Citation: *Canada Employment Insurance Commission v KC*, 2022 SST 830

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault
Respondent:	K. C.
Representative:	Kristen Worbanski

Decision under appeal:	General Division decision dated March 7, 2022 (GE-22-320)

Tribunal member:	Charlotte McQuade
Type of hearing:	Teleconference
Hearing date:	July 11, 2022
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	September 7, 2022
File number:	AD-22-195

Decision

[1] The appeal is allowed.

[2] The General Division made an error law in how it interpreted section 153.17 (1) of the *Employment Insurance Act* (EI Act).

[3] The Claimant cannot have a credit of 480 hours to help her start a benefit period on September 19, 2021, as the Canada Employment Insurance Commission (Commission) correctly applied the credit of hours to her claim of September 27, 2020.

Overview

[4] As a temporary measure associated with the pandemic, claimants could get a one-time credit of 300 insurable hours (hours) to start a claim for Employment Insurance (EI) regular benefits or 480 hours for special benefits.[1] This provision was in place from September 27, 2020, to September 25, 2021.

[5] K. C. is the Claimant. She established a claim for maternity and parental benefits effective September 27, 2020. After her benefit period had ended, the Claimant filed another claim for sickness benefits to be followed by maternity and parental benefits on September 21, 2021, as she was expecting a second child. The Claimant asked the Commission to apply the credit of 480 hours to her qualifying period so she could start the new claim.

[6] The Commission said the law required that the credit be applied to the first initial claim on or after September 27, 2020, even it wasn't needed. So, it had applied the credit to the first claim. The Commission said that since the credit could only be applied once, the Claimant could not have the credit to start a new benefit period. This meant

[1] See section 153.17 (1) of the *Employment Insurance Act* (EI Act) which is the section that describes the credit of hours. See sections 21 to 23.3 of the EI Act, which describes that special benefits include sickness, maternity, parental, compassionate care, and family caregiver benefits.

she did not have enough insurable hours to start a new benefit period on September 19, 2021.

[7] The Claimant appealed the Commission's decision to the Tribunal's General Division who allowed her appeal. The Commission appealed the General Division's decision.

[8] The Commission says the General Division made an error of law when it interpreted section 153.17 (1) of the EI Act to mean the Commission had the discretion to apply the credit of hours to the first initial claim made on or after September 27, 2020, only if needed.

[9] I have decided the General Division made an error of law in how it interpreted section 153.17 (1) of the EI Act. I am allowing the appeal and am substituting my decision for that of the General Division.

[10] The credit of hours must be applied to the first initial claim on or after September 27, 2020. Since the Claimant had the credit applied to her claim of September 27, 2020, she cannot have the credit of hours to start a benefit period on September 19, 2021.

Preliminary matters

New Evidence

[11] The Appeal Division generally does not accept new evidence. This is because the Appeal Division isn't rehearing the case. Instead, the Appeal Division decides whether the General Division made certain errors, and if so, how to fix those errors.

[12] I can only accept new evidence that the General Division didn't have when it made its decision, if that new evidence provides general background information only,

highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly.[2]

– I will not consider the Claimant's statement

[13] The Claimant provided a statement with her submissions, explaining how the Commission's interpretation of section 153.17 (1) of the EI Act results in an arbitrary and unjust result in her case. [3]This statement was not before the General Division so it is new evidence.

[14] The Claimant argues that this statement is a restatement of facts that were not in dispute before the General Division so it should be considered.

[15] The Commission argues the statement should not be considered. It relates to what happened in the Claimant's life and does not meet any exceptions for new evidence.

[16] I cannot consider this statement. While it may reflect certain facts that were not in dispute before the General Division, the statement was not before the General Division. The statement does not meet any of the exceptions that allow me to consider that new evidence. So, I will not consider the Claimant's statement.

– I will consider the Backgrounder and the Committee Report

[17] The Claimant provided hyperlinks to two documents in her submissions. These documents were not before the General Division.

[18] One is a report called "Modernizing the Employment Insurance Program" from the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities to Parliament. It provides information about the EI Act

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[2] See *Sharma v Canada (Attorney General),* 2018 FCA 48, which explains the test for accepting new evidence on judicial review. Given that the Appeal Division's role is to review errors the General Division may have made, I think the same reasoning applies to new evidence at the Appeal Division.
[3] See AD7-111.

and refers to the amendment to the EI legislation allowing for the credit of insurable hours.[4]

[19] The second document is a Backgrounder from Employment and Social Development Canada dated October 23, 2020, explaining changes found in the *Covid-19 Response Measures Act*.[5]

[20] Since these documents were not before the General Division, they are new evidence.

[21] The Claimant submits that the purpose of these documents is not to supplement the evidentiary record but rather to assist in interpreting section 153.17 (1) of the EI Act. She says these documents help understand Parliament's intention.

[22] The Commission does not object to me considering these two documents. The Commission agrees they are helpful to understand Parliament's intention.

[23] These documents do not relate specifically to the Claimant's situation. Rather, they provide general background information, relevant to the pandemic-related changes to the EI Act, including section 153.17 of the EI Act. So, I will accept this new evidence as general background information.

Official notice

[24] The Claimant asks that I take "official notice" of the fact that Covid-19 waves and associated lockdowns affected different jurisdictions across the country at different times.

[25] The Commission does not object to me taking official notice of this fact.

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[4] See AD7-106 referring to Modernizing the Employment Insurance Program, HUMA Committee Report, Presented June 2021, 43rd Parliament, 2nd session.
[5] See AD7-107 referring to Backgrounder: The COVID-19 Response Measures Act, Employment and Social Development Canada, Government of Canada Website, October 23, 2020.

[26] Taking “official notice” of a fact means that the fact is treated as if it is common knowledge. A party does not have to prove that fact. It is simply accepted as a fact.

[27] The rule that governs the courts’ use of judicial notice applies to tribunals, unless the facts in question relate to the specialized knowledge or expertise of the tribunal. In that case, a tribunal may have greater latitude to take “official notice” of a fact.

[28] This Tribunal has no specialized notice about Covid-19 waves or lockdowns. So, the Appeal Division has no extra latitude in this case.

[29] To take “official notice” of a fact, the fact must not be the subject of debate among reasonable people, or the fact must be capable of an immediate check using a readily accessible and indisputably accurate source.[6]

[30] I find that I can take “official notice” of the fact that Covid-19 waves and associated lockdowns affected different jurisdictions across Canada at different times. This is a very broad general fact that in my view would be regarded as common knowledge. It would be accepted and not be the subject of debate among reasonable people.

Issues

[31] The issues in this appeal are:

a) Did the General Division make an error of law in its interpretation of section 153.17 (1) of the EI Act?

b) If so, how should the error be fixed?

[6] See *R. v Spence*, 2005 SCC 71.

Analysis

General Division decision

[32] The General Division interpreted section 153.17 (1) of the EI Act to mean that the credit of hours did not have to apply to the first initial claim made on or after September 27, 2020. Rather, the credit was only to be applied if needed to qualify.[7]

[33] The General Division decided that since the Claimant did not need the credit of hours to establish her claim on September 27, 2020, it was available to be applied to her claim of September 21, 2021.

[34] In making its decision, the General Division considered the wording of section 153.17 of the EI Act.

[35] Section 153.17 of the EI Act provides as follows:

> **153.17 (1)** 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
>
> **(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; and
>
> **(b)** in any other case, an additional 300 hours of insurable employment.
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> **153.17 (2)** Subsection (1) does not apply to a claimant who has already had the number of insurable hours in their qualifying period increased under that subsection or under this section as it read on September 26, 2020, if a benefit period was established in relation to that qualifying period

[36] The General Division decided that the words in section 153.17 (1) were not clear. This was because section 153.17 (1) didn't explicitly say the credit has to be applied to the first initial claim on or after September 27, 2020.

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[7] See paragraph 49 of the General Division decision.

[37] Also, the General Division said that the word “deemed” did not necessarily mean the credit of hours must be used on the first initial claim made on or after September 27, 2020. It could also be interpreted as a rebuttable presumption.

[38] As a rebuttable presumption, the General Division said the word “deemed” meant it was assumed the Claimant had extra hours in her qualifying period for a claim other than the first one made on or after September 27, 2020, where she actually needs the assumed hours to qualify.[8]

[39] The General Division said that since the words in section 153.17 (1) weren’t clear, they should be interpreted in keeping with the purpose of the EI Act and the purpose of Part VIII.5 of the EI Act, where section 153.171 was found.

[40] The General Division decided the purpose of the EI Act was to provide benefits to people who are unemployed. The General Division decided the purpose of Part VIII.5 of the EI Act was to help people access benefits.[9]

[41] The General Division concluded its interpretation of section 153.17 (1) was consistent with the purpose of the EI Act and Part VIII.5 of the EI Act.

[42] The General Division also reasoned that its interpretation of section 153.17 (1) should be adopted since the Supreme Court of Canada has said benefit-conferring legislation should be liberally interpreted and any doubt arising from the difficulties with the language should be resolved by the Claimant.[10]

[43] The General Division dismissed the Commission’s interpretation of section 153.17 (1) of the EI Act as being incompatible with the purpose of the EI Act and Part VIII.5 of the EI Act. As well, the General Division said it produced an absurd result because applying the credit of hours when they were not needed did nothing to help

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[8] See paragraph 32 of the General Division decision.
[9] See paragraphs 24 and 25 of the General Division decision. The General Division referred to the cases of *Canada (Attorney General) v Lesiuk*, 2003 FCA 3, *Canada (Attorney General) v Jean*, 2015 FCA 242 and *Abrahams v Attorney General of Canada*, 1983 1 SCR 2 as speaking to the purpose of the EI Act.
[10] See paragraph 25 of the General Division decision. The General Division referred to *Abrahams v Attorney General of Canada*, 1983 1 SCR 2 for this principle.

people qualify and actually harmed them by removing a chance for them to qualify at a later date when they actually needed the hours.

The General Division made an error of law in its interpretation of section 153.17 (1) of the EI Act

[44] The General Division misinterpreted section 153.17 (1) of the EI Act.

[45] Having regard to the text, context, the purpose of the EI Act and the purpose of section 153.17 (1), the credit must be applied to the first initial claim made on or after September 27, 2020.

[46] The Commission argues the General Division made an error of law when it interpreted section 153.17 (1) of the EI Act to mean the credit of hours was only to be applied to the first initial claim on or after September 27, 2020, if needed.

[47] The Commission says the words of section 153.17 (1) are clear that the credit must be applied to the first initial claim made on or after September 27, 2020, and there is no discretion to delay the application of the credit.

[48] The Claimant argues the General Division's interpretation was correct. The Claimant says the General Division's interpretation is consistent with the text, context and purpose of the law.

[49] I have to decide if the General Division's interpretation is correct. Since there is no binding Federal Court or Federal Court of Appeal decisions interpreting section 153.17 (1), I have to decide what it means.

[50] To interpret section 153.17 (1) of the EI Act, I have to keep in mind some interpretive rules.

[51] I have to consider the words in section 153.17 (1) of the EI Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[11]

[52] This means it is not enough to look at the text alone, to decide what section 153.17 (1) of the EI Act means. I also have to consider what section 153.17 (1) means in the context of related provisions in the EI Act. As well, I have to consider the purpose of section 153.17 (1) and the EI Act.

[53] However, if the words used in a section of the law are "precise and unequivocal" (in other words, clear and straightforward) their ordinary meaning will usually play a more significant role when interpreting them.[12]

[54] But purpose is also very important. Legislation is supposed to be interpreted in a way that gives effect to its purpose.[13] It also has to be interpreted in a way that does not result in absurd consequences.[14]

[55] Laws like the EI Act, which are about providing benefits, are supposed to be interpreted liberally. This means if the wording is ambiguous (unclear), the interpretation should be resolved in favour of the person seeking benefits.[15]

[56] I find that section 153.17 (1) is clear in its meaning that the credit must be applied to the first initial claim made on or after September 27, 2020, even if it is not needed. I will explain why I think this.

– Text

[57] I find the text to be clear.

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[11] See *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), at paragraph 21 and *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 117.
[12] See *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, at paragraph 10.
[13] See section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21.
[14] See *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 Can LII 837 (SCC).
[15] See *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC).

[58] As above, the General Division decided the words in section 153.17 are not clear.

[59] The Commission disagrees. The Commission says the words are clear that a claimant is deemed to have additional hours if they make an initial claim for EI benefits on or after September 27, 2020. There is no mechanism that allows a claimant or the Commission to waive the application of the additional hours if the claimant is able to qualify for benefits without them.

[60] The Commission submits that its interpretation of section 153.17 (1) has been consistently adopted by the Appeal Division in prior cases.[16]

[61] The Claimant argues that the General Division was correct when it decided the words in section 153.17 (1) are not clear.

[62] The Claimant points out the definition of **"initial claim for benefits**" does not mean "first" claim. It is defined as "a claim for the purpose of establishing a claimant's benefit period."[17]

[63] The Claimant also points out the use of the word **"an"** before "initial claim for benefits" just means a singular claim is being made. It doesn't necessarily mean the first claim. The Claimant submits that if "an" did mean "first," the limitation in section 153.17 (2) would be redundant. She argues there is no other way to word the phrase that would make grammatical sense and there is nothing limiting or restricting about the word "an."

[64] The Claimant also argues the word **"deemed"** is ambiguous as it can create either a conclusive presumption or a rebuttable presumption.

[65] The Claimant submits that the General Division correctly interpreted section 153.17 (1) to create a rebuttable presumption.

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[16] The Commission refers to *Canada Employment Insurance Commission v NK,* 2021 SST 601, *DM v Canada Employment Insurance Commission*, 2021 SST 472 and *Canada Employment Insurance Commission v SS*, 2022 SST 283.
[17] See section 6(1) of the EI Act.

[66] The Claimant explains that this means the one-time credit of hours presumptively applies to the first claim on or after September 27, 2020, unless the additional hours are not necessary to qualify for benefits, in which case the presumption is rebutted. The result is that the one-time credit applies to the first claim on or after September 27, 2020, where a claimant needs the additional hours to qualify.

[67] The Claimant maintains that whether a presumption is either a conclusive presumption or a rebuttable presumption depends largely upon the context, whether one interpretation would give rise to arbitrary results, the purpose to be served by the statute, and the necessity of ensuring that such purpose is served.

[68] The Claimant argues, of the two interpretations available for the word "deemed" in section 153.17 (1), only the General Division's interpretation that it creates a "rebuttable presumption" is consistent with the scheme of the EI Act and its purpose. To interpret it otherwise would be inconsistent with the purpose of the provision and would give rise to an absurd result.

[69] In support of her position that "deemed" creates a rebuttable presumption, the Claimant also relies on the French version of section 153.17 (1) which translates "is deemed" as "est réputé":

> **153.17 (1)** Le prestataire qui présente une demande initiale de prestations à l'égard de prestations visées à la partie I le 27 septembre 2020 ou après cette date, ou à l'égard d'un arrêt de rémunération qui survient à cette date ou par la suite, est réputé avoir, au cours de sa période de reference…

[70] The Claimant points out that "est réputé" as used in the French version of section 29 of the *Insurance Act* was interpreted by a member of the Financial Services Commission of Ontario to be a less forceful version of the word "deemed" and created a rebuttable presumption.[18]

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[18] See AD7-108 referring to *Webber v. State Farm Mutual Automobile Insurance Co*., 2008 Carswell Ont. 758.

[71] The Claimant also relies on two other cases where “deemed” was interpreted to be a rebuttable presumption. In those cases, the focus was on the purpose of the legislation and whether interpreting the provision in question as creating a non-rebuttable presumption would result in absurd and unjust results.

[72] In *Sharbern Holding Inc. v Vancouver Airport Centre*, the Supreme Court of Canada decided the presumption of deemed reliance on representations in a prospectus under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase. The Court said that a non-rebuttable presumption could be contrary to the legislative balancing underlying the disclosure requirements in the *Real Estate Act* and would result in absurd and unjust results.[19]

[73] In *Manitoba Chiropractors Assn. v Alevizos*, the Manitoba Court of Appeal considered section 4(2) of the Regulation made under the *Chiropractic Act.* This section stated that certain kinds of conduct including non-observance of a provision of the Act or Regulations “shall be deemed to be professional misconduct…” The Court of Appeal decided that a conclusive interpretation would produce absurd and unjust results. It decided the provision meant that non-observance of a provision of the Act or Regulations is misconduct only if the statutory presumption was not displaced by evidence to the contrary.[20]

[19] See AD7-109 referring to *Sharbern Holding Inc. v Vancouver Airport Centre,* 2011 SCC 23, at paragraphs 112 to 119.
[20] See AD7-109 referring to *Manitoba Chiropractors Assn. v Alevizos*, 2003 MBCA 80.

[74] The Claimant argues the same approach to interpreting "deemed" in section 153.17 (1) should be taken. She argues that it is absurd to interpret "deemed" as a conclusive presumption. She refers to a decision of the Tribunal's General Division, where the member commented that "… applying the provision like the Commission is doing is like giving an umbrella when it is sunny and taking it away when it starts to rain."[21]

[75] The Claimant also argues that I should not follow the prior decisions of the Appeal Division, where section 153.17 (1) was interpreted to mean the credit has to be applied to the first initial claim on or after September 27, 2020, even if it is not needed. The Claimant argues those cases are distinguishable because this appeal engages interpretive principles and arguments that were not put to the Appeal Division in those prior cases. Specifically she points out that the two possible interpretations of the word "deemed" were not considered in any of those cases.[22]

[76] I recognize that the Appeal Division has consistently interpreted section 153.17 (1) to mean the credit must be applied when the first claim is made on or after September 27, 2020.[23] I am not bound by those decisions and I agree with the Claimant that the detailed interpretive arguments concerning the word "deemed" were not made to the Appeal Division in those prior cases. As such, I will make my own decision about whether the General Division's interpretation of section 153.17 (1) of the EI Act is correct.

[77] Having made my own decision, I reach the same interpretation of section 153.17 (1) as the Appeal Division has done in its prior consideration of this section. I will explain why.

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[21] See AD7-110 referring to *SF v Canada Employment Insurance Commission* 2021 SST 836 at paragraph 21.
[22] See Claimant's analysis of these cases at AD7-103 to AD7-104.
[23] See for example, *Canada Employment Insurance Commission v NK*, 2021 SST 601, *DM v Canada Employment Insurance Commission*, 2021 SST 472, *Canada Employment Insurance Commission v SF*, 2022 SST 21 and *Canada Employment Insurance Commission v SS*, 2022 SST 283.

[78] I find the text of section 153.17 (1) is clear. The provision, read as a whole, is not ambiguous. The ordinary and plain meaning of the text of section 153.17 (1) is that the credit applies when the first initial claim is made on or after September 27, 2020.

[79] The definition of "initial claim for benefits" in the EI Act does not refer to a first initial claim.[24] However, the term "initial claim for benefits" is preceded by the word **"an."** In my view, the use of the article "an" in front of the term "initial claim for benefits" suggests it is the first initial claim that is being referred to.

[80] If the intention had been to include subsequent claims, I think there would have been some clarifying language suggesting that. For example, the article "any" could have been put before "initial claim for benefits." However, there is nothing in the section 153.17 or elsewhere in the EI Act specifically limiting the triggering of the hours, once a first initial claim has been made, to a claim only where the hours are needed.

[81] Further, if the use of the word "an" before "initial claim for benefits" refers to a first initial claim, that does not mean that the limitation in section 153.17 (2) is redundant.

[82] This is because not all claimants who make a first initial claim, even with the credit of hours applied, will have enough hours to qualify. Section 153.17 (2) clarifies that it is only if a benefit period was established, after the credit of hours, that the credit can't apply a second time.

[83] I also find it significant that the text of section 153.17 (1) refers to a credit of a fixed number of hours. The credit is for 300 or 480 hours, depending on the type of benefits being claimed. The amount of the credit is not tied directly to the hours a person has earned. Whether a person has one hour or a thousand hours, the amount of the credit is the same. This argues against the Claimant's interpretation that the application of the credit is linked to the hours needed by a claimant.

[84] However, the critical word in the text of section 153.17 (1) of the EI Act is the word "**deemed."**

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[24] See section 6(1) of the EI Act.

[85] I agree with the Claimant that the word “deemed” creates a presumption. There are two kinds of presumptions in the law: a rebuttable presumption and a conclusive presumption.

[86] The purpose of a rebuttable presumption is to establish something as a fact without the benefit of evidence. A rebuttable presumption is a presumption that can be rebutted by providing evidence that shows the presumption is false.[25]

[87] A “conclusive presumption” is a type of legal fiction that creates a rule. It cannot be rebutted by evidence. In other words, if certain facts exist, then a result must follow.

[88] Whether the use of the word “deemed” establishes a conclusive or a rebuttable presumption depends largely upon the context in which the word is used, the purpose to be served and the necessity of ensuring that the purpose is served.[26]

[89] The Claimant’s position is that “deemed” in section 153.17 (1) creates a rebuttable presumption. In other words, the credit of hours presumptively applies to the first claim on or after September 27, 2020, but that presumption can be rebutted by evidence showing a claimant does not need the hours to qualify.

[90] The Commission’s position is essentially that “deemed” creates a conclusive presumption. Once the first initial claim is made on or after September 27, 2020, the result that follows is the credit is applied.

[91] I find that the word “deemed” in section 153.17 (1) of the EI Act clearly creates a conclusive presumption. I find this for several reasons.

[92] First, the context in which the presumption is used does not suggest it is rebuttable. Nowhere in the section 153.17, or in Part VIII.5 of the EI Act, where section 153.17 is found, or anywhere in the EI Act is there any qualifying language or reference to circumstances in which the deeming would not apply.

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[25] See AD7-34, The Construction of Statutes, 7th Ed., Ruth Sullivan, Chapter 4, at page 32.
[26] See *Cabot v. The Queen*, 1998 CanLII 477 (TCC).

[93] Second, the way the Claimant says the presumption can be rebutted is not consistent with how rebuttable presumptions operate. With a rebuttable presumption, the fact that is being presumed has to be rebutted by evidence. For example, if a law presumes a person to have received a document by a certain date, that presumption could be rebutted by the person providing evidence that they actually received the document on another date.

[94] But the presumption in section 153.17 (1) of the EI Act doesn't operate that way. I will explain why.

[95] Assume a claimant makes an initial claim with X number of hours. Section 153.17 (1) presumes they have X hours plus either 300 or 480 hours, depending on the type of claim they make.

[96] But there is no way to rebut this presumption with evidence. To rebut the presumption, a claimant would have to show they didn't have X plus 300 or 480 hours. But that is not possible to do. The claimant will always have X plus 300 or 480 hours.

[97] The Claimant is suggesting the presumption can be rebutted by showing they don't need the hours. But it is the fact being presumed (that the person has X plus 300 or 480 hours) that must be rebutted by evidence. Evidence that a claimant doesn't need the hours doesn't rebut that fact.

[98] The way the presumption operates in section 153.17 (1) of the EI Act is consistent with a conclusive presumption. In other words, if a person makes an initial claim on or after September 27, 2020, the result that follows is the credit of either 300 or 480 hours.

[99] The cases the Claimant relies on to argue the word "deemed" creates a rebuttable presumption are distinguishable on their facts because in those cases, the fact being presumed was capable of being directly rebutted by evidence.

[100] For example, in *Sharbern Holding Inc. v. Vancouver Airport Centre*[27], at issue was section 75(2)(a) of the *Real Estate Act.* This section provided that every purchaser of any part of land to which a prospectus relates "is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not."

[101] The Supreme Court of Canada held that the presumption of deemed reliance was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase. In other words, the fact being presumed, the deemed reliance on representations, could be rebutted by actual knowledge of misrepresentations. So, the actual fact being presumed was capable of being rebutted by evidence.

[102] Similarly, in *Manitoba Chiropractors Assn. v. Alevizos,*[28]at issue was a provision that said that contravention of any provision of *The Chiropractic Act* or the regulations was "deemed" to be professional misconduct. The Manitoba Court of Appeal decided that the provision should be interpreted to mean that the non-observance of a provision of *The Chiropractic Act* or regulations is misconduct only if the statutory presumption is not displaced by evidence to the contrary. In other words, evidence that, in the particular circumstances, the contravention does not constitute professional misconduct. So, again the fact being presumed, professional misconduct, could be displaced by evidence to the contrary.

[103] This is not the situation with the presumption created by section 153.17 (1) of the EI Act. The fact being presumed cannot be rebutted with evidence.

[104] The case of *Webber v. State Farm Mutual Automobile Insurance Co.*[29] is also distinguishable because, in that case, the French and English version of the provision being interpreted were different. The member was comparing the French version of the

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[27] See AD7-109 referring to *Sharbern Holding Inc. v. Vancouver Airport Centre*, 2011 SCC 23.
[28] See AD7-109 *Manitoba Chiropractors Assn. v. Alevizos*, 2003 MBCA 80 (CanLII).
[29] See AD7-108 referring to *Webber v. State Farm Mutual Automobile Insurance Co*., 2008 Carswell Ont. 758, at paragraph 21.

text, which said, “est réputé” to the English version said, “shall be deemed to be.” Contrastingly, the French version of section 153.17 (1) refers to, “est réputé” which translates directly to “is deemed” in the English version. So, I cannot conclude there was any intention on the part of the Legislature to suggest a rebuttable presumption, having regard to the words used in the French version of section 153.17 (1).

[105] Considering the words in the provision as a whole, I find, the text is clear that the Commission must apply the credit of hours once the first initial claim has been made on or after September 27, 2020.

[106] Since the text is clear, it plays a significant role in the interpretation. However, I also have to consider whether interpreting the text in this manner is consistent with the context and purpose.

– Context

[107] The Commission argues that the section 153.17 (1) must be read in context with section 153.17 (2). The Commission says when read together, it is clear that the credit will only apply to the first initial claim made on or after September 27, 2020.

[108] The Appeal Division of this Tribunal has concluded previously that, read on its own, section 153.17 (1) could suggest that a claimant is deemed to have the additional hours applied to all initial claims made on or after September 27, 2020. However, the limitation in section 153.17 (2) then clarifies that the credit will only apply to the first initial claim.[30]

[109] The Claimant submits that section 153.17 (2) simply means you can’t have the credit twice. It doesn’t mean that the credit in section 153.17 (1) has to be applied to the first initial claim.

[110] I agree that section 153.17 (2) doesn’t necessarily narrow the credit to the first initial claim made on or after September 27, 2020. The fact the credit can’t be applied twice is consistent with both the Commission’s interpretation and the General Division’s

[30] See *Canada Employment Insurance Commission v SS*, 2022 SST 283.

interpretation. With both interpretations, the credit is only being applied once to establish a benefit period. So, the context of section 153.17 (2) does not help resolve which interpretation is correct.

[111] However, when considering section 153.17 (1) in the context of related section 153.171 of the EI Act and also the context of how benefit periods operate in the EI scheme, it is clear that the credit must be applied to the first initial claim made on or after September 27, 2020.

Section 153.171

[112] Section 153.171 provides:

> **153.171** A claimant who qualifies to receive benefits under section 7 and who received the additional 300 hours of insurable employment under paragraph 153.17 (1)(b) may make a claim for benefits under section 21 to 23.3 even if they are not a major attachment claimant, as defined in subsection 6(1).

[113] A "major attachment claimant" is defined as one who qualifies to receive benefits and has 600 or more hours of insurable employment in their benefit period.[31]

[114] Prior to September 25, 2021, a claimant had to be a "major attachment claimant," to qualify for EI maternity and parental benefits (special benefits). So they required 600 hours to qualify.[32]

[115] Section 153.171 was one of the temporary amendments added to the EI Act on September 27, 2020. This provision appears to provide an exception to the 600-hour requirement for those claimants who had a credit of 300 hours applied to a claim for regular benefits.

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[31] See section 6(1) of the EI Act, in effect until September 25, 2021.
[32] See section 22(1) of the EI Act in effect from August 12, 2018, to September 25, 2021, and see section 23(1) of the EI Act in effect from March 18, 2019, to September 25, 2021.

[116] From September 27, 2020, to September 25, 2021, the minimum unemployment rate remained at 13.1%.[33] This meant claimants of regular benefits during that period were only required to have 420 hours to qualify.[34]

[117] The practical effect of section 153.171 is that if a claimant has already received the credit of 300 hours to establish a claim for regular benefits, they can qualify for special benefits even if they have only earned 420 hours.[35]

[118] So, section 153.171 specifically addresses what happens where a subsequent claim is made for special benefits (which include maternity and parental benefits) after a claim for regular benefits was made and the credit was applied.

[119] Considering, section 153.17 (1) in the context of section 153.171 of the EI Act, it is clear the credit in section 153.17 (1) is intended to apply only to the first initial claim made on or after September 27, 2020. It is not intended to be applied to subsequent claims.

[120] Instead, section 153.171 contemplates that, where the credit has been applied to a claim for regular benefits, a reduced number of hours is required to qualify for special benefits on a subsequent claim.

[121] I recognize that section 153.171 does not address the Claimant's situation where an initial claim is made for special benefits, the benefit period ends and then, within the year the credit provision was in effect, a further initial claim for special benefits is made. However, it still shows a clear intention on the part of the legislature that the credit is to be applied to the first initial claim made on or after September 27, 2020.

[122] I will next consider section 153.17 (1) in the context of how benefit periods operate in the EI scheme.

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[33] See section 153.16 of the EI Act.
[34] See section 7(2) of the EI Act as it from September 27, 2020, to September 25, 2021.
[35] See section 6(1) of the EI Act.

Benefit period

[123] A benefit period ends after 52 weeks.[36] However, a benefit period can end before 52 weeks, if a claimant is paid their maximum weeks of benefits, or if the Commission cancels the benefit period. It can also end if a claimant requests that the benefit period end early, makes a new initial claim for benefits and qualifies to establish that new claim for benefits.[37]

[124] For benefit periods starting between September 27, 2020, and September 25, 2021, the maximum number of weeks of regular benefits was 50 weeks.[38]

[125] The maximum allowed weeks of combined regular and special benefits was 50 weeks.[39]

[126] The maximum weeks of maternity benefits is 15 and the maximum weeks of standard parental benefits is 35 weeks.[40] So, a benefit period for a person claiming both those types of benefits would last for 50 weeks.

[127] Once a benefit begins, it continues to run. The law says that a new benefit period cannot be started if a prior one has not ended.[41]

[128] If a person collects less than the maximum weeks of benefits available to them, returns to work, but then later claims benefits again, the existing benefit period is renewed and continues until the benefit period ends. In other words, until either, the maximum weeks of benefits are paid, or 52 weeks is reached.

[129] Considering that context, once a first initial claim is made, if the credit is given whether it is needed or not, and a benefit period established, no further credit would be

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[36] See section 10(2) of the EI Act.
[37] See section 10(6) of the EI Act, which explains how a benefit period can be cancelled. See section 10(8) of the EI Act, which explains when a benefit period ends.
[38] See section 12(2.1) of the EI Act.
[39] See section 12(6) of the EI Act.
[40] See section 12(3)(a) and section 12(3)(b)(i) of the EI Act.
[41] See section 10(3) of the EI Act.

expected to be required in the one-year period the credit provision was in effect. Rather, the benefit period would be expected to run until its end.

[130] This context is consistent with the Commission's interpretation that it is the first initial claim for benefits made on or after September 27, 2020, to which the credit applies.

[131] A claimant can only end the existing benefit period and start a new benefit period if they have earned enough hours since the start of their last benefit period to qualify. But this is an exception to the general rule that a benefit period, once started, will continue until its end.

[132] The Claimant's situation is also exceptional. The Claimant wanted to start a new benefit period after her prior benefit period ended. Since her initial benefit period started on September 27, 2020, it would have ended 50 weeks later on September 11, 2021.

[133] Section 153.17 ceased to be in effect on September 25, 2021, which was a Saturday. Since benefit periods only begin on Sundays, the last benefit period start date for which the Claimant could possibly have benefited from the credit was September 19, 2021.

[134] This means that the Claimant had a one-week window from the ending of the first benefit period to take advantage of the credit before it ceased to be in effect, to start a second benefit period for sickness, maternity and parental benefits.

[135] The General Division's interpretation favours these exceptional situations as opposed to the general rule that benefit periods continue until the maximum weeks have been paid or 52 weeks.

[136] While the Commission's interpretation may not be consistent with the exceptional situations described above, it is consistent with the context of the general operation of benefit periods that they will last until the maximum weeks of benefits are paid or 52 weeks is reached.

– Purpose

[137] The interpretation given to section 153.17 (1) must be consistent with the purpose of the EI Act and the purpose of section 153.17 (1).

[138] The General Division decided that the purpose of the EI Act was to provide benefits for people who are unemployed.[42]

[139] The General Division also decided that the purpose of the provisions in Part VIII.5 of the EI Act, where section 153.17 (1) is found, was to help people access benefits. The General Division relied on the title to Part VIII.5 to come to this conclusion. The title of Part VIII.5 is "Temporary Measures to Facilitate Access to Benefits."[43]

[140] The Commission disagrees with the General Division about the purpose of section 153.17 of the EI Act. The Commission argues that the purpose was to increase the hours in a claimant's qualifying period on the first claim for benefits on or after September 27, 2020. In other words, to help claimants establish their first benefit period on or after September 27, 2020.

[141] The Claimant says that the General Division correctly decided what the purpose of the EI Act and the purpose of section 153.17 were.

[142] The Claimant says this purpose is made evident in the "Modernizing the Employment Insurance Program" report prepared by the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, which provides information about the changes to the EI system as a result of the pandemic.

[143] The report states that, "the federal government also introduced a series of measures with the objective of facilitating access to the EI program… Amendments

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[42] See paragraphs 24 and 25 of the General Division decision, referring to the cases of *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3, *Canada (Attorney General) v Jean*, 2015 FCA 242 at paragraph 26 and *Abrahams v Attorney General of Canada*, 1983 1 SCR 2.
[43] See paragraph 35 of the General Division decision.

have also provided a one-time top up of insurable hours such that claimants only need 120 hours to qualify for EI regular and special benefits." [44]

[144] The Claimant submits that describing s. 153.7 as a "one-time top up" is consistent with the notion that the one-time hours credit applies where there is the need for additional hours to be added. The purpose is to "top up" hours in order to have the required number for a claim to qualify.

[145] The Claimant also relies on the prior version of 153.17 (1), in place from August 10, 2020, to September 26, 2020, that said that if a claimant is making a claim for special benefits and has fewer than 600 hours of insurable employment, the number of hours in their qualifying period will be increased by 480. The Claimant argues this provision also makes clear that the intent of Parliament was that the hours are only to be applied to a claim if needed to qualify.

[146] The Claimant also points to the "Backgrounder: The Covid-19 Response Measures Act" from Employment and Social Development Canada explaining changes to the EI Act effective September 27, 2020. The Backgrounder says, "the hours credit will be available for new EI claims for one year, in recognition that labour market conditions remain uncertain and will take time to stabilize."[45]

[147] The Claimant says this statement shows that this benefit was intended to help those who would not qualify for an extended period of time.

[148] The Claimant asks that I take official notice of the fact that Covid-19 waves and associated lockdowns affected different jurisdictions across the country at different times.

[149] The Claimant argues that there is no basis upon which to conclude that the government's intention changed from the prior version of section 153.17 (1) so as to

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[44]See AD7-106 referring to Modernizing the Employment Insurance program, HUMA Committee Report, Presented June 2021, 43rd Parliament, 2nd session.

[45] See AD7-107 referring to Backgrounder: The COVID-19 Response Measures Act, Employment and Social Development Canada, Government of Canada Website, October 23, 2020.

credit additional hours to a claim regardless of whether they are needed. The Claimant maintains that it is hard to conceive of any rational purpose in doing so, given section 153.17 was enacted at a time of heightened economic instability due to the pandemic in which numerous claims must have been anticipated.

[150] The Claimant argues further that the Commission's interpretation frustrates the intention of the EI Act because applying the hours to the first claim on or after September 27, 2020, regardless of whether they are needed removes access to those additional hours when needed, even though a claimant may not have experienced economic hardship due to the pandemic, at the time of their first claim.

[151] On the other hand, the Claimant submits, the General Division's interpretation ensures the one-time credit is applied when needed, thus facilitating access to benefits consistent with its purpose. The Claimant says that Parliament enacted these amendments quickly, in the throes of the pandemic, to ensure access to benefits. It would be contrary to the intentions of Parliament to interpret the legislation in a way that prevents access to benefits during a period in which the labour market is still experiencing the effects of the pandemic.

[152] The Claimant also questions why, if Parliament intended the one-time credit of hours to apply mandatorily to the first claim on or after September 27, 2021, even if the additional hours were redundant, they did not use the word "shall" in drafting section 153.17 (1). The use of "shall" would have ensured the application of hours be considered imperative under the Federal *Interpretation Act*.[46]

[153] I agree with the General Division that the overall purpose of the EI Act is to provide benefits to those who are unemployed. But section 153.17 was a temporary amendment to the legislation. Given its temporary nature, the context in which it was enacted is significant to determining its purpose.

[154] I find that the purpose of section 153.17 (1) of the EI Act was to provide a credit of hours to help establish the first benefit period on or after September 27, 2020. In

[46] See *Interpretation Act*, R.S.C., 1985, c. I-21, s. 11.

other words, the intent was to facilitate access to EI benefits for those who would not otherwise qualify to establish the first benefit period on or after September 27, 2020.

[155] That purpose is evident when considering that section 153.17 (1) was enacted, following directly upon the ending of the Canada Emergency Response Benefit (CERB) program. As both documents the Claimant provided explaining the background to the enactment point out, section 153.17 (1) was put in place as a temporary transitional provision following the ending of the CERB program.

[156] In that regard, the "Modernizing the Employment Insurance Program" document explains initial measures were put in place, which included the CERB, for the period from March 15, 2020, to October 3, 2020. The report explains that, following the phase out of the CERB, the government introduced some additional benefits and also introduced a series of measures with the objective of facilitating access to the EI program. These amendments included a one-time top-up of insurable hours such that individuals only needed 120 hours to qualify for regular or special benefits.[47]

[157] The Backgrounder provides similar information. The Backgrounder states, "Of the almost 9 million people who have received CERB since March, we anticipate close to 4 million will still require income support." The Backgrounder goes on to describe that a set of temporary measures were put in place to facilitate access to EI. It is pointed out that approximately 2.8 million CERB recipients will be transferred to EI regular benefits, including over 400,000 workers who would not have qualified for EI without these measures. One of the measures referred to is the hours credit.[48]

[158] These documents suggest the intention behind section 153.17 (1), therefore, was to facilitate initial "access" to the EI program, following the ending of the CERB. In other words, to facilitate the starting of the first benefit period on or after September 27, 2020.

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[47] See Chapter 1 of Modernizing the Employment Insurance program, HUMA Committee Report, Presented June 2021, 43rd Parliament, 2nd session.
[48] See Backgrounder: The COVID-19 Response Measures Act, Employment and Social Development Canada, Government of Canada Website, October 23, 2020.

[159] The interpretation of section 153.17 (1) to mean that the additional hours were to be added to the first initial claim made on or after September 27, 2020, even if not needed, is consistent with this purpose.

[160] The Claimant argues that the Backgrounder makes clear that the government recognized that the market conditions were still uncertain and would take time to stabilize. I don't disagree that market conditions remained unstable throughout the period the one-year credit provision was in place. As above, I also take official notice of the fact that the lockdowns occurred at different times in different jurisdictions across Canada.

[161] However, a recognition of ongoing instability and lockdowns occurring in different places at different times doesn't imply the purpose of section 153.17 (1) was to facilitate the starting of subsequent claims where a person had insufficient hours. A recognition of ongoing instability is equally consistent with a purpose of facilitating the starting of the first benefit period on or after September 27, 2020, at any point during the one-year period the credit provision was in effect.

[162] Respectfully, the Claimant's position on purpose does not take into account that the enactment took place in the context of the expected transition of many individuals to the EI program, following the ending of the CERB program.

[163] I see nothing in the Backgrounder, or the "Modernizing the Employment Insurance Program" report, which suggests that the purpose was to assist with the early ending of a benefit period and the starting of a subsequent one, or to facilitate the starting of a second benefit period, after the first one has ended.

[164] In fact, the Backgrounder says, "The hours credit will be available for new EI claims for one year, in recognition that labour market conditions remain uncertain and will take time to stabilize."[49] The use of the word **"new"** suggests it was first initial claims that the credit would be applied to.

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[49] See Backgrounder: The COVID-19 Response Measures Act, Employment and Social Development Canada, Government of Canada Website, October 23, 2020.

[165] The Claimant argues that the description of section 153.17 as providing a "one-time top up" is consistent with the notion that the one-time hours credit applies where there is the need for additional hours to be added. She maintains the purpose is to "top up" hours in order to have the required number for a claim to qualify.

[166] But the term "top-up" is also consistent with the purpose of assisting those claimants who don't have enough hours to establish a first benefit period on or after September 27, 2020. Those who don't have enough hours to establish the first benefit period on or after September 27, 2020, will have their hours topped up.

[167] I don't think the phrase "top-up" as used in the background information excludes the possibility of hours being credited, even if not needed. More compelling is the language in subsection 153.17 (2) which refers to the credit provision in subsection (1) not applying to a claimant who has already had the number of insurable hours in their qualifying period **increased.** It doesn't say, "topped up." The "increase" of hours makes clear the credit of hours is not tied to how many hours a claimant already has.

[168] The Claimant also points out that the legislature could have used the word "shall" in section 153.17 (1), which she says would clearly have signalled an intention that the hours had to be applied to establish the first benefit period.[50]

[169] While that is true, the legislature also could have specifically said the hours were only to be applied if needed. Indeed the prior version of section 153.17 (1) made that clear.

[170] The Claimant says we can't speculate on the reason behind the change in the wording. She argues the word "deemed" gives the Commission the same ability to add hours, if needed, as in the prior version.

[171] The *Interpretation Act* says an amendment does not imply a change in the law. However, that rule is subject to a contrary intention appearing.[51]

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[50] See section 22 of the *Interpretation Act.*
[51] See section 3(1) of the *Interpretation Act*.

[172] In my view, the very significant change in the wording of the credit provision from the prior version where the credit was only applied if a claimant had fewer than the required hours, along with the addition of section 153.171 at the same time, signifies a contrary intention. It signifies that the credit was to be applied to establish the first benefit period on or after September 27, 2020, even if not needed.

[173] The General Division relied on the title to Part VIII.5 of the EI Act, "Temporary Measures to Facilitate Access to Benefits" to find that the purpose of section 153.17 (1) was to help people access benefits.

[174] While it is true the title to Part VIII.5 is very broad, it does say "access" to benefits are being facilitated. It doesn't say "qualifying" for benefits is being facilitated.

[175] Considering the background documentation the Claimant provided that explains the temporary measures were enacted as transitional measures following the ending of the CERB program, I think it more likely than not that "access" in the title is referring to facilitating the first benefit period on or after September 27, 2020.

[176] I find the Commission's interpretation to be consistent with the purpose of section 153.17, which is to provide a credit of hours to help claimants establish their first benefit period on or after September 27, 2020.

[177] Respectfully, I find the General Division misinterpreted the purpose of section 153.17 (1) of the EI Act.

– The Commission's Interpretation does not have an absurd result

[178] The General Division concluded that the Commission's interpretation of section 153.17 (1) has an absurd result because applying the credit of hours when they were not needed did nothing to help people qualify and actually harmed them by removing a chance for them to qualify at a later date when they actually needed the hours.

[179] The Claimant submits that an interpretation may be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if

it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment.[52]

[180] The Claimant agrees with the General Division that applying the hours credit to the first claim when not needed so it can't be used later when needed is an absurd result. She says this hinders the very purpose of the provision.

[181] I do not disagree that the Claimant finds herself in an extremely difficult situation. But I cannot conclude that the Commission's interpretation of section 153.17 (1) has an absurd result.

[182] No claimant who qualifies for benefits with more than the required hours can use those extra hours to establish a subsequent benefit period. The extra hours are lost. So, the fact the Claimant had extra hours resulting from the application of the credit to establish her first benefit period, that meant she couldn't have the credit to use later, is not absurd when considered in that context.

[183] Although the Claimant cannot have the credit to establish a subsequent benefit period, that result is only absurd if the purpose of section 153.17 (1) was to help claimants establish any benefit period, including subsequent benefit periods, during the one-year period section 153.17 (1) was in effect. But, as above, that is not what the purpose is. The purpose is to provide a credit to help claimants establish a first benefit period on or after September 27, 2020.

The General Division's interpretation was incorrect

[184] I find the text, context and purpose all lead me to the conclusion that the General Division made an error of law in how it interpreted section 153.17 (1).

[185] Section 153.17 (1) requires that the credit of hours be applied to the first initial claim made on or after September 27, 2020, even if not needed. Such an interpretation is consistent with the text, context and purpose of section 153.17 (1).

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[52] The Commission refers to *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 at paragraph 27.

[186] I understand this result is going to be disappointing to the Claimant. I also recognize that the outcome of this appeal has significant consequences for her. However, I am unable to conclude that section 153.17 (1) of the EI Act can be interpreted in the manner she suggests.

Remedy

[187] When the General Division makes a reviewable error, the Appeal Division has the option of giving the decision the General Division should have given.[53] The Appeal Division will generally do this when, as in this case, the General Division made an error of law and the underlying facts aren't in dispute.

[188] Both parties agreed at the hearing that if I decided the General Division had made an error of law, the appropriate remedy was to give the decision the General Division should have given.

[189] This situation involves an error of law and the underlying facts are not in dispute so there is no reason to send the matter back to the General Division. I will give the decision the General Division should have given.

[190] I find that section 153.17 (1) means that the credit of hours must be applied to the first initial claim made on or after September 27, 2020, whether or not the credit is needed.

[191] Since the Claimant already had the credit applied to her claim of September 27, 2020, and since the credit can only be applied once, the Claimant cannot have the credit applied again to help her establish a new benefit period on September 19, 2021.

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[53] The power to give the decision, and the power to decide questions of fact and law, are found in sections 59(1) and 64(1) of the *Department of Employment and Social Development Act*.

Conclusion

[192] The appeal is allowed. The General Division made an error of law. I have made the decision the General Division should have.

[193] The Commission properly applied the credit of hours to the Claimant's claim of September 27, 2020, so the Claimant cannot use the credit of hours to start a new benefit period on September 19, 2021.

Charlotte McQuade
Member, Appeal Division