



Citation: *PM v Canada Employment Insurance Commission*, 2022 SST 931

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: P. M.

Respondent: Canada Employment Insurance Commission
Representative: Julie Villeneuve

Decision under appeal: General Division decision dated March 11, 2022
(GE-22-68)

Tribunal member: Shirley Netten

Type of hearing: Teleconference

Hearing date: June 29, 2022

Hearing participants: Appellant
Respondent's representative

Decision date: September 22, 2022

File number: AD-22-193

Decision

[1] The appeal is allowed. The matter will go back to the General Division for reconsideration.

Overview

[2] P. M. (the Claimant) received Employment Insurance (EI) regular benefits from October 4, 2020 to July 17, 2021. He reported his self-employment earnings throughout that period, and his benefits were reduced accordingly.

[3] There are special considerations for people who are claiming EI benefits while self-employed. Generally, self-employed people can't receive benefits unless they are self-employed to a minor extent.¹

[4] In September 2021, on its own initiative, the Canada Employment Insurance Commission² (Commission) reconsidered its decision to pay the Claimant benefits. The Commission decided that the Claimant wasn't entitled to EI because his self-employment was not minor in extent. The Claimant was told to repay \$12,225 in benefits.

[5] The Commission maintained its decision in November 2021. The Claimant appealed to the Tribunal's General Division. The General Division agreed that the Claimant's self-employment was such that he was not entitled to EI benefits, and dismissed the Claimant's appeal.

[6] The General Division didn't consider whether the Commission properly decided to reconsider the earlier claims for benefits. I have found that this was an error of jurisdiction. For reasons explained below, this matter must go back to the General Division to decide the issue it didn't decide.

¹ See section 30 of the *Employment Insurance Regulations* and sections 9 and 11(1) of the *Employment Insurance Act*. The rules are different for EI benefits specifically for self-employed people, in Part VII.1 of the *Employment Insurance Act*. Part VII.1 doesn't apply in this appeal.

² Service Canada acts on behalf of the Commission.

Issues

[7] The issues in this appeal are:

- a) Did the General Division fail to exercise its jurisdiction over the issue of the Commission's exercise of discretion?
- b) If so, how can I fix that error?

Analysis

The General Division made an error of jurisdiction

[8] One of the grounds of appeal to the Appeal Division is that the General Division refused to exercise its jurisdiction.³ This happens when a party raises an issue in an appeal, and the issue is within the General Division's power to decide, but the General Division doesn't decide the issue.

– **The General Division had the power to decide whether the Commission properly reconsidered the claim**

[9] The Commission did not dispute that the General Division had the power to decide whether the Commission properly exercised its discretion to reconsider. So, I will touch only briefly on this point.

[10] The General Division's mandate is to hear appeals of decisions made by the Commission in its reconsideration (internal appeal) process.⁴ In this case, the scope of the General Division's jurisdiction flows from the scope of the Commission's November 2021 reconsideration decision.⁵

[11] The November 2021 decision was a mandatory reconsideration (at the Claimant's request) of a discretionary reconsideration (on the Commission's own

³ Section 58(1)(a) of the *Department of Employment and Social Development Act*

⁴ This mandate comes from section 113 of the *Employment Insurance Act (Act)* and sections 52 and 54 of the *Department of Employment and Social Development Act*.

⁵ Under sections 112 and 112.1 of the Act, a claimant can ask the Commission to reconsider any decision other than a write-off decision. Although the name is the same, this type of reconsideration (requested by a claimant) is different from the type discussed later in this appeal, which is a reconsideration on the Commission's own initiative under section 52 of the Act.

initiative). The scope of the November 2021 decision, and hence the General Division's jurisdiction, included the issue of whether the Commission properly exercised its discretion to reconsider the claims for benefits on its own initiative.⁶

– **The General Division didn't decide whether the Commission properly reconsidered the claim**

[12] At the General Division, the Claimant made it clear that he disagreed with the Commission's retroactive decision-making.⁷ The Claimant didn't object to the ending of his benefits in July 2021; he objected to the revised decision about the benefits already paid between October 2020 and July 2021, noting the repeated assurances he had been given that his benefits were in order.

[13] The General Division confirmed the Commission's decision about the Claimant's self-employment.⁸ The General Division noted the Commission's "authority to review claims", without further comment.⁹ The General Division correctly stated that a write-off request had to be made to the Commission (or to the Canada Revenue Agency, acting on its behalf for certain write-off decisions).¹⁰

[14] The General Division didn't address or decide the question of whether the Commission properly reconsidered the Claimant's claim for benefits, under section 52 of the *Employment Insurance Act* (Act). I agree with the Claimant that the General Division ignored this issue.

[15] At the hearing, the Commission's representative conceded that there was an error of jurisdiction. However, the Commission's representative argued in writing that the General Division **implicitly** considered this issue, and that there were no concerns about the exercise of discretion. I find nothing in the General Division decision to support that argument.

⁶ The General Division has previously taken this approach, taking jurisdiction over this discretionary decision. See for example *FB v Canada Employment Insurance Commission*, 2016 CanLII 102760 (SST).

⁷ See for example GD2-3.

⁸ Paragraphs 7 to 31 of the General Division decision.

⁹ Paragraph 35 of the General Division decision.

¹⁰ Paragraph 40 of the General Division decision.

[16] The General Division referenced the Commission’s authority to reconsider, without mentioning the discretionary nature of that authority. This suggests that the member didn’t turn her mind to the Commission’s discretionary power and whether it was properly exercised.

[17] The Claimant raised concerns about the retroactive change to his benefits. The General Division ought to have addressed the question of the Commission’s exercise of discretion explicitly.¹¹ I find that the General Division made an error of jurisdiction by not addressing this issue.

How to fix the error: this matter must go back to the General Division

[18] Having found a jurisdictional error, my options are to return the matter to the General Division, or to decide the issue myself.¹² The Appeal Division will usually make the decision itself, so long as the parties have already had a full and fair opportunity to present their evidence.

[19] Unfortunately, the Claimant has not had the opportunity to address a critical point. Since the Appeal Division can’t take new evidence on this point,¹³ the Claimant must be given that opportunity at the General Division (where he can testify and/or submit additional written evidence). I’ll explain what is missing.

[20] As set out above, the General Division should have decided whether the Commission had properly exercised its discretion to reconsider the benefits already paid to the Claimant, under section 52 of the Act. Section 52 says that the Commission “may reconsider a claim for benefits” within certain timeframes.¹⁴ This is a discretionary power: the Commission can choose whether or not it will reconsider the claim. The

¹¹ In some cases about the exercise of its discretion, the Commission has conceded this point. See for example *ER v Canada Employment Insurance Commission*, 2021 SST 569. The Supreme Court of Canada has said that reasons should respond to the main arguments raised by the parties:

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paragraphs 127 to 128.

¹² These options are set out in section 59(1) of the *Department of Employment and Social Development Act*.

¹³ With limited exceptions that don’t apply here, the Appeal Division can’t hear new evidence. See, for example, *Sibbald v Canada (Attorney General)*, 2022 FCA 157

¹⁴ The timeframe is within three years after the benefits were paid or payable, extended to five years in cases of false or misleading statements or representations. See section 52(1), (5) of the Act.

Commission's representative acknowledges that a discretionary decision must be set aside if relevant factors aren't taken into account.¹⁵

[21] The law doesn't say what factors are relevant to this discretionary decision. The Commission's representative declined to make any arguments on what factors are relevant, beyond the three-year time limit.¹⁶ Her client, the Commission, has developed and published a policy to guide their agents in exercising their discretion.¹⁷ And, the Tribunal's General Division has previously decided that the factors set out in Commission policy are relevant to the discretionary decision.¹⁸ Other factors could also be relevant to resolving the obvious tension between finality (claimants should be able to rely on decisions made about their benefits) and accuracy (mistakes and misrepresentations should be corrected).¹⁹

[22] The evidence about the discretionary decision is complete: there is documentation of the decision taken by the agent in September 2021.²⁰ And the parties have made arguments on this point. So, I could have decided what factors are relevant, and whether the Commission failed to consider those relevant factors. But if I had decided that the discretion was not properly exercised, I could not have gone on to decide whether the benefits should or should not be reconsidered. This is because the Claimant hasn't had the opportunity to address the Commission's new allegation that he made misleading statements about his self-employment.

¹⁵ The discretion must be exercised "judicially." The courts have consistently said that a decision made in bad faith, for an improper purpose, in a discriminatory manner, considering irrelevant factors, or failing to consider relevant factors, must be set aside. See the Commission's arguments at AD7-10, as well as *Suresh v Canada (Minister of Citizenship and Immigration)*, [2000] 2 FC 592, *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA), [1996] 1 FC 644.

¹⁶ See AD4-1. Other times, the Commission has acknowledged that the policy factors are relevant (for example, *WA v Canada Employment Insurance Commission*, 2016 SSTADEI 77), and has settled appeals by following its policy (for example, *KN v Canada Employment Insurance Commission*, 2021 SST 449).

¹⁷ The policy is found at Chapter 17.3.3 of the *Digest of Benefit Entitlement Principles*.

¹⁸ For example, *SL v Canada Employment Insurance Commission*, 2021 SST 889 and *JP v Canada Employment Insurance Commission*, 2021 SST 109). The Commission did not appeal these decisions.

¹⁹ For example, the Claimant repeatedly raised the question of detrimental reliance: he said that he was too late to apply for different pandemic benefits because he relied on the continued payment of EI benefits, and repeated assurances from agents that those benefits were in order. It is unclear whether the Claimant was able to apply for the other benefits after his EI benefits stopped in July 2021.

²⁰ This is at GD3-159 and GD3-160.

[23] The Commission has identified possibly contradictory statements about the Claimant's intention and efforts to find work other than self-employment.²¹ The Claimant hasn't had a chance to explain the apparent discrepancy. This could be important to the question of whether the Commission properly exercised its discretion and/or whether the discretion to reconsider should have been exercised. Depending on what factors the General Division decides are relevant, other evidence might be required too.

[24] As a result, this matter is returned to the General Division to determine:

- Did the Commission properly exercise its discretion to reconsider the benefits paid to the Claimant from October 2020 to July 2021?
- If not, should the benefits be reconsidered in this case?

Conclusion

[25] The appeal is allowed. The General Division made an error of jurisdiction. The matter will return to the General Division for reconsideration.

Shirley Netten
Member, Appeal Division

²¹ See the Claimant's October 2020 application at GD3-14, and the agents' notes at GD3-157 (August 2021), GD3-160 (September 2021) and GD3-171 (November 2021). Unfortunately there are limited notes of the calls in December 2020, January 2021 and July 2021.