



Citation: *JL v Canada Employment Insurance Commission*, 2024 SST 97

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	J. L.
Representative:	B. L.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated January 31, 2023 (GE-22-3029)
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Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	January 24, 2024
Hearing participants:	Appellant Appellant's representative
Decision date:	January 30, 2024
File number:	AD-23-199

Decision

[1] I am allowing the appeal. The General Division process was unfair, so I am returning the matter to the General Division for reconsideration.

Overview

[2] J. L. is the Appellant. I will call him the Claimant because this appeal concerns his claim for Employment Insurance (EI) benefits.

[3] The Claimant applied for EI benefits on September 28, 2020. He then elected to begin receiving his Canada Pension Plan (CPP) pension while he was on benefits. However, he did not declare his pension payments as income in his weekly EI claims. The Respondent, the Canada Employment Insurance Commission (Commission), later learned about his CPP payments. As a result, it allocated the CPP earnings to weeks of benefits from November 1, 2020, to September 11, 2021.¹ This meant that the Claimant had to repay a portion of the EI benefits he received. The Claimant disagreed with the Commission's decision and asked it to reconsider.

[4] The Commission would not change its decision, so the Claimant appealed to the General Division of the Social Security Tribunal. The General Division allowed the appeal in part. It decided that the Claimant's CPP should be allocated beginning in December 2020 - and not November 2020 as the Commission had done. But it otherwise confirmed that the Commission was correct to consider the Claimant's CPP benefits as earnings and to allocate it to weeks of benefits.

[5] The Claimant is now appealing to the Appeal Division.

¹ The Commission prepared a Notice of Debt on June 4, 2022, that added \$296.00 to the overpayment amount "post-audit." The \$296.00 appears to relate to deductions for CPP pension from November 1, 2022, to December 26, 2022. The Notice of Debt showed an outstanding balance of \$1702.00, but did not reveal how it arrived at this total amount: It was not accompanied by a separate decision letter. According to an August 22, 2022, letter, \$74.00 a week had been allocated from November 1, 2020, to December 26, 2020, and \$74.00 a week would be applied from December 27, 2020, to the end of the claim. (This was apparently in addition to the \$296.00—See GD-30).

[6] I am allowing the appeal. The General Division did not give the Claimant an opportunity to be heard on his Charter challenge, so it did not act fairly. I am returning the matter to the General Division for reconsideration.

Issues

[7] The issues in this appeal are.

- a) Did the General Division make an error of jurisdiction by not considering the Claimant's Charter challenge?
- b) Did the General Division act unfairly by not giving the Claimant the opportunity to present the Charter challenge?
- c) Did the General Division make an error of law?
- d) Did the General Division make an error of fact by not considering that the Commission did not warn the Claimant that his CPP payments would reduce his EI benefits?

Analysis

General Appeal principles

[8] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

- 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 made an error of law when making its decision.
- d) The General Division based its decision on an important error of fact.²

² This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

Jurisdictional error

[9] The General Division did not make an error of jurisdiction.

[10] The General Division had the jurisdiction to consider the issues arising from the Commission's reconsideration decision.³ The reconsideration decision maintained that the Claimant's CPP payments were earnings and subject to allocation. The General Division decision considered these issues.

[11] The General Division also has jurisdiction to consider Charter challenges. In this context, a Charter challenge is a challenge to the constitutional validity of legislation, regulations, or rules.

[12] However, the General Division may only consider a Charter challenges if it is properly before it. This means that the Claimant had to file a Charter notice with the Tribunal and serve it in advance of the hearing.

[13] The notice must specify which provision of the *Employment Insurance Act* or *Department of Employment and Social Development Act* (or provision of their associated rules or regulations) is being challenged. It must also set out the facts that support the challenge and include a summary of the argument in favour of the challenge.⁴ Finally, the notice must be served on the Attorney General of Canada and on the Attorneys General of each province at least 10 days before the hearing.⁵

[14] Since the Claimant did not file any such notice or arrange for its service prior to the hearing, the Charter challenge was not properly before the General Division. That means that it did not make an error of jurisdiction by failing to consider it.

³ See section 113 of the *Employment Insurance Act* (EI Act).

⁴ See section 1(1) of the *Social Security Tribunal Regulations, 2022*.

⁵ See section 1(2) of the *Social Security Tribunal Regulations, 2022*, and section 57(1) of the *Federal Courts Act*.

Fairness

[15] The Claimant did not bring his Charter challenge to the General Division in proper form. This was at least partly because he did not know how to go about making a Charter challenge.

[16] The General Division had notice of the Claimant's intention to make a Charter argument. It acknowledged that the Claimant's post-hearing submissions, "invoked the Charter," and it agreed that its decision must consider the "relevant post-hearing documents." However, it refused to consider the Charter issue, stating that its relevance to the circumstances had not been discussed at the Claimant's hearing.⁶

[17] I acknowledge that the Claimant did not bring a Charter challenge in proper form, and that he raised it for the first time in his post-hearing submissions. Nonetheless, Charter challenges are technically demanding, and the Claimant did not have legal or professional representation.

[18] I find that it was unfair for the General Division to summarily dismiss the Claimant's Charter concerns, without giving him an opportunity to seek advice and bring forward a proper Charter challenge application.

[19] Procedural fairness is the ground of appeal on which I granted leave. I note that the Commission is conceding that the General Division acted unfairly by not offering the Claimant a chance to make his Charter argument.

Error of law

[20] The General Division did not make an error of law.

[21] It was correct that the Claimant's CPP was a pension and that his CPP payments were earnings, and also correct that they must be allocated to the period in which they were earned.⁷ It was correct that the Commission had the legal authority to allocate the

⁶ See footnote 1 to the General Division decision (AD1A-3).

⁷ See sections 35(2)(e), 35(1), and 36(1) of the *Employment Insurance Regulations*.

CPP pension earnings after it had paid out the EI benefits, and to require the Claimant to repay that amount to which he was not entitled.⁸

[22] The Claimant said that he received incorrect or incomplete advice from the Commission about the implications of electing to receive his CPP pension while collecting EI benefits.

[23] I asked the Claimant's representative if she was aware of any law or interpretation of law that says that a claimant should not be accountable for their actions if those actions were based on the Commission's incorrect advice or failure to give advice. She was unable to identify any legal authority to support such a notion.

[24] The Claimant's representative is not a lawyer, so this is not surprising.

[25] However, it is a generally accepted principle that ignorance of the law is no excuse.⁹ Furthermore, even those claimants who rely on incorrect or misleading advice from the Commission cannot keep benefits to which they are not entitled under the law.

[26] In *Buors*, the Federal Court of Appeal found that a claimant could not rely on the Commission's misinformation to avoid an overpayment.¹⁰

[27] In that case, the Claimant followed the Commission's directions on how to complete his claim reports and did not declare certain earnings. The Commission assessed an overpayment when it discovered his actual earnings, and the claimant appealed the Commission's decision. The matter went first to the Board of Referees and then to the Umpire.¹¹

[28] The Umpire confirmed that the claimant had completed the reporting cards diligently in accordance with the Commission's instructions. It found that the

⁸ See sections 52, 43(b) and 45 of the EI Act.

⁹ *Canada (Attorney General) v Albrecht*, [1985] 1 F.C. 710; *Canada (Attorney General) v Caron* (1986), 69 N.R. 132; *Canada (Attorney General) v Carry*, 2005 FCA 367; *Canada (Attorney General) v Bryce*, 2008 FCA 118; *Canada (Attorney General) v Somwaru*, 2010 FCA 336.

¹⁰ *Canada (Attorney General) v Buors*, 2002 FCA 372.

¹¹ These were the first and second levels of appeal under the former administrative appeal scheme for EI benefit matters.

Commission should not have tried to recover the overpayment in those circumstances. However, the Federal Court of Appeal overturned the Umpire Decision.

[29] In another decision called *Shaw*, the Federal Court of Appeal again held that misinformation from the Commission does not give a claimant relief from the provisions of the *Employment Insurance Act*.¹²

[30] I appreciate how the Claimant may feel it is unfair that the Commission did not inform him that claiming his CPP pension while on EI benefits would affect the amount of his EI benefit payments. Or that the Commission came back to recover the overpayment about nine months after his EI benefits ended. However, the law does not make exceptions for claimants who act based on incomplete or even incorrect advice from the Commission.

Important error of fact

[31] The General Division did not make an important error of fact.

[32] The Claimant argued that the General Division ignored or misunderstood that he received incorrect or incomplete advice from the Commission about the implications of electing to receive his CPP pension while collecting EI benefits.

[33] As an example, he argued that the General Division made an error when it said that he first spoke to the Commission after he received the notice of debt.¹³ The Claimant said this was not correct. He said he asked the Commission about his CPP before he began collecting it.

[34] I have listened to the audio recording of the General Division hearing. It is clear that the General Division understood the Claimant's argument that he would not have applied for the CPP pension if he had known it would reduce his EI benefits. I think it also understood that the Claimant believes the Commission did not do its job.

¹² *Canada (Attorney General) v Shaw*, 2002 FCA 325.

¹³ See para 52 of the General Division decision.

[35] However, those arguments did not address the issues that the General Division was required to decide. It had to decide if the Commission was correct to consider the CPP pension payments as earnings, and correct to allocate it to weeks in which the Claimant was receiving EI benefits.

[36] The Claimant did not dispute that he received CPP payments while on EI (beginning in December 2020), or the amount of those CPP payments.

[37] As noted earlier in this decision, the law says that CPP payments are earnings and must be deducted from EI benefit payments. The Commission did not deduct the CPP at the time, so it paid the Claimant more than he was entitled to receive. The law says that claimants are liable to repay overpayments, and that overpayments are recoverable debts to the Crown.¹⁴

[38] The General Division makes an important error of fact where it **bases its decision** on a finding of fact that overlooks or misunderstands relevant evidence, or on a finding that does not follow rationally from the evidence.¹⁵

[39] When I listened to the hearing, I did not hear the Claimant, or his representative, testify that they had discussed his CPP with Service Canada (or the Commission) before he started receiving the CPP benefit or before he received the Notice of Debt. His representative stated only that they talked to a Service Canada agent after receiving the Notice and the agent could not determine the reason for the Notice of Debt. The agent suggested that they ask for a reconsideration.

[40] However, it would not matter if the General Division were wrong about when the Claimant talked to the Commission about his CPP. The General Division decision did not require it to make any finding that depended on the Claimant's concerns with how the Commission administered his claim. It did not depend on the level of service provided by the Commission, when or whether the Claimant ever sought advice from

¹⁴ See section 44 and section 47 of the EI Act.

¹⁵ This is a paraphrase. An "important error of fact" is the error described in section 58(1)(c) of the DESDA.

the Commission about CPP, the correctness or completeness of the Commission's advice, or the degree to which the Claimant relied on that advice. None of these things were relevant to the decision the General Division needed to make and none of these things could have changed the decision.

[41] Therefore, the General Division did not make an important error of fact.

Remedy

[42] I must decide how to correct the General Division errors. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.¹⁶

[43] The Commission has recommended that I return the matter to the General Division so that the Claimant may have an opportunity to present his Charter argument. The Claimant would prefer that I make the decision that the General Division should have made.

[44] I have decided to return the matter for reconsideration. I have found no other error in the General Division decision so the only error requiring a remedy is the procedural fairness error.

[45] If the Claimant had properly brought a Charter challenge to the General Division and the General Division had considered and dismissed it, I would have the authority to consider an appeal of the General Division's decision on the Charter challenge. As matters stand, the Charter challenge has not yet been heard, and I have no authority to be the first one to consider it.¹⁷

[46] The matter must go back to the General Division to give the Claimant another opportunity to bring his Charter challenge.

¹⁶ See section 59(1) of the DESDA.

¹⁷ Unless the Claimant had claimed that the General Division process itself violated his Charter rights. But even then, the Claimant would have had to properly bring that challenge to the Appeal Division.

Conclusion

[47] I am allowing the appeal. The General Division acted in a way that was procedurally unfair. I have found that the General Division made no error of law or important error of fact, but I have returned the matter to the General Division so that it may reconsider the Claimant's Charter challenge.

[48] I remind the Claimant that he must bring his Charter challenge to the General Division in proper form, and ensure that it has been served 10 days in advance of his General Division hearing. I have set out the basic requirements at para 13, above.

[49] The General Division suggested that the Claimant approach the Commission with a request that his debt be written off. He may still do so if he has not already.

Stephen Bergen
Member, Appeal Division