



Citation: *ML v Canada Employment Insurance Commission*, 2022 SST 784

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** M. L.  
**Representative:** Kim Bouchard

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Jessica Grant

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**Decision under appeal:** General Division decision dated January 4, 2022  
(GE-21-1661)

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**Tribunal member:** Jude Samson

**Type of hearing:** Videoconference  
**Hearing date:** May 31, 2022  
**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** August 18, 2022  
**File number:** AD-22-65

## Decision

[1] The appeal is allowed. The Claimant's benefit period can be cancelled.

## Overview

[2] M. L. is the Claimant in this case. Her appeal is about the interplay between different benefit programs aimed at helping people through the COVID-19 pandemic.

[3] During the pandemic, the Claimant received the Employment Insurance (EI) Emergency Response Benefit for many months. She also invested time and energy in building her own business.

[4] After the Emergency Response Benefit program ended, the Canada Revenue Agency (CRA) paid Canada Recovery Benefits to the Claimant for several months. However, a problem arose when the CRA discovered that she also had an open claim (or benefit period) for EI benefits.

[5] The Claimant asked the Canada Employment Insurance Commission (Commission) to cancel her claim, but it refused.<sup>1</sup>

[6] The Claimant appealed the Commission's decision to the Tribunal's General Division, but it dismissed her appeal. It described this case as an unfortunate situation in which different benefit programs work against each other, instead of together.

[7] Now the Claimant is appealing the General Division decision to the Tribunal's Appeal Division.

[8] The General Division made errors in this case. As a result, I can give the decision it should have given: the Claimant meets the requirements for the Commission to cancel her benefit period.

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<sup>1</sup> While the law gives the Commission the power to make decisions about the EI program, most people deal with Service Canada. Service Canada delivers the EI program for the Commission.

## Issues

[9] I'll consider the following issues in this decision:

- a) Did the General Division make an error of law or jurisdiction by
  - assuming that the Claimant had established a claim for EI regular benefits in October 2020?
  - only considering whether the Commission could cancel the Claimant's benefit period at the time of her request?
- b) If the General Division made an error, how should I fix its error?

## Analysis

[10] I can intervene in this case only if the General Division made a relevant error.<sup>2</sup> This decision focuses on whether the General Division overlooked an important issue or misinterpreted relevant parts of the law.<sup>3</sup> Any error of these types will allow me to intervene in this case.

### **The General Division made errors of law and jurisdiction**

[11] Like many people, the Claimant was laid off from work in March 2020 because of the COVID-19 pandemic. So, she applied to the Commission for benefits.

[12] The Commission processed the Claimant's application as a claim for the EI Emergency Response Benefit.<sup>4</sup> When that program was ending, the government announced that some 2.8 million Canadians would be transitioning to EI regular benefits on September 27, 2020.<sup>5</sup>

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<sup>2</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

<sup>3</sup> Errors of jurisdiction and law fall under sections 58(1)(a) and 58(1)(b) of the DESD Act.

<sup>4</sup> See sections 153.8(1), 153.8(5), and 153.1310 of the *Employment Insurance Act* (EI Act).

<sup>5</sup> See the News release starting on page GD10-5 of the appeal record.

[13] At the Commission's urging, the Claimant filed one biweekly report for EI benefits. However, the Commission contacted her because she reported being self-employed. In a discussion between the Claimant and the Commission, the Claimant said that she wasn't asking for EI regular benefits at the time. Instead, she said that she would apply for the Canada Recovery Benefit, which she received for several months.<sup>6</sup>

[14] The Claimant was surprised, then, when the CRA suddenly stopped paying her benefits. It said that she wasn't eligible for the Canada Recovery Benefit because of her open claim with the Commission.

[15] So, the Claimant contacted the Commission to try to solve the problem. However, the Commission said that, even though she wasn't entitled to benefits, the Claimant didn't meet the requirements for her benefit period to be "terminated, cancelled, voided or withdrawn."<sup>7</sup>

– **The General Division made errors of law and jurisdiction by assuming that the Claimant had established a benefit period in October 2020**

[16] The General Division should have decided whether the Claimant had a benefit period starting on October 4, 2020. It made errors of law and jurisdiction by overlooking this issue.

[17] The EI system is claim-driven.<sup>8</sup> The law says that a person who wants to receive benefits has to start by making an initial claim and proving that they qualify to receive benefits. Then, the person has to file biweekly reports showing that they meet the requirements for receiving benefits, and that they haven't been disqualified or disentitled for any reason.

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<sup>6</sup> See pages GD12-9 and GD12-12.

<sup>7</sup> See the notes of a telephone call between the Commission and the Claimant on page GD3-20.

<sup>8</sup> See, for example, sections 9, and 48–50 of the EI Act.

[18] So how, as the Commission argues, did the Claimant come to have a benefit period starting in October 2020? In fact, the Commission admits that the Claimant didn't file an initial claim for benefits at that time.<sup>9</sup>

[19] Confusingly, the Commission's position about the start of the Claimant's benefit period has changed over time. Here are some examples:

- In an email sent to the Claimant on September 16, 2020, the Commission said, "we will automatically review your file and start a new claim for EI regular benefits if you qualify."<sup>10</sup>
- In an argument to the General Division, the Commission said that by attempting to complete a biweekly report, the Claimant submitted an initial claim for EI regular benefits.<sup>11</sup>
- And in another argument to the General Division, the Commission said that the Claimant's Emergency Response Benefit claim dated March 24, 2020, was used to establish a new claim for EI benefits effective October 4, 2020.<sup>12</sup>

[20] Given the Claimant's arguments, the claim-driven nature of the EI program, and the Commission's inconsistent explanations, the General Division should have recognized that it needed to decide whether the Commission had validly established a benefit period in the first place. Only then did it need to consider if the Commission could cancel the benefit period.

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<sup>9</sup> See page GD6-1.

<sup>10</sup> See page GD10-13.

<sup>11</sup> See page GD10-2.

<sup>12</sup> See page GD12-2.

- **The General Division made errors of law and jurisdiction by only considering whether the Commission could cancel the Claimant’s benefit at the time of her request**

[21] The Claimant asked the Commission to cancel her benefit period on July 5, 2021.<sup>13</sup> Importantly, however, the Commission’s powers to cancel a benefit period change once the benefit period has ended.

[22] A person must be able to establish a new benefit period when trying to cancel one that is still active.<sup>14</sup> That situation does not apply here since the Claimant did not want to establish a new benefit period.

[23] However, once a person’s benefit period has ended, section 10(6)(a) of the *Employment Insurance Act* (EI Act) allows the Commission to cancel the benefit period if no benefits were paid or payable during the period.<sup>15</sup>

[24] In this case, the Claimant’s benefit period ended on October 2, 2021, at the latest. In other words, it had clearly ended by the time of the General Division hearing in November 2021. Yet the General Division limited itself to asking whether the Commission could cancel the benefit period **at the time of the Claimant’s request**, so while the benefit period remained active.<sup>16</sup>

[25] The General Division made errors of law and jurisdiction by overlooking the question of whether the benefit period could be cancelled after the benefit period ended.

[26] The law says that a cancelled benefit period is deemed never to have begun.<sup>17</sup> This means that the effect of cancelling a benefit period is the same regardless of whether it was cancelled during the benefit period or after it had ended.

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<sup>13</sup> I recognize that the Claimant’s main argument is now that the Commission never validly established her benefit period in the first place.

<sup>14</sup> See section 10(6)(b) of the EI Act for the full list of requirements.

<sup>15</sup> See section 10(6)(a) of the EI Act.

<sup>16</sup> See paragraphs 13 and 14 of the General Division decision.

<sup>17</sup> See section 10(7) of the EI Act.

[27] Again, the General Division should have been alive to this changing situation and decided all the questions needed to respond to the Claimant's cancellation request.<sup>18</sup>

[28] The Commission denies that the General Division made an error in this part of its decision. Instead, it says that the General Division need only decide issues arising from a "substantive reconsideration."<sup>19</sup>

[29] The Tribunal takes a broad approach to its jurisdiction, within the limits of the law, to manage appeals fairly, efficiently, and to allow meaningful recourse.<sup>20</sup>

[30] If I accepted the Commission's argument, then the Claimant would have to submit a second cancellation request, and restart the recourse process in the event of another negative decision. That approach is impractical, inefficient, and unnecessary under the law. Of course, the Tribunal must still act fairly and ensure that the parties are aware of all the issues it will decide.

[31] The law allows the General Division to decide appeals *de novo* (anew).<sup>21</sup> This means that it can and frequently does consider new evidence and changing circumstances when reaching its decision. In a misconduct case, for example, the General Division would not simply ask if the Commission's decision was correct at the time the applicant asked for benefits, ignoring whether the employer later changed its view about the relevant conduct.

[32] In a legislative scheme that is similar to this one, the Federal Court discussed the broad nature of a *de novo* hearing, including the ability to introduce new issues.<sup>22</sup>

[33] Here, the Commission's arguments show that it considered whether the Claimant met **any** of the legal requirements for cancelling a benefit period. It argued that benefits **were payable** to the Claimant, without limiting itself to the time of the Claimant's

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<sup>18</sup> See section 64(1) of the DESD Act.

<sup>19</sup> In support of its argument, the Commission relies on section 113 of the EI Act and on *MM v Canada Employment Insurance Commission*, 2021 SST 208 at paragraph 39.

<sup>20</sup> See *DS v Canada Employment Insurance Commission*, 2020 SST 773 at paragraph 7.

<sup>21</sup> See especially sections 54, 64, and 66 of the DESD Act.

<sup>22</sup> See *Stevens Estate v Canada (Attorney General)*, 2011 FC 103 at paragraphs 66–74.

request.<sup>23</sup> This is the critical issue that determines whether section 10(6)(a) of the EI Act applies in this case or not.

[34] For all these reasons, the General Division made an error by limiting itself to considering whether the Commission could cancel the Claimant's benefit period, at the time she made her request.

### **I will fix the General Division's error by giving the decision it should have given**

[35] At the hearing, both parties said that I could give the decision the General Division should have given.<sup>24</sup> The Commission repeated its position after the hearing.<sup>25</sup>

[36] I agree. The Claimant was given a full opportunity to present her case at the General Division. And although the General Division had to make several requests, the Commission eventually provided all its relevant documents. Indeed, the facts of this case are not especially controversial.

#### **– The Commission validly established the Claimant's benefit period**

[37] The Claimant strenuously argued that the Commission lacked the legal power to establish the Claimant's benefit period. I disagree.

[38] The Claimant highlights how a person applying for EI benefits first needs to submit an initial claim for benefits. Only then will the Commission consider whether it can establish a benefit period and pay benefits to that person.<sup>26</sup> The Commission can also decide how a claim must be made and on what form.<sup>27</sup>

[39] As a result, the Claimant argues that the Commission had no power to establish a benefit period on her behalf. Specifically, the Claimant's application from March 2020

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<sup>23</sup> See, for example, the Commission's arguments on page GD4-3, GD6-1, and GD10-2 (the last two being written after the benefit period expired).

<sup>24</sup> Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16 to 18.

<sup>25</sup> See the Commission's arguments on page AD18-2.

<sup>26</sup> See section 6(1) of the EI Act, which defines "initial claim for benefits," along with sections 9 and 48 of the EI Act.

<sup>27</sup> See section 50 of the EI Act.



was deemed to be an application for EI Emergency Response Benefits.<sup>28</sup> The Claimant filed no other applications that the Commission could use to establish a claim for regular benefits.

[40] As mentioned above, the Commission's response to this argument has been unclear. In its arguments to the Appeal Division, yet another theory was advanced: the Claimant's application from March 2020, after being used to establish the Claimant's entitlement to Emergency Response Benefits, was "carried forward" and deemed to be an initial claim for EI benefits in October 2020.<sup>29</sup>

[41] In my view, the simpler and more compelling argument is that, in September 2020, the Commission used its powers under the law to waive the need for an application in order to benefit "a class or group of claimants."<sup>30</sup>

[42] I confess that there is no specific evidence about the Commission's decision to use this power. However, I'm satisfied from the Commission's communications that that's what was intended when it wrote: "we will automatically review your file and start a new claim for EI regular benefits if you qualify."<sup>31</sup>

[43] The Claimant also argues that temporary measures, which came into force in September 2020, make clear that an application for benefits was still required.<sup>32</sup> However, that section does not change the fact that the Commission decides what is required to make a claim, and that it can waive those requirements in appropriate circumstances.

[44] And while the Claimant relies on telephone conversations she had with the Commission to say that she wasn't claiming EI benefits, all those conversations happened after her EI claim was opened on October 4, 2020.<sup>33</sup> Plus, the fact that the

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<sup>28</sup> See sections 153.8 and 153.1310 of the EI Act.

<sup>29</sup> See page AD9-4.

<sup>30</sup> Section 50(10) of the EI Act gives the Commission this power.

<sup>31</sup> See page GD10-13. Also, see the references to "automatic transition" in the Government's News release starting on page GD10-5.

<sup>32</sup> In support of this argument, the Claimant relies especially on section 153.18 of the EI Act, which refers to a person making an initial claim for benefits on or after September 27, 2020.

<sup>33</sup> See, for example, pages GD12-7 to 12.

Claimant was contacting the Commission, and the contents of those conversations, demonstrate that the Claimant knew she had an open claim with the Commission, even if she wasn't specifically requesting benefits at that time.

– **The Claimant did not make an invalid choice about applying for EI benefits**

[45] I'm unable to accept the Claimant's argument about making an invalid choice between benefit options.

[46] The Claimant also argues that she took all reasonable steps to inform herself about the two benefit options available to her in the fall of 2020 and that the Commission couldn't establish a benefit period because she made no clear choice in favour of EI regular benefits.<sup>34</sup> If anything, the Claimant chose the Canada Recovery Benefit.<sup>35</sup>

[47] I recognize the Claimant's unique circumstances, and how she might feel prejudiced by the consequences that flowed from following the Commission's messages and the establishment of her benefit period. These programs were complex, changing quickly, and prone to unforeseen consequences.

[48] However, as I discussed above, the Commission waived the need for an application in this case. In addition, the Commission informed the Claimant of its plans and the Claimant did not, before October 4, 2020, discuss her unique circumstances with the Commission or object to the establishment of a benefit period.

[49] And while I agree that the Commission could have provided better information to the Claimant, the Tribunal cannot do any of the following:<sup>36</sup>

- supervise the quality of service given by the Commission;

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<sup>34</sup> In support of these arguments, the Claimant relies on *Karval v Canada (Attorney General)*, 2021 FC 395 and *Semenchuck v Ruhr*, 1996 CanLII 7148 (SK QB).

<sup>35</sup> See the telephone conversations between the Claimant and the Commission reported on pages GD12-9 and GD12-12.

<sup>36</sup> See *HM v Canada Employment Insurance Commission*, 2019 SST 319 at paragraph 18 and *Dalgleish v Canada (Attorney General)*, 2018 FC 275 at paragraph 9.

- require that it tell people how to maximize their benefits; or
- relieve people from the consequences of the law.

[50] Finally, this case is very different from the ones that the Claimant relies on to support her arguments. Those cases are about a choice (or election) that the person needed to make under the law. The relevant laws in this case did not offer the Claimant a similar kind of choice.

– **The Claimant met the requirements for cancelling her benefit period**

[51] The law says that, once a benefit period has been established, the Commission can cancel it “if it has ended and no benefits were paid or payable during the period.”<sup>37</sup>

[52] The Commission paid no benefits to the Claimant during the benefit period. The critical question is whether benefits were **payable** to the Claimant during the period.

[53] With the advantage of hindsight, it’s possible to conclude that no benefits were payable to the Claimant during the benefit period. I arrived at this conclusion for the following reasons:

- The Claimant was self-employed throughout the benefit period. As a result, the law considers that she worked full working weeks.<sup>38</sup> It also means that **the Claimant had no “weeks of unemployment,”** which are required for EI benefits to be payable.<sup>39</sup>
- To receive benefits, the Claimant also had to file biweekly reports, of which she filed just one.<sup>40</sup> However, the Commission refused to pay benefits because the Claimant was self-employed.<sup>41</sup> The Claimant never appealed

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<sup>37</sup> See section 10(6)(a) of the EI Act.

<sup>38</sup> See section 30 of the *Employment Insurance Regulations* (EI Regulations).

<sup>39</sup> See sections 9, 11(1), and 12(1) of the EI Act.

<sup>40</sup> This report starts on page GD10-18.

<sup>41</sup> See pages GD12-2 and GD12-12.

that decision and the time for doing so has expired. The time for filing additional biweekly reports has expired too.<sup>42</sup>

[54] Regardless, the Commission argues that benefits were payable to the Claimant. In support of its argument, the Commission relies on section 7 of the EI Act. That section says that benefits are payable to a person who qualifies to receive them. It then continues by saying that a person qualifies as long as they have had an interruption of earnings and have accumulated sufficient hours of insurable employment during their qualifying period. The Commission argues that the Claimant met this definition, so benefits were payable to her.

[55] I cannot accept the Commission's argument for several reasons.

[56] First, section 7 establishes when a person qualifies for benefits. It alone does not determine if benefits are payable to that person.<sup>43</sup>

[57] The Commission's argument ignores other sections, including section 9. The Claimant also needed to meet the requirements in section 9 for benefits to be payable to her. Here's what section 9 says:

**Establishment of benefit period**

**9** When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

[Underlining added]

[58] Sections 11 and 12 of the EI Act also make clear that benefits are only payable for a "week of unemployment." But as mentioned above, the Claimant was self-employed, meaning that she had no weeks of unemployment falling in her benefit period. As a result, no benefits were payable to her.

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<sup>42</sup> See section 26 of the EI Regulations.

<sup>43</sup> See also the definition of "benefits" under section 2 of the EI Act.

[59] In other words, section 7 of the EI Act does not establish a universal definition of “payable” that applies throughout some or all of the Act. Many other sections must also be considered to determine when benefits are payable.

[60] Second, the Commission’s interpretation of when benefits are payable leads to an absurd result. It strips section 10(6) of nearly all meaning. It suggests that, once a benefit period is validly established, then benefits are payable and it can never be cancelled.

[61] In other words, the Commission’s argument is circular. Section 10(6) starts with the words, “Once a benefit period has been established...” It then goes on to describe how the benefit period can be cancelled.

[62] But accepting the Commission’s argument would mean that the conditions needed to establish a benefit period also remove the ability to cancel the benefit period. Alternatively, the only benefits periods that can be cancelled are the ones that should never have been established in the first place.

[63] Using the Commission’s interpretation, can it only cancel a benefit period when it later determines that a condition under section 7(2) had not, in fact, been met? And then why would it have to wait until the end of the benefit period to cancel it? I cannot interpret section 10(6) so narrowly.

[64] Instead, the need to wait until the end of the benefit period allows for a retrospective look at whether benefits were paid or payable. It’s no longer necessary to consider whether, using some different set of facts, benefits might have been payable.

[65] Finally, the Commission’s argument about how the meaning of “payable” from section 7 of the EI Act should be used to understand its meaning in section 10(6) is undermined by the French version of the EI Act. In the French version, different expressions are used in the two sections.

**Benefits payable to persons who qualify**

**7 (1)** Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

**Qualification requirement**

**(2)** An insured person qualifies if the person

- (a)** has had an interruption of earnings from employment; and
- (b)** has had during their qualifying period at least [the minimum number of] hours of insurable employment.

[...]

**Cancelling benefit period**

**(6)** Once a benefit period has been established for a claimant, the Commission may

- (a)** cancel the benefit period if it has ended and no benefits were paid or payable during the period;

[Underlining added]

**Versement des prestations**

**7 (1)** Les prestations de chômage sont payables, ainsi que le prévoit la présente partie, à un assuré qui remplit les conditions requises pour les recevoir.

**Conditions requises**

**(2)** L'assuré remplit les conditions requises si, à la fois :

- a)** il y a eu arrêt de la rémunération provenant de son emploi;
- b)** il a, au cours de sa période de référence, exercé un emploi assurable pendant au moins quatre cent vingt heures.

**Annulation de la période de prestations**

**(6)** Lorsqu'une période de prestations a été établie au profit d'un prestataire, la Commission peut :

- a)** annuler cette période si elle est terminée et si aucune prestation n'a été payée, ou ne devait l'être, pendant cette période;

[66] The English and French versions of the EI Act are of equal value and have to be given meaning according to the rules of statutory interpretation.<sup>44</sup>

<sup>44</sup> See *Canada (Attorney General) v Redman*, 2020 FCA 209 at paragraph 22 (and the authorities cited in that paragraph).

[67] If the use of “payable” in sections 7 and 10(6) creates any ambiguity in the English version of the Act, then the French version should prevail. It is clearer, doesn’t produce absurd results, and better reflects the overall scheme of the EI Act.

## **Conclusion**

[68] The appeal is allowed. The General Division made errors of law and jurisdiction in this case. These errors allow me to give the decision the General Division should have given. The Commission can cancel the Claimant’s benefit period because she meets the requirements under section 10(6)(a) of the EI Act: no benefits were paid or payable to her during the benefit period.

Jude Samson  
Member, Appeal Division