



Citation: *MG v Canada Employment Insurance Commission*, 2022 SST 868

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

Decision

Appellant: M. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (448901) dated January 19, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Videoconference

Hearing date: March 30, 2022

Hearing participant: Appellant

Decision date: April 11, 2022

File number: GE-22-470

Decision

[1] The appeal is dismissed. The Tribunal does not agree with the Claimant.

[2] The Commission correctly calculated the Claimant's rate of weekly benefits. This means the Claimant must repay the Employment Insurance (EI) benefits that he was not entitled to receive.

[3] The Claimant may write the Commission directly to request the debt be written off.

Overview

[4] The Claimant stopped working on November 26, 2020. His employer issued a Record of Employment (ROE) that reported his first day of work was May 3, 2020. The employer reported the Claimant two weeks of earnings for the first week of his employment. The Commission calculated his weekly benefits based on that information and paid him \$517 in weekly EI benefits.

[5] The Claimant's employer issued an amended ROE showing that he started work on April 27, 2020. The change in start date meant that the Claimant's earnings for his first week of earnings was now divided over the first and second weeks of employment. The amended ROE was issued on December 9, 2020, which is one day after the first ROE was issued.

[6] On November 1, 2021, the Commission notified the Claimant it recalculated the Claimant's EI weekly benefits based on the amended ROE. It said his weekly EI benefits should be \$500 instead of \$517 and it issued a notice of debt requesting the Claimant pay back \$374 of benefits he was not entitled to receive.

[7] The Claimant does not agree he should have to repay the EI benefits. He says that the error was not of his making. The employer gave the Commission incorrect information. The Commission relied on the employer's error and took too long to review the information. It was aware of the correct start date of his employment from

information on his application for EI benefits and the employer corrected its mistake within one day. The Commission took too long to review the information.

Issue

[8] Did the Commission correctly calculate the Claimant's rate of weekly benefits?

Analysis

[9] To qualify for EI benefits, you need to have worked enough hours and have earnings within a certain time frame. This time frame is called the "qualifying period."¹

[10] The dollar amount of EI benefits that a claimant receives is 55% of a claimant's "weekly insurable earnings" in a "calculation period."²

[11] The formula to calculate a claimant's weekly insurable earnings involves four steps.³

- a) Determine the rate of unemployment in the economic region where the claimant resides when they apply for EI benefits.
- b) Determine the "number of weeks" to be used to calculate the weekly insurable earnings in the calculation period.⁴ The "number of weeks" is the calculation period.
- c) Review each week of the claimant's insurable earnings in the qualifying period to find the highest weekly insurable earnings for the "number of weeks."
- d) Add together the highest weekly amounts and any money paid to the claimant by reason of lay-off or separation from employment and then divide by the "number of weeks" to get the claimant's insurable weekly earnings.⁵

¹ See section 7 of the *Employment Insurance Act* (EI Act) and section 93 of the *Employment Insurance Regulations* (EI Regulations).

² See section 15 of the EI Act.

³ See section 14 of the EI Act.

⁴ See section 14(2) of the EI Act.

⁵ See section 14(3) of the EI Act.

[12] The Claimant applied for EI benefits on December 9, 2020. He had a previous benefit period that ended on November 28, 2020. This meant that his qualifying period ran from December 1, 2019 to November 28, 2020. The Claimant does not dispute this is the qualifying period and I accept it as fact.

[13] Temporary measures in place at the time the Claimant applied for EI benefits said the weekly insurable earnings were the deemed to be the greater of:

- a) a claimant's insurable earnings in the calculation period divided by the number of weeks in that period in which the claimant had earnings, and
- b) \$909.⁶

[14] The Claimant's employer issued an ROE on December 8, 2020. It reported that the Claimant worked from May 3, 2020 to November 26, 2020. He earned \$20,822.68 during that time. The Claimant was paid varying amounts over 16 bi-weekly pay periods.

[15] The Claimant's employer issued an amended ROE on December 9, 2020. It reported that the Claimant worked from April 27, 2020 to November 26, 2020. His earnings remained at \$20,822.68 during that time. There was no change to the varying amounts paid over the 16 bi-weekly pay periods.

[16] At the time the Claimant applied for EI benefits he was living in EI economic region 66. The unemployment rate was 13.1%. The Claimant did not object to this being the unemployment rate so I accept it as fact.

[17] Because the Claimant lived in an economic region with an unemployment rate of 13.1%, the "number of weeks" in the calculation period was 14.⁷

[18] However, in its first calculation of the Claimant's weekly benefits the Commission counted the Claimant's first two weeks of earnings as one week. This meant that the

⁶ See section 153.192(1) of the EI Act.

⁷ See section 14(2) of the EI Act

Commission recorded \$1,678.40 as the Claimant's earnings for the week of May 3, 2020 to May 10, 2020 when in fact those earnings were earned from April 26, 2020 to May 10, 2020.⁸ Using \$1,678.40 as one week of earnings resulted in the Claimant's highest 14 weeks of earnings totaling \$13,152.⁹

[19] The law required the Commission to divide his earnings by 14. So, the Commission divided the \$13,152 by 14 to determine the Claimant's weekly insurable earnings were \$939. This meant the Commission calculated the Claimant's rate of weekly benefits to be \$517.¹⁰

[20] The Commission recalculated the Claimant's rate of weekly benefits in November 2021. It wrote to the Claimant that it reviewed new ROEs from his employer.

[21] For the recalculation, the Commission determined the Claimant's first week of earnings were not among the highest weeks of earnings in the qualifying period. It now counted the earnings from May 3, 2020 to May 10, 2020 as \$903.74. The remaining \$774.66 was less than any of the other highest weeks of earnings so it was not used.¹¹ Using \$903 as one week of earnings, instead of the \$1,678.40 used before, resulted in the Claimant's highest 14 weeks of earnings totaling \$12,376.¹²

[22] The law required the Commission to divide these earnings by 14. So, the Commission divided the \$12,377 by 14 to determine the Claimant's weekly insurable earnings were \$884.¹³

[23] Temporary measures in place at the time the Claimant applied for EI benefits said the weekly insurable earnings were the deemed to be the greater of:

⁸ Section 2 of the EI Act says for the purposes of the EI Act and EI Regulations, a week is the seven day period beginning on Sunday

⁹ See page GD4-3 in the appeal file.

¹⁰ $\$13,151.61 \div 14 = \939.40 ; $\$939.40 \times 55\% = \516.67 . Amounts less than 50 cents are rounded down to the nearest whole dollar while amounts greater than 50 cents are rounded up to the nearest whole dollar.

¹¹ $\$1,678.40 - 903.74 = \774.66

¹² See page GD4-3 and GD4-4 in the appeal file

¹³ $\$12,376.95 \div 14 = \884.07

- a) a claimant's insurable earnings in the calculation period divided by the number of weeks in that period in which the claimant had earnings, and
- b) \$909.¹⁴

[24] This meant when the Commission recalculated the Claimant's rate of weekly insurable earnings to be \$884 those earnings had to be increased to \$909. As a result, his weekly EI benefits were recalculated to be \$500.¹⁵

[25] The Claimant received EI benefits at the weekly rate of \$517 from December 10, 2020 to October 9, 2021. The reduction in benefits to \$500 meant the Claimant was overpaid by \$17 in each of those weeks and had to repay \$374 in EI benefits that he was not entitled to receive.¹⁶

[26] The Claimant does not dispute the calculations.

[27] The Claimant argues that he should not have to repay any money. He was not aware that a mistake was made on the original REO, nor was he informed that an amended ROE had been issued. The employer made an error on the ROE and the Commission relied on that error when it calculated his benefits.

[28] The Claimant said he put April 27, 2020 as his first day worked on his application for EI benefits. He filled out his application on December 9, 2020. The employer issued the first ROE on December 8, 2020, with the first day worked as May 3, 2020. The Commission would have been aware by December 9, 2020, through his application for EI benefits and the amended ROE issued on that date there were differing start dates but chose it not to cross check the information until 11 months later.

[29] The Claimant said that taking 11 months to review the error was too long especially as the Commission was aware within one day that his employer had made a

¹⁴ See section 153.192(1) of the EI Act.

¹⁵ $\$909 \times 55\% = \500

¹⁶ The notice of debt issued to the Claimant was for \$732. That amount includes the deduction of \$39 for the \$78 in earnings the Claimant had from her last employment.

mistake on the ROE and that mistake would affect the amount of benefits he was entitled to receive.

[30] The Claimant said that he had no reason to suspect that the amount of benefits he received could be wrong or above what he should have expected to receive. The Claimant said that he has collected EI benefits in the past due to the seasonal nature of his work. His EI benefits have gone up each time because his wages usually go up each year. Had he been made aware of the new ROE issued by the employer to correct its error in the start date he would have contacted the Commission to find out if the error would have any effect on the benefits he should receive.

[31] The Claimant explained that repaying the \$374 would be a financial hardship for him and his family. He is not in a position to repay the overpaid benefits. He has asked his employer to accept responsibility for the overpayment caused by their error and it has refused.

[32] I recognize the Claimant's argument that it took too long for the Commission to recalculate the Claimant's given that it was aware from December 9, 2020 the employer had amended the ROE. However, the law says the Commission may review any claim within 36 months of benefits being paid.¹⁷ And, where benefits are either underpaid or overpaid, as is the case here, the Commission must calculate the amount of money and notify the claimant.¹⁸ The Commission can ask a claimant to repay any benefits the claimant was not entitled to receive.¹⁹

[33] I find that the Commission correctly recalculated the Claimant's rate of weekly benefits to be \$500. It used the correct number of weeks (14) and chose the 14 highest paid weeks from his employment that he had in the qualifying period. This means that the re-calculation was in accordance with the EI Act and the EI Regulations. As a result, the Claimant received \$374 of EI benefits that he was not entitled to receive and must repay those benefits.

¹⁷ See section 52(1) of the EI Act.

¹⁸ See section 52(2) of the EI Act.

¹⁹ See section 52(3) of the EI Act.

Other matters

[34] I am sympathetic to the Claimant's financial circumstances that the request to repay benefits has created. As tempting as it may be in such cases (and this may well be one), I am not permitted to re-write legislation or to interpret it in a manner that is contrary to its plain meaning.²⁰ I must follow the law and render decisions based on the relevant legislation and precedents set by the courts.

[35] The Commission has the discretion to write off amounts owing.²¹

[36] I do not have the jurisdiction to write off the debt.²²

[37] Nothing in my decision prevents the Claimant from writing directly to the Commission to ask it to write-off the debt created by the overpayment.²³ If the Claimant is not satisfied with the Commission's response, he may appeal to the Federal Court of Canada.

Conclusion

[38] The appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section

²⁰ *Canada (Attorney General) v. Knee*, 2011 FCA 301. This how I refer to court cases that apply to the circumstances of this appeal

²¹ See section 56 of the EI Regulations

²² *Arksey v. Canada (Attorney General)*, 2019 FC 1250

²³ Section 56 of the EI Regulations gives the Commission broad power to write off an overpayment when it would cause undue financial hardship for a claimant to repay it.