



Citation: *JJ v Canada Employment Insurance Commission*, 2024 SST 425

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: J. J.

Respondent: Canada Employment Insurance Commission
Representative: Nikkia Janssen

Decision under appeal: General Division decision dated January 23, 2024
(GE-24-40)

Tribunal member: Stephen Bergen

Type of hearing: Teleconference

Hearing date: April 23, 2024

Hearing participants: Appellant
Respondent's representative

Decision date: **April 24, 2024**

File number: AD-24-129

Decision

[1] I am allowing the appeal. I find that the General Division made an error of law. I am returning the matter to the General Division with directions.

Overview

[2] J. J. is the Appellant. I will call him the Claimant since this appeal is about his claim for Employment Insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant should have received an EI workshare-adjusted benefit rather than the Employment Insurance Emergency Response Benefit (EI-ERB). It transferred him over to the workshare benefit, which was paid at a lower rate. The Claimant had received the higher EI-ERB benefit rate for six weeks, which meant that the Claimant had been overpaid by \$2552.00. On December 15, 2020, the Commission told the Claimant it was writing off this amount.

[4] However, the Claimant had also received another \$2000.00, which the Commission routinely paid as an advance on benefits to EI-ERB claimants so that they could get assistance quickly. The Commission expected to recover this advance from claimants by withholding their EI-ERB benefits in later weeks of their claim. In the Claimant's case, the Commission had not recovered the advance by the time it converted the EI-ERB benefit to a workshare-adjusted EI benefit. As a result, it declared an overpayment of \$2000.00. It did not write off the \$2000.00.

[5] The Claimant disagreed with the overpayment and asked the Commission to reconsider. The Commission maintained its decision in a written decision dated August 31, 2021. The Claimant appealed the reconsideration decision to the General Division.

[6] However, the General Division found that the Claimant filed his appeal more than a year late. As a result, it dismissed his claim. It refused to consider the appeal of the Commission's decision to convert his benefits and its decision that it had overpaid him (and that he would have to repay) the EI - ERB advance of \$2000.00.

[7] The Claimant appealed to the Appeal Division.

[8] I am allowing the appeal. The General Division made an error by failing to find, or explain, how it determined the date the Claimant received the reconsideration decision. I am returning the matter to the General Division to reconsider.

Issues

[9] Did the General Division make an error of law by failing to find or explain the date that the Commission communicated the reconsideration decision to the Claimant?

Analysis

[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

Error of law

[11] The Claimant did not agree with the General Division decision but his application to the Appeal Division did not identify an error that I can consider. Nonetheless, I found an arguable case that the General Division made an error of law. I stated that the General Division may have failed to give adequate reasons.

[12] In response to the leave to appeal decision, the Commission conceded that the General Division failed to make clear findings of fact on which to base its decision.

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* (DESD Act).

[13] I am satisfied that the General Division made an error of law.

[14] The General Division was correct when it said that it could not consider an appeal that was more than a year late. Section 52(2) of the *Department of Employment and Social Development Act* states as follows:

... **in no case** may an appeal be brought more than a year after the day on which the decision is communicated to the appellant.

If the Claimant filed his appeal more than a year after the day it was communicated, the General Division would have no legal authority to consider the appeal.

[15] However, the General Division's decision that the Claimant's appeal was more than a year late depended on two dates. It depended on the date that the Commission communicated the decision to the Claimant, and on the date that the General Division received his appeal.

– **The date the reconsideration decision was communicated**

[16] According to the record, the Claimant denied receiving the original August 31, 2021, decision. A copy was re-sent October 31, 2022, which the Claimant again denied receiving. The Commission sent another copy by registered mail on November 30, 2022, but it was returned undelivered.

[17] If the General Division understood the Claimant to have received the reconsideration decision as a result of any of these efforts, it was not clear on what date he received it (or identify which communication effort resulted in him finally receiving the decision).

[18] I appreciate that the General Division made a finding that the Commission communicated the decision on October 31, 2020. However, this is clearly incorrect. The reconsideration decision itself is dated August 31, 2021, which is ten months after date the General Division said he received it. There is no other clear finding on the date that the decision was communicated.

[19] The Claimant made an error of law. It failed to make a coherent finding on the date that the decision was communicated.

– **The date the appeal was filed**

[20] The General Division found that the Claimant filed the appeal on December 15, 2023.

[21] At his Appeal Division hearing, the Claimant seemed to be arguing that the General Division misunderstood the date when he first filed the appeal. He said that he filed an earlier Notice of Appeal in June 2023 on the same issue.

[22] I am unable to view documents in connection with other appeals, so I asked the Commission representative if she knew anything about the Claimant's other appeal. She said that the other appeal related to a decision on the Claimant's dismissal from employment. The Claimant responded that the decision he appealed was about his dismissal but that it was also about an overpayment.

[23] Even if the Claimant appealed a related issue in June 2023, this would not be relevant to whether the Claimant filed the appeal of the August 31, 2021, decision within the year.

[24] The General Division made no error in finding that the Claimant filed this appeal - of the August 31, 2021, reconsideration decision - on December 15, 2023. The Tribunal records that the General Division received the appeal on December 15, 2023. The Claimant attached the Notice of Appeal to an email also dated December 15, 2023.

Remedy

[25] I have found that the General Division made an error. That means I must consider what I can do to fix the error. I have the power to either send the matter back to the General Division to reconsider or I can make the decision that the General Division should have made.²

² See section 59 of the DESD Act.

[26] The Commission suggested that I should return the matter to the General Division to reconsider, because it is not clear when the Commission communicated the reconsideration decision to the Claimant. In essence, it is arguing that the record is not complete.

[27] The Claimant agreed that the General Division made an error and that I should return the matter to the General Division for reconsideration.

[28] I agree. The General Division process was in writing and the Claimant's submissions addressed the overpayment issue only. I am not satisfied that the Claimant had a fair opportunity to explain when the Commission communicated the reconsideration decision to him. I cannot make the decision based on the evidence in the record.

[29] I am returning the matter to the General Division to reconsider with the following directions:

- a) The General Division shall make a clear finding of the date on which, or by which, the reconsideration decision was communicated to the Claimant.
- b) If the General Division finds that the Claimant filed his appeal within one year of the date on which the decision was communicated, but also finds that the Tribunal received the appeal more than 30 days from the date that the Commission communicated it to the Claimant, the General Division shall determine whether the Claimant has a reasonable explanation for the delay.³

The nature of the issues in the Claimant's prior appeal on or about June 2023, and what he understood about that appeal could be relevant to whether he has a reasonable explanation for why his appeal is more than 30 days late.

³ Section 52(1)(a) of the EI Act says the deadline is 30 days. Supposing that the Claimant can satisfy the General Division that he filed his appeal within the year, he will still have to show that he had a reasonable explanation for the delay if he filed the appeal more than 30 days from the date.

- c) If the General Division finds that the Claimant's appeal was filed on time or that the Claimant had a reasonable explanation for filing the appeal late (but within the year), the General Division shall consider the merits of the Claimant's appeal.

Conclusion

[30] I am allowing the appeal. The General Division made an error of law. I am returning the matter to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division