Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Canada Employment Insurance Commission v. A. D.,* 2017 SSTADEI 179

Tribunal File Number: AD-15-226

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 2, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's Representative	Rachel Paquette
Respondent	A. D.

INTRODUCTION

[1] On April 9, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal where the Appellant had allocated monies that the Respondent had received from a settlement of a claim for workers' compensation, pursuant the *Employment Insurance Act* (EI Act) and the *Employment Insurance Regulations* (EI Regulations). The Respondent attended the teleconference hearing held by the General Division. No one attended on behalf of the Appellant.

[2] The Appellant filed an application for leave to appeal with the Tribunal's Appeal Division on April 30, 2015. Leave to appeal was granted on May 20, 2016.

[3] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issues under appeal; and

b) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] A teleconference hearing was initially scheduled to take place on September 13, 2016. However, as the Respondent had not received notice of the hearing by September 6, 2016, the Tribunal adjourned the hearing to November 22, 2016, when it was heard and completed.

[5] The following facts are not in dispute:

a) After an employment injury in 2012, the Respondent made a workers' compensation claim for an income replacement benefit, the claim was refused, the Respondent appealed and he was eventually successful in December 2013;

b) The Respondent received funds from the *Fonds de la santé et de la securité de travail* (FSST) in January 2014;

c) The Respondent was receiving Employment Insurance (EI) from December 2012 to September 2013; he received 15 weeks of EI medical benefits followed by 24 weeks of regular benefits;

d) Since he had received EI, in January 2014, the Respondent advised the Appellant that he had received payment (from the FSST) for the period from November/December 2012 to December 2013;

e) The receipt for the amount received from the FSST, dated January 13, 2014, shows various amounts corresponding to the period from November 9, 2012, to December 1, 2013, for a total of $20,495.49, which was issued in one payment in January 2014;

f) The Appellant allocated these amounts (to the period from December 2, 2012, to September 28, 2013) and issued a notice of debt to the Respondent in the amount of $9,840.00;

g) The Respondent requested a reconsideration of the Appellant's allocation decision, and the Appellant maintained its decision.

[6] The General Division found that the amounts received by the Respondent from the FSST were "a full and final settlement of a claim for workers' compensation payments" pursuant to paragraphs 35(2)(*b*), 35(7)(*a*) and 36(12)(*d*) of the EI Regulations and were excluded from "earnings" and "entire income" as those terms are understood in accordance with sections 35 and 36 of the EI Regulations and the EI Act. On this basis, the General Division allowed the Respondent's appeal.

ISSUES

[7] Did the General Division err in law or err in fact and law in making its decision?

[8] Should the Appeal Division dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or confirm, rescind or vary the General Division decision?

LAW

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), 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.

[10] Leave to appeal was granted on the basis that the Appellant had set out reasons that fell into the enumerated grounds of appeal, and that at least one of the reasons had a reasonable chance of success, specifically under paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[11] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division.

[12] Relevant provisions of the EI Regulations include (emphasis added):

> **DETERMINATION OF EARNINGS FOR BENEFIT PURPOSES**
>
> **35.** (1) The definitions in this subsection apply in this
>
> section. "employment"
>
> "employment" means
>
> (a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,
>
> (i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

"income"

"income" means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

"pension"

"pension" means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

"self-employed person"

"self-employed person" has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

…

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(*e*) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

(8) For the purposes of paragraphs (2)(*c*) and (7)(*b*), a sickness or disability wage-loss indemnity plan is not a group plan if it is a plan that

(a) is not related to a group of persons who are all employed by the same employer;

(b) is not financed in whole or in part by an employer;

(c) is voluntarily purchased by the person participating in the plan;

(d) is completely portable;

(e) provides constant benefits while permitting deductions for income from other sources, where applicable; and

(f) has rates of premium that do not depend on the experience of a group referred to in paragraph (*a*).

SUBMISSIONS

[13] The Appellant made the following submissions:

a) The General Division erred in fact and in law.

b) The standard of review applicable to questions of mixed fact and law is reasonableness.

c) The amount received by the Respondent from the FSST was to compensate for wage loss from December 2, 2012, to December 14, 2013. It was not a final settlement of a claim for workers' compensation.

d) The Federal Court of Appeal confirmed that when a victim of an employment injury receives an income replacement benefit for a limited period of time and his entitlement ceases when he is able to do similar work, this income does not constitute "permanent settlement workers' compensation payments" within the meaning of the EI Regulations.

e) The onus of proof is on the claimant to prove that the monies received constitute something other than "earnings." Here, the Respondent's own letter confirmed that he received income replacement benefits starting on December 4, 2012, and his entitlement ceased on December 14, 2013, when he was able to do similar work. Therefore, the monies that he received from the FSST were not a final settlement; they were "earnings" under paragraph 35(2)(*b*) of the EI Regulations and were properly allocated pursuant to paragraph 36(12)(*d*) of the EI Regulations.

[14] The Respondent did not file written submissions, but he made oral submissions at the appeal hearing. The Respondent made the following arguments:

a) He was turned down by the FSST and appealed; a final decision was made in December 2013;

b) During the process of his workers' compensation claim, he was told to contact the EI office and apply for sick benefits, which he did; he received sick benefits followed by regular benefits;

c) In September 2013, all of his EI benefits ran out;

d) There was no overlap of his receiving EI benefits and any subsequent jobs;

e) In January 2014, he was cleared by a doctor to work and the FSST told him that there would be no more payments;

f) He contacted the EI office, even though no one told him that he had to, and was told to provide documents; the agent told him that the EI office would get back to him promptly about whether they "could take some of it back or not at all";

g) He did not try to cheat anyone; he did not receive the money from FSST when he was on EI; and

h) When he received the money from FSST in January 2014, he was not able to do physical manual labour.

ANALYSIS

Standard of Review

[15] The Appellant submits that the issue is a question of mixed fact and law and that the standard of review is reasonableness.

[16] The Federal Court of Appeal has determined, in *Canada (A.G.) v. Jewett*, 2013 FCA 243, and *Chaulk v. Canada (A.G.)*, 2012 FCA 190, and in other cases, that the standard of

review for questions of law and jurisdiction in EI appeals from the Board of Referees (BOR) is correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[17] Until recently, the Appeal Division had been considering a decision of the General Division a reviewable decision by the same standards as that of a decision of the BOR.

[18] However, in *Paradis v. Canada (A.G.)*, 2004 FCA 64, and *Canada (A.G.) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the Tribunal's Appeal Division is reviewing appeals of EI decisions rendered by the General Division.

[19] The Federal Court of Appeal, in *Maunder v. Canada (A.G.)*, 2015 FCA 274, referred to *Jean, supra*, and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the Appeal Division to decisions of the General Division. The *Maunder* case related to a claim for a disability pension under the *Canada Pension Plan*.

[20] In the matter of *Hurtubise v. Canada (A.G.)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the Appeal Division that had dismissed an appeal from a General Division decision. The Appeal Division had applied the following standard of review: correctness on questions of law, and reasonableness on questions of fact and law. The Appeal Division had concluded that the General Division decision was "consistent with the evidence before it and is a reasonable one…" The Appeal Division applied the approach that the Federal Court of Appeal in *Jean, supra*, suggested was not appropriate, but the Appeal Division decision was rendered before the *Jean* decision. In *Hurtubise*, the Federal Court of Appeal did not comment on the standard of review and concluded that it was "unable to find that the Appeal Division decision was unreasonable."

[21] There appears to be a discrepancy in relation to the approach that the Tribunal's Appeal Division should take on reviewing appeals of EI decisions rendered by the General Division, and in particular, whether the standard of review for questions of law and jurisdiction in EI

appeals from the General Division differs from the standard of review for questions of fact and mixed fact and law.

[22] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act without reference to "reasonableness" and "correctness" as they relate to the standard of review.

General Division Decision

[23] The General Division's decision stated:

> [40] The Tribunal agrees with the Commission that the sums received from the FSST were provided to compensate for wage loss because the Notice of Payment from the FSST provides that the monies were received on account of "Indemnité de remplacement de revenue" (GD3-15 to 17). The Appellant also did not appear to dispute this fact. He even advised in his testimony that some of the monies, which he received from the FSST had been reduced on account of his remuneration from some of the jobs, which he had attempted. Indeed this is consistent with the note at GD3-17 of the FSST Notice of Payment and the documents submitted by him at GD6.
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> [41] The Tribunal finds that, accordingly, the amounts appear at first blush to constitute earnings on the basis of the first part of paragraphs 35(2)(b) and 36(12)(d) of the Regulations, and the broad definition of income and earnings in the legislation and jurisprudence/case law (McLaughlin 2009 FCA 365).
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> …
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> [43] The Tribunal finds, however, that when the language of paragraphs 35(2)(b) and 36(12)(d) of the Regulations is examined more closely, and read together with paragraph 35(7)(a) it is clear that the monies, which the Appellant received from the FSST, are excluded from the definition of earnings and income in the Regulations because they amount to a "lump sum or pension paid in full and final settlement of a claim made for worker's compensation payments" as those terms are understood in accordance with the Act, Regulations, and jurisprudence/case law.
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> [44] The Tribunal finds that the language in paragraph 35(7)(a) is clear and that there is no ambiguity. The Regulations have been drafted with the intention of excluding the allocation of worker's compensation payments, which can be characterized as a "lump sum or pension paid in full and final settlement of a claim made for worker's compensation payments". That this is what is intended is reinforced by the wording of the second parts of subsection 35(2)(b) and 36(12)(d).
>
> …

[49] The Tribunal finds that while its conclusion appears to be contrary to the philosophy of paragraph 35 of the Regulations and more specifically, the idea that the entire income of the Appellant must be considered for the purposes of deduction and allocation (*McLaughlin* 2009 FCA 365) and the principle of the avoidance of double compensation (*Walford*, A-263-78), the wording of the Regulations is clear and the Tribunal's conclusion must be in accordance with what the Regulations intended (*Rizzo and Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21; *John Doe* v. *Ontario (Finance),* 2004 SCC 36 and *Canadian National Railway Co.*, 2014 SCC 40; *Picard* 2014 FCA 46; *Abrahams v. Attorney General of Canada*, 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2 at page 10).

…

[54] In the context of examining section 35 and 36 of the Regulations and the broad definition of income and earnings in the legislation and jurisprudence, there is no question that an ancillary purpose of this part of the Regulations is the avoidance of double compensation (*Walford*, A-263-78). There are several parts of the Act and Regulations, however, where the legislator has carved out exceptions for one reason or another, or which support policy rationales on an exceptional basis and which run contrary to other principles and purposes in the Act. (See for example, section 55(1) of the Regulations, which provide clear exceptions to the general prohibition of being outside of Canada in section 37(b) of the Act (*Elyoumni* 2013 FCA 151; *Picard* 2014 FCA 46).

[55] While the Tribunal is unaware of the policy rationale for the exclusion in paragraph 35(7)(a) of the Regulations, one plausible explanation is that when compensation can be characterized as a "full and final settlement" it would further the objective of administrative efficiency and of making benefits available quickly because it could be characterized and compartmentalized quickly and then excluded from allocation with a certain degree of finality (*Abrahams v. Attorney General of Canada*, 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2; *Picard* 2014 FCA 46).

[56] While the rationale for the exclusion is not obvious, what is clear is that these kind of payments were intended to be excluded even where they could otherwise be characterized as income or earnings. The Tribunal notes parenthetically, that its interpretation and application of the Regulations appears to be consistent with the Digest of Benefit Entitlement Principles, at Chapter 5.4.0. (the "Digest", which is not binding on the Tribunal and which guides the Commission (*Picard* 2014 FCA 46)). The following excerpt implies that most payments made by worker's compensation boards are "earnings", only full and final settlements of these payments are excluded specifically, and, that "moneys" paid by worker's compensation boards as full and final settlements that are designed to compensate a claimant for loss of income are excluded from earnings:

> "Although only full and final settlement workers' compensation payments are specifically excluded from earnings for benefit purposes, not all payments made by workers' compensation boards are earnings. Earnings for benefit

> purposes are only those moneys which are earned by labour, or which resemble moneys earned by labour. Moneys paid by workers' compensation boards that are designed to compensate a claimant for loss of income due to the incapacity and are not made in full and final settlement clearly fall into this category."

[24] The General Division also found that the payment in this case was made in a lump sum and as full and final settlement of a claim made for workers' compensation payments. Therefore, the General Division concluded that the monies received by the Respondent were excluded from the definition of earnings and income in the EI Regulations.

[25] On the basis of these findings, the General Division allowed the Respondent's appeal.

[26] The Appellant submits that the General Division erred in law and in mixed fact and law. It relies on jurisprudence that confirms that when a victim of an employment injury received an income replacement benefit for a limited period of time and his entitlement ceased when he was able to do similar work, this income does not constitute "permanent settlement workers' compensation payments" within the meaning of the EI Regulations.

[27] In *Lacasse v. Canada (A.G.)*, A-577-97, the claimant had received income replacement benefits from November 1991 to November 1993. The Umpire found that these benefits were considered earnings up to November 1993. The Federal Court of Appeal denied the claimant's application for judicial review from the bench, stating that the income received did not constitute "permanent settlement workers' compensation payments" within the meaning of the *Unemployment Insurance Regulations* (former name for EI Regulations).

[28] The General Division distinguished the *Lacasse* decision (at paragraphs 60 and 61 of its decision). It appears that *Lacasse* was distinguished on the basis that the settlement in that matter was not final and was subject to appeal.

[29] By my reading of the *Lacasse* decision and the CUB decision that was the subject of that judicial review (CUB 38079), the claimant had received an income replacement benefit from the provincial workers' compensation board during a period when she was unable to work. The issue was whether this benefit constituted earnings or was an exception as a "permanent settlement workers' compensation." The Umpire concluded that as the claimant had received an

income replacement benefit for a limited period of time and that entitlement ceased when she was able to resume work, the benefit did constitute earnings. I find that the General Division erred in law when it distinguished the *Lacasse* decision.

[30] The General Division also distinguished a number of CUB decisions without explanation. Most notably, the fact situation in CUB 61311 is similar to the present case and in its decision, the Umpire interpreted the same legislative provisions: the claimant appealed a workers' compensation decision denying him benefits, he was eventually paid a lump sum for wage loss benefits over a certain period, he argued that during the period he received EI benefits he had no other source of income and was unable to work, payment of the lump sum was received after EI benefits had ended, and the Commission had allocated this sum on the basis that it was a benefit for wages lost during the covered period (and not a final settlement of a claim such as when a value is arrived at to cover the value of the injury suffered). The BOR had allowed the appeal and found that the payment was not considered earnings to be allocated pursuant to paragraphs 35(2)(*b*) and 36(12)(*d*) of the EI Regulations. The Umpire overturned the BOR decision and confirmed the Commission's decision to allocate the payment.

[31] CUB decisions, while they may be persuasive, are not binding on the Tribunal. However, Federal Court of Appeal jurisprudence is binding. Distinguishing jurisprudence without a meaningful analysis is problematic. Moreover, the General Division misinterpreted the jurisprudence in its parenthetical note on the *Lacasse* decision.

[32] This is a reviewable error pursuant to paragraph 58(1)(*b*) of the DESD Act.

[33] Given this error of law, the Appeal Division is required to make its own analysis and decide whether it should dismiss the appeal, give the decision that the General Division should have given, refer the case back to the General Division, confirm, reverse or modify the decision: *Housen v. Nikolaisen*, [2002] SCR 235, 2002 SCC 33 at paragraph 8, and subsection 59(1) of the DESD Act.

[34] Is the Appeal Division able to give the decision that the General Division should have given on this issue? I find that it is, as the facts necessary to make this decision are not in dispute and no further evidence is required from the parties.

General Division Error and Appeal Division Decision

[35] There is no dispute on the following:

a) The Respondent made a workers' compensation claim in 2012 and received a lump sum payment in January 2014 (from the FSST);

b) This payment was to replace income during the period from December 2012 to December 2013, while the Respondent was unable to work due to an employment injury;

c) The Respondent received EI medical benefits for 15 weeks followed by EI regular benefits for 24 weeks; he stopped receiving EI benefits in September 2013;

d) The Respondent was cleared by his doctor to resume work in January 2014.

[36] In the *Lacasse* matter, the claimant had received an income replacement benefit from the provincial workers' compensation board during a period that she was unable to work. The issue was whether this benefit constituted earnings or was an exception as a "permanent settlement workers' compensation." The wording "permanent settlement workers' compensation" was a predecessor to the current wording "full and final settlement of a claim made for workers' compensation payments."[1]

[37] The Federal Court of Appeal upheld the Umpire's decision in *Lacasse*, which had concluded that because the claimant had received an income replacement benefit for a limited period of time and that entitlement ceased when she was able to resume work, the benefit constituted earnings.

[38] In my view, it is not possible to distinguish *Lacasse* on the facts. Although there has been a change in terminology since *Lacasse* was decided, this change does not affect its application to the present situation. Applying *Lacasse* to the facts in the present matter, I find that the amounts received by the Respondent from the FSST constitute earnings.

[1] The change in terminology was likely to avoid the confusion created by the word "permanent." The Federal Court of Appeal, in *Canada (Attorney General) v. Rutherford*, A-241-94, noted the confusion and held that the adjective "permanent" modifies the word "settlement" and not the word "injury."

[39] As noted in paragraph 30, above, the fact situation in CUB 61311 is similar to the present case. The wording in CUB 61311 is the same as in the present case: “full and final settlement of a claim made for workers' compensation payments.” The Umpire found that the claimant was paid a lump sum for wage loss benefits over a certain period, that during the period he received EI benefits he had no other source of income and was unable to work, and that payment of the lump sum was received after EI benefits had ended. He concluded that the Commission was correct in its allocation of this sum on the basis that it was a benefit for wages lost during the covered period and not a final settlement of a claim.

[40] I find that the *Lacasse* decision is binding jurisprudence and that CUB 61311 is persuasive.

[41] Considering the parties’ submissions, and my review of the General Division’s decision and the appeal file, I conclude that the General Division erred in law in making its decision, and I allow the appeal.

[42] In the circumstances, I am able to give the decision that the General Division should have given (which was the dismissal of the Respondent’s appeal before the General Division).

CONCLUSION

[43] The appeal is allowed, and the General Division decision is rescinded.

Shu-Tai Cheng
Member, Appeal Division