



Citation: *MC v Canada Employment Insurance Commission*, 2024 SST 745

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	M. C.
Representative:	Kristopher Stone
Respondent:	Canada Employment Insurance Commission
Representative:	Jonathan Dent

Decision under appeal:	General Division decision dated November 10, 2023 (GE-23-2354)
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Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	May 13, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	June 27, 2024
File number:	AD-24-124

Decision

[1] The appeal is allowed.

[2] The General Division made an error of law because it didn't give adequate reasons for its decision. The General Division also didn't provide a fair process. This means the case must go back to the General Division for reconsideration.

Overview

[3] M. C. is the Claimant. He was let go from his employer. He received some funds from his employer as a settlement.

[4] The parties agreed the funds meet the definition of earnings in the Employment Insurance (EI) Regulations.¹ The parties disagree on how those earnings should be allocated under section 36 of the EI Regulations. At issue is whether the earnings he received was a retiring allowance or whether it was for overtime he already worked for his employer.²

[5] The Canada Employment Insurance Commission (Commission) has maintained its position that the earnings were paid because of the Claimant's separation from his employer.³ As a result, the earnings should be allocated starting the week of his separation from employment. The Commission says the earnings represent a retiring allowance as indicated in the Minutes of Settlement (Minutes) between the Claimant and his employer.⁴

[6] The Claimant says the true intent of the Minutes has to be considered. He says the earnings were paid for hours he already worked that were overtime hours. So, the

¹ See section 35 of the *Employment Insurance Regulations* (EI Regulations).

² See GD3-20 the Minutes of Settlement.

³ See section 36(9) of the EI Regulations. See also the Commission's notice of decision dated June 2, 2023 at GD3-28. The Commission's reconsideration decision dated August 1, 2023 at GD3-55. The Commission's representations at GD4 and AD3.

⁴ See Minutes of Settlement (Settlement) dated February 22, 2023 at GD3-21. The Commission says this should be allocated under section 36(9) of the EI Regulations.

Claimant says the earnings should be allocated back to when his services were performed.⁵

[7] The parties agreed, and I accept, there was an error in the General Division decision. The General Division didn't give an adequate explanation for how it weighed the evidence before it. It didn't explain why it preferred the Minutes over testimony given.

[8] The General Division also didn't provide the Claimant with a fair process. The Claimant didn't give any testimony, the General Division accepted evidence through his Legal Representative. Additionally, the General Division told the Claimant and his Legal Representative that he didn't need to hear any more. He told them they should be able to tell which way he was leaning. The Claimant's Legal Representative says they stopped making submissions due to the Member's comments.⁶

[9] Although the Claimant's Legal Representative wanted me to substitute my own decision, I find I can't waive a natural justice issue. I find this case has to go back to the General Division.

Issues

[10] The issues in this appeal are:

- a) Did the General Division make an error in law when it failed to provide adequate reasons about how it weighed the evidence at the hearing relating to the allocation of earnings and what subsection of the Regulations it was using?
- b) Did the General Division provide an unfair process when it didn't take testimony from the Claimant and gave an impression it had decided the matter in favour of the Claimant?

⁵ See section 36(4) of the EI Regulations.

⁶ See AD1-3.

c) If so, how should the errors be fixed?

Analysis

[11] I can intervene (step in) only if the General Division made an error. I can only consider certain errors.⁷ 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 considering an argument or not giving adequate reasons to support its decision
- based its decision on an important error about the facts of the case

[12] In this case, the Claimant says the General Division made several errors. He says he didn't fully testify at the hearing because he thought the General Division accepted that the earnings were for overtime.

[13] The Claimant argues the General Division didn't provide adequate reasons when it decided to ignore evidence and testimony about the nature of the earnings.

The General Division made an error of law because it didn't provide adequate reasons about how it weighed the evidence relating to the allocation of earnings and what subsection of the Regulations was used

[14] The parties agree the funds the Claimant received from his employer are earnings.⁸ The dispute is about the nature of the earnings and how they should be allocated under section 36 of the EI Regulations.

⁷ See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

⁸ See section 35 of the EI Regulations.

[15] The General Division decided to accept the strict wording of the Minutes. It said the earnings the Claimant received was a retiring allowance.⁹

[16] The Claimant argues the wording in the Minutes had a drafting error. The Claimant says the sole reason the term “retiring allowance” was used was for tax purposes.¹⁰

[17] The Claimant argues the General Division was required to do a fulsome analysis about what the intent of the payment was. The General Division doesn’t explain why it preferred the Minutes, over the testimony of the expert witness and the Claimant and his Legal Representative.

[18] The Commission agrees the intent of the payment received by the Claimant is what is required to be decided.¹¹ The Commission argues there is a brief explanation which shows the General Division considered the expert witness’s testimony.¹²

[19] When there is a material finding that goes to the root of the decision, the General Division must explain why it prefers that evidence.¹³ The Minutes versus the expert witness’s testimony needed to be weighed. There needed to be an explanation about why one was preferred over the other. The General Division didn’t do that here.

[20] The General Division stated conclusions, but didn’t say how it arrived at those conclusions. The General Division didn’t grapple with the evidence before it. This is an error of law. The General Division didn’t give adequate reasons.

[21] Additionally, the General Division made a second error, related to the allocation provision it applied. The General Division didn’t make clear which subsection of section 36 it applied for the allocation. Paragraph 21 of the decision seems to be quoting section 36(9). But paragraph 23 of the decision says the earnings have to be allocated

⁹ See the General Division decision at paragraph 11.

¹⁰ See the General Division decision at paragraph 14. Also, listen to the General Division hearing recording at 00:25:59 and 00:36:10.

¹¹ See *Budhai v Canada (Attorney General)*, 2002 FCA 298. The parties agreed that this is the leading case from the Federal Court of Appeal on this issue.

¹² See the General Division decision at paragraphs 12 to 19.

¹³ See *Bellefleur v Canada (Attorney General)*, 2008 FCA 13 at paragraph 3.

under section 36(12).¹⁴ This is also an error because section 36(12) is about specific types of payments related to sickness and providing care and isn't at issue here.

The General Division didn't provide a fair process to the Claimant because it didn't take testimony from him and gave the Claimant the impression he had decided the case in his favour

[22] The General Division gave the impression that the Claimant and his Legal Representative had swayed his thinking in their favour. Additionally, the Claimant didn't testify. The Claimant's Legal Representative was the one who presented unsworn evidence. The Claimant subsequently just agreed that he adopted what his Legal Representative had told the General Division.¹⁵

[23] The General Division told the Claimant he could save them from a lot of trouble. The General Division said although it might have seemed like things had been decided based on what was said during the preamble, he was now second guessing his original thoughts. The General Division then stated that what the Claimant, and his representative, told him about his employment contract and the hours the Claimant worked makes sense. It looks like the money the employer gave the Claimant was for overtime hours.¹⁶

[24] The General Division member then also says, "you have a pretty good idea now of where I am leaning".¹⁷ The Claimant, nor his Legal Representative, made any further submissions after those statements. The Claimant's Legal Representative believed the General Division had accepted their position and was finding in their favour.¹⁸

[25] I find the way the hearing was conducted didn't amount to a fair process. The Claimant didn't provide testimony. If the Claimant's Legal Representative was going to

¹⁴ The parties agreed at the Appeal Division hearing that neither of them were arguing that section 36(12) applies in this situation.

¹⁵ Listen to the General Division hearing recording at 00:39:52.

¹⁶ Listen to the General Division hearing recording at 00:40:22.

¹⁷ Listen to the General Division hearing recording at 00:46:52.

¹⁸ In the Claimant's Application to the Appeal Division for leave to appeal it was plead that "before the Appellant completed his submissions the Member indicated he had concluded the money remitted was in fact for overtime pay previously accrued and would be ruling in favour of said Appellant, therefore prompting the Appellant to cease making submissions".

give testimony as a witness, then the General Division should have clarified this dual role. If the Claimant's Legal Representative was testifying then he should have been affirmed prior to doing so.

[26] Additionally, the Claimant and his Legal Representative stopped making submissions because they thought the case had already been decided in their favour.

Remedy

[27] The Claimant's Legal Representative said even though natural justice was advanced as an error, he wanted the Appeal Division to substitute its decision.¹⁹ Yet, I find the Claimant's Legal Representative can't waive a natural justice error.

[28] I informed the Claimant and his Legal Representative that if there is a natural justice issue, a typical remedy would be to send it back to the General Division. The Commission believed the record was complete.

[29] I find the General Division did give the Claimant the impression that nothing more needed to be said. I don't find a party, or a representative, can waive a natural justice issue. I find this means that I must send the case back to the General Division for reconsideration.²⁰

Conclusion

[30] The appeal is allowed. I have found the General Division made errors in its decision.

[31] Due to the natural justice errors, I find the case must go back to the General Division for reconsideration.

Elizabeth Usprich
Member, Appeal Division

¹⁹ Listen to the Appeal Division hearing recording at 01:20:30.

²⁰ Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.