



Citation: *HZ v Canada Employment Insurance Commission*, 2023 SST 1104

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: H. Z.
Representative: B. S.

Respondent: Canada Employment Insurance Commission
Representative: Rachel Paquette

Decision under appeal: General Division decision dated February 8, 2022
(GE-21-2607)

Tribunal member: Janet Lew

Type of hearing: Videoconference
Hearing date: October 18, 2022
Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: August 16, 2023
File number: AD-22-169

Decision

[1] The appeal is allowed in part.

[2] The General Division did not make an error about the issue over whether a claim made in April 2020 by the Appellant, H. Z. (Claimant), should be deemed a claim for Emergency Response Benefits.

[3] The General Division should have addressed the arguments over reinstatement of the Claimant's January 2021 claim. But the Respondent, Canada Employment Insurance Commission (Commission), did not have any authority to cancel the January 2021 claim or any authority, for that matter, to backdate the claim to October 2020. The January 2021 claim should have been maintained throughout. I am restoring the January 2021 claim.

[4] As an interstate client, the Claimant was entitled to receive 12 weeks of Employment Insurance regular benefits under the January 2021 claim.

Overview

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

[6] The Claimant that the General Division made jurisdictional, legal, and factual errors regarding two claims that she made for Employment Insurance regular benefits.¹ She made her first claim on April 2, 2020, and the second on January 31, 2021.²

[7] For the first claim, the Claimant argues that the General Division made a legal error when it found that the Commission had appropriately converted her claim to one for Emergency Response Benefits (ERB). She says her claim should have always

¹ See Claimant's first application filed on April 17, 2020, at GD 3-4 to GD 3-17, and second application filed February 5, 2021, at GD 3-26 to GD 3-39.

² The Claimant's application form at GD 3-38 suggests that she filed a second application in February 2021, but the parties agree that her second application was established on January 31, 2021.

remained a claim for Employment Insurance benefits and she should have received only Employment Insurance regular benefits, not ERB.

[8] As for the second claim, the Claimant argues that the General Division made a jurisdictional error. She says that the General Division should have reinstated her second claim that the Commission had effectively extinguished.

[9] Finally, the Claimant further argues that the General Division also miscalculated the weeks of benefits which she says she is entitled to receive under both claims.

[10] The parties agree that the General Division made a jurisdictional error. The parties agree that the General Division should have considered whether it could reinstate the January 2021 claim.

[11] I accept that the General Division made a jurisdictional error as it should have considered the Claimant's arguments over reinstatement of her second claim. So, I will consider whether the General Division should have reinstated the second claim. I will also address whether it should have converted the first claim to an ERB claim.

Preliminary matters

[12] The Claimant argues that any payments she received from her employment from October 26, 2020 to December 18, 2020 represent severance. She argues that because the payments represent severance, they should not be offset against or allocated towards any Employment Insurance benefits that she received.

[13] This represents a new issue that has not come up before, and is therefore outside my authority to address. But even if I could address it and even if there was evidence to support the Claimant's assertions, likely I would have determined that the severance would still be considered earnings for the purposes of subsection 36(9) of the *Employment Insurance Regulations*.³ Severance pay would still be allocated.

³ *Blais v Canada (Attorney General)*, 2011 FCA 320.

Issues

[14] The Claimant has set out numerous issues, summarized as follows:

April 2020 claim:

- a) Did the General Division make a legal error when it determined that the Commission had appropriately converted the April 2020 claim so that the Claimant received ERB instead of Employment Insurance regular benefits?
 - i) If so, how many weeks of Employment Insurance regular benefits was the Claimant entitled to receive?
 - ii) If not, did the General Division miscalculate how many weeks of ERB the Claimant was entitled to receive?

January 2021 claim:

- b) Did the General Division fail to consider whether the Commission should have reinstated the January 2021 claim?
 - i) If so, can and should I reinstate the January 2021 claim?
 - ii) How many weeks of Employment Insurance regular benefits was the Claimant entitled to receive for the January 2021 claim?

[15] The parties agree that the answer to question b) is “yes.” So, I will consider whether the January 2021 claim should have been reinstated.

Analysis

[16] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.⁴

[17] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

General background

[18] The handling of the two claims has been messy and confusing. Some of the documents, on their own, are incoherent or have gaps and paint an incomplete picture of even basic facts. I am setting out the facts as they appear and have been presented by the parties.

[19] The Claimant is a resident of the United States. She works in Canada and is known as an interstate or commuter client. She worked as an accounting clerk for a Canadian employer from June 2011 to April 10, 2020. She was laid off due to a shortage of work. She applied for Employment Insurance regular benefits on April 17, 2020.⁵ This was the Claimant's first claim. Her employer issued a Record of Employment the following day.⁶

[20] The Claimant returned to work. She worked from October 26, 2020 to December 18, 2020. She stopped working because of a shortage of work. She applied for Employment Insurance regular benefits on February 5, 2021.⁷ This was her second claim.

⁴ Section 58(1) of the *Department of Employment and Social Development Act*.

⁵ See Claimant's Application for Employment Insurance benefits, at GD 3-4 to GD 3-17.

⁶ See Record of Employment dated April 18, 2020, at GD 3-19.

⁷ See Claimant's Application for Employment Insurance benefits, at GD 3-26 to GD 3-39.

[21] The Claimant's employer issued a Record of Employment on February 19, 2021.⁸ The Record of Employment showed that the Claimant had 320 hours of insurable employment.

– **The Commission's initial decision**

○ **the first claim**

[22] Initially the Commission determined that the Claimant, being an interstate client, was entitled to 36 weeks of regular benefits on her first claim.⁹ There is conflicting information about how many weeks of benefits the Claimant might have received under this claim:

- There is evidence that suggests the Claimant received 36 weeks of regular benefits¹⁰
- There is also evidence that she received 19 weeks of regular benefits.¹¹ (The Commission never explained why it paid 19 weeks of regular benefits, but likely it is because the Claimant returned to work in October 2020.¹²)

[23] After a review in April 2021, the Commission converted the claim to a claim for ERB. The Commission determined that, as an interstate client, the Claimant was entitled to receive 20 weeks of ERB under this claim.¹³

⁸ See Record of Employment dated February 19, 2021, at GD 3-40.

⁹ See letter dated August 11, 2021 from Service Canada to the Claimant, at GD 3-79.

¹⁰ Representations of the Commission to the Social Security Tribunal – Appeal Division, at AD 3-5.

¹¹ My Service Canada Account for claim started on April 12, 2020, at GD 3-86 to GD 3-87.

¹² Record of Employment dated February 19, 2021, at GD 3-40 (and GD 3-78).

¹³ See letter dated September 9, 2021 from Service Canada to the Claimant, at GD 3-62 (and GD 3-72), advising that the Commission had paid the Claimant from May 17, 2020 to October 3, 2020 as CERB. See also Representations of the Commission to the Social Security Tribunal – Appeal Division, at AD 3-2. The Commission explained why it paid the Claimant 20 weeks rather than 19 weeks of ERB. The Commission explained that the Claimant had not received regular benefits from May 17 to May 23, 2020.

- **the second claim**

[24] As for the second claim, the Claimant would not have been eligible for regular benefits based on the 320 insurable hours recorded in the Record of Employment.¹⁴ However, the Claimant received a 300-hour credit under subsection 153.17(1) of the *Employment Insurance Act* (EIA).

[25] Hence, based on 620 hours of insurable employment, the Commission determined that the Claimant was entitled to receive 12 weeks of benefits under subsection 55(7) of the *Employment Insurance Regulations* (EIR). The Commission initially paid the Claimant 12 weeks of regular benefits.¹⁵

[26] The Claimant calculated that she was entitled to 50 weeks of regular benefits. She asked the Commission to extend her claim so that she could receive 50 weeks of regular benefits.

[27] Upon review, the Commission backdated the second claim to October 4, 2020. The Commission told the Claimant that she had established a claim with 1,820 hours.¹⁶ It referred her to Schedule I of the EIA as well as the regional rate of unemployment (though as an interstate client resident in the United States, there would not be a regional rate of employment. So, Schedule I would not have been a relevant consideration.)

[28] The Commission told the Claimant that she was entitled to 36 weeks of regular benefits under this claim.¹⁷ The Commission noted that a maximum of 36 weeks of regular benefits could be paid for interstate claims.

¹⁴ Record of Employment dated February 19, 2021, at GD 3-40 (and GD 3-78).

¹⁵ My Service Canada Account for claim started on January 31, 2021, at GD 3-43 (and 76 to GD 3-77).

¹⁶ It is unclear where the Commission found that the Claimant had established a claim with 1,820 hours, but likely the Commission meant that the Claimant had in excess of 1,820 hours, based on her Record of Employment at GD 3-19 (and at GD 3-75). The Record showed she had 2,056 hours of insurable employment.

¹⁷ Service Canada letter dated August 11, 2021, at GD 3-58. The Commission told the Claimant that the “number of weeks payable is determined by the table in Schedule I and is based on the clients (*sic*) insurable hours in the qualifying period as well as the regional rate of unemployment in the clients (*sic*) place of residence at benefit period commencement.” But as the Claimant is an interstate client, Schedule I did not apply to her.

[29] The Claimant's My Service Canada Account showed that she was paid 27 weeks of regular benefits under the second claim, starting from October 4, 2020 to the week of April 4, 2021.¹⁸

[30] The Commission later advised the Claimant that it should have paid her only up to January 31, 2021. The Commission also told her that the January 2021 claim should never have existed and that there was now an overpayment of 12 weeks of benefits.¹⁹ The Commission also told her that she was "still eligible for 9 more weeks on the right claim that started on October 4, 2020, however, you declined to take them."²⁰

– **The Claimant asked the Commission for a reconsideration of both claims**

[31] In October 2021, the Claimant asked the Commission to reconsider its decision. She told an agent that she had received 19 weeks of regular benefits under her April 2020 claim. She felt that she should have received regular benefits, instead of ERB. As for her second claim, she argued that she was entitled to receive 50 weeks of regular benefits. She also wanted her second claim to end in January 2022. This would have meant the claim would have started in January 2021, rather than October 2020.

– **The Commission's reconsideration decisions**

○ **The reconsideration decision of November 24, 2021²¹**

[32] The reconsideration decision covered both claims. The Commission maintained that it had properly converted the first claim to an ERB claim. The Commission referred to subsection 153.8(5) of the EIA. The Commission said that it could not reinstate the claim for regular benefits.

[33] As for the second claim, the Commission determined that section 55 of the *Employment Insurance Regulations* applied to interstate clients. The Commission determined that, under the section, an interstate client could receive up to a maximum of 36 weeks of regular benefits, based on 1,820 hours of insurable employment. So, the

¹⁸ My Service Canada Account for claim started on October 4, 2020, at GD 3-90 to GD 3-92.

¹⁹ Letter dated September 9, 2021, at GD 3-62 (and GD 3-72) and Notice of Debt, at GD 3-63.

²⁰ Letter dated September 9, 2021, at GD 3-62 (and GD 3-72).

²¹ Reconsideration decision dated November 24, 2021, at GD 3-100 to GD 3-101.

Commission maintained that the Claimant was ineligible to receive 50 weeks of regular benefits.

[34] The Commission also said that it could not reinstate the January 31, 2021 claim because the Claimant did not want to disturb the benefit period of October 4, 2020.

- **The reconsideration decision of November 29, 2021**

[35] The Commission's second reconsideration decision did not change the outcome. The Commission stated that it could not reinstate the benefit period of January 31, 2021 "because [she] did not want the commission to establish overpayment from October 4, 2020 to January 30, 2021. In this case, without establishing overpayment, the benefit period of January 31, 2021 cannot be reinstated."²²

- **The General Division decision**

[36] The Claimant appealed the Commission's reconsideration decision to the General Division. The General Division determined that the Commission had properly converted the first claim to an ERB claim. The General Division also found that the Commission had properly calculated the number of weeks of ERB the Claimant was entitled to get.

[37] The General Division also determined that it did not have the power to reinstate the January 2021 claim but that if it did, the Claimant would not be entitled to get 50 weeks of regular benefits.

Did the General Division make a legal error when it determined that the Commission had to convert the April 2020 claim to an ERB claim?

[38] The Claimant argues that the General Division made a legal error when it determined that her first claim had to be converted to an ERB claim. She argues that, as an interstate client, she was never eligible for ERB under paragraph 153.9(1)(a) of the EIA.²³

²² Reconsideration decision dated November 29, 2021, at GD 3-102 to GD 3-103.

²³ Claimant's submissions, at AD 4-2.

[39] Section 153.9(1) of the EIA sets out the eligibility requirements for the ERB. Under paragraph 153.9(1)(a) of the EIA, a claimant is eligible for the ERB if they reside in Canada.

[40] The Claimant also relies on Interim Order #9 - subsection 153.8(2) of the EIA. The subsection reads, "A claim must not be made after December 2, 2020." She argues that, as a claim for ERB had not been made by that date, the Commission should have left her Employment Insurance claim unchanged.

[41] The Commission argues that the General Division did not make any errors in converting the April 2020 claim because of subsection 153.3(8) of Part VIII.3 of the EIA. The Commission also argues that the Claimant was not entitled to receive any ERB after October 3, 2020, as the availability of ERB ended on October 3, 2020. In other words, the Commission says that this date became the new end date for the benefit period, so benefits could not be paid beyond October 3, 2020.

[42] The General Division found that the Commission did not have any discretion or choice but to convert the claim to an ERB claim because of subsections 153.3(8) and paragraphs 153.5(2)(b) and 153.1310(a) and (c) of the EIA. The General Division found that it was irrelevant that the Commission converted the claim after December 2, 2020, as it found that the Commission had the right to reconsider a claim within 36 months of benefits being paid or having been payable.

[43] The sections upon which the Commission relies are as follows:

PART VIII.3 – Interim Orders

153.3 (8) Conflict – If an interim order made under subsection (1) or a provision added under paragraph (1)(a) provides that it applies despite any provision of this Act or any regulation made under this Act, the interim order or added provision prevails to the extent that it conflicts with this Act or any regulation made under this Act.

PART VIII.4 – Employment Insurance Emergency Response Benefit

Interpretation

153.5 (2) Definition of Claimant– For the purposes of this Part, *claimant* means a person ...

(b) who could have had a benefit period established on or after March 15, 2020 with respect to any of the benefits referred to in paragraph (3)(a) . . .

(3) The benefits referred to in paragraphs (2)(b) to (d) are . . .

(a) with respect to a claimant referred to in paragraph (2)(b), benefits provided under section 152.03 or provided under Part I, other than those benefits provided under any of sections 22 to 24; ...

153.9(1) Eligibility – A claimant is eligible for the employment insurance emergency response benefit. ...

(b) if they are a claimant referred to in paragraph 153.5(2)(b) and they have no income from employment or self-employment for at least seven consecutive days within the two-week period in respect of which they claimed the benefit ...

Special Rules

Benefits referred to in paragraph 153.5(3)(a)

153.1310 The following rules apply to a person who made an initial claim for benefits in respect of any of the benefits referred to in paragraph 153.5(3)(a) and who either had, before the coming into force retroactively of this Part, a benefit period established on or after March 15, 2020 with respect to the benefits for which the claim was made, or who would have had, but for the coming into force of this Part on March 15, 2020, a benefit period established on or after that same date with respect to the benefits for which the claim was made:

(a) the person is deemed to have made a claim for the employment insurance emergency response benefit under section 153.8; ...

(c) the benefits referred to in paragraph 153.5(a) received on or after March 15, 2020 are deemed to be the employment insurance emergency response benefit ...

[44] I will address the Claimant's arguments.

– **Eligibility provisions under subsection 153.9(1) of the Employment Insurance Act**

[45] The Claimant is correct that she was not eligible for the ERB under paragraph 153.9(1)(a) of the EIA. That section requires a claimant to be resident in Canada. The Claimant was not a resident of Canada.

[46] However, the eligibility requirements for ERB extend beyond paragraph 153.9(1)(a) of the EIA. Eligible claimants can also include those described in paragraphs 153.9(1)(b) and (c). The Commission argues that paragraph 153.9(1)(b) applies to the Claimant.

[47] To fall within the definition of a claimant under paragraph 153.9(1)(b) of the EIA, an individual must be:

- A claimant referred to in paragraph 153.5(2)(b) of the EIA and
- Have had no income from employment or self-employment for at least seven consecutive days within the two-week period in respect of which they claimed the benefit.

[48] Paragraph 153.5(2)(b) must be read together with paragraph 153.5(3)(a). The latter defines the benefits that are referred to in paragraph 153.5(2)(b).

[49] The Claimant denies that she falls within the definition of a claimant under this section because she did not claim ERB. She claimed Employment Insurance regular benefits. (Otherwise, she does not dispute that she did not have any income for at least seven consecutive days within the two-week period in respect of which she claimed regular benefits.)

[50] This is where section 153.1310 of the EIA applies. If an individual meets all of the conditions of section 153.1310, they are deemed to have made a claim for ERB. This means that they are automatically treated as if they applied for ERB, even if they wanted and filled out an application form for regular Employment Insurance regular

benefits. It does not matter then whether that individual does not want ERB and prefers Employment Insurance regular benefits.

- **The “deeming provisions” under section 153.1310 meant the application had to be treated as if it were a claim for ERB**

[51] To fall within section 153.1310 of the EIA, the individual must:

- Have made an initial claim for benefits
- The claim has to be in respect of benefits referred to in paragraph 153.5(3)(a) of the EIA and
- They had to have had a benefit period established on or after March 15, 2020.

[52] The Claimant clearly meets two of these conditions. She made an initial claim for benefits, and she had a benefit period established after March 15, 2020. She made an initial claim for benefits in April 2020, and a benefit period was established after this date.

[53] The only question is whether her initial claim of April 2020 is in respect of benefits referred to in paragraph 153.5(3)(a) of the EIA. These benefits include benefits for illness, injury, or quarantine for self-employed persons (under section 152.03 of the EIA). They also include benefits under Part I, other than those provided under any of sections 22 to 24 of the EIA.

[54] Benefits under Part I of the EIA, other than those described in sections 22 to 24 of the EIA, include regular benefits. Sections 22 to 24 include special benefits, such as maternity and parental benefits, compassionate care benefits, and benefits payable to a claimant who is a family member of a critically ill child or adult. Section 24 are work-sharing benefits.

[55] The initial claim was in respect of benefits referred to in paragraph 153.5(3)(a) of the EIA because the Claimant was seeking regular benefits.

[56] So, as the Claimant made an initial claim for regular benefits, had a benefit period established after March 15, 2020, and her claim was in respect of benefits referred to in paragraph 153.5(3)(a) of the EIA, her claim for regular benefits was deemed to have been a claim for ERB.

[57] There are no provisions in the EIA that would have allowed the Claimant to choose which benefits to receive, or that would have exempt her from the deeming provisions.

– **The Claimant was eligible for ERB under section 153.9 of the EIA**

[58] The Claimant still maintains that she was not a claimant for the purposes of section 153.9 of the EIA. If she was not a claimant under the section, then she would not be eligible for benefits. She still maintains that she was ineligible for the ERB because she was a non-resident. The Claimant cites paragraph 153.9(1)(a) of the EIA.

[59] But, as I have noted above, eligible claimants are not limited to those described in paragraph 153.9(1)(a) of the EIA. Eligible claimants include those who also fall into paragraph 153.9(1)(b) and (c). The Claimant meets the requirements of 153.9(1)(b) so was eligible for the ERB.

– **The limitation under subsection 153.8(2) of the EIA did not apply**

[60] The Claimant disputes that ERB was payable under subsection 153.8(2) of the EIA. She claims that any claim would have had to have been made by December 2, 2020 for ERB. But she says the Commission did not attempt to convert her claim before then. So, she says that the Commission did not make her claim on time to enable it to convert her claim.

[61] But, because her claim of April 2020 for regular benefits was deemed to have been a claim for ERB, the limitation under paragraph 153.8(2) did not apply. Her claim was made before December 2, 2020.

– **Summary regarding the Claimant`s first claim**

[62] In summary, because of the deeming provisions (section 153.1310(a) of the EIA), the Claimant was deemed to have made a claim for ERB before the end of the limitation period of December 2, 2020. The General Division did not misinterpret the EIA or make a legal error when it determined that the Commission had properly converted the Claimant`s Employment Insurance claim for regular benefits to a claim for ERB.

Did the General Division miscalculate how many weeks of ERB the Claimant was entitled to receive?

[63] The Claimant says that the General Division miscalculated the number of weeks of benefits that she was entitled to receive.

[64] As the Claimant was deemed to have made a claim for ERB, it is irrelevant how many weeks of regular benefits she might have received. I need to examine how many weeks of ERB she was entitled to receive. This involves looking at the timeframe or duration when ERB was available.

[65] Section 153.8(1) of the EIA sets out the period during which ERB was available. As I noted above, payment of ERB was available to the end of October 3, 2020. The section reads:

153.8(1) Claim – any claimant may, in the form and manner established by the Minister, make a claim for the employment insurance emergency response benefit for any two-week period starting on a Sunday and falling within the period beginning on March 15 2020 and ending on October 3, 2020.

[66] The Claimant received ERB up to October 3, 2020. No further ERB was payable or available to be paid after this date.

Did the General Division fail to consider whether the Commission should have reinstated the January 2021 claim?

[67] The Claimant argues that the General Division should have reinstated her January 2021 claim. She says, that way, she would have received 50 weeks of Employment Insurance benefits.

[68] The General Division examined whether the Claimant would have been entitled to receive 50 weeks of regular benefits, if a benefit period on January 31, 2021, was re-established. However, the General Division did not consider the Claimant's arguments that it should reinstate her January 2021 claim.

[69] The parties agree that the General Division failed to consider whether the Commission could or should have reinstated the January 2021 claim.

[70] The Commission had reconsidered several issues, including whether it would reinstate the Claimant's January 2021 claim. For that matter, the General Division would have been acting within its authority to consider whether the January 2021 claim could in fact be reinstated.

[71] I accept that the General Division should have addressed the issue of reinstatement of the January 2021 claim. But rather than returning this matter to the General Division, I will decide the issue. All of the relevant facts are before me, and the parties agree on the general facts. There is no need to return this matter.

– **The parties' position on reinstatement**

[72] The Commission acknowledges that one of its officers backdated the Claimant's January 2021 claim to October 2020 by mistake.²⁴ The Commission has been and is prepared to correct this mistake by reinstating the January 2021. However, the Commission says reinstating the claim will lead to a greater overpayment for the Claimant.

[73] The Commission says that if it reinstates the January 2021 claim, this means that the Claimant should not have received any regular benefits over 17 weeks from October 4, 2020 to January 30, 2021. There would have been no basis for those payments. The Commission says that, as the Claimant was not entitled to 17 weeks of

²⁴ Representations of the Commission to the Social Security Tribunal – Appeal Division filed September 6, 2022, at AD 3-5.

regular benefits from October 4, 2020 to January 30, 2021, there was an overpayment.²⁵

[74] The Claimant wants the Commission to reinstate her January 2021 claim, but denies that there would be any overpayment from October 4, 2020 to January 30 2021. She says that she is entitled to 50 weeks of regular benefits under subsection 55(10) of the *Employment Insurance Regulations*, starting on January 31, 2021.

[75] The Commission says there is no basis for payment of 50 weeks of benefits. The Commission argues that subsection 55(7) of the EIR applies because the Claimant is an interstate client. The section sets out the maximum number of weeks of benefits that may be paid in a benefit period. The number of weeks of benefits that may be paid corresponds with an interstate client's hours of insurable employment.

[76] Although the Commission says backdating the claim was a mistake, the Commission is prepared to let the Claimant keep the backdated claim to October 4, 2020 to avoid the overpayment. The Commission would let the Claimant retain the benefits she received for the period from October 4, 2020 to January 30, 2021.

– **Restoring the January 2021 claim**

[77] Despite the Commission's offer, there is no legal basis upon which I can maintain the backdated claim. As it is, the Commission lacked the authority to cancel the January 31, 2021 claim in the first place. This is because benefits had already been paid to the Claimant.²⁶ In other words, there should be no issue over reinstatement because the Commission could not cancel the claim to begin with.

²⁵ In its Representations to the Social Security Tribunal – Appeal Division, the Commission stated that the Claimant received 12 weeks of regular benefits between October 4, 2020 to January 30, 2021. Yet, it also stated that if the January 2021 claim is reinstated, the Claimant would need to repay 17 weeks of regular benefits she received during this timeframe. There are 17 weeks from October 4, 2020 to January 30, 2021. The Payment Schedule also shows that the Commission paid 17 weeks of benefits, at GD 3-54.

²⁶ Section 10(6) of the *Employment Insurance Act* provides limited circumstances when the benefit period may be cancelled.

[78] But as the Commission effectively cancelled the January 2021 claim and backdated it to October 2020, then the January 2021 claim should be restored or reinstated as if neither the cancellation nor backdating had ever occurred.

[79] This leaves me to examine how many weeks of regular benefits the Claimant was entitled to receive under a claim that started on January 31, 2021.

How many weeks of Employment Insurance regular benefits was the Claimant entitled to receive with a claim starting January 31, 2021?

[80] The Claimant argues that the General Division made a legal error by misinterpreting and applying subsection 55(7) of the EIR to her second claim. She says that, as a result, the General Division miscalculated how many weeks of benefits she was entitled to get under her second claim.

[81] The Claimant argues that subsection 55(7) of the EIR does not apply to her second claim. Under subsection 55(7), she would get only 12 weeks of benefits based on 620 hours of insurable employment (which includes the one-time credit of 300 hours²⁷).

[82] The Claimant argues that she is entitled to 50 weeks of benefits under her second claim due to:

- Section 7 of the EIA – she says that she qualified for benefits under this section and
- Interim Order No. 8 – she says that she was able to obtain the 300-hour credit available to those who made initial claims under Part I of the EIA. So, she says that subsection 12(2.1) of the EIA—which can be found under Part I—must also apply to her.

²⁷ As noted above, the Commission gave the Claimant a 300-hour credit of insurable employment under section 153.17(1) of the *Employment Insurance Act*.

[83] Although the Claimant has not specifically argued subsection 12(2.1) of the EIA, I understand that she relies on the section to support her claim to 50 weeks of benefits. The section provides a maximum number of 50 weeks of regular benefits where the “benefit period [began] during the period beginning on September 27, 2020 and end[ed] on September 25, 2021,” despite subsection 12(2).

[84] The Commission argues that, as an interstate client, none of these sections established entitlement of benefits to the Claimant.

– **Section 7 of the EIA does not entitle a claimant to benefits**

[85] Section 7 of the EIA sets out who qualifies for benefits. The section provides that benefits are payable to those who qualify for them. An insured person qualifies if the person has had an interruption of earnings and has had during their qualifying period at least 420 hours of insurable employment.

[86] The Commission’s response to this section 37 of the EIA. The Commission says the section provides that a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada.

[87] The Commission is correct to note that there is a difference between qualifying for benefits and being entitled to receive those benefits.

[88] To understand this distinction, section 7 of the EIA has to be read in the whole context of the *Employment Insurance Act*. Section 7 cannot be read in isolation. For instance, there are some sections of the *Employment Insurance Act* under which a claimant could be disentitled or disqualified from receiving any benefits. Those claimants might have experienced an interruption of earnings and had at least 420 hours of insurable employment. Yet, because of their factual circumstances (for instance, such as having voluntarily left their employment without just cause), they would not receive benefits.²⁸

²⁸ See sections 29 and 30 of the *Employment Insurance Act*.

[89] So, the Claimant is unable to rely on section 7 alone to establish entitlement to Employment Insurance benefits. She might be seen to qualify for benefits under the section, but qualifying for benefits alone does not establish entitlement.

[90] In passing, I note the obvious. Section 7 of the EIA does not provide any guidance as to how many weeks of benefits a claimant might receive, even if they qualify and are not disentitled or disqualified from receiving any benefits. So, the Claimant would have been unable to rely on the section to establish entitlement to any particular number of weeks of benefits.

– **Interim Order No. 8²⁹**

[91] The Claimant says that she should have received 50 weeks of regular benefits because of Interim Order No. 8. The Interim Order amended the EIA to facilitate access to benefits for claimants seeking to establish claims on or after September 27, 2020.

[92] Measures under the Interim Order included providing a one-time credit of 300 hours for those establishing a claim for Employment Insurance regular benefits. This became subsection 153.17(1)(b) of the EIA.

[93] The Interim Order did not actually establish or set out the number of weeks of benefits available to a claimant. In other words, the Interim Order did not state that a claimant would receive 50 weeks of regular benefits.

[94] The Claimant received the 300 hours credit under subparagraph 153.17(1)(b) of the EIA. Paragraph 153.17(1) of the EIA reads:

153.17(1) Benefits under Part I – A claimant who makes an initial claim for benefits under Part I on or after September 27, 2020 or in relation to an interruption of earnings that occurs on or after that date is deemed to have in their qualifying period ...

(b) in any other case, an additional 300 hours of insurable employment.

²⁹ See Canada Gazette, Part II, Volume 154, Number 19.

[95] The Claimant argues that this one-time credit was available to only those claimants who fell under Part I of the *Employment Insurance Act*. So, she argues that, if she was able to benefit from this Part, she says that she should be able to benefit from other sections of the *Employment Insurance Act*. She says that she was not limited to subsection 55(7) of the EIR.

[96] There is no dispute that the Claimant was able to rely on subsection 153.17(1) of the EIA. There is no dispute either that the Claimant made an initial claim for Employment Insurance benefits under Part I after September 27, 2020.

[97] Subsection 12(2.1) of the EIA falls within Part I of the EIA. At the General Division, the Claimant argued that subsection 12(2.1) of the EIA applies. So, from what I can determine, the Claimant is relying on the fact that subsection 153.17(1) applies to also say that subsection 12(2.1) applies as both fall within Part I of the EIA.

– **Subsection 12(2.1) of the EIA**

[98] Subsection 12(2.1) of the EIA provides a general maximum of 50 weeks for which benefits may be paid in a benefit period. Unlike subsection 12(1), subsection 12(2.1) does not refer to the regional rate of unemployment in determining the number of weeks for which benefits may be paid in a benefit period.

[99] The Claimant notes that subsection 12(2.2) of the EIA expressly states that subsection 12(2.1) of the EIA does not apply to a claimant under the *Employment Insurance (Fishing) Regulations*. So, she argues that as her situation was not excluded by subsection 12(2.2), that she must necessarily fall within subsection 12(2.1) and be entitled to receive the general maximum of 50 weeks of benefits.

[100] As I have noted above, any particular sections of the EIA cannot be read in isolation. They have to be read against the backdrop of the EIA. Part I also includes instances when disentitlement and disqualification of benefits occurs. It makes little sense, for instance, that a claimant who engaged in misconduct or voluntarily left their employment without just cause, would also be entitled to the general maximum of 50 weeks of regular benefits.

[101] So, while the Claimant could get the one-time 300 hours credit under paragraph 153.17(1)(b) of the EIA as a claimant who made an initial claim, that did not somehow mean that subsection 12(2.1) necessarily applied—to the exclusion of other provisions within the EIA.

– **Section 37 of the EIA**

[102] There is still the issue of section 37 of the EIA. Under section 37, a claimant generally is not entitled to receive benefits for any period during which the claimant is not in Canada.³⁰

[103] Section 37 of the EIA reads:

37. Prison inmates and persons outside Canada – Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

(b) is not in Canada

[104] The Commission argues that this describes the Claimant. She lived outside Canada.

[105] The Claimant argues that section 37 applies to only Canadian residents who are outside Canada. She argues that it does not apply to commuter clients.³¹ She also argues that subsection 55(7) of the EIR does not apply to her either.

– **Section 55 of the EIR**

[106] Subsection 55(7) of the EIR sets out the number of weeks for which benefits may be paid in a benefit paid for a claimant referred to in subsections (5) and (6) who is not disentitled from receiving benefits. Subsection (5) does not apply as it relates to those making a claim for benefits from insurable employment outside Canada.

³⁰ Section 37(b) of the *Employment Insurance Act*.

³¹ Claimant's submissions at AD 1-6.

[107] Subsection 55(6) of the EIR reads:

Subject to subsection (7), a claimant who is not a self-employed person and who **resides outside Canada**, other than a claimant referred to in subsection (5), is not disentitled from receiving benefits for the sole reason of their **residence outside Canada** if ...

(my emphasis)

– **Section 37 of the EIA has to be read with section 55 of the EIR**

[108] Although the Claimant argues that neither section 37 nor subsection 55(7) apply to her, as I have stated above, sections of the EIA and EIR cannot be read in isolation. Section 37 of the EIA cannot be read independently from section 55 of the EIR.

[109] Section 55(6) of the EIR responds to any ambiguity there might be that section 37 of the EIA does not apply to those who reside outside Canada. Subsection 55(6) of the EIR makes it clear that a claimant who is not a self-employed person and who resides outside Canada generally is disentitled from receiving benefits because of their residence outside Canada, unless they fall within the exceptions set out in the subsection.

[110] The Claimant would be disentitled from receiving any benefits under section 37 of the EIA as she is outside Canada, but for subsection 55(6) of the EIR.

[111] Subsection 55(7) of the EIR limited the maximum number of weeks the Claimant could be paid in her benefit period. Based on 620 hours of insurable employment, she was limited to 12 weeks.

[112] The General Division did not misinterpret or mis-apply section 37 of the EIA or section 55 of the EIR. The General Division's findings and conclusions about the number of weeks of entitlement to benefits were consistent with the evidence before it.

Conclusion

[113] The General Division did not make any errors relating to the first claim. The General Division appropriately determined that the first claim was deemed to have been a claim for ERB.

[114] As for the second claim, the General Division did not address the issue of whether it should have reinstated the claim of January 2021.

[115] The General Division should have addressed the Claimant's arguments over reinstatement of the January 2021 claim. The General Division should have identified that the Commission simply had no authority to cancel the benefit period once benefits had already been paid, nor any authority to backdate the claim to October 2020. The January 2021 claim should have stood throughout.

[116] As the Commission cancelled the January 2021 claim, it should be restored as if it had never been cancelled or extinguished.

[117] For this second claim, as an interstate client who resides outside Canada, the Claimant was limited to 12 weeks of Employment Insurance benefits under section 37 of the EIA and subsections 55(6) and (7) of the EIR.

[118] I recognize that this decision is likely to leave the Claimant with an overpayment. I do not have any authority to waive the overpayment, but the Commission has expressed a willingness in past to write off any overpayments. As the overpayment may cause the Claimant undue hardship, and as the Commission inappropriately cancelled and then backdated the January 2021 claim, I encourage the Commission to consider this option.

[119] The appeal is dismissed.

Janet Lew
Member, Appeal Division