



Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 1099

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

Decision

Appellant: J. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (550302) dated November 8, 2022 (issued by Service Canada)

Tribunal member: Mark Leonard

Type of hearing: Teleconference

Hearing date: May 8, 2023

Hearing participants: Appellant

Decision date: May 19, 2023

File number: GE-22-4130

Decision

[1] The appeal is dismissed.

[2] The Appellant was overpaid 5 weeks worth of Employment Insurance (EI) benefits. The Appellant remains responsible to repay the EI benefits to which she was not entitled.

Overview

[3] The Appellant was paid 55 weeks of EI benefits. Despite errors made by the Commission, the maximum weeks of benefits that can be paid to the Appellant is 50.

[4] The Appellant was automatically converted from Employment Insurance Emergency Response Benefits (EI-ERB) to regular EI benefits on October 4, 2020. She was entitled to 50 weeks of benefits. Her benefits would have ended on September 18, 2021.

[5] The Appellant reported to the Commission that she had been working limited hours at the time of the conversion and continued to do so. The Commission offered to change the start date of her claim to November 22, 2020. This meant that her claim would then end on November 6, 2021. This meant that she had been overpaid for the weeks from October 4, 2020, to November 21, 2020, and resulted in an overpayment of \$3,280.00.

[6] Subsequently, the Commission decided to backdate her claim to the original date of October 4, 2020. This meant that the Appellant should have received 50 weeks of benefits ending on September 18, 2021. However, she was paid benefits until October 23, 2021, resulting in her receiving 5 weeks more than the maximum allowable. The Commission recalculated the overpayment based on the weeks from September 18, 2021, to October 3, 2021, and established an overpayment of \$1,735.00.

[7] The Commission says that it is bound by the Employment Insurance Act that stipulates a claimant cannot receive more than 50 weeks of benefits.

[8] The Appellant says that the Commission made errors, none of which were her fault. She says that she should not have to repay the benefits.

Issue

[9] Was the Appellant paid more than the maximum weeks of benefits allowable?

[10] If so, is the overpayment subject to repayment?

Analysis

[11] Benefits are paid to claimants for each week of unemployment that falls within a benefit period.¹ The length of a benefit period is 52 weeks unless a claimant qualifies for an extension.²

[12] In a claimant's benefit period, they may be subject to legislated maximums for weeks of benefits payable. In the case of the Appellant, the maximum number of weeks of benefits that can be paid in her benefit period is 50.³

[13] The Commission can only pay benefits for a week of unemployment that falls within a claimant's benefit period. The benefit period can be extended, but only under specific circumstances and with limitations.⁴

Was the Appellant paid more than the maximum weeks of EI benefits?

[14] I find that the Commission paid the Appellant 55 weeks of EI benefits which is an overpayment of 5 weeks more than allowable under the law.

[15] The Appellant had established a claim for EI-ERB that ran until October 3, 2020

¹ See Section 12(1) of the *Employment Insurance Act*.

² See Section 10 of the *Employment Insurance Act*.

³ See Section 12 (2.1)

⁴ See Section 10 Subsections 10 to 15.

[16] The Commission then automatically converted the Appellant's claim to regular benefits starting October 4, 2020.⁵

[17] On July 20, 2021, the Commission recalculated the Appellant's claim and changed the commencement date to November 20, 2020, because the Claimant had been working when her claim originally began up until November 19, 2020.

[18] The Commission had already paid the Appellant regular benefits for 39 weeks from October 4, 2020, to July 3, 2021.

[19] As a result of the change of her claim start date, the last week of benefits payable moved from September 18, 2021, to October 23, 2021.

[20] As a result of this change, the Commission determined that it had overpaid the Appellant for the period from October 4, 2020, to November 21, 2020, a period of seven weeks. The resulting overpayment was calculated as \$3,280.00.

[21] The Appellant received the first demand for repayment of \$3,280.00 on July 24, 2021.

[22] The Appellant says that she immediately contacted the Commission and conveyed that there was a mistake and that she could not possibly owe that amount. She says that the Service Canada agent agreed with her that there was a mistake and that it would be corrected such that she would not have an overpayment.

[23] However, The Appellant continued to receive demands for payment monthly and followed up with the Commission regularly.

[24] The Commission's records show that it attempted to make corrections in August 2021 to move the start date of her claim back to October 4, 2020. It acknowledged that an error had been made and her claim should never have been post-dated from

⁵ See Part VIII.4 of the Employment Insurance Act. Emergency Provisions (EI-ERB) were only for claims made related to Covid-19 between March 15, 2020 and October 3, 2020. New provisions under Part VIII.5 took effect no later than October 4, 2020. This means that anyone who had an active claim for EI-ERB was automatically converted to the Interim Orders provisions no later than October 4, 2020.

October 4, 2020, to November 22, 2020, but for some reason the Commission's computer system did not accept the change.

[25] Later, after the Appellant again contacted the Commission in November 2021, the Commission did backdate the claim to its original start date of October 4, 2020, however, this caused another problem. By the time the Commission had properly corrected the Appellant's claim, it had already overpaid her benefits for five weeks from September 19, 2021, to October 23, 2021.

[26] And still, the demands for payment for \$3,280.00 kept coming monthly. The Appellant again contacted the Commission in January and February 2022 and relayed her frustration asserting that she did not owe \$3,280.00. A Commission representative noted in the file that a review of the overpayment calculation was to be conducted.

[27] It was not until May 4, 2022, when the Commission finally completed a recalculation based on the claim beginning on October 4, 2020. As a result of this recalculation, the Commission determined that the Claimant had been overpaid benefits from September 19, 2021, to October 23, 2021. The overpayment was recalculated to be \$1,735.00

[28] Again, the Appellant contacted the Commission and relayed that she did not believe she had an overpayment of \$1,735.00. She made a request for reconsideration and the Commission confirmed its decision that she had been overpaid \$1,735.00 in EI benefits.

[29] The Appellant now submits that she should not be required to repay the overpayment because all the errors that led to it were the fault of the Commission. She says that she has no confidence that the amount requested had been properly calculated because of all the mistakes made by the Commission on her file.

[30] She says that if the Commission had acted sooner, it could have corrected her claim before the additional weeks of benefits were paid and there would be no overpayment

[31] I agree with the Appellant that the Commission should have acted sooner to correct her claim, or more importantly, should not have moved her start date in the first place.

[32] But the issue now is whether the Appellant was overpaid benefits.

Did the Commission overpay the Appellant EI benefits?

[33] I find that the Commission paid the Appellant 5 weeks of EI benefits to which she was not entitled.

[34] I also find that it was the errors of the Commission and not any action or omission on the part of the Appellant that led to the overpayment of benefits.

[35] It is evident from the documentation that the Commission paid the Appellant EI benefits from October 4, 2020, to October 23, 2021. She was entitled to 50 weeks of benefits from October 4, 2020. Her benefits should have ended on September 18, 2021. The additional five weeks of benefits paid from September 19, 2021, to October 23, 2021, were weeks she was not entitled to receive.

[36] The Commission submitted a recap of the weeks of benefits that the Appellant received.⁶ It details that the Commission paid the Appellant 5 weeks of EI benefits beyond when her benefit period should have ended.

[37] It appears from the documentation and submission from the Commission, that it originally rendered a decision to post-date the benefit period start date of the Appellant's claim. While a reason was not expressly noted, I am convinced that the Commission's actions were to assist her. It was post-dating the claim to beyond a period when the Appellant was working. It would have benefitted the Appellant by allowing her a longer benefit period in which to claim weeks of unemployment.

[38] However, I am satisfied that the Commission did not have the authority to post-date the Appellant's benefit period start date because the legislation required that the

⁶ See GD3-29 to 31

Commission automatically convert any EI-ERB claim establishing it no later than October 4, 2020.⁷ The Commission was authorized to automatically convert claim for those who were in receipt of emergency benefits prior to September 25, 2020. There were no provisions to allow it to post-date that conversion process.

[39] When the Commission post-dated her claim, it identified that the weeks it paid her benefits before the amended date would constitute an overpayment and issued a demand for payment. When the Appellant questioned the overpayment, the Commission conducted several reviews but ultimately determined that it had made an error post-dating her claim. It reconsidered its earlier decision and corrected the Appellant's benefit period start date back to October 4, 2020. It was then discovered that she had been overpaid 5 weeks benefits. It issued a demand for repayment of the 5 weeks of EI benefits it overpaid at the end of her claim.

[40] The Appellant does not dispute that she received 55 weeks of benefits. She says that because of all the mistakes the Commission made on her file, she is not convinced that the amount of the overpayment is correctly calculated. She says that there should not be an overpayment. She adds that even if she was overpaid benefits, she should not be required to repay it because it was the Commission's errors that caused it.

Is the overpayment amount correct?

[41] I find that the overpayment amount of \$1,735.00, as identified by the Commission is correct.

[42] The Commission decided that the Appellant's benefit period began on October 4, 2020. I am satisfied that the commencement date is correct. The date is consistent with the Commission's actions to convert EI-ERB claims into regular EI benefits when the emergency response benefit period ended October 3, 2020.

[43] For a reason that is not clear in the Commission's submissions, a decision was made to post-date the start of the Appellant's benefit period. It was that decision that

⁷ See

first prompted the Commission to conduct a review (July 2021) and request repayment of benefits it had paid the Appellant from October 4, 2020, to November 28, 2020.

[44] It then again reconsidered the Appellant's claim on May 4, 2022 and found that it should not have post-dated the Appellant's claim and reverted the start date of her claim back to October 4, 2020. This resulted in the Commission recalculating benefits payable and any overpayment based on the 5 weeks at the end of her claim for which she had received EI benefits but was not entitled. This recalculation took place approximately 6 months after the claim was scheduled to end.

[45] The Commission submitted a recap of the weeks of benefits received by the Appellant. The recap shows that the Claimant received benefits for 55 weeks from October 4, 2020 to October 25, 2021. I am satisfied that the documentation detailing the overpayment is correct.

[46] She was entitled to a maximum of 50 weeks of benefits. Her benefits should have ended September 18, 2021.

[47] The Commission identified the amounts paid to the Appellant for the 5 weeks for which she was not entitled to benefits as follows.⁸

Report Week	EI benefits paid
September 19 to September 25, 2021	\$325.00
September 26 to October 2, 2021	\$300.00
October 3 to October 9, 2021	\$300.00
October 10 to October 16, 2021	\$360.00
October 17 to October 23, 2021	\$450.00
Total	\$1,735.00

⁸ See GD3-57

[48] I am satisfied that the Commission identified the correct weeks in which it overpaid the Appellant. The Appellant did not present any evidence that would support a conclusion that the Appellant did not receive EI benefits for the weeks in question.

[49] I am also satisfied that the amount paid to the Appellant in each of those weeks adds up to \$1,735.00. The Appellant would have noted receiving lesser amounts because of tax deductions.

Did the Commission act judicially when it reconsidered the Appellant's claim?

[50] I find that The Commission did not act judicially when it reconsidered the Appellant's claim.

[51] The law says that a person who receives benefits for which they are not entitled must return them.⁹ However, the Commission has a policy that it uses to determine when an overpayment will or will not be established.¹⁰

[52] The Commission **may** reconsider a claim at any time within thirty-six months of benefits having been paid.¹¹

[53] Where the EI Act uses the word may, it means that the Commission has the discretion to choose whether to act or not. When the Commission exercises its discretion to act, it is expected that the Tribunal will not interfere with the Commission's decision unless it can be shown that the Commission,¹²

- acted in bad faith, acted for an improper purpose or motive,
- took into account an irrelevant factor,
- ignored a relevant factor,
- or acted in a discriminatory manner.

⁹ See Section 43 of the *Employment Insurance Act*.

¹⁰ See the Commission's "Digest of Benefit Entitlement Principles, Chapter 17 – Section 3."

¹¹ See Section 52(1) of the *Employment Insurance Act*.

¹² See the following Federal Court of Appeal decisions: *Sirois* A-600-95; and *Chartier*, A-42-90

[54] I have considered the Commission's submissions and I can find no evidence that it acted in bad faith or for an improper purpose or motive.

[55] I am convinced that the Commission original decision to post-date the start of the Appellant's claim was intended to assist her. She was working during the period from October 4, 2020, to November 22, 2020. The Commission decided that it could move her benefit period start date forward to after her period of working ended thus also pushing forward the benefit period end date. This would have allowed the Claimant the potential to claim more weeks of unemployment.

[56] Likewise, when the Commission identified that it had made an error in post-dating the claim, it simply took the necessary steps to bring the claim back into legislative compliance. There is no bad faith, improper purpose or motive, in the decision to bring the claim into compliance either. Further, I can find no irrelevant factor that the Commission considered and allowed to influence its decisions.

[57] Having seen many files where the Commission had reconsidered its previous decision, I again cannot find that it acted in a discriminatory manner when it reconsidered this file. It was simply correcting its own errors to bring the matters into compliance. I see no arbitrary actions that could be considered discrimination directed toward the Appellant.

[58] However, to act judicially, the Commission must also consider all relevant factors before rendering a decision.

[59] The Appellant points out that the Commission has a policy that details how it will examine the circumstances when it makes mistakes that would lead to an overpayment. She claims that the Commission did not follow its policy and that it should not have created the overpayment.

[60] I could not find in the Commission's submissions any evidence that it considered its policy before making its decision that resulted in the overpayment.

[61] The Commission should have examined the Appellant's circumstances through the lens of its own policy before creating the overpayment. By not considering its own policy, I am satisfied that the Commission did not act judicially.

[62] So, I will do that now and substitute my decision for the one the Commission should have given.

The Policy

[63] The Commission's reconsideration policy states that a claim will only be reconsidered in the following situations:

- benefits have been underpaid
- benefits were paid contrary to the structure of the EIA
- benefits were paid as a result of a false or misleading statement
- the claimant ought to have known there was no entitlement to the benefits received.

[64] Clearly, because the benefits were not underpaid to the Appellant, this criterion does not apply. I have already found that it was the Commission's errors that lead to the overpayment not any false or misleading information provided by the Appellant.

[65] Neither am I convinced that the Appellant ought to have known that there was no entitlement to the benefits. The Appellant was simply trying to get her claim corrected. She believed that the Commission had made errors that caused the creation of the overpayment. Commission representatives confirmed her suspicions. It was not until after her claim had ended that the Commission was finally able to correctly calculate her claim and then inform her of the remaining overpayment.

[66] Given the number of interactions with the Commission in which she was told there would be a correction to her claim, I can understand how she might now be concerned that it remains incorrectly calculated. At the very least, I accept she would be confused by the Commission's many conflicting actions on her file. I am not convinced that she could have concluded that she was not entitled to the benefits she received.

[67] This leaves the question of whether the benefits were paid contrary to the structure of the Act.

Benefits paid contrary to the structure of the Act.

[68] I find that despite the Commission's errors in establishing the Appellant's benefit period, and its failure to consider it policy on reconsideration, it was obligated to correct the start date of the Appellant's claim once it became aware of the errors it had made.

[69] The policy defines what it considers to be basic elements that when in error constitute circumstances that are contrary to the structure of the Act.¹³

[70] The policy notes that the date of the interruption of earnings and start date of a claim are basic elements required to set up a claim and pay benefits. There was no provision within the Act that would allow the Commission to have post-dated the Appellant's claim to a date later than legislation requires.

[71] Therefore, applying the incorrect start date to a claim is an error that is contrary to the structure of the Act.

[72] It follows that when the Commission has overpaid benefits because it established the incorrect start date, even if it is the Commission's fault, it has no choice but to reconsider its previous decision, establish the overpayment and request repayment. The Commission cannot act in a way that is contrary to the law.¹⁴ Likewise an error or misinformation by the Commission does not give rise to relief from the application of the law.¹⁵

[73] I empathize with the Appellant. The Commission made errors and delayed correcting them. Its representatives told the Appellant that they would fix the problems and here would be no overpayment. However, the delays in making those corrections which involved moving her benefit start date twice, resulted in her being paid benefits

¹³ See Section 17.3.3.2 "Contrary to the Structure of the act."

¹⁴ See (*Granger v. Canada Employment Insurance Commission*), A-684-85

¹⁵ See (*Canada (A.G.) v. Shaw*, 2002 FCA 325)

after they should have ceased. This leaves her with a sizable overpayment subject to recovery.

[74] But the law simply does not allow me to relieve the Appellant from responsibility for the overpayment. I cannot ignore the law even if the outcome may seem unfair.

[75] The Appellant contends that the requirement to repay the benefits is a financial hardship. Once again financial hardship is not a criterion that I may consider regarding whether the Appellant was overpaid benefits, or whether those overpaid benefits are subject to recovery. Neither do I have the jurisdiction to consider whether she could have the debt written off.¹⁶

[76] However, nothing in my decision would prevent the Claimant from seeking assistance in the other ways, such as.

- The Appellant may request that the Commission write-off the debt.
- If repayment will cause the Appellant financial hardship, she can contact the Debt Management Call Centre of the Canada Revenue Agency and ask about applying for debt relief.

Conclusion

[77] The appeal is dismissed.

[78] This means that the Appellant remains responsible for the overpayment of \$1,735.00 in EI benefits.

Mark Leonard
Member, General Division – Employment Insurance Section

¹⁶ See Section 112(1) of the *Employment Insurance Act*.