



Citation: *Canada Employment Insurance Commission v AT*, 2024 SST 1559

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Nikkia Janssen

Respondent: A. T.

Decision under appeal: General Division decision dated May 17, 2024
(GE-23-2847)

Tribunal member: Melanie Petrunia

Type of hearing: Videoconference

Hearing date: September 13, 2024

Hearing participants: Appellant's representative
Respondent

Decision date: December 17, 2024

File number: AD-24-403

Decision

[1] The appeal is allowed. The General Division exceeded its jurisdiction and made an error of law in its decision. The Claimant does not have sufficient self-employment earnings to qualify for maternity and parental benefits.

Overview

[2] The Respondent, A. T. (Claimant), is self-employed. She established a claim for maternity and parental benefits starting March 6, 2022. In her application, she estimated her self-employment earnings for 2021. The Respondent, the Canada Employment Insurance Commission (Commission), paid her benefits based on her estimated earnings and advised her that her claim would be recalculated once the Canada Revenue Agency (CRA) provided the actual amount of her self-employment income.

[3] The Canada Revenue Agency (CRA) notified the Commission that the Claimant's self-employment earnings for 2021 was \$15, which is less than she needed to qualify.¹ The Commission decided that the Claimant did not qualify for the benefits that she received. The Claimant appealed to the Tribunal's General Division.

[4] The General Division allowed the Claimant's appeal. It found that the taxable dividends that the Claimant received from her professional corporation could be considered self-employment earnings. This meant that she had enough self-employment earnings to qualify for benefits. The Commission is now appealing the General Division decision. It argues that the General Division made errors of law in its decision.

[5] I am allowing the appeal and making the decision that the General Division should have made. The General Division made an error of law and exceeded its jurisdiction when it found that the Claimant had sufficient self-employment earnings.

¹ GD3-23

Issues

[6] The issues in this appeal are:

- a) Did the General Division err in law when it relied on section 35 of the *Employment Insurance Regulations (EI Regulations)*² to support its calculation of self-employment earnings?
- b) Did the General Division exceed its jurisdiction by making a determination on the Claimant's self-employment earnings?
- c) If so, how should the error be fixed?

Analysis

[7] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:³

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- made an error of law in making its decision; or
- based its decision on an important mistake about the facts of the case.

– The legislation

[8] The *Employment Insurance Act (EI Act)* defines a self-employed person as someone who is or was engaged in a business or is employed by a corporation in which they control more than 40% of the voting shares.⁴

² *Employment Insurance Regulations*, S.O.R./96-332.

³ The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act (DESD Act)*.

⁴ See sections 152.01(1) and 5(2)(b) of the *Employment Insurance Act*, S.C. 1996, c.23.

[9] Section 152.07(1) sets out the requirements for a self-employed person to qualify for special benefits. The self-employed person must:

- have entered into an agreement, that has not been terminated or deemed terminated, with the Commission at least 12 months before applying for benefits;
- have had an interruption of earnings; and
- have earned a minimum amount of self-employment earnings in their qualifying period.

[10] The EI Act sets out how self-employment earnings are determined which is dependant on the nature of the self-employment. For a claimant who is employed by a corporation and controls more than 40% of the voting shares, the amount of self-employed earnings for a year is the amount that would have been the person's insurable earnings for the year had the person's employment not been excluded from insurable employment.⁵

– **The General Division decision**

[11] The General Division reviewed the applicable legislation. The parties agreed that the Claimant had entered into an agreement with the Commission at least 12 months before applying for benefits and that she had an interruption of earnings. The General Division focused its analysis on whether the Claimant had sufficient self-employment earnings in her qualifying period.⁶

[12] The General Division reviewed the procedural history of the matter. On a previous appeal to the Appeal Division, the matter had been returned to the General Division. The Appeal Division found that the CRA had the sole jurisdiction to determine the amount of insurable earnings.⁷ So, the General Division asked the Commission to

⁵ See section 152.01(2)(b) of the EI Act.

⁶ General Division decision at paras 14 to 18.

⁷ See Appeal Division decision in AD-23-384 dated October 3, 2023 and General Division decision at paras 7 and 8.

request a ruling from the CRA on the amount of the Claimant's insurable earnings, if her employment had been insurable.⁸

[13] The CRA would not provide a ruling. It said that it could only determine the amount of insurable earnings for insurable employment and could not provide an answer for a hypothetical situation.⁹ The General Division stated that it agreed with the CRA's determination of its own jurisdiction and found that this meant it had the jurisdiction to determine a self-employed person's earnings for benefit purposes.¹⁰

[14] The General Division reviewed the types of business structures in Canada and how a self-employed person can receive income from their business, including receiving a salary or through the payments of dividends from a corporation. It found that it was necessary to determine how much of the Claimant's self-employment income was from investing in her business and what amount could be considered self-employment earnings.¹¹

[15] The General Division considered Schedule 13, "Employment Insurance Premiums on Self-Employment and Other Eligible Earnings," included with the Claimant's Income Tax Return. It found that the schedule is the form and manner used by the Commission and the Minister of National Revenue to calculate EI premiums for self-employed persons but that it is not evidence of self-employed earnings.¹²

[16] The General Division found that Schedule 13 only captures some of the ways in which self-employment earnings are calculated.¹³ Although it is the form the Commission decided to use to calculate premiums, it is not determinative of what those earnings actually are.

[17] The General Division found that it had to determine what the Claimant's earnings from employment would have been if her employment had not been excluded from

⁸ RDG13

⁹ RDG16-2

¹⁰ General Division decision at paras 23 and 24.

¹¹ General Division decision at paras 25 to 27.

¹² General Division decision at para 32.

¹³ General Division decision at para 34.

insurable employment. It looked at subsection 35(2) of the *EI Regulations* and found that dividends can be considered employment income when directly tied to work performed for the business.¹⁴

[18] The General Division found that the full amount of the dividend payment to the Claimant was employment income.¹⁵ Based on this finding, it determined that the Claimant had sufficient self-employment earnings to qualify for benefits.

The General Division erred in law in relying on section 35(2) of the EI Regulations

[19] The General Division found that the dividend payment received by the Claimant constituted self-employment earnings. It relied on subsection 35(2) of the *EI Regulations* in making this determination.

[20] Subsection 35(2) states:

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of **any employment**, including... (emphasis added)

[21] This section specifically concerns the determination of earnings for the purposes of determining whether there has been an interruption of earnings and whether there are earnings to be deducted from a claimant's EI benefits. This section explicitly states that the earnings are from any employment, and it defines employment as including insurable, not insurable and excluded employment.¹⁶

[22] The General Division seems to have equated earnings as determined under section 35(2) of the *EI Regulations* with the earnings that would have been insurable if

¹⁴ General Division decision at para 44.

¹⁵ General Division decision at para 65.

¹⁶ Subsection 35(1) of the *EI Regulations*.

her employment was not excluded. But section 35(2) clearly states that it addresses the determination of earnings for specific purposes and the amount of self-employed earnings for a year under subsection 152.01(2) is not one of the specified purposes.

[23] The Federal Court of Appeal has also confirmed that this section does not speak to the determination of insurable earnings. In *Blondin*, the Court stated:

While, at first blush, this text may appear to assist the applicant, a closer analysis reveals that it does not. The regulation's primary thrust is with interruption of "earnings" and it does not speak at all to the more limited concept of "insurable earnings" which is the basis of the calculation under s. 24. The workers' compensation benefits received by the applicant were not insurable earnings and s. 57 does not make them so.¹⁷

[24] Similarly, the fact that the dividends received by the Claimant may constitute earnings for the purposes of section 35 of the *EI Regulations*, does not mean that they would be considered insurable earnings.

[25] The General Division does not explain why it found that the amounts that it determined to be earnings according to subsection 35(2) of the *EI Regulations*, would be considered insurable earnings if the Claimant's employment was not excluded.

[26] I find that the General Division erred in law when it relied on section 35(2) of the *EI Regulations* for its determination that the dividends that the Claimant received were earnings and therefore also constituted self-employment earnings for the purposes of section 152.01(2)(b).

The General Division exceeded its jurisdiction

[27] The General Division also exceeded its jurisdiction when it found that the amount of self-employment earnings assessed by CRA is not determinative of the issue and decided what the Claimant's self-employment earnings were. The Commission argues

¹⁷ *Blondin v. Canada (Minister of Employment and Immigration)*, 1988 CanLII 5716 at para 8.

that the General Division erred by not relying on the amount reflected on Schedule 13 of the Claimant's tax return.

[28] In its decision, the General Division found the *EI Act* provides that CRA has jurisdiction over whether or not employment is insurable, the hours of insurable employment and the amount of insurable earnings. It stated that the *EI Act* does not say that CRA has jurisdiction to determine self-employment earnings.¹⁸

[29] The section that the General Division referred to that provides for CRA's jurisdiction is found in Part IV of the *EI Act* which concerns insurable earnings and collection of premiums. The General Division said that the CRA does not have jurisdiction to determine self-employment earnings because the calculations and definitions concerning the self-employed are found in Part VII.1.¹⁹

[30] I disagree. As set out above, section 152.01(2) establishes how self-employed earnings are determined. The administration of this section lies with the Minister of National Revenue (Minister).²⁰ The General Division did not refer to section 97(1) of the *EI Act* when it made its determination regarding jurisdiction. The section, also found in Part IV of the *EI Act* states:

97(1) Minister's duty – The Minister shall administer this Part, section 5, subsections 152.01(2) and (3) and sections 152.21 to 152.3 and any regulations made under sections 5, 55, 152.26 and 152.28, and the Commissioner of Revenue may exercise all the powers and perform all the duties of the Minister under this Part and Part VII.1.

[31] The section that the General Division referenced in support of its finding concerning CRA's limited jurisdiction sets out who may request a ruling from the CRA and the questions on which they may ask for a ruling.²¹ Section 97 clearly sets out the

¹⁸ General Division decision at para 23.

¹⁹ General Division decision at para 23.

²⁰ Section 97 of the *EI Act*.

²¹ Section 90 of the *EI Act*.

sections and Parts of the *EI Act* that are within the jurisdiction of the Minister, which includes the section governing the determination of self-employed earnings.

[32] Looking at the legislative scheme more broadly, it is clear that the determination of self-employed earnings is within the Minister's jurisdiction. The *EI Act* sets out that a self-employed person who has entered an agreement with the Commission must pay a premium based on their self-employment earnings.²²

[33] The Minister has determined that an individual who is required to pay a premium in respect of their self-employment earnings shall file a return. This requirement is set out in section 152.22. It reads:

Return to be filed

152.22 (1) If a self-employed person is required to pay a premium for a year in respect of their self-employed earnings, a return of the person's self-employed earnings for the year shall, without notice or demand for it, be filed with the Minister of National Revenue in the form and manner, and containing the information, specified by that Minister, by that person (or, if the person is unable for any reason to file the return, by their representative) on or before the day on which the person's return of income under Part I of the *Income Tax Act* is required by that Part to be filed or would be required by that Part to be filed if tax under that Part were payable for the year.

[34] The Claimant filed her tax return for 2021, including Schedule 13 as required. This form requests certain information from a taxpayer's tax return and provides a calculation of self-employment earnings from which the Minister determines the amount of premium payable. The Minister is required to review the form and send a notice of assessment to the taxpayer:

Examination of return and notice of assessment

152.24 The Minister of National Revenue must, with all due dispatch, examine each return of self-employed earnings and assess the premium to be paid for the year in respect of those earnings and the interest and penalties, if any, payable, and, after

²² Section 152.21 of the *EI Act*.

the examination, send a notice of assessment to the person who filed the return.

[35] The Claimant takes issue with the amount of self-employment earnings as determined and assessed by the Minister. As a result of this assessment, the Claimant was required to repay EI benefits that she received and so she requested reconsideration by the Commission, and ultimately appealed to the Tribunal.

[36] Section 152.28 provides that certain sections of the *Income Tax Act* that concern objections and appeals apply to Part VII.1 of the EI Act (this is the part dealing with benefits for the self-employed).

[37] Given the wording of the *EI Act*, I find that the Commission does not have the jurisdiction to determine what the Claimant's self-employment earnings are pursuant to section 152.01(2), nor does the Tribunal. This section is clearly administered by the Minister, and not the Commission.

[38] This reading of section 152.01(2) is also supported by the context. The section says that self-employment earnings are equal to the amount that would have been the insurable earnings for the year if the employment had not been excluded.

[39] Section 2(1) of the *EI Act* defines "insurable earnings" as follows:

"Insurable earnings" means the total amount of the earnings, as determined in accordance with Part IV, that an insured person has from insurable employment.

[40] As discussed above, Part IV of the *EI Act* concerns insurable earnings and collection of premiums. Responsibility for the administration of this section of the *EI Act* also lies with the Minister.²³ It would be inconsistent with the legislative scheme if the Commission, or the Tribunal, had the jurisdiction to determine what a Claimant's insurable earnings would have been if their employment was not excluded.

²³ Section 81 of the EI Act.

[41] Parliament clearly set out in the *EI Act* that the Minister is tasked with determining the amount of a claimant's insurable earnings, and the calculation and payment of premiums. Disputes concerning these issues are raised with the CRA and resolved by way of appeals to the Tax Court of Canada.

[42] Similarly, when Part VII.1 was added to the *EI Act*, section 97 was amended. This gave the Minister responsibility for the administration of the sections concerning the determination of self-employment earnings, and the calculation and payment of premiums for self-employed claimants. Section 152.28 made it clear that the *Income Tax Act* sections concerning objections and appeals applied.

[43] This interpretation reflects a consistent approach for insured and self-employed claimants who take issue with the determination of their earnings.

[44] I appreciate that the CRA refused to provide a ruling on what the Claimant's insurable earnings would have been if her employment had not been excluded. It is unfortunate that the CRA did not provide a clearer explanation of its role in the assessment of self-employment earnings.

[45] However, while it would not provide a ruling, the Minister had already made a determination of what the Claimant's insurable earnings would have been if her employment had not been excluded when it assessed the Claimant's Schedule 13, return of self-employment earnings.

[46] I note that the initial letter that the Claimant received concerning her application for benefits states:

In the case of estimated self-employment income, your claim will be recalculated, if necessary, once the actual amount of your self-employment income is provided to us from the Canada Revenue Agency. (...)

Please note that estimated self-employment income is accepted on an interim basis. The information required by Service Canada to prove qualification for EI benefits is the net self-employment income as assessed by CRA. Therefore, failure to file a tax return

in accordance with the CRA filing due dates may preclude you from being entitled to EI benefits.²⁴

[47] During the reconsideration process, the Claimant had a discussion with a Service Canada agent. The notes from this call show that the Claimant was upset with her accountant and the agent advised her to talk to the accountant and have CRA reassess her earnings, which she said that she would do.²⁵

[48] Neither the Commission nor the General Division could circumvent the legislation and make a determination as to what the Claimant's self-employment earnings were, disregarding the amount assessed by CRA. To do so essentially reassesses the Claimant's self-employment earnings for the tax year at issue. This is clearly outside the jurisdiction of the Tribunal.

Remedy

[49] I have found that the General Division made an error of law and exceeded its jurisdiction. To fix the General Division's error, I can give the decision that the General Division should have given, or I can refer this matter back to the General Division for reconsideration.²⁶

[50] The parties agree that the record is complete, and I should make the decision that the General Division should have made. I agree.

The Claimant did not have enough earnings to qualify for benefits

[51] As set out in the legislative provisions above, in order to qualify for benefits, the Claimant must have had at least \$5,289 in self-employment earnings in 2021. The Claimant's self-employment earnings were assessed by CRA as \$15 in 2021.

²⁴ GD3-21

²⁵ GD3-37

²⁶ Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.

[52] For the reasons set out above, I find that I am bound by the self-employment earnings as assessed by CRA. The Claimant does not have sufficient self-employment earnings to qualify for EI benefits.

Conclusion

[53] The appeal is allowed. The General Division made an error of law and exceeded its jurisdiction. I have made the decision that the General Division should have made. The Claimant does not have sufficient earnings to qualify for EI benefits.

Melanie Petrunia
Member, Appeal Division