



Citation: *GS v Canada Employment Insurance Commission*, 2023 SST 1353

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: G. S.

Respondent: Canada Employment Insurance Commission
Representative: Isabelle Thiffault

Decision under appeal: General Division decision dated May 23, 2023
(GE-22-4109)

Tribunal member: Stephen Bergen

Type of hearing: In Writing

Decision date: October 5, 2023

File number: AD-23-559

Decision

[1] I am allowing the appeal in part: The General Division made an error of jurisdiction when it decided that the Claimant did not qualify for benefits as of October 23, 2022. I am rescinding this part of the decision.

[2] I have also found that the General Division made an error of jurisdiction or law by not considering the issue of antedate or applying the entire legal test for antedate. After correcting the error, I confirm that the Claimant was not entitled to an antedate.

Overview

[3] G. S. is the Appellant. On October 29, 2022, he made a claim for Employment Insurance (EI) benefits so I will call him the Claimant. The Respondent, the Canada Employment Insurance Commission (Commission), denied the claim for compassionate care benefits because the Claimant did not have sufficient self-employment earnings to qualify.

[4] The Claimant requested the Commission to establish his benefit period on August 7, 2022, (called “antedating the claim”), but the Commission refused because the Claimant would not have qualified at that earlier time either. When the Claimant asked the Commission to reconsider its decision to refuse his antedate, it would not change its decision.

[5] The Claimant appealed to the General Division of the Social Security Tribunal (Tribunal), which dismissed his appeal. I granted leave for him to appeal the General Division decision to the Appeal Division.

[6] I am allowing the appeal in part. I am rescinding that part of the decision dealing with the Claimant’s qualification for benefits as of October 23, 2022. At the same time, I confirm that he was not entitled to an antedate to August 7, 2022.

Preliminary Issue

[7] The Claimant requested that the appeal proceed in writing.

[8] The Commission provided a written submission after I granted leave to appeal. The Tribunal invited the Claimant to also provide a written submission.

[9] The Claimant called the Tribunal on August 9, 2023, to say that he was satisfied with what he had sent the Tribunal. The Tribunal called him on September 11, 2023, to confirm that he had received the Commission's September 8, 2023, submission. It asked if he wished to respond. The Claimant told the Tribunal that he had nothing else to send.

[10] This decision is based on a review of the record. This includes the evidence and submissions that was in front of the General Division, and its decision. I have also considered the Claimant's submissions that were associated with his Application to the Appeal Division, and the Commission's submissions.

Issues

[11] The Claimant raised the following issues in his appeal:

- a) Did the General Division make an error of law by requiring the Claimant to show a minimum amount of earnings in order to qualify for compassionate care benefits?
- b) Did the General Division make an important error of fact when it found that the Claimant's earnings in his qualifying period were insufficient to qualify for compassionate care benefits?

[12] However, I granted leave to appeal after finding an arguable case that the General Division made errors of jurisdiction.

[13] I found that it may have made an error by considering an issue that it did not have the power to consider when it decided that the Claimant did not qualify for benefits on October 23, 2022.

[14] I also found that the General Division may have made an error by failing to decide whether the Commission was right to refuse to antedate the claim to August 7, 2022. The Commission argues that this was also an error of law.

Analysis

General Principles

[15] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

- a) The General Division hearing process was not fair in some way.
- b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
- c) The General Division made an error of law when making its decision.
- d) The General Division based its decision on an important error of fact.¹

Errors of jurisdiction

[16] I find that the General Division made errors of jurisdiction. After the Commission informed the Claimant on November 9, 2022, that he did not qualify for benefits, the Claimant asked the Commission to antedate his claim to August 7, 2022. He believed that he would have had enough self-employment earnings to qualify for compassionate care benefits if his claim started in August. He gave the Commission his reasons for not applying for benefits earlier.

[17] In a November 18, 2022, decision, the Commission refused to antedate his claim, saying that he would not have qualified for benefits even if his claim started on August 7, 2022. The Claimant requested a reconsideration of the November 18, 2022, decision.

¹ This is a plain language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[18] When the Commission discussed the reconsideration request with the Claimant, it confirmed that it had notified him of the November 18, 2022, decision, and that it was maintaining its decision “regarding the claimant’s antedate request.”² The Commission’s written reconsideration decision of December 12, 2022, states on its face that it is a reconsideration of the November 18, 2022, decision and that the Commission is maintaining its decision on the antedate.³

[19] The General Division has jurisdiction to consider appeals from reconsideration decisions only, and to consider only those issues arising from the reconsideration decision.

– **Failure to decide the issue of antedate**

[20] The issue before General Division was whether the Claimant was entitled to an antedate to August 7, 2022.

[21] The General Division did not mention antedate in its decision. It considered only whether the Claimant had sufficient self-employment earnings to qualify, and it considered this issue at two separate times. It looked at whether he qualified on August 7, 2022, and whether he qualified on October 23, 2022, near the date the Claimant submitted his application for benefits.

[22] By failing to consider the antedate issue or failing to analyze the Commission’s antedate decision using the legal test for antedate, the General Division made an error of jurisdiction or law.

[23] The *Employment Insurance Act* (EI Act) says that the Commission must consider two things before deciding to antedate a claim: It must consider whether a claimant would have qualified for benefits on the earlier date and whether they had good cause for the entire period of the delay.⁴ A claimant must satisfy the Commission that both are true, or the Commission cannot allow the antedate. In this case, the Commission found

² See GD3-32.

³ See GD3-33.

⁴ See section 10(4) of the EI Act.

that the Claimant would not have qualified on August 7, 2022, so it did not need to consider whether he had good cause for the delay since then.

[24] The General Division decided that the Claimant did not have sufficient self-employment earnings to qualify for compassionate benefits on August 7, 2022. It was necessary and appropriate for the General Division to review the Claimant's earnings in the qualifying period that would be associated with a claim starting on August 7, 2022. This was at least part of the analysis that was required to determine whether the Claimant's claim should be antedated.

[25] However, the broader issue before the General Division was whether the Commission properly denied the Claimant's request for an antedate. The test for antedate requires consideration of two criteria. The General Division did not even mention antedate, and its decision does not show that it considered or applied the test for antedate.

[26] I recognize that a claimant must meet both criteria. This means that it was open to the General Division to decide that the Claimant was not entitled to have his claim antedated, based solely on its finding that he did not have the self-employment earnings to qualify.

[27] But this does not relieve the General Division from clearly identifying that it is deciding the issue of antedate - if it is not considering the Claimant's reasons for the delay - why it is not doing so. The decision does not show that the General Division understood the issue was antedate or that it turned its mind to both requirements.

[28] The Commission concedes that the General Division made either an error of law or of jurisdiction by failing to address the antedate issue or apply the legal test.

– **Qualification as of October 23, 2022**

[29] The General Division made an error of jurisdiction by considering whether the Claimant qualified for benefits on October 23, 2022.

[30] As mentioned earlier, the General Division's jurisdiction is limited to the issues identified in the reconsideration decision. When it considers other issues, it exceeds its jurisdiction.

[31] The November 18, 2022, decision did not deal with his entitlement as of October 23, 2022; nor was it an issue in the Commission's reconsideration.

Error of law or of fact

[32] The Claimant disagrees with the General Division's finding that the self - employment earnings in his qualifying period were insufficient to qualify for compassionate care benefits.

[33] He argued that compassionate care benefits should be available to everyone regardless of income. He said that he should not have to show a minimum amount of earnings in order to qualify for compassionate care benefits.

[34] The General Division did not make an error of law by requiring him to show a minimum amount of earnings. The law says that a self-employed person whose benefit period begins anytime between September 26, 2021, and September 24, 2022 (which would include August 7, 2022) must have \$5,289.00 in their qualifying period.⁵

[35] The Claimant may disagree with the law, but the General Division had no choice but to follow the law.

[36] The General Division did not make an error of fact either.

[37] The qualifying period for a self-employed person is the year immediately before the year during which their benefit period begins.⁶ If the Claimant's claim had been antedated to August 7, 2022, his qualifying period would be the 2021 year.

⁵ See section 152.07(1) of the EI Act.

⁶ See section 152.08(1) of the EI Act.

[38] The Claimant originally reported that he had self-employment income of \$7,187.00 for 2021, but Canada Revenue Agency's (CRA) assessment revised this figure and provided the Commission with self-employed earnings of \$0.00 for 2021.

[39] The Claimant did not dispute this figure at the General Division or provide evidence that his self-employment earnings should have been higher. He has not suggested that the General Division made an error by relying on the figure provided by CRA.

Remedy

[40] I have found errors in how the General Division reached its decision, so I must now decide what I will do about that. I can rescind or vary the General Division decision, make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.⁷

[41] The Commission agreed that the General Division made errors and it suggests that I should send it back for a new hearing. The Claimant has not said how he would like me to deal with the matter.

[42] I have decided that I can make the decision. I have the evidence I require to correct the errors of the General Division and to decide the issues.

The Claimant's qualification for benefits as of October 23, 2022

[43] I am rescinding the portion of the decision concerning the Claimant's qualification for compassionate care benefits as of October 23, 2022. This matter was outside the jurisdiction of the General Division, so it should not have been considered.

[44] This means the Claimant is free to ask the Commission to reconsider its November 9, 2022, decision, although he will be late. If he tries to have the November 9, 2022, decision reconsidered, the Commission will need to decide whether it should consider a late request.

⁷ See section 59(1) of the DESDA.

The issue of antedate and the test for antedate

[45] It was not clear that the General Division considered whether the Commission properly refused to antedate the claim to August 7, 2022, or whether it turned its mind to the entire test for antedate.

[46] Nonetheless, the General Division did consider whether the Claimant would have had sufficient self-employment income to qualify for compassionate care benefits as of August 7, 2022. It found as fact that he did not have the income that he would require to qualify. I have found no error in this finding, and I accept that the Claimant did not have the income to qualify.

[47] Since he did not have enough income to qualify as of August 7, 2022, he fails the antedate test. For this reason, I do not need to decide whether he had good cause for the delay between August 7, 2022, and his application for benefits.

[48] I find that Commission properly refused to antedate the claim to August 7, 2022.

Conclusion

[49] I am allowing the appeal in part. I am rescinding the part of the General Division decision that finds that the Claimant did not qualify for benefits as of October 23, 2022.

[50] On the question of antedate, I have made the decision that the General Division, should have made. I confirm that the Claimant is not entitled to an antedate to August 7, 2022.

Stephen Bergen
Member, Appeal Division