



Citation: *EB v Canada Employment Insurance Commission*, 2024 SST 960

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: E. B.

Respondent: Canada Employment Insurance Commission
Representative: Jonathan Dent

Decision under appeal: General Division decision dated March 11, 2024
(GE-24-252)

Tribunal member: Elizabeth Usprich

Type of hearing: In Writing

Decision date: August 13, 2024

File number: AD-24-243

Decision

[1] The appeal is dismissed.

[2] The General Division made an error of law. I have given the decision the General Division should have given. The outcome is the same. The Claimant had earnings that had to be allocated.

Overview

[3] E. B. is the Claimant. The Claimant's employer went bankrupt and closed. The Applicant received money from the Wage Earner Protection Program (WEPP). The money received was considered earnings and the Canada Employment Insurance Commission (Commission) allocated the earnings which prevented Employment Insurance (EI) benefits from being paid for certain weeks.

[4] The Claimant appealed to the Social Security Tribunal (Tribunal) General Division. The General Division agreed with the Commission.

[5] The Claimant says the General Division made an error of jurisdiction. She says the WEPP she received shouldn't be considered earnings. She says the WEPP should be considered like insurance money because her employer failed to pay her. She feels the EI legislation is biased.

[6] The General Division made an error of law. It decided the WEPP was income arising from employment. But it didn't give adequate reasons as to why this was the case. There is also binding case law that wasn't considered.

[7] I have given the decision the General Division should have given. After applying the case law, I have reached the same conclusion. The WEPP money received is earnings and is required to be allocated. This means the Claimant isn't entitled to EI benefits during that time.

Issues

[8] The issues in this appeal are:

- a) Did the General Division make an error of law by failing to provide adequate reasons when it concluded money the Claimant received from the WEPP was income arising from employment?
- b) If so, how should the error be fixed?

Analysis

[9] I can intervene (step in) only if the General Division made an error. I can only consider certain errors.¹ Briefly, the errors I can consider are about whether the General Division:

- acted unfairly in some way
- dealt with an issue it didn't have the power to deal with, or didn't deal with an issue it was supposed to deal with
- made an error of law, such as not giving adequate reasons to support its decision
- based its decision on an important error about the facts of the case.

[10] The Claimant argues the General Division made an error of jurisdiction. She says the funds she received from WEPP should be considered like insurance money.

[11] The characterization of the WEPP funds are better considered as an error of law. That is because the General Division made a decision about this issue. An error of jurisdiction arises when the General Division didn't decide an issue it should have, or decided an issue it shouldn't have.

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

[12] The General Division had to adequately explain if the WEPP funds were earnings under the *Employment Insurance (EI) Act*. If so, it then had to explain how those earnings had to be allocated.

The General Division made an error of law by failing to provide adequate reasons about why the WEPP funds were earnings arising from employment

[13] The General Division decided the Claimant had earnings because it was income arising from her employment.² The General Division said the Claimant received money from her employer.³ But this wasn't so. The Claimant received money from the government department that administers WEPP.

[14] This means there is an error of law and an error of fact from the same point. There is an error of fact because the General Division erroneously (wrongly) said it was the Claimant's employer that gave her the money.

[15] This became an error of law because the General Division had to explain how the government department met the definition in section 35 of the EI Regulations. Specifically, the General Division had to explain how the money received by the Claimant was from an employer **or any other person**.

[16] I find by not giving full and adequate reasons there is an error of law.

Remedy

[17] Since I have found an error, there are two main ways I can remedy (fix) it. I can make the decision the General Division should have made. I can also send the case back to the General Division if I don't feel the hearing was fair or there isn't enough information to make a decision.⁴

² See the General Division decision at paragraph 21.

³ See the General Division decision at paragraph 18.

⁴ Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

[18] Neither party has suggested that the hearing wasn't fair or that there isn't enough information for me to make a decision.⁵ I find this means I can give the decision that the General Division should have given.

The Claimant received earnings as defined by the Employment Insurance Regulations

[19] The Claimant doesn't dispute that she received money through the Government under the WEPP program.⁶ The Claimant confirmed she sent the Commission the letter she received about these amounts.⁷

[20] I have to first decide if the money the Claimant received was earnings as defined by the EI Act.⁸

[21] It isn't disputed that the Claimant's employer went bankrupt. The Claimant received a total of \$8,278.83 through government department that oversees the WEPP program.

[22] The Claimant says this money is like insurance and should not count as earnings. The Commission says the government department is included in the definition of income under the EI Regulations.

[23] The courts have broadly interpreted "earnings" in this context. Section 35 says, "income means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy."⁹ This means if there is any money a claimant gets from an employer or any other person it is considered income under the EI Regulations.

⁵ The General Division gave the Claimant full opportunity to present her information. The General Division also specifically asked if the Claimant had anything else she wanted to say. Listen to the General Division hearing recording at 00:24:46 and 00:26:39.

⁶ See GD3-33 and GD3-36 and listen to the General Division hearing recording at 00:22:30.

⁷ See GD3-34.

⁸ See section 35 of the *Employment Insurance Regulations* (EI Regulations).

⁹ See section 35(1) of the EI Regulations.

[24] The Claimant received money so that isn't at issue. The money wasn't from her employer because her employer was bankrupt. So, I have to decide if the government department is included in the term "any other person".

[25] This very issue was decided by the Federal Court of Appeal.¹⁰ The Court's decision was about the WEPP. It was considering if "any other person" included the government department that administers this program.¹¹ The Court found that money paid from the WEPP couldn't be characterized as a "relief grant". It said, "Accordingly, the payments received under the Program must be deemed to constitute non-exempt earnings." This means money received through the WEPP program is income from "any other person". It also means it is earnings under the EI Regulations.

Allocating the earnings received

[26] Once money is determined to be earnings, it then must be allocated.¹²

– Earnings received as wages

[27] The Claimant received \$8,278.83 through the WEPP. The breakdown of those earnings shows \$2,841.53 were for wages. This money is still allocated, but it is allocated back to the time the Claimant performed the services.¹³ The services were performed before the employer went bankrupt and before the Claimant was receiving EI benefits. This means there is no overpayment as a result of this allocation. So, there is nothing the Claimant has to pay back to EI for those earnings.

¹⁰ See *Canada (Attorney General) v King*, [1996] 2 F.C. 940 (Federal Court of Appeal).

¹¹ This decision was about the *Unemployment Insurance Regulations*, C.R.C., c. 1576 and section 57 of those Regulations. Section 57(1) says, "income' means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person". The relevant portion of the wording is exactly the same as section 35(1) of the current EI Regulations.

¹² See section 36 of the EI Regulations.

¹³ See section 36(4) of the EI Regulations.

– **Earnings received for vacation, termination and severance pay**

[28] The remaining \$5,437.30 was a combination of vacation, termination, and severance pay.¹⁴ The regulations are clear that these earnings are allocated to the week when you are separated from your job.¹⁵

[29] Even though the Claimant received the money months after she separated from her employer, it is allocated back to when she separated.

[30] The Claimant said the last day she worked was August 14, 2023. This was confirmed by the Claimant's Record of Employment.¹⁶ For EI purposes, this means the first week of separation was the week of August 13, 2023.

[31] Neither party has taken issue with the General Division's math.¹⁷ As a result, I am adopting this portion of the General Division's decision.¹⁸

[32] So, the \$8,278.83 the Claimant received are earnings. Part of those earnings are wages and are allocated back to when the Claimant was working for her employer. The remaining \$5,437.30¹⁹ is allocated to the week when the Claimant's separation from her employer occurred. The earnings are allocated at \$1,421.00 per week.

[33] This means the overpayment, and Notice of Debt, the Commission calculated are correct.

¹⁴ The Claimant received \$1,947.21 for vacation pay; \$2,841.53 for termination pay; and \$648.56 for severance pay.

¹⁵ See section 36(9) of the EI Regulations.

¹⁶ See GD3-15 and GD3-35.

¹⁷ The General Division's math is the same as what the Commission wrote in their representations at GD4-5.

¹⁸ See the General Division decision at paragraph 30.

¹⁹ This amount is rounded down to \$5,437.00.

Conclusion

[34] The appeal is dismissed. I have found the General Division made an error of law.

[35] But the outcome remains the same. The Claimant had earnings that had to be allocated.

Elizabeth Usprich
Member, Appeal Division