



Citation: *MS v Canada Employment Insurance Commission*, 2024 SST 5

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

# **Leave to Appeal Decision**

**Applicant:** M. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated September 25, 2023  
(GE-23-1816)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** January 3, 2024

**File number:** AD-23-970

## Decision

[1] Leave to appeal is refused. This means the appeal will not proceed.

## Overview

[2] The Applicant (Claimant) received \$476 from his former employer. The Respondent (Commission) decided that the money is “earnings” under the law because it is vacation pay. The Commission allocated the earnings he received starting the week he was laid off from his employment. The Claimant did not agree. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[3] The General Division found that the Claimant’s vacation pay was earnings under the law that were paid because of being laid off and that those earnings were properly allocated by the Commission.

[4] The Claimant seeks leave to appeal of the General Division’s decision to the Appeal Division. He submits that he disagrees with the General Division decision. The Claimant puts forward that he could have applied for sickness benefits, but he didn’t. He looked for work instead. He puts forward that he has contributed to the Canadian economy for ten years and feels that he should not be penalized by having his vacation pay considered as earnings under the law. The Claimant submits that he should have waited to return to work before withdrawing his vacation pay.

[5] I must decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[6] I refuse leave to appeal because the Claimant’s appeal has no reasonable chance of success.

## Issue

[7] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

## Analysis

[8] Section 58(1) of the *Department of Employment and Social Development Act* specifies the only grounds of appeal of a General Division decision. These reviewable errors are that:

1. The General Division hearing process was not fair in some way.
2. 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.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[9] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove his case but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[10] Therefore, before I can grant leave to appeal, I need to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

### **Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?**

[11] The Claimant submits that he disagrees with the General Division decision. The Claimant puts forward that he could have applied for sickness benefits, but he didn't. He

looked for work instead. He puts forward that he has contributed to the Canadian economy for ten years and feels that he should not be penalized by having his vacation pay considered as earnings under the law. The Claimant submits that he should have waited to return to work before withdrawing his vacation pay.

[12] An abundance of case law has established that monies received upon separation, such as vacation and severance pay and pay in lieu of notice, are considered earnings, and must be allocated, pursuant to the *Employment Insurance Regulations*.<sup>1</sup>

[13] The General Division correctly applied the law that says that all earnings paid or payable because of separation of employment are allocated starting the week of the Claimant's loss of employment. The allocation starts on that week despite when the earnings are paid or payable.<sup>2</sup>

[14] In his application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[15] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

## Conclusion

[16] Leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine  
Member, Appeal Division

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<sup>1</sup> See sections 35 and 36 of the *Employment Insurance Regulations; Canada (Attorney general) v Boucher Dancause*, 2010 FCA 270; *Canada (Attorney general) v Cantin*, 2008 FCA 192.

<sup>2</sup> See 36(9) of the *Employment Insurance Regulations; Canada (Attorney General) v Roch*, 2003 FCA 356.