



Citation: *AM v Canada Employment Insurance Commission*, 2022 SST 1328

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: A. M.
Representative: D. M.

Respondent: Canada Employment Insurance Commission
Representative: Melanie Allen

Decision under appeal: General Division decision dated August 25, 2022
(GE-22-1420)

Tribunal member: Charlotte McQuade

Type of hearing: Videoconference
Hearing date: November 8, 2022
Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: November 28, 2022
File number: AD-22-665

Decision

[1] I am allowing the appeal in part.

[2] The General Division based its decision on an important error of fact. I have made the decision the General Division should have. The Claimant is entitled to a seven-day exemption from disentitlement starting from September 30, 2018, but otherwise remains disentitled from benefits to October 19, 2018.

[3] The General Division did not make an error of jurisdiction by not deciding whether the Claimant was entitled to further weeks of sickness benefits in the period from January 13, 2019, to March 1, 2019.

Overview

[4] A. M. is the Claimant. The Claimant applied for EI sickness benefits on September 13, 2018, and her benefit period began on September 23, 2018. The Claimant left Canada on September 14, 2018, to attend her sister's funeral. The Claimant returned to Canada on October 21, 2018.

[5] Claimants who are not in Canada are not entitled to benefits unless they meet an allowed exception.¹ To meet an exception, claimants must be outside Canada for an allowed reason and must meet the availability requirements set out in the law.²

[6] The Claimant had not declared her absence from Canada. When the Canada Employment Insurance Commission (Commission) learned of her absence, the Commission disentitled the Claimant from benefits from September 24, 2018, to October 19, 2018, for reason she was outside Canada without meeting an allowed exception for this period. This decision created an overpayment.

¹ See section 37(b) of the *Employment Insurance Act* (EI Act). The allowable exceptions are set out in section 55 of the *Employment Insurance Regulations* (EI Regulations).

² See section 55 of the EI Regulations.

[7] The Claimant appealed the Commission's decision to the Tribunal's General Division who dismissed her appeal.

[8] The Claimant appealed the General Division's decision to the Appeal Division. She says the General Division based its decision on an important error of fact and made several errors of jurisdiction.

[9] I am allowing the appeal in part. The General Division did not make an error of jurisdiction by not deciding whether the Claimant was entitled to further weeks of sickness benefits during the period from January 13, 2019, to March 1, 2019.

[10] However, the General Division based its decision on an important error of fact when it decided that the Commission had allowed the Claimant a seven-day exemption to attend her sister's funeral from September 15, 2018, to September 23, 2018. I have substituted my decision for the General Division to find the Claimant is entitled to a seven-day exemption from disentitlement starting September 30, 2018, but she remains disentitled thereafter to October 19, 2018.

[11] It is not necessary for me to consider whether the General Division made an error of jurisdiction by not deciding whether the amount of the overpayment was correct because the Commission will need to recalculate the overpayment to reflect the exemption from disentitlement for the seven-day period starting September 30, 2018.

I did not consider the Claimant's new evidence

[12] As part of her submissions, the Claimant submitted a medical report dated November 14, 2018, which had not been given to the General Division.³I decided at the hearing I wouldn't consider this document.

[13] The Appeal Division generally does not consider new evidence because the Appeal Division isn't rehearing the case. Instead, the Appeal Division is deciding whether the General Division made certain errors, and if so, how to fix those errors. In

³ AD2-4.

doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[14] There are a few limited exceptions to this rule but the Claimant's document did not meet those exceptions.⁴

I will consider the new issue raised by the Claimant

[15] In her submissions to the Appeal Division, the Claimant added a new issue she had not raised in her Application to the Appeal Division. She asked the Appeal Division to decide whether the General Division had made an important error of fact that the Commission had allowed her a seven-day exemption from disenfranchisement to attend her sister's funeral. She maintains the Commission did not provide her a seven-day exemption from disenfranchisement.

[16] The Commission consented to adding this issue to the appeal. So, I have considered this issue as part of the appeal.

Issues

[17] The issues in this appeal are:

- a) Did the General Division base its decision on an important error of fact that the Commission allowed the Claimant a seven-day exemption from disenfranchisement from September 15, 2018, to September 21, 2018, for reason she was outside Canada to attend the funeral of an immediate family member?

⁴ On an application for judicial review, the Federal Court will only accept new evidence if it provides general background information, highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly. See *Sharma v Canada (Attorney General)*, 2018 FCA 48, which explains the test for accepting new evidence. In *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 39, the Federal Court of Appeal accepts that the Appeal Division should be guided by the same exceptions to the rule against new evidence that apply to the courts on judicial review.

- b) Did the General Division make an error of jurisdiction by not deciding whether the Claimant was entitled to further weeks of sickness benefits in the period from January 13, 2019, to March 1, 2019?
- c) Did the General Division make an error of jurisdiction by not deciding whether the Commission had correctly calculated the overpayment?
- d) If the General Division made any of these errors, what is the remedy?

Analysis

[18] The Appeal Division may intervene in a General Division decision only if the General Division makes an error of law or an error of jurisdiction, bases its decision on an important error of fact, or breaches procedural fairness.

The General Division did not make an error of jurisdiction by not deciding whether the Claimant was entitled to additional weeks of sickness benefits

[19] The General Division did not have the jurisdiction to decide whether the Claimant was entitled to additional weeks of sickness benefits in the period from January 13, 2019, to March 1, 2019.

[20] While in receipt of EI sickness benefits, the Claimant left Canada on September 14, 2018, to attend her sister's funeral, which occurred on September 29, 2018. The Claimant returned to Canada on October 21, 2018.

[21] The Claimant submits that the General Division should have decided whether she was entitled to further weeks of sickness benefits in the period from January 13, 2019, to March 1, 2019. She says she was still ill and on sick leave then, but received no EI sickness benefits. She says she raised this argument to the General Division but the General Division did not address this issue.

[22] An error of jurisdiction means that the General Division didn't decide an issue it had to decide or decided an issue it did not have the authority to decide.

[23] The General Division's authority to review decisions comes from the *Employment Insurance Act* (EI Act). The EI Act says that the General Division can only review reconsideration decisions made by the Commission that are appealed to the Tribunal.⁵ This means that the General Division can only consider and make decisions about the issues that arise from the reconsideration decision under appeal.

[24] In this case, the reconsideration decision under appeal was not about the Claimant's entitlement to sickness benefits from January 13, 2019, to March 1, 2019. Rather, it concerned the Commission's disentitlement of the Claimant from benefits from September 24, 2018, to October 19, 2018, for being outside Canada without meeting an allowed exception.

[25] Specifically, the reconsideration decision said that the Claimant was outside Canada from September 14, 2018, to October 21, 2018, and was paid seven consecutive days from September 15, 2018, to September 21, 2018, to attend the funeral of an immediate family member. The decision said that the Claimant was disentitled from benefits for the period September 24, 2018, to October 19, 2018.⁶

[26] Claimants who are not in Canada are not entitled to benefits unless they meet an allowed exception.⁷

[27] So, the General Division had to decide whether the Claimant could show that she met an allowed exception for being outside Canada from September 24, 2018, to October 19, 2018.

[28] One of the exceptions for being outside Canada is a seven-day period to attend the funeral of an immediate family member.⁸

⁵ Sections 112 and 113 of the EI Act set out the Tribunal's authority to review reconsideration decisions made by the Commission.

⁶ GD3-29.

⁷ See section 37(b) of the EI Act. The allowable exceptions are set out in section 55 of the EI Regulations.

⁸ See section 55(1)(b) of the EI Regulations.

[29] The General Division decided that the Claimant did not meet this exception or any other exceptions for being outside Canada from September 24, 2018, to October 19, 2018, so she remained disentitled to benefits for this period.

[30] The General Division made this decision on the understanding that the Commission had already allowed the Claimant a seven-day exemption from September 15, 2018, to attend the funeral of an immediate family member.⁹

[31] I see no evidence in that record that the Claimant had requested a reconsideration about the number of weeks of sickness benefits she had received or about whether she was entitled to further weeks of sickness benefits in the period from January 13, 2019, to March 1, 2019. There is also no reconsideration decision from the Commission about that issue.

[32] The Commission submits that it never made an initial decision or reconsideration decision of the Claimant's entitlement to sickness benefits from January 13, 2019, to March 1, 2019. The Commission says, therefore, the General Division did not make an error of jurisdiction by not deciding this issue.

[33] However, the Commission says that since the disentitlement for being out of Canada meant the Claimant had not received the maximum 15 weeks of sickness benefits, and since the Claimant has now submitted medical evidence supporting that her medical problems continued until March 1, 2019, the Commission will review the Claimant's entitlement for possible additional weeks of sickness benefits from January 13, 2019, to March 1, 2019, once the appeal decision is rendered.

[34] The General Division did not have the jurisdiction to decide whether the Claimant was entitled to any weeks of sickness benefits during the period from January 13, 2019, to March 1, 2019. So, it did not make an error of jurisdiction by not deciding this issue.

⁹ See paragraph 13 and paragraph 20 of the General Division decision.

The General Division based its decision on an important error of fact

[35] The Appeal Division can intervene only in certain kinds of errors of fact. I can intervene only if the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.¹⁰

[36] If the General Division makes a factual finding that squarely contradicts or is unsupported by the evidence, its determination may be said to have been made perversely, capriciously, or without regard to the evidence.¹¹

[37] As above, the General Division decided that the Claimant did not meet this exception or any other exceptions for being outside Canada from September 24, 2018, to October 19, 2018. The General Division decided this, on the understanding that the Commission had allowed the Claimant an exemption from disentitlement for the period from September 15, 2018, to September 21, 2018.¹²

[38] The Claimant submits that the General Division made an error of fact about this. She says she did not receive an exemption from disentitlement from September 15, 2018, to September 21, 2018, and, as the payment record shows, her benefit period did not begin until September 23, 2018, and she did not begin receiving benefits until September 30, 2018.

[39] The Commission agrees that the General Division based its decision on an important error of fact when it decided the Commission had provided the Claimant with a seven-day exemption from disentitlement from September 15, 2018, to September 21, 2018. The Commission says that there was an error about this in the reconsideration decision but in its representations to the General Division, this error was pointed out.

[40] The Commission confirms that the Claimant's benefit period began on September 23, 2018. The Commission explained that since the Claimant left Canada prior to the benefit period beginning, on September 23, 2018, the Commission did not

¹⁰ See section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act).

¹¹ See *Garvey v Canada (Attorney General)*, 2018 FCA 118.

¹² See paragraph 13 and paragraph 20 of the General Division decision.

consider her for an exemption for the period from September 24, 2018, to October 19, 2018.

[41] I find the General Division made a mistake of fact without regard to the material before it. The General Division understood that the Commission had allowed the Claimant a seven-day exemption from disentitlement from September 15, 2018, to September 21, 2018, but the record showed otherwise.

[42] The reconsideration decision says that the Claimant was paid for seven days from September 15, 2018, to September 21, 2018, as she left the country to attend the funeral of a family member.¹³ However, in the Commission's representations to the General Division, the Commission explained the reconsideration decision was in error when it stated the Claimant had been paid seven days from September 15, 2018, to September 21, 2018, and that the Claimant's benefit period did not begin until September 23, 2022.¹⁴

[43] The payment history on file also shows that the Claimant's benefit period did not actually begin until September 23, 2018.¹⁵

[44] Since the General Division understood the Claimant had received the seven-day exemption from disentitlement, it did not consider whether she might benefit from an exemption from disentitlement for the period from September 24, 2018, to October 19, 2018. So, the General Division based its decision on an error of fact that the Claimant had already been given a seven-day exemption.

[45] Because the General based its decision on an error of fact, made without regard to the material before it, I can intervene in the decision.¹⁶

¹³GD3-29.

¹⁴ GD4-1.

¹⁵ GD3-23.

¹⁶ See section 58(1) of the DESD Act, which sets out the type of errors that allow the Appeal Division to intervene in a decision of the General Division.

I do not need to consider whether the General Division made an error of jurisdiction by not deciding whether the Commission had correctly calculated the overpayment

[46] The Claimant submits that the General Division made an error of jurisdiction by not deciding whether the amount the Commission had correctly calculated the overpayment. She submits the overpayment amount is not correct.

[47] However, I do not need to consider this issue because, as a result of my substituted decision, set out below, the Commission will need to recalculate the overpayment.

Remedy

[48] To remedy the error, I can send the appeal back to the General Division for reconsideration or I can give the decision the General Division should have.¹⁷

[49] I am satisfied the parties had a full and fair opportunity to present their case before the General Division and the essential facts concerning the Claimant's absence from Canada are not in dispute. So, this is an appropriate case for me to substitute my decision.

Substituted decision

[50] The Claimant left Canada on September 14, 2018, to attend her sister's funeral. The Claimant returned to Canada on October 21, 2018.

[51] The Claimant's sister's funeral was held on September 29, 2018.¹⁸

[52] The law allows an exemption from disentitlement for reason that a claimant is outside Canada for a period of not more than seven days to attend the funeral of a member of the Claimant's immediate family.¹⁹

¹⁷ See section 59(1) of the DESD Act, which gives me this authority.

¹⁸ GD2-10.

¹⁹ See section 55(1)(b) of the EI Regulations.

[53] The Commission says its policy is to apply the exemption to the first seven days a claimant is outside Canada. In the Claimant's case, since she was already outside Canada for seven days before her benefit period began on September 23, 2018, the exemption does not apply. The Commission says that even if the seven-day exemption was applied to the first week of the benefit period, it would not change the amount of the overpayment, as it would just push the week the waiting period was served, back a further week.

[54] The Claimant submits that, section 55(1)(b) of the *Employment Insurance Regulations* (EI Regulations), which is the relevant exemption provision, does not say that the exemption must be applied to the first seven days outside Canada. It just says a claimant who is outside Canada to attend a funeral of a family member is entitled to a seven-day exemption from disqualification. The Claimant suggests the exemption be applied to the week of September 30, 2018.

[55] The term "immediate family" is defined in subsection 55(2) of the EI Regulations and includes, among other things, "a child of the claimant's father or mother." The Claimant's sister therefore meets the definition of an "immediate family" member.

[56] I agree with the Claimant that the exemption provision does not specify what seven-day period it applies to. It may be the Commission's policy to apply the exemption to the first seven days a claimant is outside of Canada but there is nothing in the EI Act or EI regulations that says that is the period to which the seven-day exemption must be applied.

[57] In my view, had the legislature intended the exemption to apply specifically to the first seven days a claimant is outside Canada, it would have said that. So, I find that the seven-day exemption period is not restricted to the first seven days outside Canada.

[58] However, the seven-day period to which the exemption applies cannot be arbitrarily chosen. The period must have some connection to the date of the funeral, given that is the reason for the exemption. Since the Claimant's sister's funeral was held

on September 29, 2018, I find it appropriate to apply the seven-day period from September 30, 2018, as suggested by the Claimant.

[59] This means the Claimant is not disentitled to benefits for a seven-day period from September 30, 2018, but she is thereafter until October 19, 2018, as she remained outside Canada without meeting any further exemptions from disentitlement for this period.

[60] The overpayment arising from the disentitlement, therefore, needs to be recalculated by the Commission.

Conclusion

[61] The appeal is allowed in part.

[62] The Claimant is entitled to a seven-day exemption from disentitlement from September 30, 2018, but remains disentitled thereafter until October 19, 2018. The overpayment arising from the disentitlement is to be recalculated by the Commission.

[63] The General Division did not make an error of jurisdiction by not deciding whether the Claimant was entitled to further weeks of sickness benefits for the period from January 13, 2019, to March 1, 2019. The Commission is requested to consider whether the Claimant is entitled to any further weeks of sickness benefits in that period, as per its submissions.

Charlotte McQuade
Member, Appeal Division