



Citation: *NA v Canada Employment Insurance Commission*, 2024 SST 797

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: N. A.

Respondent: Canada Employment Insurance Commission
Representative: Kevin Goodwin

Decision under appeal: General Division decision dated December 21, 2023
(GE-23-2637)

Tribunal member: Janet Lew

Type of hearing: In person
Hearing date: May 28, 2024
Hearing participants: Appellant
Respondent's representative

Decision date: July 10, 2024
File number: AD-24-58

Decision

[1] The appeal is dismissed.

[2] The General Division correctly calculated the qualifying period, as well as the hours that the Appellant, N. A. (Claimant), had accumulated within her qualifying period.

[3] The General Division did not make a legal or factual error in determining that the Claimant does not have sufficient hours within her qualifying period. As she does not have sufficient hours, she does not qualify for Employment Insurance sickness benefits.

Overview

[4] The Claimant is appealing the General Division decision. The General Division found that the Claimant did not have enough insurable hours in her qualifying period to qualify for Employment Insurance sickness benefits. It determined that she needed to have 600 hours to qualify for sickness benefits, but that she only had 595 hours.

[5] The Claimant argues that she has enough insurable hours within her qualifying period to qualify for sickness benefits. She says that the General Division made three mistakes: (1) it did not properly consider what her qualifying period should have been, (2) it ignored the evidence that she says showed she had extra hours, and (3) it failed to extend her qualifying period.

[6] The Claimant argues that if the General Division had not made these errors, she would have had enough insurable hours to qualify for sickness benefits. She is asking the Appeal Division to give the decision she says the General Division should have made.

[7] The Respondent, the Canada Employment Insurance Commission (Commission), argues that the General Division did not make any errors. The Commission asks the Appeal Division to dismiss the appeal.

Issues

[8] The issues in this appeal are as follows:

- a) Did the General Division make a legal or factual; error about when the Claimant's qualifying period started and ended?
- b) Did the General Division miscalculate the Claimant's insurable hours?
- c) Did the General Division fail to consider whether the Claimant's qualifying period could be extended?

Analysis

[9] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.¹

[10] For these types of factual errors, the General Division had to have based its decision on that error and had to have made the error in a perverse or capricious manner, or without regard for the evidence before it.²

The General Division did not make an error about when the Claimant's qualifying period started and ended

[11] The General Division accepted that the Commission had correctly determined the Claimant's qualifying period to run from March 27, 2022, to March 25, 2023. Other than citing section 8(1)(a) of the *Employment Insurance Act*, it did not explain how it came to that determination.

[12] The qualifying period is dependent on when the benefit period begins, and the benefit period is determined by the later of either when a claimant's interruption of earnings occurs, and when they made an initial claim for benefits.³

¹ See section 58 (1) of the *Department of Employment and Social Development (DESD) Act*.

² See section 58(1)(c) of the *DESD Act*.

³ See section 10(1) of the *Employment Insurance Act*.

[13] The Claimant says that, as she last worked on March 16, 2023, the qualifying period should be calculated from this date. Generally, the qualifying period is the 52-week period immediately before the beginning of a benefit period.⁴

[14] The Claimant argues that the qualifying period should be the 52-week period before she stopped working on March 16, 2023. In other words, she says the qualifying period should run from March 16, 2022, to March 16, 2023. That way, she says it would include 14 insurable hours that she has from her employment for the week of March 20, 2022.⁵

[15] The Commission argues that the benefit period and hence, the qualifying period, started later than the Claimant suggests. The Commission says that the Claimant's benefit period did not start to run until after she experienced an interruption of earnings. The Commission says that, as the Claimant received sick pay after March 16, 2023, she could not have had an interruption of earnings. The Commission argues that sick pay is considered insurable, and therefore constitutes earnings.

[16] The Commission also argues that, even if the Claimant's qualifying period ran from March 16, 2022, to March 16, 2023, she would no longer be able to include 32 hours of sick pay as insurable hours. (The Claimant received 32 hours of sick pay for March 17, 20, 21, and 22, 2023.⁶)

[17] The Commission argues that under the Claimant's calculation of the qualifying period, the Claimant would gain 14 hours on one end of her qualifying period. But, on the other end, she would lose 32 hours. In other words, the Commission says the Claimant still would not have enough insurable hours to qualify for sickness benefits.

⁴ See section 8(1) of the *Employment Insurance Act*.

⁵ See Electronic Claimant's Report for the weeks of March 20 and 27, 2022, at GD 3-54.

⁶ See Supplementary Record of Claim, dated August 14, 2023, at GD 3-39 and GD 3-40, confirming that there were 32 hours of paid sick leave for March 17, 20, 21, and 22, 2023.

[18] As I have noted above, the qualifying period is dependent upon when the benefit period begins. A benefit period is defined in section 10(1) of the *Employment Insurance Act* as beginning on the later of

- (a) the Sunday of the week in which the interruption of earnings occurs, and
- (b) the Sunday of the week in which the initial claim for benefits is made.⁷

[19] From this, it is clear that one has to determine either when the interruption of earnings occurs, and when the initial claim for benefits is made. From there, the benefit period is the later of the Sunday of the two. In this case, the later is (a) the Sunday of the week in which the interruption of earnings occurred.

[20] So, one has to examine when the interruption of earnings occurred. The parties dispute when this occurred.

[21] The Claimant says the interruption of earnings occurred on March 16, 2023, once she was no longer able to work and stopped working because of her medical condition. She says that her benefit period began on the Sunday of the week in which the interruption of earnings occurred. She says it occurred on March 16, 2023, when she was no longer able to work because of her medical condition.

[22] The Commission says that the interruption did not occur at that time because the Claimant received sick pay for March 17, 20, 21, and 22, 2023.⁸

[23] Section 14(1) of the *Employment Insurance Regulations* (Regulations) defines when an interruption of earnings occurs. It occurs when an insured person is laid off or separated and has a period of seven or more consecutive days during which no work is performed for that employer “**and in respect of which no earnings that arise from**

⁷ See section 10(1) of the *Employment Insurance Act*.

⁸ See Supplementary Record of Claim, dated August 14, 2023, at GD 3-39 and GD 3-40, confirming that there were 32 hours of paid sick leave for March 17, 20, 21, and 22, 2023.

that employment, other than earnings described in subsection 36(13),⁹ are payable or allocated.” (My emphasis)

[24] So, if the Claimant received earnings from her employment during that period, then an interruption of earnings will not have occurred. So, if the sick pay is considered earnings, then the Claimant will not have had an interruption of earnings by March 16, 2023, and the benefit period would not start to run yet.

[25] Section 35(2) of the Regulations defines what is considered earnings. Earnings are the entire income of a claimant arising out of any payment and includes sick pay.

[26] The Claimant's sick pay is considered earnings. As the Claimant had earnings for March 17, 20, 21, and 22, 2023, an interruption of earnings did not start by March 16, 2023.

[27] In the Claimant's case, the benefit period did not start to run until the Sunday of the week in which the interruption of earnings occurred, which, in this case, was Sunday, March 26, 2023. So, the Claimant's qualifying period—the 52-week period that immediately preceded this—ran from Sunday, March 27, 2022, to Saturday, March 25, 2023.

[28] The General Division did not make an error about when the Claimant's qualifying period started and ended.

The General Division did not miscalculate the Claimant's insurable hours

[29] The General Division did not miscalculate the Claimant's insurable hours. In the face of conflicting evidence before it, the General Division was entitled to assess and weigh the evidence and decide what evidence it preferred. Besides, even if the General Division had failed to include an additional three hours, it would not have changed the

⁹ Section 36(13) of the *Employment Insurance Regulations* refers to payment paid or payable in respect of a holiday or non-working day that is observed as such. This does not apply to the Claimant.

outcome. The Claimant would still have been left with insufficient hours to qualify for Employment Insurance sickness benefits.

[30] The Claimant argues that the General Division miscalculated her insurable hours. She says that she has more than 600 hours, whereas the General Division found that she had 595 hours.

[31] The Claimant worked for two different employers: X and Y. There are pay cheque stubs for both. They show the following:

X

PAY PERIODS	HOURS
December 1 to 31, 2022	128
January 1 to 31, 2023	152
February 1 to 28, 2023	124
March 1 to 31, 2023	87
June 1 to 30, 2023	32 (sick pay)
Total insurable hours	523 hours

Y

PAY PERIODS	HOURS	CLAIMANT says actual hours are
March 16 to 31, 2022	14*	14*
April 1 to 15, 2022	15.3	15.3
April 16 to 30, 2022	22.3	22.3
May 1 to 15, 2022	34.15	37.15
Total insurable hours	71.75	74.75

* These hours fall outside the qualifying period and therefore do not count.

[32] The Claimant agrees with the pay cheque stubs for X. She agrees that she has 523 insurable hours from this employment.

– **The Claimant says there were three missing hours**

[33] The Claimant disagrees with the total hours from her employment with Y. She says that one of the pay cheque stubs is wrong because it is missing three hours. She says there should be 37.15 hours for the pay period from May 1 to 15, 2022. She kept her own records and a calendar that shows that she worked these hours.

[34] However, she says that she has been unable to get her employer to pay her the proper amount or to correct the pay cheque stub to show that she worked 37.15 hours. She says that this employer is no longer in business. In other words, she cannot locate the employer, so will be unable to get the employer to remedy its error.

[35] There was no other evidence before the General Division to show what attempts the Claimant might have made to get her employer to address the perceived discrepancy.

[36] The Claimant says that the General Division ignored her evidence that showed she worked 37.15 hours, rather than 34.15. However, in the face of conflicting evidence, the General Division was entitled to assess and weigh the evidence and decide which evidence it preferred. (Ultimately, in the event of any disputes over hours, the Claimant should ask the Canada Revenue Agency for a ruling on the insurability of any employment.)

[37] However, even if there was no dispute that the Claimant had 37.15 insurable hours—instead of 34.15 hours—for the pay period from May 1 to 15, 2022, the Claimant would still fall short of the required number of insurable hours to qualify for sickness benefits. She would still need to find an additional two hours.

– **The Claimant says the 14 hours she worked from March 16 to 31, 2022 should count towards her hours**

[38] The Claimant argues that she should be able to rely on the 14 hours in the pay period from March 16 to 31, 2022. However, these hours fall outside the qualifying period from March 27, 2022, to March 25, 2023.

[39] The Claimant filed electronic reports when she filed her claim. An Electronic Claimant's Report¹⁰ shows that the Claimant declared that she worked these 14 hours in the week from March 20, 2022, to March 26, 2022. She did not declare any hours between March 27, 2022, and April 2, 2022.

[40] So, the Claimant cannot rely on the 14 hours as they fall outside her qualifying period.

[41] The General Division did not miscalculate the number of insurable hours that the Claimant accumulated within her qualifying period between March 27, 2022, and March 25, 2023.

The General Division did not fail to consider whether the Claimant's qualifying period could be extended

[42] The General Division did not consider whether the Claimant's qualifying period could be extended. But the Claimant's circumstances did not allow for an extension.

[43] Section 8(2) of the *Employment Insurance Act* lists when the qualifying period can be extended. The qualifying period can be extended by the aggregate of any weeks during the qualifying period for which the person proves that they:

- (a) were incapable of work because of a prescribed illness or injury,
- (b) were confined in a jail, penitentiary or other similar institution and was not found guilty of the offence for which the person was being held,

¹⁰ See Electronic Claimant's Report, at GD 3-54.

- (c) were receiving assistance under an employment support measure, or
- (d) were receiving payments under a provincial law on the basis of having ceased to work because continuing to work would have resulted in danger to the person, her unborn child, or a child whom she was breastfeeding.

[44] There is no evidence that any of the circumstances described in paragraphs (b) to (d) were present. The Claimant was incapable of work because of a prescribed illness during the qualifying period, so potentially section (a) could apply.

[45] Section 8(2) of the *Employment Insurance Act* also requires the person to prove “in such as manner as the Commission may direct, that throughout the week the person was not employed in insurable employment” because the person was incapable of work because of a prescribed illness or injury.

[46] The Commission argues that section 8(2) of the *Employment Insurance Act* means that a claimant has to be unavailable for work for the entire seven-day period of that week.

[47] The Claimant says that she stopped working on Thursday, March 16, 2023. So she says that she should be able to rely on the week of March 19 to 25, 2023, to extend her qualifying period. She says that she was unavailable for work for the entire seven-day period of that week. More importantly, she argues that she was not employed in insurable employment because she was incapable of working throughout that week because of illness.

[48] The Commission argues that the Claimant cannot rely on the week of March 19 to 25, 2023 to extend her qualifying period because her employer paid her (sick leave). The employer paid her sick leave for four days, on March 17, 20, 21, and 22, 2023. In other words, the Commission says that, by paying her sick leave, it showed that she was still employed in insurable employment.

[49] Indeed, section 10.1(1) of the Regulations states that:

Where an insured person is remunerated by the employer for a period of paid leave, the person is deemed to have worked in insurable employment for the number of hours that the person would normally have worked and for which the person would normally have been remunerated during that period.

[50] Although the Claimant was not working and did not receive wages for the week from March 19 to 25, 2023, she received sick leave pay. Having received sick pay, under section 10.1(1) of the Regulations, she was deemed to have worked in insurable employment.

[51] As the Claimant was deemed to have worked in insurable employment, she did not meet the requirements of section 8(2) of the *Employment Insurance Act* that, throughout the week, she was not employed in insurable employment. So, she cannot get an extension of her qualifying period.

Conclusion

[52] The appeal is dismissed. The General Division did not make any errors regarding the qualifying period or in its calculation of the Claimant's insurable hours.

Janet Lew
Member, Appeal Division