



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *PC v Canada Employment Insurance Commission*, 2021 SST 3

Tribunal File Number: AD-20-857

BETWEEN:

P. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision and Decision by: Stephen Bergen

Date of Decision: January 11, 2021

DECISION AND REASONS

DECISION

[1] I am granting the application for leave (permission) to appeal. I am also allowing the appeal and returned the matter to the General Division to make a new decision.

OVERVIEW

[2] The Applicant, P. C. (Claimant) was laid off and she applied for Employment Insurance benefits in March 2020. The Respondent, the Canada Employment Insurance Commission (Commission) did not process her application because the Claimant qualified for, and received Canada Emergency Response Benefits (CERB).

[3] The Claimant reapplied for Employment Insurance benefits in September 2020. However, the Respondent had difficulty confirming the Claimant's hours of insurable employment because at least one Record of Employment document (ROE) was missing. It made an entitlement decision based on the hours of employment that it could confirm. The Claimant supplied another ROE and asked the Commission to reconsider. The Commission included additional hours of employment and found that the Claimant was entitled to additional weeks of benefits. However, the Claimant still believed that the Commission was missing some of her hours of insurable employment.

[4] The Claimant appealed to the General Division of the Social Security Tribunal. She argued that the Commission made a mistake in calculating her weeks of benefits. She stated that she had worked overtime for one of her employers so she had actually worked more hours for that employer than the Commission accepted. She also argued that her qualifying period should have been the period before her first application in March 2020, extended by 28 weeks because of the CERB rules. This would mean that other hours of employment would have to be included and evaluated.

[5] The General Division dismissed the Claimant's appeal, finding that the Commission had properly calculated her hours of insurable employment within the correct qualifying period. The Claimant is now seeking leave to appeal.

[6] The Claimant has an arguable case that the General Division made an error of jurisdiction so I am granting leave to appeal. In addition, I am allowing the appeal on its merits and returning the matter to the General Division for a new decision. This is because I accept the Commission's concession. The Commission acknowledges that the General Division acted outside of its authority when it made a decision on how many hours of the claimed employment were hours of insurable employment.

PRELIMINARY MATTERS

[7] I scheduled a case conference to discuss the nature of the Claimant's challenge to the General Division decision. I also wanted to hear the Commission's position on the General Division decision. I wanted to know whether the Commission would acknowledge that the General Division might have made an error of jurisdiction.

[8] The Claimant did not attend the case conference, although the Appeal Division had emailed her an invitation on December 21, 2020. At the time of the hearing, Appeal Division staff made repeated efforts to contact the Claimant at the two phone numbers provided by the Claimant. The Appeal Division was unsuccessful in reaching the Claimant, so I decided to proceed with the case conference to see if the Commission was willing to make any concession.

[9] During the conference, the Commission's representative acknowledged that the General Division might have made an error. In fact, it accepted that the General Division did make an error. The Commission stated that the General Division had not had the authority to decide which of the Claimant's hours were hours of insurable employment. Therefore, the Commission agreed that the Appeal Division should combine the leave to appeal with a decision on the merits of the appeal. It suggested that the Appeal Division should return the matter to the General Division for a new decision.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[10] “Grounds of appeal” are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:¹

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUE

[11] Did the General Division act within its authority (or jurisdiction) when it determined which, or how many, of the Claimant’s hours of employment were hours of insurable employment?

ANALYSIS

[12] The *Department of Employment and Social Development Act* (DESD Act) states that the only the Canada Revenue Agency (CRA) can decide those matters specified in section 90 of the *Employment Insurance Act* (EI Act).

[13] Among other things, section 90 of the EI Act includes:

- (a) Whether an employment is insurable;
- (b) How long an insurable employment lasts, including the dates on which it begins and ends;
- (c) What is the amount of any insurable earnings;
- (d) How many hours an insured person has had in insurable employment.

[14] When the Commission decided the Claimant’s entitlement to weeks of benefits, it had to create an ROE for one of the Claimant’s former employers. This newly created ROE was a

¹ This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

substitute for a missing ROE that the Claimant's employer did not supply. The substitute ROE identified the period that the employment began and ended, set out the Claimant's hours of work for this employer, and specified her earnings.

[15] At the General Division hearing, the Claimant disputed the number of hours of insurable employment for this employer. She claimed that the Commission had not considered her overtime.

[16] The General Division did not accept the Claimant's arguments. It confirmed the hours of insurable employment used by the Commission for the employer. In doing so, the General Division made an error of jurisdiction, as the Commission has now acknowledged.

[17] The final ruling on insurable hours must be a CRA decision. The CRA is the only agency with authority to determine the Claimant's insurable earnings or hours of insurable employment. Without the benefit of a ruling from the CRA, the General Division was not in a position to assess which, or how many, of the Claimant's hours were hours of insurable employment.

[18] This is an appropriate case for combining the leave to appeal decision with the decision on the merits, given the Commission's concession.

[19] I have decided to return the matter to the General Division, rather than make the decision the General Division should have made.² Just like the General Division, I do not have the authority to decide which of the Claimant's hours are insurable employment. That means I cannot decide how many weeks of benefits the Commission should have given the Claimant.

CONCLUSION

[20] I am granting the application for leave to appeal. Additionally, I am allowing the appeal on its merits. I am sending this matter back to the General Division for a new decision on how many weeks of benefits the Claimant should have received.

² Section 59 of the DESD Act says, in part, that I may dismiss the appeal, give the decision that the General Division should have given, or refer the matter back to the General Division for reconsideration.

[21] This decision does not restrict the scope of a new appeal before the General Division. The General Division will have to consider the insurable hours from each employment within her qualifying period. This may further require it to assess whether the Claimant's qualifying period was determined correctly and whether the Commission captured the hours of insurable employment within the qualifying period from every employer.

[22] The Claimant may be able to request a ruling from the CRA. If either the Claimant or the Commission request a CRA ruling, I direct the General Division to defer making a decision on the appeal until it has had the chance to review that ruling.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	Josee Lachance, Representative for the Respondent
------------------	---