



Citation: *RF v Canada Employment Insurance Commission*, 2025 SST 283

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	R. F.
Respondent:	Canada Employment Insurance Commission
Representative:	Kevin Goodwin
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Decision under appeal:	General Division decision dated November 15, 2024 (GE-24-263)
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Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	March 4, 2025
Hearing participants:	Appellant Respondent's representative
Decision date:	March 21, 2025
CORRIGENDUM DATE:	March 24, 2025
File number:	AD-24-843

Decision

[1] The appeal is allowed in part.

[2] I have dismissed the Claimant's appeal of some of the issues, and I have made the decision that the General Division should have made on others. I am returning one issue to the General Division for reconsideration.

[3] I have decided to dismiss the appeal of the issue of weeks of entitlement, and of the issue of earnings and allocation of the net Settlement funds. The General Division did not make an error in how it evaluated these issues.

[4] The General Division made an error in the date from which the allocation was to begin, and an error in the length of the benefit extension. I made the decision that the earnings should be allocated beginning with the week of April 29, 2019 (and be allocated and applied against benefits beginning with the week of May 5, 2019). I have decided that the Claimant's benefit period should be extended by 17 weeks.

[5] I am returning the matter to the General Division to consider whether the \$117.00 overpayment amount was correctly determined.

Overview

[6] R. F. is the Appellant. I will call him the Claimant because this appeal is about his claim for Employment Insurance (EI) benefits.

[7] The Claimant lost his job in April 2019. His employer gave him accrued vacation pay, and pay-in-lieu of notice, which the Commission allocated. The Claimant later negotiated a settlement in which he received 15 weeks of pay as a retiring allowance (herein referred to as "Settlement funds"), as well as an additional contribution to defray legal fees.

[8] The Commission considered these additional payments to be earnings and found that they were paid by reason of his separation. It allocated them to weeks of benefits.

As a result, it found that the Claimant had been paid benefits in weeks in which he should not have received them. At the same time, the Commission extended his benefit period so that he could still collect all his benefits.

[9] The Commission sent the Claimant two Notices of Debt. The first was for \$6,627.00. The employer paid this amount out of the Settlement funds. The second was for an additional \$117.00, to correct for what the Commission believed was a miscalculation. The Claimant paid the \$117.00. There is no outstanding overpayment.

[10] The Claimant asked the Commission to reconsider, but the Commission would not change its decision. It maintained:

- that the Settlement funds were earnings that were paid because the Claimant was separated from his employment,
- that the benefit period had been correctly extended.
- that the Claimant was entitled to 38 weeks of regular benefits,
- that the benefit period duration was correct, and,
- that the Claimant was overpaid but that no overpayment was outstanding.

[11] The Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal. The General Division dismissed the appeal on the weeks of entitlement, on the allocation of earnings, and on the overpayment issue. It found that the Commission did not correctly determine the benefit period duration or the extension to the benefit period.

Preliminary matters

New Evidence

[12] As a rule, the Appeal Division does not consider new evidence that was not available to the General Division. The courts have repeatedly affirmed that this is outside the authority of the Appeal Division.¹ For the most part, I will not be considering

¹ See for example *Sibbald v Canada (Attorney General)*, 2022 FCA 157; *Gittens v. Canada (Attorney General)*, 2019 FCA 256; *Marcia v Canada (Attorney General)*, 2016 FC 1387; *Bellefeuille v Canada (Attorney General)*, 2014 FC 963.

anything found in the Claimant's written submissions or discussed in the hearing if it **was not also presented to the General Division.**

[13] Having said that, the courts have described some limited exceptions to the rule. The Appeal Division may consider new evidence if it is general background information, if it highlights a procedural defect in the General Division process, or if it proves the complete absence of evidence on some particular finding.²

[14] I want to specifically address two separate items of new evidence because the Claimant believes them to be important to his appeal and he has argued that the Appeal Division should consider them.

– **Demand letter, etc.**

[15] The Claimant introduced a demand letter from his lawyer, together with associated records of email exchanges, and invoices for legal services.³ These documents were not in evidence before the General Division.

[16] This evidence is specific to the Claimant's case, and it is not general background information. It does not help to show that the General Division process was unfair in any way. It does not prove that there is a defect that is not in the appeal record.

[17] The Claimant believes the demand letter will help to prove the purpose of the Settlement funds, which relates to whether the funds were properly characterized as earnings. This was one of the most important issues in dispute.

[18] The Appeal Division **does not** accept new evidence whose purpose is to help establish some fact relevant to its findings. I will not be considering the demand letter or other evidence in the AD1C submission.

² See *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

³ See AD1C.

– **Rationale for Canada Revenue Agency (CRA)**

[19] The Claimant has also asked that I consider his evidence of the reasons for the CRA ruling. He provided a two-page excerpt of what he claims is the rationale for the ruling (the “rationale”), which he obtained through an access to information request.⁴

[20] I note that the excerpt is incomplete. The footer on the excerpt indicates that it is pages 20 and 21 of what was apparently a 31-page document. The other pages of the rationale were not provided.⁵

[21] The Claimant offered this part of CRA’s rationale to show that the ruling was based, at least in part, on a finding that there was no “contract of service” for the period of the retiring allowance. He believes this supports his assertion that the General Division made an error of law or jurisdiction when it found the Settlement funds were allocable earnings.

[22] The Claimant’s request that I receive the rationale does not fit neatly into any of the exceptions. The rationale provides some background to the CRA ruling, which was before the General Division, but I do not accept that this is what is meant by “general” background. The rationale does not support an argument that there was a defect in the General Division hearing process or show that there was no evidence on some finding of fact.

[23] Nonetheless, the list of exceptions is not necessarily closed. It is sometimes possible to consider an exception that is not among those I listed, providing that the receipt of the evidence is consistent with the differing roles of the General Division and the Appeal Division.⁶ The General Division can receive evidence to find facts. The Appeal Division looks for errors in how the General Division reached its decision.

⁴ See the CRA ruling at 2B-10: The ruling was that \$9513.63 was insurable earnings because it was paid in respect of employment under section 2(1)(a) of the *Insurable Earnings and Collection of Premiums Regulations* (IECPR) the sum of \$27,384.19 which the Claimant received was not “insurable earnings” because it was a “retiring allowance” per s. 2(3)(b) of the IECPR.

⁵ See AD1-D, 35, 36.

⁶ *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para. 20.

[24] I will consider the evidence of the “rationale.” It was Service Canada that requested the CRA ruling.⁷ And since such rulings are binding on the General Division, it is important that it be interpreted correctly. It is obvious that the reasons for the ruling are relevant to how the ruling ought to be interpreted. At the same time, the Claimant has provided an excerpt only. That means I need to be careful about how I use it.

Issues

[25] The issues in this appeal are:

Errors of procedural fairness

- a) Did either the Tribunal’s registry procedures or the General Division member’s difficulty referencing file documents interfere with the Claimant’s right to be heard?
- b) Was the General Division member biased against the Claimant?

Error of jurisdiction

- c) Did the General Division make an error of jurisdiction by effectively overturning a CRA ruling?

Errors of law

- d) Did the General Division make an error of law in finding the Settlement funds to be earnings?
- e) Did the General Division make an error of law in how it determined when the allocation was to begin?
- f) Did the General Division make an error of law in how it treated the legal fees?
- g) Did the General Division make an error of law in how it combined and classified the different types of earnings?

⁷ See GD2-9.

Errors of fact

- h) Did the General Division make an important error of fact by relying on the “Summary Document”?
- i) Did the General Division make an important error of fact by misstating the amount of the Settlement funds?
- j) Did the General Division make an important error of fact by relying on the “unapproved” faxed letter from the lawyer?
- k) Did the General Division make an error of fact by ignoring or misunderstanding evidence of the overpayment amount?

Analysis

[26] 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.⁸

Error of procedural fairness

[27] The Claimant argued that the General Division made errors of procedural fairness.

[28] Parties before the General Division have a right to certain procedural protections such as the right to be heard and to know the case against them, and the right to an unbiased decision-maker. This is what is meant by “procedural fairness.”

⁸ 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).

[29] The Appeal Division has jurisdiction to consider only errors made by the General Division. Much of the Claimant's argument is concerned with his dissatisfaction with his treatment by Service Canada.⁹ However, I may only consider whether the General Division acted in a way that was procedurally fair, so I will not be reviewing the actions of Service Canada.

[30] The Claimant also asserted that his documents were mishandled by the Social Security Tribunal registry and by the General Division member. The Claimant argued that this interfered with his ability to present his case. Specifically, he said that it limited the time he had to present his arguments to the General Division through his inability to use his own index and bookmarking system. He says that this was procedurally unfair.

[31] In addition, the Claimant attributed incompetence or bad faith to both the Tribunal and the member.¹⁰ He did not use these terms precisely. However, he says that the Tribunal "did everything it could to derail the appeal." He said that he had to "hand hold" the member to help him find documents.

[32] The Claimant also made comments that imply he believes the member was biased. He asserted that the member "pretended" he was unfamiliar with "the mess" in the file and also "pretended" he was unable to use the Claimant's index and bookmarks. He said that the member "bullied" him by redirecting him back to a topic of discussion, and that he "tried to put words in his mouth."

[33] The Claimant says that the member "lied" about why the Case Conference recording was abridged, and that he "twisted and turned" the objective of the hearing by writing in the decision that the Claimant wanted to present one single appeal, when the Claimant had wanted all three appeals heard. He also said that the member tried to "la[y] a pitfall" for him at the Case Conference, by asking him to put all the documents he wanted the Tribunal to consider on a single USB drive.

⁹ i.e., Service Canada agents acting on behalf of the Commission.

¹⁰ See AD1-26 to AD1-31.

[34] I have reviewed the file and file history, read the decision, and listened to the audio recording of the hearing. I have considered the Claimant's concerns, but I have found nothing to suggest that either the Tribunal or the member acted in a way that was procedurally unfair.

– **Right to be heard**

[35] The Claimant saw the issues as both numerous and complex. Because of this, he created his own index and bookmarking system to access documents during the hearing. He believed that he needed to follow his system in order to cover everything he wanted to cover within the time allotted for the hearing.

[36] The Claimant filed three appeals to the General Division in respect of several different reconsideration decisions. All three appeals were heard at the same time, but the Tribunal maintained separate files, and the General Division issued separate decisions. This appeal concerns only one of those appeals.

[37] There was a lot of ground to cover in the hearing, since it involved three hearings. The main issues in **this** appeal were whether the Settlement funds were earnings, and how they should be allocated. This appeal also considered when the allocation should begin, the extension of the Claimant's benefit period, and his total weeks of regular benefit entitlement.

[38] In one of the other appeals (GE-24-261), the Claimant had been arguing that he should have been able to access the EI-ERB benefits earlier (and thereby collected more weeks of EI-ERB). He had only been allowed to collect EI-ERB after his regular benefits were exhausted. If the Commission had not allocated the Settlement funds, the Claimant would have exhausted his benefits earlier. This second appeal was dependent on whether the Settlement funds had been properly allocated.

[39] The final appeal (GE-24-831) before the General Division concerned whether the Claimant qualified for regular benefits after CERB ended. It addressed the appropriate qualifying period and the hours of insurable employment within that qualifying period.

[40] There were a large number of often-lengthy documents to receive and arrange for the three appeals, and a large number for this particular appeal even if it is considered by itself. The materials relevant to this appeal are sometimes co-mingled with the material addressing the Claimant's other two appeals.

[41] The General Division file for this appeal included the original GD3 reconsideration file at 127 pages. In addition, the Claimant filed roughly 1400 pages of submissions and evidence (found in files named GD2, GD2B, GD12 (parts 1 and 2), GD25, GD33, and GD55). The Commission added three submission documents totalling 16 pages. During the processing of his General Division appeal, the Claimant also filed approximately 30 additional documents. These were procedural requests, objections, and complaints.

[42] The Claimant wanted to use his own system to access and refer to documents, exploiting the bookmarking feature of the Adobe software. The Tribunal uses Foxit software to view pdf documents, but Foxit has a similar bookmarking feature.

[43] The Claimant's bookmarking system was apparently disordered at the time the documents were received and uploaded by the Tribunal.

[44] At one point, the member arranged a Case Conference to try to clarify the issues and simplify the documents for the hearing. The Tribunal's registry also attempted to assist the Claimant with his various concerns about missing or duplicated documents.

[45] The Claimant may have been displeased with how long it took to straighten out his documents, but he cannot maintain that the Tribunal's registry processes interfered with his ability to present his appeal. When he spoke with the Tribunal the day before his hearing, he did not request the Tribunal to postpone so that he could reformat, reorganize, or re-index the documents, or to otherwise prepare for the hearing (although he had requested earlier postponements). In fact, the Claimant confirmed that he was finally satisfied that his bookmarking system had been restored or realigned to his satisfaction.

[46] When I review the General Division record on this appeal, it appears that the Tribunal paginated (added page numbers to) documents GD31 and GD25, but then combined them into a third document GD33, which duplicates the content of GD31 and GD25. As a result, there was no need to reference either GD31 or GD25, since their content was included within the new GD33. To reflect the combined content, the Tribunal revised the pagination of GD33. The GD33 documents include both their original document designation and page numbers, and the GD33 designations and page numbers.

[47] Other than the double-numbering in the GD33 document, the Tribunal's indexing of the documents is unremarkable.

[48] So far as I can determine after listening to the recording, and by trialing the Claimant's system myself, the system seems to work as follows: A master list (GD55) includes specific references within documents. Some of the larger document files (GD2 and GD2B), included one item titled "Index." Clicking on the Index would open a list of references corresponding to all of the references in the master list for that particular document. Clicking on one of the references in that list would allow the user to jump to the appropriate document. Other GD document files did not have this "Index" item, but references could still be selected within their bookmark lists. This would take the user directly to their location.

[49] The oral hearing lasted 3 hours and 27 minutes. In my view, this ought to have been enough time to consider all the relevant issues, even without the Claimant's system. The Claimant may be right that some time could have been saved using his system —assuming the member had understood what the Claimant was doing and was proficient with the bookmarking feature.

[50] Unfortunately, the General Division member struggled to follow the Claimant's system. The Claimant spent a large part of the hearing attempting to educate the member to his methods. He often persisted in their use, heedless of the member's obvious difficulty.

[51] The fact that the member was unable to use the bookmarking feature simply meant that he would need to use the document identifiers assigned by the Tribunal. The Tribunal's regular process is to identify pages from documents in the General Division record with a document designation and page number.¹¹ Parties to an appeal who wish to refer a member to a specific passage ordinarily use this process. The documents in this appeal had been identified in this way by the Tribunal registry.

[52] Whenever the Claimant reverted to using the Tribunal's usual system, the member was capable of finding and following documents. He was able to open the appropriate document tab and scroll to the correct page number, just as he would follow documents in most other appeals.

[53] Near the close of the oral hearing, the Claimant suggested that he had meant to highlight more references but did not have time. However, this does not mean he was not offered a fair chance to present his argument. The Claimant's insistence on his own document reference system was part of the reason he ran short of time in the hearing.

[54] In addition, the Claimant had also given the member extensive written submissions in which his arguments were set out in detail. Members routinely review the written arguments and file evidence between the time of the hearing and when they make their decision.

[55] If the Claimant believed that he required more time to expound on all of his arguments in the hearing, and if he believed that the General Division would not appreciate those arguments otherwise, he could have asked for an adjournment to continue the hearing. Or, he could have asked to supplement his arguments with post-hearing submissions. The Claimant did not ask for an adjournment or ask to provide additional submissions.

[56] I find that the General Division process gave the Claimant a fair opportunity to be heard.

¹¹ Such as GD1-5 to represent the fifth page in the General Document number 1, or AD2-3 for the third page in the Appeal Division document number 2.

– **Allegations implying bias**

[57] The Claimant's assertions that the General Division member lied or that he was somehow twisting the hearing objective or that he was laying pitfalls, represent a challenge to the member's impartiality. His claim that the member was only pretending to have difficulty with the Claimant's system, or that he was bullying the Claimant, also suggest that the member was predisposed against the Claimant.

[58] These amount to an allegation of bias.

[59] A "biased" mind is a closed mind, one that is resistant to reason and evidence. The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada has stated that the test for bias is: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"¹²

[60] If the Claimant could establish that such a person—reviewing the member's conduct—would think that the member was biased, then he would have established an error of procedural fairness.

[61] However, the Claimant has not proven bias, for the reasons which follow.

A reasonable apprehension of bias is not supported by the evidence

[62] There is simply no evidence that the member acted with the malicious intentions attributed to him by the Claimant. Presuming his impressions of the member's actions are sincere, they reflect a highly subjective evaluation of what appear to be relatively inconsequential actions or behaviour.

[63] I listened to the hearing. The member's difficulty with the Claimant's system was obvious and real, and not a pretense. More than that, it was understandable that he would have difficulty. Parties to appeals to the Tribunal are given latitude to present their case as they see fit, but they cannot presume that what makes perfect sense to

¹² See *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.

them will also make sense to the member. It is ultimately their responsibility to make sure they are understood. The Claimant might have had a better impression of the member if he had recognized that his own system was interfering with the member's ability to hear and understand his arguments.

[64] The Claimant's suggestion that the member "lied" was a reference to what the member had said about the reason for the abridged recording of the case conference. The member believed the recording was as short as it was because he failed to restart the recording after the Commission's representative unexpectedly joined.

[65] The General Division may have been mistaken as to why the audio recording of the case conference was abridged, but it would be reasonable for him to suppose that it was short because of some technical difficulty or his own inadvertent error in activating the recording. These kinds of problems are common. The General Division member had no reason to lie, and the Claimant has not proven that the General Division member lied.

[66] In any event, it is hard to imagine a circumstance where a missing or abridged recording of a case conference would result in unfairness.

[67] Case conferences are called at the discretion of the member, and the Tribunal is not legally required to record them. This one was nothing more than an effort to clarify the procedure going forward. A case conference is not a hearing. The member cannot make findings of fact or reach any conclusion of law at the case conference. If the eventual hearing proceeded in some way that was contrary to what the Claimant believed had been agreed at the case conference, he could raise that concern at the hearing.

[68] The question of whether the member understood that the Claimant was bringing one or three appeals is a semantic quibble. The Claimant clearly brought three appeals. The member clearly understood he had three separate appeal files before him, and it is also clear that he considered all three in the one appeal hearing. The Claimant received

decisions on all three appeals. The Claimant does not dispute that the member considered three appeals, or that he intended the member to consider three appeals.

[69] Nothing in the way the member conducted himself suggested, “bullying.” The member tried to redirect the Claimant to the evidence or issues with which he was concerned, which is entirely appropriate. So far as “trying to put words in his mouth,” the member was only trying to ensure that he and the Claimant had a common understanding of the issues of the appeal. The *Social Security Tribunal Rules of Procedure* requires the member to use active adjudication to help parties fully participate in the process.¹³

[70] The Claimant also asserted that the member was “laying a pitfall” by asking the Claimant to “submit a USB key with the information [the Claimant] wishes to present at the oral hearing.” The member had called a case conference because of the Claimant’s concerns about missing or duplicated documents in the record. One of the main purposes of the case conference was to ensure that the Claimant was satisfied that the Tribunal had received all of his documents in their entirety. In the course of the conference, the Claimant seemingly agreed to provide the USB key as a way of making certain of this.

[71] I do not see how this could be a pitfall for the Claimant, or how the Claimant could reasonably believe that the member intended to lay a pitfall.

Other suggestions of bias

[72] The Claimant also asserted that the General Division was dismissive of his evidence and advocated on behalf of the Commission. There is no merit to this argument.

[73] If the Claimant were able to show that important evidence relevant to one of the General Division’s key findings was not considered, I would consider this as an error of

¹³ See section 8(2) of the *Social Security Tribunal Rules of Procedure*.

fact. If he means that the member demonstrated a pattern of casually dismissing relevant evidence without justification, this could suggest bias.

[74] However, his claim seems to be based on his impression of the member, and not on an identifiable pattern of disdain for relevant evidence. He has not pointed me to even one instance of this, let alone a pattern.

[75] So far as taking the Commission's side, I have reviewed the decision itself and I have scrutinized the member's conduct in the hearing and, but I do not find any evidence that the General Division took the Commission's side.

[76] The decision describes both the Commission's and the Claimant's positions on the issues before him. The Claimant may disagree with the importance the General Division attaches to his evidence, but it is the General Division's job to assign weight to the evidence.

[77] So far as conduct in the oral hearing, the hearing may have felt one-sided to the Claimant because the Commission did not attend the hearing to present its arguments. The Commission rarely attends General Division hearings and this means that claimants may not always notice or answer the Commission's key arguments. Members often describe the Commission's position to claimants or ask them to answer arguments on important questions. This is not to take the Commission's side, but to ensure that claimants have the opportunity to present their best case.

[78] To give an example from the Claimant's hearing, there is one point in the hearing where the member interjected to explain to the Claimant why the Commission would ask for a CRA ruling and how it might use such a ruling. This followed a period in which the Claimant had argued at length based on his conviction that the CRA ruling irrefutably established that his retiring allowance was not earnings. The Claimant may have perceived the General Division to be "advocating on behalf of the Commission," but it is more likely that the member was offering the Claimant a chance to expand or supplement his arguments.

[79] To sum up, the Claimant has not proven his assertions that the member was dismissive of his evidence or that it was taking the Commission's side. I find that "an informed person, viewing the matter realistically and practically and having thought the matter through," would not conclude that the member was biased.

Bias not raised at earliest opportunity

[80] I must also reject the Claimant's allegation of bias because he took too long to raise his objection.

[81] Bias is a serious allegation. The courts have consistently held that a party must object to perceived procedural unfairness at the earliest opportunity. The failure to do so implies a waiver of the right to appeal such unfairness later. The Federal Court of Appeal has said, "

A party who believes that the presiding judge has created a reasonable apprehension of bias must make that position known at the first opportunity. One cannot secretly nurse a reasonable apprehension of bias for the purpose of raising it in the event of an adverse result."¹⁴

[82] The Claimant asserts concerns that would have arisen from the member's conduct at the case conference and at the oral hearing. He did not allege bias until he received the General Division decision that dismissed his appeal, before he alleged the member was biased. He waited too long.

Error of Jurisdiction

– CRA ruling

[83] The Claimant argued that the General Division made an error of jurisdiction by dismissing the CRA ruling. He argues that the CRA ruling is outside the General Division's jurisdiction.

¹⁴ See *Bassila v Canada (Attorney General)* 2003 FCA 276.

[84] According to the Claimant, he was interviewed by an officer from CRA for the purpose of the ruling. The officer advised the Claimant that, “they were tasked with determining whether the severance pay, vacation pay and pay in-lieu [was] insurable or not.”¹⁵

[85] The CRA ultimately found that the Settlement funds were not insurable employment under the Insurable Earnings and Collection of Premiums Regulation, because it was a Retiring Allowance.

[86] The Claimant is correct that the General Division had no jurisdiction to review the CRA decision. The CRA has exclusive jurisdiction to determine the insurability of earnings.

[87] However, the General Division did **not** decide that the Settlement funds were not a Retiring Allowance. It did **not** decide that they were not “insurable” earnings. It found that the Settlement funds were earnings, that they were paid because of the Claimant’s separation from employment, and that they were therefore subject to allocation from the week of separation.

[88] The General Division did not interfere with the actual CRA ruling and it explained why it did not believe the CRA ruling was applicable.

[89] The General Division did not make an error of jurisdiction. In the next section, I will also consider whether the General Division made an error of law in how it interpreted the effect of CRA ruling.

Error of Law

– Were the Settlement funds earnings?

[90] This question bears directly on the Claimant’s greatest concern.

[91] The Settlement funds, net of legal fees, was \$20,736.43. This amount was considered earnings and found to have been paid on account of the Claimant’s

¹⁵ See GD2-11.

separation from employment. Because it was almost entirely allocated to weeks of benefits, the Settlement funds significantly extended the period required for the Claimant to obtain his full 38 weeks of regular benefits. This was important to the Claimant because it meant that he could not obtain EI ERB benefits as early as he would have liked. It meant that he received fewer benefits in total (regular plus EI-ERB combined).

[92] If the Settlement funds had not been considered earnings, only the Claimant's vacation pay (\$4,036.79) and the pay-in-lieu (\$5,476.84) would have been allocated (Total is \$9,513.63). Of this total, \$1,164.00 would have been allocated to top-up his earnings to \$1,790.00 in the last week of his employment. This part of the allocation would not delay when the Claimant would be entitled to receive benefits. The balance of \$8,349.63, applied at \$1,790.00 per week, would offset a full **five weeks** of benefits. This would mean that the Claimant would have received his full 38 weeks of regular benefit entitlement over a period of **44 weeks** (38 weeks plus the five-week deferral, plus one week for the waiting period).

[93] On the other hand, if the \$20,736.43 were properly considered earnings, then this amount would be included in the total to be allocated, which would also include the \$9,513.63 in combined vacation pay and "pay-in-lieu." The total to be allocated would be \$30,250.06. The first \$1,164.00 of the \$30,250.06 would still be allocated to the last week in work, but the balance of \$29,086.06 would translate to a deferral of 17 weeks.

[94] This balance was allocated at \$1,790.00 for every week—except the last. By my calculations, \$446.06 would be the remainder to be allocated in the 17th week (August 25–31), reducing his regular benefit payment of \$562.00 to \$116.00.¹⁶ The Claimant would have received all of his benefits in **56 weeks** (38 weeks of benefits, plus a 17-week deferral, plus one week for the waiting period).

¹⁶ The Commission calculated the remainder at \$445.00 for the 17th week of allocation, and so determined the Claimant should be paid \$117.00 in the week of August 25–31. I believe the Board's practice is to pay zero in this partial benefit week and treat it as the waiting period week and then pay the \$117.00 in the next week before returning to regular payments in the following weeks.

[95] If the Settlement funds had not been earnings, he would have received all of his benefits by March 8, 2020. March 1–7 would be his final week of benefits. If they are earnings and allocable, as found by the General Division, the Claimant should only have received all his regular benefit entitlement by ~~June 7, 2020~~ **May 31, 2020**. ~~May 31–June 6,~~ **May 24 - May 30** would be his final week of benefits.

Effect of CRA ruling

[96] The Claimant argues that the General Division made an error of law in finding that the Settlement funds of \$27,384.19 were earnings.

[97] He does not dispute that “earnings” are the “entire income of a claimant arising out of employment,” as set out in the *Employment Insurance Regulations* (Regulations).¹⁷ However, the Claimant says his Settlement funds do not fall within the definition of earnings. He referred to the definition of “employment” in the Regulations, which states that employment means “any employment whether insurable, not insurable, or excluded employment, under any express or implied contract of service other employment contract.”¹⁸

[98] The Claimant argues that he did not receive his Settlement funds under a contract of service. He relies on the CRA ruling, which he notes is binding on the Commission.

[99] The CRA ruling states only that the sum of \$27,384.19 which the Claimant received was not “insurable earnings” because it was a “retiring allowance” per section 2(3)(b) of the *Insurable Earnings and Collection of Premiums Regulations* (IECPR).

[100] The fact that CRA has ruled that the Settlement funds were not insurable does not mean they were not earnings. The definition of employment in the Regulations includes both insurable and non-insurable employment.

¹⁷ See section 32(2) of the Regulations.

¹⁸ See section 32(1) of the Regulations.

[101] However, the Claimant says the ruling must be understood by considering its reasons. He referred to the CRA rationale that he provided the Appeal Division. According to the rationale, the CRA found that there was no “contract of service” from June 11, 2019, when his pay-in-lieu lapsed, until January 24, 2020.¹⁹ Because of this, the Claimant asserts that his Settlement funds were not from “employment.”

[102] I disagree. Even if CRA's reasons were binding on the General Division in the same way as its ruling, I am not convinced that the General Division made an error of law when it found that the Settlement funds were earnings.

[103] Section 35(2) of the Regulations does not require that a claimant's earnings be paid during a period of employment, or even that they be for work performed in a particular period of employment. It says that earnings are the entire income “**arising** out of any employment.” The Claimant had a contract of service when he was employed. Even though he was no longer employed under a contract of service when he received the Settlement funds as a retiring allowance, he would not have obtained that settlement if not for his employment. It still arose from his contract of service.

[104] However, I am not even satisfied that the General Division must accept the CRA's finding that there was no “contract of service,” for the purpose of determining earnings for allocation.

[105] According to section 90(1) of the EI Act, the Commission is authorized to seek a ruling from CRA to determine whether an employment is insurable, how long insurable employment lasts (and when it began and ended), the amount of the “insurable earnings,” the number of hours of insurable employment, the premiums payable, and any refunds of premiums, the employer of an insured person, and whether employers are associated employers.²⁰

¹⁹ See AD1-36.

²⁰ Section 90(1)

[106] Nothing in section 90(1) authorizes the CRA to rule on whether a payment received by a claimant is, or is not, earnings for the purpose of allocation. That decision is within the jurisdiction of the Commission, exclusively.

[107] I also note that the Claimant acknowledged that the CRA decision was based on its finding that the Settlement funds were a “retiring allowance.” The courts seem to have considered the interpretation of “retiring allowance,” only in the context of appeals of CRA decisions. However, the Claimant submitted an explanation of what CRA means by the term “retiring allowance,” which he describes as CRA’s rules for employers issuing T4s. In that definition, retiring allowance is also called “severance pay.”²¹

[108] The Federal Court of Appeal has consistently found severance payments to be earnings under section 35. And it has consistently found that they are allocable under section 36(9) of the Regulations as paid or payable by reason of a lay-off or separation from an employment.²²

[109] The General Division was not bound to follow the CRA ruling. It did not make an error of law, when it found that the retiring allowance was earnings, and that it was subject to allocation under section 36(9).

Purpose of retiring allowance

- The General Division did not consider the Claimant’s reinstatement rights

[110] The Claimant argued that the General Division erred in law because it failed to recognize that the law does not consider money to be earnings if it is paid for the relinquishment of reinstatement rights. According to the Claimant, the General Division ignored the Release and Indemnity document (Release) that was schedule “C” to the Minutes of Settlement (Settlement Agreement).

²¹ GD2-19.

²² See for example, *Robinson v Canada (Attorney General)*, 2013 FCA 255; *Curpen v Canada (Attorney General)*, 2013 FCA 29; *Blais v Canada (Attorney General)*, 2011 FCA 320.

[111] The Claimant believes that such a right of reinstatement arises from the Release. The Release is a broadly worded document intended to be comprehensive of all possible claims. It is arguable that it includes a “right of reinstatement” by implication, but such a right is not among those expressly identified in the Release.²³

[112] The Claimant had the burden to show that the Settlement funds were not earnings.²⁴ If he meant to say that they were not earnings because they were paid to compensate him for the relinquishment of reinstatement rights, then he had to prove that as well.

[113] If the Claimant and the employer had agreed that the Claimant had a right of reinstatement and that he should be compensated for giving up that right, then one would expect there would be more evidence to suggest this was the case.

[114] There is not. The Settlement Agreement describes the Settlement funds only as a “lump-sum payment of 15 weeks base salary.” His lawyer described it only as a “Retiring Allowance in respect of his termination of employment.”²⁵

[115] The Claimant did not tell either the Commission or the General Division that he believed the Settlement funds were paid to compensate him for relinquishing his right of reinstatement. At his hearing, the General Division member twice asked the Claimant if he was saying the employer paid the Settlement funds *for something else*. He twice insisted that the payment was a retiring allowance, without elaborating further.²⁶

[116] The General Division did not make an error of law by not considering or following case law that might apply where payments are made to compensate for the surrender of a right of reinstatement. The Claimant did not argue to the General Division that he had been compensated for relinquishing a right of reinstatement, and the evidence itself did not suggest such an argument.

²³ See GD2-41.

²⁴ See *Mayor v. Minister of Employment and Immigration* (1989), 97 N.R. 353 (F.C.A.)

²⁵ See GD3-37.

²⁶ See transcript at AD1-162 to 163: Question at line 3021 and response at 3039 and 3042, Question at 3045, with response at 3047 and 3049.

[117] The Claimant also noted that the General Division member did not ask the Claimant about “*aggravated damages*.”²⁷ The Claimant raised this as an “error of law.”

[118] Nothing turns on whether or not the General Division specifically asked the Claimant about aggravated damages. The General Division had no legal obligation to prompt the Claimant to reframe his claim or to take his testimony in a new direction. The Claimant had the burden to show that the Settlement funds were not earnings.²⁸ As I have said, he insisted only that the payment was a retiring allowance.

[119] I will return to what the General Division said about aggravated damages later in the decision when I turn to errors of fact.

[120] The Claimant cited *Canada (Attorney General) v Warren*, with the apparent understanding that *Warren* identifies three conditions necessary to establish a right of reinstatement exists.²⁹ Perhaps the “three conditions” he cited has some basis in labour law, but they are not found in the *Warren* decision. The principle in *Warren* appears to be that—at least for the purpose of evaluating earnings under the EI Act—the question of a claimant’s right to be reinstated can only arise if they were wrongfully dismissed.

[121] The Claimant asked that I consider how the employer had bullied and harassed him, and he suggests that the Settlement funds were also intended to compensate for these actions. It was for this purpose that he proposed I accept the demand letter into evidence.³⁰ I have not considered the demand letter.

[122] But, even if there was some evidence before the General Division that the Claimant had been seeking compensation for wrongful dismissal, and even if the General Division had accepted that the Claimant received compensation for his wrongful dismissal, this would not have assisted the Claimant. There is a legal presumption that awards or Settlement funds for wrongful dismissal (less legal fees) are meant to compensate for lost income. They are presumed to be earnings under

²⁷ See AD1-36, at point 1.

²⁸ See *Mayor v. Minister of Employment and Immigration* (1989), 97 N.R. 353 (F.C.A.)

²⁹ See *Canada (Attorney General) v Warren*, 2012 FCA 74.

³⁰ The Claimant submitted the demand letter in his AD1C submission.

section 35 of the Regulations.³¹ If the Claimant wanted to assert that he was compensated for surrendering his right of reinstatement, he would have had to offer sufficient, and sufficiently specific, evidence to overcome the presumption that a payment described as “a lump-sum payment of 15 weeks base salary” was not a payment for lost income, or otherwise earnings.

Dismissing the Settlement Agreement

[123] The Claimant asserted that the General Division dismissed the Settlement Agreement without considering it. He argues that this was an error of law, but he did not elaborate. It is not obvious to me how this could be an error of law.

[124] If the Settlement Agreement contained evidence that was relevant to any of the General Division’s key findings, the General Division would be required to consider it. I will consider the argument that the General Division dismissed the Settlement Agreement when I evaluate whether the General Division made an error of fact.

[125] I have considered the Claimant’s various arguments, but I find no error in the General Division’s finding that the Settlement funds were earnings.

– Were the earnings paid by reason of the Claimant’s separation allocated to the correct weeks?

[126] **The General Division made an error of law** in how it allocated the earnings paid by reason of the Claimant’s separation.

[127] The General Division correctly stated that these earnings should be allocated beginning with the week that the Claimant was separated from employment. It found that the Claimant was separated from employment on Monday, April 29, 2019, and the Claimant does not dispute this.

[128] However, the General Division stated that the week of separation began **Sunday, May 5, 2019**. This is a misreading of the law.

³¹ See *Court v Canada (Attorney General)*, 2020 FCA 199.

[129] The *Employment Insurance Act* (EI Act) says that a “week” is a period of seven days beginning on and including Sunday.³² Since the Claimant was separated from employment on Monday, April 29, 2019, the week in which he was separated from employment would have been the week beginning on Sunday, April 28, 2019.

[130] The General Division was either mistaken in taking Sunday, May 5, 2019, to be part of the week preceding the Sunday, or it employed the week following the week the Claimant was separated from employment. In either case, it misapplied the law.

[131] I note that the Claimant also took issue with how his benefit period was extended. However, it could only have been an error to extend the benefit period if it were an error for the General Division to find that the Settlement funds were earnings to be allocated from the week of separation.

[132] I have not found that the General Division made an error in that regard. Therefore, the extension of his benefit period could only mean that the Claimant could receive all 38 weeks of regular benefits within his benefit period, after the Settlement funds and other payments from his employer were allocated. His benefit period would still end when no further benefits were payable under his claim.³³

Did the General Division provide inadequate reasons for how it decided on the benefit period extension?

[133] The Claimant said little about how the General Division’s decision on the benefit period extension was an error of law. However, he argued—under the heading “error of law” that the General Division took the benefit period extension out of context.

[134] The General Division decided that the Commission had made an error because the Claimant had been entitled to a 16-week extension. The Claimant has maintained that he should not have required an extension at all. This was based on his argument

³² See the definition of a “week” in section 2(1) of the EI Act.

³³ See section 10(8)(a) of the EI Act.

that the Settlement funds were not earnings and should not have been allocated. I suspect that this is the “context” to which he was referring.

[135] Having said that, it is not at all clear how the General Division arrived at that decision. I suspect that it did not feel robust reasons were necessary because the Claimant received his full entitlement to regular benefits, regardless of whether the extension was 16 or 17 weeks. It noted the Commission’s arguments that it had extended the benefit period by one week and mistakenly added a seventeenth week. The General Division seemed to accept this and to also accept that the Commission’s error was to the Claimant’s benefit.

[136] However, I find that the General Division made an error of law by accepting the Commission’s representations without providing adequate reasons. Section 10(a) of the EI Act provides for an extension of a claimant’s benefit period for the total number of weeks within the benefit period that the claimant is not entitled to benefits because he is in receipt of earnings paid because of the severance of the employment relationship.³⁴ The General Division did not explain how it concluded that 16 weeks was the total number of weeks of benefits offset by the allocation.

[137] However, the Claimant did not argue that his benefit extension should be either sixteen weeks or seventeen weeks, and it does not matter to the result in this case. I have found that the Settlement funds were earnings and that they needed to be allocated from the week of separation (together with the Claimant’s vacation pay and pay-in-lieu).

[138] That means that the benefit extension was to the Claimant’s benefit.

– **Were the legal fees treated incorrectly?**

[139] The Commission also conceded what it believes to be a second error in the General Division decision. The employer had given the Claimant an additional \$1,500.00 to apply towards his legal fees to obtain the Settlement funds. The General

³⁴ See section 10(b) of the EI Act.

Division appeared to have added the \$1,500.00 to the earnings, instead of deducting it from the legal fees.

[140] However, I find that the General Division did not make an error of law in how it treated the legal fees or the employer's contribution towards legal fees.

[141] The \$1,500.00 was not a gift. It was part of the negotiated settlement that resulted from the Claimant's separation from employment. Therefore, it does not matter whether the \$1,500.00 contribution was added to the gross Settlement funds or deducted from the legal fees: The result is the same.

[142] Supposing that the Claimant was paid \$27,384.15 in Settlement funds plus another \$1,500.00 towards legal fees, but then had to satisfy the legal fees out of pocket. His net (allocable) Settlement funds would be represented by the following formula: $(\$27,384.15 + \$1,500.00) - \$8,147.72 = \$20,736.43$. However, if he was paid only \$27,384.15 but his legal fees were reduced by the employer's contribution, then his net Settlement funds would be calculated as $\$27,384.15 - (\$8,147.72 - \$1,500.00) = \$20,736.43$.

[143] Both calculations result in the same amount to be allocated.

– **Were the Claimant's different types of earnings improperly combined and classified?**

[144] The Claimant argues that it was an error of law for the General Division to combine vacation pay, pay-in-lieu, and the Settlement funds as "earnings."

[145] This is not an error of law. The General Division had to determine how much of what the Claimant received from the employer should be considered "earnings," and it had to determine when those earnings should be allocated.

[146] It combined the various kinds of payments into one category because it had accepted that they could all be treated in the same way. It accepted that they were all earnings (including the Settlement funds) and it considered them all to be paid or payable by reason of the Claimant's separation from employment. Whether received as

vacation pay, pay-in-lieu, or as a retiring allowance, all of the payments could all be allocated from the week the Claimant was separated from his employment.

[147] The fact that some of the benefits were paid at the time the Claimant's employment was terminated, while other benefits were paid after later negotiations with the employer is irrelevant. The fact that the employer made deductions from some benefits and not from others is also irrelevant.

Important error of fact

[148] The General Division is the trier of fact. The role of the Appeal Division is to determine whether the General Division made certain kinds of errors. One of those errors is an "important error of fact."

[149] To find such an error, the Appeal Division must consider whether the General Division ignored or misunderstood any evidence that was relevant to its key findings. However, it has no authority to re-evaluate or reweigh the evidence to reach a different conclusion.³⁵

[150] I will deal briefly with each of the asserted errors of fact.

– The General Division's references to the Summary document (GD33).

[151] The Claimant argued that the General Division member "limited" his consideration to a single page from a summary document.³⁶

[152] Strictly speaking. The General Division is not required to put any references to the record in its decision. It may add references where it feels it is appropriate for the reader to easily confirm that its statement is based in the record.

[153] Regardless, the decision must be taken as a whole. The Claimant is referring to a reference in a paragraph from the General Division's overview of the issues. The decision goes into more depth (and provides additional references) in its analysis of this

³⁵ See, for example: *Tracey v Canada (Attorney General)*, 2015 FC 1300; *Hideq v Canada (Attorney General)*, 2017 FC 439.

³⁶ See AD1-34, 41.

issue. Furthermore, the issue in view is the Claimant's entitlement to weeks of benefits. The Claimant did not even dispute that he was entitled to 38 weeks of benefits.

[154] The General Division did not make an error of fact. It did not ignore file evidence that could have affected its decision about the Claimant's entitlement to weeks of regular benefits.

[155] The General Division may not have referred specifically to each piece of evidence or even to every argument raised, but that does not mean that it ignored anything relevant. As noted in the *South Yukon* decision:

When it comes time to draft reasons in a complex case, trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.³⁷

– **Reference to aggravated damages**

[156] According to the General Division decision, the member asked the Claimant if he was submitting that the Retiring Allowance was for something else like aggravated damages. The Claimant is correct about this. He is also correct that the General Division member did not mention *aggravated damages* when it asked him if the retiring allowance was for "something else."³⁸ If the member wondered whether the Claimant meant to assert that the Settlement funds were for aggravated damages, he did not mention this to the Claimant.

[157] The decision may have misstated what the member told the Claimant. On the other hand, he may have only meant to communicate what was his mind when he asked the Claimant the question.

³⁷ *Her Majesty the Queen v South Yukon Forest Corporation et al.*, 2012 FCA 165 at para 49 and 50.

³⁸ See AD1-36, at point 1.

[158] In either case, it is not an important error of fact. Whether the member asked the Claimant about aggravated damages could not have affected its decision. The Claimant did not assert that the resigning allowance, or any part of it, was aggravated damages, and there was no other evidence on this point. Furthermore, the General Division made no specific finding on aggravated damages.

[159] Based on the preponderance of evidence before it, the General Division accepted that the Settlement funds was a retiring allowance, and that it was paid because the Claimant was separated from his employment.

– **Different settlement amount**

[160] According to the Claimant's lawyer, the gross Settlement funds were \$27,384.15,³⁹ although the Claimant has stated that it was \$27,384.19.⁴⁰ The General Division noted this figure as \$27,384.19 at paragraph 49 of its decision, and as \$27,384.19 in paragraph 14. In paragraph 50, it used the figure \$27,364.15.

[161] The member's meaning can be determined from the decision. In seven places in the decision, the General Division correctly noted the net Settlement funds (\$27,284.15 less the net legal costs) were \$20,736.43⁴¹ in seven places. The deductions by which the \$20,736.43 figure was derived from the gross Settlement funds are repeated through the decision.

[162] The member's numerical errors do not represent an error of law. They are minimal "slips" with no significant impact on the decision.

– **Reliance on "non-approved" faxed letter from lawyer**

[163] The Claimant argued that the General Division made an error of fact by relying on his lawyer's letter to the Commission, when he had not reviewed or approved it.⁴²

³⁹ See GD3-37.

⁴⁰ See AD1-35.

⁴¹ See paragraphs 14, 15, 42, 46, 49, 51 and 85, of the General Division decision.

⁴² The letter is found at GD3-31.

The letter stated that the Settlement funds were a retiring allowance and were paid “in respect to [the Claimant’s] termination from employment.”

[164] There was no dispute that the Settlement funds were paid as a “retiring allowance.” However, the General Division relied on the letter to find that the retirement allowance was paid by reason of separation. It said that it was “compensation for loss of employment.”

[165] The General Division stated that there was no evidence that the Settlement funds were paid for any other reason, and the Claimant did not point to any evidence that it missed. The Claimant’s argument has always been focused on his belief that his retiring allowance could not be earnings because the CRA said it was not insurable. He had not suggested that the Settlement funds had nothing to do with his separation from his employment.

[166] The Claimant may not have reviewed and approved the lawyer’s letter, but the General Division was still entitled to give it some weight. It is not the role of the Appeal Division to interfere with how the General Division weighs or evaluated the evidence.⁴³

– **Treatment of \$117.00 overpayment, and overpayment generally**

[167] At one point, the Claimant stated that the General Division had not been aware of the “overpayment” issue.⁴⁴ I appreciate that the amount of the overpayment is what the Claimant is ultimately concerned about. However, the overpayment amount is just a calculation that proceeds from the other entitlement decisions on the file. The *amount* of the overpayment itself is not normally an independent issue before the General Division.

[168] Once the General Division or the Appeal Division makes a decision related to entitlement issues that necessarily affects the calculation of the overpayment, the Commission would ordinarily recalculate the overpayment as it implements the appeal decision.

⁴³ See, for example: *Tracey v Canada (Attorney General)*, 2015 FC 1300; *Hideq v Canada (Attorney General)*, 2017 FC 439.

⁴⁴ See AD1-28, point 4.

[169] The Claimant also argued that the General Division misunderstood the evidence when it accepted that the Claimant had been overpaid \$117.00 on top of the \$6,627.00 overpayment.⁴⁵ The total of \$6,744.00 is equivalent to 12 weeks of benefits. This suggests that the Commission sought to recover 12 full weeks of benefits that it paid the Claimant because it did not believe the Claimant was entitled to them.

[170] The following are my calculations to determine the correct allocation:

- a) The total amount to be allocated from the week in which the Claimant was separated from employment is \$30,250.06. This was derived as follows:
- \$27,384.15 (the gross Settlement funds) **plus** \$1,500.00 (contribution for legal fees) **minus** \$8,147.72 (total legal fees invoiced) **plus** \$9,513.63 (combined vacation pay and “pay-in-lieu”) **equals** \$30,250.06.
- b) The Commission considered the Claimants usual weekly earnings to be \$1,790.00. This was not disputed. The Commission allocated \$1,164.00 to the last week he worked, so this portion did not affect his benefits.

The balance of \$29,086.06 (which is **equal to** \$30,250.06 **minus** \$1,164.00) was allocated to weeks of his benefit period at \$1,760.00 per week.

- c) At \$1,790.00 per week, \$29,086.06 would be allocated over 17 weeks:
- \$29,086.06 **divided by** \$1,790.00 **equals** 16 weeks, **with a remainder** of \$446.06 for the 17th week.
 - Because of the allocation, the Claimant should not have received any benefits until his 17th week, when he would have been entitled to a partial benefit (which would be his regular benefit rate of \$562.00 **minus** \$446.06 which **equals** \$115.94).⁴⁶

⁴⁵ There are two Notices of Debt: The first is for 6,744.00 and is dated January 4, 2020 (GD3-41). The second is for \$117.00 and is said to be from incorrect calculations (GD3-42). It was sent January 11, 2020 (GD3-43).

⁴⁶ The Commission has rounded this off to \$117.00 in its calculations.

- The 17th week is the week of August 26 to August 31, 2019. However, there would also have been a one-week waiting period in which he could not be paid benefits.
- d) If the Commission already allocated \$8,349.00 for vacation pay and pay-in-lieu. This cancels out five weeks of benefits.
- (\$8,349.00 **divided** by the usual rate of pay of \$1,790.00 **equals** to 4.664 i.e., 4 weeks with a remainder of 0.664 weeks.
 - The remainder of 0.644 **times** regular rate of \$1,790.00 equal to = \$1,189.00 which is in excess of the usual rate of pay so it cancels out the benefit for a 5th week.)

Let's look at the first 18 weeks of the claim:

- I. If nothing had been allocated, the Claimant would have received nothing in the first week, 16 weeks of benefits at \$562.00, and one week at \$117.00 in week 18.
- II. But because the vacation pay and pay-in-lieu were allocated, his 18-week period was comprised of five weeks of allocation, one-week waiting period, and 12 full weeks of benefits, or \$6,744.00.
- III. Once the final allocation was done, the first 18 weeks of his benefit period should have looked like this. An allocation period of 16 weeks (no payment made), a week of waiting period, and the Claimant should have received a partial payment of \$117.00 in week 18.
- IV. His overpayment is the difference between II and III above. He received \$6,744.00 and he should only have received \$117.00. That means that the overpayment should be \$6,627.00.

[171] There is insufficient information in the General Division record to determine whether the overpayment was calculated correctly in all respects, and particularly with regard to the treatment of the \$117.00 overpayment.

[172] I cannot tell from the file if he was actually paid \$117.00 for the one partial payment week (which I have assumed to be week 18), as opposed to the full \$562.00. **But if he was, then he should have only been assessed an overpayment of \$6,627.00, and not the additional \$117.00.**⁴⁷

[173] If the Commission paid the Claimant his full benefit of \$562.00 in week 18, then the Claimant would likely owe the Commission \$7,072.00, which is \$332.00 more than the Commission said he owed (as the total of the two notices of debt). If he was not paid anything at all in week 18, then his overpayment should only be \$6,510.00 in total.

Remedy

[174] I have the power to send the matter back to the General Division for reconsideration, and I also have the power to make the decision that the General Division should have made.⁴⁸ However, I can only make the decision that the General Division should have made if the record is complete.

[175] I am going to substitute my decision on some issues. My decision on these issues is a final decision not reviewable by the General Division.

[176] I am going to refer one issue back to the General Division for reconsideration.

My decision

– Entitlement weeks

[177] There is no basis for me to interfere in the General Division's decision on the number of entitlement weeks. The Claimant did not dispute that he was entitled to 38 weeks of benefits.

[178] I am dismissing the appeal on this issue.

⁴⁷ Assuming this was not made up elsewhere in his claim.

⁴⁸ See sections 59(1) and 64 of the DESDA.

– **Earnings and allocation**

[179] I have found no error in how the General Division decided that the Settlement funds was a retiring allowance, and that the retiring allowance was earnings within the meaning of section 35 of the Regulations; allocable according to section 36(9) because it was paid in consequence of the Claimant's separation from employment.

[180] I am dismissing the appeal on this issue.

– **Benefit period extension**

[181] I have found that the General Division made an error by providing inadequate reasons for why it agreed with the Commission that the Claimant was entitled to a 16-week extension.

[182] I have found that the portion of the Claimant's severance that may be allocated and applied to weeks of benefits, would fully offset 16 weeks of benefits, and offset all but \$117.00 of a seventeenth week. (My calculations of the weeks are set out above in the "Overpayment" section.) This means that the Claimant lost entitlement to benefits (entirely or partially) in 17 weeks: Depending on circumstances, he could—potentially—have required a 17-week extension in order to claim all of those benefits.

[183] The Claimant was entitled to a 17-week extension.

[184] I understand that the Claimant was not interested in obtaining a longer extension. Rather, he maintained that he should not have required an extension at all, based on his argument that the Settlement funds were not earnings and should not be allocated. However, I have found that the Settlement funds were earnings and that they needed to be allocated from the week of separation (together with the Claimant's vacation pay and pay-in-lieu).

[185] This means that the extension of his benefit period was to the Claimant's benefit. Therefore, I am dismissing his appeal on this issue.

– **Beginning of allocation**

[186] I have sufficient information to make the decision the General Division should have made on the question of when the allocation should begin. I am substituting my decision as follows:

[187] I find that the allocation must begin as of April 29, 2019, which is the Sunday of the week of separation. After allocating earnings of \$1,164.00 to the week of April 29, 2019, only the balance of \$29,086.06 is to be allocated and applied to reduce benefits otherwise payable.

[188] In its submissions to the Appeal Division, the Commission states that it began the allocation from April 29, 2019, regardless of what it said in its earlier representations to the General Division. It says that it only “applied” the balance (after deducting the amount that it had to allocate to the Claimant’s final week of employment) against weeks of benefits in the benefit period. My calculations are consistent with the Commission’s figures in this regard.

– **Overpayment**

[189] However, **I am returning the matter to the General Division** to determine whether the Commission correctly assessed the overpayment, and the additional \$117.00, represented by the second Notice of Debt, in particular.

[190] Based on how the General Division treated the overpayment, I am concerned that the Commission would not be able revisit the amount of the overpayment while the General Division decision stands.

[191] I appreciate that the Commission has said that it extended the benefit period by an extra week and that this meant the Claimant came out ahead anyway. It may be that the Commission paid the Claimant an “extra week” of benefits as it believes, because the Claimant had paid the \$117.00 debt, and it extended the benefit period an extra week.

[192] However, the record is confusing and incomplete when it comes to the treatment of the overpayment. I fail to see how the amount of the overpayment is related to whether the Claimant's benefit period was mistakenly extended an extra week. The Claimant's 38 weeks of benefits appear to have been paid well in advance of the end of the extended benefit period.

[193] Having said that, I have found that the allocation should have begun on April 29, 2019, and I have found that the Claimant's extension should have been 17 weeks. It is possible that these findings may affect how the General Division calculates the overpayment.

Conclusion

[194] The appeal is allowed in part.

[195] Like the General Division, I have decided to dismiss the issues of weeks of entitlement, and of earnings and allocation of the Settlement funds. The General Division did not make an error in how it evaluated these issues.

[196] I have also made the decision that the earnings should be allocated beginning with the week of April 29, 2019 (and be allocated and applied against benefits beginning with the week of May 5, 2019). I have decided that the Claimant's benefit period should have been extended by 17 weeks.

[197] I am referring the matter back to the General Division to consider whether the Commission correctly calculated the overpayment.

Stephen Bergen
Member, Appeal Division