



Citation: *KM v Canada Employment Insurance Commission*, 2023 SST 33

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** K. M.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** A. Fricker

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**Decision under appeal:** General Division decision dated June 14, 2022  
(GE-22-1378)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Videoconference

**Hearing date:** October 31, 2022

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** January 11, 2023

**File number:** AD-22-463

## Decision

[1] The appeal is allowed. I returning the matter to the General Division for reconsideration.

## Overview

[2] The Appellant, K. M. (Claimant), was injured in a car accident. She received short and long-term disability payments through her employer. She returned to work from August 2021 to October 2021. The Claimant applied for regular Employment Insurance (EI) benefits in February 2022. Her Record of Employment (ROE) showed 376 insurable hours.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant needed 420 insurable hours but had only accumulated 376. It decided that the Claimant did not qualify for benefits.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division found that the Claimant did not work enough hours to qualify for EI benefits. The General Division also found that the Claimant's qualifying period could not be extended because she received wage loss benefits and this was considered insurable employment.

[5] The Claimant is appealing the General Division decision to the Appeal Division. She argues that the General Division made errors of law in its decision. The Commission agrees that the General Division made errors of fact and law in its decision.

[6] The General Division made an error of law when it found that the Claimant's qualifying period could not be extended. I find that the record is not complete and I am returning the matter to the General Division to reconsider whether the Claimant had sufficient insurable hours to qualify for benefits.

## Preliminary matters

[7] At the hearing of this matter, the Commission took the position that the Claimant was entitled to the maximum extension to her qualifying period so it would begin on February 9, 2020, 104 weeks before she applied for benefits. The Commission said that she could request to have her claim started on an earlier date, October 29, 2021, when the Claimant stopped working. This is called an antedate.

[8] The hearing proceeded but I held the matter in abeyance while the Claimant requested an antedate of her claim and delayed issuing my decision. The parties agreed that the outcome of the antedate request might have resolved the issue before the Appeal Division. The Commission advised on November 15, 2022, that the Claimant's request to have her claim antedate was denied and she could request reconsideration of that decision.

## Issues

[9] The issues in this appeal are:

- a) Did the General Division err when it found that the Claimant's qualifying period could not be extended?
- b) If so, how should the error be fixed?

## Analysis

[10] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:<sup>1</sup>

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;

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

- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

## **The General Division made an error of law**

### **– The General Division decision**

[11] The General Division considered whether the Claimant had worked enough hours to qualify for EI benefits. It considered the Claimant's region and regional rate of unemployment and found that the Claimant needed to have worked 420 hours in her qualifying period to qualify for benefits.<sup>2</sup>

[12] In its decision, the General Division notes that the Commission was asked to provide more information about the possible extension to the Claimant's qualifying period.<sup>3</sup> The Commission stated that the Claimant did not qualify for an extension to her qualifying period because she was paid wage loss benefits as part of her paid leave from her job.<sup>4</sup>

[13] The General Division considered whether the Claimant qualified for an extension to her qualifying period. It found that the Claimant was injured in a serious motor vehicle accident in the period before she returned to work. However, the General Division found that the Claimant was not entitled to an extension of her qualifying period because "she did receive assistance from employment benefits and it was insurable employment."<sup>5</sup>

[14] The General Division relied on the sections of the *Employment Insurance Act* (EI Act) that state that the qualifying period cannot be extended during weeks in which paid leave is determined to be insurable because a claimant is considered to have insurable employment in those weeks.<sup>6</sup>

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<sup>2</sup> General Division decision at para 15.

<sup>3</sup> General Division decision at para 7.

<sup>4</sup> General Division decision at para 8 and GD7.

<sup>5</sup> General Division decision at para 30.

<sup>6</sup> See section 8(2) of the EI Act; section 8(5) of the EI Act.

[15] The General Division noted that the Claimant agreed that she received wage loss benefits through her employment from around February 2020 to the end of July 2021.<sup>7</sup>

[16] The General Division found that the Claimant was not entitled to an extension to her qualifying period. It agreed with the Commission that the qualifying period was the 52 weeks before her benefit period would start: February 7, 2021 to February 5, 2022.

– **The parties agree that the General Division erred**

[17] The Claimant disagrees with the General Division finding that she did not qualify for an extension to her qualifying period because she was receiving wage loss insurance payments. She states that EI premiums were deducted from her short and long-term disability payments.

[18] The Commission says that the General Division based its decision on an important error of fact when it found that the Claimant was employed in insurable employment while she was receiving long-term disability payments.

[19] The Commission argues that the General Division based its decision that the Claimant's qualifying period could not be extended on this factual error. It says that it was an error of law to find that that the Claimant was not entitled to an extension and that she does, in fact, meet the requirements to have her qualifying period extended to 104 weeks.

[20] I agree with the parties that the General Division made an error of law. There was very little evidence in the file dealing with whether or not the Claimant was employed in insurable employment while she was receiving short and long-term disability payments. The General Division accepted the Commission's submission that she was in insurable employment when it found that the Claimant was not entitled to an extension to her qualifying period.

[21] Neither the Commission nor the General Division considered section 10.1(1) of the EI Regulations. This section states that employees who are on employer-paid leave

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<sup>7</sup> General Division decision at para 28.

are deemed to be working in insurable employment and are accumulating the number of insurable hours they would normally have accumulated had they worked during the leave period.

[22] The ROE submitted by the Claimant's employer is only for the period from August 2, 2021 to October 29, 2021. If the Claimant had been on employer-paid leave prior to her return to work, she should have accumulated insurable hours which would be recorded on an ROE.

[23] If a claimant is on employer-paid leave, they are not entitled to an extension to the qualifying period because they are still accumulating insurable hours. When the claimant is not on employer-paid leave, no insurable hours are accumulated but the claimant could be entitled to an extension of the qualifying period. In this case, the Commission considered the Claimant to be on employer-paid leave but no insurable hours appear to have been recorded for that period.

[24] The General Division erred in law by failing to consider section 10.1(1) of the EI Regulations after finding that the Claimant was on employer-paid leave.

### **Fixing the error**

[25] To fix the General Division's error, I can give the decision that the General Division should have given or I can refer this matter back to the General Division for reconsideration.<sup>8</sup>

[26] The Commission argues that the Claimant is entitled to an extension to but still does not have enough insurable hours when her qualifying period is extended to 104 weeks. Her qualifying period, with the extension, would be from February 9, 2020 to February 5, 2022. The Commission says that there are no additional hours of insurable employment in this period.

[27] The Claimant says that she does not want to have another hearing at the General Division because she wants the matter to be resolved. However, she believes

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<sup>8</sup> Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.

she may have additional ROEs and was unclear about whether or not she was on employer-paid leave before returning to work.

[28] At the General Division, the Commission took the position that the Claimant was in insurable employment while receiving long-term disability payments. The Commission is now arguing that its position before the General Division was wrong, and the Claimant was not in insurable employment because she was not on employer-paid leave. It says that she would not have accumulated additional hours during her leave period.

[29] This issue was not properly considered by the General Division. The Commission says that there are no further ROEs to take into consideration, but the Claimant is not certain. The Claimant put forward arguments about possible additional hours before her short-term disability benefits ended. I cannot accept new evidence at the Appeal Division. Both parties wish to rely on facts that were not before the General Division.

[30] The reconsideration file contains little information about the Claimant's period of leave and the type of benefits she received. It appears that this issue did not arise until the appeal to the Appeal Division. For this reason, I find that the record is not complete and the Claimant did not have an opportunity to fully present her case.

[31] I am returning the matter to the General Division to reconsider whether the Claimant was on employer-paid leave and, if not, whether she has sufficient hours of insurable employment in an extended qualifying period. I understand that the Claimant would like to have this matter resolved without another hearing. Unfortunately, the record is not complete and I do not have the evidence before me needed to render a decision.

– **Additional comments**

[32] As discussed above, the Claimant's last day of work was recorded as October 29, 2021, on her ROE but she did not apply for benefits until February 2, 2022. She requested an antedate, which was denied by the Commission. The issue of the antedate was not before the General Division, and is not an issue that I can consider. The Claimant may request a reconsideration of this issue, separate from this appeal.

## **Conclusion**

[33] The appeal is allowed. The General Division made an error of law. I am returning the matter to the General Division for reconsideration.

Melanie Petrunia  
Member, Appeal Division