



Citation: *Canada Employment Insurance Commission v AT*, 2023 SST 1323

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

Respondent: A. T.
Representative: D. O.

Decision under appeal: General Division decision dated April 5, 2023
(GE-22-4131)

Tribunal member: Stephen Bergen

Type of hearing: Teleconference

Hearing date: September 19, 2023

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

Decision date: October 3, 2023

File number: AD-23-384

Decision

[1] I am allowing the appeal and returning the matter to the General Division for reconsideration.

Overview

[2] A. T. is the Respondent in this appeal. She had Employment Insurance coverage through a self-employment agreement. She made a claim for maternity benefits when she needed them, so I will call her the Claimant. The Appellant is the Canada Employment Insurance Commission (Commission). It denied the Claimant's maternity benefit application because it found she did not have sufficient self-employment earnings to qualify.

[3] The Claimant appealed to the General Division of the Social Security Tribunal (Tribunal). The General Division allowed her appeal, finding that her insurable earnings were sufficient to qualify for maternity benefits.

[4] The Appellant appealed the General Division decision to the Appeal Division. I granted leave to appeal and heard the appeal.

[5] I am allowing the appeal. The General Division made an error of jurisdiction and an important error of fact. I am returning the matter to the General Division for reconsideration.

Preliminary Issue

[6] The Commission had referred to other decisions of the Tribunal in its submissions. The Claimant disagreed with how the Commission used those decisions but could not find the decisions or her notes at the time of the hearing. The Commission did not object to the Claimant being given an opportunity to respond to the cited decisions, so I gave her until September 26, 2023, to respond in writing. The Claimant provided a response on September 26, 2023.

[7] The Tribunal gave the Commission an opportunity to respond to the Claimant's post-hearing submission, but it did not.

[8] I have considered the Claimant's submissions and have addressed them in the body of this decision where appropriate.

Issues

[9] The issues in this appeal are:

- a) Did the General Division go beyond its jurisdiction to find that the Claimant's Notice of Assessment earnings would have been insurable if they had not been self-employment earnings?
- b) Did the General Division make an important error of fact by finding that the Claimant's self-employment earnings were greater than the earnings she reported as self-employment earnings on Schedule 13 of her tax return?
- c) If the General Division made an error, how should the error be fixed?

Analysis

General Principles

[10] 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

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).

Error of Jurisdiction

[11] The Commission argued that the General Division made an error of jurisdiction. It said that the General Division could not decide whether her earnings were sufficient without first determining whether her earnings would have been insurable if she had not been self-employed. The Commission argued that only the Canada Revenue Agency (CRA) can determine which earnings are insurable earnings.

[12] I agree. The General Division had jurisdiction to determine which of the Claimant's earnings were from self-employment. However, it could not determine whether those self-employment earnings (or which portion of them) would be insurable if they had not been excluded as self-employment. The *Employment Insurance Act* (EI Act), states that the Commission, or the employee or employer, may request CRA to rule on the amount of the insurable earnings.² It says that only CRA may decide this question.³

[13] In my view, the General Division exceeded its jurisdiction. It decided that all the Claimant's net earnings were self-employment earnings, but it also found that her self-employment earnings would have been insurable.⁴ It made an error when it decided that they would have been insurable because only CRA can decide this.

Important error of fact

[14] The Commission also argued that the General Division did not have evidence on which it could have determined that all her net income was from self-employment.

[15] According to the Claimant's Notice of Assessment, the Claimant had total income of \$49,465.70, and both net and taxable income of \$49,455.00.⁵ She testified that her accountant recorded her net income under "dividends" in her tax return.⁶ She said that

² See section 90(1)(c) of the EI Act.

³ See section 90.1 of the EI Act.

⁴ That is, if they were not excluded under section 5(2) of the EI Act.

⁵ See GD3-36.

⁶ Listen to the audio recording of the General Division decision at timestamp 16:30.

this was line 1200 or line 1210⁷ of her return.⁸ She agreed that he reported only \$15.70 on Schedule 13 as self-employment income.

[16] The Commission said that it was “obvious” that the Claimant’s income was not paid to her in a way that was “insurable,” because she did not report it to CRA on Schedule 13.

[17] I disagree that it is obvious that the Claimant’s income did not include insurable earnings. The Commission does not need to defer to CRA, when CRA is simply informing the Commission what the Claimant (or her accountant) reported as self-employment earnings. Neither is the General Division required to consider the information on the Schedule 13 to be determinative of her self-employment earnings.

[18] The General Division did not disregard the Schedule 13, as argued by the Commission.⁹ It chose to rely on evidence other than the Schedule 13 (or the self-employment earnings reported by CRA to the Commission based on the Schedule 13)¹⁰ to determine the Claimant’s self-employment earnings.

[19] The Commission stated that there was no evidence to contradict the Schedule 13. It referred to *P.N.*, a different decision of the General Division, apparently to show that evidence would be required to rebut the Schedule 13. As in this case, the claimant’s accountant in *P.N.* had not completed the proper paperwork to show her self-employment earnings.¹¹ However, the General Division panel used evidence other than the filed Schedule 13 to correct the claimant’s self-employment income.

[20] In her post-hearing submission, the Claimant says that she does not understand why the Commission is arguing that the General Division made an error finding that she

⁷ The Claimant likely meant line 12000, or line 12010. I take notice that these lines are for reporting dividends received by a taxpayer from their share of the ownership of a taxable Canadian corporation. Line 12000 of the tax return includes “eligible” dividends and line 12010 does not.

⁸ Listen to the audio recording of the General Division decision at timestamp 16:30.

⁹ See the General Division decision at paras 19, 20.

¹⁰ See GD3-23.

¹¹ *P. N. v Canada Employment Insurance Commission*, 2018 SST 1368

has additional self-employment earnings, when a different panel of the General Division was able to do so in *P.N.*

[21] I appreciate the Claimant's position and I disagree with the Commission that there was "no evidence" of the Claimant's self-employment earnings beyond the Schedule 13. The Claimant testified that she had self-employment income that her company paid her as dividends. She acknowledged that it was not reported under Schedule 13, but she testified that she had meant for her accountant to ensure she qualified for the EI maternity benefit.

[22] The quality of the Claimant's evidence may not have matched that of the evidence in *P.N.*, but nonetheless, there was some evidence that the Claimant had self-employment earnings that were not recorded on the Schedule 13. It is not my job to interfere with how the General Division evaluated or weighed the evidence, as the Commission acknowledges in its own submissions.¹²

[23] Nonetheless, I agree with the Commission that the General Division made an important error of fact.

[24] The General Division found (indirectly) that all \$49,455.00 of the Claimant's net income was from self-employment. It stated that the Claimant's self-employment earnings are the amount that would have been her insurable earnings for the year, if her employment had been insurable.¹³ And, it found that all \$49,455.00 would have been insurable earnings, if her self-employment earnings were insurable.¹⁴ Taken together, these statements necessarily imply that the General Division accepted that all of the \$49,455.00 was self-employment income.

[25] According to the General Division, the Claimant said that all of her income was from self-employment, but this is not accurate. It is true that the Claimant stated that she

¹² AD3-3: a reference to the decisions in *Garvey v Canada (Attorney General)*, 2018 FCA 118, and *Cameron v AGC*, 2018 FCA 100.

¹³ See para 21 of the General Division decision.

¹⁴ See para 22 of the General Division decision.

had “self-employment income only” on her application for benefits.¹⁵ However, this was in response to a question in which she was required to choose between two options: She could select “self-employment income only,” or she could select “a combination of employment income and insurable employment income”. Therefore, the Claimant’s response is only evidence that she understood all of her **employment** income to be from self-employment. It does not rule out the possibility that the net income figure on her tax form or Notice of Assessment may have included income arising from some non-employment source.

[26] In her testimony, the Claimant said only that her accountant reported all of her income as dividends. She testified that her accountant knew she had registered for the EI self-employment benefits program and that she believed he was taking care of it. She gave a non-expert opinion that he should have reported her income as “professional income” (on Revenue Canada’s Schedule 13 - where he reported only \$15.70).¹⁶

[27] The Claimant is a psychologist who worked through what appears to be a professional corporation, for which she was the sole shareholder. If this is correct, then the revenues earned by the Claimant from those services (and flowing into the company) could be characterized as income from self-employment for EI’s purposes. It would not matter whether she drew that income from the company through a salary or by paying dividends to herself. This is noted in the Commission’s own *Digest of Benefit Entitlement Principles*.¹⁷

[28] Even so, the evidence did not support a conclusion that all the dividends were self-employment earnings. There are other possibilities. For example, some portion of the dividends she received could have been a distribution of gains from the company’s sale of capital property. Or, some portion could have been a distribution of passive income from the company’s reinvestment of earnings from the Claimant’s services. The

¹⁵ See GD3-10.

¹⁶ Listen to the audio recording of the General Division decision at timestamp 16:05.

¹⁷ See section 5.16.2.3 [Working in a corporation in which shares are owned](#), *Digest of Benefit Entitlement Principles* accessed on September 26, 2023 at [Digest of Benefit Entitlement Principles-Chap 5-Section 16 - Canada.ca](#)

evidence is not clear whether the dividends represented a distribution of self-employment earnings alone.

[29] There was also no evidence that the money paid to the Claimant in 2021 as a dividend or dividends, was sourced entirely from her qualifying period, or that those 2021 dividends represented the net profit after deduction of all the expenses properly associated with earning 2021 revenue.

[30] I recognize that there was at least some evidence suggesting her net income included self-employment income, and there was nothing to say that she had income from some source other than self-employment. But this does not mean that there was evidence on which the General Division could find that all her net income was self-employment income, or determine how much of her income was from self-employment.

[31] The General Division made an important error of fact because its finding did not follow from the evidence that was before it. It did not have the evidence it required to determine how much of the Claimant's net income was self-employment income. That means it could not determine if she qualified for maternity benefits.

Remedy

[32] 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 make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.¹⁸

[33] The Commission says that I have all the evidence I need to make the decision the General Division should have made. It says this because it believes Schedule 13 is sufficient to establish that the Claimant did not have sufficient insurable earnings to qualify. However, the Commission agrees that there might be a way for it to ask for a CRA ruling if I sent the matter back to the General Division.

¹⁸ See section 59(1) of the DESDA.

[34] The Claimant says that she would have nothing new to bring to a new General Division hearing and that I should just make the decision.

[35] I disagree with both the Commission and the Claimant. I have found that the General Division did not have evidence by which it could conclude that the Claimant had sufficient self-employment earnings to qualify. I have also found that it did not have jurisdiction to evaluate whether those self-employment earnings would have been insurable.

[36] I do not have evidence on which I might assess whether the Claimant had sufficient self-employment earnings.

[37] In addition, the Commission has disputed whether the Claimant's actual self-employment earnings (and not the amount misreported on Schedule 13) would otherwise be insurable. I can not presume that her self-employment earnings are insurable or that they are not insurable. Only the CRA may answer this question.

[38] I am returning the matter to the General Division for reconsideration. The Claimant should expect that she will have to prove her actual self-employment earnings arising from the qualifying period. Once the General Division is satisfied of the amount of the Claimant's self-employment earnings, it may want to request the Commission to obtain a ruling from CRA.

Conclusion

[39] I am allowing the appeal and I am returning the matter to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division