



Citation: *FM v Canada Employment Insurance Commission*, 2024 SST 971

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: F. M.

Respondent: Canada Employment Insurance Commission
Representative: Julie Duggan

Decision under appeal: General Division decision dated June 14, 2024
(GE-24-1634)

Tribunal member: Elizabeth Usprich

Type of hearing: Teleconference

Hearing date: August 13, 2024

Hearing participants: Appellant
Respondent's representative

Decision date: August 14, 2024

File number: AD-24-411

Decision

[1] The appeal is dismissed.

[2] The General Division made an error of jurisdiction. I have given the decision the General Division should have given.

[3] The Canada Employment Insurance Commission (Commission) used its discretion judicially to reconsider the claim for benefits. This means the outcome is the same for the Claimant and the appeal is dismissed.

Overview

[4] F. M. is the Claimant. He applied for Employment Insurance (EI) benefits and established a claim for benefits on October 20, 2022.

[5] The Claimant says near the end of his EI benefit period he received some vacation pay from his employer. He contacted the Commission to let them know.¹

[6] The Commission contacted the Claimant's employer and confirmed the employer had issued an incorrect Record of Employment.² The employer failed to include the vacation pay.

[7] The Commission reconsidered the claim for benefits and decided the Claimant had to pay \$187.00. The Claimant said it wasn't fair he had to repay this money, when it was his employer that made the mistake.³ The Commission didn't change its mind.

[8] The Claimant appealed to the Social Security Tribunal (Tribunal) General Division. The General Division looked at why the Claimant was paid the money. It found the money paid was earnings and decided the Commission had correctly allocated it. This meant the Claimant had to pay back his overpayment of EI benefits.

¹ See GD3-20.

² See GD3-22.

³ See GD3-33.

[9] The Claimant appealed this decision because he didn't think it was fair. He felt his employer made the mistake of paying him late, but he had the penalty.

[10] The General Division made an error of jurisdiction. It failed to do an analysis about whether the Commission exercised its discretion judicially when it reconsidered the Claimant's benefits.

[11] The parties agreed on the outcome and remedy. I have given the decision the General Division should have given.

[12] The Commission judicially reconsidered the claim for benefits. The money the Claimant received was earnings and it was properly allocated. This means the appeal is dismissed because there is no change in the outcome.

The parties agree on the outcome of the appeal

I accept the proposed outcome

[13] At the hearing, the parties agreed the General Division made an error of jurisdiction. The General Division didn't do an analysis about whether the Commission judicially exercised its discretion under section 52 of the *Employment Insurance Act* (EI Act). This is the section that gives the Commission the power to reconsider a claim.

[14] I can intervene (step in) only if the General Division made an error. I can only consider certain errors.⁴ An error of jurisdiction is an error I can consider.⁵

[15] The Commission wrote in its representations to the General Division that it had the authority under section 52 to reconsider the claim.⁶ The Commission is correct that this section of the EI Act does give it the authority to review a claim. But the Commission has to exercise the discretion to review judicially. When the Commission

⁴ See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

⁵ An error of jurisdiction occurs when the General Division didn't decide something it should have, or decided something it shouldn't have.

⁶ See GD4-4.

has discretion to review something, as is the case here, the Tribunal can only change the decision if the Commission didn't exercise its power judicially.⁷

[16] The Federal Court of Appeal has laid out a legal test that is binding on the Tribunal. That means the legal test must be applied. It says a discretionary power is not exercised judicially if it can be shown that the decision maker: acted in bad faith; acted for an improper purpose or motive; considered an irrelevant factor or ignored a relevant factor; or acted in a discriminatory manner.⁸

[17] The General Division didn't do an analysis about whether the Commission acted judicially. This means the General Division failed to make a decision it should have made.

Remedy

[18] Since I have found an error, there are two main ways I can remedy (fix) them. 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.⁹

[19] The parties agreed there is no new evidence that either of them would present. This means the record is complete. This still allows me to hear any arguments the parties have.

[20] The Commission put forth its arguments. It said it acted judicially because it didn't act in bad faith or for any improper purpose or motive. It didn't consider any irrelevant fact or ignore anything relevant. Finally, it didn't act in a discriminatory manner.

[21] The Commission says it got new information from the Claimant after EI benefits had been paid. The Claimant was paid vacation pay late by his employer. It

⁷ See *Attorney General (Canada) v Knowler*, 1996 CanLII 7314 (FCA).

⁸ See *Attorney General (Canada) v Purcell*, [1996] 1 FCR 644.

⁹ Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

acknowledges this wasn't the Claimant's fault, but he still earned the vacation pay and it had to be allocated.

[22] The Claimant hoped his employer could have been responsible for the mistake. Once the Claimant understood the process, he had no arguments against what the Commission had done. He agreed the Commission used its discretion judicially. He didn't dispute the money he received was earnings and that it had to be allocated.

[23] The Claimant understood this meant his appeal would be dismissed.

Conclusion

[24] The appeal is dismissed.

[25] The General Division made an error of jurisdiction. I have given the decision the General Division should have given.

[26] The Commission used its discretion judicially to reconsider the claim for benefits. The money the Claimant received was earnings and was allocated properly. This means the outcome is the same for the Claimant and the appeal is dismissed.

Elizabeth Usprich
Member, Appeal Division