Citation: *Canada Employment Insurance Commission v AC,* 2024 SST 1261

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Marcus Dirnberger
Respondent:	A. C.
Representative:	Philippe Chrétien

Decision under appeal:	General Division decision dated April 12, 2024 (GE-24-535)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	September 24, 2024
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	October 21, 2024
File number:	AD-24-327

Decision

[1] The appeal is dismissed.

Overview

[2] The Respondent (Claimant) is a permanent employee of the Government of Canada. She's represented by the Canadian Association of Professional Employees (CAPE).

[3] The Claimant began a claim for EI maternity and parental benefits on November 27, 2022. In the last month of her year-long claim, her employer paid her $2,500. She reported this money to the Appellant (Commission) which decided that it was a "signing bonus" for ratifying a collective agreement. It allocated this money as earnings to a week during her EI claim. This way of allocating the Claimant's money created an overpayment.

[4] The Claimant disagreed and argued that this money was paid under a contract of employment for the performance of past services. After an unsuccessful reconsideration, the Claimant appealed to the General Division of the Tribunal.

[5] The General Division determined that the money was earnings. It found that the "dominant" reason for the money was payment related to the performance of regular duties and responsibilities under a past collective agreement, and not a signing bonus. The General Division determined that the money should be allocated under section 36(4) of the *Employment Insurance Regulations* (EI regulations). It allowed the Claimant's appeal.

[6] The Appeal Division granted the Commission leave to appeal of the General Division decision. The Commission submits that the General Division erred in fact and in law when it concluded that the money was payment related to the performance of regular duties and responsibilities under a past collective agreement.

Issue

[7] Did the General Division err in fact and/or in law when it concluded that the money was payment related to the performance of regular duties and responsibilities under a past collective agreement?

Preliminary observation

[8] It is well established that I can only consider the evidence that was presented to the General Division to decide the present appeal. The Appeal Division has a limited jurisdiction.[1]

Analysis

Position of the Commission

[9] The Commission submits that the General Division erred in law and fact when it found the $2,500 one-time lump sum payment was not intended to be a signing bonus and should be allocated under section 36(4) of the EI Regulations.

[10] The Commission submits that the General Division erred in law in its interpretation of the *Budhai* case.[2] Notably, in the *Budhai* case, it was determined that when there is a linkage between when a lump sum is paid and past periods of work, it should not be viewed as a signing bonus.

[11] The Commission submits that there is no such tie-in this case, as there is no linkage to past periods of work included in the payment parameters of the signing bonus. Also, it puts forward that in *Budhai*, the lump sum was tied to a specific past period of work and was only given to employees who had worked in that past period, which is not the case here. The Commission submits that the $2,500 payment the

[1] *Sibbald v Canada (Attorney General)*, 2022 FCA 157.
[2] *Budhai v Canada (Attorney General)*, 2022 FCA 298.

Claimant received was paid to all incumbents of positions within the EC group within the Claimant's union at the date of ratification.

[12] The Commission submits that the General Division made contradictory findings. It determined that the money was not a retroactive payment and then determined that the one-time lump sum payment was paid for services performed under a previous collective agreement.[3]

[13] Consequently, the Commission submits that the General Division misapplied the facts to the legislation and based its decision on an erroneous finding of fact that was made in a capricious manner, when it found that the $2,500 one-time lump sum payment was not a signing bonus.

[14] The Commission submits that the General Division also erred in law in determining that the money should be allocated under section 36(4) of the EI Regulations because as there is no linkage, the payment cannot be allocated for services that the Claimant has provided under another collective agreement. The Commission submits that the money should be allocated under section 36(19) b) of the EI Regulations.

Position of the Claimant

[15] The Claimant submits that the General Division made no error that would justify the Appeal Division to intervene, when it concluded that the payment was earnings that needed to be allocated under section 36(4) of the EI Regulations.

The General Division decision

[16] The General Division found that the money was earnings because the law says the entire income you get from any employment is earnings.[4]

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[3] In paragraph 18 and 43 of the General Division decision.
[4] Section 35 of the *Employment Insurance Regulations*.

[17] The General Division found, on a balance of probabilities, that the money was not a retroactive pay increase because the money was only paid to CAPE members who remained employed and were part of the bargaining unit when the new collective agreement was signed. The General Division found that although the payment was part of an agreement yet to be ratified, it was more likely than not that this money was not intended to be a signing bonus.

[18] The General was not persuaded that the dominant intention for the $2,500 payment was “an incentive to promote ratification on the collective agreement”. The General Division found from the terms of the documentary evidence and the surrounding circumstances that the dominant intention for the payment was for the performance of past services under the previous collective agreement.

Is the Appeal Division justified to intervene?

[19] The General Division found that the one-time lump sum was paid to employees “for the performance of regular duties and responsibilities associated with their position.”

[20] However, it does not justify or clearly explain why it found the payment of the lump sum was for the performance of past services. It does not explain the linkage between the lump sum that was paid and past periods of work, to support its conclusion that the payment was for the performance of regular duties and responsibilities under a past collective agreement.

[21] The need to justify or clarify was all the more necessary as the General Division found on one hand that the money was not a retroactive pay increase because the money was only paid to CAPE members who remained employed and were part of the bargaining unit when the new collective agreement was signed, and on the other hand, determined that the one-time lump sum payment was paid for services performed under a previous collective agreement.

[22] It is well established that the General Division must clearly explain and justify the conclusions it renders. In failing to do so, I conclude that the General Division erred in

law or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner.[5]

[23] In these circumstances, I also conclude that the General Division erred in law in its application of the teachings of the Federal Court of Appeal in *Budhai*.

[24] I am therefore justified to intervene.

Remedy

There are two ways to fix the General Division's errors

[25] When the General Division makes an error, the Appeal Division can fix it in one of two ways: (1) it can send the matter back to the General Division for a new hearing; or (2) it can give the decision that the General Division should have given.[6]

The record is complete enough to decide this case on its merits

[26] I am of the view that the record is complete. Both parties had the opportunity to present their case before the General Division. I will therefore give the decision that the General Division should have given.

Is the money the Claimant received earnings under EI law?

[27] Yes. The $2,500 lump sum payment is earnings. That's because the law says the entire income you get from any employment is earnings. The law defines both "income" and "employment." Income is anything you got or will get from an employer or any other person. It doesn't have to be money, but it often is. Employment is any work you did or will do under any kind of service or work agreement.[7]

[28] Section 35(2) of the EI Regulations indicates that "the earnings to be taken into account ... are the entire income of a claimant arising out of any employment...".

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[5] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v Canada (Attorney General)*, 2008 FCA 13.
[6] See section 59(1) of the DESDA.
[7] See 35(1) of the *Employment Insurance Regulations*.

[29] To me, there is no doubt that the evidence shows a sufficient connection between the income received and the employment held by the Claimant.[8]

[30] I don't agree with the Claimant that the money was a retroactive pay increase that would exempt it from being qualified has earnings.[9] First, the Tentative Agreement didn't call the money a retroactive pay increase or link it to any rate of increase. Annex A does not indicate that the lump-sum is linked to a rate increase. Furthermore, the lump-sum section is separate and looks very different from the rate increase section contained in the same document.

[31] But, most importantly, the money was only paid to EC members who remained employed and were part of the bargaining unit when the new collective agreement was signed. If the money had been a retroactive pay increase, ex-employees would have received it too.

[32] The evidence and the relevant jurisprudence clearly support the conclusion that the lump-sum payment received by the Claimant constitutes earnings pursuant to section 35 of the EI Regulations, and that said earnings must be allocated.

What was the true nature of the payment? Why was it paid?

[33] Annex A of the Tentative Agreement reads in part as follows:

> · The Employer will provide a one-time lump-sum payment of two thousand five hundred dollars ($2,500) to incumbents of positions within the EC group on the date of signing of the collective agreement.
>
> · This one-time allowance will be paid to incumbents of positions within the EC group for the performance of regular duties and responsibilities associated with their position.

[34] I note that Annex A of the Tentative Agreement specifies that the payment is for the "performance of regular duties and responsibilities associated with their position."

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[8] *Canada (Attorney General) v. Roch*, 2003 FCA 356.
[9] See 35(7) d) of the *Employment Insurance Regulations*.

I also note that there is no mention whatsoever of a “signing bonus” in the Tentative Agreement or in any other document produced in evidence.

[35] I give great weight to the Chief Negotiator’s statement that the lump sum was never intended to be a signing bonus, and that this was clearly expressed at the bargaining table during the formal discussions. He also specified that the amount of $2,500 was pensionable, which would not be the case if it had been a “signing bonus”.[10]

[36] I find that the Claimant’s evidence is further supported by the fact that the lump-sum, although not a retroactive pay increase, was contained in Annex A related to rate increases going back to June 2022, giving weight to the fact that the payment was for past services. It was clearly not paid for the provision of future services, i.e. under the new salary scale, because the staff members were not required to offer services within the framework of this new scale to receive the money.

[37] The evidence also shows that the members weren’t on strike, so there was no real need to incentivize them to return to work through a signing bonus. This is all the more true as the EC group continued to work for a long time under the old collective agreement.

[38] The fact that only members of the EC group at the time of signing could receive the money is not a bar to concluding that the amount was paid for services rendered by the remaining members of the EC group under a previous collective agreement.

[39] The Commission argues that the money was a signing bonus, an incentive to sign the new collective agreement. However, it provides no convincing evidence that would lead me to conclude that this was the dominant intention for the payment.

[40] As stated in *Budhai*, all provisions of a collective agreement are to induce its acceptance and are conditional on ratification. One must determine from the terms of an agreement and the surrounding circumstances, what was the dominant intention.[11]

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[10] GD12-4.
[11] *Budhai v Canada (Attorney General) (C.A.), 2002 FCA 298 (CanLII)*, [2003] 2 FC 57.

[41] It was determined in *Budhai* that when there is a linkage between when a lump sum is paid and past periods of work, it should not be viewed as a signing bonus. It was also determined that it was not necessary to specify how many hours an employee had worked for the promised amount to be payable "for the performance of services".

[42] When considering all the evidence, I find that the Claimant has met her burden of proof. She has proven, on a balance of probabilities, that there is a linkage between the lump-sum and her past periods of work, and that it should not be viewed as a signing bonus.

[43] I conclude that, from the terms of the agreement and the surrounding circumstances, the dominant intention for the money was not a signing bonus but a payment related to the performance of regular duties and responsibilities under a past collective agreement.

Which allocation section applies?

[44] Section 36(4) of the EI Regulations can apply to a sum that is payable for services already rendered under an earlier contract. As stated previously, money may be payable "for the performance of services", even though an employee need not have worked a minimum number of hours to be eligible for it.

[45] I find that the Claimant’s lump sum should be allocated under section 36(4) of the EI Regulations since it was money paid for services under an earlier contract of employment. It is not necessary for me to consider allocating the money under section 36(19) b) of the EI Regulations since section 36(4) already applies.

[46] Since I have found that the payment was made for the performance of past services, it must be allocated to the period during which the services were performed before the Claimant established a claim for EI special benefits.

Conclusion

[47] The Commission's appeal is dismissed.

[48] The lump sum payment received by the Claimant is to be allocated under section 36(4) of the EI Regulations to the period during which the services were performed before the Claimant established an initial claim for EI special benefits effective November 27, 2022.

Pierre Lafontaine
Member, Appeal Division