



Citation: *Canada Employment Insurance Commission v WC*, 2022 SST 595

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Josée Lachance
Respondent: W. C.

Decision under appeal: General Division decision dated December 23, 2021
(GE-21-2112)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference
Hearing date: June 28, 2022
Hearing participants: Appellant's representative
Respondent

Decision date: July 7, 2022
File number: AD-22-9

Decision

[1] The appeal is allowed.

Overview

[2] The Respondent (Claimant) received \$41,819.86 from his former employer. The Appellant (Commission) decided that the money received was severance pay and vacation pay and represented “earnings” under the law.

[3] The Commission allocated the earnings starting the week of March 1, 2020, at an amount of \$2,082 per week. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division determined that the Claimant had received \$41,199 in earnings, excluding a bonus, and that the earnings had to be allocated starting the week of February 23, 2020 at \$2,082 per week with \$1,641 being allocated to the week beginning July 5, 2020. It concluded that the Claimant had to repay \$6,303 in Employment Insurance (EI) benefits received during these weeks. The General Division also concluded that the Claimant had to repay \$573 in EI benefits received during the waiting period week.

[5] The Appeal Division granted the Commission leave to appeal of the General Division’s decision. The Commission submits that the General Division made errors in law.

[6] I must decide whether the General Division made errors in law when it allocated the Claimant’s earnings and determined the amount of the overpayment.

[7] I am allowing the Commission’s appeal.

Issues

[8] Did the General Division make an error in its interpretation of section 36(9) of the *Employment Insurance Regulations* (EI Regulations) when it concluded that the earnings had to be allocated starting February 23, 2020?

[9] Did the General Division make an error in law when it determined that earnings received due to separation from employment cannot be allocated to the waiting period?

[10] Did the General Division make an error in the calculation of the Claimant's overpayment?

Analysis

Appeal Division's mandate

[11] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.¹

[12] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.²

[13] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, I must dismiss the appeal.

¹ *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.

² *Idem*.

Did the General Division make an error in its interpretation of section 36(9) of the EI Regulations when it concluded that the earnings had to be allocated starting February 23, 2020?

[14] The General Division determined that the Claimant received \$41,199 in earnings, excluding the bonus, and that the earnings had to be allocated starting the week of February 23, 2020 at \$2,082 per week with \$1,641 being allocated to the week beginning July 5, 2020. It concluded that the Claimant had to repay \$6,303 in EI benefits received during these weeks.

[15] The General Division also determined that the Claimant's waiting period was the week of July 12, 2020. It therefore concluded that the Claimant had to repay \$573 in EI benefits received during that week.

[16] The Commission submits that the General Division misapplied section 36(9) of the EI Regulations when it determined that the allocation of separation monies had to start in the week of February 23, 2020, instead of March 1, 2020.

[17] I take notice that before the General Division, the parties agreed that the Claimant's normal weekly earnings was \$2,082.00. They also agreed that the Claimant was laid-off on February 28, 2020.

[18] The General Division decided that the weekly amount of money of \$2,082 had to be allocated starting the week of February 23, 2020, the week of the lay-off.

[19] It is true that section 36(9) of the EI Regulations says that earnings a claimant receives for being separated from their job have to be allocated starting the week of separation. However, it also says that the total earnings of a claimant from that employment are, in each consecutive week except the last, equal to a claimant's normal weekly earnings from that employment.

[20] In other words, when a claimant has received their full salary for the week in which the dismissal occurred, the amount received must be allocated to the following week so 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". By contrast, if a Claimant only worked part of their normal workweek, the amount must be allocated to the week of dismissal.³

[21] I therefore find that the General Division misapplied section 36(9) of the EI Regulations when it determined that the allocation of separation monies had to start in the week of February 23, 2020, instead of March 1, 2020, because the Claimant had received his full salary for that week.

[22] I am therefore justified to intervene on that issue.

Did the General Division make an error in law when it found that earnings received due to separation from employment cannot be allocated to the waiting period?

[23] The Commission submits that the General Division made an error in law when it determined that the allocation received due to separation from employment cannot be allocated to the waiting period.

[24] The law says that a claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a waiting period of one week of unemployment for which no benefits are payable.⁴

[25] However, if a claimant has earnings during their waiting period, an amount not exceeding those earnings shall, as prescribed, be deducted from the benefits payable for the first three weeks for which benefits are otherwise payable.⁵

³ CUB 20328; CUB 20126; CUB 18773; CUB 17772 and CUB 17689.

⁴ Section 13 of the *Employment Insurance Act* (EI Act).

⁵ Section 19 (1) of the EI Act, and section 39 of the EI Regulations.

[26] The General Division noted that because the law requires that money received on separation from employment be allocated starting with the week of separation the waiting period is **most often** served in the week after the final week of allocation.

[27] I acknowledge that in the Commission's initial calculations, that included the bonus, a remaining amount of \$182 representing earnings during the waiting period had to be deducted from the Claimant's benefits the following week in conformity with the law.

[28] However, the General Division excluded the bonus from its calculations. Therefore, it did not make an error when it concluded that the Claimant had to repay the \$573 in EI benefits received during the waiting period week. The Commission arrives to the same conclusion for a different week in its updated overpayment breakdown that excludes the bonus.⁶

[29] I therefore see no reason to intervene on this issue.

Did the General Division make an error in the calculation of the Claimant's overpayment?

[30] Because the General Division started the allocation of earnings in the week of February 23, 2020, instead of March 1, 2020, there is an error in the General Division's calculation of the Claimant's overpayment.

[31] I am therefore justified to intervene on this issue.

⁶ See AD5-1.

Remedy

[32] Considering that both parties had the opportunity to present their case before the General Division, I will render the decision that should have been given by the General Division.⁷

[33] I find that the allocation of separation monies must start in the week of March 1, 2020, because the Claimant received his full salary for the week of February 23, 2020.

[34] I find that the total of \$41,199 is to be allocated starting the week of March 1, 2020, at \$2,082 per week with \$1,641 being allocated to the last week beginning July 12, 2020. The Claimant has to repay \$6,876 (12 weeks x \$573).

[35] I find that the Claimant has to serve a one-week waiting period the week of July 19, 2020. He has to repay the \$573 in EI benefits received during that week.

[36] Therefore, the Claimant's total overpayment is \$7,449.

Conclusion

[37] The appeal is allowed.

[38] The Claimant's total overpayment is \$7,449.

Pierre Lafontaine
Member, Appeal Division

⁷ Pursuant to section 59(1) of the DESD Act.