Citation: *NI v Canada Employment Insurance Commission*, 2023 SST 1856

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	N. I.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (562313) dated December 15, 2022 (issued by Service Canada)

Tribunal member:	Mark Leonard
Type of hearing:	Teleconference
Hearing date:	May 24, 2023
Hearing participants:	Appellant
Decision date:	June 2, 2023
File number:	GE-23-115

Decision

[1] The appeal is dismissed.

[2] The Appellant has not shown that she qualified for Employment Insurance (EI) benefits on the date she requested her Employment Insurance (EI) benefits to start. This means that the Claimant's application can't be treated as though it was made earlier.[1]

Overview

[3] The Claimant applied for (EI) benefits on August 3, 2022. She is now asking that the application be treated as though it was made earlier, on April 24, 2022. The Canada Employment Insurance Commission (Commission) has already refused this request.

[4] There are two elements that the Appellant must meet to have her claim start on an earlier date. First, she must qualify to receive EI benefits on the earlier requested date. If she qualified on the earlier date, then she must show good cause for the delay in making her initial claim.

[5] The Commission says that the Claimant requested her claim to begin on April 24, 2022. Despite approving the Appellant's claim and starting her benefit period on April 24, 2022, upon further review of her claim, it determined that she did not qualify to receive benefits on that date. The Commission says that to qualify for EI benefits the Appellant must have an interruption of employment earnings. It says that the Appellant received a salary continuance beyond April 24, 2022 and did not have an interruption of employment earnings until June 28, 2022.

[6] The Claimant disagrees and says that the monies she received from the Employer between April 26, 2022 and June 28, 2022, were not a salary continuance. She says that it was severance and her termination date of April 26, 2022, is the date that should be used to calculate the beginning of her claim.

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[1] Section 10(4) of the *Employment Insurance Act* (EI Act) uses the term "initial claim" when talking about an application.

Issue

[7] Can the Claimant's application for benefits be treated as though it was made on April 24, 2022? This is called antedating (or, backdating) the application.

Analysis

[8] When you make an application for EI benefits and you want the claim to start earlier (antedate), you must prove these two things:[2]

a) You qualified for benefits on the earlier day (that is, the day you want your application antedated too).

b) 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.

[9] The main argument in this case is whether the Claimant qualified for benefits on the earlier date she requested her benefits to start.

[10] Despite being separated from her employment on April 26, 2022, the Appellant did not make her application for benefits until August 3, 2022. The Commission spoke to the Appellant in August 2022 and allowed the antedate of her claim to April 24, 2022.

[11] Later the Commission re-examined her claim and determined that she had been receiving a salary continuance from April 26, 2022, to June 28, 2022. The Commission is saying that the Appellant continued to receive her salary (earnings) between April 26, 2022 and June 28, 2022, and therefore had no interruption of her employment earnings.

[12] The Commission notified the Appellant on November 17, 2022, that it was changing the start date of her claim from April 24, 2022, to July 3, 2022. As a result of the change, the Commission established an overpayment of EI benefits for the period from April 26, 2022, to July 3, 2022.

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[2] See section 10(4) of the EI Act.

[13] The Commission maintains that because the Appellant did not have the required interruption of earnings until June 28, 2022, it cannot antedate her claim to April 24, 2022, and the benefits it had already paid her for that period must be paid back.

[14] The Appellant says that she was terminated from her job and her last day of work was April 26, 2022. She says that she did not work for the Employer after that date. She asserts that the monies paid to her by the Employer were for her severance from employment and are not a salary continuance. Additionally, she says that the employer failed to adhere to the terms of her Termination Agreement and pay her severance monies as a lump sum.

[15] So, I must determine whether the Appellant met the criteria to qualify for benefits on the earlier date of April 24, 2022.

Did the Appellant qualify for benefits on April 24, 2022?

[16] I find that the Appellant did not qualify to receive EI benefits on April 24, 2022, because there was no interruption of earnings as defined by the law.

[17] To qualify for EI benefits any claimant must have an interruption of earnings and a specific number of hours of insurable employment in their qualifying period.[3]

[18] The qualifying period is generally the 52-week period before your benefit period would start. There is no dispute that the Appellant had the requisite hours in the 52-week qualifying period of prior to April 24, 2022, so she meets that requirement.

[19] Additionally, you must experience an interruption of earnings.[4] An interruption of earnings occurs when the following criteria are met:

- the claimant is laid off or terminated from their employment,
- the claimant does not work for seven consecutive days for that employer, and

[3] See Section 7(2) of the Employment Insurance Act.
[4] See Section 7(1) of the Employment Insurance Act.

- the claimant does not receive any earnings from that employment.[5]

[20] An interruption of earnings occurs at the beginning of the week in which the claimant's earnings reduce more than 40% of their normal weekly earnings.[6] This usually occurs at the time of lay-off or separation from employment.

[21] The Appellant was separated from her employment on April 26, 2022. The Appellant submitted a letter prepared by her Employer that details her "Termination Package." The package includes.

- 17 weeks of salary consisting of 8 weeks pay in lieu of notice, and 9.33 weeks severance. (The total compensation amount for this part of the settlement is $39,743.02)
- a gratuitous sum of $40,000.00 in exchange for full and final release of all claims against the Employer.
- extending her Group Insurance Plan until June 30, 2022 and she remained enrolled in the Registered Pension Plan up to the end of her notice.

[22] The letter prepared by the Employer notes that these sums are to be paid to the Appellant in a lump sum payment.

[23] The Appellant submits that she was constructively dismissed from her employment. She says that she did not work for the employer after April 26, 2022.

[24] She says that all the monies paid to her are separation monies. She confirmed that she received periodic payments from the Employer on a biweekly basis immediately after her termination but that these payments were an error. She says that the "Termination Package" specifically states that the monies were to be paid in a lump sum and not in periodic payments.

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[5] See Section 14(1) of the Employment Insurance Regulations.
[6] See Section 14(2) of the Employment Insurance Regulations. Section 2 of the Employment insurance Act states that a week is seven consecutive days and starts on a Sunday.

[25] She says that her lawyer contacted the Employer and told them to stop making the payments and pay out the remainder of the sums in a lump sum payment. The Appellant confirmed that she never signed any documentation to accept the monies in periodic payments.

[26] The Appellant also noted that at the time of her separation for employment, there were special rules in effect regarding how the Commission would treat separation payments. She submits that all the monies were paid because of her termination and therefore met the requirements to be considered separation monies that are not to be taken into consideration when determining her eligibility for EI benefits or affect the payment of benefits.

[27] The Commission submits that the Appellant did not suffer an interruption of earnings that would allow for the antedate of her claim. It says that the Appellant received periodic payments consistent with a salary continuation. It established the Appellant's claim effective April 24, 2022 and paid the Appellant benefits from that date.

[28] It says that the Employer confirmed that it played the Appellant salary until June 28, 2022. It says that the Appellant received pay stubs during that period. The Commission asserts that the Employer paid the Appellant 8 weeks of salary in periodic payments for the period from April 23, 2022, to June 28, 2022. The Employer confirmed that the Appellant received the equivalent of her salary during the period of notice. It asserts that all deductions including EI premiums, Group Medical Insurance and Group pension premiums were paid and the Appellant received a "pay stub" detailing these amounts.

[29] The Commission concluded that the Appellant received a salary continuance. It says that the Appellant's actual interruption of earning did not occur until after June 28, 2022, when these periodic payments stopped.

When did the Appellant's interruption of earnings happen?

[30] I find that the Appellant did not suffer an interruption of earnings until June 28, 2022. This means that her benefits cannot begin earlier than this date.

[31] As I noted above, there are three criteria necessary to have an interruption of earnings.

[32] The first is that the Appellant had to be laid off or terminated from her employment. There is no dispute between the parties that the Appellant was separated from her employment on April 26, 2022. The Appellant asserts it, and the Commission has accepted that date as her last working day. I see no evidence that would lead me to a different conclusion, so accept it as fact.

[33] The second criterion is that the Appellant cannot have worked for the Employer for seven consecutive days. Neither party disputes that the Appellant did not work for the Employer for more than seven days after her termination on April 26, 2022. Again, I see no evidence that would lead me to a different conclusion, so I accept it as fact.

[34] The last criterion is that the Appellant cannot receive any earnings arising from that employment.

[35] I find that the Appellant did receive earnings during the period from April 23, 2022, to June 28, 2022.

[36] Both the Commission and the Appellant agree that she received periodic payments during that period. I examined the Record of Employment (RoE) prepared by the Employer.[7] It confirms that the Appellant was paid biweekly. It notes that her last paid day was June 28, 2022. It also notes the EI insurable hours worked leading up to June 28, 2022. In the biweekly period leading up to her last paid day of work, the Appellant received insurable earnings of $1,099.83. In the six weeks prior to that, she had insurable earnings consistent with her insurable earnings prior to her termination.

[37] I am satisfied that the biweekly payments during the notice period were consistent with her pays prior to termination and are consistent with a continuation of salary during the period from April 23, 2022, to June 28, 2022. The earnings reported by the Employer were deemed insurable earnings which means EI premiums were paid on

[7] See GD3-15

them. In addition to the periodic payments, the Appellant remained part of the group medical insurance plan, and the group pension plan until June 28, 2022.

[38] The Appellant suggests that the entire sums paid whether periodic or in a lump sum were separation amounts consistent with severance payments and not salary continuation. Further she asserts that it was the Employer's error in making the period payments. She asserts that the "Termination Notice" specifically notes that all the monies would be paid in a lump sum.

[39] I acknowledge that the "Termination Notice" does state that all the monies are to be paid in a lump sum. But that is not what happened. The monies were paid biweekly for at least 8 weeks.

[40] Therefore, I am not convinced that the periodic monies paid to the Appellant (biweekly) can be characterized solely as severance payments. If the periodic payments were actual severance monies paid over a period, they would not be insurable. Nor do severance monies typically include payment of group insurance premiums and group pension plan amounts.

[41] The Employer characterized the periodic payments as "pay in lieu of notice."

[42] The payment of separation monies, including pay in lieu of notice, does not necessarily prevent an interruption of earning from occurring.[8] The interruption can still occur even when an employer pays the monies in periodic payments.

[43] However, an interruption of earnings does not occur in cases where a claimant stops working, continues to receive periodic payments of earnings, and continues to benefit from the employer's group insurance. Instead, those claimants remain employed under a contract of employment until their group insurance ends.[9]

[8] See Section 35(6) of the Employment Insurance Regulations.
[9] See (*Canada (A.G.) v. Verreault,* 1986, 86 N.R. 389 FCA)

[44] I am satisfied that the Appellant remained under a contract of employment with her Employer until June 28, 2022.

[45] The Appellant submits that the Employer made an error in paying her in periodic payments and all the monies should have been paid in a lump sum as was agreed to in the Termination Notice.

[46] The fact that the Employer paid the amounts in a fashion that was not consistent with the terms of the agreement is not a matter I can address. If a party breaches an element of a contract, it is a dispute for the courts to decide, not the Social Security Tribunal. I am restricted to deciding based on the facts before me. The fact is that the Employer paid the Appellant biweekly amounts consistent with her previous salary earnings. It took the appropriate deductions, including EI premiums, health benefit premiums and pension premiums.

[47] I note that the Employer was able to pay out these biweekly amounts over an eight-week period. It should have been evident to the Appellant upon receiving the first periodic payment that the Employer was not following the agreement, yet the biweekly payments continued for 8 weeks before the Appellant had her lawyer contact the Employer to stop the payments and issue any remaining monies as a lump sum.

[48] I can only conclude that she accepted the arrangement when it began and only questioned it towards the end of the payment period.

[49] Regardless, the Employer made the payments which are consistent with a salary continuance. Therefore, there was no interruption of earnings until those periodic payments stopped. The actual interruption of earnings took place June 28, 2022, after the Employer stopped paying the Appellant biweekly. The Appellant's claim cannot begin before that date.

[50] The Appellant submitted that there were special rules in effect when she received the monies and so should not affect her claim.

[51] The Appellant is correct concerning rule changes. During the Covid-19 pandemic, the Interim Orders establishing how EI benefits would be administered included a provision that directed the Commission not to allocate severance monies to weeks of unemployment.[10]

[52] A claimant could keep the severance monies and collect EI benefits from the time of application.

[53] Those provisions ended September 24, 2022. That meant that any claim made after September 24, 2022, would be processed under the usual rules associated with the EI Regulations. In other words, the requirement to allocate earnings resumed as of September 25, 2022.

[54] The Appellant made her claim on August 8, 2022, before the resumption of the allocation provisions. The Appellant did benefit from these provisions in that some of her separation monies were exempted from allocation to weeks of unemployment. In other words, the lump sum payments did not affect her EI benefits.

[55] However, because the Appellant received a significant potion of those monies in the form of a salary continuance, those monies were not subject to allocation and therefore fell outside the parameters of the interim procedures. Those periodically paid monies extended her employment and delayed her interruption of earnings. Only monies paid after her claim started effective June 28, 2022, would be eligible under the interim order provisions.

[56] The Appellant suggests that the Commission's should not have reviewed her claim because the representative she first dealt with completed a thorough examination of her claim and deemed her eligible for benefits and starting her claim on April 24, 2022.

[57] The Commission admits that it made an error when it started the Appellant's claim on April 24, 2022. It says that it reviewed the Appellant's claim after it had already

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[10] See Section 153.193 of the *Employment Insurance Act*.

decided to pay her and determined that because of the periodic salary continuation payments, the Appellant did not incur an interruption of earnings and therefore was not entitled to benefits. It reconsidered her claim and established the later start to her claim date. This change resulted in an overpayment of $6,380.00.

[58] The Commission can reconsider its own previous decision. However, it must act judicially when it does so.

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

[59] I find that The Commission acted judicially when it reconsidered the Appellant's claim.

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

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

[62] Where the *Employment Insurance Act* (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:

- 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.

[63] 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.

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

[64] I am convinced that the Commission original decision to antedate the start of the Appellant's claim was because it was satisfied that she had just cause for the delay in making her claim and also concluded that she qualified on the earlier date. At the time it was unaware of the salary continuance payments.

[65] When the Commission identified that it had made an error in antedating the claim, it simply took the necessary steps to bring the claim back into legislative compliance by moving the start date to after the interruption in earnings.

[66] There is no bad faith, improper purpose, or motive, in the decision to bring the claim into compliance.

[67] Further, I can find no irrelevant factor that the Commission considered and allowed to influence its decisions.

[68] 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 the Appellant's claim. 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.

[69] I am also satisfied that it considered all relevant factors before rendering a decision. The Commission investigated and obtained information from both the Appellant and Employer concerning both the nature of her separation and money paid to her, as well as the reasons for the delay in making her claim. These are the relevant factors in determining whether the Appellant qualified for EI benefits.

[70] Lastly, The Commission developed a policy to ensure fair application of Section 52 of the EI Act. It details the circumstances for when it reconsiders a claim that would result in an overpayment of benefits when a claimant is not at fault.[12]

[12] See Section 17.3.3 of the Digest of Benefit Entitlement Principles.

[71] 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 EI Act
- 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.

[72] 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.

[73] However, I am satisfied that the Commission was aware that it could not allow the Appellant's claim to continue without bringing it into compliance because to do so would have allowed the payment of benefits contrary to the structure of the Act.

[74] The policy clearly stipulates that the date of the interruption of earnings and the start date of any claim is a basic element required to set up a claim. Not correcting the start date of the claim would be contrary to the structure of the Act. The Commission had no choice but to correct the start date of the claim.

Overpayment of EI Benefits

[75] I empathize with the Appellant. The Commission made an error when it established her claim start date as April 24, 2022. Correcting its own error leaves the Appellant with a sizable overpayment subject to recovery. Even though it is the Commission's fault, it had no choice but to reconsider its previous decision, correct its error, and establish the overpayment.

[76] The Commission cannot act in a way that is contrary to the law. An error or misinformation by the Commission does not give rise to relief from the application of the law.

[77] 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.

[78] The other element necessary to allow antedate of a claim is whether the Appellant had good cause for the delay in making her claim.

Good Cause

[79] Since I have found that the Appellant did not qualify for benefits on the earlier date of April 24, 2022, there is no need for me to consider whether she had good cause for the delay in making her claim from April 24, 2022 to August 3, 2022.

[80] The Commission established the Appellant's claim effective July 3, 2022. Clearly, it was satisfied that that the Appellant met the requirements, including good cause, to have her claim start on that date even though she did not make her application until August 3, 2022.

Conclusion

[81] The Claimant hasn't proven that she qualified for EI benefits on the earlier date of April 24, 2022, as she requested. This means that her claim cannot be antedated to that date.

[82] The appeal is dismissed.

Mark Leonard
Member, General Division, Employment Insurance Section