



Citation: *HZ v Canada Employment Insurance Commission*, 2022 SST 273

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

Decision

Appellant: H. Z.
Representative: B. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (437337) dated November 29,
2021 (issued by Service Canada)

Tribunal member: Leanne Bourassa

Type of hearing: Videoconference
Hearing date: January 25, 2022
Hearing participants: Appellant
Appellant's representative

Decision date: February 8, 2022
File number: GE-21-2607

Decision

[1] The appeal is dismissed.

[2] The Claimant's claim for benefits starting April 12, 2020 was appropriately converted from a regular Employment Insurance claim to an Employment Insurance Emergency Response Benefits claim.

[3] The Claimant would not be entitled to 50 weeks of regular Employment Insurance benefits for a claim starting January 31, 2021.

Overview

[4] The Claimant is a US resident who works in Canada. She established a claim for regular Employment Insurance (EI) benefits starting April 12, 2020. She received 36 weeks of benefits. She established a second claim beginning January 31, 2021. Only 12 weeks of benefits were approved for that claim.

[5] The Claimant called the Commission's interstate department to find out if the January 31, 2021 claim could be extended to 50 weeks of benefits. After the discussions with an agent, her April 12, 2020 claim was converted to an EI Emergency Response Benefits (EI ERB) claim with 19 weeks of benefits paid. Another claim was established for her starting October 4, 2020 for 36 weeks and benefits were paid on that claim. Her January 31, 2021 claim was deleted but she had already been paid benefits under that claim, so this resulted in an overpayment.

[6] The Claimant disagreed with these changes and asked the Commission to reconsider them. The Commission explained that the April 12, 2020 claim was correctly converted to EI ERB benefits. Also, the legislative amendment allowing for 50 weeks of benefits for a post EI ERB claim does not apply to interstate/commuter claimants because their claims are not calculated the same way as claims for those living in Canada. Finally, the January 31, 2021 benefit period could not be re-established without creating an overpayment, which the Claimant did not want.

[7] The Claimant still wants her April 2020 claim to be reverted to a regular EI claim. She then wants her January 2021 claim to be re-established with 50 weeks of benefits.

[8] The Commission says it was obligated to convert the Claimant's April 12, 2020 claim to an EI ERB claim. The maximum number of weeks of benefits the Claimant could be entitled to on the January 31, 2021 claim, if it were to be reinstated, would be 36 weeks of benefits. Finally, reinstating the January 31, 2021 would result in an overpayment for the claimant from the October 4, 2020 claim, which still exists.

Preliminary comments

[9] Both parties in this case have submitted extensive argumentation and documentation. I have reviewed all of it. As the Claimant asked, I have kept in mind that some of the evidence submitted shows the situation as it is after the manual modifications done by the Commission in June 2021, not the way the benefits were actually paid to the Claimant.

[10] The Tribunal is only able to consider appeals of decisions made by the Commission on reconsideration.¹ Before issuing a reconsideration decision, the Commission presented several options to the Claimant to try to resolve the situation. The Claimant said they wanted to make an appeal to the Tribunal, without choosing any of those options. So, the Commission issued a reconsideration decision.

[11] What this means is that the options presented to the Claimant by the Commission before issuing their reconsideration decision are not before me. Regardless of my decision, the parties will still have choices to make and will need to discuss between them how to resolve the situation.

Issues

[12] Was the Commission required to convert the Claimant's April 2020 Regular EI claim to an EI ERB claim?

¹ See section 113 of the Employment Insurance Act.

[13] Would the Claimant be entitled to 50 weeks of benefits, if her benefit period established on January 31, 2021, was re-established?

Analysis

[14] The evidence shows that there are three claims involved in this case:

- **The April 2020 claim**

- This claim was originally established on April 12, 2020 as a regular EI benefits claim. 36 weeks of benefits were actually paid to the Claimant on this claim, from May 17, 2020 to January 30, 2021.
- At the time of the appeal, the Commission considers that this claim had been converted to an EI ERB claim.
- After being converted to an EI ERB claim, the Commission changed its calculations on paper to consider that 20 weeks of EI ERB benefits were paid to the Claimant. The last payment was considered to have been made for the week ending October 3, 2020.
- The remaining weeks of benefits that were attributed to the October 2020 claim.
- Since an EI ERB claim would mean the Claimant was entitled to a lesser amount of benefits, this change created an overpayment for the Claimant. The amount of this overpayment was written off by the Commission so the Claimant did not need to pay it.

- **The October 2020 claim**

- The Commission created this claim in June 2021 after the Claimant inquired about having more hours on the January 2021 claim.

- The claim was established as of October 4, 2020.
 - Under this claim, the Claimant was entitled to 36 weeks of benefits. The Commission adjusted their records to show that 27 weeks of benefits had been paid to the Claimant for the period of October 4, 2020 to April 10, 2021. This adjustment was only done on paper. The Claimant refused to submit reports to claim the outstanding 9 weeks of benefits.
 - Because the Commission attributed payments under this claim to periods for which benefits under the January 2021 claim had actually been paid to the Claimant, the Claimant was considered to have received payments for 12 weeks under both the October 2020 and the January 2021 claims.
 - At the time of the hearing, the Commission says that this claim should not exist. However, its creation was not addressed in the reconsideration, so is not in issue before the tribunal.
- **The January 2021 claim**
 - This initial claim for benefits was made by the Claimant on February 5, 2021 and established as of January 31, 2021.
 - 12 weeks of benefits were authorized and actually paid to the Claimant from January 31, 2021 to April 24, 2021.
 - This claim was cancelled by the Commission in June 2021 when the October 2020 claim was created.
 - The Claimant wants this claim reinstated with entitlement to 50 weeks of benefits.

Issue 1: Was the Commission required to convert the April 2020 Regular EI claim to an EI ERB claim?

[15] The April 2020 claim cannot be a regular EI claim. The Commission had no choice but to convert the claim to an EI ERB claim.

– The Claimant did qualify for EI ERB benefits

[16] The Claimant argues that she was not eligible for EI ERB benefits because she does not reside in Canada.²

[17] The Commission explains that even though she did not reside in Canada, the Claimant was eligible for EI ERB benefits. This is because on or after March 15, 2020, she would have been otherwise available to establish a benefit period for regular EI benefits.³

[18] I find that the fact that the Claimant resides outside of Canada does not mean she was ineligible for EI ERB benefits. To be eligible for EI ERB benefits, you need to meet the definition of “claimant” under the law. A claimant for EI ERB purposes includes someone who could have had a benefit period for regular EI benefits on or after March 15, 2020.⁴

[19] I find the Claimant could establish a benefit period for regular EI starting April 12, 2020, because the evidence shows that:

- Her record of employment shows that the last day of work for which she was paid was April 10, 2020.
- She submitted her application for benefits on April 17, 2020.
- At that point, she would have experienced an interruption of earnings and had no income for a period of 7 days.

² She is basing this argument on Section 153.9(1)(a) of the Employment Insurance Act (EI Act).

³ See section 153.5(2)(b) of the EI Act.

⁴ See sections 153.5(2)(b) and 153.5(3)(a) of the EI Act.

- Her claim for regular benefits would be established as of April 12, 2020, because that is the Sunday of the week in which she made her application for benefits.⁵
- The Commission calculated that her qualifying period was from April 14, 2019 to April 11, 2020. I agree with that calculation.
- Her record of employment showed that during that period, she had accumulated more than 1,820 insurable hours of employment.
- Since the Claimant resides in a state of the United States that is contiguous to Canada and is available for work in Canada, she is not disentitled from receiving benefits.⁶
- The Claimant confirmed to an agent that she had not received benefits from the United States.
- Since she has more than 1,820 hours of insurable employment in her qualifying period, she could be paid a maximum of 36 weeks of regular EI benefits.⁷

[20] I find that since the Claimant would have qualified to have a benefit period for regular EI benefits established after March 15, 2020, she would meet the definition of a claimant for the EI ERB.⁸ Since she meets the definition of claimant and has not had income for a period of seven (7) or more consecutive days, she was eligible for the EI ERB as of April 12, 2020.⁹

[21] Since the Claimant did have a valid claim for benefits effective after March 15, 2020, this claim would have been deemed to be a claim for EI ERB benefits. The Commission was then obligated to make the necessary adjustments.

⁵ This is set out in Section 10(1)(b) of the EI Act.

⁶ See section 55(6) of the Employment Insurance Regulations (EI Regulations).

⁷ This is set out in section 55(7) of the EI Regulations.

⁸ See section 153.5(2)(b) of the EI Act. This section refers to benefits listed in section 153.5(3)(a), which includes regular EI benefits.

⁹ Further to section 153.9(1)(b) of the EI Act.

– **The Commission was obligated to convert her benefits from regular EI to EI ERB benefits**

[22] The Commission did not have a choice to leave the Claimant's April 2020 claim as a regular EI claim. They were required by the law to convert it to an EI ERB benefits claim.

[23] The law says that if an interim order or provision of the law made to mitigate the economic effects of COVID-19 says that it applies despite any existing provision of the Act, then the interim law or provision prevails where there are conflicts.¹⁰

[24] Because of this, when claimants made a claim after March 15, 2020, they do not have a choice of receiving regular EI or EI ERB benefits. Any application that was made after that day is deemed to be an application for EI ERB benefits.¹¹ Any regular EI benefits they received after March 15, 2020 would be deemed to be EI ERB benefits.¹²

[25] The Claimant argues that since the Commission originally accepted this claim as a regular EI claim and paid 36 weeks of benefits on that basis, then the claim for regular EI benefits is proven to be valid.

[26] The Commission often has to review a claim if they get new information that could show that a Claimant was not eligible for benefits that were paid to them. The law includes provisions to allow the Commission to review claims and make changes if necessary. Because of this, I do not find that the fact that benefits were paid to the Claimant as a regular EI claim in April 2020 is definitive proof that the claim must remain a regular EI claim.

– **The December 2, 2020 deadline does not apply**

[27] The fact that the conversion of the April 2020 claim was done after December 2, 2020 does not invalidate it.

¹⁰ See section 153.3(8) of the EI Act.

¹¹ See section 153.1310 (a) of the EI Act.

¹² See section 153.1310 (c) of the EI Act.

[28] The Claimant argues that the April 2020 claim should not have been converted to an EI ERB claim since this was done after the December 2, 2020 deadline for EI ERB claims to be made.

[29] The Commission argues that processes are in place that allow for it to recalculate claims that were made previously. They argue that the Claimant's claim was recalculated under those rules.

[30] The parties agree that in April 2021 the Claimant called the Commission about the number of weeks of benefits she was entitled to under her January 2021 claim. At that time, she confirmed that she had not received any benefits from the United States.

[31] The Commission explains that the EI Act allows for the Commission to reconsider a claim within 36 months of benefits being paid or having been payable.¹³ If they determine that the claimant was not qualified or entitled to receive benefits, they have to recalculate the amount of money in question and notify the claimant of their decision.¹⁴

[32] The Commission submits that in April 2021, the Claimant confirmed that they had not received any money from the United States. Since a commuter claimant needs to confirm this to be entitled to benefits, it became necessary for the Commission to reconsider whether she was eligible for benefits when the claim was established in April 2020.

[33] I understand the Claimant's argument that no EI ERB claim had existed before December 2, 2020, so it is not possible to say that a claim for EI ERB was made before that date. Unfortunately, since the law clearly says that a claim made between March 15, 2020 and September 26, 2020 is deemed to be an EI ERB claim, and the Claimant did make a claim for benefits on April 17, 2020, I have to conclude that she is deemed to have an EI ERB claim that was made before December 2, 2020.

¹³ This is set out in section 52 of the EI Act.

¹⁴ Subsection 52(2) of the EI Act. This subsection is modified for EI ERB purposes by subsection 153.1303 (1) of the EI Act.

[34] Since there was a claim that was made in April 2020 and benefits were paid on that claim, the Commission had the authority to recalculate it. The fact that they did this after December 2, 2020, is not relevant because the recalculation was within 36 months of benefits being paid. The EI ERB claim was not made in June 2021. It was only deemed to be an EI ERB claim and recalculated at that time.

[35] To summarize, I find that the Claimant was eligible for EI ERB benefits and the Commission acted correctly in deeming her regular EI claim to be an EI ERB claim. The Commission conducted the recalculation within 36 months of the payments, as it was entitled to do.

Issue 2: Would the Claimant be entitled to 50 weeks of benefits if her January 31, 2021 claim were re-established.

[36] I find that if the Claimant's claim established as of January 31, 2021 were to be reinstated she would not be entitled to 50 weeks of regular EI benefits.

– What sections of the law apply to the Claimant?

[37] The Commission explains that since the since the Claimant is an interstate/commuter claimant, the calculation of the number of weeks of benefits she is entitled to is set out in the EI Regulations, not the EI Act.

[38] The Claimant says that the EI Act says that a claimant who made a claim for regular benefits beginning between September 27, 2020 and September 25, 2021 can be paid a maximum of 50 weeks of regular benefits.¹⁵ It also says that this provision does not apply to a claimant under the Employment Insurance (Fishing) Regulations.¹⁶ She says that both of these provisions apply to her.

[39] These sections of the law do not apply to the Claimant. Claimants who are not in Canada are not entitled to receive benefits.¹⁷ Since the Claimant does not live in

¹⁵ See section 12 (2.1) of the EI Act.

¹⁶ Section 12 (2.2) of the EI Act.

¹⁷ See section 37 of the EI Act.

Canada, but works in Canada, she benefits from an exception to this disentanglement.¹⁸ The number of weeks of benefits for a claimant who fits under this exception is established under the EI Regulations¹⁹, and not the sections of the law quoted by the Claimant.

[40] The Claimant argues that since the law says that claimants under the Fishing Regulations are specifically excluded from the 50-week maximum on claims between September 27, 2002 and September 25, 2021, this rule should apply to her, because she is not a fisher. The fact that fishers are excluded from the 50-week maximum rule, does not mean that interstate/commuter claimants are entitled to it.

[41] The sections of the law quoted by the Claimant apply to claimants who are regularly entitled to benefits. The Claimant is not one of those claimants because she is entitled to benefits because of the exception to disentanglement for claimants living outside of Canada. The fact that she is not engaged in fishing is not relevant to her entitlement to benefits.

[42] This means that the Claimant would not be entitled to the maximum of 50 weeks of benefits mentioned in the sections of the law she has quoted.

– **The specific number of weeks of benefits the Claimant would be entitled to under the January 2021 claim is not before me.**

[43] Presently, the January 2021 claim has been cancelled in favor of the October 2020 claim made manually by the Commission. The Claimant is asking for the January 2021 claim to be reinstated with 50 weeks of benefits.

[44] The Commission has submitted that the October 2020 claim should not have been created. It was an antedate (backdating) of the January 2021 claim, which resulted in the January 2021 claim being voided. Notes in the file show that the

¹⁸ Subsection 55(6) of the EI Regulations. Section 55(7) of the EI Regulations established the maximum number of weeks a US resident can receive and the maximum set out in that section is 36 weeks.

¹⁹ Subsection 55(7) of the EI Regulations.

Commission discussed with the Claimant options that included reinstating the January 2021 claim, but the Claimant preferred to bring the matter before the Tribunal.

[45] From these notes, it seems that the January 2021 claim could be reinstated, but that there would be consequences that the Claimant does not accept.

[46] Since the Claimant has not accepted the reinstatement of the January 2021 claim on the terms the Commission has offered, the Commission's reconsideration letter does not say how many weeks of benefits the Claimant would be entitled to under that claim. So, the calculation of the number of weeks is not before me at this time.

[47] In any case, the number of weeks of benefits the Claimant would be entitled to under a January 2021 claim, is not something that can be determined with certainty right now. Whether or not the October 2020 claim remains in place would affect the calculation of the number of weeks of benefits to which the Claimant would be entitled under a reinstated January 2021 claim, or if the Claimant could even qualify for such a claim.

[48] However, as explained above, the number of weeks of benefits that a US resident can receive is set out in the EI Regulations.²⁰ Under those regulations, a claimant who has 1,820 hours or more of insurable employment in Canada will be entitled to a maximum of 36 weeks of benefits. In no case would she be entitled to 50 weeks of benefits on a January 2021 claim.

Conclusion

[49] The appeal is dismissed. The Claimant's April 2020 benefit claim must be deemed to be an EI ERB claim. If her January 2021 benefit period were to be reinstated, the maximum number of weeks of benefits she could be entitled to as an interstate/commuter claimant is 36.

Leanne Bourassa
Member, General Division – Employment Insurance Section

²⁰ Subsection 55(7) of the EI Regulations.