



Citation: *NG v Canada Employment Insurance Commission*, 2024 SST 1055

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: N. G.

Respondent: Canada Employment Insurance Commission
Representative: Nikkia Janssen

Decision under appeal: General Division decision dated
February 22, 2024 (GE-23-3308)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: July 18, 2024

Hearing participants: Appellant
Respondent's representative

Decision date: September 3, 2024

File number: AD-24-231

Decision

[1] I am allowing N. G.'s appeal because the General Division made two legal errors and an important factual error.

[2] To fix the errors, I have made the decision the General Division should have made. I have allocated and deducted her earnings. This confirms the Canada Employment Insurance Commission's (Commission) calculation of her overpayment (\$10,501).¹

[3] My decision doesn't give her the outcome she wants. Unfortunately for her, the Tribunal doesn't have any power to write off or reduce her overpayment. She can apply to the Canada Revenue Agency (CRA) for debt forgiveness based on financial hardship.

Overview

[4] N. G. is the Claimant in this case. In 2016, she was working for a college (employer). Starting that spring, she was unable to work because of an injury. So, she took all of her vacation leave. Her employer laid her off for the summer. And she applied for Employment Insurance (EI) benefits.

[5] The Canada Employment Insurance Commission (Commission) paid her regular and sickness benefits in 2016.

[6] The Claimant and her union fought to get sickness (disability) income replacement benefits—both short-term and long-term benefits. She settled her case. Her employer and the insurance company paid her retroactive benefits and other money, including for weeks when she had already received EI benefits.

¹ This is the amount of her overpayment on the date the Canada Employment Insurance Commission (Commission) made its original decision and sent her a notice of debt (see GD3-84 to GD3-89). She may have paid off some of the debt since then. I take into account payments she has made or money the Canada Revenue Agency (CRA) might have taken to pay off her debt.

[7] The Commission learned about these retroactive payments. It asked her and her employer for more information. Eventually, the Commission decided that she had received earnings. The Commission went back in time and allocated these earnings to weeks when she had received EI benefits. It deducted the earnings from the benefit amounts she had received. Then the Commission calculated how much it had overpaid her in EI benefits (\$8,055) and sent her a notice of debt.²

[8] The Claimant asked the Commission to reconsider its decision. The Commission changed how it allocated some of her earnings. But it didn't tell her how this affected her overpayment.³

[9] The Claimant appealed to this Tribunal's General Division. In its written argument to the General Division, the Commission said that as a result of its reconsideration decision, her overpayment was \$12,038.⁴

[10] The General Division dismissed her appeal. It decided that the Commission was correct about her sources of income that counted as earnings under the *Employment Insurance Act* (EI Act) and *Employment Insurance Regulations* (EI Regulations). It decided the Commission made two mistakes when it allocated her earnings to weeks when she had received EI benefits. The General Division corrected the allocation. But it didn't calculate the amount of her overpayment. It left that to the Commission to do.

[11] The Claimant appealed to the Appeal Division. I gave her appeal permission to go forward.

[12] At the Appeal Division, the Commission said that the Claimant's overpayment was \$10,501. The Claimant argues she has no confidence that the Commission has correctly calculated her overpayment. She is asking the Appeal Division to forgive her debt based on her financial situation. The Commission argues the General Division

² See GD3-89. The Commission also created a penalty for misrepresenting her situation (\$3,983). That amount was included on the notice of debt.

³ See the reconsideration decision letter the Commission sent to the Claimant, at GD3-117.

⁴ See GD4-5.

made legal errors and an important factual error. Both parties say I should make the decision the General Division should have made.

Issues

[13] There are four issues in this appeal.

- Did the General Division make a legal error when it decided the Commission could only go back 36 months when it reviewed the Claimant's benefits?
- Did the General Division make a legal error when it allocated the Claimant's vacation pay?
- Did the General Division make an important factual error when it decided her normal weekly earnings were \$735?
- If the General Division made an error, how should I fix the error?

Analysis

The Appeal Division's role

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

- It based its decision on a legal error.
- It based its decision on an important factual error.⁵

[15] I have decided the General Division made two legal errors and one important factual error.

[16] I fixed those errors by making the decision the General Division should have made. Like the Claimant, I wasn't confident that the Commission correctly calculated her overpayment. So, I reviewed the law and the facts. I allocated and deducted her

⁵ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls sets out these grounds of appeal. I will call these errors.

earnings from the weeks she received EI benefits. I calculated her overpayment. And I reviewed the Commission's calculations.

[17] My calculation of her overpayment is \$1 different from the Commission's calculation. So, I accept the Commission's position that her overpayment was \$10,501.

[18] The rest of this decision explains what I have decided and why.

The General Division made a legal error when it used section 52 of the EI Act

[19] The General Division makes a legal error where it misinterprets or doesn't use the correct section of the EI Act or EI Regulations.

[20] The General Division used section 52 to say that the Commission could only go back 36 months from the date it reviewed her claim and sent her a notice of debt.

[21] But section 52 doesn't apply to limit the Commission's power to allocate earnings and create an overpayment.⁶ Section 46.01 sets that time limit.

[22] So, the General Division used the wrong section of the EI Act. In other words, it made a legal error.

The General Division made a legal error when it used the wrong section of the EI Regulations to allocate the Claimant's vacation pay

– What the law says about earnings, allocation and deduction of earnings, and overpayments

[23] The Commission (and General Division) had to apply the versions of the EI Act and EI Regulations that were in force when the Claimant received benefits.⁷

⁶ See *Chartier v Canada (Attorney General)*, 2010 FCA 150; and *Faullem v Canada (Attorney General)*, 2022 FCA 29.

⁷ I looked at the version of the *Employment Insurance Act* (EI Act) and *Employment Insurance Regulations* (EI Regulations) that were in effect during the period starting the week of June 19, 2016 and ending the week of December 11, 2016. This included two Pilot Projects that affected the rules for deducting earnings from regular benefits under section 19(2) of the EI Act. See EI Regulation 77.97(3) (Pilot Project 19) and EI Regulation 77.93(3) (Pilot Project 20).

[24] Section 35 of the EI Regulations sets out the types of income that count as earnings.

[25] Section 36 tells the Commission the week or weeks to which it should allocate (in other words, assign) the earnings.

[26] If the Commission allocates earnings to a week when the person got EI benefits, the Commission usually has to deduct those earnings from that week of EI benefits.

[27] The amount the Commission has to deduct depends on the type of benefits and type of earnings. If the person received EI regular benefits, the Commission deducts some of the earnings.⁸ If the person received EI sickness benefits, the Commission deducts 100% of illness or disability benefits paid under a group plan.⁹

[28] There are also rules about how to allocate and deduct earnings owed or paid to the person during their waiting period.¹⁰

[29] A person might receive income after they have received EI benefits—for the same time period. If that income counts as earnings, the Commission has to go back in time to when they received EI benefits. It has to allocate the earnings to weeks in their EI claim then deduct the earnings from the EI benefits the person received in each week. This will result in an overpayment, which the person has to repay to the Commission.¹¹ This is what happened in the Claimant's case after she settled her legal case against her employer and the insurance company.

– **The Claimant received vacation pay on separation from her employment**

[30] The Claimant used her vacation when she was sick. Because she won her case against her employer and the insurance company, her employer had to return the

⁸ See section 19(2) of the *Employment Insurance Act* (EI Act).

⁹ See section 21(3) of the EI Act. Sometimes these insurance benefits are called income replacement benefits, short-term disability benefits, or long-term disability benefits.

¹⁰ See section 19(1) of the EI Act and section 39(3) of the EI Regulations.

¹¹ See section 43 of the EI Act.

vacation to her. In other words, it had to pay her back money equal to the value of the vacation days she used.

[31] The General Division decided that her vacation pay was earnings that the Commission had to allocate.¹² It accepted that she received this vacation pay upon separation from employment.¹³

[32] Then the General Division used section 36(8)(b) of the EI Regulations to allocate her vacation pay to weeks in her EI claim. That was the wrong section. Section 36(9) sets out the rules for allocating all earnings (including vacation pay) paid or payable on separation from employment.

[33] So, the General Division used the wrong section of the EI Regulation. In other words, it made a legal error.

The General Division misunderstood or ignored evidence when it decided the Claimant's weekly insurable earnings were \$735

[34] 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.¹⁴ 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.

[35] The EI Act says the Commission had to deduct an amount of the Claimant's earnings from her weekly benefits.¹⁵ That amount is based on her weekly insurable earnings, before she applied for EI benefits.

¹² See paragraph 30 of the General Division decision.

¹³ See paragraphs 29, 31, 35, and 41 of the General Division decision.

¹⁴ 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.

¹⁵ See EI Act section 19(1) and 19(2).

[36] The General Division correctly stated that it had to decide the Claimant's normal weekly earnings—meaning her weekly insurable earnings.¹⁶ It decided that her normal weekly earnings were \$735.¹⁷ It disagreed with the Commission's calculation of \$976.

[37] At the Appeal Division, the Commission argued the General Division made an error.¹⁸ It based her weekly insurable earnings on her biweekly disability insurance payments from Sun Life. The Commission says the General Division should have used her employment income, not her disability payments that were only 75% of her weekly employment income.¹⁹ The Commission said the correct amount of the Claimant's weekly employment earnings was \$975.

[38] I agree with the Commission. The General Division misunderstood the evidence about the Claimant's weekly earnings to arrive at \$735. Or it ignored the Claimant's employment income when it used the Sun Life disability payments instead. The correct amount of the Claimant's normal (insurable) weekly earnings is \$975.

[39] Then the General Division used the incorrect amount (\$735) to decide how much the Commission should allocate to, and deduct from, her benefits in specific weeks.²⁰ In other words, the General Division based its decision on an incorrect finding of fact it made by misunderstanding the evidence.

[40] So, the General Division made an important factual error.

Fixing the error by making the decision the General Division should have made

[41] The law gives me the power to fix the General Division's errors.²¹

[42] The Commission said that I should make the decision the General Division should have made. It says all the information is in the General Division file. And it said

¹⁶ See paragraphs 30 to 32 of the General Division decision.

¹⁷ See paragraph 34 of the General Division decision.

¹⁸ See AD3-7.

¹⁹ See AD3-6 and GD3-33.

²⁰ See the table at paragraph 36 of the General Division decision.

²¹ Section 59(1) of the DESD Act gives me these powers.

the correct amount of the overpayment is \$10,501. Its argument and calculation to support that amount are in its written legal argument.²²

[43] The Claimant said that she just wanted the case to be over. She didn't want me to send it back to the General Division. She doesn't understand how the Commission allocated and deducted her vacation pay. And she has no confidence that the Commission correctly calculated her overpayment.

[44] I will make the decision the General Division should have made. I have all the information I need to do that.

– **Applying the law about earnings, allocation, and deduction to the Claimant's five sources of income**

[45] As I explained to the Claimant at the beginning of her hearing, her case is extremely complicated. The law about earnings and allocation is complicated. She received five different types of income after the Commission had already paid EI benefits to her. That income was paid to her at different times and for different periods. She received both EI regular and sickness benefits from the Commission in 2016. Finally, to calculate the overpayment, the Commission had to use the law in place in 2016.

[46] The Claimant agreed that she had the five sources of income the Commission identified in its written argument. I will go through the Claimant's five sources of income, one at a time and say whether each counts as earnings. And if it does, I will identify the week(s) to which the Commission had to allocate it.

[47] Then I will explain how I calculated her overpayment, based on what the law says about deducting earnings from EI benefits.

²² See the table at AD3-8, and the explanation/argument at AD3-6 to AD3-8.

– **Wage-loss benefits from her employer**

[48] The short-term wage loss (disability) benefits the Claimant received from her employer are earnings.²³

[49] The earnings payable for her two-week waiting period didn't have to be allocated or deducted.²⁴

[50] After her waiting period, these earnings had to be allocated at

- \$731 for the weeks of June 19, 2016 to August 7, 2016
- \$732 for the weeks of August 14, 2016 and August 21, 2016
- \$735 for the weeks of August 28, 2016 to September 18, 2016

– **Vacation pay**

[51] The Claimant's employer reimbursed her for the vacation she used, because she should not have had to use it in the first place. So, her employer paid her \$4,874 in vacation pay upon separation from her employment. This entire amount is earnings.²⁵

[52] The entire amount had to be allocated, beginning with the week of separation, in consecutive weeks, in the amount of her normal weekly earnings (\$975).²⁶ So, it had to be allocated at \$975 per week from September 18, 2016 to October 16, 2016— for the last week, when the allocation was \$1 less.

– **Special allowance for signing a new collective agreement**

[53] The Claimant's employer paid her a one-time signing bonus of \$825 when her new collective agreement was signed. It was payable to her on September 1, 2016.

²³ See section 35(2)(c)(i) of the EI Regulations.

²⁴ See section 39(3) of the EI Regulations.

²⁵ See section 35(2) of the EI regulations and *Canada (Attorney General) v Roch*, 2003 FCA 356.

²⁶ See section 36(9) of the EI Regulations.

[54] The entire amount had to be allocated.²⁷ And I find that the entire amount had to be allocated to the week the transaction occurred—in other words, the week it was payable to her. I am following EI Regulation 36(19)(b) since none of sections 36(1) to 36(18) applies.

[55] So, I allocated her entire signing bonus to the week of August 28, 2016.

– **Retroactive wage increase**

[56] The employer paid the Claimant a retroactive wage increase of \$439. This does not count as earnings, so it does not have to be allocated and deducted from the EI benefits she received.²⁸

– **Long-term disability benefits from Sun Life**

[57] As a result of her settlement, Sun Life had to pay the Claimant a long-term disability benefit of \$659 per week, effective September 23, 2016.²⁹

[58] This weekly amount is earnings.³⁰ It had to be allocated to the weeks in respect of which the amount was paid, starting the week of September 25, 2016 to the week of December 11, 2016. (December 11, 2016 was the last week the Commission paid her EI benefits.)

– **Calculating the overpayment and how the Claimant can ask for a write-off**

[59] The Claimant's weekly EI benefit rate was \$537.

[60] The Claimant's overpayment is the difference between the rate of weekly EI benefits she was entitled to receive after the deduction of allocated earnings **and** the amount the Commission paid her. Essentially, she has an overpayment because the

²⁷ See section 35(2) of the EI regulations and *Canada (Attorney General) v Roch*, 2003 FCA 356

²⁸ See section 35(7)(d) of the EI Regulations.

²⁹ Because she won her grievance, Sun Life paid her a retroactive lump sum payment of \$12,210.86 for the period September 23, 2016 to January 31, 2017. Her last week of EI entitlement was December 11, 2016.

³⁰ See section 35(2)(c)(i) of the EI Regulations.

Commission didn't deduct her earnings from her EI benefits in 2016. It did that after it learned about these earnings when she settled her case in 2017.

[61] For every week the Commission paid her the EI sickness benefits, it had to deduct 100% of her earnings in that week.³¹ This meant that for every week she received the EI sickness benefit, she had to pay back the entire amount of that benefit (\$537 per week).

[62] For every week the Commission paid her EI regular benefits, it had to deduct 50% of her earnings for that week from her EI weekly benefit of \$537.³²

[63] I calculated the Claimant's overpayment. And I reviewed the Commission's calculation of the overpayment, which it set out in a table.³³ My calculation was \$1 different from the Commission's calculation. So, I find that it's more likely than not the Commission correctly calculated the Claimant's overpayment (\$10,501).

– **The Tribunal can't reduce or write off the overpayment, but she can apply to the CRA based on financial hardship**

[64] Unfortunately for the Claimant, the EI Act says the Tribunal has no power to be lenient, or forgive, or write off all or part of an overpayment.³⁴ And the law doesn't let me decide her appeal based on financial hardship, compassion, or fairness.

[65] The Claimant can contact the **Canada Revenue Agency Collection Service Centre** to negotiate a payment plan or **ask for relief based on her financial hardship at 1-866-864-5841**.

[66] Because the Claimant is living in Ontario, she might be eligible to get free legal help to deal with the CRA. She can contact Legal Aid Ontario (1-800-668-8258) to get

³¹ See section 21(3) of the EI Act.

³² See section 19(2) of the EI Act, amended by EI Regulation 77.97(3) (Pilot Project 19) and EI Regulation 77.93(3) (Pilot Project 20).

³³ See that table in the Commission's written argument to the Appeal Division, at AD3-8.

³⁴ See section 112.1 of the EI Act.

the contact information for her local community legal clinic. Or she can search for that information on-line at <https://www.legalaid.on.ca/legal-clinics/>.

Conclusion

[67] I am allowing the Claimant's appeal because the General Division made three errors in its decision.

[68] I have corrected the General Division's error by making the decision it should have made.

[69] I have decided that under the EI Act and EI Regulations, the Claimant had a \$10,501 overpayment based on her earnings during the weeks she received EI benefits.

[70] Her outstanding overpayment balance is less now because the CRA has held back money it otherwise would have paid to her.

Glenn Betteridge
Member, Appeal Division