



[TRANSLATION]

Citation: *SB v Canada Employment Insurance Commission*, 2024 SST 1048

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant:	S. B.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	General Division decision dated August 20, 2024 (GE-24-2687)
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Tribunal member:	Pierre Lafontaine
Decision date:	September 3, 2024
File number:	AD-24-559

Decision

[1] Permission to appeal isn't granted. The appeal won't proceed.

Overview

[2] The Applicant (Claimant) worked as a superintendent in a residential building. He became unable to work for medical reasons on February 23, 2023. He applied for Employment Insurance (EI) benefits. He started receiving sickness benefits on February 26, 2023.

[3] On April 21, 2023, the Claimant left his job as a superintendent. He started a new job on April 24, 2023. He received \$2,942.15 in vacation pay after the benefit period had ended.

[4] The Respondent (Commission) allocated the Claimant's earnings from the week he resigned, based on average weekly earnings of \$779. This allocation resulted in a benefit overpayment that he had to pay back.

[5] On reconsideration, the Commission upheld its initial decision. The Claimant appealed to the Tribunal's General Division.

[6] The General Division found that the vacation pay that the Claimant had received was earnings. The Commission correctly allocated the earnings received for being separated from his job to a number of weeks, starting with the week of separation. The allocation was based on the average weekly earnings from that job. It found that he would have to pay back the overpayment.

[7] The Claimant wants to appeal the General Division decision to the Appeal Division. He argues that his employer paid his vacation pay well after his sickness benefits had ended. The Records of Employment (ROEs) that his employer completed are full of mistakes. He still agreed to a payment arrangement because he is tired of fighting against a large system that focuses only on specific details instead of looking at the full situation.

Issue

[8] The law specifies the only grounds of appeal of a General Division decision.¹

These reviewable errors are the following:

1. The General Division hearing process wasn't fair in some way.
2. The General Division didn't decide an issue it should have decided. Or, it decided something it didn't have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[9] An application for permission to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that has to be met on the hearing of the appeal on the merits. At the permission to appeal stage, the Claimant doesn't have to prove his case; he has to establish that his appeal has a reasonable chance of success. This means that he has to show that there is arguably a reviewable error based on which the appeal might succeed.

[10] I will give permission to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

I am not giving the Claimant permission to appeal

[11] The Claimant argues that his employer paid the vacation pay well after his sickness benefits had ended. He argues that the ROEs that his employer completed are full of mistakes. He still agreed to a payment arrangement because he is tired of fighting against a large system that focuses only on specific details instead of looking at the full situation.

¹ See section 58(1) of the *Department of Employment and Social Development Act*.

[12] The evidence shows that the Claimant left his job on April 21, 2023. He received \$2,942.15 in vacation pay after his benefit period had ended. He earned an average of \$779 per week.

[13] It is well established that the monies paid as a result of a separation constitute earnings under section 35 of the *Employment Insurance Regulations* (EI Regulations). The monies have to be allocated in accordance with section 36(9) of the EI Regulations.²

[14] The Federal Court of Appeal has established that the allocation has to be made in accordance with the terms of section 36(9) of the EI Regulations, regardless of when the earnings are said to be paid or payable. In other words, the Court tells us to focus on why the payment is made **rather than when it is made**.³

[15] So, the General Division didn't make an error in finding that the earnings that the Claimant received for being separated from his job had to be allocated to the number of weeks, starting with the week of separation. The allocation was based on the average weekly earnings from that job, regardless of when the employer paid.

[16] The employer paid the Claimant \$2,942.15 in termination pay. This amount, before deductions, was considered income and had to be allocated to benefits from April 16, 2023, to May 6, 2023, based on average weekly earnings. The leftover amount of \$605.00 had to be allocated to benefits during the benefit week of May 7, 2023. The calculation was: $3 \times \$779 + \$605 = \$2,942$.

[17] I see no reviewable error made by the General Division. It considered the material before it and the applicable law in deciding whether the Commission should allocate the earnings that the Claimant received.

² See *Canada (Attorney General) v Boucher Dancause*, 2010 FCA 270; and *Canada (Attorney General) v Cantin*, 2008 FCA 192.

³ See *Brulotte v Canada (Attorney General)*, 2009 FCA 149; *Canada (Attorney General) v Roch*, 2003 FCA 356; and *Canada (Attorney General) v King*, [1996] F.C.J. No. 483.

[18] I have to point out that only an officer of the Canada Revenue Agency authorized by the Minister can, if asked, decide how long an insurable employment lasts—including when it starts and ends—the amount of any insurable earnings, and how many hours an insured person has had in insurable employment.⁴

[19] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for permission to appeal, I have no choice but to find that the appeal has no reasonable chance of success.

Conclusion

[20] Permission to appeal isn't granted. This means that the appeal won't proceed.

Pierre Lafontaine
Member, Appeal Division

⁴ See section 90(1) of the *Employment Insurance Act*.