



Citation: *KL v Canada Employment Insurance Commission*, 2022 SST 625

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:** K. L.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Angèle Fricker

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**Decision under appeal:** General Division decision dated January 27, 2022  
(GE-21-2460)

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**Tribunal member:** Jude Samson

**Type of hearing:** On the Record

**Decision date:** August 10, 2022

**File number:** AD-22-125

## Decision

[1] The appeal is dismissed. The Claimant's pension income needs to be considered (allocated) when calculating the amount of his Employment Insurance (EI) benefits.

## Overview

[2] K. L. is the Claimant in this case. The Canada Employment Insurance Commission (Commission) refused to pay him EI regular benefits.

[3] On the one hand, the Commission says that the Claimant's pension from a former employer is part of the earnings that it needs to consider when calculating the amount of his EI benefits.<sup>1</sup> According to the Commission, this pension reduces the Claimant's benefits to zero.

[4] On the other hand, the Claimant argues that the Commission should ignore his pension income. The Claimant says that his pension was part of a settlement with his former employer in the context of a lawsuit for wrongful dismissal. According to the Claimant, the settlement meant that he was forced to take an early retirement.

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division, but it dismissed his appeal. The General Division found that the Claimant's pension payments are earnings that the Commission needs to consider.

[6] The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division. At a pre-hearing conference, the parties agreed that I could decide this appeal based on the evidence and arguments already on file. I agree. The issues are straightforward and the parties have expressed their arguments clearly in writing.

[7] I've concluded that there are no reasons for me to change the General Division decision. As a result, I'm dismissing the Claimant's appeal.

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<sup>1</sup> The *Employment Insurance Regulations* (EI Regulations) set out a complicated list of items that are included and excluded from earnings and that the Commission must then consider (or "allocate") against a claim for EI benefits: see sections 35 and 36 of the EI Regulations.

## Issue

[8] This decision focuses on one issue: Did the General Division make a relevant error when it found that the Commission had to include the Claimant's pension income as part of his earnings?

## Analysis

[9] I can intervene in this case only if the General Division made a relevant error.<sup>2</sup> In this appeal, I considered whether the General Division made an error of law or based its decision on an important error about the facts of the case.

[10] Any error of law can justify my intervention in the case.

[11] However, not all errors of fact will allow me to intervene in the case. I cannot intervene just because the General Division made a mistake about some minor detail that has no impact on the outcome of the case. Instead, I can only intervene if the General Division based its decision on a fact that the evidence seriously contradicts or cannot support.<sup>3</sup>

## The General Division made no error about the Claimant's pension income

[12] The essential facts are as follows:

- The Claimant applied for EI regular benefits on September 17, 2021;
- The Commission established his claim for benefits starting on September 12, 2021;<sup>4</sup>

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<sup>2</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act*.

<sup>3</sup> This is a summary from paragraph 41 of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47.

<sup>4</sup> See page GD3-26 in the appeal record. Section 10(1) of the *Employment Insurance Act* establishes the start of a benefit period.

- The Claimant retired on September 8, 2021, and became eligible to receive pension income from his former employer;
- If this pension income is part of the Claimant's earnings and needs to be allocated, or taken into account when calculating the amount of his benefits, then the Claimant's EI benefits are reduced to zero.

[13] The General Division decided that the Claimant's pension was part of his earnings, as defined under the law.<sup>5</sup> The General Division relied on section 35 of the *Employment Insurance Regulations* (EI Regulations), which says that earnings are a person's entire income from employment, and include a person's pension income.<sup>6</sup>

[14] However, the Claimant argues that he was effectively forced to retire as part of a settlement agreement with his former employer. In particular, the Claimant highlights the following:

- The Claimant's previous employer fired him, but later admitted that he was wrongfully dismissed.
- As part of a settlement that the Claimant and his former employer signed in 2018, the Claimant agreed to a "vacation period," a "salary continuation period," and a "leave of absence period."<sup>7</sup> These were parts of the employer's promise to keep the Claimant whole until his retirement at age 55. Under this agreement, the Claimant also preserved his rights to a full pension and to retiree benefits.
- As part of the settlement, the Claimant said he would retire in September 2021 and provide the employer with all the necessary paperwork.<sup>8</sup>
- As the primary breadwinner; however, the Claimant argues that he had no choice but to accept the agreement with his former employer. He says that he

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<sup>5</sup> Section 36 of the EI Regulations says that earnings need to be allocated.

<sup>6</sup> See section 35(2)(e) of the EI Regulations.

<sup>7</sup> The Memorandum of Agreement starts on page GD3-33.

<sup>8</sup> See paragraph 6 on page GD3-35.

acted as any reasonable person would do and accepted the agreement, including the forced retirement.

[15] In these circumstances, the Claimant argues that his pension income is excluded from earnings under section 35(7)(g), which was recently added to the EI Regulations:

**35(7)** That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

[...]

**(g)** earnings paid or payable to a claimant by reason of a lay-off or separation from employment.

[16] The General Division concluded that the Claimant could not rely on this provision. I've concluded that there are no relevant errors in this part of the General Division decision.

[17] First, I acknowledge that the General Division decision refers to section 35(7)(e) of the EI Regulations instead of to section 35(7)(g). Obviously, it would have been better if the General Division had referred to the right section number, but this mistake isn't fatal to its decision. It's clear from the General Division's decision that it was applying the right provision and that the section number was just a typing mistake.<sup>9</sup>

[18] Second, the Claimant can't rely on section 35(7)(g) because it wasn't in force at the time he established his claim for EI benefits.

[19] The Claimant retired on September 8, 2021, and became eligible for his pension on that day. He submitted his application for EI benefits on September 17, 2021. His benefit period started on September 12, 2021.

[20] All these things occurred before September 26, 2021, when section 35(7)(g) of the EI Regulations came into force.<sup>10</sup>

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<sup>9</sup> See *NA v Minister of Employment and Social Development*, 2017 CanLII 97196 at paragraphs 16–19.

<sup>10</sup> See sections 347(3) and 351 of the *Budget Implementation Act, 2021, No. 1*.

[21] Third, the Claimant has not established that the General Division based its decision on an important mistake about the facts of his case. As mentioned above, this is a high threshold to meet. Briefly, I can only intervene if the General Division based its decision on a fact that the evidence seriously contradicts or cannot support.<sup>11</sup>

[22] I recognize that the Claimant disagrees with some of the General Division's conclusions. However, the General Division considered the Claimant's arguments and its conclusions are supported by evidence. For example, the Claimant argues that he had no choice but to sign the agreement with his former employer, and that he did what any reasonable person would do.

[23] I'm not convinced by the relevance of this argument, or that the General Division should go behind an agreement like this one to assess what a reasonable person would do in all the circumstances.

[24] Besides, there is evidence — including the Memorandum of Agreement between the Claimant and his former employer — that supports the General Division's conclusion. The Claimant signed an agreement saying that he had “chosen to retire” and made a “decision to retire.”<sup>12</sup>

[25] The Claimant is receiving a pension income because he meets the eligibility requirements.<sup>13</sup> The agreement did not create his entitlement to a pension. However, it “made him whole” by securing the path towards his goal of retiring with a full pension and retiree benefits.

[26] For all these reasons, I find that the General Division made no relevant errors when it concluded that the Claimant's pension income had to be included in his earnings, and taken into account when calculating the amount of his EI benefits.

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<sup>11</sup> This is a summary from paragraph 41 of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47.

<sup>12</sup> See the preamble to the agreement, along with clauses 7 and 10 on pages GD3-33 to 36.

<sup>13</sup> See page GD3-43.

## **Conclusion**

[27] I am dismissing the Claimant's appeal. The General Division made no relevant errors in his case.

Jude Samson  
Member, Appeal Division