



Citation: *CJ v Canada Employment Insurance Commission*, 2024 SST 484

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	C. J.
Respondent:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen
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Decision under appeal:	General Division decision dated November 16, 2023 (GE-23-2348)
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Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	April 18, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	May 6, 2024
File number:	AD-23-1079

Decision

[1] I am allowing the appeal. The General Division made an error of jurisdiction. I have corrected that error by making the decision the General Division should have made. I found that the Commission did not consider its decision judicially, and that it should not have reconsidered at all.

Overview

[2] C. J. is the Appellant. This appeal concerns her claim for Employment Insurance (EI) benefits so I will call her the Claimant.

[3] The Respondent is the Canada Employment Insurance Commission (Commission). When the Claimant applied for benefits, her employer reported her severance and pay in-lieu-of-notice (additional payments) to the Commission. The Claimant confirmed these amounts.

[4] However, the Commission overlooked this information when it calculated her insurable earnings and benefit rate. By the time it realized its mistake, it had already paid the Claimant several weeks of benefits.

[5] The Commission reconsidered its original decision. It adjusted her insurable earnings and allocated the additional payments to weeks in her benefit period. This increased her weekly benefit rate, but it reduced her benefit entitlement in the initial weeks of her claim. The revised allocation resulted in an overpayment to the Claimant.

[6] When the Claimant asked for a reconsideration, the Commission changed its decision. It recognized that the additional payments should not have been included in her insurable earnings and that this caused it to set the benefit rate too high. It also discovered that it had made a mistake in how it allocated the additional earnings. To correct for this, the Commission reduced her benefit rate. At the same time, it reallocated the additional payments in a way that the allocation had less effect on the Claimant's entitlement.

[7] The Claimant appealed to the General Division of the Social Security Tribunal (Tribunal), arguing that she disclosed everything and that she should not be held responsible for the Commission's mistakes. The General Division confirmed the Commission's reconsideration decision and dismissed her appeal.

[8] The Claimant appealed the General Division to the Appeal Division.

[9] I am allowing the Claimant's appeal. The General Division made an error of jurisdiction by failing to consider whether the Commission acted judicially when it reconsidered the Claimant's benefits. I have made the decision the General Division should have made and found that the Commission did not reconsider judicially. I have decided that the Commission should not have reconsidered at all. The manner in which this affects the Claimant is explained in more detail later in the decision.

Issues

[10] The issues in this appeal are:

- a) Did the General Division fail to exercise its discretion by not considering whether the Commission acted judicially?
- b) If so, how should the error be fixed?

Analysis

[11] 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

[12] When the Commission reconsiders a decision on its own initiative, it is exercising its discretion. The law requires that the discretionary decisions be made in a judicial manner.

[13] This means that the Commission must not act in bad faith, with an improper purpose, or in a discriminatory manner. It must also consider all the relevant factors while disregarding those that are not relevant.²

[14] Despite the Claimant's objection to the Commission's decision to correct its mistake to her detriment, the General Division did not consider how the Commission reached its reconsideration. The General Division did not analyze whether the Commission acted in a judicial manner, nor is there any indication that the General Division was even aware that the Commission had used a discretionary power when it reconsidered the Claimant's benefits.

[15] In its submissions, the Commission concedes that the General Division made an error of jurisdiction.

[16] I agree with the Commission. I find that the General Division should have considered whether the Commission acted judicially, and that it made an error of jurisdiction when it failed to do so.

Remedy

[17] I have the power to send the matter back to the General Division to reconsider, or I may make the decision that the General Division should have made.³

[18] Both parties ask that I make the decision the General Division should have made. Both parties ask me to find that the General Division did not act judicially by reconsidering the Claimant's benefits in mid-March 2023.

² See *Suresh v Canada (minister of Citizenship and Immigration)*, 2 FC 592; *Canada (Attorney General) v Purcell*, 1995 CanLII 3558.

³ See section 59(1) of the DESDA.

[19] The record is complete, I have the information I require to make the decision that the General Division should have made.

Did the Commission act judicially when it reconsidered the Claimant's benefits?

[20] The Claimant did not act judicially.

[21] I have no reason to believe that the Commission acted in bad faith or with an improper purpose, or that it discriminated against the Claimant when it decided to reconsider. However, judicial decision-making also requires the Commission to consider all the relevant factors. As the Commission now concedes, the reconsideration criteria in its policy are relevant factors.

[22] According to the Commission's policy, the Commission does not ordinarily reconsider in the following circumstances:

- Benefits were not underpaid.
- Benefits were not paid contrary to the structure of the *Employment Insurance Act* (EI Act).
- Benefits were not paid as a result of a false or misleading statement.
- There is no evidence that the claimant ought to have known they were not entitled to the benefits they received.

[23] The Commission acknowledges that these factors were not considered in this case.

[24] I agree that the elements of the Commission's policy are relevant to its decision to reconsider. Although I am not bound by decisions of the Appeal Division, I am persuaded by the decision in *MS. Canada Employment Insurance Commission*, which found that the Commission's policy sets out the relevant factors to be considered as a first step to deciding whether to exercise its discretion to reconsider.⁴ *MS* referenced the

⁴ See *MS v Canada Employment Insurance Commission* at paras 41-43 (considered: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699).

Supreme Court of Canada decision in *Baker v Canada (Minister of Citizenship and Immigration)*, which reached a similar conclusion regarding the relevance of administrative guidelines to discretionary decisions.

[25] There is no evidence that the Commission's reconsideration decision took these factors into account, and I take the Commission at its word when it says it did not consider them.

[26] The Commission did not act judicially when it reconsidered the Claimant's benefits.

Should the Commission have reconsidered the Claimant's benefits?

[27] I have found that the General Division did not consider whether the Commission acted judicially. However, if the General Division had considered this, and if it had found that the Commission did not act judicially, it would have the power to decide (in the place of the Commission) that the original decision should or should not be reconsidered. Since I am making the decision that the General Division should have made, I have the same power that the General Division would have had.

[28] I find that the Commission should not have reconsidered its decision. As the Commission now concedes, the Claimant did not meet any of its reconsideration criteria. She was not underpaid benefits. It would not be contrary to the act for her to receive those benefits that were later adjusted as a result of the allocation of the severance and in-lieu payments. On February 10, 2023, she gave the Commission information about her normal weekly earnings as well as information that she received \$750.00 in severance pay and \$750.00 as pay-in-lieu of notice: The Commission had all the information it required to make the correct decision when it began to make weekly payments of \$425.00 in March 2023. The Claimant did not make any false or misleading statements. Finally, there was no evidence that she knew or ought to have known she should not receive the amounts she was paid.

[29] As noted earlier, these are all relevant factors. The Commission may have failed to consider other relevant factors as well, but it certainly did not consider these—so it should not have reconsidered.

[30] So, the next question is this: since the Commission should not have reconsidered, how does that affect the Claimant's benefits or overpayment?

– **Reaching a net result**

The Commission's initial reconsideration

[31] The Commission reconsidered on May 26, 2023. The employer had already included the \$750.00 pay-in-lieu in the Claimant's final pay period—which was incorrect. But the Commission mistakenly added the other \$750.00 in severance to her final pay period as well (and to her insurable earnings). This increased her benefit rate from \$426.00 to \$444.00.

[32] At the same time, but in a separate calculation, the Commission allocated both the \$750.00 pay-in-lieu and the \$750.00 severance to weeks in her claim period, which offset weekly benefits that she would otherwise have been entitled to. This resulted in an \$858.00 overpayment and the Notice of Debt received by the Claimant.

The Claimant's request for reconsideration

[33] The Claimant requested a reconsideration on June 16, 2023. When the Commission looked at her claim again, it adjusted its allocation of benefits. It attributed \$450.00 to the week before the claim commenced, to bring her up to her usual weekly pay. This did not affect her weekly benefit entitlement. It also allocated \$750.00 to the week of February 5, 2023 - February 11, 2023. This meant that she could not serve her waiting period until the next week. However, it did not affect her benefit entitlement, since the Commission had treated that week as her waiting period week, and she had not been paid benefits in that week under the Commission's earlier calculations. The remaining \$300.00 (from the \$1500.00 of the additional payments) was allocated to the

week of February 12, 2023 - February 18, 2023, her waiting period week, which meant that it would be deducted dollar for dollar from the following week.

[34] The effect of the revised allocation was to reduce the Claimant's overpayment from \$858.00 to \$714.00. So, the Claimant would have owed \$714.00 as a result of her consideration of the allocation.

[35] In the reconsideration process, the Commission realized that it had mistakenly included the severance and pay-in-lieu as insurable earnings. This caused it to inflate the Claimant's benefit rate. The Commission adjusted the Claimant's benefit rate from \$444.00 to \$436.00.

[36] To give effect to its these recalculations, the Commission sent the Claimant two decisions. In a decision of August 4, 2023, the Commission told the Claimant that the \$300.00 would be allocated to the week of February 12, 2023. On August 10, 2023, the Commission told the Claimant that her benefit rate had been changed to \$436.00, which meant she had been overpaid. It sent her a new Notice of Debt for \$168.00 because it had paid her 21 weeks at the higher rate. $(21 \times [444-436] = 168)$.

The Claimant's appeal to the General Division

[37] In response to the overpayment and Notice of Debt, the Claimant asked the Commission to reconsider its decision under section 112(1) of the EI Act. The Commission reconsidered as a result. It adjusted her allocation to her benefit, but it also reduced her benefit rate.

[38] The Claimant appealed the August 4, 2023, allocation decision to the General Division. However, adjustments to both the allocation and the benefit rate arose out of a single request for reconsideration. Furthermore, her appeal referred to her concerns with adjustments to her benefit rate, as well as to the allocation. The General Division accepted jurisdiction over both the allocation and benefit rate issues.⁵

⁵ See GD2-8 (Notice of Appeal); -paras 28–32 of the General Division decision.

[39] The General Division did not accept that the Commission made a mistake in how it conducted her allocation or calculated her benefit rate (in its August 2023 reconsideration decisions following the Claimant's request).

The result of this appeal

[40] In her appeal to the Appeal Division, the Claimant argued that the Commission had miscalculated her actual benefits and overpayment more than once, so the Commission should have to prove to her satisfaction that its calculations are correct.

[41] When the Claimant was at the General Division, the Commission tried to explain its adjustments to the best of its ability. However, it was the Claimant who had the burden of proof to show that the Commission's calculations were incorrect.

[42] She has not explained in this appeal how the General Division made an error in its evaluation of the Commission's reconsideration decisions, which included its review of the Commission's calculations.

[43] In any event, the Claimant now agrees that her benefit rate is \$436.00 and that she was overpaid \$168.00 because she was paid \$444.00. She simply does not feel she should have to repay anything because she suffered undue hardship.

[44] Whether the Claimant experienced "undue hardship" was not relevant to the decision the General Division had to make, so it is not a basis for finding an error in the General Division decision. Likewise, it is not relevant to the decision that I make in substitution for the General Division decision.

[45] I understand that the Claimant endured the financial strain of an unexpected demand for the payment of an unknown debt. I have no power to cancel or forego any part of the Claimant's debt because the Commission's demand for payment may have come at a bad time. The law says she must repay it.⁶

⁶ See section 44 and 47 of the EI Act.

[46] The only error in the General Division decision is that it failed to consider whether the Commission originally reconsidered in a judicial manner. I have found that it did not do so. This allowed me to also find that the original decision should not have been reconsidered. I am finding the original reconsideration to be invalid.

[47] This means that I agree with the Commission that the “allocation overpayment” should be cancelled. By “allocation overpayment”, I mean the \$858.00 in the original notice of debt which was reduced to \$714.00 after the August 2023 reconsideration.

[48] I also agree that the Commission decided to decrease the Claimant’s benefit rate as a consequence of the Claimant’s own request for reconsideration. If I had to adjust the Claimant’s benefit rate without regard to the effect of the Claimant’s request for reconsideration, I would have two options. I could confirm the benefit rate of \$425.00, which is the rate as it stood before the Commission did its own reconsideration. Or I could act in the Commission’s place and reconsider the benefit rate. Based on the evidence, I would likely find that it should have been \$436.00 as the Commission did. I cannot imagine a circumstance in which I would reinstate the \$444.00 benefit rate in order to cancel the \$168.00 overpayment.

[49] The allocation overpayment is cancelled but the Claimant remains responsible for the \$168.00 overpayment. This is the result of 11 weeks of benefits being paid at the \$444.00 rate, when they should have been paid at \$436.00.

[50] Both parties agree that the Commission has already recouped \$450.00 towards the overpayment, which now stands as a credit towards the Claimant.

[51] Because of the recoupment, the Commission owes the Claimant \$282.00 (\$450.00 less the \$168.00 overpayment).

Conclusion

[52] I am allowing the appeal. The General Division made an error of jurisdiction. I have corrected the error and made the decision that the General Division should have made had it properly exercised its discretion.

[53] The overpayment resulting from the allocation of severance and pay-in-lieu is cancelled. The Claimant is responsible for the \$168.00 overpayment arising from benefit rate adjustments. She has already paid the Commission \$450.00 towards the original debt, so the net effect is that the Commission now owes the Claimant \$282.00.

Stephen Bergen
Member, Appeal Division