CHAPTER EIGHT: EMPLOYMENT INSURANCE

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CHAPTER EIGHT: EMPLOYMENT INSURANCE

This Manual is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. Nothing herein creates a solicitor-client relationship. All information in this Manual is of a general and summary nature that is subject to exceptions, different interpretations of the law by courts, and changes to the law from time to time. LSLAP and all persons involved in writing and editing this Manual provide no representations or warranties whatsoever as to the accuracy of, and disclaim all liability and responsibility for, the contents of this Manual. **Persons reading this Manual should always seek independent legal advice particular to their circumstances.**

I. INTRODUCTION

A. Keeping Up to Date on Changes to Employment Insurance

When working with an Employment Insurance claim, always ensure that you are working with the most updated information. Consult Service Canada's Employment Insurance website before proceeding.

B. General

Employment Insurance (EI) is a contributory federal social insurance scheme that pays benefits to eligible workers who lose their jobs or who cannot work due to illness, pregnancy or due to responsibilities for a newborn or newly-adopted child, an ill family member [or person considered to be like a family member]. Service Canada and the Canada Employment Insurance Commission (the Commission) administer and act as the registry for the system.

Under the *Employment Insurance Act*, SC 1996, c. 23 [*EI Act*], both employees and employers are required to contribute to the payment of premiums. A claimant is not automatically entitled to benefits for loss of employment because they paid premiums. Certain criteria (see **Section IV: Qualifying for EI**) must be met before benefits are payable.

The EI appeal process is a multistage system. The list immediately below shows the progression of decisions and appeals under the regime:

a) decision made by an agent of the Commission affecting the Claimant, employer, and the Commission itself;
b) party applies to the Commission for Reconsideration of the Commission's decision;
c) party appeals to the Employment Insurance section of the General Division of the SST (Social Security Tribunal of Canada);
d) party applies for leave to appeal and then, if leave is granted, appeals decision of the General Division to the Appeal Division of the SST;
e) in exceptional cases, claimant applies to Federal Court of Appeal for Judicial Review;
f) in exceptional cases, claimant appeals court's decision to the Supreme Court of Canada. (Cases will usually only proceed to the Supreme Court of Canada if the disputed issue is of national significance).

A separate appeal structure exists for cases concerning the insurability of employment. This structure is set out in **Section XII. A. 3 Insurability Decisions**.

C. Deadlines for Appeals

- For Requests for Reconsideration: **30 days**

- For appeals to the General Division: **30 days** from the date the Reconsideration decision was communicated to the applicant
- For appeals to the Appeal Division: **30 days** from the time the decision was communicated to the applicant
- For judicial review to the Federal Court of Appeal: **30 days** from the date of the decision was communicated (*Federal Courts Act*, RSC 1985, c F-7, s 18.1).
- Note that for all deadlines, requests for an extension of the deadline may be made to the governing body.

For rulings that must be decided by the CRA:

- For a claimant's requests for rulings to the Canada Revenue Agency (CRA): Before **June 30th** in the year following the year to which the question relates. Note that the CRA rules on insurability issues.
- For appeals to the Minister of National Revenue from a CRA decision: **90 days** from the date of the notification of the ruling (*EI Act*, s 91).

II. GOVERNING LEGISLATION AND RESOURCES

A. Employment Insurance Act, 1996, c 23 and Regulations

Ensure that you are working with the most recent version of the Act. The legislation can also be found online at http://laws-lois.justice.gc.ca/eng/index.html

B. Carswell's Annotated Employment Insurance Statutes

Lavender, T.S., Carswell (2010-).

Updated every year, Carswell's Annotated Employment Insurance Statutes is an excellent tool for detailed legal research. It contains the entire *EI Act* and Regulations, with extensive annotations after each provision describing the history of the section, and the decisions interpreting and applying it.

C. EI Jurisprudence Online

The EI homepage at http://www.servicecanada.gc.ca/eng/sc/ei/index.shtml has links to legislation, a jurisprudence library, and to the SST and Umpires sections. This site is a good place to start, though one should be aware that certain sections may be dated or not have the information most useful to building a good case for a claimant. The Jurisprudence Library has decisions by the Umpires, the Federal Court of Appeal and the Supreme Court of Canada. These decisions can be searched via a search engine located at www.ei-ae.gc.ca/en/library/search.shtml.

NOTE: The Umpires were the highest level of appeal in the EI system before being replaced by the appeal division of the SST. Canadian Umpire Benefit (CUB) decisions are decisions made by the Umpire.

CanLII has a database of SST decisions located at http://www.canlii.org/en/ca/sst/.

A very useful resource can be found in the "Employment Insurance Appeal Decisions Favourable to Workers" decisions database. The database makes available a collection of Employment Insurance jurisprudence where decisions were favourable to workers. One should be aware, however, that this section has not been updated to reflect some recent rulings favourable to workers. **At the time of writing, this section was last updated in September 2012**. More information and a link to the database can be found at:
http://www.ae-ei.gc.ca/eng/board/favourable_jurisprudence/favourable_decisions_toc.shtml.

NOTE: According to the SST website, the SST is not legally bound to follow its own decisions or those of the "legacy tribunals" (Board of Referees, Umpires). A prior decision may be at most persuasive, especially where the facts are similar. The tribunal must, however, follow rulings of the Federal Court, Court of Appeal, and the Supreme Court of Canada.

D. Tax Court Decisions

There is a separate site for Tax Court decisions (on insurability issues, etc.). The search page is located at http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/tcc-cci_Eng/Search. Searches can be limited to UI and EI decisions.

E. Digest of Benefit Entitlement Principles

This two-volume policy manual is published by the Commission and is amended periodically. It contains a summary of general law and policy for each subject matter, with references to the relevant

sections of the *EI Act* and Regulations and refers to many decisions of the Umpires and Federal Court. However, it is written by the Commission, and many chapters do not accurately describe the cases. It must, therefore, be used with caution, and **not** as the sole reference. However, the online version is the most reliable source; few printed versions are fully up to date. The manual can be found online at https://www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml.

F. Employment and Social Development Canada

Employment and Social Development Canada (ESDC) maintains an extensive web site with many tools, which is located at https://www.canada.ca/en/employment-social-development.html.

For general information regarding EI claims contact:

Vancouver Service Canada Centre
1263 West Broadway
Vancouver, BC
Telephone: 1-800-622-6232

III. QUALIFYING FOR EI

A. Insurable Employment

Sections 5(1) and (2) of the *EI Act* set out what is and what is not insurable employment. Please note that s 5(2) outlines specific instances of employment that are not insurable (i.e. employment in Canada by an international organization, by a foreign government, or by Her Majesty in right of a province). When in doubt, the reader should consult s 5 of the *EI Act* and s 3 of the *EI Regulations*.

Generally, if the employer has deducted EI premiums, then the employment is insurable. However, it is the nature of the employment, and not the premiums paid, that is determinative.

Some disputes are determined **solely** by the Canada Revenue Agency (CRA). These disputes concern s 90(1) of the *EI Act*, and include:

a) whether employment is insurable;
b) how long employment lasts, including the dates on which it begins or ends;
c) the amount of any insurable earnings;
d) how many hours an insured person has had insurable employment;
e) whether a premium is payable;
f) the amount of a premium payable;
g) who is the employer of an insured person;
h) whether employers are associated employers; or
i) what amount shall be refunded under s 96(4) - (10);

Appeals of decisions by the CRA are made first to the Minister of National Revenue (within 90 days of being informed of the decision), and then to the Tax Court of Canada (*EI Act*, s 103). Tax Court decisions can be appealed to the Federal Court of Appeal under s 27 of the *Federal Court Act*, RSC 1985, c. F-7.

Workers with insurable earnings below $2,000 will have their premiums refunded.

B. Qualifying Period

1. General

To qualify for EI benefits, a claimant must have worked a certain number of hours of insurable employment during the claimant's qualifying period. The required number of hours may vary according to the location of the claimant, and the unemployment rate in the region they live in. The definition of qualifying period is set out in s 8(1) of the *EI Act*. This is usually the shorter of either:

a) the 52 weeks immediately before the benefit period commences under s 10(1);
b) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period under s 10(1). I.e., the period between the beginning of a prior claim and the beginning of the present claim.

2. Extensions of the Qualifying Period

However, the qualifying period may be extended (i.e. the Commission will look further back in time) up to a maximum of 104 weeks, as set out in ss 8(2)(a)-(d). It may be extended if the claimant can prove that they were unable to work during any of the weeks of the qualifying period because of:

a) illness, injury, quarantine, or pregnancy;
b) confinement in a jail, penitentiary or other similar institution and was not found guilty of the offence for which the person was being held or any other offence arising out of the same transaction;
c) receiving assistance under employment benefits; or
d) the claimant has left the job due to hazardous work or working conditions. This covers situations where the claimant has ceased to work because to continue would have entailed danger to the worker, the worker's unborn child, or a child whom the worker is breast-feeding.

NOTE: The extension under (d) is limited to situations where a worker would receive payments under provincial law. Many provinces, including BC, do not yet provide for such payments. Consequently, BC workers cannot use (d) as a ground to extend the qualifying period.

The absolute **maximum extension** of a qualifying period is **104 weeks** (two years). After 104 weeks, no extensions can be made to the claimant's qualifying period.

NOTE: The same insurable hours can never be used for two separate claims.

C. Minimum Hours of Employment Required

1. Types of Claimants

Claimants are normally classified depending on their prior "attachment" to the labour market. However, due to COVID-19, there are temporary measures that may or may not be extended after September 24th, 2022. Please check the CRA website for the most up to date information. The temporary measures are as followed: insured person qualifies for regular and special benefits if the person has had an interruption of earnings from employment (see part D below); and has had during the qualifying period at least 420 hours of insurable employment. See section 7 of the *EI Act* for more details.

2. Youth and EI

As long as a minor is employed in insurable employment and is paying into the plan, a minor is eligible in the same manner as an adult.

3. Hours Required

Until September 24, 2022, a claimant needs 420 hours of insurable employment during the qualifying period to qualify for EI benefits. After September 24, 2022, a claimant will need between 420 hours and 720 hours during the qualifying period depending on the regional unemployment rate.

Look up EI Economic Region by Postal Code to find out the unemployment rate in your region and the number of hours to qualify for regular benefits
https://srv129.services.gc.ca/ei_regions/eng/postalcode_search.aspx

NOTE: The number of hours that an insured person needs under s 7 to qualify for benefits is increased to the number shown under s 7.1(1) if one or more violations has occurred in the 260 week period prior to the initial claim (see **Section IX: Keeping Out of Trouble**).

D. Interruption of Earnings

To establish a claim, the worker must have an "interruption of earnings." An interruption of earnings is defined as:

> **Seven or more consecutive days** during which the employee performs no work and for which the employee will **receive no earnings.** (*EI Regulations,* s 14)

Layoff, the end of a contract and dismissal can all be causes of an interruption of earnings.

A substantial reduction in the hours of work (for example, from full time to one day a week or less) does **not** meet the definition of interruption of earnings for regular benefits. Consequently, a worker whose hours are drastically reduced cannot establish a claim unless they have a full week of unemployment. The only exception is for special benefits. However, if there is an interruption of earnings from one of two part-time jobs with the same employer, then the claimant could qualify.

NOTE: In the case of **special benefits**, an interruption of earnings occurs when a worker experiences a reduction in earnings of more than 40% of the person's normal weekly earnings.

1. Weeks of Unemployment

"Week of unemployment" is defined in s 11(1) of the *EI Act*: "A week of unemployment for a claimant is a week in which the claimant does not work a full working week". However, the following subsections of s 11 describe situations which do *not* amount to an interruption of earnings as defined in s 14.

E. Record of Employment

An employer who completes a paper form must provide an employee with a Record of Employment (ROE) five days after the first day of the interruption of earnings, or the day on which the employer becomes aware of the interruption of earnings.

However, if the ROE is completed in electronic form, it must be sent to the Commission no later than 5 days after the end of the pay period in which the first day of the interruption of earnings fell. The rules for this are set out in s 19(3.1) of the *EI Regulations.* If there are 13 or fewer pay periods in a year, then the ROE must be sent to the Commission no later than 15 days after the first day of the interruption of earnings. An employer who completes a ROE in electronic form is not required to send a copy to the employee.

The ROE contains information important to the EI claim. It sets out the first and last dates of work, the total hours worked and the total earnings, which are used to determine the amount of benefits payable and it also sets out the reason for separation. If it says that the claimant quit or was fired, the Commission must investigate the reasons. Depending on the conclusions of the Commission, the claimant may be disqualified from all regular benefits (see **Section VI.C: Effect of Earnings**).

NOTE: It is important that claimants who have worked more than one job during the qualifying period retain the ROEs from each employer.

If the claimant disagrees with statements in the ROE, they can ask the employer to correct them. The claimant should also bring the errors to the Commission's attention at the time of application.

F. Filing an Application

Applications should be filed during the first full week of unemployment (see **Appendix A: Checklist for Initial Application for EI Applications**). However, as a matter of policy, applications will be automatically "antedated" (see **Section V.B: Antedating**) for up to four weeks following the week of the interruption of earnings. If the claimant delays longer than this, they may lose benefits unless they are able to show "good cause" for the delay. Because of this, if a claimant cannot get a ROE immediately, they should still go to the nearest Canada Employment Insurance Commission office and complete an application. Usually, the Commission will want to have an ROE before they process the claim. However, claimants should always ensure they apply on time even if they do not yet have their ROE. The Claimant should make efforts to get the ROE from the employer. If the Claimant is unsuccessful the Commission will contact the employer if the record is not completed on time. If necessary, a claimant may prove their employment history and insurable earnings by filing an application supported by payslips and cheque stubs, etc.

NOTE: Applications may be filed online through the ESDC web site. Applicants filing online must still submit their ROE(s) by mail or in person. If the claimant's ROE has a "W" or "S" serial number, their employer has provided ROE electronically to the local office and the claimant is not required to submit the paper copy. Claimants may review and edit their claim information online by using the "My EI Information on-line" service provided by Service Canada

For general information about filing an application and about the EI system visit: https://www.canada.ca/en/services/benefits/ei/ei-apply-online.html.

IV. TYPES OF BENEFITS

A. Regular Benefits

EI benefits are calculated using your highest weeks of earnings over the qualifying period (generally 52 weeks): http://www.servicecanada.gc.ca/eng/ei/vbw/index.shtml. (Applies to both regular and special benefits).

Regular EI benefits are payable during the benefit period to a claimant who:

- has had the requisite number of hours of insurable earnings during the qualifying period;
- has had an interruption of earnings from employment;
- is capable of and available for work;
- has made "reasonable and customary efforts" to find employment; and
- is unable to find suitable employment.

The maximum number of weeks of regular benefits available to a claimant varies according to the claimant's hours of insurable employment in the qualifying period and the regional rate of unemployment. See Schedule I and s 12(2) of the *EI Act*.

B. Special Benefits

Special benefits are available in special circumstances where the claimant has not lost their employment. Self-employed Canadians and permanent residents can also opt in. Ordinarily, a claimant requires 600 hours to qualify for special benefits, but temporary measures have lowered the requirement to 420 hours until September 24th, 2022. The rest of this chapter refers to the 420 hours threshold, but please note that number may change after September 24th, 2022. Please see the CRA website for the most up to date version of the rules. There are six types of EI special benefits: sickness, compassionate care, maternity, parental benefits, benefits for parents caring for a critically ill child, and benefits for persons providing care for a critically ill adult family member (s 12(3)). More than one type of special benefit can be claimed within one benefit period. Similarly, special and regular benefits claims can be combined. However, s 12(6) sets out the maximum for such a combination. If a claimant has not collected any regular benefits and is just combining different special benefits to which they are entitled, the maximum number of weeks the claimant can collect is the combined maximum for each of the special benefits they are collecting. To ensure they have time to collect all these combined weeks, their benefit period will also be extended to the combined maximum number of weeks of special benefits they can collect.

If the claimant has collected regular benefits but is also entitled to collect special benefits during their benefit period, then the claimant can combine weeks of benefits, but the maximum number of combined weeks cannot be higher than 50.

C. Sickness Benefits

1. Entitlement

To qualify for sickness benefits, the claimant must be able to prove that they are unable to work due to illness, injury, or quarantine. This normally requires that the claimant obtain a medical certificate completed by a doctor or medical practitioner stating the expected duration of incapacity (*EI Regulations*, s 40(1)). The claimant must also show that they would have been available to work if they had not fallen ill, gotten injured or placed in quarantine. The illness, injury, or quarantine must be that of the claimant personally. If you qualify for this benefit you may qualify for up to 15 weeks of sickness benefits. It is

expected that the maximum will increase to 26 weeks sometime in the near future. Please see the CRA website to see if that change is in effect at the time you are reading this.

2. Prescribed Illness, Injury or Quarantine

Sickness benefits are only available for a "prescribed illness, injury or quarantine that renders a claimant incapable of performing the functions of their regular or usual employment or other suitable employment" (*EI Regulations,* s 40(4)). The onus is on the claimant to prove entitlement. A medical certificate is usually required, and the Commission may also require a claimant to undergo a medical examination at their direction pursuant to s 40(2) of the *EI Regulations*. In those situations, the Commission must pay travel and other expenses for the examination (*EI Regulation*, s 40(3)).

NOTE: For more information on claiming sickness benefits, please refer to the ESDC website: https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/sickness.html .

D. Compassionate Care Benefits

Compassionate Care Benefits may be paid up to a maximum of 26 weeks to a claimant who has to be absent from work to provide care or support to a gravely ill family member and is at risk of dying within 26 weeks. The benefits for compassionate care must be claimed within a 52-week period that generally starts on the day the doctor certifies the family member is likely to die. Unemployed persons on EI can also apply for this type of benefit.

To be eligible for Compassionate Care Benefits a claimant must apply and show that:

- their regular weekly earnings from work have decreased by more than 40 percent; and
- they have accumulated 420 insured hours in their qualifying period.

The *EI Act*'s expanded definition of "family member" includes a claimant's:

- own child or the child of the spouse or common-law partner;
- wife/husband or common-law partner;
- father/mother or father's wife/mother's husband, if parent is remarried;
- common-law partner of father/mother, if there has been no remarriage;
- other relatives; and
- anyone that the gravely ill person considers to be like a family member.

To establish a claim for compassionate care benefits in order to care for a gravely ill person who considered you to be like a family member, medical proof is required. This includes an Authorization to Release Medical Certificate form signed by the gravely ill person or their legal representative and a Medical Certificate for Employment Insurance Compassionate Care Benefits form signed by the medical doctor.

1. Sharing Compassionate Care Benefits

Compassionate care benefit can be shared with other family members as long as each one of the family members is also eligible. Family members can claim the benefits at the same time or at different times as long as the number of weeks claimed for compassionate care benefits does not exceed 26 weeks altogether.

There is still a one-week waiting period before benefits can be claimed. However, if the

benefit is to be shared with other family members, only the first family member to claim compassionate care benefit has to serve the one-week waiting period.

NOTE: For more information on claiming compassionate care benefits, and for a comprehensive list of persons included under the term "family member," please refer to the ESDC website: http://www.servicecanada.gc.ca/eng/ei/types/compassionate_care.shtml#Definition.

E. Benefits for Family Members of Critically Ill Children (PCIC)

Eligible family members who take leave from work to provide care or support to a child with a life-threatening illness or injury can receive up to 35 weeks of benefits. The benefits must be collected in the 52-week window beginning on the day a medical certificate is issued showing that the child is critically ill or, if the claim is made before the certificate is issued, from the date a specialist medical doctor certifies that the child is critically ill or injured. The child must be under the age of 18 at the time that the beginning of the benefits window; if the child turns 18 at any time during the benefits window besides the beginning, the claimant will remain eligible to claim PCIC benefits.

As with other special benefits, the claimant must have an interruption of earnings (for special benefits, a greater than 40% reduction in earnings) and have 420 hours in their qualifying period.

These benefits are not available to family members of a child with a chronic illness or condition that is their normal state of health. There must be a significant change from the child's normal or baseline state of health at the time they are assessed by a specialist medical doctor.

PCIC benefits can be shared between both eligible family member. Eligible family members can claim for PCIC benefits at the same time or at different times as long as the sum of the weeks claimed does not exceed the 35 weeks.

NOTE: For more information on claiming PCIC benefits, please refer to the ESDC website: https://www.canada.ca/en/services/benefits/ei/family-caregiver-children.html.

F. Benefits for Family Members of Critically Ill Adult (PCIA): the Family Caregiver Benefit for Adults

Eligible family members who take leave from work to provide care or support to a family member with a life-threatening illness or injury can receive up to 15 weeks of benefits. The benefits must be collected in the 52-week window beginning on the day a medical certificate is issued showing that the adult is critically ill or, if the claim is made before the certificate is issued, from the date a specialist medical doctor certifies that the adult is critically ill or injured. The adult must be over the age of 18 at the time that the beginning of the benefits window.

As with other special benefits, the claimant must have an interruption of earnings (for special benefits, a greater than 40% reduction in earnings) and have 420 hours in their qualifying period. \

These benefits are not available to family members of an adult with a chronic illness or condition that is their normal state of health. There must be a significant change from the adult's normal or baseline state of health at the time they are assessed by a specialist medical doctor.

PCIA benefits can be shared between more than one eligible family member. Family members can claim for PCIA benefits at the same time or at different times as long as the sum of the weeks claimed does not exceed the 15 weeks.

NOTE: For more information on claiming PCIA benefits, please refer to the ESDC website:

https://www.canada.ca/en/services/benefits/ei/family-caregiver-adults.html.

G. Pregnancy Benefits

Pregnancy benefits are paid to an expectant or newly delivered mother. A mother can be entitled to both pregnancy benefits and parental benefits. Like sickness benefits, pregnancy and parental benefits can be distinguished from regular EI benefits, because they are paid even though the applicant is not available for work. All earnings no longer reduce all benefits, it is the same as the regular benefit rate.

1. Entitlement

A claimant for pregnancy benefits must:

a) have 420 hours in their qualifying period;
b) prove her pregnancy; and
c) have an interruption of earnings.

NOTE: Pursuant to s 40 (5) of the *EI Regulations,* a claimant who terminates her pregnancy within the first 19 weeks is entitled to collect sickness benefits.

2. Benefit Period and Duration

Benefits can only be paid for a maximum of 15 consecutive weeks. The period can start no more than 12 weeks before the week when the claimant's due date is expected or the week when the birth actually occurs, whichever is earliest (*EI Act,* s 22(2)).

Benefits must be collected within 17 weeks after birth or due date, whichever is later. If the child born from the pregnancy is hospitalized, the benefit period may be extended by one week for each week or part of a week that the child is hospitalized (*EI Act,* s 22(6)). However, benefits may last no longer than 15 weeks total, even if extensions have been granted. As with claims for regular benefits, there is a one-week waiting period after the claim is made before benefits become payable.

3. Pregnancy Benefit Rate

The pregnancy benefit rate is the same as the regular benefit rate. However, no proof of availability is necessary. For a comprehensive list of what is and is not, regarded as earnings, see s 35 of the *EI Regulations*. See also **Section VI.C: Effect of Earnings**, above.

NOTE: For more information on claiming pregnancy benefits, please refer to the ESDC website: https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental.html.

H. Parental Benefits

There are two options available to parents; they may choose to get 55% of their wage for 40 weeks or they may choose to receive 33% of their wage for up to 69 weeks. These benefits are available to any parent, including adoptive parents, who experience an interruption of earnings to care for their new child. However, birth mothers can collect parental benefits in addition to their pregnancy benefits.

Should parents elect to receive benefits for up to 40 weeks, parents can share the 40 weeks of benefits between them. However, each parent cannot individually claim more than 35 weeks. For example, if one parent claims 35 weeks of benefits, then the other parent may claim a maximum of 5 weeks.

Should parents elect to receive benefits for up to 69 weeks, parents can share the total benefit between them as they choose. However, no parent may receive more than 61 weeks of benefits individually.

In either case, only parents who are eligible claimants can qualify. In other words, each parent must qualify individually, and one parent cannot qualify on behalf of the other.

The period during which parental benefits can be claimed begins on the day the child is born, or placed with the parent for the purposes of adoptions, and ends 52 weeks later. The 40 weeks of parental benefit do not need to be collected in consecutive weeks and can be collected at any time during this period. Like other EI benefits, the claimant will receive 55% of their average weekly earnings.

I. Provisions for Low-Income Families

For claimants with children and low family incomes, there is a family supplement that could raise their benefit rate to a maximum of 80 percent. Low-income families are defined as those who qualify for the Canada Child Benefit, with a combined annual income of less than $25,921.

J. Employment (Training) Benefits

The EI budget includes discretionary funding for retraining. Eligibility for these benefits is determined by the criteria in s 58 of the *EI Regulations* and includes anyone whose benefit period ended within the last 60 months (see s. 76.11). Section 9 of the *EI Act* lists out certain types of benefits that could be conferred to claimants that meet the criteria in s 58.

V. THE BENEFIT PERIOD

A. Introduction

When a claim is established, the claimant's "benefit period" will begin. Under s 10(1) of the *EI Act*, the benefit period begins on the Sunday at the beginning of the week in which the interruption of earnings occurs, or on the Sunday of the week in which the initial claim for benefit is made, whichever is later, though this is subject to antedating. Benefits will only be paid during the benefit period.

B. Antedating

If an application for EI benefits was not filed within the first four weeks after the week in which the claimant experienced their interruption of earnings, they can ask that the claim be antedated back to the first date when it could have been filed under s 10(4). The claimant must establish that good cause existed for the delay in filing. "Good cause" must be demonstrated for each day until the date of application was actually made. If the claim is filed within the first four weeks, it is automatically antedated to the first date of eligibility.

> **What is "Good Cause"?** Good cause has typically been interpreted narrowly. Simple ignorance of the requirements of the *EI Act* has not been considered good cause either, though reasonable reliance on bad advice from the employer, union, a legal advisor or the Commission itself usually meets the requirements.
>
> In *Attorney General v Burke*, 2012 FCA 139, a claimant asked for his application to be backdated because he had expected to be rehired and hence did not apply for EI until after the regular deadline. The Federal Court of Appeal upheld the previous decisions granting an antedate on the basis that the claimant had done what a reasonable person would do.

C. Income That is Treated as Earnings

Section 35(2) of the *EI Regulations* defines what will be considered earnings for EI purposes.

Income that counts as "earnings" includes, but is not limited to:

a) retirement payments and retirement leave credits or payments in lieu;
b) most bonuses and gratuities;
c) wages in lieu of notice; and
d) vacation pay.

See section 35(2) of the *EI Regulations* for more detail. Please note that severance pay is normally included in the list above and may be added in after September of 2022.

It is important to note some income, while generally considered earnings, will not prevent an interruption of earnings. For example, the fact that a worker receives severance, pay in lieu of notice, or vacation pay after getting laid off will not delay the interruption of earnings. The claimant should still apply for EI as soon as possible after they stop working to make sure their application is not late, even if the money they get from the employer due to the layoff may delay the start of their actual EI benefits.

Though the claimant will need to wait until the money is used up before being eligible to receive benefits, **they must still apply for EI immediately.** The benefit period will be extended to make up for the weeks it takes to use up these earnings.

D. Income That Is Not Treated as Earnings

Section 35(7) exempts certain sources of income from being regarded as earnings. These include:

a) Disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
b) Payments under a sickness or disability wage-loss indemnity plan that is not a group plan;
c) Relief grants;
d) Retroactive increases in wages or salary.

For more details, see section 35(7) of the *EI Regulations*.

Recent cases suggest that in certain circumstances some earnings **may not** delay the start of an EI claim. In *Attorney General of Canada v Bielich*, 2005 FCA 363, the court allowed a $24,000 payment to be exempted from the claimant's allocation of earnings because the purpose of the payment was to compensate the claimant for giving up his right to seek reinstatement, not to compensate for lost pay.

NOTE: Retirement pensions are generally considered income and are deducted from EI benefits. However, if the claimant accumulates all the hours needed to qualify for EI after the date their pension starts, then their pension money will not be deducted from their EI benefits (see *EI Regulation*, s 35(7)(e).

E. The Waiting Period

Before receiving any EI benefits, a claimant must serve a one week "waiting period" during which they are unemployed and otherwise eligible for benefits *(EI Act*, section 13*).*

This waiting period also applies to pregnancy, parental, caregiver and sickness claims. For caregiver benefits, it can be deferred for the second family member if benefits are split, but the first person must serve it. If a claimant works during the waiting period, 100 percent of their earnings will be deducted from the first three (and no more than three) weekly benefit cheques.

F. Length of Benefit Period

The benefit period for regular EI benefits is 52 weeks (*EI Act*, s 10(2)). However, this period can sometimes be extended to more than 52 weeks. The criteria for this are set out in s 10(10) of the *EI Act*. The benefit period can be extended when a claimant proves that for any week during that benefit period the claimant was not entitled to benefit by reason of:

a) receiving earnings paid by reason of the complete severance of the relationship between the claimant and the claimant's former employer (i.e. "using up" severance pay, vacation pay, etc.);
b) receiving Workers' Compensation payments for a total disability; or
c) receiving payments under a provincial law on the basis of having ceased to work because continuing to work would have entailed danger to the claimant, the claimant's unborn child, or a child the claimant is breast-feeding. However, under BC law, BC residents are not entitled to these payments, and this does not apply to them.

The benefit period can be further extended under s 10(11) where a claimant can prove that for any week during the extension period, they were not entitled to benefits, again for any reason stated in s 10(10).

The length of any benefit period extended for these reasons cannot exceed 104 weeks (*EI Act*, s 10(14).

G. Payment of Regular Benefits

Where a benefit period for **regular benefits** has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximum benefit periods established in *EI Act*, section 12.

The maximum number of weeks for which benefits may be paid in a benefit period (other than special benefits) are determined in accordance with the table in Schedule I of the *EI Act* by reference to the regional rate of unemployment that applies to the claimant and the number of hours of insurable employment of the claimant in their qualifying period.

Refer to Canada's EI Economic Region map to determine whether the claimant was living in one of the economic regions: http://srv129.services.gc.ca/eiregions/eng/canada.aspx .

H. Termination of Benefit Period

Once a benefit period is established, it continues to run notwithstanding that the claimant may have returned to work (though full benefits will not actually be paid in this case), unless the benefit period is terminated.

Section 10(8) states that a benefit period terminates when:

1. no further benefits are payable to the claimant in their benefit period;
2. the benefit period would otherwise end under this section; and
3. the claimant:
   a) asks that the benefit period end;
   b) makes a new initial claim for benefit; and
   c) qualifies to receive benefit under this part of the *EI Act*.

NOTE: The way benefit rates are calculated under the *EI Act* can make the timing of the decision to end one claim and start a new one crucial.

VI. QUANTIFYING BENEFITS

A. Benefit Rate

The benefit rate is set out in s 14 of the *EI Act*. The benefit rate is either:

- 55% of the worker's weekly insurable earnings up to a maximum amount (see next section); or,
- if (1) the claimant or the spouse of the claimant has dependents and (2) the benefit rate of 55% amounts to less than $225 a week or the family income is less than $25,921, then the claimant may also be entitled to a family supplement.

The current ceiling for the maximum weekly benefits is $639 per week. Always check Service Canada's "Employment Insurance Regular Benefits" webpage to ensure this information is up-to-date at https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit.html. Effective January 1, 2022, the maximum yearly insurable amount is $60,300.

B. Weekly Insurable Earnings

A claimant's weekly insurable earnings are their insurable earnings in the calculation period divided by the number of weeks in the calculation period.

1. The Calculation Period

The calculation period is the number of weeks, consecutive or not, determined based on the applicable regional rate of unemployment as below, in which the claimant received the highest insurable earnings.

Regional Rate of Unemployment	Number of Weeks
not more than 6%	22
more than 6% but not more than 7%	21
more than 7% but not more than 8%	20
more than 8% but not more than 9%	19
more than 9% but not more than 10%	18
more than 10% but not more than 11%	17
more than 11% but not more than 12%	16
more than 12% but not more than 13%	15
more than 13%	14

C. Effect of Earnings

The benefit payable to a claimant may be reduced if the claimant has "earnings" during the benefit period. It may be possible both to work part-time and receive EI benefits at the same time, but all income must be reported on the report cards.

The "EI Working While on Claim" project is a way to help claimants stay connected with the labour market (*EI Regulations*, ss 77.95-77.96). It applies to claimants earning money while collecting any of the following types of EI benefits:

- regular benefits
- fishing benefits
- parental benefits
- compassionate care benefits
- parents of critically ill children
- family members of critically ill adults
- sickness and pregnancy benefits

As soon as a claimant completes the one-week EI waiting period, the Working While on Claim project will automatically apply to any money the claimant earns while the claimant is collecting EI benefits.

How it works

The Commission sets a threshold which is 90% of the claimant weekly insurable earnings. Below this threshold, for every dollar a claimant earns 50 cents will be deducted from their benefits. Above this threshold, a dollar of benefits will be deducted for every dollar earned. This is referred to as the "default rule".

The claimant may choose to opt for the "optional rule". The optional rule allows the claimant to keep $75 or 40% of the claimant's benefit rate (whichever is greater) without any deduction to the EI benefit they receive. Any earnings after this amount will be deducted dollar to dollar from the EI benefits the claimant is receiving.

Example from Service Canada Website:

Melissa got laid off when the construction company where she was working lost a major contract. Her weekly earnings averaged out to $800, so her weekly EI benefits are $440. She then finds a part-time job at another construction company where she works one day and earns $160 per week.

Automatically under the "default rule", she is allowed to keep 50 cents of EI benefits for every dollar she earns, so she takes home $520 per week in combined EI benefits and wages ($360 of EI benefits + $160 in wages).

If she chooses the "optional rule", she can earn up to the greater of $75 or 40% (176) of her benefit rate, without any deductions from her benefits. In this scenario, she will choose to keep 40%, as she only earns $160 per week from her work while on claim, so she can keep all of her EI benefits. Under this option, she would take home $600 per week in combined EI benefits and wages ($440 of EI benefits + $160 in wages).

In this example, Melissa would likely choose the "optional rule" if she never worked more than one day per week as she takes home $80 more per week.

Important reminders

Claimants do not have to apply to the Working While on Claim project as it will automatically be applied to their claim. The "default rule" will be the method of calculation that automatically applies. However, claimants must request to opt for the "optional rule" in order to have their benefits calculated accordingly.

What if the claimant works or lives outside Canada?

If the claimant is living in the United States and works in Canada, or if the claimant crossed the Canada–United States border between the claimant's residence and workplace and the claimant is receiving EI benefits, the Working While on Claim project will apply. Visit the Employment Insurance and Workers and/or Residents outside Canada Web page for more information: https://www.canada.ca/en/services/benefits/ei/ei-outside-canada.htm

1. Earnings During the Waiting Period

All earnings during the waiting period are deducted dollar for dollar from the benefits payable in respect of the first three weeks for which benefits are otherwise payable. There is thus little incentive to work during the waiting period.

2. Earnings of Sick or Pregnant Claimants under Supplemental Unemployment Benefit Plans

Amounts paid to the claimant during periods of illness or pregnancy under an approved Supplemental Unemployment Benefit plan will not be deducted from EI benefits. These plans allow the employer to "top up" the regular EI benefits without reductions.

Individual Supplemental Unemployment Benefit plans must be approved by the Commission, which ensures that they meet the requirements of s 37(2).

An employee normally benefits from these plans while drawing EI benefits. If the worker is ineligible for EI, they may still qualify for Supplemental Unemployment Benefits that do not count as earnings for the purpose of determining waiting periods.

VII. BENEFIT ENTITLEMENT

Once a claim is established, the basic requirement for receiving weekly benefits is that the claimant be "capable of and available for work and unable to obtain suitable employment". To prove this in the event of a dispute, the claimant should keep a "job search record" (see **Section IX.A: Job Search Record**, below).

A. Capable and Available

A claimant will be disentitled if the Commission has evidence (often supplied inadvertently by the claimant) to show that the claimant was not capable and available for work during a given period. For example, if a claimant volunteers the fact that they are only applying for jobs paying $20 per hour or more, the Commission could disentitle the claimant if there are few if any such jobs for which the claimant would be suitable. For an example of how unforeseen events can affect availability, see *Canada (Attorney General) v Leblanc,* 2010 FCA 60. In this case, a desire to work was insufficient to establish availability because the claimant lacked proper clothing and a means to get to work as the result of a house fire.

1. Vacation and Travel

A claimant cannot collect benefits for times they are on vacation, as they must be ready for work to collect benefits. However, they can collect up to the day they leave, and from the day they return, if they become immediately available again. To avoid potentially onerous penalties, vacations – including short ones – **must** be properly recorded and reported.

The Customs Match program allows ESDC to match data from Canada Customs and Revenue Agency's Customs Declaration form to determine whether an EI claimant has been out of Canada without notifying ESDC. Under the *EI Act*, a claimant is **not allowed to collect regular or sickness benefits while not in Canada**, except under certain circumstances.

2. Sickness

A claimant may receive up to 15 weeks of sickness benefits where they can prove that they were "incapable of work by reason of prescribed illness, injury or quarantine on that day and that they would otherwise be available for work" (*EI Act,* s 12(3)(c)). In theory, if the claimant is already receiving regular benefits from EI and is ill for even one day, that day must be recorded as a day on which they are not capable of or available for work.

3. Attending Courses

Most claimants taking a full-time course will be considered unavailable for work unless the Commission or an agency authorized by the Commission specifically referred the claimant to the program. Even if the course is part-time and improves the claimant's chances of finding employment, the claimant may still be disentitled because they are considered unavailable for work. In these circumstances, a claimant may attempt to prove availability, if the course does not interfere with the job search and they would immediately be able to accept an offer of employment.

According to s 25(2) of the *EI Act,* a decision refusing to refer a claimant to a course is not reviewable under s 112. However, a claimant who takes a course without the Commission's approval can still appeal a finding that they are disentitled for not being available for work while taking the course.

Persons attending full-time courses not approved by the Commission may still be entitled to EI benefits if they have established their eligibility by working part-time while attending classes and if they are still available for their previous hours of work on virtually no notice.

4. Starting a Business

Claimants who are trying to start a business are generally considered to be working full-time, regardless of whether they are receiving any income from the business. They are therefore not eligible for any benefits. The only escape for such claimants is to convince the Commission, or the SST in an appeal, that the self-employment was so minor in extent that a person would not normally rely upon it as a principal means of livelihood.

5. Working Part-time

A claimant who worked part-time may be able to claim an earnings exemption. If the claimant receives any benefits at all, the week counts toward the maximum number of weeks that can be paid under that claim. Thus, it may be in a claimant's interest not to claim benefits for a week in which only a small amount would be paid.

B. Suitable Employment

A claimant must accept suitable work but is not required to take work considered not suitable. Most of the criteria that define 'suitable work' are contained in the *EI Regulations* s 9.002(1). They are as follows:

a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;
b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and
c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.

1. Proof of Search for Suitable Employment

Section 50(8) of the *EI Act* requires that a claimant prove they are making "reasonable and customary" efforts to obtain suitable employment. Again, this emphasizes the importance of keeping a job search record, which the claimant should update daily. The criteria are further elaborated in *EI Regulations*, s 9.001:

a) the claimant's efforts are sustained;
b) the claimant's efforts consist of:
    i. assessing employment opportunities;
    ii. preparing a resume or cover letter;
    iii. registering for job search tools or with electronic job banks or employment agencies;
    iv. contacting prospective employers;
    v. submitting job applications;
    vi. attending interviews; and,
    vii. undergoing evaluations of competencies; and
c) the claimant's efforts are directed toward obtaining suitable employment.

C. Disqualification

Disqualification can be imposed under s 27(1) through s 30(1) of the *EI Act*. The effects of disqualification differ depending on what category the disqualification falls into:

Section 27(1) and 28(1) of the *EI Act* state that a claimant is disqualified from receiving benefits for 7 to 12 weeks if, without good cause, they:

- refuse a suitable employment offer; or
- refuse to apply for suitable employment when aware that a position is vacant or is becoming vacant.

A claimant will be disqualified from receiving benefits for up to 6 weeks if the claimant:

- neglected to avail themselves of an opportunity for suitable employment;
- failed to attend an interview recommended by the Commission; or
- under s 27(1.1), has failed to attend a course of instruction or training referred to by the Commission.

The disqualification will be deferred if the claimant is otherwise entitled to special benefits. In other words, a disqualification under section 27(1) of the *EI Act* will disqualify a claimant from receiving regular benefits, but the claimant may still collect any special benefits to which they are entitled.

NOTE: In these cases, the length of disqualification is appealable.

Section 30(1) of the *EI Act* states that a claimant is disqualified when they are fired due to their own misconduct or when they quit without just cause. However, s 35 states that s 30(1) does not disqualify a claimant from receiving benefits if remaining in or accepting employment would interfere with the claimant's membership in a union or ability to observe a union's rules.

The effect of a s 30 disqualification is a cut-off of all regular benefits in a benefit period. Such a disqualification is imposed if the claimant has lost any job in the qualifying period for the reasons set out in s 30, even if the claimant had other work before applying for EI (s 30(5) and (6)). Only if the claimant has worked enough hours since the disqualifying loss of employment to meet the hourly requirements to establish a claim will the disqualification not be imposed. For example, if a worker is employed in a job for five years, and gets fired for misconduct, the worker would be totally disqualified under s 30 from all regular benefits. If the worker subsequently finds a second job and gets laid off from that second job after 10 weeks, the total insurable employment would be calculated as the number of hours worked during those 10 weeks **after** the earlier s 30 disqualification. The worker's previous five years of insurable employment would not count unless the worker had enough hours in the 10-week period to qualify under the s.7 table. In that case, the previous hours would count toward the number of weeks of payable benefits.

A disqualification under section 30(1) of the EI Act is suspended for any week the claimant qualifies for special benefits. In other words, the claimant will be disqualified from receiving regular benefits if they leave their employment without just cause or lose their job due to their own misconduct, but the disqualification will not prevent the claimant from collecting special benefits to which they are entitled.

Please note that the above section, disqualification, is temporarily changed until September of 2022. Please see the CRA website for the most up to date version of the rules. The temporary changes are the following: What is important is the reason of separation for the last severance.

1. Just Cause for Voluntarily Leaving Employment

"Just cause" is defined under s 29(c) as follows: "having regard to all the circumstances, the individual had no reasonable alternative to leaving the employment". Where an employee had "just cause" for leaving their employment, they will not be disqualified. The onus is on the worker to show "just cause". The Commission must show that leaving was voluntary and that the claimant took the initiative in severing the employer-employee relationship; the worker must then prove just cause.

The Decisions of the Umpires and the SST provide examples of what is and is not considered voluntary. Once the facts have been established to show voluntary leaving, the onus then shifts to the claimant to show that they had just cause. When the evidence of the employee and the employer contradict one another, and the evidence is evenly balanced, s 49(2) of the *EI Act* provides that the claimant shall receive the benefit of the doubt.

a) Statute & Case Law

Whether the employee had "just cause" for leaving their employment is decided with statutes and case law.

Sections 29(c)(i) – (xiv) of the EI Act provide a list of the circumstances that can constitute "just cause". This list is **neither exhaustive nor conclusive**. In other words, circumstances not described in s 29(c) can also be just cause if they satisfy the main definition in s 29(c). On the other hand, circumstances listed in s 29(c)(i) – (xiv) will not be considered "just cause" if the conditions in s 29(c) are not met (if, for example, the claimant had a reasonable alternative).

NOTE: To date, the only prescribed circumstance under s 29(c)(xiv) is *EI Regulations* s 51. This states that leaving employment when the employer is downsizing the business and the claimant's decision preserves the employment of another worker does constitute just cause.

For a claimant to prove just cause, they must show:

a) a genuine grievance, or other acceptable reason for leaving the employment;
b) proof of taking all reasonable steps to alleviate the grievance; and
c) proof of a search for alternate employment before the termination, unless circumstances are so immediate that a proper search is impossible.

In *Canada v Hernandez*, 2007 FCA 320 the claimant was disqualified for quitting his job after a public health nurse advised him that the silica dust which was a main material in the factory was a carcinogen. The court decided he did not exhaust his alternatives because he should have asked the employer to change its business or find him a new job somewhere else. While this case is an aberration, it shows the importance of being able to prove that the worker did everything possible to avoid quitting.

There are thousands of decisions by the Umpires, SST and Federal Court of Appeal addressing "just cause" issues that may help determine whether just cause existed. CUB 21681 (23 Sept. 1992) confirms that just cause may result from all of the circumstances together, although no single factor would be sufficient: "When the statute says 'having regard to all the circumstances', it imposes a consideration of the totality of the evidence." Thus, if the claimant's reason for leaving is not one of the listed factors under s 29 but the claimant feels that they

had no reasonable alternative to quitting or that they were fired without committing intentional misconduct, a case could still be made that the totality of the claimant's circumstances gives rise to just cause.

b) Importance of Evidence

Detailed evidence like records or diaries is exceptionally important in the determination of a claim. An employee should try to remember as many specific incidents, dates and times as they can. Though the older Umpire decisions or SST decisions may provide an indication of what "just cause" means, they are not determinative.

c) Returning to School

The Federal Court of Appeal continues to find that voluntarily leaving one's employment to return to school, except for programs authorized by the EI Commission, does not constitute "just cause" and is a ground for disqualification from benefits under ss 29 and 30 of the *EI Act*. Please refer to https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/courses-training.html#Declaring for the rules and the form for declaring your training.

In the case of *Attorney General of Canada v Mattieu Lamonde*, 2006 FCA 44, the court held that the claimant should be disqualified from benefits because he took a year's leave from his full-time job to attend school in another community, although he immediately found part-time work when he arrived there.

NOTE: While nothing in the legislation indicates that improving one's qualifications can never be just cause, the Court of Appeal continues to set aside decisions on this basis.

2. Misconduct

Section 30(1) of the *EI Act* states that a claimant is **disqualified** when they are fired due to their own misconduct.

a) Determining Misconduct

"Misconduct" is not defined in the *EI Act*, but previous decisions have stated that the word must be given its dictionary meaning.

The Federal Court of Appeal in *Mishibinijmia v Canada (Attorney General)*, 2007 FCA 36, provided a definition stating: "there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."

The alleged misconduct must be the real or the actual and direct cause for the dismissal, not merely an excuse for it. An employer cannot invoke previously forgotten or forgiven incidents to justify a dismissal.

The onus of establishing a misconduct allegation rests on the party alleging it. The Commission or employer must prove positively the existence of misconduct and must prove the misconduct caused the loss of employment. Refer to the

Umpire decisions for examples of what constitutes misconduct justifying lawful dismissal.

b) Dishonesty

In its decision in *McKinley v* BC *Tel*, [2001] 2 SCR 161, the Supreme Court of Canada held that an employee's dishonesty does not automatically constitute a blanket grounds for dismissal. Dishonesty is only grounds for dismissal "where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to [their] employer". This decision places a duty on the trial judge to determine whether the dismissal was warranted by the nature and degree of the dishonesty, or alternatively, whether lesser sanctions were appropriate. It is likely that the same principle could be applied to EI appeals. For an example of a situation where dishonesty did not amount to just cause see *Fakhari v Canada (Attorney General),* [1996] F.C.J. No. 653.

c) Theft

In the case of *Attorney General of Canada v Linda Caul*, 2006 FCA 251, the court decided that the claimant stealing from her employer, particularly given that the employee was in a position of trust, amounted to misconduct even though the employee acted foolishly or in desperation and the employer's response was 'overkill'.

d) Addiction

In *Mishibinijima v Attorney General of Canada*, 2007 FCA 36, the court examined whether an addiction has the element of willfulness necessary for a finding of misconduct. The court found that the applicant's evidence was too weak to support the claim that he was not acting willfully. The court left open the possibility that with stronger evidence of compulsion due to addiction a claimant might succeed in rebutting misconduct.

See also *Attorney General of Canada v Brent Pearson*, 2006 FCA 199, where despite his addiction the claimant was disqualified for misconduct. In that case, the employee knew that his absences were unacceptable and notwithstanding his employer's offers to help with the addiction the employee refused to take any such measures.

In *Canada v McNamara,* 2007 FCA 107, the claimant was fired from his job because he failed a random drug test due to trace amounts of marijuana. As a result of the test, the company operating the worksite refused to allow the claimant access to the worksite because he was in violation of a drug and alcohol policy. The court declined to overturn the disqualification, despite the argument that such illegal conduct - smoking a joint on the previous weekend - could not amount to misconduct for EI purposes. The case leaves open the question of whether there would have been misconduct because he had tested positive for marijuana, or because of the zero-tolerance policy denying him access to the worksite this amounted to misconduct.

In *Nelson v. AGC, 2019 FCA 222*, the claimant was fired for consuming alcohol outside of her work, which was a violation of a reservation by-law and a violation of the employer's policies, which were considered implied terms of the employment.

NOTE: Determinations of "just cause" and "misconduct" by the Commission can be appealed and where disqualification is imposed, a client should be advised to appeal. Many claimants mistakenly believe that they are automatically disqualified from EI if they have been fired, however unfairly. Unfortunately, many such claimants do not apply for EI benefits at all, or if disqualified do not realize that they can challenge the Commission's decision until their **30-day period to appeal** expires.

D. Disentitlement

Disentitlement means that the claimant is not eligible to receive benefits. This may be due to any of a number of reasons including:

- illness of a minor attachment claimant (s 21(1));
- the claimant is an inmate of a prison or similar institution, except when on parole (s 37(a));
- the claimant is absent from Canada, unless they fall within the category set out in s 55 of the *EI Regulations* (s 37(b));
- the claimant does not have childcare in place; or
- loss of employment due to a labour dispute (i.e. either a strike or lockout (s 36)).

However, the most common basis for disentitlement is that the claimant failed to prove that they are "capable of and available for work and unable to find suitable employment" (s 18(a)). As such, claimants should understand that they **must keep a job search record**.

Disentitlements can last indefinitely until the situation is remedied. Further, a disentitlement can be retroactive, which can lead to decisions of overpayment (see below). The *EI Act* places the onus on the claimant to prove entitlement on the balance of probabilities (s 49). In cases where the evidence as a whole indicates that the claimant's availability was doubtful, it might be held that the claimant had failed to prove that they were available for suitable employment. For example, if a person is disentitled because they have no child care arrangements, they may need to give the Commission the name of a relative or friend who will care for the child until a permanent arrangement can be made.

As discussed above, the longer the period of unemployment, the less "picky" the claimant can be in their employment search (see **section VII.B** for details). When claimants fill out EI application forms, they should not be too restrictive, especially about the wages they are willing to accept, or the distances they are willing to commute. Further, the Commission is likely to disentitle a claimant who is searching for a job that is virtually non-existent in the area the claimant is searching. Also, a former employee searching for a job in a field where the wages were atypically high can be disentitled if they restrict the search to jobs with similar wage levels. This can often be the case with formerly unionized workers.

Ultimately, the Commission will make a judgment call about whether the claimant genuinely wants to find work and whether their current strategy maximizes the chances of success.

VIII. PENALTIES, VIOLATIONS AND OFFENCES

A. Imposing Penalties

Sections 38 and 40 of the *EI Act* allow the Commission to impose a penalty of up to three times the weekly rate of benefit on a claimant who **knowingly** makes a false or misleading representation to the Commission in relation to their claim for benefits. The claimant must actually know that the statement is false or misleading, and the onus of proving this is on the Commission.

The court applies a subjective knowledge test to decide whether the claimant intended to make false statements to the commission. Following, *Canada v Gates* (1995), 125 D.L.R. (4th) 348, the Court in *David Moretto v AG Canada,* [1998] F.C.J. No. 438, confirmed that even if a claimant's statement is found to be false, no penalty should be levied unless the finder of fact is satisfied that the claimant "subjectively knew" the statement was false. It is not enough to say that they should have known, or should have asked someone, or that a reasonable person would have known.

B. Types of Penalties

Types of penalties include warning letters, penalties, monetary penalties, prosecutions, and violations (discussed below). Most often, the Commission chooses to issue a monetary penalty (a fine). For relatively minor cases, they may issue a warning letter.

Alternatively, a claimant could be prosecuted criminally (summarily). Section 135(3) of the *EI Act* sets the minimum fine at $200 for fraud relating to a person's employment and Record of Employment. The maximum fine is $5,000 and where appropriate, twice the amount of benefits falsely obtained, or the fine plus imprisonment for a term of up to six months (s 135(3)). The Commission need only write a decision letter to the claimant to impose a very large penalty, which is much simpler than proceeding with a court case, and the standard of proof is much higher in a criminal court than for the Commission.

1. Appealing a Decision to Impose a Penalty

If the Commission imposes a **penalty under s 38** (or s 39 in the case of employers), **a claimant should be advised to appeal** in all but the clearest of circumstances. Regardless of what the Commission says, it has the burden of proving that the claimant knew that the statement was false or misleading at the time it was made. If the claimant has a reasonable explanation (e.g. confusion regarding the intent of the question), the appeal should be allowed.

NOTE: The Commission cannot impose a penalty under ss 38 or 39 if 36 months have elapsed since the act or omission. For a case that discusses when time limits start to run see *Attorney General of Canada v Kos*, 2005 FCA 319. The key issue here was whether file notes by an insurance officer constituted a "decision" that triggered the time limit. The court ruled that it did not, in part because the notes were not communicated to the claimant.

2. Appealing the Amount of a Penalty

The SST has jurisdiction over the amount of the penalty assigned. While the amount of the penalty can also be appealed, a penalty cannot be reduced simply because the SST considers it a bit too high. However, they can reduce a penalty if the decision is unreasonable, e.g. where Commission has erred by ignoring relevant circumstances such as the claimant's ability to pay, or health problems, or where it took irrelevant

circumstances into account. It is not necessary to prove that the Commission was unfair, just that it was not made aware of all the relevant circumstances.

C. The Violation System

Section 7.1 of the *EI Act* outlines the increased qualifying requirements for claimants who are found to have committed fraud after June 30, 1996. These requirements increase depending on how the violation is classified (minor, serious, or very serious). If the Commission chooses to simply issue a warning letter (possibly accompanied by a fine), then as per s 7.1(5), no such classification is made.

1. Increased Number of Hours Required to Qualify

Section 7.1(1) provides that an insured claimant must have a greater number of hours to qualify if that person has accumulated one or more violations in the 260 weeks before making their claim. This adds a significant barrier to receiving benefits. The increased hours required to qualify after a violation are outlined in the ***s 7.1(1) Table***, on the following page:

Section 7.1(1) Table

Regional Rate Of Unemployment	**Violation Severity**			
	Minor	**Serious**	**Very Serious**	**Subsequent**
6.0% and under	875	1050	1225	1400
over 6.0% to 7.0%	831	998	1164	1330
over 7.0% to 8.0%	788	945	1103	1260
over 8.0% to 9.0%	744	893	1041	1190
over 9.0% to 10.0%	700	840	980	1120
over 10.0% to 11.0%	656	788	919	1050
over 11.0% to 12.0%	613	735	858	980
over 12.0% to 13.0%	569	683	796	910
over 13.0%	525	630	735	840

NOTE: Violations should always be appealed.

2. Issuing Violations

Pursuant to s 7.1(4), the Commission may issue a violation notice for:

- one or more penalties imposed under ss 38, 39, 41.1 or 65.1 as a result of acts or omissions mentioned in ss 38, 39 or 65.1;
- a finding of guilt for an offence under ss 135 or 136; or

- a finding of guilt of one or more offences under the *Criminal Code* as a result of acts or omissions relating to the application of the *EI Act*.

3. Classifying Violations

If a violation is found to have occurred, as determined by the above criteria, it must be classified for purposes of the ***s 7.1(1) Table***. The *EI Act* classifies violations in the following manner under s 7.1(5)(a):

a) Minor violation: if the value of the violation is less than $1,000;
b) Serious violation: if the value of the violation is less than $5,000 (but more than $1,000), it is a serious violation;
c) Very serious violation: if the value of the violation is over $5,000, it is a very serious violation.

Under s 7.1(6), the value of a violation for purposes of classification is the amount of overpayment of benefits resulting from acts on which the violation is based. If the claimant is disqualified or disentitled, the value is the total amount of benefits they would have collected, divided by two.

IX. KEEPING OUT OF TROUBLE

A. Job Search Record

Once a claim is established, the basic eligibility requirement to receive regular EI benefits is that claimants be able to prove that they are "capable of, and available for work and unable to find suitable employment". To help prove this, the claimant should keep a job search record. This may make disentitlement less likely and improve the chances of success should an appeal be necessary. In fact, the Commission may send to the claimant a form that is essentially a job search record. This is called an "active job search statement". The statement will require the claimant to provide:

- names of the businesses applied to and the names of the persons who interviewed the claimant;
- type of employment applied for;
- date of the application or contact;
- results of application.

Potential employers need not sign the statement or record. They, however, may be contacted by the Commission to confirm the facts reported. If the form is not returned, disentitlement may follow.

Even though an "active job search statement" may not be required, the claimant should keep a job search record with this same information. The job search record should include everything done to look for work. It should be made clear that every attempt or type of attempt counts (including such things as contacting family members about employment opportunities, "cold calling," etc.). The difficulty is that many claimants do not keep such records even though they have been warned to do so. In such cases, the claimant's representative can only do the following:

a) advise the claimant to keep such lists in the future; and
b) (if true) argue that the claimant did not know that they had to keep such a list, and that any list now composed from memory is not a complete one, as the claimant cannot remember the details of all the employment opportunities they pursued.

Every regular benefit claimant must also register with the Commission. Claimants should visit the job board at least once a week and record these visits. Many EI offices now maintain electronic job boards that can be accessed from computer kiosks in the offices, or from home, like the Canada Job Bank.

Claimants should also keep a record of all telephone calls and any other kind of contact for further evidence of job searching. Below is an example of a "job search record":

June 12 – 15: Checked *The Sun* and *The Province* want ads every day.

June 12: Phoned Ajax Plumbing: George Brown, Manager, said not to send in a written application, but to call back in a month.

June 13: Checked bulletin board at the Canada Employment Centre and copied down one possible job: phoned XYZ Deliveries, but position already taken.

June 14: Wrote letter to Acme Amigos: no response.

June 15: Searched Internet job sites from Frank's house. Printed out some likely prospects.

The claimant should make the job search record as detailed and complete as possible. Include friends contacted regarding job openings, and **all efforts** made to look for a job. The claimant must at all times try to convince the Commission that they are making a great effort to find a job.

B. Interviews with an Investigation and Control Officer

At some point, the claimant may be summoned to the local EI office for an interview regarding their job search. Typically, the Investigation and Control Officer asks the claimant questions and makes a "Report of Interview," which is later reviewed by an Insurance Officer who will, on the basis of the Report, decide whether or not benefits are to continue. The claimant does not need to sign or affirm the report, though it is supposed to be read to them, and a copy should be provided for the claimant's records.

The Commission can disqualify a claimant for 7-12 weeks if the claimant fails to attend, without good cause, an interview the Commission asks them to attend (*EI Act*, s 27(1)(d)). The claimant must either attend the interview or phone to make a new appointment and confirm the new appointment in writing.

1. Keeping the Record Straight

To protect against a potentially misleading report, the claimant should try to be as general as possible in their report. However, telling the truth during the interview is imperative. For example, the client should state, if true, that they would accept the going rate rather than stating their desired wage.

If the claimant decides, after the Report is read to them, that it is incorrect or misleading, the claimant should tell the Officer immediately because the Officer may correct the report immediately. If the Officer refuses or if the claimant later decides that they disagree, the claimant should write a letter stating their position. This is important since an appeal may be necessary and such an immediate reaction by the claimant may convince the Board of their honesty and integrity. It may also lead to the earlier reinstatement of a claimant who is disentitled for unreasonably restricting their job search.

2. Disputing the Report at an Appeal

If there is a disentitlement based on the Report of Interview and an appeal follows, the SST may be willing to accept explanations and modifications of the report. There must be evidence to support these modifications. Further, their usual position will be that since the statement was read to the claimant, it must be true. There is an established principle supported by several court decisions to the effect that "statements made before disentitlement are to be believed more than statements made after disentitlement," the latter suspected of being self-serving. One effective way for a claimant to demonstrate willingness to accept wages lower than the figure stated on the application form or in an interview report is to prove that they actively pursued a job possibility paying a lower amount after learning what the salary was.

C. Reporting

In order to receive continued benefits, individuals must send in reports on a regular basis. They are usually due and cover every two calendar weeks (from Sunday to Saturday). There are three ways to send in these reports:

1. the Telephone Reporting Service;
2. the Reporting Service by Internet at http://www.servicecanada.gc.ca/eng/ei/service/interdec_report.shtml#How; and
3. the paper "Report Card" system.

The timing and due dates of these reports depend on each individual claim. This information will be available to each claimant shortly after applying to EI when the Benefit statement and Access Code is received in the mail.

NOTE: The paper "Report Card" method is only available to a claimant who cannot otherwise transmit their report card online or by phone. The standard ways of processing and paying EI benefits are the Reporting Service by Internet and the Telephone Report Service.

1. What to Include in Reports

Be careful to include the following in each report:

- gross income;
- earnings for the week they are earned, **not** the week they are received; and
  - all money received and declared should include some reference to the source and reason for the payment since it may or may not count as earnings (*EI Regulations*, s 35).
- Money received from a private or individual insurance plan paid for by the claimant should not be included.

The information given must be accurate, otherwise, the claimant could be accused of a false or misleading statement. If the claimant needs to update a report, for example, to change the amount of earnings reported, they should call the Telephone Reporting Service immediately. The Commission has a policy that they will not charge or prosecute a claimant for giving false or misleading information if the claimant volunteers the correct information before an investigation begins.

X. TIMING FOR REPORTING

Individuals should pay special attention to report due dates. Each claim has its own due dates, and the specific timing for meeting these due dates can differ between the telephone, internet and paper systems. For example, all Telephone Reporting Service reports made on the weekend are processed at 3:00 p.m. Sunday.

Claimants must complete their reports throughout the claim period whether or not they are receiving benefits (for example, during the waiting period or a period of disqualification). When an appeal is pending, reports must continue to be made because if the appeal is successful, the claimant may find that there will be no payment for any week for which no report has been made (*EI Regulations*, s 26).

Individuals on pregnancy, parental, and sickness benefits have a responsibility to report if they earn anything but they do not have a responsibility to make routine reports.

NOTE: Workers whose weekly income amounts tend to fluctuate (e.g. trade workers) should try to estimate as carefully as possible when providing an income figure. Those claimants who either err on the side of caution by declaring an amount that is too high or those who under-declare their actual income may be deemed by the Commission as providing "false or misleading information" and may incur penalties. The best way to avoid penalties is to always inform the Commission of the exact amount as soon as it is known to be correct. Also, an appeal should be filed immediately if a claimant is penalized for an inaccurate estimate of weekly earnings. The test for a penalty is that the claimant **knew** that the information they were giving was false. Honest attempts to predict actual earnings should not lead to penalties, even when it results in an overpayment of benefits.

A. Documents

It is generally a good idea to fill in all the documents the Commission requires and to return them immediately, since failure to do so may involve delay, if not disentitlement. **Keep copies of all documents in chronological order.**

B. Delays

One of the greatest difficulties with EI is delay. Often the delays are related to report cards and, in certain cases, it is possible to get the insurance officer to use their "backup manual pay system" rather than waiting for the computer. If this is done, the claimant may get their money quickly.

Another solution to delay may often be to hassle the Commission. In extreme cases, you may wish to consider writing to the Minister (Employment and Immigration) with copies to the claimant's Member of Parliament, or to opposition critics. See **Chapter 5: Public Complaints Procedure**.

C. Self-Employment While Claiming EI

Unlike employees, self-employed people and independent contractor are not automatically covered by the EI system. These workers have the option of opting into the EI system, in which case they may be entitled to receive certain special benefits, but not regular benefits.

Even though self-employed people and independent contractors are not automatically covered by the EI system, claimants may get into trouble if they try to start up a business while collecting EI after losing their job. Contrary to many claimants' belief, self-employment amounts to "working" within the meaning of the question on the weekly reports even if the person has no expectation of receiving any income from it. Section 30 of the *EI Regulations* provides that, in most cases, a claimant engaged in self-employment is deemed to have worked a full week, unless the self-employment is "so minor in extent that a person would not normally follow it as a principal means of livelihood". Failure to report such activity will usually lead to overpayments and penalties or

charges for misrepresentation. Decisions by the Commission on overpayment and/or the imposition of penalties should always be appealed

If a claimant wishes to start a business while on EI, they should contact the Commission **before** doing anything to pursue self-employment. Special benefits may be available if the claimant enters an approved self-employment agreement for the development and implementation of a business plan.

XI. OVERPAYMENT AND COLLECTIONS

A. Overpayments

If the Commission pays a claimant more than that claimant is entitled to, whether through the claimant's fault or the Commission's, the Commission is entitled to recover the overpayment (*EI Act*, s 43). The Commission may deduct the overpayment from any benefit payable to the claimant, or Commission's Collections Branch may contact the claimant to recover the overpayment (s 47). The Commission must send written notice, stating the existence of the overpayment and why it occurred, as well as explaining the right to appeal within 30 days.

If the overpayment results from a reconsideration of a decision involving an element of judgment or discretion by the Commission (often as part of a random "audit"), an appeal should be filed. Umpires have ruled that the Commission does not have the right to second-guess its previous determination of such questions (such as just cause, misconduct, and availability) unless there are significant new facts it could not have learned about when the initial decision was made.

1. Interest Regulation

EI claimants are required to pay interest on outstanding overpayments and penalties arising from what the Commission considers fraud or misrepresentation.

No interest will be charged on debt that arises from the Commission's errors in benefit payments. Where the claimant has appealed the decision that establishes the overpayment or penalty, no interest will be charged during the appeal process, and claimants will be reimbursed interest payments made before the appeal if the Referees or Umpire decide that there was no fraud or misrepresentation.

B. Time Limits

The statutory limitation on collection of overpayments is six years after declaring the overpayments, excepting the periods during which an appeal is pending. The Commission has three years to discover the debt. Periods of appeal do count in this assessment. If an overpayment is due to fraud, the Commission has six years to discover and six years to recover the amount. However, the Commission is not allowed to impose a penalty more than 36 months after the offence.

C. Write-off of Overpayment or Other Amounts Owed

Section 56 of the *EI Regulations* specifies various circumstances in which a benefit wrongly paid may be written off and not be recollected. The most useful provision allows a write off when in all circumstances:

- the sum is not collectable; or
- repayment would result in undue hardship to the claimant (s 56(1)(f)(ii)).

Regulation 56(2) provides for an almost automatic write-off of amounts paid more than a year before notification of the claimant and resulting from the Commission or employer's error.

Claimants seeking information about the amount of repayment debt may contact Service Canada.

Service Canada Information Line
1-800-206-7218

For information about collections and repayment, claimants can contact the CRA:

CRA
1-866-864-5823

A claimant may not apply for reconsideration of a decision refusing to write off an overpayment. However, according to the Digest of Benefit Entitlement Principles, the claimant or their representative may ask for an appraisal of the situation when a write-off is not granted, or a further appraisal at a higher level in the case of further complaint (20.9.0). This does not amount to a formal reconsideration and the decision cannot be appealed to the SST.

D. Benefit Repayment

Under s 145(1) of the *EI Act*, a claimant whose income for the taxation year exceeds one and one-half times the maximum yearly insurable earnings is liable for the repayment of the lesser of:

- 30 percent of the total benefits paid to the claimant in the year; or
- 30 percent of the amount by which the claimant's income exceeds one and one-half times the maximum yearly insurable earnings.

The benefit repayment scheme is administered and enforced by the Minister of National Revenue (s 148). A claimant will estimate on their tax form the amount of benefit repayment payable by them(s 147).

XII. RECONSIDERATION

Before appealing to the Social Security Tribunal, a claimant must first submit a Request for Reconsideration to the EI Commission within 30 days. Upon receipt of a Request for Reconsideration, a Service Canada employee, other than the one who made the original decision, will review your case, including any new information provided in the Request. The Service Canada employee will also conduct any additional investigation that may be required, including clarifying the circumstances, and obtaining relevant documents related to the employment. The Service Canada employee will use this information to make the EI Commission's final decision on the claimant's claim.

The Request for Reconsideration form can be found at the following link:

http://www.servicecanada.gc.ca/eforms/forms/sc-ins5210%282014-04-007%29e.pdf

This request must be submitted to Service Canada within **30 days** after the date the decision was communicated to the claimant. If the 30-day period has passed, a claimant may still submit a request for reconsideration with an explanation for the delay. The EI Commission will consider the reasons for the delay and decide whether to allow the request. This process is **free**.

The Commission will not provide a copy of the claimant's EI file when a Request for Reconsideration is submitted. Instead, the claimant must make a request for their file under the *Privacy Act.* This can be done in one of the following ways:

By mail: http://www.tbs-sct.gc.ca/tbsf-fsct/350-58-eng.asp
Online: https://atip-aiprp.apps.gc.ca/atip/welcome.do

Obtaining a copy of the claimant's file may be the only way to see material submitted by the employer, which will be especially important in cases where misconduct or just cause for leaving employment is the subject of the appeal.

The claimant will be informed in writing of the decision following the Reconsideration. If the decision is unfavourable to the claimant, a Service Canada employee will provide a verbal explanation.

A. What can be Reconsidered (and later appealed)

Most decisions of the Commission may be Reconsidered. For example, claimants are eligible to request a Reconsideration if the original decision:

- Refused EI benefits;
- Ordered that EI benefits received be repaid;
- Issued a warning letter or notice of violation; and/or
- Imposed a penalty.

B. What cannot be Reconsidered (and later appealed)

The following issues cannot be Reconsidered:

- certain discretionary benefits, such as training courses, employment (training) benefits and work-sharing, see above and the *EI Act* ss 24, 25, and 64; and
- insurability issues, which are subject to a separate decision-making and appeal process that must be appealed to the Minister of National Revenue, the Tax Court. (see **Section III.A: Insurable Employment**, and ss 90 – 105 of the *EI Act*).
- decisions concerning the write-off of debt from overpayment or penalty (*EI Act*, s 112.1)

- decisions concerning the election between the old and new formulae for earnings while on a claim (*EI Regulations* 77.96(8))

1. Insurability Decisions

Certain decisions concerning "insurable employment" must be appealed to the CRA or the Minister of National Revenue. These appeals can be found in s.90(1) of the *EI Act*.

For an example of the appeal process, consult *McPhee v Minister of National Revenue*, 2005 TCC 502. In deciding whether the claimant was an employee or an independent contractor, the court allowed a consideration of the parties' intentions.

It is crucial to analyze the dispute and file the correct type of appeal. In doubtful cases, it can be wise to do both – file an appeal and ask the CRA for a ruling.

XIII. THE SOCIAL SECURITY TRIBUNAL (SST) OVERVIEW

If the claimant is unhappy with the decision following the Reconsideration, the claimant may file an appeal to the SST. General information about the Tribunal appeal process can be found at: http://www.canada.ca/en/sst/index.html

A comprehensive guide to appeals to the General Division and Appeals Division called "Challenging A Decision About Your Employment Insurance Claim: Reconsideration and the Social Security Tribunal" can be found on the Community Legal Assistance Society website at http://www.clasbc.net/self_help_guides.

A. General Division

The SST must receive a claimant's appeal **within 30 days** of the claimant's becoming aware (including being told in a phone call) of the Reconsideration decision. There are two ways to file an appeal:

1. Fill out the Notice of Appeal to the SST General Division – EI form and e-mail, mail or fax it to the SST. The form can be filled out on the computer and then printed or printed and filled out by hand. This form is accessible at the following link: https://www1.canada.ca/en/sst/forms/noa-gd-ei-en-v2.pdf

   If the claimant is unable to print the form, the claimant may contact the SST and the Tribunal will send the form to the claimant.

2. Write the SST a letter of appeal containing *all* the information required in the form. If the claimant fails to provide all of the information required, the appeal may not be accepted.

Upon receiving an incomplete appeal, the Tribunal will send a letter to the applicant asking them to file all missing information within 30 days of the date of the letter. If the applicant does this, the Tribunal will consider the appeal to have been filed the date of the original incomplete application for the purposes of meeting the deadline to file an appeal.
Once the SST receives a completed notice of appeal, it will notify Service Canada of your appeal.

If a claimant submits an appeal form after the 30 days, the claimant can request an extension in the form. However, the decision is ultimately up to the Tribunal's discretion as to whether to grant the extension.

When a Notice of Appeal is received, a Tribunal Member will be assigned to the claimant's file. The Member will review the file and will **dismiss any file which the Member decides has no reasonable chance of success**. The SST will notify the claimant if they are considering summarily dismissing an appeal and provide the claimant with an opportunity to make additional submissions before the appeal is dismissed.

If the appeal is proceeded with, there are several types of hearings available:

- Written: The Member will ask the claimant questions and request a written response by a certain date
- Telephone
- Videoconference
- In-Person

The Member will choose the type of hearing to be used. The Tribunal will telephone or write to the claimant to arrange the hearing.

Following the hearing, the Member will send the claimant a copy of the decision.

1. Discretionary Decisions

Discretionary decisions such as the Commission's refusal to extend time, or its decision regarding the length of disqualification, can only be reversed if it is decided that the original decision:

a) ignored or failed to consider a relevant factor, including something the Commission was unaware of, such as health problems or other mitigation;
b) acted on an irrelevant factor;
c) committed a jurisdictional error; or
d) acted against the principles of natural justice, such as acting with bias or bad faith.

The issue is whether the Commission's exercise of discretion in the original decision was reasonable. However, where the Commission has failed to consider relevant evidence, or where there is new evidence presented for the first time by the claimant, the reviewer can exercise remedial authority by making the decision that should have been made. It is rarely difficult in a deserving case to show that the Commission has disregarded some relevant fact.

2. Amount of Penalty

Courts have also determined that the *amount* of a penalty for making false statements may also be appealed only to the extent that in coming up with the amount of penalty, the Commission committed an error, such that the decision or the decision-making process was unreasonable. That said, as above, one can often find some relevant "fact" that the Commission failed to consider.

Keep in mind that the decision to apply a penalty can always be appealed.

B. Re-opening a Decision

A claimant can apply to the Commission or the SST to rescind or amend a decision if there are new facts or the decision was made without knowledge of, or was based on a mistake as to, some material fact. This application can only be made once and must be submitted within one year of the decision. For more information, use the following link:
http://www1.canada.ca/en/sst/ap/eigd-rescind-amend.html.

C. Appeal Division

The Appeal Division of the SST must receive a claimant's appeal **within 30 days** of the claimant's receipt of the General Division's decision. There are two ways to file an appeal:

1. Fill out the Application to the Appeal Division – Employment Insurance form and mail or fax it to the SST. The form can be filled out on the computer and then printed or printed and filled out by hand. This form is accessible at the following link:
   https://www1.canada.ca/en/sst/forms/lta-ad-ei-en-v1.pdf.

   If the claimant is unable to print the form, the claimant may contact the SST and the Tribunal will send the form to the claimant.

2. Write the SST a letter of appeal containing all the information required in the form. It is important to ensure that all the required information is included.

If a claimant submits an appeal form after the 30 days, the claimant can request an extension in the form. However, the decision is ultimately up to the Tribunal's discretion as to whether to grant the extension. When a Notice of Appeal is received, a Tribunal Member will be assigned to the claimant's file to decide whether to grant permission to allow the appeal to proceed. The grounds for appeal to the Appeal Division are:

- The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction
- The General Division erred in law in making its decision
- The General Division based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the evidence before it

A claimant will be informed in writing if their application for permission to appeal is dismissed. Permission is not required when appealing a General Division decision to summarily dismiss the appeal.

If permission is granted for the appeal, the parties have 45 days to provide submissions. If no submissions are received, the Member will decide whether to allow the appeal to proceed based on the documents or submissions on file.

In some cases, the Appeal Division will decide solely on the basis of the written record and submissions, and the Member will decide if a hearing is necessary. The hearing process used is the same as the General Division.

Following the hearing, the Member will send the claimant a copy of the decision. The decisions of the Appeal Division are subject to review under the *Federal Courts Act.*

XIV. APPEALS TO THE SST GENERAL DIVISION

A. Appeal Docket

The Commission receives and reviews the appeal letter and, unless convinced to reverse its decision by the information contained in it, will set the place and date of appeal and send the claimant and the employer an "Appeal Docket". The docket contains all documents from the Commission's file regarding the claim that it considers relevant to the issue. The docket is given to the claimant, the General Division, and to the employer if the employer asks to participate.

The docket should be carefully reviewed, as the appeal must meet the Commission's argument and evidence. The docket includes the "Representations of the Commission to the General Division", which is basically the Commission's written argument supporting its decision. Otherwise, the Commission usually does not appear at the hearing.

B. Preparation for Appeal to the General Division

When reviewing the docket and preparing for the appeal, the claimant and their representative should consider the:

1. "Representations of the Commission to the General Division" (this is the Commission's justification for its decision);
2. evidence relied upon by the Commission; and
3. Umpire decisions or now SST Appeal Division decisions cited by the Commission.

The docket contains most of the relevant documents and also summarizes all statements made by the claimant to the Commission, as well as the Insurance Officer's decision and comments. Read the docket carefully and be prepared to comment on it.

In many cases, the claimant may have to explain that the statement does not accurately reflect what they really intended to say. For example, the claimant did not mean to say that they would only work for $12.50 per hour and no less. Rather, the claimant meant that they would prefer $12.50 per hour but would work for the going rate. The claimant will have to overcome the SST's inclination to believe what the claimant said in their statement as opposed to what is being said now, after disentitlement. The claimant must convince the SST of their honesty.

Under the *Privacy Act*, R.S, 1985, c. P-21 a claimant has a right to access the entire claim file, whether there is an appeal pending or not. This may include the documents that are not part of the docket because the Commission did not consider them relevant. If details of the Commission's record may be important to the outcome, the advocate should ask for full disclosure of all relevant files.

The jurisprudence on EI includes more than 80,000 decisions of the Umpire, along with perhaps a thousand or so decisions of the Federal Court of Appeal and the Supreme Court of Canada. Most of these decisions can be found (and searched by keywords) on CanLII or the Social Security Tribunal Website at https://www1.canada.ca/en/sst/ad/index.html. A claimant or representative should always read the cases upon which the Commission is relying. Often the quoted excerpt is taken out of context, and the facts are so different that the case can be easily distinguished, or even used to support the appeal.

Any exhibits, cases, or written arguments should be submitted to the General Division ahead of the hearing date, if possible. This will give the Tribunal a chance to familiarize themselves with the materials, and make more efficient use of the hearing. The Tribunal will accept new evidence at the hearing but may adjourn it if the material is lengthy.

Service Canada's EI website contains links to the legislation, the jurisprudence library an index of jurisprudence, as well as the General and Appeal division website. The website is available at http://www.servicecanada.gc.ca/eng/sc/ei/index.shtml.

C. Hearings Before the General Division

1. Claimant's Preparation

The claimant should be neat in appearance, be prepared to submit a job search if relevant, and be prepared to present the facts of their situation. The claimant should also be prepared to answer questions directly and clearly.

In cases where credibility is crucial, claimants may consider preparing a sworn affidavit or statutory declaration of the evidence if the facts are in dispute, since sworn evidence carries greater weight. The affidavit or declaration can also form a useful "record" of the claimant's case and is especially useful in cases where there are contradictory statements.

2. Representative's Preparation

The representative should also be neatly dressed, which in the case of LSLAP clinicians means courtroom clothing. The representative should:

a. prepare a legal basis to allow the appeal, using the *EI Act*, *EI Regulations*, Digest, and jurisprudence;
b. spend some time before the hearing with the claimant reviewing facts, explaining legal arguments and anticipating questions;
c. meet with witnesses, explain Tribunal procedure, and review with them the questions that will be asked of them at the hearing;
d. prepare a written list of points to be made in the claimant's favour. This is to ensure that if and when "sidetracked" by the General Division, none of the points will be forgotten. It will also be helpful in "making a record" to give to the General Division; and
e. prepare a written submission summarizing the main points of evidence and arguments. This fills in the gaps in the oral arguments and becomes part of the "record" for later appeals to the Appeal Division or the Federal Court.

3. Procedure at the Hearing

The General Division generally takes a "common sense" approach rather than a highly legal approach to the proceedings and is usually interested primarily in the evidence. The claimant's appearance, attitude, and presentation of facts are all important. An hour spent familiarizing the claimant with the procedure and preparing them for the types of questions the General Division will ask is usually more valuable than an hour spent mulling over the nuances of the *EI Act*. That said, the Tribunal will not allow an appeal if they do not believe they have the authority to do so, whatever sympathy they may have for the worker.

Rules of evidence generally do not apply to General Division hearings. An objection on a "technicality" may upset the General Division and jeopardize the claimant's success. However, the General Division will agree that the hearing is only to decide the questions placed before it and may accept an objection that a question is irrelevant to the issue before the Tribunal. Often decision-makers find that the evidence of a claimant that appears before them is entitled to more weight than the hearsay statement of the employer to an EI agent in a telephone conversation.

In most cases, the hearing will be taped. In the absence of a request to not tape the hearing, the General Division will typically have the hearing taped. The claimant may request to have the hearing taped if the General Division chooses not to. It is **strongly advised** that every claimant ensure that the hearing be taped, as this provides a record of the evidence, and also shows whether the General Division gave a fair hearing.

4. Evidence at the Hearing

a) Claimant's Evidence

The claimant should then be asked to tell the General Division their version of the relevant facts. The advocate may ask leading questions (requiring a simple "yes" or "no" answer) for all matters not really in dispute, or relate the non-controversial facts directly to the General Division members. However, it is important to let claimants tell crucial facts in their own words. At any point, the General Division itself may ask questions of the claimant or witnesses, or may query parts of the legal argument that it does not understand. A well-prepared claimant can make a good impression if answers are given in a clear, straightforward manner. The claimant should be sure to make eye contact with the General Division members when addressing them.

Ryan v Attorney General of Canada, 2005 FCA 320, is a useful case because the court reconsidered the weight of some claimant evidence. The court contradicted the general line of reasoning that evidence given by a claimant in response to the Commission's accusations is inherently less believable.

b) Submissions: Disputing the Commission's Case

Following the presentation of documents, the claimant's evidence, and any other witnesses, the representative should summarize the facts and evidence in the client's favour and make legal arguments if applicable. The representative should point out fallacies in the Commission's argument and distinguish the cases relied upon by the Commission.

c) Payment of Benefit Pending Appeal: Not Recoverable

Benefits are not payable in accordance with a decision of the General Division SST if, within 21 days after the day on which a decision is given, the Commission makes an application for leave to appeal to the Appeal division on the ground that the General Division has erred in law, according to s 80 of the *EI Regulations*. If benefits are paid to the claimant and the Appeal Division allows the Commission's appeal, the benefits cannot be recovered. In practice, however, when the Commission appeals it always alleges an error of law, and files within 21 days. This avoids the need to pay benefits while the appeal is pending.

XV. JUDICIAL REVIEW IN THE FEDERAL COURT OF APPEAL

If a claimant disagrees with the decision of the Appeal Division of the Social Security Tribunal, the claimant can file a Notice of Application in the local Federal Court Registry for judicial review by the Federal Court of Appeal, on grounds set out in ss 28 and 18.1(4) of the current Federal Court Act. These are very similar to the grounds for appeal to the Appeal Division of the Social Security Tribunal.

The application must be made within **30 days** of the time that the decision was communicated to the applicant, or within such further time as the Court of Appeal may allow. At this stage, qualified counsel is almost essential. Contact the Community Legal Assistance Society if this situation arises. See **Chapter 5: Public Complaint Procedure** for more information regarding judicial review.

XVI. LSLAP'S USE OF THIS CHAPTER

A. What LSLAP Can Do

The following is a summary of what LSLAP students can help with:

- Assist a client with an initial application;
  - Assist a client with an application for training benefits or write-off of debt;
- Assist a client with an application for Reconsideration
- Appeal any unfavourable decision by the Commission:
  a) write a Notice of Appeal;
  b) prepare for an appeal to the General Division;
  c) appear at hearing before the General Division;
- Assist a client with an appeal to the Minister of National Revenue;
  - Appeal unfavourable decisions by the General Division to the Appeal Division; and
- Help clients cut off from EI benefits write a letter of complaint to their MP.

B. What LSLAP Cannot Do

LSLAP cannot represent clients seeking judicial review of decisions made by the Appeal Division, because these are argued in the Federal Court of Appeal (and then, in the event of a further appeal, the Supreme Court of Canada). LSLAP students cannot appear before these courts. Clients can be referred to the Community Legal Assistance Society (CLAS), as qualified legal counsel will be required.

C. Authorization for Representatives

If a student plans to act for a claimant, or obtain information from the Commission on their behalf, the student should have the claimant sign an authorization form:

EMPLOYMENT INSURANCE COMMISSION:

I, _____, SIN# ____ ____ ____, hereby authorize you to release any and all information required by _____, or the (University of British Columbia) Law Students' Legal Advice Program, which they may request of you.

DATE:

In addition, the claimant should complete a Personal Information Request Form (available from LSLAP's office) to obtain all documents, memos, notes, e-mail messages, and other records pertaining to the EI claim. An electronic copy of the form is also available online at https://www.tbs-sct.gc.ca/tbsf-fsct/350-58-eng.asp.

XVII. APPENDIX A: CHECKLIST FOR INITIAL APPLICATION TO EI

A. Advice if client has not yet applied for EI

1. Apply immediately

- Apply during the first full week of unemployment when possible.
- Do not miss your deadline to apply simply because you do not have the ROE. If necessary, apply without the ROE.
- If the application was not filed in the first week, then the claimant should ask for the claim to be "antedated" to the date it should have been filed. "Good cause" must exist to justify each day it was delayed prior to applying (see **Section V: The Benefit Period**).

2. Warning

Statements made unwittingly over the phone can be used to disqualify the claimant.

3. How long does it take to process the application?

- Generally around four weeks, depending on administrative delay. Benefits can be retroactive if there is an administrative delay.
- **Emergency financial support** can be obtained from income assistance: this **must be repaid** when the client receives EI.

4. Reason for leaving

a) Did you leave voluntarily?

- Why did the claimant leave?
- Was there "just cause" (see **Section VII.C.1: Just Cause for Voluntarily Leaving Employment**)?
- The Commission's determination of "just cause" can be appealed to the General Division.

b) Were you fired?

- Why was the claimant fired?
- Was there "misconduct" by the claimant (see **Section VII.C.2: Misconduct**).
- The determination of "misconduct" can be appealed to the General Division.

5. Qualifying for EI

a) Availability

Are you available for work?

- Caring for others may mean you are **not** available for work. What arrangements for childcare, for instance, have you made when you obtain work?
- Studying full time will likely mean you are not available for work.
- Studying part-time may also mean you are not considered available for work. You will have to prove availability, i.e. that a course does not interfere with the job search (see **Section VIII: Benefit Entitlement**).
- You cannot be on vacation.

- Narrowly restricting your salary expectations, the type of work sought, the work location, or your work schedule can result in a determination that you are **not** available for work.

b) Capability

Are you capable of working?

- You cannot be ill or injured or otherwise incapable of working to qualify (see **Section IV.C: Sickness Benefits** and **IV.F: Pregnancy Benefits**).

c) Unable to find suitable employment

- Were you offered employment that was unsuitable?
- Were you offered employment in the same occupation for **lower pay** in **poorer working conditions**?
- Were you offered employment in a different occupation, but at **lower pay** in **poorer working conditions**?

Keep a Job Search Record (see **Section IX.A: Job Search Record**)

- Where have you sent resumes? Write down the date, and the names, addresses, and phone numbers of companies contacted**.**
- Names of people who you spoke with.
- What dates did you check the job postings board?
- Have you participated in any job search clubs?

6. Appeal any unfavourable decision

- Begin with a request for the unfavourable decision to be reconsidered by the CEIC.
- If the reconsideration decision is still unfavourable, submit a written application to the General Division of the SST. Appeal applications must be submitted within 30-calendar days of receipt of the reconsideration decision. (see **Section XIII: The Social Security Tribunal (SST) Overview**)