



Citation: *KR v Canada Employment Insurance Commission*, 2022 SST 422

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: K. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated March 31, 2022
(GE-22-346)

Tribunal member: Charlotte McQuade

Decision date: May 26, 2022

File number: AD-22-226

Decision

[1] I am refusing permission (leave) to appeal. The appeal will not proceed.

Overview

[2] K. R. is the Claimant. He was receiving benefits from the Workers' Compensation Board (WCB) while collecting Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) decided the WCB payments were earnings under the law and allocated the payments to the Claimant's claim. The amount of the Claimant's WCB payments kept changing and he also received a retroactive payment in December 2019. The Claimant provided the Commission with a letter of November 29, 2021, from the WCB, containing his payment information from May 2019. The Commission then revised its prior allocation, based on the information in that letter. This resulted in an overpayment.

[3] The Claimant appealed the Commission's decision to Tribunal's General Division. He did not dispute that his WCB payments were earnings or the weeks to which the payments had been allocated. His dispute was with the amounts the Commission had allocated. The Claimant argued that the November 29, 2021, WCB letter contained inaccurate information about the amount of his payments. He said the correct amount of the payments was what he had reported to the Commission, based on his WCB pay stubs. The Claimant also objected to the length of time it took the Commission to reconsider his claim.

[4] The General Division decided that the Commission had allocated the correct amount of earnings to the Claimant's claim. It also decided that the Commission had the authority to reconsider the Claimant's claim and had done so within the allowable time.

[5] The Claimant is now asking for permission to appeal the General Division's decision. He submits that the General Division decision was not fair because the General Division relied on the WCB letter to decide the amount of his earnings instead of what he had reported to the Commission, based on his WCB pay stubs.

[6] I am refusing permission to appeal because I am satisfied the Claimant's appeal has no reasonable chance of success. This means the Claimant's appeal stops here.

Issues

[7] In his Application to the Appeal Division form, the Claimant claimed that the General Division made an error of jurisdiction and that the General Division didn't follow procedural fairness.

[8] However, I am not limited to the Claimant's characterization of the possible errors.¹ I understand, from the Claimant's submissions, that the issue he is raising is whether the General Division may have based its decision about the amount of his earnings on an important error of fact when it relied on the WCB letter of November 29, 2021, instead of his pay stubs.²

Analysis

[9] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[10] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.³ The law says that I can only consider certain types of errors.⁴ A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.⁵

¹ See *Griffin v Canada (Attorney General)*, 2016 FC 874. In that case, the Federal Court said the requirements of section 58(1), of the *Department of Employment and Social Development Act* (DESD Act), which describes the errors I can consider, should not be applied mechanically or in a perfunctory manner.

² See AD1-5 and AD1B-2.

³ Section 58(2) of the DESD Act says this is the test I have to apply.

⁴ Section 58(1) of the DESD Act describes the only errors that I can consider when deciding whether to give permission to proceed with an appeal. These errors are that the General Division breached natural justice, made an error of jurisdiction, made an error of law or based its decision on an important error of fact.

⁵ See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.

[11] This is a low bar. Meeting the test for leave to be granted does not mean the appeal will necessarily succeed.

It is not arguable that the General Division based its decision on an important error of fact

[12] It is not arguable that the General Division based its decision about the amount of the Claimant's earnings on an important error of fact.

[13] The Claimant provided the Commission with a letter of November 29, 2021, from the WCB explaining the payments he had received from May 2019. The Commission revised its prior allocations of the Claimant's WCB earnings, based on that letter. The General Division decided the Claimant's earnings were in the amounts stated in the WCB letter.

[14] The Claimant says in his Application to the Appeal Division that he originally reported \$1137.00 every two weeks on his claimant reports. He then received retroactive pay four months later reflecting a recalculated rate of \$1861.00 every two weeks. He says it was not until he received the letter of November 29, 2021, from the WCB that he was advised that his payments were \$1861.00 every two weeks from June 2019 to June 2020.⁶

[15] The Claimant disagrees with the General Division's decision to prefer the WCB letter of November 29, 2021, to his pay stubs when it decided the amount of the earnings to be allocated to his claim. He maintains the WCB pay stubs show the accurate amount of payments he received.

[16] There was no dispute before the General Division that the WCB payments were considered to be earnings under the law or that they had to be allocated (applied) to weeks of his claim.⁷ As he is arguing before the Appeal Division, the Claimant argued

⁶ AD1B-2.

⁷ Section 35(2)(b) of the *Employment Insurance Regulations* (EI Regulations) says workers' compensation payments other than a lump sum or pension paid in full and final settlement of a claim are earnings. Section 36(12)(d) of the EI Regulations says that workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim are to be allocated to the weeks in respect the payments are paid or payable.

before the General Division that the correct amount of the WCB earnings was what he reported to the Commission, based on his pay stubs from the WCB, not the letter from the WCB of November 29, 2021.

[17] The Commission's position before the General Division was that the letter from the WCB dated November 29, 2021, contained the accurate amount of the WCB payments, after adjustments.⁸

[18] Based on the letter, the Commission decided that the Claimant had weekly earnings of \$931.00 for each of the weeks from August 11, 2019, to December 28, 2019. So it allocated \$931.00 to those weeks. The Commission decided the Claimant had earnings of \$266.00 for December 30 and 31, 2019 so it allocated \$266.00 to the week of December 29, 2021. The Commission also decided the Claimant had earnings of \$931.00 for each week from January 26, 2020, to July 12, 2020, and allocated \$931.00 to those weeks.

[19] In addition to the letter from the WCB, the General Division had before it various pay stubs from the WCB.⁹ The Claimant also provided a document showing a deposit on December 19, 2019, of \$7801.45 relating to an adjustment to various weeks on his claim prior to December 19, 2019.¹⁰ There were also copies of the Claimant's biweekly reports and records of his various conversations with the Commission.

[20] The Appeal Division can intervene because of an error of fact only if the General Division based its decision on that error. In addition, the General Division must have made its erroneous finding of fact in a perverse or capricious manner or without regard for the material before it.

[21] The General Division was required to weigh all the evidence before it and make a finding of fact as to what the amount of the Claimant's WCB earnings were.

⁸ GD3-119.

⁹ GD7-2 to GD7-7 and GD3-111.

¹⁰ GD9-2.

[22] The law says that I can assume that the General Division considered all the evidence, even if it didn't specifically mention every piece of it.¹¹ However, the General Division does need to address important pieces of evidence, especially ones that contradict its conclusion.

[23] The General Division must also analyze the evidence in a meaningful way or that can amount to an error of law.¹²

[24] The General Division made a finding of fact that the correct amount of the Claimant's WCB earnings was described in the WCB letter of November 29, 2021. The General Division concluded, based on that letter that the Claimant had earnings of \$931.00 per week from August 11, 2019, to December 18, 2019, \$266.00 per week from December 29, 2019, and then \$931.00 per week from January 26, 2020, to July 11, 2020.¹³

[25] I see no indication that the General Division ignored or misapprehended any important evidence on file about the Claimant's WCB payments in making such a finding.

[26] The General Division did not refer to each specific pay stub or each specific claimant report where the Claimant had reported his earnings to the Commission but it did not need to do so. I am satisfied the General Division considered the Claimant's pay stub evidence and his reports to the Commission and analyzed that evidence in a meaningful way.

¹¹ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

¹² See *Bellefleur v Canada (Attorney General)*, 2008 FCA 13 and *Canada (Attorney General) v Renaud*, 2007 FCA 328 at para 19.

¹³ See paragraphs 22 to 23 of the General Division decision.

[27] The General Division was aware that the Claimant's pay stubs did not match the amounts in the November 29, 2021, letter from the WCB. It acknowledged that fact in the decision.¹⁴ However, having reviewed the evidence the General Division preferred the information in the WCB letter to the other evidence and it explained why it did so.

[28] In that regard, the General Division explained it found the November 29, 2021, letter to be the most reliable up-to-date source of information of the Claimant's WCB payments. These reasons included the fact the Claimant had asked the WCB for a letter for the payment amounts and this was the letter it provided, the Claimant had told the Commission that the letter was likely correct, and the claim number on the letter matched the claim number the Claimant noted on his EI application. The General Division also noted that the payment dates on the letter matched payment dates the Claimant had provided the Commission.

[29] As well, the General Division explained that the Claimant's payment amounts had changed several times and he had received a retroactive lump sum payment in December 2019 for the period September 9 to December 19, 2019. The General Division decided that the November 29, 2021, letter from the WCB provided the most up-to-date information showing the final amount of the payments, taking into account all the adjustments and retroactive payments.¹⁵

[30] The General Division gave clear reasons why it found the letter from the WCB to be more reliable evidence than the Claimant's pay stubs.

[31] The Claimant may not agree with how the General Division chose to weigh the evidence, but weighing the evidence and deciding which evidence it will prefer is within the power of the General Division.

¹⁴ See paragraph 18.

¹⁵ See paragraphs 19 to 21 of the General Division decision.

[32] The Claimant appears to be asking the Appeal Division to reassess or reweigh the evidence that he presented at the General Division. However, the Appeal Division cannot do that. The Appeal Division is limited, under the law, to looking for reviewable errors made by the General Division.

[33] In addition to the Claimant's argument, I have reviewed the entire record and listened to the audio tape from the hearing. I did not find evidence that the General Division might have ignored or misinterpreted.¹⁶

[34] I note the Claimant himself reported to the Commission that his biweekly amount had changed to \$1803.00 biweekly as of December 1, 2019.¹⁷ He also reported a retroactive payment of \$7801.45 relating to the period from September 9, 2019, to December 19, 2019. Further, the one pay stub on file that reflects a payment after December 19, 2019, for the period from February 24, 2020, to March 8, 2020, shows biweekly pay of \$1861.54. This suggests an ongoing payment of \$1861.54 after December 19, 2019. This evidence, while it does not address all the weeks in question, is consistent with the letter from the WCB that the General Division decided to rely on.

[35] The Claimant says in his Application to the Appeal Division that the General Division made an unfair decision and didn't follow procedural fairness. I asked the Tribunal to send the Claimant a letter asking him to explain how the General Division may have made an error of jurisdiction or did not follow procedural fairness but the Claimant did not describe any such errors.¹⁸

¹⁶ See *Karadeolian v Canada (Attorney General)*, 2016 FC 615, which recommends doing such a review.

¹⁷ GD3-50.

¹⁸ See letter sent to the Claimant from the Tribunal on May 9, 2022, and Claimant's response at AD1B-2.

[36] While the Claimant may think the decision itself is unfair, he has not pointed to any aspect of the General Division process that was unfair. I found no evidence in my review of the record and the audio tape that the General Division process was unfair in any way. I note that the General Division adjourned the first hearing to allow the Claimant time to gather additional information. He did submit additional information. The hearing was reconvened and after that second hearing, the General Division also accepted post-hearing documents from the Claimant. I am satisfied that the Claimant was given a full opportunity to present his case.

[37] There is no arguable error of jurisdiction either. The General Division decided the issue it had to decide and did not decide any issue it should not have decided.

[38] The Claimant has not shown an arguable case that the General Division committed a reviewable error.

Conclusion

[39] Permission to appeal is refused. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division