



Citation : *HM v Canada Employment Insurance Commission*, 2024 SST 1043

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** H. M.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Daniel McRoberts

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**Decision under appeal:** General Division decision dated  
September 14, 2023 (GE-23-993)

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**Tribunal member:** Glenn Betteridge

**Type of hearing:** In person  
**Hearing date:** August 21, 2024  
**Hearing participants:** Appellant  
Respondent's representative  
**Decision date:** August 30, 2024  
**File number:** AD-23-962

## Decision

[1] I am dismissing H. M.'s appeal because he hasn't shown the General Division made an error.

[2] This means the General Division decision stands unchanged. He doesn't qualify for Employment Insurance (EI) benefits as a self-employed person because he didn't have at least \$5,289 in self-employment earnings in 2021.

[3] He can try to qualify for EI benefits as an employee, based on the insurable hours he worked.<sup>1</sup> If he does, he can ask the Commission to antedate (in other words, backdate) his claim to when he applied for benefits in 2022.

## Overview

[4] H. M. is the Claimant in this case. In 2022, he made two claims for EI benefits as a self-employed person.

[5] The *Employment Insurance Act* (EI Act) says that to qualify for benefits he had to have at least \$5,289 in self-employment earnings in 2021.<sup>2</sup> The EI Act says his self-employment earnings had to be calculated under the *Income Tax Act*.<sup>3</sup>

[6] On his EI applications, he reported he had \$38,441 in net self-employment earnings for the previous year. The EI application says to get this information from line 4 of Schedule 13 of his Income Tax and Benefit Return.<sup>4</sup>

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<sup>1</sup> At the hearing, I asked the Commission's representative about this. He said he didn't know of a legal reason that would stop the Claimant from applying for benefits as an employee—in other words, as an insured person based on insurable hours he worked. I looked into this after the hearing—specifically section 152.09 of the *Employment Insurance Act* (EI Act). This section doesn't say he can't apply. But it might limit the types and weeks of benefits the Commission can pay him during the benefit period of his claim.

<sup>2</sup> Section 152.07 (1)(d)(i)(B) of the EI Act sets this amount, if a person applied for benefits from September 24, 2021 and September 24, 2022. The Claimant applied for benefits twice, on May 24, 2022 and on August 16, 2022. See GD3-16 and GD3-39. Both times he applied for sickness benefits.

<sup>3</sup> Section 152.01 (2)(a) of the EI Act defines self-employment earnings, calculated under the *Income Tax Act*.

<sup>4</sup> See GD3-11.

[7] Based on what he reported, the Commission paid him benefits.

[8] Later on, the Canada Revenue Agency (CRA) told the Commission his net self-employment earnings for 2021 were zero. So, the Commission decided he didn't qualify for benefits. And it created an overpayment for the benefits it had already paid to him.

[9] The Commission upheld its decisions when he asked it to reconsider. He appealed to the Tribunal's General Division. The General Division dismissed his appeal.

[10] The Appeal Division gave the Claimant permission to appeal the General Division decision. To succeed in his appeal, he has to show that the General Division made one of the errors that the law lets me consider. Unfortunately for the Claimant, he hasn't done that.

### **Preliminary matters: the Claimant didn't send post-hearing written arguments**

[11] The Appeal Division hearing lasted over one hour and 25 minutes. I gave the Claimant a full and fair opportunity to present his legal arguments. I asked him questions about his legal arguments to make sure I understood them.

[12] I also gave him the opportunity to respond to my understanding of the law—the EI Act and court cases interpreting it—where my understanding went against his argument. I did this out of fairness to him and because I have to be an active adjudicator.<sup>5</sup>

[13] The Claimant had health issues in the months leading up to the hearing. I rescheduled the hearing several times. Out of fairness to him, I also gave him the opportunity to send in legal arguments in writing after the hearing.

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<sup>5</sup> Sections 8(2) and 17(1) of the *Social Security Tribunal Rules of Procedure* say that the Tribunal uses active adjudication to help parties fully participate in the appeal process, including when we hear appeals. Section 17(2) sets out some of the things the Tribunal can do to actively adjudicate an appeal. For example, I can decide what issues need to be addressed, give information about the law that applies to an appeal, and ask the parties and their representatives questions.

[14] He didn't send the Tribunal legal arguments by the deadline I set. So, I went ahead and made this decision.

## **Issue**

[15] There are three issues in this appeal.

- Did the General Division use an unfair process by making its decision even though the Claimant says the Commission didn't send all the documents he needed to make his case?
- Did the General Division make a legal error in how it interpreted and applied the law about self-employment earnings under section 152.01(2) of the EI Act?
- Did the General Division make an important factual error when it decided his self-employment earnings for 2021 under section 152.01 (2)(a) were effectively zero?<sup>6</sup>

## **Analysis**

[16] I am dismissing the Claimant's appeal. Unfortunately for him, he applied for EI benefits as a self-employed person. But he didn't have enough self-employment earnings to qualify for benefits. That is what the Commission and the General Division decided. And he hasn't shown the General Division made an error in its process or its decision. So, I can't allow his appeal.

## **The Appeal Division's role**

[17] The law gives the Appeal Division the power to fix a General Division decision where a person shows the General Division made one of these errors:

- It used an unfair process or was biased.

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<sup>6</sup> The General Division found he had a net loss. In other words, his had zero positive net earnings.

- It decided an issue it should not have decided or didn't decide an issue it had to decide. In legal terms, this is an error of jurisdiction.
- It based its decision on a legal error.
- It based its decision on an important factual error.<sup>7</sup>

[18] If the Claimant doesn't show the General Division made an error, I have to dismiss his appeal.

### **The Claimant is challenging how self-employed people qualify for benefits under the EI Act**

[19] The EI Act sets up two types of benefits claimants who can get regular and certain special benefits—employees and self-employed people.<sup>8</sup> Employees and self-employed people have to meet different requirements to qualify for benefits. Both employees and self-employed people have to prove they qualify for benefits.<sup>9</sup>

[20] The qualifying rules and benefits for employees are under Part I of the EI Act. Employees—in other words, people who work for employers—can qualify based on the number of insurable hours they work before they have an interruption of earnings. Their earnings are called insurable earnings.

[21] The qualifying rules and benefits for self-employed people are under Part VII.1 of the EI Act. Self-employed people can qualify for benefits if they have a valid agreement with the Commission, have an interruption of earnings, and have the minimum amount of self-employment earnings in the calendar year before they apply for benefits.

[22] The EI Act doesn't let people combine hours or earnings from employment and earnings from self-employment to qualify for benefits.

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<sup>7</sup> Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls these grounds of appeal. I will call them errors.

<sup>8</sup> The EI Act refers to insured people.

<sup>9</sup> See sections 48 (insured persons) and 152.1(2) (self-employed persons) of the EI Act.

[23] When a person makes an initial claim for benefits, they have to choose between applying for benefits as an employee (under Part I) or as a self-employed person (under Part VII.1).

[24] The weekly benefit rate for self-employed people who qualify is based on the amount of their self-employment earnings and insurable earnings in their qualifying period.<sup>10</sup>

– **The Claimant applied for benefits as a self-employed person—he is challenging the EI Act sections he needed to meet to qualify**

[25] The Claimant applied for EI benefits as a self-employed person. Based on his application date, he would qualify if he had \$5,298 in self-employment earnings in the calendar year 2021.<sup>11</sup> The definition of “self-employed person” includes a person who is or was engaged in a business.<sup>12</sup> The amount of person’s self-employed earnings for a year is the total of their:

- income for the year from their business calculated under the *Income Tax Act*, ***minus***
- all losses for the year from the businesses calculated under the *Income Tax Act*

[26] As I set out in detail below, I can’t accept any of the Claimant’s arguments.

[27] Essentially, he is arguing the EI Act as written should not apply to his claim. His arguments all challenge the EI Act in one of two ways. First, the Claimant doesn’t accept the qualifying requirements for self-employed people. He says the General Division should have used his entire income from all sources—employment and self-employment. Second, the Claimant doesn’t accept that the earnings a self-employed person needs to qualify should be calculated under the *Income Tax Act*, which is what

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<sup>10</sup> See section 152.16(1)(a) and (b) of the EI Act.

<sup>11</sup> See section 152.07 (d)(i)(B) of the EI Act.

<sup>12</sup> See section 152.01 of the EI Act.

the EI Act says. Or, alternatively, the General Division should not have counted his losses from one source of self-employment income (real estate)

[28] But the EI Act is clear about both these things. The Claimant hasn't referred to any court decision or other legal sources that make me doubt this. And the Commission and the General Division can't change what self-employed people need to show to qualify for benefits.<sup>13</sup>

[29] The General Division—and the Commission—had to follow what the EI Act says.<sup>14</sup> So, for the reasons that follow, the Claimant hasn't shown the General Division made an error.

### **The General Division process was fair**

[30] The General Division makes an error if it uses an unfair process.<sup>15</sup> These are called procedural fairness or natural justice errors. The question is whether a person knew the case they had to meet, had an opportunity to respond to that case, and had an impartial decision-maker consider their case fully and fairly.<sup>16</sup>

[31] The Claimant hasn't argued the General Division member was biased or prejudged his case.

[32] The Claimant argued that the General Division process was unfair because the Commission didn't give him all the documents in the Commission's file. He also argued that the General Division shifted the onus to him to prove he qualified for benefits, by making him send in tax documents after the hearing. At its core, this argument is challenging the sections of the EI Act that effectively say the Commission has to accept his self-employment earnings as calculated by the CRA under the *Income Tax Act*.

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<sup>13</sup> See *Canada (Attorney General) v Levesque*, 2001 FCA 304; and *Pannu v Canada (Attorney General)*, 2004 FCA 90.

<sup>14</sup> See *Canada (Attorney General) v Knee*, 2011 FCA 301.

<sup>15</sup> This is a ground of appeal under section 58(1)(a) of the DESD Act.

<sup>16</sup> See *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69; and *Kuk v Canada (Attorney General)*, 2024 FCA 74.

[33] He argued the Commission had documents from the CRA that it wasn't sharing. He argued he needed to know how the Commission (or CRA) calculated his self-employment earnings in order to know the case he had to meet and respond to that case. He said he had self-employment earnings from two businesses but was only actively engaged in one business. He said the way the CRA calculated his income was material to this legal argument.

[34] As I pointed out to the Claimant at the hearing, he had the onus of proving he qualified for EI benefits. He appealed the Commission's decision to the General Division, so he had the onus of proving his case. Finally, out of fairness to him, the General Division gave him an extra opportunity to send in evidence after the hearing. At the Appeal Division hearing he agreed that the General Division didn't make or force him to send in the post-hearing documents.

[35] For all these reasons, I can't accept his argument that the General Division process was unfair because it put the onus on him.

[36] I can't accept the Claimant's other arguments about procedural unfairness, for three reasons.

[37] First, there is no evidence to show the Commission had the documents or the information the Claimant says it had. The Commission included the information it had about the Claimant's self-employment income in a table in its reconsideration file.<sup>17</sup>

[38] At the Appeal Division hearing, the Commission representative explained what the CRA sends to the Commission. The CRA sends a data transfer to the Commission with the net amount of a person's self-employment earnings. Although this is new evidence that wasn't before the General Division, I accept it and have considered it. It is background information that helps me understand the Commission's process in a general sense, not specifically about the Claimant's case.<sup>18</sup>

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<sup>17</sup> See GD3-23.

<sup>18</sup> See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraphs 35 to 40.



[39] Second, it seems the Claimant had most if not all of the information the CRA used to calculate his net self-employment income. He filed a tax return for 2021. He calculated and reported that his net self-employment income was a loss of \$12,011.<sup>19</sup> He received a notice of assessment and a refund. In other words, he had more information than the Commission—before he sent the Tribunal his tax documents as part of his appeal.<sup>20</sup>

[40] Third, how the CRA used the *Income Tax Act* to calculate his net self-employment income for 2021 wasn't material to his General Division appeal. As I will analyze below, the Commission and the General Division had to use the amount the CRA calculated under the *Income Tax Act*. If the Claimant disagreed with that amount—or the calculation the CRA used to get to that amount—he had to dispute it under the *Income Tax Act*, not under the EI Act.

### **The General Division applied the correct law to decide the Claimant's self-employment income**

[41] The General Division makes a legal error when it does one of the following:

- ignores an argument it has to consider
- doesn't give adequate reasons for its decision
- misinterprets a law
- applies the wrong legal test
- doesn't follow a court decision it has to follow

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<sup>19</sup> See GD8-5.

<sup>20</sup> See GD8.

[42] The General Division decided the Claimant's self-employment earnings for the year were effectively zero.<sup>21</sup> This meant he didn't earn the \$5,289 he needed to qualify.<sup>22</sup>

[43] The Claimant argued the General Division made two legal errors.

[44] First, he said the General Division misinterpreted the definition of "self-employed person" in section 152.01 (2) of the EI Act.<sup>23</sup> The Claimant is making a statutory interpretation argument. He focuses on the word "engaged" in the definition of a self-employed person from section 152.01 of the EI Act. The relevant part of that definition says, "self-employed person means an individual who ... is or was engaged in a business." He says that definition means a person has to be "actively engaged" in the business, meaning, they have to have some income from it. If the person isn't actively engaged in a business, the Commission can't take into account the losses from that business when it determines the person's net self-employment earnings under section 152.01.

[45] He argues that the General Division made a legal error when it included his real estate business in his self-employment earnings from 2021. He says he wasn't actively engaged in his real estate business in 2021. He had no earnings, just bills he had to pay. So, he wants the losses from that business (about \$21,000) taken out of the calculation. He wants that because the losses cancel out his earnings from his paralegal business. That meant he didn't have at least \$5,289 in self-employment earnings for 2021. So, he didn't qualify for EI benefits.

[46] I can't accept that argument. The real target of his challenge is the calculation of his **net** self-employment income under the *Income Tax Act*. Section 152.01 is clear about two things. First, a self-employed person has to qualify based on the net amount of their self-employment earnings from their businesses. Second, that net amount is the

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<sup>21</sup> See paragraphs 26 and 45 of the General Division decision.

<sup>22</sup> See paragraphs 4, 23, 26 and 45 of the General Division decision.

<sup>23</sup> The Claimant said the General Division made that legal error in paragraphs 20 to 22 of its decision.

income for the year from their businesses under the *Income Tax Act* minus all losses for the year from their businesses under the *Income Tax Act*.

[47] There is no ambiguity, and I don't have to look for hidden ambiguity. The *Income Tax Act* and the obligation of self-employed people to file a return under that Act plays an essential role under Part VII.1 of the EI Acts.<sup>24</sup> The income and losses from the businesses have to be calculated under *the Income Tax Act*, not the EI Act. The issue of whether he had to be actively engaged in the business for the CRA to deduct his business losses from his business income has to do with the interpretation and application of the *Income Tax Act*, not the EI Act.

[48] So, the meaning of the word "engaged" in section 152.01 wasn't relevant to the General Division's decision. The General Division did what the EI Act says to do. It used his net self-employment earnings from his businesses—as calculated under the *Income Tax Act*—and decided he didn't meet the \$5,289 minimum to qualify.

[49] Second, the Claimant argues that the General Division made a legal error when it used his self-employment earnings—rather than his income from all sources—to decide whether he qualified for benefits.<sup>25</sup> He says the Federal Court of Appeal decision in the *McLaughlin* case says to do this.<sup>26</sup>

[50] The General Division analyzed the *McLaughlin* decision.<sup>27</sup> It decided it didn't apply because it was about a different legal issue. So, the court applied different sections of the EI Act and *Employment Insurance Regulations*. The General Division concluded it didn't have to follow the *McLaughlin* decision.

[51] The General Division didn't make a legal error in its analysis of the *McLaughlin* decision. And its conclusion was legally correct.

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<sup>24</sup> In addition to section 152.01, see sections 152.22 to 153 of the EI Act.

<sup>25</sup> The Claimant said the General Division made that legal error in paragraphs 35 to 39 of its decision.

<sup>26</sup> See *McLaughlin v Canada (Attorney General)*, 2009 FCA 365.

<sup>27</sup> See paragraphs 35 to 39 of the General Division decision.

[52] To summarize this section, the Claimant hasn't shown there is an arguable case the General Division made a legal error.

### **The General Division didn't make an important factual error when it decided the Claimant's self-employment income for 2021**

[53] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring or misunderstanding relevant evidence.<sup>28</sup> In other words, if the evidence goes squarely against or doesn't support a factual finding the General Division had to make to reach its decision.

[54] The law also says I can presume the General Division reviewed all the evidence—it doesn't have to refer to every piece of evidence in its decision.<sup>29</sup> I should put aside that presumption where it is highly probable the evidence it didn't refer to a relevant fact.<sup>30</sup>

[55] The Claimant argued that the General Division made an error in calculating his self-employment income or by accepting the CRA's calculation used by the Commission.<sup>31</sup> He says the General Division should not have counted his net self-employment income from real estate (approximately \$21,000 loss) because he wasn't actively engaged in real estate.

[56] I can't accept the Claimant's argument. It is based on his failed argument about a legal error. The General Division didn't make a legal error when it interpreted self-employment income to include income from both his businesses—real estate and paralegal. Because I rejected that legal argument, I have to reject his important factual error argument. The General Division could not ignore his real estate loss when it

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<sup>28</sup> Section 58(1)(c) of the DESD Act says it is 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.

<sup>29</sup> See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.

<sup>30</sup> See *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498 at paragraph 51.

<sup>31</sup> The Claimant said the General Division made that important factual error in paragraph 18.

considered his net self-employment income. And the relevant evidence supports the General Division's finding that he had a net loss for 2021.

[57] So, the Claimant hasn't shown the General Division made an important factual error.

## **Conclusion**

[58] I am dismissing the Claimant's appeal because he hasn't shown the General Division made an error.

[59] The Claimant says that he worked insurable hours in the period before he applied for EI benefits as a self-employed person. This means he might qualify for benefits as an employed person. The Commission's representative said that he can make a claim now and ask the Commission to backdate it to when he applied for self-employment benefits in 2022.

Glenn Betteridge  
Member, Appeal Division