



Citation: *Canada Employment Insurance Commission v DC*, 2021 SST 451

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission

Respondent: D. C.

Decision under appeal: General Division decision dated March 7, 2021 GE-21-297

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: August 17, 2021

Hearing participant: Isabelle Thiffault
Appellant's representative

Decision date: August 27, 2021

File number: AD-21-100

Decision

[1] I am allowing the appeal. The General Division made an error of law when it determined the date of the Claimant's interruption of earnings. The Claimant had an interruption of earnings on January 10, 2020 and was entitled to 36 weeks of employment insurance benefits.

Overview

[2] The Respondent, D. C. (Claimant), was laid off in January 2020 and applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) established a benefit period effective January 12, 2020. It determined that the Claimant was entitled to 36 weeks of benefits based on the unemployment rate in his region at that time.

[3] The Claimant also received payments because of his separation from employment (severance payment). The Commission allocated this severance payment to weeks in the Claimant's benefit period, beginning with the first week of his lay-off. The Claimant did not begin to receive regular EI benefit payments until after the Commission had fully allocated his severance in May 2020.

[4] The unemployment rate in his region had gone up by May 2020 and the Claimant felt he should be entitled to more weeks of benefits. The Commission maintained its decision on reconsideration. The Claimant successfully appealed to the General Division of the Social Security Tribunal. The General Division found that Claimant's weeks of entitlement should have been determined using the unemployment rate in May 2020, which entitled the Claimant to 45 weeks of benefits.

[5] The Commission is now appealing the General Division decision to the Appeal Division. It argues that the General Division made an error of law.

[6] I have decided that the General Division made an error of law when it decided that the Claimant did not have an interruption of earnings until his severance was fully allocated in May 2020. I have also decided to give the decision that the General Division should have given. The Claimant had an interruption of earnings on January 10, 2020 and was entitled to 36 weeks of employment insurance benefits.

Preliminary matters

[7] The Claimant did not attend the hearing. He wrote to the Tribunal on August 16, 2021 stating that he would not be attending the hearing. I am satisfied that the Claimant had notice of the hearing and proceeded in his absence.

Issue

[8] The issue in this appeal is: Did the General Division make an error of law when it found that the Claimant did not have an interruption of earnings until his severance payment was fully allocated on May 26, 2020?

Analysis

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

- acted unfairly;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.¹

The General Division made an error of law when it determined the date of the interruption of earnings

[10] Section 12(2) of the *Employment Insurance Act* (EI Act) identifies the maximum number of weeks of benefits that a claimant may receive within the claimant's benefit period. This depends on a claimant's hours of insurable employment in his or her qualifying period and on the regional rate of unemployment.

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

[11] According to section 17(1)(1.1)(a) of the *Employment Insurance Regulations* (Regulations), the Commission must use the regional rate of unemployment for the claimant's region, "during the week referred to in section 10(1) of the Act."

[12] Section 10(1) of the EI Act states that the benefit period begins on the later of

a) the Sunday of the week in which a claimant's interruption of earnings occurs, and

b) the Sunday of the week in which the claimant makes an initial claim for benefits.²

[13] The Commission must use the regional rate of unemployment that applies at the later of the date of the interruption of earnings, or the date of the application.

[14] The General Division decided that the Claimant's interruption of earnings did not occur until May 26, 2020 because this is when his severance payment had been fully allocated.³ It relied on section 14(1) of the Regulations, which provides that certain criteria must be met in order to have an interruption of earnings. One of those criteria is that there be at least seven consecutive days in which no earnings arising from the employment are allocated.

[15] The General Division referred to section 36(9) of the Regulations and found that the severance payment is considered earnings arising out of employment and must be allocated. It considered the severance payment to be allocated earnings for the purposes of section 14 of the Regulations and found the interruption of earnings therefore did not happen until May 26, 2020.

[16] The General Division applied this understanding of when the interruption of earnings occurred to section 10(1) of the EI Act. The General Division determined that the benefit period began on the later of when the Claimant applied for benefits on January 10, 2020 and when the interruption of earnings happened on May 26, 2020.

² Section 10(1) of the *Employment Insurance Act* (EI Act).

³ General Division decision at para 18.

According to the General Division, the Sunday beginning the week when the Claimant had seven consecutive days without earnings was May 31, 2020. The General Division found that this was the date that the Claimant's benefit period was established.

[17] On May 31, 2020, the rate of unemployment in the Claimant's region was 10.1%. On January 10, 2020, when the Claimant applied for benefits, the rate of unemployment was 4.9%. Using the later date meant that the Claimant was entitled to 45 weeks of benefits instead of 36.

[18] The General Division failed to apply section 35(6) of the Regulations when determining the date of the interruption of earnings. Under this section, earnings referred to in section 36(9) are not taken into consideration when determining whether there has been an interruption of earnings. As the General Division found, the severance payments were earnings referred to in section 36(9). By failing to apply section 35(6) and using the severance payments to determine the date of the Claimant's interruption of earnings, the General Division made an error of law.

Remedy

[19] I have options for how to fix the General Division's error.⁴ I can substitute my own decision or I can refer the matter back to the General Division for reconsideration.

[20] The Commission is asking me to give the decision that the General Division should have given. I find that this is appropriate because I have found that the General Division did not properly apply the law.⁵ The evidence is complete, clear and straightforward.

– The interruption of earnings occurred on January 10, 2020

[21] I find that section 35(6) applies in this case. It clearly states that earnings referred to in section 36(9) of the Regulations are not taken into account for the purposes of Section 14, which describes when an interruption of earnings occurs. This means that

⁴ See section 59 of the DESD Act.

⁵ Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way.

the severance payments that Claimant received are not to be taken into account when determining when an interruption of earnings occurred.

[22] Considering that the severance payments are not to be taken into consideration, the interruption of earnings took place when the Claimant was laid off and had a period of seven consecutive days during which no work was performed for his employer. This was on January 10, 2020.

[23] The Claimant is entitled to 36 weeks of benefits because the rate of unemployment in his region on January 10, 2020 was 4.9%.⁶

Conclusion

[24] The appeal is allowed. The General Division made an error of law. I have made the decision that the General Division should have made. The Claimant had an interruption of earnings of January 10, 2020 and is entitled to 36 weeks of benefits.

Melanie Petrunia
Member, Appeal Division

⁶ GD3-22. Also see section 12(2) of the EI Act and Schedule 1.