



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *B. J. v. Canada Employment Insurance Commission*, 2016 SSTADEI 221

Tribunal File Number: AD-15-1226

BETWEEN:

**B. J.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division – Appeal**

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SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: April 20, 2016

DECISION: Appeal allowed

## **DECISION**

[1] On consent, leave to appeal is granted and the appeal is allowed. The unpaid moneys owed by the Appellant's Employer are not paid or payable, and therefore should not be allocated.

## **INTRODUCTION**

[2] On September 25, 2015, a General Division member 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.

[4] Just prior to my leave to appeal decision being released, the Commission made submissions to the Tribunal conceding the appeal on the merits. Because of this, I grant leave to appeal and abridge the usual 45-day period for receiving submissions in order to resolve the appeal in as efficient a manner as possible.

[5] This appeal was decided on the record.

## **THE LAW**

[6] 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.

## ANALYSIS

[7] This appeal hinges on the determination of whether or not a large amount of unpaid salary owed to the Appellant is “payable” as required by s. 35 of the Employment Insurance Regulations (the Regulations). It is not disputed that this salary stems from employment, and that if the amount is payable then it must be allocated as per the Regulations.

[8] The Appellant argues that the General Division member erred by finding that unpaid salary must be allocated. He notes that his Employer is insolvent, and that although he initially sued to recover the funds he has discontinued that lawsuit because he is now sure that no recovery is possible. He submits that the moneys are therefore not “payable”. He also alleges that his Employer perpetrated a large fraud and that he was one of its victims.

[9] Contrary to its position at reconsideration and before the General Division (twice), the Commission now concedes that given that there is “overwhelming evidence” that the Employer enacted a scheme and that it is “difficult to consider” that the amounts owed will be or can be expected to be paid. Because of this, the Commission now agrees that the moneys cannot be said to be payable and that the appeal should be allowed.

[10] The General Division member, in determining that the Commission was correct in allocating the moneys (as the Commission did initially, before their concession here), cited (in paragraph 38 of her decision) *Canada (Attorney General) v. Yennelis*, A-496-94, for the proposition that “payable” means “the point in time when it is due to the claimant in the sense that he is entitled... to have it paid to him and his employer is under an obligation to pay it”. On this basis, she found that the amounts owed met that description and on that basis dismissed the Appellant’s appeal.

[11] Having considered the positions of the parties and the evidence, I find myself of the view that the parties are correct and that this appeal must be allowed.

[12] In *Yannelis*, the Court was primarily concerned with the timing of the allocation of certain earnings, rather than under what circumstances an amount is deemed to be “payable” and the portion of that decision quoted by the General Division member should be read in that context. However, the Court did find (at paragraph 13) that the word “payable” as used in the Regulations should be given its ordinary dictionary meaning. In that same paragraph, the Court noted that this meant “requiring to be paid” or “capable of being paid”.

[13] Therefore, as a matter of law, for an amount to be payable there must be some prospect of that amount being paid. I note that the purpose of allocating earnings is to prevent a claimant from receiving severance or other earnings from their employer at the same time as they are receiving benefits (“double-dipping”), even if those earnings are not actually paid at the same time as the benefits are.

[14] This makes sense, especially given the overall purpose of the employment insurance system. After all, benefits are paid to compensate for the loss of employment. If that loss has already been compensated (or will be compensated) there is no need for the benefits to be paid. Conversely, if the earnings will never actually be received, it would be contrary to that objective to say that the earnings can still be considered “payable” even though the loss of earnings remains uncompensated.

[15] In her decision, the General Division member did not consider whether or not the moneys in question had any real prospect of being paid, as required by the definition of “payable” given in paragraph 13 of *Yannelis*. As such, she committed an error of law which I am obligated to intervene to correct.

[16] Given the positions of the parties, it is in the interests of justice that I give the decision that the General Division member should have given rather than return the matter to the General Division for a new hearing. Applying the law to the agreed upon facts, I find that the unpaid salary in question will never be received and is therefore not payable within the meaning of the Regulations.

[17] Because of this, the moneys should not be allocated.

## **CONCLUSION**

[18] For the above reasons and on consent, leave to appeal is granted and the appeal is allowed. The unpaid moneys owed by the Appellant's Employer are not paid or payable, and therefore should not be allocated.

*Mark Borer*

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Member, Appeal Division