



Citation: *MD v Canada Employment Insurance Commission*, 2024 SST 953

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** M. D.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated July 14, 2024  
(GE-24-844)

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**Tribunal member:** Stephen Bergen

**Decision date:** August 9, 2024

**File number:** AD-24-481

## Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

## Overview

[2] M. D. is the Applicant. I will call her the Claimant because this application is about her claim for Employment Insurance (EI) benefits.

[3] The Claimant received regular EI benefits from July 2019 to November 2019. She worked while collecting benefits and reported her earnings to the Respondent, the Canada Employment Insurance Commission (Commission). The amounts she reported did not agree with the earnings reported by the employer. The employer's figures were higher than what the Claimant told the Commission.

[4] The Commission accepted the employer's evidence, and allocated the additional earnings to weeks of benefits that it had paid the Claimant. This reduced the amount to which the Claimant was entitled in some weeks, which meant that the Claimant had been overpaid. The Commission told the Claimant that she had to repay the overpayment, and it penalized her for making false statements.

[5] The Claimant disagreed and asked the Commission to reconsider. The Commission removed the penalty and notice of violation, but it refused to change its decision on her earnings allocation.

[6] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed her appeal. However, she successfully appealed the General Division decision to the Appeal Division. The Appeal Division decided that the Claimant had not had a fair hearing, so it sent the matter back to the General Division to be reconsidered by a different member. The General Division again dismissed her appeal, and she is now asking the Appeal Division for permission to appeal.

[7] I am refusing permission to appeal. The Claimant has not made out an arguable case that the General division made either a fairness error or an important error of fact.

## Issues

[8] Is there an arguable case that

- the General Division acted unfairly by failing to recognize that the Claimant no longer has records of the income she reported?
- the General Division made an important error of fact in how it understood the evidence of the Claimant's pay records?

## I am not giving the Claimant permission to appeal

### General Principles

[9] For the Claimant's application for leave to appeal to succeed, her reasons for appealing would have to fit within the "grounds of appeal." The grounds of appeal identify the kinds of errors that I can consider.

[10] I may consider only the following errors:

- 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 based its decision on an important error of fact.
- d) The General Division made an error of law when making its decision.<sup>1</sup>

[11] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. Other court decisions have equated a reasonable chance of success to an "arguable case."<sup>2</sup>

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<sup>1</sup> This is a plain-language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

<sup>2</sup> See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

## **Procedural fairness**

[12] The Claimant asserts that the General Division made an error of procedural fairness.

[13] Procedural fairness is not concerned with whether a party feels that the decision result is fair. Procedural fairness is concerned with the fairness of the process. Parties before the General Division have a right to certain procedural protections such as the right to be heard and to know the case against them, and the right to an unbiased decision-maker.

[14] I note that the Appeal Division allowed the Claimant's earlier appeal on the basis of procedural fairness. In that appeal, the Appeal Division found that the hearing process had not given the Claimant an adequate opportunity to provide evidence and arguments on the key legal and evidentiary questions. As a result, it returned the matter to the General Division to be reconsidered by a different member.

[15] The Claimant does not agree with the decision of the second General Division member, but she has not made an arguable case that the General Division acted unfairly this time.

[16] Most of her concerns are with how the Commission made its original decision, and not with the General Division process. She suspects that the Commission made mistakes in how it recorded her reported earnings. She says that she has not retained the records that might show that she actually reported different amounts.

[17] She may believe it is unfair that so much time has gone by that she cannot locate evidence to confirm her suspicion. However, this does not mean that the General Division process was unfair. The Claimant was obliged to present her best case, regardless of the difficulty of obtaining evidence.

[18] Beyond that, I note that the overpayment is based on the difference between her actual earnings (as found by the Commission and confirmed by the General Division) and what the Commission understood her to have reported as income. The Commission

had already decided to cancel the penalty for making false statements, so it would have made no difference to her appeal if she could prove it was the Commission that made the mistake.

[19] The Commission calculated and paid benefits based on its understanding of the earnings reported by the Claimant. If it misunderstood her earnings, it would have paid benefits based on that misunderstanding. Regardless of whether the Commission accurately recorded the earnings the Claimant reported, the only question of importance was how much she *should* have been paid (and was this more or less than the benefits she had received). Her overpayment would be calculated as the difference between the benefits the Claimant received (no matter how calculated) and what she should have received (after deductions calculated from her actual earnings).

[20] The General Division found as fact that the Commission identified the Claimant's correct earnings after its investigation. This was based on the earnings reported by the employer, the Record of Employment, and the information from the Claimant's pay stubs. All these sources agreed on her actual earnings.

[21] When a claimant receives more benefits than they are entitled to, they cannot keep the extra benefits.<sup>3</sup> This would still be true, even if the Commission had made a mistake.<sup>4</sup>

### **Important error of fact**

[22] The Claimant also asserts an important error of fact, but she is not clear on how the General Division made such an error.

[23] She seems to believe that the General Division decision does not match the evidence. The General Division found that her pay statements agree with the employer's records, so the Claimant thinks she should have won her appeal.

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<sup>3</sup> See section 44 of the EI Act.

<sup>4</sup> See *K.H. v Canada Employment Insurance Commission*, 2015 SSTAD 1470.

[24] The General Division makes an important error of fact when it bases its decision on a finding that ignores or misunderstands relevant evidence, or on a finding that does not follow rationally from the evidence.<sup>5</sup>

[25] In this case, the Claimant has not pointed to any evidence that was ignored or misunderstood. And she has not made out an arguable case that its findings are not rationally related to the evidence that it considered.

[26] The General Division clearly found that the figures reported by the employer to the Commission matched the information on the Record of Employment. They also matched the information from the Claimant's pay stubs. It accepted that this evidence established the Claimant's actual earnings. From this, it found that the Commission correctly revised the Claimant's weekly earnings and recalculated the allocation. That is why it dismissed the appeal.

[27] However, that does not mean that the General Division thought that the information from these sources also matched the information in the questions and answers of the Claimant's e-reporting.<sup>6</sup> In fact, the e-reports do not line up with what the employer told the Commission, the Record of Employment, or the Claimant's pay stubs. The General Division did not say that the earnings figures from the e-reports were accurate.

[28] It is possible that the Claimant meant to argue that the General Division's decision was contrary to its statement that there was "no discrepancy" between the earnings figures described in the e-report and the figures that the Commission alleges the Claimant declared.<sup>7</sup> If so, the Claimant misunderstands what the General Division was saying.

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<sup>5</sup> I have tried to make this error more understandable. This ground of appeal is defined in section 58(1)(c) of the DESDA. The General Division will have made an error of fact where it, "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

<sup>6</sup> See RGD5. The e-reports show the earnings figures that the Claimant self-reported to the Commission.

<sup>7</sup> See para 32 of the General Division decision.

[29] The General Division meant only that the earnings that the Commission said the Claimant reported are the same as those earnings found in the record of the Claimant's e-reports. It was not trying to say that the Claimant's reported earnings were her actual earnings.

[30] The Claimant's appeal has no reasonable chance of success.

## **Conclusion**

[31] I am refusing permission to appeal. This means that the appeal will not proceed.

Stephen Bergen  
Member, Appeal Division