



Citation: *MD v Canada Employment Insurance Commission*, 2024 SST 286

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: M. D.

Respondent: Canada Employment Insurance Commission
Representative: Daniel McRoberts

Decision under appeal: General Division decision dated September 28, 2023
(GE-23-1759)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: February 21, 2024

Hearing participants: Appellant
Respondent's representative

Decision date: March 20, 2024

File number: AD-23-955

Decision

[1] I am allowing M. D.'s appeal, in part.

[2] The General Division based made an important factual error in its decision. I have fixed (remedied) the error by making the decision the General Division should have made.

[3] M. D. under-reported her income on her biweekly reports. This meant the Canada Employment Insurance Commission (Commission) overpaid her Employment Insurance (EI) benefits. But the **correct overpayment is \$33 less** than the Commission originally calculated.

Overview

[4] In this decision, I will call M. D. the Claimant because she made **a claim for EI regular benefits in 2018**. The Commission paid her benefits. She worked and reported her income for some weeks in her claim.

[5] Later on the Commission reviewed her income reports for the weeks she worked. The Commission decided the Claimant had under-reported her income.¹ It allocated her unreported earnings to weeks in her claim. This resulted in **an overpayment and debt of \$480**.

[6] The Claimant requested a reconsideration. The Commission maintained its overpayment decision. The Claimant appealed to the Social Security Tribunal's (Tribunal) General Division. The General Division dismissed the Claimant's appeal. She appealed to the Tribunal's Appeal Division.

[7] The Commission concedes the General Division made an important factual error. I am not satisfied the Claimant agreed with that error. She says the General Division

¹ See section 43, 44, 52(2), and 52(3) (overpayments) of the *Employment Insurance Act* (EI Act), and sections 35 (earnings) and 36 (allocation of earnings) of the *Employment Insurance Regulations* (EI Regulations).

made different errors. The Commission also now says her overpayment should be \$33 less than it originally calculated. The parties say if I find an error I should make the decision the General Division should have made.

[8] The Claimant sent in documents after the Appeal Division hearing. I didn't accept and have not considered those documents when I made this decision. I gave my reasons in a letter the Tribunal sent to the parties.²

Issues

[9] There are two issues in this appeal

- Did the General Division base its decision on an **important error of fact** when it found it **wasn't possible to compare the Claimant's payslips to the employer's payroll records**?
- If the General Division made that error, how should I **fix (remedy) it**?

Analysis

[10] The Tribunal's General Division and Appeal Division have different roles. If I find the General Division didn't make an error, I have to dismiss the Claimant's appeal. If the Claimant shows the General Division made an error, the law says I can step in and fix the error.³ The law sets out the types of errors the Appeal Division can consider.⁴

[11] The General Division made an important factual error when it found it didn't have the information it needed to allocate the Claimant's pay slip information to weeks in her EI claim. It also made a legal error and an error of jurisdiction when it didn't calculate the overpayment.

² The letter is dated February 29, 2024.

³ I get these powers from sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act). The DESD Act created the Social Security Tribunal.

⁴ See section 58(1) of the DESD Act.

[12] To fix those errors, I have made the decision the General Division should have made.

[13] The rest of this decision sets out my reasons.

The General Division based its decision on a misunderstanding about the Claimant's payslips

[14] The General Division makes an **important factual error** if it bases its decision on a factual finding it made by ignoring, misunderstanding, or mistaking the evidence.⁵ In other words, the evidence goes squarely against or doesn't support a factual finding.⁶

[15] In this case, the **General Division misunderstood or made a mistake about the Claimant's payslips.**

[16] The General Division had to first decide whether the Claimant had proven her employer's earnings information was wrong. At the General Division hearing, the Claimant said her payslips showed the payroll information her employer sent to the Commission was wrong.

[17] The Commission argues the General Division made an error of fact about the Claimant's earnings information from her biweekly payslips. At paragraph 18 of its decision, the General Division found that, "a direct week-by week comparison between what the employer reported and what the Appellant argues isn't possible using the information she's provided." I will call this the direct comparison. The Commission says it is possible to do a direct comparison based on the Claimant's payslips.⁷

[18] I asked the Claimant if she agreed with the important factual error the Commission is conceding. She said she really didn't know what to say. The Claimant checked "important factual error" on her Appeal Division form. However, in her reasons

⁵ Section 58(1)(c) of the DESD Act says it's a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.

⁶ See *Garvey v Canada (Attorney General)*, 2018 FCA 118; and *Walls v Canada (Attorney General)*, 2022 FCA 47.

⁷ See the Commission's written argument at page AD03-6.

explaining the General Division's errors, she doesn't point to an error of fact. When she had the opportunity at the Appeal Division hearing, she didn't raise any errors of fact.

[19] The General Division found the Claimant **didn't show her employer made mistakes** in how it reported her earnings (paragraph 20). The General Division concluded that the Claimant's payslips didn't support her argument that her employer's payroll records were wrong because the **total amount from her payslips isn't less** than what her employer reported (paragraph 20).

[20] I agree with the Commission that the **General Division misunderstood the evidence**. It was possible to do the direct comparison, based on a weekly breakdown from the Claimant's payslips. The Commission showed that it was possible in its written argument to the Appeal Division.⁸ It explained how it did the comparison based on the Claimant's payslips, which were part of the evidence at the General Division.

[21] The General Division based its conclusion the Claimant hadn't shown her employer made mistakes on that misunderstanding. Entitlement to EI benefits is calculated on a **weekly basis**. And earnings have to be allocated on a **weekly basis**. But the General Division based its conclusion on the **total amount for all weeks the Commission reviewed**. It said the total earnings from her payslips wasn't less than the total her employer provided. So the General Division's conclusion that the Claimant hadn't shown her employer made mistakes (in reporting her earnings on a weekly basis to the Commission) is based on a misunderstanding of the Claimant's payslips and how they can be compared to the employer's payroll records.

[22] So the General Division based its decision on an **important factual error**.

Fixing the error by making the decision the General Division should have made

[23] The law gives me the power to fix (remedy) the General Division's error. In appeals like this one, I would usually fix the errors by

⁸ See the Commission's written argument at page AD03-6.

- sending the case back to the General Division to reconsider **or**
- making the decision the General Division should have made based on the evidence that was before the General Division, without considering any new evidence.⁹

– **What the parties say I should do**

[24] The parties agree on how I should fix the error.

[25] The Commission says there is sufficient information for me to allocate the Claimant's earnings and calculate the amount of the Claimant's overpayment. It argues the result would be a modification of the overpayment—reducing it by \$33. It says it made an error when it originally calculated the overpayment, and in the overpayment breakdown it sent to the General Division.

[26] The Claimant said she would prefer that I made the decision to put the issue to rest. She also said during the hearing she was confused because she thought the hearing was about the General Division's mistakes. Now the Commission was admitting it made a mistake when it calculated the overpayment. She hadn't been able to calculate the overpayment.

[27] I agree with the parties, so I am going to make the decision the General Division should have made.

– **The Claimant under-reported her earnings, so she has an overpayment**

[28] The Commission went back and reviewed the Claimant's income for the **weeks of September 2, 2018 through November 25, 2018**.

[29] The Claimant continues to believe it is impossible that she misreported her earnings each week during this period. At the General Division and Appeal Division hearings, she said she reported her **net** earnings to EI—without vacation pay.¹⁰ But the

⁹ These are two of the powers section 59(1) of the DESD Act gives to the Appeal Division to fix (remedy) a General Division error.

¹⁰ Listen to the General Division hearing recording starting at 21:28.

law says **earnings include vacation pay**.¹¹ So the **Commission included vacation pay** when it allocates earnings and calculate her entitlement to EI. It is more likely than not this explains the difference between the earnings the Claimant reported versus what her employer reported and what her payslips show.

[30] The Claimant also continues to believe the Commission made a mistake when it didn't calculate her income for three weeks—September 30, October 14, and November 11, 2018. The Commission didn't include these weeks in the information it requested from the employer and the Claimant, or in its decision letters. The Commission says it skipped these weeks on purpose.¹² Based on the income information it originally had, these weeks would have made **no legal or practical difference to the Claimant's entitlement**. She was entitled to **zero EI regular benefits in those weeks** since she earned too much money. So the Claimant is wrong to say the Commission made a mistake by not including these weeks in its original calculations.

[31] The Commission has the power to calculate an overpayment when it goes back and allocates unreported earnings. The Tribunal also has the power to calculate an overpayment in this type of case.¹³

[32] Based on her payslips (which she sent to the General Division), the Commission now says she didn't make too much money in one of those weeks—November 11, 2018. The Claimant was entitled to benefits that week. And this means it underpaid her that week. So her **overpayment is \$33 less than the Commission's original calculation**.¹⁴

¹¹ Section 35 of the EI Regulations broadly defines "income" and "earnings". Earnings includes everything a worker gets in the form of pecuniary benefit from their work. See *Côté v Canada Employment Insurance Commission* (1986), 69 NR 126 (FCA). Section 36(8) of the EI regulations sets out rules the Commission has to follow when allocating **vacation pay**.

¹² See the Commission's written argument at page AD03-6, including the chart and its explanation of its calculations.

¹³ I disagree with the General Division's decision when it says only the Commission has the power to calculate an overpayment (paragraph 35). The Commission gets it powers to reconsider a decision and its duty to **calculate overpayments** under section 52(1) and (2) of the EI Act. Under section 54(1) of the DESD Act the General Division has the power to **give the decision the Commission should have given**. And under section 59(1) of the DESD Act the Appeal Division has the power to give the decision the General Division should have given.

¹⁴ See GD12.

[33] I have reviewed the following evidence and information for the weeks September 2, 2018 through November 25, 2018

- income the Claimant reported¹⁵
- employer's reports of her income¹⁶
- Claimant's payslips¹⁷
- Commission's calculation of her weekly income and allocation of earnings based on her payslips
- Commission's calculation of her entitlement to benefits, based on the percentage of earnings the Commission has to deduct from her benefits rate under sections 19(2) and (3) of the EI Act
- Commission's original calculation of her overpayment and notice of debt¹⁸
- Commission's updated calculation of her overpayment—based on the number of days she worked, the earnings she declared on her biweekly reports, her gross weekly pay from her payslips, and its explanation¹⁹

[34] I accept her employer's reports of the Claimant's income and I accept her payslips. The evidence from both these sources is consistent. There is no evidence that goes against this evidence—other than the Claimant's biweekly reports. I don't accept the information from her biweekly reports because I find it's more likely than not she under-reported her income, maybe because she didn't report her vacation pay. And I have no other reason to doubt the employer's evidence and her payslips.

¹⁵ See pages GD03-16, GD03-18 (note the two columns are reversed in this letter), and GD02B-27.

¹⁶ See GD03-14 and GD03-15.

¹⁷ See pages GD02B-28 through GD02B-34.

¹⁸ See page GD03-21, document GD12, and page GD02B-36.

¹⁹ See the Commission's written argument at page AD03-6, including the chart and its explanation of the overpayment calculations.

[35] Based on the documents I reviewed and evidence I accepted, I find for the weeks September 2, 2018 through November 25, 2018

- the Claimant under-reported her income to the Commission on her biweekly reports
- she hasn't shown her employer's information about her income is wrong
- under sections 35 and 36 of the *Employment Insurance Regulations*, the entire amount of income she under-reported counts as earnings and should be allocated to the weeks in which she earned it
- her unreported earnings must be deducted from her regular benefits according to section 19 of the EI Act
- so the Commission overpaid her EI regular benefits in the amount of \$447, which is **\$33 less than the overpayment the Commission originally calculated**

Conclusion

[36] I am granting the Claimant's appeal, in part.

[37] The General Division made an important factual error.

[38] To fix (remedy) that error I made the decision the General Division should have made. The Claimant under-reported her earnings. The allocation and deduction of those unreported earnings resulted in an overpayment and debt of \$447. This is **\$33 less than the overpayment the Commission originally calculated.**

[39] It will now be up to the Commission to reduce the Claimant's debt (or reimburse her if she has already paid off the debt) based on this decision.

Glenn Betteridge
Member, Appeal Division