



Citation: *IS v Canada Employment Insurance Commission*, 2024 SST 423

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: I. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 25, 2024
(GE-23-3149)

Tribunal member: Solange Losier

Decision date: April 24, 2024

File number: AD-24-91

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] I. S. is the Claimant in this case. He applied for Employment Insurance (EI) regular benefits and established a benefit period effective August 13, 2023.

[3] The Canada Employment Insurance Commission (Commission) found that the Claimant had received pay in lieu of notice totalling \$5,961.54.¹ The Commission allocated a portion of it to his EI claim for the week from August 13, 2023 to August 19, 2023. The remaining amount was allocated the following week starting August 20, 2023.

[4] The General Division concluded that the Claimant had received earnings in the form of pay in lieu of notice totalling \$5,961.54 and that the Commission had properly allocated it to the correct weeks.²

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.³ He argues that the General Division made an important error of fact.

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.

Issue

[7] Is there an arguable case that the General Division made an important error of fact or an error of law?

¹ See Commission's initial decision at pages GD3-22 to GD3-23 and reconsideration decision at page GD3-26.

² See General Division decision at pages AD1A-1 to AD1A-7.

³ See application to the Appeal Division at pages AD1-1 to AD1-10.

Analysis

[8] An appeal can only proceed if the Appeal Division gives permission to appeal.⁴

[9] I must be satisfied that the appeal has a reasonable chance of success.⁵ This means that there must be some arguable ground upon which the appeal might succeed.⁶

[10] I can only consider certain types of errors. I have to focus on whether the General Division could have made one or more of the relevant errors (this is called the “grounds of appeal”).⁷

[11] The possible grounds of appeal to the Appeal Division are that the General Division did one of the following:⁸

- proceeded in a way that was unfair
- acted beyond its powers or refused to exercise those powers
- made an error in law
- based its decision on an important error of fact.

[12] For the appeal to proceed to the next step, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

– **The Claimant argues that the General Division made an important error of fact**

[13] In his application to the Appeal Division, the Claimant argues that the General Division made an important of error for the following reasons.⁹

⁴ See section 56(1) of the *Department of Employment and Social Development Act* (DESD Act).

⁵ See section 58(2) of the DESD Act.

⁶ See *Osaj v Canada (Attorney General)*, 2016 FC 115.

⁷ See grounds of appeal in section 58(1) of the DESD Act.

⁸ See section 58(1) of the DESD Act.

⁹ See page AD1-5.

[14] First, the Claimant says that the General Division erred when it concluded that the Commission had correctly allocated the earnings he received (pay in lieu of notice) to weeks after the August 7, 2023 date.

[15] Second, he wrote that he suspected the Record of Employment (ROE) might have had errors in it, which has added to the confusion.

[16] Third, the Claimant says that the General Division erred when it dismissed his appeal without considering the facts he provided or failed to establish the facts from the information available.¹⁰

[17] I acknowledge that the Claimant's main arguments are that the General Division made an important error of fact. But, the substance of his arguments also suggest that the General Division did not follow the law correctly when it started the allocation. For that reason, I have also considered whether the General Division made an error of law.¹¹

[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."¹²

[19] If the General Division based its decision on an important mistake about the facts of the case, then I can intervene. This involves considering some of the following questions:¹³

- a) Does the evidence squarely contradict one of the General Division's key findings?
- b) Is there no evidence that could rationally support one of the General Division's key findings?

¹⁰ See page AD1-5.

¹¹ See section 58(1)(b) of the DESD Act.

¹² See section 58(1)(c) of the DESD Act.

¹³ This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

- c) Did the General Division overlook critical evidence that contradicts one of its key findings?

[20] An error of law can happen when the General Division doesn't apply the correct law or when it uses the correct law but misunderstands what it means or how to apply it.¹⁴

I am not giving the Claimant permission to appeal

- **The General Division decided that the Claimant received pay in lieu of notice and that it was earnings**

[21] The law says that earnings are the entire income that you get from any employment.¹⁵ However, there are some specific circumstances in law where income is not considered earnings.¹⁶

[22] The General Division had to decide whether the Claimant received any money from his employer. If he did, it then had to decide how much money was received and for what reason. After that was established, it had to decide whether it was earnings according to the law.

[23] First, the General Division decided that the Claimant received money from his employer totalling \$5,961.54. It found that the money was pay in lieu of notice and was in fact considered earnings.¹⁷

[24] Second, the General Division found that the reason the employer paid the Claimant the pay in lieu of notice was because their employment relationship ended.¹⁸ In doing so, the General Division gave weight to what the employer told the Commission about the money in a telephone conversation.¹⁹

¹⁴ See section 58(1)(b) of the DESD Act.

¹⁵ See section 35(2) of the *Employment Insurance Regulations* (EI Regulations).

¹⁶ See section 35(7) of the EI Regulations.

¹⁷ See paragraphs 10, 17-19 of the General Division decision.

¹⁸ See paragraph 18 of the General Division decision.

¹⁹ See pages GD8-2 and GD12-2.

[25] Third, the General Division found that the pay in lieu of notice/earnings did not meet any of the exemptions outlined in the law.²⁰ This issue was not disputed by either party.

[26] At the General Division hearing, the Claimant argued that the \$5,961.54 was not pay in lieu of notice because it wasn't paid as "extra" or additional money to him.²¹

[27] The General Division considered the Claimant's argument that the money was not pay in lieu of notice, but it rejected that argument. It found that the evidence supported that the money was in fact properly characterized as pay in lieu of notice.²² Specifically, the General Division found that the employer paid the Claimant pay in lieu of notice over two payments: \$1,788.46 on July 6, 2023 and \$4,173.08 on July 20, 2023, totalling \$5,961.54.²³

[28] The Claimant may disagree with that finding, but the General Division was free to weigh the evidence and determine that it was pay in lieu of notice. It explained with reasons why it did so.

[29] In his application to the Appeal Division, the Claimant also argued that the ROE might have had some errors in it, causing some confusion.²⁴

[30] At the General Division hearing, the Claimant asked the Member to look at the ROE, specifically pay period #2 ending July 30, 2023 showing an amount of \$5,961.54 as insurable earnings.²⁵ He told the General Division that this money was not paid at first, so he had to contact his employer. Following that, another department (not the usual payroll department) paid him by e-transfer. He referred to an email from his employer that shows he got this e-transfer on August 4, 2023.²⁶

²⁰ See paragraph 19 of the General Division decision.

²¹ See paragraphs 6, 15, 26-28 of the General Division decision and audio recording from General Division hearing at 15:01 to 16:00.

²² See paragraphs 17-18 of the General Division decision.

²³ See paragraph 18 of the General Division decision.

²⁴ See ROE at page GD3-17.

²⁵ See audio recording from General Division hearing at 33:52 to 36:50.

²⁶ See page GD10-2.

[31] The General Division re-confirmed with the Claimant that he received that payment from the employer.²⁷ The Claimant agreed that the money was received, but reiterated that it was sent by e-transfer from another department only after he spoke to the employer.²⁸

[32] I note that the above payment the Claimant is referring to appears to be a salary continuance payment and not the pay in lieu of notice payment that is in question (coincidentally, they are both the same gross amounts of \$5,961.54, but they were paid on different dates).²⁹

[33] The important part here is that the General Division sought clarification from the Claimant on this issue. In light of the Claimant's allegations that the ROE had an error in it, the General Division had to consider whether the ROE was accurate. However, once the Claimant confirmed that he eventually received the payment reflected on pay period #2 from his ROE, then this was no longer a live issue.

[34] The General Division is the trier of fact and was entitled to weigh the evidence and give weight to the ROE. There is no indication that there were other errors in the ROE.

[35] There is no arguable case that the General Division made an important error of fact when it decided that the \$5,961.54 paid by his employer was pay in lieu of notice and earnings that a portion needed to be allocated to his EI claim.³⁰

[36] As well, there is no arguable case that the General Division made an important error of fact by relying on the ROE because the Claimant agreed at the General Division hearing that he received the money via e-transfer from another department. Accordingly, the ROE reflected the correct amount in pay period #2.

²⁷ See page GD10-2 The Claimant is referring to an amount identified as a salary continuance for period from July 17 to July 28, 2023, paid on August 4, 2023. Gross is reflected on ROE as \$5,961.54, but net amount e-transferred and deposited was \$3,936.57.

²⁸ See audio recording from General Division hearing at 36:50.

²⁹ See pages GD3-17; GD10-2 and GD12-2.

³⁰ See section 58(1)(c) of the DESD Act.

- **The General Division decided that the Claimant separated from his job on August 7, 2023, so the allocation had to start from August 13, 2023**

[37] The law says that earnings have to be allocated to certain weeks.³¹ The allocation of earnings depends on **why** you received the earnings.

[38] When you separate from your job, the law says that the earnings have to be allocated **starting the week you were separated**.³² The earnings have to be allocated starting the week your separation starts, even if you didn't get those earnings at that time.

[39] The General Division decided that the Claimant received pay in lieu of notice because he separated from his job.³³

[40] The General Division found that the Claimant separated from his employment on August 7, 2023.³⁴ It relied on the ROE that shows the Claimant's last day paid was August 7, 2023 and this is also consistent with what the employer told the Commission in a telephone conversation.³⁵

[41] The General Division accepted that the Claimant's normal weekly earnings were \$3,128.00. It noted that this issue was not disputed between the parties.³⁶

[42] The General Division decided that the Commission had correctly allocated a portion of the pay in lieu of notice.³⁷ Specifically, \$3,128.00 had to be allocated the week starting from August 13, 2023. The remaining amount of \$599.00 had to be allocated to the following week starting August 20, 2023.³⁸ This means that the total amount allocated was \$3,727.00.

³¹ See section 36 of the EI Regulations.

³² See section 36(9) of the EI Regulations.

³³ See paragraph 22 of the General Division decision.

³⁴ See paragraph 24 of the General Division decision.

³⁵ See pages GD3-17; GD3-18 and GD12-2.

³⁶ See paragraph 25 of the General Division decision. Also, see page GD3-25.

³⁷ See paragraph 20 of the General Division decision.

³⁸ See paragraph 25 of the General Division decision.

[43] It is not arguable that the General Division made an error of law in concluding that the Commission had correctly allocated the pay in lieu of notice.³⁹ The General Division identified the relevant law and correctly applied it in its decision. The Claimant separated from his job on August, 7, 2023, so the allocation had to start from August 13, 2023.⁴⁰

[44] It is also not arguable that the General Division made an important error of fact when it decided the Claimant received pay in lieu of notice, the date of separation, the normal weekly earnings or the weeks it had to be allocated. Its findings were consistent with the evidence in the file.

[45] I reviewed the file, listened to the audio recording from the General Division hearing and examined the decision under appeal. I did not find any key evidence that the General Division might have ignored or misinterpreted.⁴¹

Conclusion

[46] Permission to appeal is refused. This means that the appeal will not proceed.

Solange Losier
Member, Appeal Division

³⁹ See section 58(1)(b) of the DESD Act.

⁴⁰ This was a Sunday, the beginning of the week.

⁴¹ See *Karadeolian v Canada (Attorney General)*, 2016 FC 615, which recommends doing such a review.