



Citation: *Canada Employment Insurance Commission v TL*, 2024 SST 1488

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: Canada Employment Insurance Commission
Representative: Jessica Murdoch

Respondent: T. L.

Decision under appeal: General Division decision dated November 4, 2024
(GE-24-3215)

Tribunal member: Stephen Bergen

Decision date: November 29, 2024

File number: AD-24-787

Decision

[1] I am refusing leave to appeal. The appeal will not proceed.

Overview

[2] The Applicant is the Canada Employment Insurance Commission (Commission). T. L. is the Respondent. I will call him the Claimant because the Commission's application is about his claim for Employment Insurance (EI) benefits.

[3] The Claimant left his job on October 3, 2023, and applied for EI benefits the same day. The Commission established a benefit period and began paying him benefits beginning with the week of October 8, 2023.

[4] When the Commission learned that the employer had continued to pay the Claimant until January 10, 2024, it decided that the Claimant had not had an interruption of earnings. On April 26, 2024, it cancelled his claim and demanded that the Claimant repay the benefits he had received. The Claimant asked the Commission to reconsider but it would not change its decision.

[5] The Claimant appealed to the General Division, which determined that the money the Claimant's employer paid him for the period between October 3, 2023, and January 10, 2024, was paid to him because he was laid off from his employment. It found that he had experienced an interruption of earnings, because this kind of payment cannot be considered for the purpose of an interruption of earnings.

[6] The Commission is asking for permission to appeal the General Division's decision.

[7] I am refusing permission to appeal. The Commission has not made out an arguable case that the General division acted unfairly, or outside of its jurisdiction, or that it made an error of fact.

Issues

[8] The issues are as follows:

- a) Is there an arguable case that the General Division acted unfairly by deciding on the nature of earnings, without notice to the Commission?
- b) Is there an arguable case that the General Division exceeded its jurisdiction by deciding whether the Claimant's earnings were insurable?
- c) Is there an arguable case that the General Division made an error of fact when it found that the earnings were severance despite evidence that they were paid as a "salary continuance"?

I am not giving the Commission permission to appeal

Procedural fairness error

[9] The General Division decided that the Claimant had an interruption of earnings on October 3, 2023. The Commission acknowledges that this was the issue before the General Division, and it says that it does not dispute the General Division's decision on this issue. Furthermore, it does not appear to take exception to the General Division's stated refusal to consider the allocation issue.

[10] However, the Commission argues that the General Division made an error in how it determined that there had been an interruption of earnings. According to the Commission, the Claimant's "earnings" was not an issue under appeal. It says that the General Division should not have reviewed the nature of the payments received by the Claimant between October 3, 2023, and January 10, 2024, and should not have characterized these earnings as "severance."

[11] The Commission argues that the process was unfair because the General Division did not let it know that it was going to consider the nature of the Claimant's earnings. In the Commission's view, it should have been given an opportunity to make arguments and provide evidence on how the earnings should be categorized.

[12] The Commission has not made out an arguable case that the General Division acted in a way that was procedurally unfair.

[13] The Commission originally decided that the Claimant had no interruption of earnings based on evidence that he continued to receive earnings from the employer. Now that the General Division has found that the Claimant did have an interruption of earnings on October 3, 2023, the Commission says that it does not dispute its decision on this issue. Instead, it takes issue with what it believes to be a decision on another issue. It is concerned with how the General Division considered the nature of the Claimant's earnings.

[14] But the General Division could not have decided that the Claimant did not have an interruption of earnings without considering why the earnings were paid. There was no dispute that the Claimant continued to receive payments from his employer from October 3 until January 10, 2024. So, the General Division could only decide that there had been no interruption in earnings if it had authority to disregard those earnings.

[15] The General Division found that authority in section 35(6) of the *Employment Insurance Regulations* (Regulations), which allows that the earnings referred to in section 36(9) of the Regulations are not considered for the purpose of determining a claimant's interruption of earnings under section 14(1) of the Regulations. The earnings referred to in section 36(9) are earnings paid by reason of a claimant's lay off or separation from employment.

[16] The Commission is sophisticated to the issues, the law, and the process. It will have known that earnings paid by reason of lay off or separation are not considered earnings for the limited purpose of determining whether an interruption of earnings has occurred. It may also be presumed to know that the General Division is authorized by law to decide any question of law or fact necessary for the disposition of the appeal.¹

¹ See section 64(1) of the DESDA.

[17] The General Division could not dispose of the appeal without considering the question of whether the earnings were paid by reason of the Claimant's lay off or separation.

[18] Furthermore, the Commission should not have been surprised that the General Division would consider the reason or nature of the earnings to be relevant. The Commission had already investigated the nature of the earnings with the employer before making its original decision. After its investigation, it determined that the employer had paid the Claimant a "salary continuance" until January 10, 2024. Even the Commission's submissions to the General Division acknowledged that—though it may not have made a decision on allocation of earnings—it had been obliged to decide whether the Claimant's earnings were "regular earnings" or "a form of separation monies," (just as the General Division was obliged to do).²

[19] There is no arguable case that the Commission was not given a fair opportunity to provide evidence or argument, or to be heard generally.

Error of Jurisdiction

[20] The Commission argues that the General Division exceeded its jurisdiction because the General Division determined whether insurable hours on the Record of Employment (ROE) were linked to earnings. It said that only the Canada Revenue Agency (CRA) has the authority to do this.

[21] There is no arguable case that the General Division exceeded its jurisdiction by making a decision only the CRA could make.

[22] The General Division did not decide, or need to decide, any of the questions reserved to the CRA, including whether the Claimant's employment, earnings, or hours were insurable.³ Whether the earnings received by the Claimant were insurable is incidental. It has nothing to do with the General Division's decision.

² See GD4-4.

³ See section 90 of the EI Act.

[23] The General Division needed to decide whether the Claimant had experienced an interruption of earnings despite the fact that he continued to receive payments from the employer. To do so, it applied section 35(6) of the Regulations which excludes earnings referred to in section 36(9).

[24] I recognize that the purpose of section 36(9) is to describe how the earnings described in that section should be allocated, and I understand that the General Division held that the allocation question was outside of its jurisdiction.

[25] But, once again, the General Division did not decide, or need to decide, how the Claimant's earnings should be allocated. The Claimant's decision that the Claimant's earnings were those referred to in section 36(9), is an application of section 35(6). The General Division did not **apply** section 36(9) in order to allocate the Claimant's earnings.

[26] Section 35(6) states that certain earnings must not be taken into consideration for the purpose of determining if there has been an interruption of earnings under section 14. According to section 35(6), the Commission should not take into account the "earnings **referred** to in section 36(9)" for this purpose. The earnings referred to in section 36(9) are "earnings paid or payable to a claimant by reason of a lay-off or separation from employment." So, earnings paid for that reason are not to be considered. Section 35(6) was not drafted to say that the Commission should not take into account "those earnings found to be allocable in accordance with section 36(9)."

[27] The General Division had to consider whether the earnings were paid by reason of lay off or separation for the purpose of deciding if the Claimant had an interruption of earnings. It could do so without having to decide how they should be allocated.

[28] There is no arguable case that the General Division exceeded its jurisdiction. The General Division did not decide whether the earnings paid to the Claimant were insurable, and it did not decide how his earnings should be allocated.

Error of fact

[29] For the General Division to make an important error of fact, it must base its decision on a finding of fact that overlooks or misunderstands relevant evidence, or on a finding that does not follow rationally from the evidence.⁴

[30] The Commission argues that the General Division's finding that the earnings were "severance" is perverse, when there was clear evidence that they were a "salary continuance."

[31] For this to be an error of fact, it would have had to be one on which the General Division decision was based.

[32] However, the Commission has not made out an arguable case that the distinction between "salary continuance" and "severance" is relevant to whether the Claimant had an interruption of earnings.

[33] I suspect there is some difference between payments that are structured or characterized as "salary continuance" as opposed to payments that are "severance pay," for purposes such as income tax planning. However, the fact that an employer makes "salary continuance" payments does not establish a continuing employment relationship. It certainly does not suggest that a claimant would have received those payments if not for the lay-off or separation.

[34] I appreciate that the General Division called the earnings "severance" and not "salary continuance," and that the employer called the payment "salary continuance." Conceptually, "salary continuance" is more akin to a payment "in lieu of notice," than it is to a Claimant's normal earnings. It may even be a subspecies of severance.

[35] Whatever it is called, the General Division decision does not depend on whether the payment was severance or salary continuance. Section 36(9) does not make any

⁴ I have tried to make this error more understandable. This ground of appeal is defined in section 58(1)(c) of the DESDA. The General Division will have made an error of fact where it, "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

distinction between severance pay, payments in lieu of notice, or any other payment that is paid by reason of lay off or separation.

[36] The only finding that was significant to the General Division's decision was its finding that the Claimant's earnings between October 3, 2023, and January 10, 2024, were paid to him **by reason of his lay-off or separation**. The General Division demonstrated that it understood that this was important.⁵ And it found that this was the reason for the Claimant's earnings in that period.⁶

[37] The Commission has not made out an arguable case that this finding was without an evidentiary basis. Likewise, it has not identified how the General Division decision was based on any finding that overlooked or misunderstood relevant evidence.

[38] There was evidence that the Claimant was laid off from his employment on October 3, 2023. This included his statements to the Commission, his testimony to the General Division, and the ROE evidence.

[39] There was also evidence that the Claimant's termination from employment was permanent. He described the lay-off as a "mass lay-off," told the Commission that he was not returning, and said that he considered his employment ended as of October 3, 2023.⁷

[40] There was also evidence that Claimant did not know he was getting anything else from the employer until some time after his last regular paycheck. The Claimant had testified that he did not learn he would get any additional payment until after he received his last paycheck on October 11, 2023.⁸ He said that he did not know anything about a severance package until "much after the fact" and he didn't receive anything until February.⁹ He said that he had not known that the employer was paying him anything (as "salary continuance") until he filed his taxes and received his T4.¹⁰ He

⁵ See para 12 of the General Division decision.

⁶ See para 21 of the General Division decision.

⁷ See GD3-18 and 19.

⁸ Listen to the audio record of the General Division hearing at 6:20.

⁹ Listen to the audio record of the General Division hearing at 7:15.

¹⁰ Listen to the audio record of the General Division hearing at 7:30.

said it had been deposited to an employee account which he had not been able to access since he retrieved the amount of his final October 11, 2023, cheque.

[41] The Commission's appeal has no reasonable chance of success.

Conclusion

[42] I am refusing permission to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division