Citation: *VM v Canada Employment Insurance Commission*, 2022 SST 1006

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	V. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger

Decision under appeal:	General Division decision dated February 10, 2022 (GE-21-2527)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	August 2, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	October 11, 2022
File number:	AD-22-149

Decision

[1] The appeal is dismissed. The General Division did not make an error when it concluded that the Claimant did not have enough insurable hours to qualify for Employment Insurance sickness benefits.

Overview

[2] This is an appeal of the General Division decision.

[3] The General Division found that the Appellant, V. M. (Claimant), had not worked enough hours to qualify for Employment Insurance sickness benefits. He had earned 122 insurable hours, falling short of the 420 hours needed to qualify for sickness benefits.[1]

[4] The Claimant argues that the General Division made legal and factual errors. He argues that the General Division should have accepted that he was entitled to a one-time credit of 480 hours, under the temporary relief measures in the *Employment Insurance Act*.[2] He says he should have gotten the credit because he filed his application on September 24, 2021. (After this date, the credit was no longer available.[3]) If the Claimant gets the one-time credit, then he has enough hours to qualify for benefits.

[5] The Claimant asks the Appeal Division to allow his appeal and give the decision he says the General Division should have given. He argues the General Division made a legal error by retrospectively applying the law. He asks the Appeal Division to find that he was entitled to receive the one-time credit of 480 hours.

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[1] Between September 26, 2021 and September 24, 2022, a claimant needed at least 420 hours of insurable work. Before September 26, 2021, and after September 24, 2022, a claimant needed 600 hours to qualify for sickness benefits. The Canada Employment Insurance Commission determined that the Claimant needed 420 hours of insurable employment. See Commission's representations to the Social Security Tribunal-Appeal Division (SST-AD), at AD3-1, referencing GD3-27 to GD3-28. See also subsection 7(2)(b) of the *Employment Insurance Act*.
[2] Subsection 153.17(1) (a) of the *Employment Insurance Act*.
[3] Section 153.196 of the *Employment Insurance Act*.

[6] The Respondent, the Canada Employment Insurance Commission (Commission), argues that the General Division did not make any errors. The Commission says that there are no grounds of appeal because the Claimant was not eligible to receive the one-time credit. The Commission asks the Appeal Division to dismiss the Claimant's appeal.

Issues

[7] The issues are as follows:

a) Did the General Division make a factual error about when the Claimant's interruption of earnings arose?

b) Did the General Division make a legal error by retroactively or retrospectively applying the law?

Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[4]

General Background

[9] The Claimant applied for Employment Insurance sickness benefits on September 24, 2021.

[10] The Claimant says that his last day of work was on September 24, 2021. The Commission states that the Claimant's last day of work was September 25, 2021.[5] The Record of Employment[6] shows that the last day for which the Claimant was paid was September 25, 2021.

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[4] See section 58(1) of the *Employment Insurance Act*.
[5] See Commission's representations to the Social Security Tribunal-Appeal Division (SST-AD), at AD3-4 and representations to the General Division-Employment Insurance Section, at GD4-2.
[6] See Record of Employment dated November 3, 2021, at GD3-17 to GD3-18.

[11] The Claimant had accumulated 122 hours of insurable employment from his employment, covering the period from September 7 to September 25, 2021.

[12] The Commission told the Claimant that it could not pay him benefits. The Commission found that the Claimant did not have enough hours of insurable employment within his qualifying period to qualify for benefits. The qualifying period is the time within which a claimant has to accumulate enough insurable hours to establish a claim for benefits.

[13] The Commission explained to the Claimant that he should have accumulated at least 420 hours of insurable employment between September 27, 2020 and September 25, 2021 to qualify for benefits.[7]

[14] The Claimant says that he was entitled to a one-time credit of 480 hours that was available under the temporary relief measures in the *Employment Insurance Act*. Adding the one-time credit to his own insurable hours would give him enough hours to qualify for benefits.

Employment Insurance Act

[15] The Commission's representations include a legislative overview.[8] The Commission notes that the Government of Canada amended the *Employment Insurance Act* through interim orders to provide emergency income support during the COVID-19 pandemic.

[16] The Commission also notes that the Government of Canada introduced temporary measures under Part VIII.5 of the *Employment Insurance Act*. These measures facilitated access to Employment Insurance benefits. This included section 153.17, which the Commission says was to help individuals qualify for benefits with a minimum of 120 hours of work.

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[7] See Commission's letter of November 4, 2021, at GD3-27 to GD3-28, and reconsideration decision dated December 7, 2021, at GD3-35 to GD3-36.
[8] Commission's representations to the Social Security Tribunal – Appeal Division (SST-AD), at AD3-3 to AD3-4.

[17] The Claimant relies on subsection 153.17(1)(a) of the *Employment Insurance Act*. Under the section, a claimant can get a one-time credit of insurable hours. That section reads as follows:

> **153.17(1) Benefits under Part I** – A claimant who makes an initial claim for benefits under Part I on or after September 27, 2020 or in relation to an interruption of earnings that occurs on or after that date is deemed to have in their qualifying period
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> (a) if the initial claim is in respect of benefits referred to in any of sections 21 to 23.3, an additional 480 hours of insurable employment.

[18] The Commission says that the temporary measures ceased to apply on September 25, 2021.[9] The Commission argues that, as a result, the Claimant cannot rely on the section to increase his insurable hours to qualify for benefits.

[19] Section 153.196(1) of the *Employment Insurance Act* reads:

> **153.196 (1) September 25, 2021 or repeal** -- Subject to subsections (2) and (3), this Part ceases to apply on the earlier of September 25, 2021 and the day on which *Interim Order No. 8 Amending the* Employment Insurance Act *(Facilitated Access to Benefits)* is repealed.[10]

[20] "This Part" refers to Part VIII.5-- Temporary Measures to Facilitate Access to Benefits (ss. 153.15-153.196) includes section 153.17(1), the section that provided for the increase in hours of insurable employment.

[21] The earlier of the two dates referred to in section 153.196(1) is September 25, 2021. Thus, Part VIII.5, the temporary measures, ceased to apply on that date.

[22] This does not change the Claimant's arguments. The Claimant does not dispute the Commission's argument that the temporary measures ceased to apply on

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[9] See Commission's representations, at AD3-3. Under section 153.196(1) of the *Employment Insurance Act*, the temporary measures under Part VIII.5–which includes the section that increases the hours of insurable employment—ended on September 25, 2021.
[10] Subsections (2) and (3) are not relevant. They refer to section 153.19 (late claims) and 153.1922 and 153.1924 (fishers) of the *Employment Insurance Act*.

September 25, 2021. But, he maintains that the section is irrelevant in his case because he applied for benefits before that date. As he applied for benefits on September 24, 2021—before the cut-off date—he says he should have received the one-time credit.

The General Division decision

[23] The General Division rejected the Claimant`s arguments. The General Division wrote:

> First, on April 19, 2021, the Budget 2021 was implemented and it included a number of temporary measures that came into force on September 26, 2021. It said that all claimants who establish a benefit period from September 26, 2021 to September 24, 2022 now require 420 hours of insurable employment. That means the previous credit of hours no longer applies.
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> Second, even though the Claimant applied for sickness benefits on Friday, September 24, 2021, his claim only became effective on the Sunday, September 26, 2021. This was done correctly by the Commission. The law says that a benefit period begins on the later of the Sunday of the week in which the interruption of earnings occurs. [citation omitted]
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> Third, there was no interruption of earnings prior to September 24, 2021 which may have permitted him to make his claim made effective earlier.[11] The Claimant said he was working consistently from September 7, 2021 to September 24, 2021.[12]
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> Lastly, I have no authority or discretion in law to grant the Claimant benefits, even though he has compassionate circumstances given his heart condition.

[24] The General Division concluded that, as the Claimant could not rely on the one-time credit of 420 hours, he did not have enough hours to qualify for benefits.

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[11] See *Pannu v Canada (Attorney General)*, 2004 FCA 90.
[12] See General Division decision, paras 20 to 23.

Did the General Division make a factual error about when the Claimant's interruption of earnings arose?

– The parties' arguments

[25] The Claimant argues that the General Division made a factual error about when he had an interruption of earnings.

[26] The Claimant argues that his last day of work was on September 24, 2021. He denies that he worked on September 25, 2021, or that his employer had even scheduled him to work that day. He claims that he experienced an interruption of earnings on September 25, 2021.[13]

[27] The Commission found that the Claimant's last day of work was September 25, 2021.[14] The Commission agrees with the Claimant that the interruption of earnings occurred on September 25, 2021.[15]

[28] I note that the Commission also stated in its representations at the General Division that the Claimant failed to produce evidence suggesting that he met the interruption of earnings in the week of September 19, 2021.[16] Yet, the week of September 19, 2021, includes Saturday, September 25, 2021. This means that the interruption of earnings could not have occurred on September 25, 2021. The Commission did not reconcile its two seemingly conflicting positions.

– Why the interruption of earnings is important

[29] The Claimant does not say why any error about the interruption of earnings is important to his appeal. But, when an interruption of earnings takes place is important because:

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[13] See Claimant's submissions, at AD5-2.
[14] See Commission's representations, at AD3-4.
[15] See Commission's representations, at AD3-4.
[16] See Commission's representations to the Social Security Tribunal-Employment Insurance Section, at GD4-4.

- When the interruption of earnings took place can determine when the benefit period and the qualifying period began, and

- More importantly, unless and until there is an interruption of earnings from employment, a claimant does not qualify for Employment Insurance benefits.

[30] In addition to having a sufficient number of hours in their qualifying period, a claimant also has to have an interruption of earnings from their employment.[17]

– **The *Employment Insurance Act* defines when an interruption of earnings arises**

[31] An "interruption of earnings" has a specific meaning under the *Employment Insurance Act* when it involves someone who stops working because of illness or injury.

[32] Section 2(1) of the *Employment Insurance Act* defines an interruption of earnings as an interruption that occurs in the earnings of an insured person and in any circumstances determined by the regulations.

[33] The Commission referred to sections 14(1) and (2) of the *Employment Insurance Regulations*. The sections define when an interruption of earnings occurs in the scenario when someone stops working because of illness or injury.

[34] Section 14(1) and (2) of the *Employment Insurance Regulations* state:

> **14** (1) … an interruption of earnings occurs where, following a period of employment with the employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer in respect of which no earnings that arise from that employment … are payable or allocated.

[17] See section 7(2) of the *Employment Insurance Act*. The section states that 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 420 hours of insurable employment.

> (2) An interruption of earnings from employment occurs in respect of an insured person **at the beginning of the week** in which a reduction in earnings that is **more than 40% of the insured person's normal weekly earnings** occurs because the insured person ceases to work in that employment by reason of illness, injury or quarantine …
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> (My emphasis)

[35] So, when applying for special benefits such as sickness benefits, an interruption of earnings takes place when a claimant's normal weekly earnings go down by more than 40%. The reduction is in the weekly earnings, not the daily earnings.

– **Evidence regarding the Claimant's interruption of earnings**

[36] The Claimant filled out the application form for Employment Insurance benefits, stating that his last day of work was on September 24, 2021.[18] His employer provided a Record of Employment. It stated that the employer last paid the Claimant on September 25, 2021.[19]

– **The General Division's findings on the Claimant's interruption of earnings**

[37] The General Division noted the Claimant's evidence that his last day of work was on September 24, 2021.[20]

[38] The General Division did not make any direct findings as to when the Claimant last worked, or when the Claimant's interruption of earnings arose. However, the General Division found that there was "no interruption of earnings before September 24, 2021".[21]

[39] The General Division also found that the Claimant's benefit period began on the "later of the Sunday of the week in which the interruption of earnings occurs."[22] Clearly,

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[18] See Claimant's application for Employment Insurance benefits, at GD3-7 and GD3-8.
[19] See Record of Employment, dated November 3, 2021, at GD3-17.
[20] See General Division decision, at para 18.
[21] See General Division decision, at para 22.
[22] See General Division decision, at para 21.

the General Division meant the benefit period began on the Sunday of the week in which the interruption of earnings occurs.[23]

[40] The General Division found that the Claimant's qualifying period was from September 27, 2020 to September 25, 2021.[24] The qualifying period is the 52 weeks before the benefit period starts.[25] This means the General Division found that the benefit period started on September 26, 2021.

[41] If the General Division found that the benefit period began on the Sunday of the week in which the interruption of earnings occurred, then this effectively meant that it found that the interruption of earnings occurred at the beginning of the week of September 26, 2021.

– **The Claimant's interruption of earnings**

[42] It did not matter in this case then whether the Claimant had stopped working on September 24, 2021, or on September 25, 2021. Under section 14(2) of the *Employment Insurance Regulations*, the Claimant had to show that he had a reduction in earnings that was more than 40% of his normal weekly earnings for an interruption of earnings.

[43] As the Commission noted, the Claimant did not produce any evidence suggesting that he had an interruption of earnings in the week of September 19, 2021, as defined by the *Employment Insurance Regulations*.[26] The Claimant did not experience a 40% drop in earnings that week.

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[23] Section 10(1) of the *Employment Insurance Act* defines the beginning of the benefit period as the later of (a) the Sunday of the week in which the interruption of earnings occurs, and (b) the Sunday of the week in which the initial claim for benefits is made.
[24] See General Division decision, at para 14.
[25] See section 8 of the *Employment Insurance Act*.
[26] See Commission's Representations to the Social Security Tribunal – Employment Insurance Section, dated December 22, 2021, at GD4-3 to GD4-4.

[44] In other words, the interruption of earnings took place at the beginning of the week of September 26, 2021, because he had a reduction in earnings that was more than 40% of his normal weekly earnings that week.

[45] Therefore, the General Division did not make a factual error about when the Claimant's interruption of earnings occurred.

Did the General Division make a legal error by retroactively or retrospectively applying the law?

[46] The Claimant argues that the General Division made a legal error by concluding that Budget 2021 applied in his case. He says Budget 2021 does not apply because it came into force on September 26, 2021—two days after he had already applied for benefits.

[47] The General Division noted that, under Budget 2021, claimants who established a benefit period from September 26, 2021 to September 24, 2022 could no longer avail themselves of the previous credit of insurable hours.

[48] The Claimant argues that the General Division made an error by retroactively or retrospectively applying the 2021 provisions to an application that he made before the budget even came into force. He says that the law as it stood on September 24, 2021—when he made his application—should apply. He says he made his application on time, so he could still get the one-time credit.

[49] The Claimant argues that there is a general presumption against retrospective legislation because of the need for certainty.

[50] In *Elguindy*,[27] the Federal Court of Appeal examined whether new legislation could apply retrospectively. Dawson J.A. wrote:

[27] *Elguindy v Canada (Attorney General)*, 2019 FCA 17 at para 11.

> [11] To the extent that the applicant argues that subsection 5(3) was impermissible retrospective legislation, I agree with Professor Sullivan that in "contexts such as fiscal law or entitlement to periodic benefits, it is doubtful that there is any cogent basis for presuming that a legislature does not intend new legislation to apply retrospectively so as to change the tax or benefit regime for the future." (Ruth Sullivan, Sullivan on the Construction of Statutes, sixth ed. (Markham, Ont.: LexisNexis, 2014) at page 768).

[51] The Claimant has not provided any evidence to suggest that Parliament did or could not have intended that Budget 2021 would not apply retrospectively. Without this evidence, I see no basis why legislation should or could not have retrospective application when the language is specific as to the breadth of its coverage.

– **The Claimant did not have an accrued right**

[52] However, even if, as the Claimant argues, Budget 2021 did not apply retrospectively, the very fact that the Claimant had applied for benefits on September 24, 2021, ultimately does not help him. The Claimant had to establish that he had an accrued or accruing right when he applied for benefits.

[53] In *R. v Ruskas*,[28] Chief Justice Lamer addressed whether an applicant had an accrued or accruing right:

> .. A right can only be said to have been "acquired" when the right-holder can actually exercise it. The term "accrue" is simply a passive way of stating the same concept (a person "acquires" a right; a right "accrues" to a person). Similarly, something can only be said to be "accruing" if its eventual accrual is certain, and not conditional on future events [citation omitted]. **In other words, a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.**
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> (My emphasis)

[54] As I have noted above, to qualify for Employment Insurance benefits, certain requirements have to be met. In addition to having a sufficient number of hours in their

[28] *R. v Puskas*, 1998 CanLII 784 at para 14 (SCC).

qualifying period, a claimant also has to have an interruption of earnings from their employment.[29]

[55] When the Claimant applied for benefits on September 24, 2021, he had yet to experience an interruption of earnings, as defined by the *Employment Insurance Regulations*.

[56] Because the Claimant did not fulfill all of the conditions to be entitled to Employment Insurance benefits, the Claimant had not accrued and was not accruing any right to receive those benefits. He therefore did not qualify for benefits. This seems to be a complete answer to the Claimant's appeal.

– **Interpretation of subsection 153.17(1)(a) of the Employment Insurance Act**

[57] Finally, I note that my colleagues have helpfully interpreted subsection 153.17(1)(a) of the *Employment Insurance* Act, although they have done so in the context of claims for regular benefits.[30]

[58] *P.G.*[31] involved eight claimants who worked to September 22, 2021. They applied for Employment Insurance regular benefits on September 23, 2021. They argued that they should get the one-time credit of 300 hours because they applied for benefits before September 25, 2021. That way, they would have enough insurable hours to qualify for benefits. The Appeal Division found that the claimants were not entitled to the credit. The extra hours were available to only those whose benefit periods started between September 27, 2020, and September 25, 2021.

[59] In *P.G.*, the Appeal Division examined what the words "initial claim for benefits" means in subsection 153.17(1) of the *Employment Insurance Act*. The Appeal Division

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[29] See section 7(2) of the *Employment Insurance Act*. The section states that 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 420 hours of insurable employment.
[30] See, for instance, *P.G.et al. v Canada Employment Insurance Commission* 2022 SST 388; *Canada Employment Insurance Commission v R.G.*, 2022 SST 648; *Canada Employment Insurance Commission v R.H.*, 2022 SST 663; and *Canada Employment Insurance Commission v C.C.*, 2022 SST 705.
[31] See *P.G.et al. v Canada Employment Insurance Commission* 2022 SST 388.

found that, under the *Employment Insurance Act*, an initial claim for benefits does not mean when a claimant applies for benefits.

[60] Instead, an "initial claim for benefits" means a "claim made for the purpose of establishing a claimant's benefit period," as defined by section 6(1) of the *Employment Insurance Act*. After examining the text, context, and purpose of the section, the Appeal Division determined that an initial claim links to a specific benefit period.

[61] I adopt the general principles and conclusions reached by my colleagues in their respective decisions that, for an initial claim made after September 25, 2021, a claimant cannot get the one-time credit. The extra hours are only available for benefit periods that began between September 27, 2020, and September 25, 2021.

[62] In the case before me, the Claimant's benefit period began on Sunday, September 26, 2021, as this was the Sunday of the week in which the interruption of earnings occurred. Since the one-time credit is only available for benefit periods that began between September 27, 2020, and September 25, 2021, the Claimant cannot get the one-time credit.

– **If the Claimant's benefit period began on September 19, 2021**

[63] The Commission is prepared to let the Claimant "choose which regime best benefits him."[32] So, this means the Claimant can get the one-time credit—but only if his benefit period began before Sunday, September 26, 2021.

[64] However, if the Claimant's benefit period began on Sunday, September 19, 2021, he still would not have enough qualifying hours. This is because he would have been unable to rely on any insurable hours he earned between September 19, 2021, and September 25, 2021. Those hours fall outside his qualifying period.

[32] See Commission's representations to the Social Security Tribunal – Appeal Division (SST-AD), at AD3-5.

[65] While he would have received the one-time credit of 480 hours, he would not have the 600 hours needed to qualify for sickness benefits.[33]

[66] As the Commission argues, while the Claimant can choose which qualifying and benefit period favours him the most, he cannot straddle both regimes and take benefits from both without considering the requirements to qualify for those benefits.

[67] Either way—whether the Claimant's benefit period starts on September 19, 2021, or September 26, 2021—he does not have enough insurable hours.

– Summary

[68] I have determined that the Claimant's benefit period began on September 26, 2021. For a benefit period starting on Sunday, September 26, 2021, the Claimant needs to have 420 hours of insurable employment to qualify for sickness benefits. However, the Claimant is not entitled to the one-time credit of 480 hours because it was only available up to September 25, 2021.

[69] If the Claimant's benefit period had started on Sunday, September 19, 2021, the Claimant could have availed himself of the one-time credit of 480 hours. However, he would have needed 600 hours of insurable employment to qualify for sickness benefits. He does not have enough hours, as he cannot rely on the hours he earned between September 19, 2021, and September 25, 2021. Those hours fall outside his qualifying period.

[70] Besides, the Claimant did not experience an interruption of earnings until the beginning of the week of September 26, 2021. He had to have an interruption of earnings to qualify for benefits when he filed his application. Because he did not have an interruption of earnings at that time, he did not qualify for benefits.

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[33] The Commission explained this scenario in its representations, at AD3-4. Before September 26, 2021, a claimant needed 600 hours to qualify for sickness benefits.

Conclusion

[71] The appeal is dismissed. The General Division did not make an error when it concluded that the Claimant did not qualify for Employment Insurance sickness benefits.

Janet Lew
Member, Appeal Division