



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. L. v. Canada Employment Insurance Commission*, 2017 SSTADEI 16

Tribunal File Number: AD-16-993

BETWEEN:

**S. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Pierre Lafontaine

HEARD ON: January 10, 2017

DATE OF DECISION: January 20, 2017

## **REASONS AND DECISION**

### **DECISION**

[1] The appeal is dismissed.

### **INTRODUCTION**

[2] On July 8, 2016, the General Division of the Tribunal determined that the allocation of earnings was calculated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] The Appellant requested leave to appeal to the Appeal Division on August 4, 2016. Leave to appeal was granted on August 17, 2016.

### **TYPE OF HEARING**

[4] The Tribunal held a teleconference hearing for the following reasons:

- The complexity of the issue under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] At the hearing, the Appellant was present but not the Respondent.

### **THE LAW**

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the only grounds of appeal are the following:

- 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.

## **ISSUE**

[7] The Tribunal must decide if the General Division erred when it concluded that the allocation of earnings was performed in accordance with sections 35 and 36 of the Regulations.

## **ARGUMENTS**

[8] The Appellant submits the following arguments in support of the appeal:

- She disputes the General Division conclusion that the retirement allowance she received constitutes earnings pursuant to subsection 35(2) of the Regulations;
- The money she received, as indicated on the revised Record of Employment, was not earned while working;
- The General Division erred when it concluded that the entire sum of money constituted earnings according to section 35 of the Regulations and that the sum had to be allocated according to section 36 of the Regulations.

[9] The Respondent submits the following arguments against the appeal:

- Subsection 35(2) of the Regulations states that the entire income from any employment is considered earnings for benefit purposes, unless it is exempted under one of subsections 35(3) to 35(7) of the Regulations;

- The Appellant argues that the additional monies received from the employer was not earned while working and should not be considered earnings. It is submitted that the Appellant has not provided proof to support her allegation that the retiring allowance (\$41,572.00) is not earnings;
- The evidence clearly shows that even though the retiring allowance was not paid out until October 2014, the “trigger” for the payment was her separation from employment on March 28, 2013. The subsequent payment arose out of employment and constitutes earnings under subsection 35(2) of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations;
- The revised allocation of earnings overlapped with a period in which the Appellant was also in receipt of Employment Insurance benefits. Consequently, the Appellant received benefits to which she was not entitled, and an overpayment was established. The Appellant therefore is liable for the repayment of the resulting overpayment of \$17,310.00;
- The General Division committed no error in dismissing the appeal because the decision conforms to the *Employment Insurance Act* (Act), as well as the established case law.

## **STANDARD OF REVIEW**

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the Appeal Division does not owe any deference to the conclusions of the General Division with respect to questions of law, whether or not the error appears on the face of the record. However, for questions of mixed fact and law and questions of fact, the Appeal Division must show deference to the General Division. It can intervene only if 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 - *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[12] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (A.G.) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that “[w]hen it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court”.

[13] The Federal Court of Appeal further indicated that:

[n]ot only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[14] The Court concluded that “[w]hen it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.”

[15] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (A.G.)*, 2015 FCA 274.

[16] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

## **ANALYSIS**

[17] The Tribunal proceeded in the absence of the Respondent since it was satisfied that it had received the notice of hearing as per section 12 of the *Social Security Tribunal Regulations*.

[18] In appeal, the Appellant is no longer contesting the decision of the General Division that concluded that the amounts received from her employer were earnings and that they had to be allocated pursuant to section 36 of the Regulations.

[19] She now submits that she does not understand the calculations of the Respondent that bring the amount owing to the sum of \$17,310.00.

[20] On September 7, 2016, following the Appellant's request for clarification, the Respondent provided the following explanation:

After serving her two week waiting period from September 1, 2013 to September 14, 2013 the claimant collected the full 41 weeks from September 15, 2013 to June 28, 2014 (\$310.00 the week of September 15, 2013 due to the balance of the allocation outstanding from the waiting period and \$425.00 for the remaining 40 weeks)) [...] the 41 weeks of benefits paid resulted in an overpayment of 17,310.00\$.

[21] The amount of \$17,310.00 clearly comes from the 40 weeks of benefits received by the Appellant at a benefit rate of \$ 425.00for a total of \$17,000.00, plus the \$310.00 for the week of September 15, 2013, due to the balance of the allocation outstanding from the waiting period, for a total amount of \$17,310.00.

[22] The revised allocation of earnings overlapped with a period in which the Appellant was also in receipt of Employment Insurance benefits. Consequently, the Appellant received benefits to which she was not entitled and an overpayment was established. The Appellant is therefore liable for the repayment of the resulting overpayment of \$17,310.00.

[23] The General Division came to the conclusion that the sums received by the Appellant constituted earnings pursuant to section 35 of the Regulations and that as per section 36 of the Regulations, these earnings had to be allocated.

[24] The Tribunal does not have the authority to retry a case or to substitute its discretion for that of the General Division. The Tribunal's jurisdiction is limited by subsection 58(1) of the DESD Act. Unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

[25] The Tribunal finds that the decision of the General Division was based on the evidence before it and that it complies with the law and the decided cases.

## **CONCLUSION**

[26] The appeal is dismissed.

[27] The Tribunal recommends that the Respondent communicate directly to the Appellant a detailed explanation of how the benefit rate was calculated before and after the revised allocation of earnings.

Pierre Lafontaine

Member, Appeal Division