Citation: *Canada Employment Insurance Commission v JP*, 2023 SST 1460

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Josee Lachance
Respondent:	J. P.

Decision under appeal:	General Division decision dated May 1, 2023 (GE-22-4234)

Tribunal member:	Solange Losier
Type of hearing:	Teleconference
Hearing date:	September 22, 2023
Hearing participant:	Appellant
Decision date:	November 7, 2023
File number:	AD-23-550

Decision

[1] The appeal is allowed. The General Division made an error of fact. The matter will go back to the General Division for redetermination.

Overview

[2] J. P. is the Claimant in this case. She applied for Employment Insurance (EI) sickness benefits on August 4, 2022. [1]

[3] The Commission established the Claimant's EI claim from October 2, 2022. It decided that she only had 412 hours of insurable employment from October 3, 2021 to October 1, 2022 ("52 week qualifying period") but that she needed 600 hours.[2] Because she didn't have enough hours, she could not get EI sickness benefits.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division.[3] However, she did not attend the General Division hearing. The hearing proceeded without her because the General Division decided that she got notice of the hearing.[4]

[5] The Commission's written arguments to the General Division identify that they made a mistake when they established the Claimant's EI claim from October 2, 2022.[5] Because of the mistake, they said that the 52-week qualifying period was also wrong. Instead, the Commission says that the Claimant's EI claim for sickness benefits filed on

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[1] See Application for EI sickness benefits at pages GD3-3 to GD3-18.
[2] See section 93 of the *Employment Insurance Regulations* (EI Regulations). Sickness benefits are one type of "special benefits".
[3] See Claimant's Appeal to the General Division at pages GD2-1 to GD2-15.
[4] See paragraphs 8-12 of the General Division decision. Also, section 58 of the *Social Security Tribunal Rules of Procedure* (SST Rules) allows for an oral hearing to take place without a party if the Tribunal is satisfied that the party received the notice of hearing.
[5] See page GD4-3.

August 4, 2022 should have been established either July 10, 2022 or July 17, 2022 because she reported her last day of work was July 13, 2022.[6]

[6] The General Division decided that the Claimant was in fact allowed to get EI sickness benefits because she had enough hours during her qualifying period.[7] It also decided that she was ill for 3 weeks during her qualifying period, so her 52 week qualifying period was extended by an additional 3 weeks.[8]

[7] The Commission appealed to the Appeal Division of the Tribunal and argued that the General Division made an error of law when it concluded that the Claimant was allowed to get EI sickness benefits. [9] It said that the evidence about the duration of the Claimant's illness was inconsistent in the record and led the General Division to wrongly concluding that the qualifying period could be extended by 3 weeks. It also said that additional fact finding needed to be done because they only provided preliminary calculations about the Claimant's hours of insurable employment.

[8] I am allowing the Commission's appeal because I find that the General Division made an error of fact.[10]

Preliminary matters

[9] This case was previously scheduled to be heard by teleconference on September 7, 2023.[11] The Claimant asked the Tribunal to reschedule the hearing.[12] The

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[6] See page GD4-1.

[7] See General Division decision at pages AD1-7 to AD1-15.

[8] Section 8(2)(a) of the *Employment Insurance Act* (EI Act) allows for an extension to the qualifying period if the person proves that throughout the week the person was not employed in insurable employment because the person was incapable of work because of a prescribed illness, injury, quarantine or pregnancy.

[9] See application to the Appeal Division at pages AD1-1 to AD1-15 and Commission's arguments at AD2-1 to AD2-5.

[10] See sections 58(1)(b)(c) of the *Department of Employment and Social Development* (DESD Act).

[11] See notice of hearing at pages AD0-1 to AD0-3.

[12] See pages AD0-1 to AD0-3.

hearing was rescheduled to September 22, 2023 and the new notice of hearing was emailed to the parties.[13]

[10] The Tribunal called and spoke the Claimant on two separate occasions to provide information and remind her about the hearing.[14]

[11] The Claimant did not attend the Appeal Division hearing scheduled on September 22, 2023. Only the Commission attended. I proceeded with the hearing in the Claimant's absence because I was satisfied that the Claimant got the notice of hearing.[15]

[12] After the hearing had already concluded, the Claimant emailed the Tribunal asking to reschedule the hearing.[16] She said that she missed the hearing due to work.

[13] I wrote back to the Claimant and denied her request to reschedule the hearing for the following reasons.[17] The Claimant had already made a request to reschedule and the new hearing date was scheduled based on her availability. She got notice of the hearing details in advance of the hearing and had received two reminder calls from the Tribunal. Lastly, the Tribunal booked time to hear the case on the scheduled date and the Commission was in attendance and ready to proceed.

[14] However, I invited the Claimant to provide post-hearing written arguments about her case before making a decision. She was provided with a copy of the Appeal Division audio recording and for convenience, another copy of the Commission's written arguments for her review.[18] The deadline to provide her written arguments was October 4, 2023.

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[13] See pages AD0A-1 to AD0A-3. The new notice of hearing was emailed to the parties on July 31, 2023.
[14] See telephone notes dated August 30, 2023 and September 19, 2023.
[15] See section 58 of the SST Rules.
[16] See pages AD3-1.
[17] See pages AD4-1 to AD4-3.
[18] See Commission's arguments at AD2-1 to AD2-5.

[15] As of the date of this decision, the Tribunal has not received a reply from the Claimant.

Issues

[16] The issues in this appeal are:

a) Did the General Division make an error of law or error of fact when it decided that the Claimant could get EI sickness benefits and extended her qualifying period?

b) If there was an error, how should I fix it?

Analysis

[17] An error of law can happen when the General Division doesn't apply the correct law or uses the correct law but misunderstands what it means or how to apply it.[19]

[18] An error of fact happens when the General Division has based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.[20]

[19] This involves considering some of the following questions:[21]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

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[19] See section 58(1)(b) of the DESD Act.
[20] See section 58(1)(c) of the DESD Act.
[21] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

[20] The Commission's arguments refer to specific evidence and facts that they say the General Division ignored and that it based its decision on preliminary calculations about the number of hours the Claimant had. Given that, I have focused on whether the General Division made an error of fact.[22]

[21] I can intervene in the General Division decision if an error is established.[23]

The General Division made an error of fact

– The Commission's arguments about the error

[22] The Commission argues that the General Division erred when it decided to extend the qualifying period for 3 weeks concluding that the Claimant was ill and unable to work from July 13, 2022 to August 4, 2022.

[23] The Commission says that the evidence in the record about the period of time the Claimant was ill was inconsistent. It also noted that the Claimant didn't attend the hearing to testify about this issue.

[24] Specifically, the Commission relies on a discussion they had with the Claimant.[24] During that discussion, the Claimant told the Commission that she disagreed with the number of insurable hours worked and that she stopped working at the end of July because she was ill with Covid-19. The Claimant told the Commission that she was working reduced hours, so her earnings fell below 60% of her normal weekly earnings.

[25] The Commission says that the General Division's decision shows that it was aware there was inconsistent evidence about the Claimant's period of illness, but that it ignored this piece of evidence without explaining why.[25]

[26] The Commission further argues that the Claimant would not be eligible for an extension to the qualifying period if she worked reduced hours during the period she

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[22] See section 58(1)(c) of the DESD Act.
[23] See section 59(1) of the DESD Act.
[24] See supplementary record of claim at page GD3-35.
[25] See paragraph 36 of the General Division decision.

was ill because the law requires her to prove that she was not employed throughout the week and incapable of work because of her illness.[26]

[27] Lastly, the Commission submits that the General Division made an error of law when it concluded that the Claimant had enough hours of insurable employment to qualify for EI sickness benefits.[27]

– **EI sickness benefits**

[28] The laws says that a person applying for EI sickness benefits needs at least 600 hours of insurable employment during their qualifying period.[28]

[29] However, there was a temporary measure in place called a *common national entrance requirement* at the time that the Claimant applied for EI sickness or regular benefits.[29]

[30] In order to get EI sickness benefits, the Claimant needed to have at least 420 hours of insurable employment during her qualifying period. This only applied to EI claims made between September 26, 2021 and September 24, 2022.

[31] A qualifying period is usually the 52 weeks before your benefit period would start.[30] There are some circumstances where a qualifying period can be extended beyond 52 weeks, but no more than 104 weeks.[31]

[32] In this case, to get an extension to the qualifying period, the Claimant had to prove that throughout the week she was not employed in insurable employment because she was incapable of work because of a prescribed illness.[32]

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[26] See section 8(2)(a) of the EI Act.
[27] See Commission's arguments at pages AD2-1 to AD2-5.
[28] See section 93 of the EI Regulations.
[29] See *Budget Implementation Act, 2021*, No. 1. The Claimant applied for EI sickness benefits on August 4, 2022 at pages GD3-3 to GD3-18.
[30] See section 8 of the EI Act.
[31] See sections 8(2) and 8(7) of the EI Act.
[32] See section 8(2)(a) of the EI Act.

– The General Division decided that the Claimant had enough hours to qualify for EI sickness benefits and extended her qualifying period

[33] In this case, the key issues the General Division had to decide was whether the Claimant had enough hours of insurable employment to qualify for EI sickness benefits.

[34] In making that decision, it also had to decide whether the Claimant could get an extension to the qualifying period.

[35] The General Division found that the evidence about the period of time the Claimant was ill was not consistent.[33] It decided that the Claimant was ill and unable to work for 3 weeks from July 13, 2022 to August 4, 2022 and relied on the dates she reported in her application finding it was more reliable than her recollection since it was closest to the period she was sick.[34]

[36] The General Division further explained that the Claimant may have had earnings during the period she was ill and unable to work, but it was only because of the timing of her timesheets.[35]

[37] The General Division also decided that the 52 week qualifying period could be extended by 3 weeks because it had decided that the Claimant was ill and unable to work from July 13, 2022 to August 4, 2022.[36]

[38] The General Division concluded that the Claimant had enough hours of insurable employment to qualify for EI sickness benefits based on a benefit period starting September 18, 2022.[37] It relied on the Commission's preliminary calculations that the Claimant had 425 hours from August 29, 2021 to September 17, 2022.[38]

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[33] See paragraph 36 of the General Division decision.
[34] See paragraph 36 of the General Division decision and application for EI sickness benefits at GD3-3 to GD3-17.
[35] See paragraph 38 of the General Division decision.
[36] See paragraphs 39-41 of the General Division decision.
[37] See paragraphs 42-48 of the General Division decision.
[38] See section 53 of the SST Rules. Also, see pages GD5-1 to GD5-3 and G6-1 to GD6-4.

– The General Division overlooked some relevant evidence about the Claimant's period of illness

[39] In my view, the General Division made two errors of fact. I will explain more below.

[40] First, the General Division made an error of fact when it overlooked some relevant evidence that was important to its key findings about the period of time the Claimant was ill.[39]

[41] The General Division's decision shows that it was aware of the contradictory evidence about the dates the Claimant was ill. It listed some of that evidence, but it missed some relevant evidence.[40]

[42] As the Commission pointed out, the discussion between the Claimant and Commission located at page GD3-35 was an important piece of evidence that was not considered. In particular, the Claimant told the Commission that the interruption of earnings happened at the end of July due to being sick with Covid. She told the Commission that her earnings fell below 60% of her normal weekly earnings because she was working reduced hours.

[43] In its decision, the General Division referred to only some of the conflicting evidence, not all of it. For example, it identified the conflicting dates of illness reported in her application for EI sickness benefits and request for reconsideration.[41]

[44] However, there was other conflicting evidence about this issue including the discussion she had with the Commission where she reported being ill at the end of July and said she was working reduced hours.[42] In her appeal forms to the General Division, the Claimant included a letter where she wrote that she was ill from the third week of

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[39] See section 58(1)(c) of the DESD Act.
[40] See paragraph 35 and 36 of the General Division decision.
[41] See paragraph 35 of the General Division decision.
[42] See pages GD3-35 and GD2-10.

July 2022 to the end of August 2022.[43] This evidence suggests that she may have been sick more than 3 weeks.

[45] The General Division was entitled to make findings about the dates the Claimant was ill based on the evidence. But to do so, the General Division needed to turn its mind to all the conflicting evidence and address the contradictions. In this case, the General Division overlooked some of the conflicting evidence about the Claimant's period of illness.

– **The General Division relied on preliminary calculations when it determined that the Claimant had enough hours of insurable employment**

[46] Second, the General Division made an error of fact when it relied on the Commission's preliminary calculations about the Claimant's insurable hours of employment. These hours were not conclusive.

[47] The General Division took steps and wrote to the Commission to ask for more information about the Claimant's hours of insurable employment under various scenarios.[44] The Commission responded to the General Division's request for information but said that they were only preliminary calculations and more fact finding still needed to be done with the employer about the Claimant's hours, particularly since the ROE's showed some earnings during the weeks she said she was sick and unable to work.[45]

[48] The Claimant had previously told the Commission that she disagreed with the number of insurable hours she had.[46] In this scenario, the General Division should have first asked the Commission to obtain a ruling from Canada Revenue Agency (CRA) to

[43] See page GD2-10.
[44] See GD5-1 to GD5-3.
[45] See GD6-1 to GD6-4.
[46] See page GD3-35.

determine the Claimant's total number of insurable hours during the qualifying period instead of relying on preliminary calculations. [47]

[49] It was not enough to ask the Commission to make some preliminary calculations about the Claimant's hours and rely on them. There needed to be a CRA ruling obtained, particularly since there was evidence that the Claimant disagreed with the number of hours she had. This needed to happen before making a finding of fact that the Claimant had enough hours to qualify for EI sickness benefits during her qualifying period.

How to fix the error

[50] There are two options for fixing an error by the General Division.[48] I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.

[51] The Commission submits that the case should be returned to the General Division for redetermination.[49] It says that further fact finding is needed in order to properly determine whether the Claimant's qualifying period should be extended.

[52] In the alternative, the Commission says that if I choose to make a decision based on the information in the file that I should decide that the Claimant is not entitled to get an extension to the qualifying period and EI sickness benefits.

[53] I find that the record is not complete in this case. For example, there isn't enough information for me to decide how many hours of insurable employment the Claimant had during the qualifying period. Only a CRA ruling can determine this.

[54] Given the above, it would be appropriate to return this case to the General Division for redetermination. It is not necessary to include a direction to the General

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[47] See section 90(1)(d) of the EI Act. The CRA has exclusive jurisdiction to decide the number of insurable hours of employment.
[48] See section 59(1) of the DESD Act.
[49] See page AD2-5.

Division because the Commission also has the authority to make a request for CRA ruling at any time.[50]

Conclusion

[55] The appeal is allowed. The General Division made an error of fact. The matter will be returned to the General Division for redetermination.

Solange Losier
Member, Appeal Division

[50] See section 90(2) of the EI Act.