



Citation: *DD v Canada Employment Insurance Commission*, 2021 SST 829

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

Decision

Appellant: D. D.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (431420) dated August 19, 2021
(issued by Service Canada)

Tribunal member: Charlotte McQuade
Type of hearing: Teleconference
Hearing date: October 21, 2021
Hearing participants: Appellant
Decision date: November 6, 2021
File number: GE-21-1755

Decision

[1] The appeal is dismissed. D. D. (Claimant) hasn't shown that he had enough earnings from fishing to receive fisher benefits from March 28, 2021. He has been overpaid by \$3934.00.

Overview

[2] The Claimant was employed as a fisher. He worked from May 18, 2020 to July 11, 2020 with one employer. He also worked from July 5 to July 11, 2020 with another employer. He had fishing earnings from both employers totalling \$14,507.44. The Claimant applied for fisher benefits on September 29, 2020 and was paid the maximum 26 weeks of fisher benefits from September 27, 2020 to March 27, 2021. The Claimant then re-applied for fisher benefits on April 13, 2021, asking that his benefit period start March 28, 2021. The Claimant had not had any further earnings from fishing.

[3] The Commission started a new benefit period from March 28, 2021 for the Claimant and paid him fisher benefits from March 28, 2021 to May 15, 2021. The Commission then decided that the Claimant had to pay all those benefits back as they had established the benefit period by mistake. This caused an overpayment of \$3934.00. The Commission decided that the Claimant hadn't earned the required \$2500.00 in insurable earnings from fishing to qualify to start a benefit period on March 28, 2021.¹

[4] As a result of the pandemic, the government imposed some temporary measures to help claimants access benefits. These were called *Temporary Measures to Facilitate Access to Benefits* (temporary measures). The temporary measures allowing a fishing claim to be calculated using the highest earnings from either a fisher's current claim or previous years' claims for the same season.² Fishers may only benefit from this measure once for a summer claim and once for a winter claim.

¹ See subsection 8(6) of the *Employment Insurance Fishing Regulations* (EI (Fishing) Regulations).

² These measures are found in part VIII.5 of the *Employment Insurance Act* (Act). See sections 153.1922, 153.1923(1) and 153.1923(2) and 153.1924 of the Act.

[5] The Commission says that since the Claimant already had a claim for summer fishing benefits established effective September 27, 2020, using the temporary measures, the temporary measures cannot be used again to assist the Claimant in establishing a benefit period from March 28, 2021. The Commission says the Claimant does not have enough hours to establish a winter fishing claim either. The Commission acknowledges that it started the Claimant's benefit period on March 28, 2021 in error but says since the Claimant was not entitled to the benefits, that he has to pay them back.

[6] The Claimant doesn't dispute that he does not qualify for the benefits he receive. However, he says he should not be responsible for the Commission's mistake in establishing the claim and paying him benefits if he was not entitled to them. The Claimant says that when his initial claim finished, he spoke to his union and his M.P. and asked them if he was entitled to further benefits. Both told him he was entitled to a 10-week extension. Someone called him from the Commission and told him the same thing. He told the agent he had no additional earnings. He was told that didn't matter, as his earnings from the prior summer would be used. Then, after he had been paid seven weeks of benefits, he got a call from the Commission saying they had made a mistake and he had to pay the benefits back. The Claimant says it is not fair for the Commission to tell him one thing, and then change their mind. He says it is also not fair to wait so long before alerting him to the mistake. The Claimant also says that if he has to pay the benefits back, he should be paying the amount he actually received after tax, not the gross amount. He says having to repay the overpayment is causing him financial hardship.

[7] I have to decide whether the Claimant has the required \$2500.00 in fishing earnings to qualify for EI fisher benefits from March 28, 2021.

[8] I have decided, for the reasons set out below that the Claimant does not have the required \$2500.00 in fishing earnings to qualify for EI fisher benefits from March 28, 2021.

Issue

[9] Does the Claimant have enough earnings from fishing to qualify for fisher benefits from March 28, 2021?

Analysis

Qualifying for fisher benefits

[10] Not everyone who stops work can receive EI benefits. You have to prove that you qualify for benefits.³ The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he qualifies for benefits.

[11] To qualify for fisher benefits, a claimant must not qualify for regular benefits and must have accumulated since the beginning of their qualifying period, not less than the amount of insurable earnings as a fisher that is set out in the schedule for the unemployment rate applicable to the region where the claimant resides.⁴

[12] The Commission says the Claimant meets the first requirement. He does not qualify for regular benefits.

[13] A fisher can collect benefits over the winter or over the summer. A fisher can collect benefits over both seasons if they accumulate enough earnings in each separate season.

[14] I will refer to a summer claim as a claim made during a period not earlier than the Sunday of the week in which October 1 falls and ends no later than the Saturday of the week in which June 15 falls.⁵ I will refer to a winter claim as a claim made during a period not earlier than the Sunday of the week in which April 1 falls and ends on

³ See section 48 of the Act.

⁴ See subsection 8(7) of the EI (Fishing) Regulations.

⁵ See subsection 8(1) of the EI (Fishing) Regulations.

Saturday of the week in which December 15 falls.⁶ There are different qualifying periods for each of the two types of benefit periods.

[15] Since this issue in this case concerns the Claimant's claim for a fisher benefits from March 28, 2021, I will only explain the qualifying period for a winter claim.⁷

[16] For a winter fisher claim, the qualifying period begins on the latest of (i) the Sunday of the week in which the September 1 preceding the week in which the fisher makes the initial claim for benefits falls; (ii) the Sunday of the week in which the fisher's last benefit period began; and (iii) the Sunday of the 31st week preceding the week in which the fisher makes the initial claim for benefits.

[17] The qualifying period ends on the Saturday of the week preceding the week in which the fisher makes the initial claim for benefits.

[18] The Claimant had a prior fisher claim before his claim made on April 13, 2021. The Claimant worked from May 18, 2020 to July 11, 2020 with one employer. He also worked from July 5 to July 11, 2020 with another employer. He had fishing earnings from both employers totalling \$14,507.44. The Claimant applied for fisher benefits on September 29, 2020 and was paid the maximum 26 weeks of fisher benefits from September 27, 2020 to March 27, 2021. Since his claim for benefits was made on September 29, 2020 and the benefit period began on September 27, 2020, this was a summer claim.

[19] The Claimant then re-applied for fisher benefits on April 13, 2021, asking that his benefit period start March 28, 2021. Since the Claimant made his initial claim on April 13, 2021, and is asking that his benefit period begin March 28, 2021, this is a winter claim. March 28, 2021 is the Sunday of the week in which April 1, 2021 falls.

⁶ See subsection 8(6) of the EI (Fishing) Regulations.

⁷ See subsection 8(9) of the EI (Fishing) Regulations

[20] The Commission says the Claimant's benefit period for his new initial claim started on March 28, 2021. The Claimant did not dispute this start date of his benefit period and I accept this as the start date.

[21] The Commission does not say what the Claimant's qualifying period is.

[22] I have considered the rule in the legislation, as described above, to determine the qualifying period. The Sunday of the week in which the September 1 preceding the week in which the Claimant made the initial claim for benefits falls is August 30, 2020. The Sunday of the week in which the Claimant's last benefit period began is September 20, 2020. The Sunday of the 31st week preceding the week in which the Claimant made the initial claim for benefits was September 6, 2020. The legislation says the later of those dates is the start of the qualifying period so the qualifying period begins on September 27, 2020.

[23] The qualifying period ends on the Saturday of the week preceding the week in which the Claimant makes the initial claim for benefits. Although the Claimant made his claim on April 13, 2021, the Commission appears to have considered it to have been made as of April 1, 2021. The Saturday before that is March 27, 2021.

[24] So the Claimant's qualifying period is from September 27, 2020 to March 27, 2021.

[25] The Commission says in order for the Claimant to qualify for benefits from March 28, 2021, he required fishing earnings are \$2500.00. The Claimant does not dispute this is the amount of earnings he requires so I accept he requires \$2500.00 in his qualifying period to establish a claim for benefits on March 28, 2021.

[26] This means the Claimant either has to have earned \$2500.00 from fishing from September 27, 2020 to March 27, 2021 or be able to qualify based on the temporary measures the government implemented to help fishers access benefits.

[27] The Commission says that the Claimant had not earned the required \$2500.00 in his qualifying period to establish a new benefit period for EI fisher benefits on March 28,

2021. The Commission says the Claimant had no earnings from fishing during this period. The Claimant confirmed in his testimony that he had no earnings from fishing in this period. He says he next fished again on May 17, 2021.

[28] Since the Claimant did not earn the required \$2500.00 in his qualifying period, he cannot establish a claim from March 28, 2021 unless he can benefit from the temporary measures.

Temporary measures

[29] If a claimant cannot meet the conditions of having enough earned fishing earnings in their current qualifying period, the temporary measures allow a fishing claim to be calculated using the highest earnings from either a fisher's current claim or the previous year's claim from the same season or the second previous year's claim for the same season.⁸

[30] The earnings considered must be from the same seasons. For an initial claim for benefits made on or after March 28, 2021 the earnings that are considered as the insurable earnings in the qualifying period⁹ are the highest of either (i) the earnings that would be used to calculate the fisher's rate of weekly benefits, (ii) the earnings that were used to calculate the fisher's rate of weekly benefits for the benefit period that was established for the fisher during the period beginning on March 29, 2020 and ending on December 19, 2020, and (iv) the earnings that were used to calculate the fisher's rate of weekly benefits for the benefit period that was established for the fisher during the period beginning on March 31, 2019 and ending on December 21, 2019.¹⁰

[31] A fisher may only benefit from this measure once for a summer fishing claim and once for a winter fishing claim between September 27, 2020 and September 25, 2021.¹¹

⁸ Pursuant to Part VIII.5 and Section 153.1922 and 153.1923 of the Act.

⁹ See section 153.1924 of the Act.

¹⁰ See subsection 153.1923(b) of the Act.

¹¹ See subsection 153.1923 (2) of the Act.

[32] For the Claimant to benefit from the above-noted temporary measures, he must have established a benefit period for the period beginning on March 29, 2020 and ending on December 19, 2020 or established a benefit period for the period beginning on March 31, 2019 and December 21, 2019.¹² In other words, he must have had benefit periods for winter claims in either 2019 and 2020.

[33] The Commission says the Claimant's prior claim for summer fishing benefits was established on September 27, 2020 for the claimant using the temporary measures, even though he did not require those temporary measures. The Commission says the legislation says the Claimant's claim for summer benefits starting on March 28, 2021 could not be established using the temporary measures as a fisher may have a claim established for summer fishing benefits only once.

[34] The Commission says it mistakenly established a benefit period from March 28, 2021 and paid the Claimant benefits before discovering that claim had been established using the temporary measures a second time, although that was not permitted under the legislation.

[35] The Claimant confirmed in his testimony that he typically files his claim for fisher benefits at the same time every year around the last week of September or the first week of October, not in March.

[36] I agree with the Commission that the temporary measures cannot be used to assist the Claimant in establishing a benefit period on March 28, 2021 but for a different reason than the Commission suggests.

[37] The Claimant and the Commission both agree the Claimant had enough earnings to establish his September 27, 2020 benefit period so he did not need the temporary measures to qualify for that benefit period.

[38] Section 153.1922 of the Act provides: "A fisher who does not meet the conditions under paragraph 8(2)(b) or (7)(b) of the Employment Insurance (Fishing) Regulations

¹² See section 153.1922 of the Act.

may receive benefits under section 8.1 of those Regulations if the fisher has received such benefits during any of the periods referred to in subparagraph 153.1923(1)(a)(ii) or (iii) or (b)(ii) or (iii).”

[39] I read this to mean that it is only if a fisher does not qualify with enough earnings from fishing in his qualifying period then the temporary measures are to be applied. The Claimant already qualified under paragraph 8(2) (b) of the EI (Fishing) Regulations by earning enough insurable earnings from fishing in his qualifying period to start the September 27, 2020 benefit period.

[40] It is unclear why the Commission is calling the March 28, 2021 benefit period a second summer claim. As above, it is a winter claim. I also don't agree that the temporary measures can only be used once, for either a summer fisher claim or a winter fisher claim. The legislation clearly says the temporary measures can be used once for a summer claim *and* once for a winter claim.¹³

[41] However, I find the Claimant cannot benefit from the temporary measures to establish a benefit period on March 28, 2021 anyway. I find this because there is no evidence that the Claimant established a winter benefit period beginning on March 29, 2020 and ending on December 19, 2020 or a winter benefit period beginning on March 31, 2019 and ending on December 21, 2019. His benefit periods were for the alternate season. So, I find the Claimant cannot use the temporary measures to assist him in establishing a claim or benefits on March 28, 2021. As he did not have winter benefit periods established, in 2019 or 2020 he cannot use earnings from 2019 or 2020 to assist him in establishing a winter claim in 2021.

So, can the Claimant establish a claim for benefits from March 28, 2021?

[42] I find that the Claimant hasn't proven that he has enough earnings from fishing in his qualifying period to establish a benefit period from March 28, 2021. He needs

¹³ See subsection 153.1923 of the Act.

\$2500.00 in earnings and he has none. He also cannot benefit from the temporary measures to assist him as he had no benefit period established in the prior same season or the prior same season before that.

[43] While I sympathize with the Claimant's situation, I can't change the law. ¹⁴This means the Claimant has been overpaid in the amount of \$3934.00.

Overpayment

[44] The Claimant says he should not be responsible for the Commission's mistake in establishing the claim and paying him benefits if he was not entitled to them. The Claimant says that when his prior claim finished, he spoke to his union and his M.P. and asked them if he was entitled to further benefits. Both told him he was entitled to a 10-week extension. An agent from the Commission called him and told him the same thing. He told the agent he had no additional earnings. The agent told him that didn't matter, as his earnings from the prior summer would be used. Then, after he had been paid seven weeks of benefits, he got a call from the Commission saying they had made a mistake and he had to pay the benefits back. He says this has put him in a difficult financial situation. This is a significant amount of money to ask him to pay back. He is the sole income earner in the family. His wife has a disability, as does his adult son. He says this situation has been devastating. What he is being asked to pay back is almost a quarter of his yearly income. He explained how difficult it is to manage over the winter with the heating costs.

[45] The Claimant says it is not fair for the Commission to tell him one thing, and then change their mind and to wait so long before alerting him to the mistake. The Claimant also says that if he has to pay the benefits back, he should be paying the amount he actually received, being the net amount, not the gross amount.

[46] The Commission agrees they made a mistake but says the Claimant still has been paid benefits he is not entitled to.

¹⁴ See *Pannu v Canada (Attorney General)*, 2004 FCA 90.

[47] The Claimant did all he could to clarify his entitlement to benefits. He was assured he was eligible for the benefits he received. The Commission's error has put the Claimant in a truly unfortunate position. However, I am unable to remedy it. The overpayment was validly created as the Claimant was not entitled to the benefits he was paid. The Federal Court of Appeal has said that misinformation by the Commission is no basis for relief from the operation of the Act. It has also said the law has to be followed even if the Commission made a mistake.¹⁵ I am bound by those rulings.

[48] The overpayment must be calculated at the gross amount of benefit paid, rather than the net amount. The legislation imposes a liability on a claimant to repay "an amount paid by the Commission to the claimant as benefits" to which the claimant was not entitled.¹⁶ The legislation does not state that a claimant must only return the net amount of benefit received. It refers to amount "paid" as benefits. The Commission remits deducted taxes to the CRA on behalf of claimants. While I appreciate that the Claimant may have to pay back more than was actually received, reimbursement of any taxes overpaid could be pursued through the CRA.

[49] I also have no authority to waive or write off the overpayment or to direct the Commission to do so. That authority rests with the Commission.¹⁷ The Commission says it cannot waive or write-off the overpayment.

[50] Although this recommendation is non-binding on the Commission, I would recommend the Commission reconsider whether it can write-off the overpayment, given the Commission agrees that it mistakenly established the benefit period and given the Claimant's financial hardship.

¹⁵ See *(Canada (Attorney General) v. Shaw*, 2002 FCA 325 and *Robinson v. Canada (Attorney General)*, 2013 FCA 255.

¹⁶ Section 43 of the Act.

¹⁷ See section 112.1 of the Act and section 113 of the Act.

Conclusion

[51] The appeal is dismissed. The Claimant cannot establish a benefit period on March 28, 2021.

Charlotte McQuade
Member, General Division – Employment Insurance Section