[TRANSLATION]

Citation: *Canada Employment Insurance Commission v CM et al.*, 2023 SST 390

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | Canada Employment Insurance Commission |
| **Representative:** | Suzette Bernard |
| **Respondent:** | C. M. *et al.* |
| **Representative:** | Martin Savoie |
| **Added Party:** | |
| **Representative:** | Pierrick Bazinet (counsel) |

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| **Decision under appeal:** | General Division decision dated July 14, 2022 (GE-20-2036 *et al.*) |

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| **Tribunal member:** | Pierre Lafontaine |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | January 31, 2023 |
| **Hearing participants:** | Appellant's representative<br>Respondents' representative |
| **Decision date:** | March 31, 2023 |
| **File number:** | AD-22-500 *et al.* |

## Decision

[1] The appeal is allowed. The Claimants are not entitled to benefits.

## Overview

[2] The Appellant, the Canada Employment Insurance Commission (Commission), decided that it was unable to pay the Respondents (Claimants) Employment Insurance (EI) benefits from July 22, 2019, to August 2, 2019, because [a claimant] cannot be considered unemployed [during] any week in which they are on annual leave (vacation) and for which they receive their usual remuneration for a full working week. On reconsideration, the Commission upheld its initial decision. The Claimants appealed to the General Division.

[3] The General Division determined that the Claimants' contract of service continued during the two weeks the employer was closed. It found that the Claimants were unemployed because, despite having a contract of service, they had not received their usual remuneration for the weeks from July 22, 2019, to August 2, 2019. It also found that the Claimants had not received differed remuneration for those weeks.

[4] The Appeal Division gave the Commission permission to appeal the General Division decision. The Commission argues that the General Division made its decision without considering the evidence before it and made an error of law in its interpretation of the issue of the Claimants' unemployment.

[5] I have to decide whether the General Division ignored the evidence before it and whether it made an error of law in its interpretation of section 11(3) of the *Employment Insurance Act* (EI Act).

[6] I am allowing the Commission's appeal.

## Issue

[7] Did the General Division ignore the evidence before it and make an error of law in its interpretation of section 11(3) of the EI Act?

# Analysis

## Appeal Division's mandate

[8] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

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

[10] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or 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.

## Did the General Division ignore the evidence before it and make an error of law in its interpretation of section 11(3) of the EI Act?

## The facts

[11] The Claimants made an initial claim for EI benefits that should have started on July 21, 2019. They indicated that they had stopped working on July 18, 2019, because of a shortage of work. They also indicated that they would go back to work for their employer.

[12] On October 9, 2019, the employer confirmed to the Commission that the summer business shutdown period was two weeks long for all employees. Employees were expected to report to work after the shutdown period, on August 5, 2019.

[13] The Commission determined that the Claimants could not be considered unemployed from July 22, 2019, to August 2, 2019, because they were on annual

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

vacation leave and received their usual remuneration for a full working week. The Claimants appealed the Commission's reconsideration decision to the General Division.

## The General Division decision

[14] The General Division determined that the Claimants' contract of service continued during the two weeks the employer was closed. It found that the Claimants were unemployed because, despite having a contract of service, they had not received their usual remuneration for the weeks from July 22, 2019, to August 2, 2019. It also found that the Claimants had not received differed remuneration for those weeks.

## The Commission's position

[15] The Commission argues that the General Division made an error of law by not applying section 11(3) of the EI Act.

[16] The Commission says that the General Division did not consider the evidence before it. It argues that the Claimants expressed their choice to take their summer vacation when the collective agreement was ratified, and this choice is valid throughout the duration of the agreement.

[17] The Commission says that the General Division noted that the Claimants were expected to go back to work after the two-week shutdown. This means that the Claimants continued to be employees of the employer during the period of leave.

[18] The Commission argues that article 16.01 of the collective agreement provides for an amount of savings and a vacation period for any employee governed by the collective agreement, which means that the Claimants received remuneration that had been set aside.

[19] The Commission says that all the prerequisites for section 11(3) of the EI Act to apply are met. In addition, section 10.1 of the *Employment Insurance Regulations* says that an insured person is deemed to have worked where they are remunerated by the employer for a period of paid leave or for a period of leave in the form of a lump sum payment calculated without regard to the length of the period of leave.

[20] The Commission says that the General Division's finding produces an absurd result that allows the Claimants to be paid twice for the two-week vacation period: once under the collective agreement, and once under the EI program. That goes against the very essence of the EI program.

## The Claimants' position

[21] The Claimants argue that the Appeal Division is not sitting *de novo*. It must only determine whether the General Division made an error of fact or law.

[22] The Claimants say that the General Division decision is based on the evidence. Since the Commission did not attend the General Division hearing, it cannot come back now before the Appeal Division to change the facts.

[23] According to the Claimants, the evidence showed that the weeks of the shutdown during the construction holidays were not paid by the employer. The workers receive the savings they set aside in a trust, and the contributors get their savings on two specific dates each year regardless of whether the workers take a vacation.

[24] The Claimants say that the moneys received from the trust are not earnings under the EI Act. The Commission acknowledged this in a letter dated November 23, 2010, and in its arguments to the Tribunal.

[25] The Claimants say that the evidence showed that employees do not request leave for the business shutdown period during the construction holidays.

[26] The Claimants say that the evidence showed that the shutdown period was not included in the number of vacation days. The employer was in attendance and represented before the General Division, and it presented no evidence to contradict this.

[27] According to the Claimants, the collective agreement says that the business shuts down for the construction holidays, and the evidence showed this. In addition, the employer stopped paying its employees.

## Analysis

[28] The General Division had to decide whether the Claimants were unemployed for the period from July 22, 2019, to August 2, 2019, when the employer shut down for the construction holidays.

[29] As the General Division rightly pointed out, the issue before it was not whether the moneys that the trust pays to the Claimants are earnings to be allocated within the meaning of the law and regulations.[2]

[30] Section 11(3) of the EI Act says that a week or part of a week is not a week of unemployment when:

- it is part of a period of leave from employment under an agreement between an employer and an employee
- [it] is part of a period of leave from employment during which the employee continues to be an employee of the employer
- the employee receives remuneration that was set aside, regardless of when it is paid

[31] The General Division determined that the contracts of service continued during the two weeks the business was closed. It considered that the Claimants were bound by a collective agreement. It noted that the Claimants went back to work after the two-week shutdown. The evidence shows that the Claimants continued to be employees of the employer.

[32] In its analysis of section 11(3) of the EI Act, the General Division did not dispute that, twice a year, the Claimants receive their savings set aside in trust. It noted that the collective agreement says that a payment is made [translation] “during the summer holidays [and] during the winter holidays.”

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[2] The decision in *Bryden v Canada Employment and Immigration Commission*, [1982] 1 SCR 443, does not apply in this case because it involved determining the allocation of earnings for benefit purposes.

[33] I note that the collective agreement provides for an amount of savings related to a percentage and a vacation period for any employee who will have completed a certain number of years of service before the end of the vacation year.[3]

[34] It is clear from the evidence that the percentage of savings that an employee receives is directly related to their vacation entitlement based on their seniority.[4]

[35] The evidence shows that the Claimants receive remuneration that was set aside, regardless of when it is paid.

[36] Lastly, the General Division had to determine whether the weeks at issue are part of a period of leave from employment under an agreement between an employer and an employee. The General Division determined that the Claimants were not taking a period of leave at that time.

[37] The General Division relied on the English version of the law in finding that the employee does not take a period of leave. It pointed out that section 11(3) says "the employee […] takes the period of leave."

[38] The General Division noted that, despite there being a collective agreement and, as a result, an agreement for the two-week construction holiday shutdown, it would have difficulty in finding that the employee "takes" a period of leave at that time. It said that an employee would be unable to continue working when the business shuts down. No leave requests were made for that period. In its view, the employees did not have a choice whether to work.

[39] I find that the General Division made an error in its interpretation of the law, since it did not consider the English version of the law in its entirety. The English version says that the employee "takes the period of leave **under an agreement with their**

[3] See article 16.01 of the collective agreement.
[4] See GD3-43: vacation table showing the vacation entitlement and the percentage received based on the employee's seniority.

**employer**." The General Division failed to consider that the Claimants establish the period of leave in question **under an agreement with the employer**.

[40] To support its position, the General Division ignored the collective agreement that was negotiated by the parties and that sets out conditions of employment for the employer's employees, including annual leave. The collective agreement is binding on the signing parties.

[41] Under this collective agreement, the Claimants chose to take two weeks off when the employer shuts down for the construction holidays.

[42] The parties clearly expressed this desire in the collective agreement, which states that the employer will shut down the plant during the two (2) weeks of Quebec's summer construction holidays and that only the Christmas break is not included in the employee's vacation period.[5]

[43] This means that the Claimants did not have to request leave for that period, since it was already included in the collective agreement. The employer confirmed this multiple times.[6]

[44] For these reasons, I find that the General Division ignored the evidence before it and made an error of law in its interpretation of section 11(3) of the EI Act.

[45] This means that I should intervene.

## Remedy

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

[47] The evidence shows that all the conditions required for section 11(3) of the EI Act to apply are met. The Claimants continued to be employees of the employer, they

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[5] Articles 16.03 and 16.05 of the collective agreement.
[6] See the questionnaire and the employer's answers at GD3-71 to GD3-73.
[7] In accordance with the Appeal Division's powers under section 59(1) of the *Department of Employment and Social Development Act*.

received remuneration that had been set aside, and the leave was included in the collective agreement agreed to by the Claimants. The Claimants are not entitled to benefits.

[48] The Commission's appeal should be allowed.

## Conclusion

[49] The appeal is allowed.

Pierre Lafontaine
Member, Appeal Division