



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. G. v Canada Employment Insurance Commission*, 2019 SST 580

Tribunal File Number: AD-18-837

BETWEEN:

**J. G.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Stephen Bergen

DATE OF DECISION: June 11, 2019

## **DECISION AND REASONS**

### **DECISION**

[1] The appeal is allowed in part.

[2] The issue of the allocation and overpayment is returned to the General Division to make a decision. The General Division decision that the Claimant is disentitled to benefits from December 12, 2016, to April 19, 2017, is rescinded. The decision to refuse jurisdiction over the write-off of the overpayment is confirmed.

### **OVERVIEW**

[3] The Appellant, J. G. (Claimant), applied for parental Employment Insurance benefits in May 2017 and requested an antedate to December 2016, although the Claimant was out of Canada from December 12, 2016, to April 19, 2017. The Respondent, the Canada Employment Insurance Commission (Commission), did not formally consider the Claimant's antedate request and the Claimant began receiving benefits in April 2017. At this point, the Claimant had resumed employment in Canada. When the Commission discovered that it had been paying the Claimant benefits during a period in which the Claimant had earnings, it allocated the earnings and declared an overpayment. The Commission also imposed a penalty and issued a notice of violation based on the Claimant having knowingly made false statements.

[4] After the Claimant requested a reconsideration, the Commission agreed that the Claimant had not knowingly made false statements. It withdrew the penalty and notice of violation. However, the Commission maintained its original decision on the allocation and overpayment. The Claimant appealed to the General Division, claiming that the overpayment was a result of the Commission's error and should be waived. The General Division dismissed his decision, and the Claimant now appeals to the Appeal Division.

[5] The appeal is allowed in part. The General Division misunderstood its jurisdiction or otherwise erred in law when it considered the effect of the Claimant's absence from Canada but failed to consider whether his allocation was correctly calculated or allocated.

## ISSUES

[6] Did the General Division misunderstand or fail to exercise its jurisdiction in relation to the reconsideration decision?

## ANALYSIS

[7] The Appeal Division may intervene in a decision of the General Division, only if it can find that the General Division has made one of the types of errors described by the “grounds of appeal” in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] The only grounds of appeal are as follows:

- a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record, or;
- c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

### **Did the General Division misunderstand or fail to exercise its jurisdiction in relation to the reconsideration decision?**

[9] The Claimant submitted two decisions with his notice of appeal to the General Division. The first decision was a July 12, 2018, reconsideration decision which maintained a May 31, 2018, initial decision. The May 31 initial decision concerned whether the Claimant collected earnings while he was on benefits. Claimant also submitted another decision dated July 12, 2018, with his notice of appeal. This decision was the refusal to write off the overpayment, and it was not a reconsideration decision.

[10] The General Division considered two issues. The first issue was whether the Claimant was disentitled to benefits during the period that he was out of Canada from December 12, 2016,

to April 19, 2017. The other issue considered by the General Division was whether “the amount of the overpayment [was] subject to review”.

#### Disentitlement issue

[11] The Commission had originally directed a portion of its submissions to the question of whether the Claimant was disentitled to benefits during his absence from Canada from December 2016 to April 2017. However, this was not at issue in the reconsideration decision under appeal. The reconsideration decision concerned allocation and overpayment, and the period in which earnings were reallocated was a different period; between April 2017 and August 2017. In discussing the Claimant’s reconsideration request, the Commission referred back to the earlier period from December 2016 to April 2017 and told the Claimant that “[n]o benefits were paid during [this period] and no overpayment established ... no one is indicating any wrong-doing on [the Claimant’s] behalf for making [the] application for the parental benefits for this period.”<sup>1</sup>

[12] The Claimant’s request for an antedate and his disentitlement while absent from Canada were not relevant to the initial Commission overpayment decision, or to its reconsideration of that decision, and these issues were not before the General Division.

[13] The General Division erred under section 58(1)(a) of the DESD Act by exceeding its jurisdiction when it identified the Claimant’s disentitlement to parental benefits while he was outside of Canada, as an issue that was before it,<sup>2</sup> and when it found the Claimant to be disentitled to benefits in that period.<sup>3</sup>

#### Write-off of overpayment

[14] The General Division stated that the Claimant may request the Commission to reconsider its initial decision under section 112(1) of the *Employment Insurance Act* (EI Act), but that a

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<sup>1</sup> GD3-49

<sup>2</sup> General Division decision, page 3

<sup>3</sup> General Division decision, para. 16

decision “respecting the amount payable” is not subject to review in accordance with section 112.1 (which refers to decisions to write-off or not to write-off amounts owing).

[15] I am assuming that the General Division meant that it had no authority to review the refusal to write off the overpayment. This is correct at law. The Commission may not reconsider decisions under section 56 of the *Employment Insurance Regulations* to reduce or write-off an overpayment that would otherwise be owing (under section 112.1 of the EI Act) and the General Division has no jurisdiction to consider decisions that are not reconsideration decisions (under section 112(1) of the EI Act). Therefore, the General Division did not have jurisdiction to consider the Commission’s decision refusing to write-off the overpayment.<sup>4</sup>

[16] I appreciate the Claimant’s arguments that he did nothing wrong and that he would not have been overpaid in the first place if the Commission had not made the mistake. However, the Claimant has not disputed that he was paid benefits to which he was not entitled. Section 43 of the EI Act states that a claimant is liable to repay an amount paid by the Commission to the claimant as benefits to which the claimant is not entitled. Section 47 of the EI Act says that such amounts are debts owing to the Crown. No exceptions are made in legislation for overpayments made by the Commission in error (except where the Commission is authorized to write-off an amount, and has decided to do so). I cannot disregard these clear statements of law.

[17] The Commission is aware that it is responsible for the overpayment and it has therefore relieved the Claimant of an associated penalty and violation. Unfortunately for the Claimant, the Commission refused to write off the overpayment. Write-off decisions are not subject to reconsideration and thus not appealable to the General Division. Since it was not properly before the General Division, the General Division did not err under section 58(1)(a) of the DESD Act by refusing jurisdiction over this decision.

#### Overpayment and allocation issue

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<sup>4</sup> General Division decision, para. 30

[18] The reconsideration decision that was before the General Division was the July 12, 2018, reconsideration of the May 31, 2018, decision. This is the decision that found that the Claimant had employment earnings at the same time that he was collecting benefits. The decision allocated the Claimant's earnings to weeks of benefits from the week beginning April 16, 2017, through to the week beginning on July 30, 2017. The Commission informed the Claimant that he would have to repay the overpayment of benefits that resulted from the reallocation.

[19] The General Division made no decision as to whether the Claimant received all or any part of those earnings and whether the earnings were properly allocated, and it made no decision as to whether the Claimant was required to repay any part or all of the \$5,598.00 overpayment declared by the Commission in consequence of its allocation.

[20] This oversight may be related to the fact that the Commission had conceded the Claimant's appeal of the allocation.<sup>5</sup> Nonetheless, as the Commission now agrees,<sup>6</sup> the General Division failed to address the allocation and overpayment issue, or state whether it accepted or rejected the concession.

[21] I find that the General Division erred under section 58(1)(a) of the DESD Act by refusing to exercise its jurisdiction to make a decision on the issues that were before it, namely; the allocation and overpayment issues arising from the July 12, 2018, reconsideration of the May 31, 2018, decision.

## **REMEDY**

[22] I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, to refer the matter back to the General Division with or without directions, or to confirm, rescind or vary the General Division decision in whole or in part.

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<sup>5</sup> GD5-1

<sup>6</sup> AD2-3

[23] The Claimant asked that I make the decision that the General Division should have made. The Commission submitted that the record is not complete and that I should refer the matter back to the General Division for reconsideration on the allocation and overpayment issue alone. I agree with the Commission. The General Division has not made a decision on the allocation and overpayment. Therefore, the record is not complete such that I am prepared to make the decision that the General Division should have made. I am returning the issue of allocation and overpayment back to General Division to make a decision. I note that the Commission has confirmed its concession regarding the allocation of earnings,<sup>7</sup> and I would recommend that the General Division decision address the Commission's concession in some fashion.

### CONCLUSION

[24] The appeal is allowed.

[25] The General Division decision that the Claimant is disentitled to benefits from December 12, 2016, to April 19, 2017, is rescinded. The decision to refuse jurisdiction over the write-off of the overpayment is confirmed. The matter of the allocation and overpayment arising from the decision on appeal is returned to the General Division to make a decision.

Stephen Bergen  
Member, Appeal Division

HEARD ON:	March 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. G., Appellant  X, Representative for the Appellant

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<sup>7</sup> AD5-1