Citation: *NK v Canada Employment Insurance Commission*, 2021 SST 602

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	N. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (427518) dated July 7, 2021 (issued by Service Canada)

Tribunal member:	Mark Leonard
Type of hearing:	Videoconference
Hearing date:	August 16, 2021
Hearing participants:	Appellant
Decision date:	August 19, 2021
File number:	GE-21-1260

Decision

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

[2] The Appellant has shown that she has enough eligible hours to qualify for Employment Insurance (EI) benefits.

Overview

[3] The Appellant applied for combined pregnancy and parental EI benefits, but the Canada Employment Insurance Commission (Commission) decided that the Appellant did not have enough hours to qualify.[1]

[4] The Commission says that the Appellant needs 420 hours to qualify but that she doesn't have enough. The Commission did not show how many hours the Appellant worked in her qualifying period prior leading up to her claim for maternity and parental benefits. It relies simply on the assertion that it cannot grant a 300-hour credit to the Appellant's hours, as provided for in the *Temporary Measures* put in place September 27, 2020, because she already was granted a 300-hour credit on a previous claim.

[5] The Appellant disagrees and says that she has enough hours to qualify if the 300-hour credit is added to the hours she worked. She says that she did not need the credit to qualify previously and that she has worked over 120 hours since the previous benefit period started. She also submitted that all hours from another employment should be counted which would qualify her to receive benefits.

[6] I have to decide whether the Appellant has worked enough hours to qualify for EI benefits.

Issue

[7] Has the Appellant worked enough hours to qualify for EI benefits?

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[1] Section 7 of the *Employment Insurance Act* (EI Act) says that the hours worked have to be "hours of insurable employment." In this decision, when I use "hours," I am referring to "hours of insurable employment."

Analysis

How to qualify for benefits

[8] Not everyone who stops work can receive EI benefits. You have to prove that you qualify for benefits.[2] The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she qualifies for benefits.

[9] To qualify, you need to have worked enough hours within a certain timeframe. This timeframe is called the "qualifying period."[3]

[10] The number of hours depends on the unemployment rate in your region.[4]

The Appellant's region and regional rate of unemployment

[11] The Commission decided that the Appellant's region was Toronto and that the regional rate of unemployment at the time was 13.7%.

[12] Prior to the Covid-19 relief measures enacted by Parliament, a claimant would need at least 600 hours in their qualifying period to qualify for EI maternity and parental benefits (special benefits).[5] But changes to the *Employment Insurance Act* (the Act) to address Covid-19 realities set the minimum unemployment rate at 13.1% which established that a claimant can qualify for maternity and parental benefits with as little as 420 hours.[6]

[13] Temporary measures put in place September 27, 2020, further provides for a credit up to 300 hours for a claimant who does not have enough hours to meet the 420-hour requirement. In the case of a claimant for special benefits, the claimant will be

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[2] See section 48 of the EI Act.
[3] See section 7 of the EI Act.
[4] See section 7(2)(b) of the EI Act and section 17 of the *Employment Insurance Regulations*.
[5] Section 7 of the EI Act sets out a chart that tells us the minimum number of hours that you need depending on the different regional rates of unemployment.
[6] See Section 153.171 of the EI Act.

granted 300 hours.[7] Combined with at least 120 hours of work, this would result in the claimant having the minimum 420 hours necessary to qualify for benefits.

The Appellant agrees with the Commission

[14] The Appellant agrees with the Commission's decisions about which region and regional rate of unemployment apply to her.

[15] There is no evidence that makes me doubt the Commission's decision. So, I accept as fact that the Appellant needs to have worked no less than 120 hours to qualify for benefits. The issue will be whether the Appellant can receive a credit to assist her in reaching the 420-hour threshold.

The Appellant's Qualifying Period

[16] As noted above, the hours counted are the ones that the Appellant worked during her qualifying period plus a 300-hour credit. In general, the qualifying period is the 52 weeks before your benefit period would start.[8]

[17] Your **benefit period** isn't the same thing as your **qualifying period**. It is a different timeframe. Your benefit period is the time when you can receive EI benefits.

[18] The Commission decided that the Appellant's qualifying period was shorter than the usual 52 weeks because the Appellant had an earlier benefit period that started on September 27, 2020.

The Commission established the Appellant's qualifying period for this previous claim as being from March 17, 2019, to September 26, 2020. The Commission did not specify the Appellant's subsequent qualifying period for her claim for maternity and parental benefits. However, the Commission did communicate to the Appellant that she needed to acquire 420 hours since September 27, 2020. She testified that her child was born on June 15, 2021.

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[7] See Section 152.17 (1) of the EI Act.
[8] See section 8 of the EI Act.

[19] While the Commission did not submit what the Appellant's qualifying period would be, I conclude that it had determined that her qualifying period to receive maternity and parental benefits could not reach back beyond September 27, 2020.

The Appellant doesn't agree with the Commission

[20] The Appellant disagrees with the Commission about her qualifying period to receive maternity and parental benefits. The Appellant says that her qualifying period should be longer because she worked for two employers.

[21] The Appellant was laid off from her first retail job in March 2020. She received the Canada Emergency Response Benefit (CERB). In June 2020, she obtained a part-time job at a retail outlet in a mall. She was able to work three to four shifts per week when the store was allowed to open, but only one to two shifts per week when the store was closed to in-store shopping but still offering curbside pickup.

[22] The Commission confirmed that the Appellant established a benefit period effective September 27, 2020, when her benefits were automatically converted from CERB to EI regular benefits. It was determined that she had the maximum 1820 hours in her qualifying period (March 17, 2019, to September 26, 2020).

[23] The Commission submitted two Records of Employment (RoE's). The first noted that the Appellant earned 1720 hours from April 23, 2019, to March 15, 2020. The second noted that the Appellant earned 777 hours between June 29, 2020, and June 11, 2021. It says that it cannot count the hours that the Appellant earned at the second job up until September 26, 2020, because they were earned during the qualifying period that established her EI claim effective September 27, 2020.

[24] The Appellant says that she should qualify to receive benefits based solely on the hours she worked for the second employer since she did not need all the hours she worked in order to qualify for EI regular benefits on September 27, 2021. The law says that your current qualifying period can't overlap with an earlier qualifying period.[9] To

[9] See Section 8(1)(b) of the EI Act.

include all the hours the Appellant worked with the second employer before September 27, 2020, would mean that her qualifying period would overlap her earlier qualifying period. I cannot count any hours that the Appellant earned before September 27, 2020.

[25] Based on the date her previous benefit period was established, I am satisfied that her qualifying period for her maternity and parental benefits claim would be from September 27, 2020, to the week of the birth of her child, June 13, 2021.[10] This means that she would have to accumulate the requisite 420 hours to qualify for benefits within that period.

The hours the Appellant worked

The Appellant agrees with the Commission

[26] The Commission did not provide any submissions substantiating the number of hours the Appellant has worked since September 27, 2020, and June 13, 2021.

[27] The Appellant testified that during a telephone conversation with a Commission agent it was confirmed that the Appellant had worked 336 hours in the period from September 27, 202 to June 13, 2021.

[28] The Appellant doesn't dispute this, and there is no evidence that makes me doubt it. So, I accept it as fact.

[29] The Appellant needs 420 hours to qualify to receive benefits, however; she had only worked 336 hours. Ordinarily this would mean that she does not qualify for benefits. But the issue of the 300-hour credit remains.

Is the Appellant entitled to the 300-hour credit?

[30] Because of the Covid-19 pandemic and in response to the increased unemployment it caused, Parliament created temporary measures that would assist Canadians qualifying for benefits. One added measure is a one-time 300-hour credit to assist claimants who could not meet the 420 minimum hour requirement to qualify. In

[10] See Section 22(2)(a)(ii) f the EI Act.

essence, this credit would allow a claimant with as little as 120 actual working hours in their qualifying period be eligible for benefits.[11]

[31] The Commission confirmed that it applied the 300-hour credit to the Appellant's claim for regular benefits that started September 27, 2020. It says that when it converted her from CERB to EI regular benefits effective September 27, 2020, the credit was automatically applied. It says that the 300 hours is a one-time credit and because it was automatically applied to the Appellant's previous claim, she cannot receive the credit to assist her in qualifying for any subsequent claim such as special benefits. The Commission says that it is only interpreting the temporary measure based on its plain meaning.

[32] The Appellant disagrees with the Commission's automatic application of the credit to her converted claim. She says that on September 27, 2020, she already had enough actual working hours (1820) to qualify for regular benefits. She says that she did not need the credit to qualify and that it should not have been applied at that time. She believes that the credit should have remained available and added to her 336 hours of work in the current qualifying period to assist her in qualifying for benefits.

[33] She further adds that during the period from September 27, 2020, and June 13, 2021, she worked as many hours as she could. She suggests that had it not been for the lengthy lockdowns (enforced closures) of retail outlets she would have worked enough hours to qualify for maternity and parental benefits without the credit. She added that she is currently trying to work as many hours as she can in order to qualify for benefits.

[11] See Section 153.17 (1) of the EI Act.

What is the result of the Commission's decision to deny the Appellant the credit?

[34] The fundamental purpose of EI benefits is to assist claimants who through no fault of their own find themselves unemployed. The benefits are designed to help a claimant through the period of unemployment and transition to a new employment. This premise is based on a reality where suitable employment is readily available and a claimant should be able to find employment in a reasonable period.

[35] One inescapable truth is that the enforced closures and other restrictive measures used to control the spread of the Covid-19 virus also severely limited access to employment. Parliament realized this fact and established temporary measures as well as enacted new emergency and recovery measures to assist Canadians.

[36] For the Appellant, she was laid off from her full-time employment at the outset of the pandemic. She received CERB. However, she did what was expected and looked for work. She found it in the form of a part-time job in June 2020. The effect of working was to reduce her benefits for some weeks. Her claim was converted to EI regular benefits September 27, 2020, and the Commission applied the one-time credit even though she did not require it to qualify for benefits.

[37] Now, the Appellant must find a way to amass the full 420 hours to be eligible for maternity and parental benefits she would have been eligible for under any other circumstances. But she had to do this amidst two significant periods of lockdown where retail business was forced to close to the public and at best only offer curbside pickup. This caused the Appellant to go from three to four shifts per week down to one to two shifts. It severely restricted her capacity to work the requisite hours to qualify for benefits again. This was not her choice. She was deprived of the opportunity by the enforced closures.

[38] Had there never been a Covid-19 pandemic, the Appellant would have worked up to close to her due date and would have proceeded on maternity and parental benefits. These special benefits are not to assist claimants with transitioning to another employment. They exist to ensure new mothers and parents are afforded the time to care for and nurture their child.

[39] By applying the 330-hour credit to the Appellant's converted claim in September 2020 when she did not need it, the result was that it made it impossible for the Appellant to qualify later for the special benefits. The Act is clear; her maternity benefits could not begin later than the week in which the child is born.[12] Any hours she accumulates between the birth date and end of her current claim cannot be backdated to allow her qualify on that earlier date. The Commission knows this. By denying her access to the 300-hour credit, the Appellant would be limited to the 336 actual hours she worked in the qualifying period. It is not enough to qualify.

[40] Through no fault whatsoever of the Appellant, she finds herself denied to opportunity to care for and nurture her child for the legislated benefit period because she could not establish a new benefit period due to the lack of hours. The primary reason that she could not accumulate those hours is a result of the enforced restrictions that shut down or severely restricted the retail sector. She simply was deprived of the opportunity to work the required hours.

[41] However, I must consider the Appellant's argument surrounding the Appellant's submission that she did not need the credit to qualify for regular benefits when her claim was automatically converted. I cannot accept the Commission's argument that the credit is applied to the first claim regardless of whether it is needed. The Appellant had more than enough hours to qualify for regular benefits. She did not need the credit to qualify nor did it offer any other advantage to her.

[12] See Section 22(2)(b)(ii) of the EI Act.

[42] I am satisfied that the 300-hour credit should not have been applied to her converted claim and therefore remains available to be used to increase the Appellant's hours from 336 to 636 for in the qualifying period for her special benefits claim.

[43] I reviewed both the current and previous versions of Section 153.17 (1). In the previous version dated from August 10, 2020, to September 26, 2020, it clearly states that if a claimant is making a claim for special benefits and has fewer than 600 hours of insurable employment, the number of hours that the claimant has in their qualifying period will be increased by 480 hours for special benefits. It also noted in subparagraph (3) that the hours may only be increased once.

[44] In the more recent version dated September 27, 2020, it says that a claimant is deemed to have in their qualifying period an additional 480 hours for special benefits or 300 hours in any other case, and further limits the increase in hours to one-time only. It is ambiguous as to whether the credit is applied regardless of need.

[45] Clearly, the previous version envisioned that there was actually a need to have the hours increased because a claimant could not meet the requirements otherwise. The Covid-19 Response Measures Act Backgrounder relays to Canadians that the credit will be applied to help Canadians qualify with a minimum of 120 hours. [13] Even this information leads to the conclusion that the credit is applied when claimants would not otherwise qualify.

[46] The very purpose of the 300-hour credit is to assist claimants just like the Appellant who could not work the requisite 420 hours to qualify for benefits but had worked the minimum 120 hours. I find that the 300-hour credit applied to the Appellant's converted regular benefit, in September 2020 was an error because it was applied even though it was not needed to assist the Appellant in qualifying for benefits. Therefore, the 300-hour credit is available to be applied to her qualifying period to receive maternity and parental benefits.

[13] https://www.canada.ca/en/employment-social-development/news/2020/10/backgrounder.html

So, has the Appellant enough hours to qualify for EI benefits?

[47] I have considered the totality of the circumstances that the Appellant faced with particular attention to the effect that the Covid-19 enforced closures and restrictions had in depriving her the opportunity to obtain enough insurable working hours so that she would qualify for maternity and parental benefits.

[48] I find that the Appellant has proven that she has enough hours to qualify for benefits because she needs 420 hours. She has worked 336 hours and with the application of the one-time 300-hour credit has 636 hours available in her qualifying period.

Conclusion

[49] The Appellant has enough hours to qualify for benefits.

[50] This means that the appeal is allowed.

Mark Leonard
Member, General Division – Employment Insurance Section