



Citation: *JE v Canada Employment Insurance Commission*, 2023 SST 1309

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

Decision

Appellant: J. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (565372) dated January 19, 2023 (issued by Service Canada)

Tribunal member: Mark Leonard

Type of hearing: In person

Hearing date: July 26, 2023

Hearing participants: Appellant

Decision date: August 3, 2023

File number: GE-23-716

Decision

[1] The appeal is allowed in part.

[2] The Appellant has not shown that he is entitled to a higher weekly benefit rate based on additional insurable earnings in his qualifying period.

[3] However, I accept the Canada Employment Insurance Commission's (Commission) proposed action of establishing the Appellant's claim on an earlier date. The result of changing the effective date of the claim is that the Appellant will be entitled to a higher weekly benefit rate of \$403.00.

Overview

[4] The Appellant initially applied for Employment Insurance (EI) regular benefits on November 9, 2021. At the time of his application, the Employer had not provided him a Record of Employment (RoE), so the Commission did not establish the claim. The Appellant reapplied for benefits on December 30, 2021. Since the Appellant still did not have a RoE, the Commission accepted the Appellant's submission concerning his earnings and employment dates. It determined his weekly rate of benefits, and his claim was established effective November 28, 2021.

[5] When the Commission received the Employer's RoE, it found that the Appellant's earnings were less than had first been established. It reduced the Appellant's weekly benefit rate accordingly and an overpayment of EI benefits resulted.

[6] The Appellant challenges the change in his weekly benefit rate. He says that the employer did not provide accurate employment dates on the ROE. He says he worked longer than they recorded.

[7] The Commission says it has no proof of the Appellant working more hours than listed on the RoE. It says that the Appellant's adjusted weekly rate of benefits is correctly calculated.

[8] However, the Commission suggests that the Appellant's claim may be established on an earlier date. The change would allow for an increased weekly benefit rate and additional weeks of benefits resulting in the elimination of the overpayment.

[9] I must examine the circumstances and determine whether the Commission correctly calculated the Appellant's benefit rate.

[10] Also, I will examine whether the Appellant's claim can be established earlier.

Issues

[11] Did the Commission calculate the Claimant's weekly benefit rate correctly?

[12] Can the Appellant's application for benefits be treated as though it was made on October 31, 2021? This is called antedating (or, backdating) the application.

Analysis

[13] The weekly EI benefits rate is the maximum amount they can receive for each week in their benefit period. The Commission calculates the benefit rate based on 55% of a claimant's weekly earnings.¹

[14] To obtain the weekly earnings, the Commission uses a variable number of weeks that represent the claimant's highest earnings within their qualifying period. The qualifying period is generally the 52 weeks immediately prior to the date they establish the claim, and their benefit period begins.²

[15] The variable number of weeks used to calculate the average earnings ranges from 14 to 22 weeks depending on the regional rate of unemployment where the claimant lives.³ The Act contains a table that sets the number of weeks to be used based on the corresponding specific range of the unemployment rate.

¹ See Section 14(1) and 17 of the *Employment Insurance Act*.

² See Section 8 of the *Employment Insurance Act*.

³ See Section 14(2) and 14(4) of the *Employment Insurance Act*.

[16] The weekly earnings are an average determined by dividing the *total* insurable earnings in the accounted weeks by the number of weeks identified in the table.

[17] Further, it is possible to antedate (backdate) a claim to begin on an earlier date.

[18] To get your application for benefits antedated, you must prove these two things:

- You had good cause for the delay during the entire period of the delay. In other words, you have an explanation that the law accepts.
- You qualified for benefits on the earlier day (that is, the day you want your application antedated too).⁴

Did the Commission calculate the Appellant's weekly EI benefit rate correctly?

[19] Yes. The Commission properly applied the provisions of *the Employment Insurance Act (Act)* when it calculated the Appellant's weekly benefit rate.

Date of Claim

[20] I find that the Commission correctly established the Appellant's claim effective November 28, 2021. However, the claim may be eligible to be established on an earlier date as proposed by the Commission. I will explain this later in the decision.

[21] The Appellant made an initial EI claim on November 9, 2021, but the Commission did not establish it because the Appellant did not have a RoE with which to calculate his benefits.

[22] After the Appellant made his second claim dated December 30, 2021, the Commission interviewed him on February 28, 2022, and accepted his statements regarding how much he had been earning and when his employment ended. It created a RoE with his employment start date noted as June 28, 2021, and the end date as November 30, 2021. The earnings recorded were \$16,500.00.

⁴ See Section 10(4) of the *Employment Insurance Act*.

[23] It established his claim effective November 28, 2021, because this was the Sunday that immediately preceding his interruption in earnings and the date of his application for benefits, November 30, 2021.⁵

[24] It was only much later, in April 2022, the Employer would submit a RoE that showed significantly different employment dates and pay amounts. The Employer supplied RoE noted an employment start date of August 1, 2021, and an end date of October 31, 2021, with earnings of only \$9,533.32.

[25] Regardless of the differing information between the two RoE's, the Commission used the date of the Appellant's second application for benefits to establish his claim. This was consistent with the provisions of *Employment Insurance Act (Act)*.

[26] I am satisfied that the Commission correctly established the Appellant's benefit period start date as November 28, 2021.

Qualifying Period

[27] The Commission identifies the Appellant's qualifying period as November 29, 2020, to November 30, 2021. The dates are consistent with a 52-week period immediately preceding the establishment of the claim.⁶

[28] The Appellant did not dispute the qualifying period.

[29] I am satisfied that the qualifying period established by the Commission was correct based on the information it had on hand.

[30] This means that only the weeks of insurable employment that fall within this period can be used to establish a claim.

⁵ See Section 10(1) of the *Employment Insurance Act*.

⁶ See Section 8(1) of the *Employment Insurance Act*.

Regional Rate of Unemployment

[31] The Commission identified the Appellant's EI economic region as St. Catharines, Ontario. On November 28, 2021, the date the Appellant's claim was established, the unemployment rate was 7.8%.

[32] The Appellant confirmed that he was living in St. Catharines when he made both of his EI claims. He did not dispute the unemployment rate identified.

[33] I am satisfied that the Commission identified the correct economic region and applied the correct unemployment rate of 7.8%. There is no evidence that would support a different conclusion.

Weekly Earnings and Benefit Rate

[34] I find that the Commission correctly established the Appellant's benefit period and weekly benefit amount at \$262.00. The Appellant has not shown that he accumulated more insurable hours than what was noted on his Employer issued RoE that would change the calculation of his weekly benefit rate.

[35] The Act includes a Table that sets out how many weeks of earnings will be included in the calculation of the Appellant's benefit rate.⁷ For an unemployment rate of 7.8%, the number of weeks of earnings is twenty (20). This number is referred to as the "divisor."

[36] I am satisfied that the Commission correctly identified the number of weeks of earnings to be included. Ordinarily this means that the Commission would total the *best* 20 weeks of the Appellant's earnings then average it to calculate his weekly earnings.

[37] The Commission initially used the Appellant's statements to determine he had worked from June 28, 2021, to November 30, 2021, a total of 23 weeks. It calculated his weekly benefit rate at \$407.00.

⁷ See Section 14(2) of the *Employment Insurance Act*.

[38] Once the Commission received the Employer's RoE, it was determined that the Appellant had only worked a total of 14 weeks and been paid \$9,533.32. The Commission was obligated to recalculate the Appellant's claim. The revised calculation resulted in revised weekly insurable earnings of \$476.70. At 55%, this reduced the Appellant's weekly benefit rate to \$262.00. The difference between the two weekly benefit rates resulted in an overpayment of benefits of \$1,595.00, subject to recovery from the Appellant.

[39] The Appellant disagrees with the dates of employment. He says that the Employer has not reported all the hours he worked. He submits that he started working in late June 2021 when he was asked to coordinate the administration office for a federal political party leading up to an election. His functions included assisting candidates activate their respective campaigns.

[40] The Appellant stated that he had an employment contract but no longer has a copy. He claims he worked from June 28, 2021, until November 30, 2021. He attested that he was paid \$3,333.00 per month. He says he was paid in cash or by electronic transfer. He claims that he never received a pay cheque or pay remittance slip. Nor did he ever receive a T4 for tax purposes. He could not remember what deductions, if any, were taken from his pay and asserted that he was not entitled to any work-related benefits.

[41] Essentially, the Appellant is saying that he worked more hours and had more insurable earnings in his qualifying period which would, if proven, increase his weekly benefit rate.

[42] The Commission submits that the RoE from the Employer is what it used to correct the Appellant's claim and establish his weekly benefit rate.

[43] That RoE noted that the Appellant started working on August 1, 2021, and his employment ended October 31, 2021. It recorded his total insurable hours at 458 and total insurable earnings of \$9,533.32. It does note that the Appellant's earnings were \$3,333.33 in the first two months and \$2,86.66 in the last month.

[44] The Commission submits that the Appellant has not provided any evidence that he worked outside of the dates shown. Therefore, it can only calculate his claim based on the information provided by the employer.

[45] The Appellant confirmed that he has not retained any documentation that would support his claim that his employment dates are incorrect.

[46] I am satisfied that the dates as shown in the employer supplied RoE the only ones that can be accepted despite my concerns with the Employer's employment practices.

[47] I am not convinced that the Appellant worked until November 30, 2021. It is not logical that the Appellant worked until that date but filed his first claim for EI on November 9, 2021. I am inclined to accept the submissions from the Commission. The Employer's RoE submitted shows that the Appellant's last day was October 31, 2021, and is consistent with him filing his first claim for EI benefits on November 9, 2021.

[48] Further, the Appellant admitted that he had volunteered with the Employer prior to starting his paid employment. While I have serious concern with the Employer's practices, it simply cannot be shown by the Appellant that he was engaged in paid employment prior to August 1, 2021. He has no records that would support a conclusion that he did.

[49] The Appellant confided that he suffers from depression. He says that he was medically discharged from the Canadian Armed Forces and lives on a small pension and Ontario Disability Support Program payments. He added that he has been homeless since his employment ended. His homelessness creates issues regarding maintaining records. He says that he does not have the money to repay the overpayment of benefits.

[50] While I empathize with the Appellant's circumstances, the onus is upon him to show that he was engaged in paid employment beyond the dates shown on the Employer's RoE. There should be some documentation supporting earnings payments

made to him. Without such evidence, I cannot conclude that he had more insurable hours and earnings beyond what is recorded on the RoE.

[51] I find that the Appellant has not shown that he had insurable employment beyond the dates shown on the Employers RoE.

[52] Therefore, the calculation of the Appellant's weekly benefit rate is correct based on the information contained in that RoE.

[53] However, in reviewing the file, the Commission submits that it is satisfied that the Appellant qualified for EI benefits as early as October 31, 2021. This was the true date of his interruption of earnings, and he had made a claim shortly afterwards. Changing the Appellant's claim effective date would have an effect on his weekly benefit rate.

Commission Concession

[54] The Commission submits that it can establish the Appellant's benefit period effective October 31, 2021. In doing so, it would allow the Commission to calculate the Appellant's claim, according to the Temporary Measures detailed in Budget 2021 and the *Employment Insurance Act*.⁸ The provisions allow that for a claim established between September 26, 2021, and November 20, 2021, the weekly insurable earnings will be calculated by taking the total earnings in the qualifying period divided by the number of weeks within that qualifying period when the claimant had insurable earnings.

[55] In doing so, the Commission submits that it would change the Appellant's weekly benefit rate to \$399.00. It offers that the overpayment subject to recovery from the Appellant would be eliminated. The Commission did not submit its calculations to arrive at the \$399.00 weekly benefit rate.

[56] Effectively, the change would result in the Commission taking the Appellant's total earnings and instead of using 20 weeks as the divisor, it would use the Appellant's 13 weeks of earnings he received from August 1, 2021, to October 31, 2021. During

⁸ See Part VIII.6 Section 153.197(1) Temporary Measures

that period, he also obtained 458 insurable hours which exceeded the 420-hour minimum requirements to qualify for benefits.

[57] On October 31, 2021, the unemployment rate in the St. Catharines Region was 8.6%. Applying Schedule 1, Table of Weekly Benefits⁹, the Appellant's 458 insurable hours, it would entitle him to 16 weeks of EI benefits.

[58] Using the established calculation formula, I find the Appellant's weekly benefit rate to be \$403.00.

$$\$9,533.32 \text{ (insured earnings in calculation period)} \div 13 \text{ (weeks in which the Appellant had earnings)} = \$733.00 \times 55\% = \mathbf{\$403.00}$$

[59] However, since the Commission rejected the Appellant's first EI application of November 9, 2021, and that decision was never challenged by the Appellant, the Appellant's second EI application upon which the Commission established the Appellant's benefit period is the only legitimate claim.

[60] To comply with the Commission's proposed action, it would require the Appellant's claim to be backdated to the earlier date.

Can the Appellant's application for benefits be treated as though it was made on October 31, 2021?

[61] I find that the Appellant's claim can be antedated to October 31, 2021.

[62] As I noted above, a claim can be antedated (backdated) if the Appellant qualified on the earlier date and a claimant has a good cause for the delay.¹⁰

[63] The Commission has already submitted that the Appellant qualified on the earlier date of October 31, 2021, when he experienced the actual interruption of earnings. Further, in making the concession to adjust the claim, the Commission has signalled

⁹ See Schedule 1 (Subsection 12(2)) as defined in Section 329(1) of the Budget Implementation Act, 2021 No. 1.

¹⁰ See Section 10(4) of the *Employment Insurance Act*.

that it is satisfied that the Applicant had a good reason for the delay. Given the difficulties both the Appellant and Commission had in obtaining a RoE from the Employer, I agree that the Appellant had good cause for the delay. I am satisfied that the proposed action is supported in law.

[64] Therefore, I accept the Commission proposal to antedate the Appellant's claim to October 31, 2021, with the intention of adjusting his weekly benefit rate and number of weeks of benefits.

Conclusion

[65] The appeal is allowed in part based on a concession by the Commission.

[66] The Appellant has not shown that he is entitled to a higher weekly benefit rate based on additional insurable earnings in his qualifying period.

[67] However, I accept the Canada Employment Insurance Commission's (Commission) proposed action of establishing the Appellant's claim on an earlier date. The result of changing the effective date of the claim is that the Appellant will be entitled to a higher weekly benefit rate of \$403.00.

Mark Leonard
Member, General Division – Employment Insurance Section