



Citation: *HZ v Canada Employment Insurance Commission*, 2024 SST 1553

Social Security Tribunal of Canada

Appeal Division

Decision

Appellant: H. Z.

Respondent: Canada Employment Insurance Commission
Representative: Kevin Goodwin

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

Tribunal member: Melanie Petrunia

Type of hearing: In Writing
Decision date: **December 16, 2024**
File number: AD-24-716

Decision

[1] The appeal is allowed in part.

[2] The General Division erred by not addressing whether it should have reinstated the January 2021 claim. I have made the decision that the General Division should have made. The Claimant is entitled to a 36-week benefit period in respect of her second claim, commencing January 31, 2021.

Overview

[3] This appeal concerns two claims for Employment Insurance (EI) regular benefits. The Appellant, H. Z. (Claimant), made her first claim on April 2, 2020, and the second on February 5, 2021. At all relevant times, the Claimant worked in Windsor, Ontario but resided in the United States.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), initially established a benefit period for the first claim. It found that the Claimant was entitled to EI regular benefits for 36 weeks, applying a provision of the *Employment Insurance Regulations (EI Regulations)* that applies to claimants who work in Canada but reside in a U.S. state contiguous to Canada.¹

[5] The Claimant was put back on the payroll by her employer and paid eight weeks of termination pay for the period from October 26, 2020, to December 18, 2020. She was permanently laid off and made a second claim for EI regular benefits in February 2021. The Commission established a second benefit period commencing January 31, 2021, and found that the Claimant was entitled to 12 weeks of benefits.

¹ See ss. 55(7) of the *Employment Insurance Regulations*, S.O.R./96-332.

[6] The Claimant argued that she was entitled to 50 weeks of benefits on the second claim. The Commission disagreed but found that the Claimant should have received the EI Emergency Response Benefit (EI ERB) for her first claim, not regular benefits. EI ERB was payable at a lower rate than the regular benefits that she received. The Commission wrote off the resulting overpayment.

[7] The Commission also voided the Claimant's second benefit period and backdated her claim to October 4, 2020, the day after her EI ERB benefit period ended. It established a 36-week benefit period for regular EI benefits from October 4, 2020, to June 12, 2021.

[8] The Claimant appealed the Commission's decisions to the General Division.² The General Division dismissed the appeal, finding that the first claim was properly converted to a claim for EI ERB. It also found that it did not have the power to reinstate the January 2021 claim but, if it did, the Claimant would not be entitled to 50 weeks of regular EI benefits for a claim starting January 31, 2021.

[9] The Claimant appealed the General Division decision to the Tribunal's Appeal Division. The appeal was allowed in part and the Claimant asked the Federal Court of Appeal to review the Appeal Division decision.

[10] The Federal Court of Appeal found the Appeal Division decision unreasonable with respect to the number of weeks of benefits the Claimant was entitled to on the second claim. The Court returned the matter to the Appeal Division to be decided in accordance with its reasons.³

[11] I am allowing the appeal in part. The General Division did not make any errors with respect to the Claimant's first benefit period. With respect to the second benefit period, the General Division erred by not considering the Claimant's arguments concerning the reinstatement of the January 2021 claim.

² *H.Z. v. Canada Employment Insurance Commission*, 2022 SST 273 (General Division decision).

³ *Zhou v. Canada (Attorney General)*, 2024 FCA 170 (Zhou).

[12] As directed by the Federal Court of Appeal, I have made the decision that the General Division should have made, which is that the Claimant is entitled to a second benefit period of 36 weeks commencing January 31, 2021.

Preliminary matters

[13] The parties agreed that a further hearing in this matter was not required. Based on the reasons for judgement from the Federal Court of Appeal, the parties agreed that the appeal should be decided based on the record.⁴

Issues

[14] The issues in this appeal are:

- a) Did the General Division err in law when it found that the Claimant's first claim was properly converted to an EI ERB claim?
- b) Did the General Division err in law when it failed to consider whether the January 2021 claim should be reinstated?
- c) If so, how should the error be fixed?
- d) What is the Claimant's entitlement with respect to the second claim?

Analysis

[15] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:⁵

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;

⁴ See AD11 and AD12.

⁵ The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

– **Background**

[16] As discussed above, this matter was reviewed by the Federal Court of Appeal (Court) and the facts underlying the Commission's decisions have been outlined in detail by both the General Division and the Court.⁶ In light of the direction from the Court and the agreement of the parties, I will not review those facts again in detail but offer a brief summary.

[17] The Claimant was residing in the United States but working across the border in Canada when she was temporarily laid off on April 10, 2020. She applied for EI regular benefits and the Commission determined that she was entitled to 36 weeks of benefits pursuant to the *EI Regulations*.

[18] Sections 55(6) and 55(7) of *EI Regulations* applied to the Claimant due to her circumstance of commuting to work in Canada while living in the U.S.A. These provisions establish the number of weeks of benefits a commuter is entitled to, based on the insurable hours accumulated in the claimant's qualifying period.

[19] The Claimant was put back on the payroll by her employer before her benefit period ended. She was paid eight weeks of termination pay for the period from October 26 to December 18, 2020. The Claimant was permanently laid off and made a second application for EI regular benefits on February 5, 2021. A Record of Employment was issued on February 19, 2021, showing 320 hours of insurable employment.

[20] The Commission established a second benefit period commencing January 31, 2021. It determined that the Claimant was entitled to 12 weeks of regular benefits based on the 320 hours of insurable employment in her qualifying period, plus a one-time

⁶ See General Division decision at para 14 and *Zhou* at paras 4 to 16.

credit of 300 hours allowed by another temporary provision in the *Employment Insurance Act (EI Act)*.⁷

[21] The Commission later determined that the Claimant's first claim should have been established as a claim for the EI ERB. This decision resulted in an overpayment of benefits which the Commission wrote off. The Commission also backdated the second claim to October 4, 2020, to cover the period that the Claimant was paid regular benefits after the EI ERB benefit period ended. This voided the benefit period commencing January 31, 2021.

– **The General Division decision**

[22] The General Division found that the Claimant met the eligibility requirements for the EI ERB under paragraph 153.9(1)(b) of the *EI Act*. It determined that the Commission correctly converted the claim for EI regular benefits to a claim for EI ERB pursuant to paragraph 153.1310(c)(i) of the *EI Act*.⁸

[23] The General Division also determined that it did not have the jurisdiction to reinstate the January 2021 benefit period. However, it found that the Claimant would not be entitled to 50 weeks of EI regular benefits if it did have that power.⁹

– **The Appeal Division decision**

[24] The Appeal Division found that the General Division did not misinterpret the legislation or make a legal error when it found that the Commission properly converted the Claimant's first claim to a claim for EI ERB.¹⁰ It reviewed all the relevant provisions of the *EI Act* and found that the Claimant was eligible for the EI ERB pursuant to paragraph 153.9(1)(b) of the *EI Act*. It also found that she met all the conditions in section 153.1310 to have her claim for regular benefits deemed to be a claim for EI ERB.¹¹

⁷ See ss. 153.17(1) of the *Employment Insurance Act*, S.C. 1996, c.23.

⁸ General Division decision at paras 21 to 24.

⁹ General Division decision at para 48.

¹⁰ *H.Z. v. Canada Employment Insurance Commission*, 2023 SST 1104 (Appeal Division decision).

¹¹ Appeal Division decision at paras 45 to 61.

[25] The Appeal Division noted that the parties had agreed that the General Division should have addressed the issue of the reinstatement of the Claimant's January 2021 claim.¹² It found that the Commission did not have the authority to void and backdate the Claimant's second claim according to section 10(6) of the *EI Act*. The Claimant had been paid benefits in respect of the second benefit period and did not agree to cancel it.¹³

[26] Finally, the Appeal Division found that subsection 55(7) of the *EI Regulations* applied to the Claimant. It determined that she had 620 insurable hours in her qualifying period which entitled her to 12 weeks of benefits in her benefit period commencing January 31, 2021.¹⁴

– The Federal Court of Appeal decision

[27] On judicial review, the Claimant argued that she was not entitled to the EI ERB and should have received 36 weeks of regular benefits on her first claim. The Court disagreed and found that it was reasonable to conclude that the first claim was deemed to be a claim for EI ERB due to the combined effect of the temporary provisions.¹⁵

[28] The Court also found that it was reasonable to conclude that the Commission could not cancel the Claimant's second benefit period and backdate it to October 4, 2020. The Court referred to the limitation on the Commission's authority in subsection 10(6) of the *EI Act*.¹⁶

[29] The Court found that the Appeal Division reasonably concluded that subsection 55(7) of the *EI Regulations* applied to the Claimant and she was not entitled to a 50-week benefit period on the second claim.¹⁷ However, the Court found that the Appeal Division ignored subsection 153.18(1) of the *EI Act* when it found that the

¹² Appeal Division decision at para 69.

¹³ Appeal Division decision at para 77.

¹⁴ Appeal Division decision at para 117.

¹⁵ *Zhou* at paras 29 to 32.

¹⁶ *Zhou* at paras 33 and 34.

¹⁷ *Zhou* at paras 37 and 38.

Claimant was only entitled to 12 weeks of benefits on that claim. The Appeal Division decision was therefore unreasonable in this respect.¹⁸

[30] The Court directed that the Appeal Division decision be set aside and the Claimant's appeal redetermined in accordance with its reasons. In light of the Court's determination that the Appeal Division decisions concerning the first claim and the reinstatement of the January 2021 benefit period were reasonable, I will briefly address these issues.

[31] I find that the General Division did not err when it determined that the Commission properly converted the Claimant's first claim to a claim for EI ERB. The Claimant was eligible for the EI ERB pursuant to paragraph 153.9(1)(b) of the *EI Act*. I find that she met all the conditions in section 153.1310 to have her claim for regular benefits deemed to be a claim for EI ERB.

[32] I find that the General Division should have considered the Claimant's arguments concerning the second claim. The Commission had no authority to backdate the second benefit period to October 2020 in light of section 10(6) of the *EI Act*. Benefits had been paid out to the Claimant on the January 2021 claim, and she did not agree to cancel it in favour of establishing a new benefit period.

Remedy

[33] The appropriate remedy in this case is to substitute my own decision for that of the General Division. The decision of the Federal Court of Appeal is binding, and the parties have agreed to have the matter decided in accordance with the Court's reasons.

– The Claimant was entitled to a benefit period of 36 weeks commencing January 2021

[34] The parties agree that the Commission could not cancel the Claimant's second benefit period commencing January 31, 2021. I agree. The Claimant made a claim for

¹⁸ *Zhou* at para 39.

benefits on February 5, 2021, and a benefit period was established as of January 31, 2021.

[35] On judicial review, the Claimant argued that she was entitled to 50 weeks of EI regular benefits pursuant to section 12 of the *EI Act*. She claimed that the available number of weeks of benefits is set out in subsection 12(2.1). She does not fall under any of the exceptions set out in subsection 12(2.2) of the *EI Act*, so she asserts that she is entitled to 50 weeks of benefits. The Federal Court of Appeal disagreed with this argument, and I am bound by the Court's decision.¹⁹

[36] The Claimant was a commuter and subsection 55(7) of the *EI Regulations* applied to her second claim. This section sets out the number of weeks of benefits a claimant is entitled to based on the insurable hours accumulated in their qualifying period.

[37] Subsection 153.18(1) of the *EI Act* was another temporary provision meant to facilitate access to benefits. This section extends the qualifying period by 28 weeks for those who received EI ERB and made an initial claim for benefits on or after September 27, 2020. This section applies to the Claimant's second claim for benefits.

[38] The Commission conceded before the Federal Court of Appeal that, when this provision is taken into consideration, the Claimant's second benefit period is properly calculated as 36 weeks.²⁰

[39] I find that the Claimant's qualifying period is extended by 28 weeks pursuant to Subsection 153.18(1) of the *EI Act*, increasing the Claimant's insurable hours. I accept the Commission's submission that, when properly calculated under subsection 55(7) of the *EI Regulations*, the Claimant is entitled to a 36-week benefit period in respect of her second claim, commencing January 31, 2021.

¹⁹ *Zhou* at paras 35 to 37.

²⁰ *Zhou* at para 39.

Conclusion

[40] The appeal is allowed in part.

[41] The General Division properly determined that the Claimant's first claim was deemed to be a claim for EI ERB.

[42] The General Division erred by not addressing whether it should have reinstated the January 2021 claim. I have made the decision that the General Division should have made.

[43] The Claimant's January 2021 claim is restored. Subsection 55(7) of the *EI Regulations* applies to the Claimant, as does subsection 153.18(1) of the *EI Act*. Pursuant to these sections, the Claimant's qualifying period is extended by 28 weeks, entitling the Claimant to a 36-week benefit period in respect of her second claim.

Melanie Petrunia
Member, Appeal Division