



[TRANSLATION]

Citation: *GM v Canada Employment Insurance Commission*, 2024 SST 263

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

<b>Appellant:</b>	G. M.
<b>Representative:</b>	É. M.
<b>Respondent:</b>	Canada Employment Insurance Commission
<b>Representative:</b>	Josée Lachance

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<b>Decision under appeal:</b>	General Division decision dated November 1, 2023 (GE-23-2077)
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<b>Tribunal member:</b>	Pierre Lafontaine
<b>Type of hearing:</b>	In person
<b>Hearing date:</b>	March 12, 2024
<b>Hearing participants:</b>	Appellant's representative Respondent's representative
<b>Decision date:</b>	March 14, 2024
<b>File numbers:</b>	AD-23-1013 and AD-23-1062

## Decision

[1] The Claimant's appeal is allowed.

[2] The Commission's appeal is dismissed.

## Overview

[3] The Appellant (Claimant) received \$4,094.51 from his employer when his employment ended.

[4] The Respondent (Commission) decided that the money was "earnings" under the law because it was vacation pay. The Commission told the Claimant that the \$4,094.51 would be allocated to his benefit period from October 30, 2022, to January 14, 2023, and that the remaining balance—\$38.00—would be allocated to the week of January 15, 2023.

[5] The Claimant asked the Commission to reconsider, but it upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[6] The General Division decided that the Claimant had received total earnings of \$3,860.00 as his vacation pay for 2019, 2020, 2021, and 2022 and that these earnings had to be allocated starting the week of October 30, 2022.

[7] The Claimant was given permission to appeal the General Division decision to the Appeal Division. He argues that the General Division made an error, since only the vacation pay for the last year should be allocated, not the previous years. The Commission was also given permission to appeal. It argues that the General Division made errors of fact and law.

[8] I am allowing the Claimant's appeal. I am dismissing the Commission's appeal.

## Issues

[9] Did the General Division make an error in its interpretation of section 36(9) of the *Employment Insurance Regulations* (EI Regulations) when it found that the vacation pay for the previous years had to be allocated from October 30, 2022?

[10] Did the General Division base 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 when it decided that the amount received as vacation pay was \$3,860.00 and that the Commission had not correctly allocated this amount under section 36(9) of the EI Regulations?

## Preliminary remarks

[11] To decide this appeal, I have listened to the recording of the General Division hearing.

[12] As explained at the hearing on March 12, 2024, the Appeal Division does not accept new evidence, since this is not a *de novo*, or fresh, hearing.<sup>1</sup>

## Analysis

### Appeal Division's mandate

[13] 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*.<sup>2</sup>

[14] 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.

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<sup>1</sup> See *Sibbald v Canada (Attorney General)*, 2022 FCA 157. Except in exceptional circumstances not applicable here.

<sup>2</sup> See *Canada (Attorney General) v Jean*, 2015 FCA 242; and *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[15] 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 make an error in its interpretation of section 36(9) of the EI Regulations when it found that the vacation pay for the previous years had to be allocated from October 30, 2022?**
- **Did the General Division base 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 when it decided that the amount received as vacation pay was \$3,860.00 and that the Commission had not correctly allocated this amount under section 36(9) of the EI Regulations?**

[16] The Claimant argues that the General Division made an error, since only the vacation pay for the last year of work should be allocated, not the previous years.

[17] The Commission says that the General Division did not make an error of law, since the wording of section 36(9) of the EI Regulations is clear. It says that all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation.

[18] However, the Commission argues that the General Division 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 when it decided that the amount received as vacation pay was \$3,860.00 and that the Commission had not correctly allocated this amount under section 36(9) of the EI Regulations.

[19] The Claimant argues that the employer had a legal duty under the *Act respecting labour standards* (ALS) to pay him his vacation every year, and it did not. He says that he never asked to accrue vacation pay, since he did not know that he was entitled to vacation pay.

[20] The ALS says that annual leave cannot be deferred and accumulated over several years unless a collective agreement or a decree says that it can.<sup>3</sup> I note that there is no evidence on file to support that the Claimant was subject to a collective agreement or decree.

[21] The ALS also says that, in the absence of a collective agreement or decree, the employer **must** pay the employee an indemnity pertaining to the annual leave in a lump sum before the beginning of the leave or in the manner applicable for the regular payment of the employee's wages.<sup>4</sup>

[22] The facts of this case are unique in that the evidence does not show that the Claimant agreed to let the employer accrue vacation pay.

[23] In the circumstances, I find that the vacation pay for 2019, 2020, and 2021 was not paid to the Claimant "by reason of lay-off or separation from employment" within the meaning of section 36(9) of the EI Regulations. The employer should have paid it during the annual leave. But, because of a mistake by the employer, the Claimant did not receive his vacation pay at the right time. The fact that he finally received his vacation pay from his employer when he was separated from his job is irrelevant.

[24] Based on the teachings of the Federal Court of Appeal, the vacation pay for 2019, 2020, and 2021 did not become due and payable when the employment ended. In other words, the employer's obligation to make these payments did not become liquid and payable only when the Claimant's employment ended. These payments were due and payable by the employer well before the Claimant's employment ended, except for the 2022 vacation pay.<sup>5</sup>

[25] I find that the General Division made an error of law and that the Claimant's vacation pay for 2019, 2020, and 2021 should not have been allocated under section 36(9) of the EI Regulations.

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<sup>3</sup> See section 70 of the *Act respecting labour standards*.

<sup>4</sup> See section 75 of the *Act respecting labour standards*.

<sup>5</sup> See *Canada (Attorney General) v Savarie*, [1996] FCJ No 1270.

[26] This means that I am justified in intervening.

## **Remedy**

[25] I find that the parties had the opportunity to present their case before the General Division. I will give the decision that the General Division should have given.

[27] For the above reasons, the Claimant's vacation pay for 2019, 2020, and 2021 should not have been allocated under section 36(9) of the EI Regulations.

[28] Concerning the vacation pay of \$1,028.58 for 2022, it became due and payable when the Claimant was separated from his job on November 5, 2022. This money is earnings to be allocated under section 36(9) of the EI Regulations.

[29] The Claimant's average weekly earnings were determined from the Record of Employment on file to be \$385.84. Since he worked the week of October 30, 2022, to November 5, 2022, his prorated earnings that week were \$198.34. So, \$187.50 of his total vacation pay has to be added to his earnings in his last week of work to equal his average weekly earnings. Then, \$385.84 has to be allocated to the weeks of November 6, 2022, and November 13, 2022, and the remaining \$69.40 to the week of November 20, 2022.

## **Conclusion**

[30] The Claimant's appeal is allowed.

[31] The Commission's appeal is dismissed.

[32] Since the Claimant worked the week of October 30, 2022, to November 5, 2022, his prorated earnings that week were \$198.34. So, \$187.50 of his total vacation pay has to be added to his earnings in his last week of work to equal his average weekly earnings. Then, \$385.84 has to be allocated to the weeks of November 6, 2022, and November 13, 2022, and the remaining \$69.40 to the week of November 20, 2022.

Pierre Lafontaine  
Member, Appeal Division