two years developing a business continuity plan involving the re-employment of retirees, the purchase of a call center in another country and the deployment of employees from other locations to the location affected by the strike/lockout. The Umpire, having the benefit of new evidence on the level of the employer's operations determined a work stoppage had occurred "at the claimant's workplace. In accordance with s. 53(3) of the *Act*, no account could be taken of exceptional or temporary measures used by the employer, before and during the work stoppage."[36]

[114] I am not bound by CUBs. In this decision I have cited CUBs that address the issue of whether appellants have lost their employment as a result of a work stoppage attributable to a labour dispute. 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.

[115] In my view, the operations of the Appellant's employer continued largely uninterrupted by the lockout. The employer advised the public it had taken measures to ensure the least disruption possible. The Appellant and witnesses testified the services of the municipality continued. There was no disruption in recreational activities, the capital works projects undertaken prior to the lockout continued and in some cases were completed during the lockout, collection of taxes and issuing of permits also

[36] The Umpire used "Act" when in fact it is section 53(3) of the EI Regulations that speaks to exceptional or temporary measures.

continued. The only disruption to the latter two was that these activities had to be carried out over the phone rather than in person, a practice which was in place during the COVID-19 pandemic. Garbage collection, provided by a contractor and arranged prior to the lockout, also continued without interruption.

[116] The employer did discontinue fire dispatch services it was offering to a neighbouring municipality. However, this reduction in service did not affect the residents of the employer's municipality.

[117] The Appellant testified the ratio of management to unionized employees was 1 to 3. This means that 25% of the employer's workforce was not unionized and continued working to provide the employer's services during the lockout. The employer regularly hired student employees for the summer months to carry out its recreational programming. The evidence is that all summer programs continued without interruption. Event staff, who work on a call in basis, also part of the staff complement, continued to deliver their services during this period. In addition, the employer reported savings as a result of the lockout. This indicates the employer did not have to make any additional expenditures to continue its operations during the lockout. This evidence tells me there was no interruption in the services provided by the employer and there was no appreciable reduction in the services provided by the employer. As a result, I find there was no work stoppage.

[118] In *Caron* at p. 638 - 639, the court said

> However, what essentially characterizes the section 44 (now 31) 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 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. The loss of employment, on the other hand, is a phenomenon completely independent of intent, which is capable of affecting both those directly involved in the work

> stoppage, the strikers or employees who are locked out, and those who are not in any way concerned but who have lost their employment as a result nevertheless.

[119] In *Caron*, the Court viewed the work stoppage as impacting only the parties to the contract, that is the employer and the employees. Non performance of the contract from the employee side means not performing any work. Non performance from the employer's side means not offering employment. I note the employer had the intent to cause a work stoppage but, in this case, their intention is not determinative when determining whether a work stoppage occurred. This is because, in this case, the employer continued their operations largely unaffected by the lockout and as found above, no work stoppage occurred.

Conclusion

[120] The Commission has shown there was a labour dispute.

[121] The Commission has not met its burden to prove there was a work stoppage. Because there was no work stoppage, the Appellant is not disentitled from receiving EI benefits for this reason.

[122] The appeal is allowed.

Raelene Thomas

Member, General Division – Employment Insurance Section

Appendix A

The decision (GA-1-72) applies to the following 74 files:

File Number
GE-21-2194
GE-21-2196
GE-22-4292
GE-21-2197
GE-21-2199
GE-21-2201
GE-21-2205
GE-21-2202
GE-21-2207
GE-21-2208
GE-21-2211
GE-21-2215
GE-21-2219
GE-21-2224
GE-21-2222
GE-21-2229
GE-21-2234
GE-21-2231
GE-21-2237
GE-21-2239
GE-21-2238
GE-21-2244
GE-21-2240
GE-21-2241
GE-21-2242
GE-21-2243
GE-21-2249
GE-21-2245
GE-21-2250
GE-21-2251
GE-21-2255
GE-21-2258
GE-21-2264
GE-21-2267
GE-21-2268
GE-21-2270
GE-21-2273
GE-21-2275

GE-21-2279
GE-21-2283
GE-21-2284
GE-21-2285
GE-21-2286
GE-21-2293
GE-21-2295
GE-21-2296
GE-21-2297
GE-21-2300
GE-21-2301
GE-21-2302
GE-21-2278
GE-21-2277
GE-21-2274
GE-21-2265
GE-21-2266
GE-21-2263
GE-21-2261
GE-21-2257
GE-21-2259
GE-21-2256
GE-21-2254
GE-21-2170
GE-21-2252
GE-21-2236
GE-21-2235
GE-21-2232
GE-21-2230
GE-21-2225
GE-21-2223
GE-21-2221
GE-21-2218
GE-21-2216
GE-21-2213
GE-21-2210