



Citation: *AD v Canada Employment Insurance Commission*, 2024 SST 865

## **Social Security Tribunal of Canada**

### **Appeal Division**

# **Decision**

**Appellant:** A. D.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Adam Forsyth

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**Decision under appeal:** General Division decision dated September 25, 2023  
(GE-23-1558)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** In person

**Hearing date:** May 31, 2024

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** July 25, 2024

**File number:** AD-23-928

## Decision

[1] The appeal is allowed. The General Division made an error of law. I am returning the matter to the General Division to determine whether the Commission exercised its discretion judicially under section 46.01 of the *Employment Insurance Act* (EI Act).

## Overview

[2] The Appellant, A. D. (Claimant), was injured in a workplace accident in October 2018. He applied for employment insurance (EI) benefits in December 2018 and received regular and sickness benefits between December 2018 and July 2019. While he was in receipt of benefits, he was approved for workers' compensation benefits (WCB). In July 2019, the Claimant received a lump sum of WCB representing payments retroactive to February 5, 2019.

[3] The Claimant contacted the Commission in July 2019 to tell them that he was receiving WCB. In March 2023, the Commission allocated the WCB received by the Claimant from February to July 2019. The Commission also decided that the Claimant had underreported his earnings in two of the weeks that he received benefits. These decisions resulted in an overpayment.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. It found that the Commission could review the Claimant's benefits more than three years later because it had a reason to believe that the Claimant made a false statement in two reports. It found that the Commission had exercised its discretion judicially when it decided to review the Claimant's benefits.

[5] The General Division made an error of law by applying the wrong section of the *Employment Insurance Act* (EI Act) when deciding whether the Commission could allocate the WCB he received after more than three years had passed. I am returning the matter to the General Division to determine whether the Commission exercised its discretion judicially under section 46.01 of the EI Act.

## Issues

[6] The issues in this appeal are:

- a) Did the General Division err in law when it considered whether the Commission could allocate the WCB that the Claimant received under section 52(5) of the EI Act?
- b) If so, how should the error be fixed?

## Analysis

[7] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:<sup>1</sup>

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

### – Background

[8] The Claimant applied for EI benefits on December 17, 2018, and was paid regular and sickness benefits over the period from December 23, 2018, to July 13, 2019. He notified the Commission on July 25, 2019, that he had received WCB in a lump sum of \$18,332 for the period from February 5, 2019, to July 3, 2019.<sup>2</sup> The Commission verified the payment information with WorkSafe NB in February 2020.<sup>3</sup> The Commission contacted WorkSafe NB again in March 2022 to confirm the information.<sup>4</sup>

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<sup>1</sup> The relevant errors, formally known as “grounds of appeal,” are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

<sup>2</sup> GD3-22

<sup>3</sup> GD3-25 to GD3-27.

<sup>4</sup> GD3-33

[9] The Claimant was then notified on March 24, 2023, that the Commission had reviewed the claim for benefits that started in December 2018. It found that there were two weeks in which the Claimant had underreported his earnings, the weeks starting January 27, 2019, and February 3, 2019. The Commission adjusted the allocation of earnings for these weeks and allocated the WCB that the Claimant received.<sup>5</sup>

[10] A Notice of Debt was issued notifying the Claimant that the allocation of earnings had resulted in an overpayment in the amount of \$8,684. The Claimant requested reconsideration, but the Commission maintained its decision.

– **The General Division decision**

[11] In its decision, the General Division considered the Claimant's argument that it was not reasonable or fair for the Commission to go back almost five years to recover the amounts he was paid. He said that he had been honest with the Commission and notified them as soon as he received the WCB lump sum, and they chose not to act.<sup>6</sup>

[12] The General Division considered whether the Commission had the power to review the Claimant's benefits under section 52 of the EI Act. It found that the Commission had the power to review all of the periods that the Claimant had received benefits, although there were only two periods that it believed false statements were made.<sup>7</sup> These statements were not related to the WCB received by the Claimant.<sup>8</sup>

[13] The General Division stated that the Commission could review the entire period that the Claimant received benefits. It acknowledged that the normal time frame for reconsidering benefits is three years. The Commission can go back as far as six years when it thinks a claimant made an incorrect statement.

[14] The General Division found that, even though the incorrect statements that the Claimant made about his earnings were unrelated to the WCB payments, these

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<sup>5</sup> GD3-36

<sup>6</sup> General Division decision at para 27.

<sup>7</sup> General Division decision at para 17.

<sup>8</sup> General Division decision at para 18.

statements allowed the Commission to review the entire benefit period.<sup>9</sup> It decided that the Commission could allocate the WCB that the Claimant received even though more than 36 months had passed.

### **The General Division made an error of law**

[15] I find that the General Division made an error of law by applying section 52 in these circumstances. The Federal Court of Appeal has said that section 52 is not applicable to the recovery of amounts due pursuant to section 45 of the EI Act.<sup>10</sup>

[16] The General Division correctly determined that the WCB received by the Claimant qualified as earnings pursuant to subsection 35(2)(b) of the Employment Insurance Regulations (EI Regulations). This regulation specifically sets out that WCB payments are to be taken into account for the purposes of sections 45 and 46 of the EI Act.

[17] The earnings must be allocated according to section 36(12)(d) of the EI Regulations, which states that workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments, must be allocated to the weeks for which the payments are paid or payable.

[18] Under section 45 of the EI Act, if a claimant received benefits for a period, and is later paid earnings by someone else for the same period, the claimant must return the benefits that would not have been paid if the earnings had been paid when the benefits were received. The Federal Court of Appeal has said that the recovery of an overpayment under section 45 is not a decision to reconsider a claim for benefits under section 52.<sup>11</sup> This means that the limitation periods in section 52 do not apply.

[19] However, I find no error in the General Division's determination that the Commission could go back and reconsider the two weeks in which it found that the Claimant had made a misrepresentation about his earnings. The General Division found

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<sup>9</sup> General Division decision at para 20.

<sup>10</sup> See *Chartier v. Canada (Attorney General)*, 2010 FCA 150 (*Chartier*).

<sup>11</sup> See *Chartier*.

that the earnings that the Claimant reported for those weeks were not correct and it was reasonable for the Commission to think that he had made false statements.

[20] I see no evidence that the General Division may have overlooked when making this determination. It correctly applied the law with respect to the claims for those weeks.

## **Remedy**

[21] To fix the General Division's error, I can give the decision that the General Division should have given, or I can refer this matter back to the General Division for reconsideration.<sup>12</sup>

[22] The Commission says that the General Division made an error of law in its decision, but this error does not affect the outcome. It argues that I should make the decision that the General Division should have made and dismiss the appeal.<sup>13</sup>

[23] I have found that the General Division made an error of law by applying the wrong section of the legislation. However, I find that the General Division did not consider section 46.01 of the EI Act and there is no evidence on file concerning the Commission's decision under that section. Therefore, I find that the record is incomplete.

[24] As discussed above, the WCB that the Claimant received was earnings as set out in section 35(2)(b) of the EI Regulations. This amount is to be allocated in accordance with section 36(12) of the EI Regulations. The earnings are to be taken into account for the purposes of section 45 of the EI Act.

[25] As confirmed by the Federal Court of Appeal in *Chartier* section 52 of the EI Act does not apply to the recovery of benefits under section 45. This means that the Commission can recover the overpayment even though it did not notify the Claimant for almost four years.

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<sup>12</sup> Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.

<sup>13</sup> AD3-7

[26] The Appellant also relies on the decision in *Chartier*, citing the Court's statement that the 36-month time limit for reconsideration in section 52 applies in all cases except where there is bad faith. However, the Court, in that decision, also goes on to state:

There is no mention of good or bad faith in section 46, which must be read together with section 45, which refers to a claimant's obligation to repay overpayments of benefits upon receiving deferred earnings.

Lastly, unlike section 52, section 46 does not provide for the reconsideration of initial claims for benefits. Initial claims remain as they were made by the claimant, and received and accepted by the Commission. The application of sections 45 and 46 merely gives rise to the allocation of amounts paid, and payments to the claimant or recovery of overpayments, as the case may be.<sup>14</sup>

[27] This decision in *Chartier* was relied on in another recent Federal Court of Appeal decision, *Faullem v. Canada (Attorney General)* (*Faullem*) which confirmed that the time limitations in section 52 are not applicable to the recovery of benefit overpayments provided for in section 45.<sup>15</sup>

[28] In *Faullem*, the claimant had argued that the Tribunal should have considered section 46.01 of the EI Act, which was introduced after the *Chartier* decision. This section states:

No amount is payable under section 45, or deductible under subsection 46(1), as a repayment of an overpayment of benefits if more than 36 months have elapsed since the lay-off or separation from the employment in relation to which the earnings are paid or payable and, in the opinion of the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment.

[29] The Court in *Faullem* suggested that the Commission and the Tribunal examine the application of section 46.01.<sup>16</sup> Here it is unclear that the Commission has considered the application of this section as it appeared to rely on section 52 when it made its decision to allocate the WCB payments. It does not seem that the Claimant

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<sup>14</sup> See at paras 41 and 42.

<sup>15</sup> See *Faullem v. Canada (Attorney General)*, 2022 FCA 29.

<sup>16</sup> See *Faullem* at para 106.

was made aware of the application of this section, either by the Commission or the General Division, and therefore did not have an opportunity to address it.

[30] For these reasons, I find that the record is incomplete, and the matter should be returned to the General Division for reconsideration.

## **Conclusion**

[31] The appeal is allowed. The General Division made an error of law. I am returning the matter to the General Division to consider the application of section 46.01 of the EI Act.

Melanie Petrunia  
Member, Appeal Division