



Employment Insurance

January 1, 2014

<http://www.dal.ca/faculty/law/dlas/public-legal-education.html>

Acknowledgement

Dalhousie Legal Aid Service would like to gratefully acknowledge and thank the [Law Foundation of Ontario](#) for its financial support of LEAP.

Disclaimer

This document contains general legal information and not legal advice. **If you need advice about a specific legal problem then you should contact a lawyer.** If you will have difficulty affording a lawyer then you should contact [Nova Scotia Legal Aid](#) or [the Legal Information Society of Nova Scotia's lawyer referral service](#).

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Qualifying for EI

Legislative Framework

Employment Insurance is governed by the *Employment Insurance Act*:
<http://laws-lois.justice.gc.ca/eng/acts/E-5.6/>

There are also *Employment Insurance Regulations*:
<http://laws-lois.justice.gc.ca/eng/regulations/SOR-96-332/>

The *EI Act* establishes several types of benefits. This document will focus on regular EI benefits.

Qualifying for EI

There are two basic initial qualifying criteria that must be met by an EI claimant:

- i. **Interruption of Earnings** – for a claimant for regular EI benefits this essentially means the claimant is no longer employed. There must be no work performed and no income from employment for 7 consecutive days in order to constitute an interruption of earnings; and
- ii. **Hours of Insurable Employment** – a claimant must have enough hours of insurable employment during their qualifying period (usually the 52 weeks leading up to their application). The hours required are based on the regional rate of unemployment. Generally a claimant will qualify for EI if they have worked 700 hours during their qualifying period. The number of hours required for EI per region can be found here:
<http://srv129.services.gc.ca/rbin/eng/geocont.aspx>

Insurable Employment

An EI claimant's hours must come from insurable employment. If there is a dispute about whether the employment was insurable or not that issue is dealt with by the Canada Revenue Agency (CRA)

If your client is unsatisfied with the CRA's decision they have **90 days** from the date they receive it to appeal to the Tax Court.

A publication explaining how to appeal the CRA's decision re insurable employment can be found here:
<http://www.cra-arc.gc.ca/E/pub/tg/p133/README.html>

If possible you should speak with a lawyer if you have a client facing this situation.

Additional Hours

One circumstance in which a claimant will require more than 700 hours is if they have committed a violation or violations (i.e. be found to have made false and misleading statements on a previous EI claim) within the past 5 years.

The seriousness of the violation or violations will determine how many additional hours are required to qualify for EI.

Another circumstance requiring increased hours is if someone is a new entrant or reentrant in the labour force. Someone is a new or reentrant if they have less than 490 total hours of workforce attachment during the year prior to their qualifying period (examples of workforce attachment include insurable employment, receipt of EI benefits, workers compensation, etc...). An exception to this rule is if someone received parental or pregnancy benefits in the 4 years prior to that year they are not considered a new or reentrant.

New or re entrants require 910 hours of insurable employment to qualify for EI.

Applying for EI & Appeals

Application Process

There are two ways to apply for EI benefits. Online, at:
<http://www.servicecanada.gc.ca/eng/ei/application/employmentinsurance.shtml>

Or in person at your local Service Canada office.

In order to process an EI application a claimant must have all of their Records of Employment (ROE) from the past 52 weeks.

If someone is experiencing difficulty in obtaining their ROE's they should contact Service Canada at 1-800-206-7218.

Appeals

Reconsideration

If a claimant's application for EI is denied they may request reconsideration of the denial **within 30 days** of the date they received the decision letter.

The form to request reconsideration is found here:
<http://www.hrsdc.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=ins5210&ln=eng>

Social Security Tribunal

If a claimant's request for reconsideration is denied they have another chance to appeal to the new Social Security Tribunal (SST). The SST is composed of a general and appeal division as well as an EI and Income Security section.

The SST began hearing EI cases as of April 1st, 2013. It replaced the Board of Referees and the Umpire which previously heard EI appeals.

While the Social Security Tribunal is a new body it still subject to the previous case law on EI.

Process

A claimant has **30 days** from the receipt of the letter indicating that their reconsideration was denied to request an appeal to the Social Security Tribunal General Division EI Section.

Instructions on how to appeal an EI denial, along with the required forms, can be found at the Social Security Tribunal's website here:
<http://www.canada.gc.ca/sst-tss/hta-cij/eigendiv-divgenae-eng.html>

After an appeal is filed the EI Commission must provide the SST a package of documents which will include the request for reconsideration, all documents relevant to the decision being appealed, a copy of the decision being appealed and the submissions of the Commission. These documents must be sent by the SST to the appellant.

Along with the documentation pertaining to the appeal the SST will also include a Notice of Hearing **or** a Notice of Dismissal.

If the SST determines that an appeal has no reasonable chance for success they **must** summarily dismiss it – in other words there will be no hearing. Before summarily dismissing an appeal the SST must give written notice to the appellant, and offer the appellant a reasonable period of time to make submissions.

Hearings

Hearings can either be in the form of written questions and answers or oral. Oral hearings can be via teleconference, videoconference or in person. You should request an oral hearing at the time of filing your Notice of Appeal to the SST.

The SST will provide interpretive services as required.

If you intend on calling witnesses at your hearing you should advise the SST as early in the appeal process as possible. This is extremely important as having witnesses will weigh in favour of having an oral hearing.

The SST will provide a copy to you (or your client) with all documentation submitted to it. However it will only provide **one** copy. Therefore it is extremely important that you retain the copy of the documentation you receive from the SST.

Do not bind or tab any submissions to the SST, the tribunal will do this for you.

One adjournment will be granted without reasons, however any subsequent adjournments will require exceptional circumstances.

Social Security Tribunal Appeal Division

An appellant may appeal to the appeal division **within 30 days** of the date the decision is communicated to them by the SST general division.

Leave to Appeal

Unlike at the SST general division an appellant must be granted 'leave to appeal' to the SST appeal division. Leave will only be granted in the following circumstances:

- i. the General Division failed to observe a principle of natural justice (i.e. the right to a fair hearing) or otherwise acted beyond or refused to exercise its jurisdiction;

- ii. the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- iii. the General Division based its decision on an erroneous finding of fact that it made in an arbitrary manner or without taking into account the evidence before it.
- iv. The application for leave to appeal form to the SST Appeal Division can be found here: <http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATATTAD.pdf>

The one exception to the requirement to obtain 'leave to appeal' is a decision by the SST general division to summarily dismiss an appeal.

Process

Clients who wish to appeal to the SST Appeal Division should consult with a lawyer.

Any submissions in support of an appeal **must** be made within 45 days of leave to appeal being granted.

With certain exceptions, decisions of the SST appeal division can be judicially reviewed by the Federal Court of Appeal. Should a client wish to seek a judicial review they **must** consult a lawyer.

Applications for judicial review **must** be made within **30 days** of the decision being communicated to the appellant.

Disqualification

Reasons for Disqualification

There are numerous reasons a claimant can be disqualified from receiving regular EI benefits.

Three of the more common reasons for EI claimants being disqualified are:

- Quitting a job (under the *EI Act* this is referred to as 'Voluntary Leaving');
- Misconduct; and
- Availability.

Voluntary Leaving

EI claimants can be disqualified from receiving benefits if they voluntarily leave their employment without 'just cause'.

Just cause is not defined in the *EI Act*. It is said to exist if there was no reasonable alternative to leaving employment, or taking leave having regard to all of the circumstances.

The *EI Act* lists certain circumstances which will constitute 'just cause' for voluntarily leaving employment.

Just Cause

The *EI Act* lists the following specific circumstances as just cause for voluntarily leaving employment:

- sexual or other harassment;
- obligation to accompany a spouse, common-law partner or dependent child to another residence;
- discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*;
- working conditions that constitute a danger to health or safety;
- obligation to care for a child or a member of the immediate family;
- significant modification of terms and conditions respecting wages or salary;
- excessive overtime work or refusal to pay for overtime work;
- significant changes in work duties;
- antagonism with a supervisor if the claimant is not primarily responsible for the antagonism;
- practices of an employer that are contrary to the law;
- discrimination with regard to employment because of membership in an association, organization or union of workers;
- undue pressure by an employer on the claimant to leave their employment; and
- any other reasonable circumstances that are prescribed.

Misconduct

An EI claimant is disqualified from receiving benefits if they lost their employment by reason of their own misconduct.

The *EI Act* does not define misconduct. However it has been defined by various legal decisions.

Misconduct is **willful** conduct, or conduct that is so **reckless** so as to amount to willfulness, which adversely affects the employment relationship.

Misconduct is often found to exist where a claimant's actions irreparably damage the trust relationship between employer and employee.

To a certain extent the nature of a claimant's employment will determine whether the conduct complained of amounts to misconduct.

Dismissal for cause based on a claimant's conduct is not the same as dismissal for misconduct. For example: incompetence, stupidity, misunderstanding between an employee and employer, momentary carelessness or simple mistakes may be cause for dismissal but are not necessarily equivalent to misconduct.

Misconduct **must** be the reason the claimant lost their job, and the burden of proving misconduct rests with the EI Commission and employer.

Availability

In order to be entitled to benefits, claimants must show that they are seeking employment and are available for work.

Availability is a willingness to work under regular conditions without unduly limiting the chances of obtaining employment.

It is a question of fact, and the burden for proving availability rests upon claimants.

There is a rebuttable presumption that a claimant who is enrolled as a full-time student is not available for work.

Helpful Tips

Applications

It is unlikely you will meet with a client prior to them making a claim for EI.

If a client left their employment voluntarily their application should detail why they had no reasonable alternative but to leave their employment.

If a client lost their employment due to misconduct their application should provide their version of the events that lead to their dismissal. It may be helpful to include copies of workplace rules or policies.

Reconsideration

Reconsideration is mostly a paper based process. The person conducting the reconsideration will engage in some fact finding if necessary which may involve contacting the claimant, and other parties.

Any additional information in support of your client's claim should be submitted at this stage. Examples of additional information could include: letters to or from the employer, employment contracts, workplace rules or policies, etc...

While objective evidence is the most useful at this stage you may wish to consider submitting subjective evidence from your client or other witnesses in the form of sworn statements.

Social Security Tribunal

Prior to a hearing before the SST your client will receive a package of documents. These documents will contain all of the factual information upon which the Commission's decision was based. Review the facts to ensure their accuracy.

The package will also contain a memorandum of facts and law written by an employee of the Commission. Review this document **carefully**. It contains the legal reasons why your client's claim was denied including cases supporting the Commission's position. You should review the cases cited by the Commission to better understand its legal position in your client's appeal.

The EI Commission does not send a representative to the SST General Division hearings, however other interested parties (i.e. an employer) have the option to attend. This would most likely occur in the event of a hearing into misconduct.

Remember that this is your client's first chance to tell their story, and have their credibility assessed by a decision maker.

You should walk your client through their version of the events in question keeping in mind the legal reason why your client's claim was denied.

Any witnesses who wish to give evidence should be present at the hearing.

After all of the evidence has been presented you should summarize your client's case, and explain how the evidence has addressed the legal issue which lead to the denial of your client's claim.

You may wish to submit case law to the SST in support of your client's case.

First Meeting

Ask a potential EI client to bring the following to their first meeting with you:

- i. A copy of their EI Application (if applicable);
- ii. ROE's for the preceding 52 weeks;
- iii. Any correspondence from the EI Commission (if applicable);
- iv. Any correspondence from the SST (if applicable); and
- v. Any other relevant information to their claim.
 - This will depend on the reason for the denial. For example if someone left voluntarily due to a significant change in work duties you may ask the client to bring in their old and new job descriptions. You may only ascertain what you need after your first meeting.

During the first meeting you should obtain the following from your client:

- i. If applicable an Authorization to Disclose allowing you to speak to the SST. The form can be found in the following link:
<http://www.canada.gc.ca/sst-tss/hta-cij/eigendiv-divgenae-eng.html>
- ii. Consent forms to obtain any other records, i.e. medical, if applicable (*insert hyperlink to medical consent form*).

Finally, you should also advise your client that if they are in receipt of income assistance they will have to repay the income assistance they received for any period of time they also receive EI.

If Your Client is Successful

Congratulations! However you should ensure your client is reminded of the following:

- i. Your client will receive EI retroactive to their initial application date (minus the two week waiting period). You should ensure they do not spend that money upon receipt as they may owe all, or a portion of it, to the Province if they were in receipt of income assistance pending receipt of their EI; and
- ii. While on EI your client has certain responsibilities. These will be explained to them by the EI Commission; however you should impress upon them that they should be taken seriously as violations can result in financial penalties, and more stringent eligibility requirements for future claims.

Additional Resources

Case Law

Applicable case law on EI comes from the Umpire (eventually the SST Appeal Division) and the Federal Court of Appeal. The Supreme Court of Canada can also make decisions on EI.

There are **excellent** online case law resources for EI:

- i. EI Appeal Decisions Favourable to Workers: http://www.ei.gc.ca/eng/board/favourable_jurisprudence/favourable_decisions_toc.shtml
- ii. Jurisprudence Library: <http://www.ei.gc.ca/eng/library/searchxt.shtml>
- iii. Digest of Benefit Entitlement Principles: http://www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml
- iv. Index of Jurisprudence: <http://srv130.services.gc.ca/indexjurisprudence/eng/about.aspx>
- v. Quick Reference Tool: http://www.ei.gc.ca/eng/board/quick_reference_page.shtml

Government

The federal government maintains a website on EI here:

<http://www.servicecanada.gc.ca/eng/sc/ei/index.shtml>

Community Legal Education Ontario (CLEO)

CLEO has a publication about EI that can be found here: <http://www.cleo.on.ca/en/publications/emplns>

Nova Scotia Legal Aid

NSLA offices provide summary advice to clients regarding EI. Their contact information can be found here: <http://www.nslegalaid.ca/contact.php>