



Citation: *Canada Employment Insurance Commission v WB*, 2022 SST 555

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

Respondent: W. B.

Decision under appeal: General Division decision dated September 29, 2021
(GE-21-1453)

Tribunal member: Shirley Netten

Type of hearing: Teleconference

Hearing date: January 25, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: June 24, 2022

File number: AD-21-345

Decision

[1] I am allowing the appeal by the Canada Employment Insurance Commission (Commission). The General Division made several errors in its allocation decision.

Overview

[2] This appeal is about the allocation of settlement monies against the Claimant's (W. B.'s) Employment Insurance (EI) claim.

[3] The Claimant stopped working on July 11, 2019. He collected EI regular benefits from August 25, 2019 to August 8, 2020,¹ followed by EI emergency response benefits until October 3, 2020. He eventually negotiated a settlement with his former employer. In June 2021, Service Canada² allocated \$51,686.84 in settlement and pay in lieu against his EI claim, resulting in an overpayment of \$12,926.

[4] The Claimant was partially successful in his appeal to the General Division. The General Division said that only \$19,635.18 of the settlement monies were earnings. The General Division said that this amount should be allocated against benefits from the week of July 7, 2019 to the week of September 1, 2019. This reduced the Claimant's overpayment to \$1,124.

[5] The Commission appealed, claiming that the General Division made three errors in deciding the allocation and overpayment. I agree that the General Division made these errors. Correcting the errors leads to an overpayment of \$2,500 due to the allocation of earnings. The Claimant may have an additional overpayment of \$302 associated with the first, incorrect allocation of earnings, but that is outside the scope of this appeal.

¹ The Claimant applied on August 19, 2019, and served a one-week waiting period.

² On behalf of the Commission.

Issues

[6] The issues in this appeal are:

- a) Did the General Division make a factual error by deducting the same legal fees twice, from the earnings to be allocated?
- b) Did the General Division make a legal error in allocating the earnings, by forgetting to account for the Claimant's earnings in his last week of work?
- c) Did the General Division make a legal error in allocating the earnings, by forgetting to include a one-week waiting period?
- d) What is the result of fixing the General Division's errors?

Analysis

The amount of \$22,145.18 must be allocated

– The General Division made a factual error

[7] One of the grounds of appeal to the Appeal Division is that the General Division based its decision on a finding of fact that isn't supported by the evidence.³

[8] The settlement between the Claimant and his former employer included:

- \$25,807.65 pay in lieu of notice
- \$40,750 for legal fees and general damages
- \$1,581.94 to reimburse the cost of a replacement laptop

[9] The Claimant had previously received \$8,708.34 as pay in lieu of notice.

[10] The General Division found that the total pay in lieu of notice of \$34,515.99 was earnings. But, the General Division agreed with the Claimant that the legal fees, general

³ This is a paraphrase of section 58(1)(c) of the *Department of Employment and Social Development Act*.

damages and reimbursement were not earnings.⁴ The General Division accepted that the Claimant had paid \$12,380.91 in legal fees outside the settlement, and that the \$40,750 above included another \$2,500 for legal fees.

[11] The Commission notes that the Claimant had paid \$12,370.81 in legal fees outside the settlement, and not \$12,380.91. Other than this \$10.10 discrepancy, the Commission doesn't dispute any of the above findings.

[12] The General Division went on to make an important factual error. From the pay in lieu of notice of \$34,515.99, the General Division subtracted \$14,880.81 in legal fees to conclude that earnings of \$19,635.18 had to be allocated.⁵ This was contrary to the evidence. Having already removed the \$40,750 from earnings, and since that amount included \$2,500 in legal fees, the General Division should not have subtracted the \$2,500 again from the pay in lieu of notice. The General Division made a factual error.

– **I can fix the General Division's mistake**

[13] When the General Division has made an error, the Appeal Division can refer the matter back to the General Division or make the decision itself.⁶ In this case, there is no need to return the matter to the General Division. Both parties were able to provide their evidence to the General Division, and the underlying facts are not in dispute.

[14] The receipts for the legal fees total \$12,370.81.⁷ This is the amount that should be deducted from the pay in lieu of notice of \$34,515.99. I agree with the Commission's representative that **\$22,145.18** in earnings must be allocated against the EI claim.

⁴ The Claimant was successful on this point, and the Commission is not opposing this aspect of the decision. So, I haven't addressed his arguments to me that the \$40,750 should not be earnings.

⁵ The General Division's math was slightly off here: it said that \$34,515.99 - \$14,880.81 was \$19,635.06, but that is incorrect.

⁶ See section 59(1) of the *Department of Employment and Social Development Act*.

⁷ These are found at GD3-21 to GD3-23.

None of the separation earnings can be allocated in the week of July 7, 2019

– The General Division made a legal error

[15] Another ground of appeal to the Appeal Division is that the General Division erred in law in making its decision.⁸

[16] The General Division said that the earnings should be allocated at the rate of \$2,346.15 each week, beginning on July 7, 2019 (the Sunday of the week the Claimant stopped working). The General Division is right that this is when the allocation exercise begins. But the General Division didn't realize that employment earnings in that first week had to be considered as well.

[17] The law says that earnings must "be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the **total earnings of the claimant from that employment** are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment."⁹

[18] The General Division didn't account for the Claimant's earnings for the week of July 7, 2019, to ensure that the total amount allocated wouldn't exceed normal weekly earnings. This was an error of law.

– I can fix the General Division's mistake

[19] The Record of Employment shows that the Claimant earned at least his normal weekly earnings of \$2,346.15 during the week of July 7, 2019. This means that none of the \$22,145.18 in separation earnings can be allocated to that week. Instead, as the Commission argues, the separation earnings must be spread across 10 weeks beginning with the week of July 14, 2019:

- 9 weeks at \$2,346.15 (the weeks of July 14, 21, 28, August 4, 11, 18, 25, September 1 and 8, 2019),

⁸ See section 58(1)(c) of the *Department of Employment and Social Development Act*.

⁹ See section 36(9) of the *Employment Insurance Regulations*, as it read at the time.

- the balance of \$1,029.83 in the tenth week (the week of September 15, 2019).

The Claimant has to serve a waiting period

– The General Division made a legal error

[20] The law says that a claimant must serve a waiting period of one week.¹⁰

[21] The General Division decided that the allocation would be complete in the week of September 1, 2019, with a resulting overpayment of \$1,124 based on benefits resuming the following week. In doing so, the General Division forgot that the Claimant had to serve a one-week waiting period. This was an error of law.

– I can fix the General Division’s mistake

[22] Adding a week’s waiting period to the allocation means that the Claimant should not have received EI benefits until the week of September 29, 2019 (after the 10 weeks described above, plus one additional week).

[23] This part of the allocation exercise indicates that the Claimant was overpaid five weeks of benefits (the weeks of August 25 and September 1, 8, 15 and 22, 2019).

There is no “taxation year” limitation to the allocation

[24] In his arguments, the Claimant asks whether this matter should be viewed as a new claim, because claims are limited to the taxation year. The Claimant didn’t appeal the General Division decision. But in any case, the allocation of settlement monies isn’t limited to a specific year.

[25] The law says that if a claimant receives EI benefits and later receives earnings from their employer, they must repay the benefits that wouldn’t have been paid if they had received the earnings during the claim.¹¹ It doesn’t matter how much later, or in which taxation year, the settlement monies are paid.

¹⁰ See section 13 of the *Employment Insurance Act*.

¹¹ See section 45 of the *Employment Insurance Act*.

The correct allocation of \$22,145.18 leads to an initial overpayment of \$2,500

[26] I have accepted the Commission's arguments about the General Division errors. But the Commission's representative said that I can't decide the resulting overpayment, because the overpayment is not a decision but the result of a decision on the allocation of earnings. I disagree. The Claimant disputed the allocation of earnings. The General Division addressed the earnings to be allocated and how they should be allocated. The General Division made a decision about the resulting overpayment. And, it is in both parties' interests to have this matter resolved to the extent possible.

[27] The allocation exercise changes the Claimant's benefit payments in two ways.

[28] First, the Claimant shouldn't have received benefits for the first five weeks, at the beginning of his claim (as set out previously), while the earnings were being allocated. This is an overpayment of \$2,810 ($\562×5).

[29] Second, because the Claimant lost five weeks of benefits at the beginning, he was entitled to an additional five weeks of EI regular benefits at the end of his claim if he remained unemployed. Since the Claimant was receiving the EI emergency response benefits for those five weeks at \$500 per week, he can only get a top-up to the higher benefit rate. This is an underpayment of \$310 ($\62×5).¹²

[30] This leads to a net overpayment of \$2,500.

[31] Unfortunately, another aspect of the overpayment can't be resolved in this decision.

The calculation of the ultimate overpayment is beyond the scope of this appeal

[32] The Commission's representative says that the Claimant's resulting overpayment will be \$2,802 and not \$2,500. She says that Service Canada paid the Claimant a lump sum of \$7,802 for an additional 21 weeks of benefits at the end of his claim (a top-up of

¹² The five weeks are the weeks of August 9, 16, 23, 30 and September 6, 2020.

emergency response benefits for eight weeks, and regular benefits for 13 weeks) when it completed the first (incorrect) allocation in June 2021. This amount was paid to the Claimant even though he had a debt of \$12,926 at the time. The Commission's representative also says that \$7,500 was later paid against the Claimant's debt. She implies that this was from the Claimant's former employer (who held back this amount from the settlement).

[33] The Claimant is not sure what payment he received, and he has no knowledge of any payment made against his debt. There was no evidence of these payments before the General Division.

[34] If the Commission's representative is right about these payments, then the Claimant would have an additional \$302 overpayment (\$7,802 that he shouldn't have received, less \$7,500). I won't make a decision on this point because I can't consider new evidence, and the parties haven't agreed on this aspect of the overpayment. While the Claimant asked for time to review the Commission's arguments, he eventually opted not to respond.

Conclusion

[35] The appeal is allowed. The General Division made several errors in its allocation decision. The correct allocation of earnings leads to an overpayment of \$2,500. The Claimant may have an additional overpayment that is outside the scope of this appeal.

Shirley Netten
Member, Appeal Division