



Citation: *Canada Employment Insurance Commission v KL*, 2023 SST 465

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Gilles-Luc Belanger

**Respondent:** K. L.

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**Decision under appeal:** General Division decision dated October 3, 2022  
(GE-22-1339)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Teleconference

**Hearing date:** January 23, 2023

**Hearing participants:** Appellant's representative  
Respondent

**Decision date:** April 19, 2023

**File number:** AD-22-746

## Decision

[1] The appeal is allowed. The General Division erred in law in its interpretation of the legislation. The Claimant's weekly benefit rate for her 2021 summer fishing claim was \$300.

## Overview

[2] The Respondent, K. L. (Claimant), is a fisher. She established a summer fishing benefit period effective October 11, 2020 (the 2020 claim) and then again October 3, 2021 (the 2021 claim). The Applicant, the Canada Employment Insurance Commission (Commission), initially set the Claimant's weekly benefit rate for the 2021 benefit period at \$584. Later, it changed the rate to \$300.

[3] The Commission said that the rate of \$584 resulted from a temporary measure to help claimants during the COVID-19 pandemic. It said that the measure should not have applied to the Claimant's 2021 benefit period because it had already been applied to the Claimant's 2020 benefit period.

[4] The Claimant successfully appealed the Commission's decision to the General Division of the Tribunal. The General Division decided that the Claimant did not need the temporary measure to establish her benefit period in 2020, so it should not have been applied. It decided that the measure was available to be applied to the Claimant's 2021 claim.

[5] The Commission is appealing the General Division decision. It argues that the General Division made an error of law in its interpretation of temporary provisions in the *Employment Insurance Act* (EI Act).

[6] I find that the General Division misinterpreted the legislation. The temporary provision at section 153.1923 of the EI Act applied to the Claimant's 2020 claim and did not apply to her 2021 claim.

## Issues

[7] The issues in this appeal are:

- a) Did the General Division err in its interpretation of sections 153.1922 and 153.1923 of the EI Act?
- b) How should the error be fixed?

## Analysis

[8] I can intervene in this case only if the General Division made a relevant error, which is known as a “ground of appeal.”<sup>1</sup> One of the grounds of appeal is that the General Division made an error of law in making its decision. The interpretation of legislation is a question of law.<sup>2</sup>

### **The General Division misinterpreted the temporary measures**

#### **– The General Division decision**

[9] The General Division considered the temporary measures at sections 153.1922 and 153.1923 of the EI Act.<sup>3</sup> These measures were introduced in response to the COVID-19 pandemic.

[10] Under one of these measures, claimants who did not qualify for fishing benefits under the *Employment Insurance (Fishing) Regulations* (Regulations) may have qualified for benefits under the temporary measures.<sup>4</sup>

[11] Another of these measures allowed claimants to use the highest of either their current year’s fishing earnings, or the earnings from the previous two fishing seasons to determine their benefit rate.<sup>5</sup>

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<sup>1</sup> Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal.

<sup>2</sup> See *Canada (Attorney General) v Trochimchuk*, 2011 FCA 268 at paragraph 7.

<sup>3</sup> See sections 153.1922 and 153.1923(1)(b) under Part VIII.5 of the Temporary Measures to Facilitate Access to Benefits, of the *Employment Insurance Act*.

<sup>4</sup> See section 153.1922 of the *EI Act*.

<sup>5</sup> The specific periods are set out in section 153.1923(1) of the *EI Act*.

[12] In its decision, the General Division found that these temporary measures only apply when a Claimant needs them to qualify for EI fishing benefits.<sup>6</sup> It considered the wording of the sections and found that the temporary measures are linked to the establishment of a benefit period.<sup>7</sup>

[13] Because the Claimant did not need the measures in order to qualify for EI fishing benefits for the 2020 claim, the temporary measures did not apply.<sup>8</sup>

[14] The General Division found that the temporary measures can be used to establish one benefit period for a summer fisher claim.<sup>9</sup> The measures were available to the Claimant to establish her 2021 claim, because they did not apply to the 2020 claim.

– **The Commission’s appeal to the Appeal Division**

[15] The Commission argues that the General Division made an error of law when it decided that section 153.1923 only applied to claimants who qualified for benefits under section 153.1922. It says that a plain reading of the sections does not support the General Division’s interpretation.

[16] The Commission also argues that the General Division failed to consider section 153.197(3) of the EI Act, which established a minimum weekly insurable earning rate for fishers of \$545. This section applied to claimants whose benefit period began between September 26, 2021 and November 20, 2021.

[17] The Claimant argues that the General Division’s interpretation is correct. She did not need the temporary provisions to qualify for benefits for her 2020 claim and needed them to increase her benefit rate for her 2021 claim.

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<sup>6</sup> General Division decision at para 15.

<sup>7</sup> General Division decision at para 17.

<sup>8</sup> General Division decision at para 18.

<sup>9</sup> General Division decision at para 13.

[18] The interpretation of legislation is a question of law. I do not owe the General Division any deference on questions of law. For this reason, I will turn directly to the interpretation of the temporary provisions.

[19] When interpreting legislation, the courts have said that the Tribunal must consider the text, context, and purpose of the legislation.<sup>10</sup> I have to consider the words of the legislation in their entire context in their grammatical and ordinary sense harmoniously with the scheme and object of the EI Act, and the intention of Parliament.<sup>11</sup>

[20] So, I will address the legislative scheme, consider the words used in the temporary provisions, the context of surrounding and related provisions, and the purpose of the temporary measures.

– **The legislative scheme**

[21] To qualify for EI fishing benefits under the Regulations (the regular fishing rules), a claimant has to prove two things:

- They do not qualify for EI regular benefits; and
- They have at least \$2,500 of fishing earnings.<sup>12</sup>

[22] The rate of weekly benefits that will be paid to a claimant is determined under section 8.1 of the Regulations. Under this section, the earnings are based on the claimant's earnings from employment as a fisher in their qualifying period and the regional rate of unemployment.

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<sup>10</sup> See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) at paragraph 121 where the Court held that “the administrative decision maker’s task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue.”

<sup>11</sup> See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para 21 and *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 (*Canada Trustco*).

<sup>12</sup> See section 8(2) of the *Employment Insurance (Fishing) Regulations*. Because this appeal concerns a summer fishing claim, I am referring only to the sections of the EI Act and Regulations that relate to summer fishing claims. There are corresponding sections relating to winter fishing claims.

– **The words in the temporary provisions are clear**

[23] Where the words used in legislation are clear, they play a dominant role in the interpretative process.<sup>13</sup> I find that the wording of the temporary provisions is clear.

[24] The wording of the legislation is important so I will include the full text of the provisions. Section 153.1922 reads:

Eligibility

153.1922 A fisher who does not meet the conditions under paragraph 8(2)(b) or (7)(b) of the Employment Insurance (Fishing) Regulations may receive benefits under section 8.1 of those Regulations if the fisher has received such benefits during any of the periods referred to in subparagraph 153.1923(1)(a)(ii) or (iii) or (b)(ii) or (iii).

[25] I find that the plain meaning of this section is that it allows claimants who otherwise would not qualify for EI fishing benefits under the regular fishing rules to receive benefits under section 8.1 of the Regulations if they had received such benefits during the same period in the 2019-2020 season or the 2018- 2019 season.

[26] Section 153.1923 states:

Determined earnings

153.1923 (1) The rate of weekly benefits under section 8.1 of the Employment Insurance (Fishing) Regulations shall be calculated using the highest of the following earnings:

(a) in the case of an initial claim for benefits under subsection 8(1) of those Regulations,

(i) if applicable, the earnings that would be used to calculate the fisher's rate of weekly benefits,

(ii) the earnings that were used to calculate the fisher's rate of weekly benefits for the benefit period that was established for the fisher under subsection 8(1) of those

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<sup>13</sup> See *Canada Trustco* at para 10.

Regulations during the period beginning on September 29, 2019 and ending on June 20, 2020, and

(iii) the earnings that were used to calculate the fisher's rate of weekly benefits for the benefit period that was established for the fisher under subsection 8(1) of those Regulations during the period beginning on September 30, 2018 and ending on June 15, 2019; and

(...)

Benefit period

(2) A fisher may have a benefit period established once under paragraph (1)(a) and once under paragraph (1)(b).<sup>14</sup>

[27] This section provides that a claimant's weekly benefit rate is to be calculated using the highest earnings from the current season, the 2019-2020 season or the 2018-2019 season.

[28] The General Division found that these provisions are to be read together. When read together, it found that section 153.1923 is only applied when a claimant didn't qualify for EI fishing benefits under the regular fishing rules.

[29] The General Division based this interpretation on the language used in section 153.1923(2) and found that the temporary measure is linked to the establishment of a benefit period.

[30] I find that the General Division misinterpreted these provisions when it found that section 153.1923 only applied when a claimant needed the temporary provisions to qualify for EI fishing benefits.

[31] Section 153.1922 allows claimants who do not have sufficient earnings in their current qualifying period to receive benefits if they had sufficient earnings in previous years. It is an alternative way of qualifying for benefits. The rate of benefits that the claimant will be paid is a separate issue.

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<sup>14</sup> Section 153.1923(1)(b) applies to winter fishing claims.

[32] Section 153.1923 is a measure that applies to all fishing claims that started when the provision was in effect, between September 27, 2020 and December 18, 2021.<sup>15</sup> The plain language used in the section clearly states that the weekly rate of benefits under section 8.1 of the Regulations shall be calculated in accordance with the section.

[33] While section 153.1922 refers to the periods outlined in section 153.1923, section 153.1923 makes no reference to section 153.1922. The language used in section 153.1923 makes it clear that it applies to the calculation of the benefit rate under section 8.1 of the Regulations, which determines the rate of benefits for claimants who qualify for EI fishing benefits under the regular rules.

[34] Whether a claimant qualifies for benefits under the regular rules in section 8(2) of the Regulations or under the temporary measure in section 153.1922, the legislation initially directs that claimants receive benefits under section 8.1 of the Regulations.

[35] The temporary measure in section 153.1923 then applies and the rate of weekly benefits under s. 8.1 shall be calculated by using the highest of the claimant's earnings in the claimant's current year, or a previous year's earnings as detailed below.

[36] A plain reading of section 153.1923 shows that a claimant's rate of weekly benefits is calculated using the highest of the fisher's total insurable earnings from:

- a) if applicable, their most recent qualifying period;
- b) the qualifying period used to establish their claim for the period from September 29, 2019 to June 20, 2020; or
- c) the qualifying period used to establish their claim for the period from September 30, 2018 to June 15, 2019.

[37] If this section only applied when a claimant needed it (along with section 153.1922) to establish a benefit period, then section 153.1923(1)(a) would be

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<sup>15</sup> See s. 153.196(3) which provides the provisions cease to apply on December 18, 2021 and *Interim Order No. 10 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-208



redundant. That clause states “if applicable” the insurable earnings from the claimant’s most recent qualifying period will be factored into the determination of the weekly benefit rate.

– **The context and purpose support the plain meaning**

[38] Sections 153.1922 and 153.1923 of the EI Act were introduced in response to the COVID-19 pandemic to assist fishers whose earnings may have been impacted by the pandemic.

[39] According to the plain meaning of section 153.1923, for claimants who qualify under section 8(2) of the Regulations, the insurable earnings from their most recent qualifying period will be taken into consideration. If those earnings are higher than the earnings in the two previous qualifying periods, those earnings will be used to calculate the benefit rate.

[40] However, if a claimant’s earnings were affected by the COVID-19 pandemic and were lower than previous years, those claimants can use the previous years earnings to receive a higher benefit rate than they would have without the temporary measures. This alleviates the financial impact for fishers who still meet the criteria to qualify under the regular rules but whose earnings were reduced due to the pandemic.

[41] For claimants who do not qualify for benefits under section 8(2) of the Regulations, section 153.1922 allows them to still receive benefits. For these claimants, the highest of the earnings from the two previous qualifying periods will be used to calculate the benefit rate. In both scenarios, section 153.1923 is applied.

[42] Section 153.1923(2) provides that the section can only be used once for a summer fishing claim and once for a winter fishing claim.

[43] The General Division found that the Claimant qualified for EI fishing benefits under the regular rules in section 8(2) of the Regulations for the 2020 claim. It decided

that, by law, the temporary measure was not applied and was therefore available to establish the 2021 claim.<sup>16</sup>

[44] I note, however, that the Claimant also qualified for EI fishing benefits under the regular rules for the 2021 claim, albeit with lower insurable earnings.<sup>17</sup> According to the General Division's interpretation, the temporary measures would again not be available. As discussed above, this renders section 153.1923(1)(a)(i) redundant. It also frustrates the purpose of helping claimants whose earnings were affected by the pandemic.

[45] If the temporary measure in section 153.1923 only applied when a claimant did not qualify for benefits under the regular rules, a claimant who had no earnings in the current year could use a previous year's earnings and receive a higher rate of benefits than a claimant who qualified for benefits under the regular rules but with lower earnings than in previous years.

[46] I find that the General Division's interpretation of the legislation was incorrect. The plain meaning of the words in section 153.1923 is that the section applies to the calculation of the weekly benefit rate for all claimants, whether they qualify under section 8(2) of the Regulations or section 153.1922 of the EI Act. Section 153.1923(2) provides that the section only applies once for a summer fishing claim.

### **I will fix the General Division's error by giving the decision it should have given**

[47] The General Division based its decision on a misinterpretation of the legislation, which is an error of law. This means that I can substitute my own decision or I can refer the matter back to the General Division for reconsideration.<sup>18</sup> I can decide any question of law or fact that is needed to resolve the Claimant's appeal.<sup>19</sup>

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<sup>16</sup> General Division decision at para 18.

<sup>17</sup> The Claimant had earnings of \$4,769.10 in her qualifying period for her 2021 claim. See GD3-44 to GD3-49.

<sup>18</sup> Section 59(1) of the DESD Act sets out my powers to fix an error.

<sup>19</sup> See section 64(1) of the DESD Act.

[48] In this case, I find that it is appropriate for me to substitute my own decision. The record is complete and the parties had a full opportunity to make their case at the General Division.<sup>20</sup>

### **The temporary measure in section 153.1923 does not apply to the second claim**

[49] For the reasons outlined above, I find that section 153.1923 applied to the Claimant's 2020 claim. Because her earnings from the current qualifying period were higher than those in her two previous qualifying periods, the current earnings were used to determine her weekly benefit rate.

[50] Section 153.1923(2) provides that the section will only apply once. When the Claimant applied for benefits in 2021, she could not benefit from the section and use her insurable earnings from the 2020 qualifying period again.

[51] The Claimant did have her rate of insurable earnings increased by section 153.197(3) which deemed her weekly earnings to be \$545. The section reads:

153.197(3) **Fishers** – Despite paragraph 8.1(a) of the Employment Insurance (Fishing) Regulations, the weekly insurable earnings of a fisher whose benefit period begins during the period beginning on September 26, 2021 and ending on November 20, 2021 are deemed to be the greater of the amount determined under that paragraph and \$545.

[52] The Claimant's weekly insurable earnings as determined under section 8.1(a) of the Regulations were less than \$545. The Commission properly applied this section and used \$545 as her weekly insurable earnings for the purpose of calculating her benefit rate. Based on this rate of earnings, the Claimant's weekly benefit rate was determined to be \$300.

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<sup>20</sup> *Canada Employment Insurance Commission v Lu*, 2021 SST 619 at paras 34-36; *X v Canada Employment Insurance Commission*, 2019 SST 351 at para 18.

## **Conclusion**

[53] The appeal is allowed. The General Division erred in its interpretation of the legislation. The Claimant's weekly benefit rate for her 2021 claim was \$300.

Melanie Petrunia  
Member, Appeal Division