Citation: *S. L. v. Canada Employment Insurance Commission*, 2015 SSTAD 1396

Appeal No. AD-13-622

BETWEEN:

S. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER:	Mark BORER
DATE OF DECISION:	December 4, 2015
DECISION:	Appeal allowed in part

DECISION

[1] The appeal is allowed in part. The decision of the board of referees is varied in accordance with these reasons.

INTRODUCTION

[2] On June 19, 2013, a panel of the board of referees (the Board) dismissed the Appellant's appeal against the previous determination of the Commission.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On August 11, 2015, a teleconference hearing was held. The Appellant attended and made submissions by way of counsel. The Commission also attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division 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.

[6] Administrative law currently establishes only two standards of review, that of correctness and that of reasonableness.

[7] As previously determined by the Federal Court of Appeal in *Canada (Attorney General) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (Attorney General)*, 2012 FCA 190,

and many other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for questions of fact and mixed fact and law in employment insurance appeals is reasonableness.

ANALYSIS

[8] This appeal concerns whether or not certain moneys paid pursuant to a settlement agreement are earnings to be allocated.

[9] Counsel for the Appellant argues that the amount in question, the sum of $11,500, was not a "retiring allowance" as stated by the settlement agreement, but instead represented damages owing because of certain human rights violations. Counsel submits that the Appellant had already received a separate amount to compensate for the loss of employment and further submits that it would make no sense for this payment to be a "retiring allowance" in light of the relatively young age of the Appellant. Finally, counsel noted that the Courts have held that moneys paid in compensation for human rights violations are not earnings resulting from employment and as such should not be allocated. The Appellant does not challenge the remainder of the decision, as it was in her favour.

[10] Appellant's counsel also argues that the overpayment should be written off by the Commission in the interest of natural justice.

[11] The Commission, on the other hand, submits that the evidence supports the conclusion that the moneys paid were received as a consequence of separation from employment. The Commission asks that the Board decision be upheld, as it was entirely reasonable. They make no submissions regarding writing off the overpayment.

[12] Before turning to the Board's decision, I note that the Commission does not appear to have rendered any decision regarding whether or not the Appellant's overpayment will be written off. In fact, it is not clear from the file whether or not any such request has yet been made. In either case, the Tribunal only has jurisdiction to review decisions of the Commission placed before it in accordance with the *Employment Insurance Act*. As this has

not been done, on the facts of this case I have no jurisdiction to intervene regarding any potential write-off.

[13] In their decision the Board summarized the evidence and correctly set out the applicable law before applying the law to the facts. After assessing the evidence before them, the Board found that the onus of proof was on the Appellant to prove that the moneys in question were not earnings, and that they were not persuaded that this was so with regard to the retiring allowance.

[14] The role of the Board is to act as the primary trier of fact. It is the Board that is best suited to examine the evidence, and it is for that reason that findings of fact or mixed fact and law can only be overturned by the Appeal Division if those findings are unreasonable.

[15] Notwithstanding the able arguments of Appellant's counsel, I find that the Board findings in this case are not unreasonable. The Board analyzed the evidence before them and came to conclusions that were based upon that evidence.

[16] As noted by the Board, the settlement agreement held that in addition to the $11,500 in question here, $15,000 in "general damages" were also paid. The Board (and the Commission) determined that these were not earnings to be allocated within the meaning of the *Employment Insurance Act* and the *Employment Insurance Regulations*. This tends to support the Board conclusion that the $11,500 was not paid to compensate for human rights violations, but for some other reason, because the $15,000 was for those damages.

[17] Based upon this, I cannot find that it was unreasonable for the Board to have concluded as it did.

[18] Finally, I note that the Commission has conceded that the Board determined that a total of $375 were not earnings but neglected to note this finding in their final decision. It cannot be denied that the Board should have stated "appeal allowed in part" rather than "appeal dismissed" since it found that $375 should not have been allocated. Although I have dismissed the remainder of the appeal, the appeal is allowed on this point alone so that this minor oversight can be corrected.

[19] Having considered the appeal docket, the submissions of the parties, and the decision of the Board, I find no reviewable error other than the one noted above. In my view, as evidenced by the decision and excepting the concession noted above, the Board conducted a proper hearing, weighed the evidence, made findings of fact, established the correct law, and applied the facts to the law.

[20] I have found no evidence to support the ground of appeal invoked. There is no reason for the Appeal Division to intervene, except as noted.

CONCLUSION

[21] For the above reasons, the appeal is allowed in part. The decision of the Board is varied in accordance with these reasons.

Mark Borer
Member, Appeal Division