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

Citation: *C. L. v. Canada Employment Insurance Commission*, 2017 SSTADEI 234

Tribunal File Number: AD-16-339

BETWEEN:

C. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 14, 2017

REASONS AND DECISION

INTRODUCTION

[1] On January 18, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined, among other things, that vacation pay that the Appellant had received from his former employer must be allocated pursuant to subsection 36(9) of the *Employment Insurance Regulations* (EI Regulations).

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on February 19, 2016, and leave to appeal was granted on April 16, 2016.

[3] An initial claim for Employment Insurance (EI) regular benefits was established effective April 5, 2015. The Appellant was paid accrued vacation pay in April 2015, and the Respondent allocated this vacation pay to the period of April 5 to April 18, 2015, and to the week starting on April 19, 2015, pursuant to sections 35 and 36 of the EI Regulations.

[4] Leave to appeal was granted on the grounds that the General Division may have based its decision on an error of law or on an error of mixed fact and law, i.e. paragraphs 58(1)(*b*) and (*c*) of the *Department of Employment and Social Development Act* (DESD Act).

[5] After leave to appeal was granted, the Tribunal sent a Notice of Hearing to the parties with a date of hearing, by teleconference, of September 20, 2016. The Appellant advised that he could not participate in the hearing, and he requested that the matter be decided on the basis of the written record. The Respondent did not object to the Appellant's request.

[6] This appeal, therefore, proceeded on the basis of the documents and submissions filed and for the following reasons:

a) the Appellant's request;

b) the parties' written submissions; and

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

ISSUES

[7] Did the General Division base its decision on an error of law or on an error of mixed fact and law?

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

THE LAW

[9] According to subsection 58(1) of the DESD Act, the only possible 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 of an error of law or of mixed fact and law as follows (reference to paragraphs from the leave to appeal decision):

> [11] The issue before the GD was allocation of vacation pay that was paid to the Applicant after separation from employment.
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> [12] The GD decision attributed submissions to the Applicant at paragraphs [13], [29], [38] and [40]. The Applicant argues that he did not make a number of those submissions and that the finding of the GD member was wrong.
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> [13] The Applicant also argues that the GD misapplied Federal Court of Appeal and CUB jurisprudence.

> […]
>
> [15] On the ground that there may be an error of law or an error of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

[11] The legislative provisions relating to earnings and the allocation of earnings are contained in sections 35 and 36 of the EI Regulations. The following subsections of section 36 are at issue here:

a) 36(5) – Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable; and

b) 36(9) – Subject to subsections (10) and (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[12] In *Canada (Attorney General) v. Vernon* (1995), 189 N.R. 308 (FCA), the Federal Court of Appeal noted that the definition of earnings in the EI Regulations is very general, simply saying that it comprises the entire income of a claimant arising out of employment. Income, in turn, is defined as any pecuniary or non-pecuniary receipt from an employer or any other person.

[13] The Appeal Division's powers include, but are not limited to, substituting its own opinion for that of the General Division. Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the General Division decision in whole or in part.

SUBMISSIONS

[14] Each party filed written submissions.

[15] The Appellant submits that his former employer had checked off "unknown" in the Record of Employment (ROE) for "expected date of recall" and, therefore, the General Division incorrectly applied subsection 36(9) of the EI Regulations. His arguments can be summarized as follows:

a) An EI agent summarized a telephone conversation with his former employer in a note dated August 18, 2015, and this document contains errors.

b) The General Division relied on some information in that note that was incorrect, specifically, as it relates to the former employer stating that he should have picked "not returning" in the ROE rather than "unknown" in response to "expected date of recall."

c) The former employer has confirmed that "unknown" is the truthful response.

d) The Appellant's lay-off or separation is not permanent and "it is reasonable to assume" that payment of vacation pay at the time of separation was to maintain "a felicitous relationship" with the Appellant in consideration of his returning to work.

e) In paragraphs 13 and 29 of the General Division decision, the member summarized the Appellant's submissions inaccurately. The member also attributed case–law-related submissions to the Appellant that he had not made.

f) The General Division misconstrued CUB 8641 and 8641A and *Canada (Attorney General) v. C. L.*, A-1650-83.

g) The General Division erred by stating that the Appellant had relied on these CUB decisions and the Federal Court of Appeal decision therefrom.

[16] The Respondent submits that the General Division correctly determined that the vacation pay should be allocated to the week of separation in accordance with subsection 36(9) of the EI Regulations. More specifically, the Respondent argues the following:

a) The Appeal Division does not owe any deference to the General Division's conclusions with respect to questions of law, regardless of whether the error appears on the face of the record. However, for questions of mixed fact and law and for 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 had made in a perverse or capricious manner or without regard for the material before it.

b) The Federal Court of Appeal has confirmed that vacation pay that is paid by reason of a "lay-off or separation" must be allocated from the date of the lay-off or separation.

c) The former employer paid out the vacation pay owing as a result of a separation from employment.

d) Whether the separation was permanent or temporary does not change the period to which the allocation is made (i.e. it could extend the benefit period pursuant to paragraph 10(*b*) of the *Employment Insurance Act* (EI Act)).

e) There is no evidence that the vacation pay was paid as earnings for a contract of employment without performance of services or that it was payable in consideration of the Appellant returning to work.

f) There is no evidence that the General Division failed to observe a principle of natural justice, failed to exercise its jurisdiction, erred in law or made an erroneous finding of fact, given the evidence in this case.

STANDARD OF REVIEW

[17] The Federal Court of Appeal determined, in *Canada (Attorney General) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (Attorney General)*, 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 (Board) is that of correctness, while the standard of review for questions of fact and for questions of mixed fact and law is reasonableness.

[18] Until recently, the Appeal Division had been considering a General Division decision a reviewable decision by the same standards as that for a Board decision.

[19] However, in *Canada (Attorney General) v. Paradis*; and *Canada (Attorney General) 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 that the General Division has rendered.

[20] The Federal Court of Appeal, in *Maunder v. Canada (Attorney General)*, 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 General Division decisions. *Maunder* pertained to a claim for a disability pension under the *Canada Pension Plan*.

[21] In *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147, and *Canada (Attorney General) v. Peppard*, 2017 FCA 110, the Federal Court of Appeal considered applications for judicial review of Appeal Division decisions that had dismissed appeals of General Division decisions. The Appeal Division had applied the following standard of review: correctness for questions of law and reasonableness for questions of fact (or of mixed fact and law). The Appeal Division decision in *Hurtubise* had been rendered before the *Jean* decision and, in *Peppard*, it was rendered after the *Jean* decision. While the Federal Court of Appeal did not comment specifically on the standard of review that the Appeal Division should apply to General Division decisions, it affirmed the Appeal Division decisions and found them to be reasonable.

[22] There appears to be a discrepancy in relation to the approach that the Tribunal's Appeal Division should take with respect to reviewing appeals of EI decisions that the General Division has rendered 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 for questions of mixed fact and law.

[23] I am uncertain how to reconcile this apparent 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 pertain to the standard of review.

[24] Consequently, I will consider whether the General Division based its decision on an error of law or on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

ANALYSIS

New evidence: letter of former employer

[25] The Appellant seeks to rely on a letter dated January 6, 2016, from his former employer. This letter was not in the record before the General Division and was not mentioned in the General Division decision. This letter was attached to the Appellant's application for leave to appeal to the Appeal Division. Therefore, it is new evidence before the Appeal Division.

[26] The Appellant relies on this document as evidence that the Commission agent who reported a telephone conversation with the former employer (in a note dated August 18, 2015) misreported that conversation.

[27] The Respondent made no submissions about whether this letter could be added to the evidence at this stage of the appeal.

[28] The main point of this letter appears to be that the former employer checked off "unknown" in the ROE for "expected date of recall," and that this was a truthful response and not an error. The full text of the letter is in the Appeal Division record, and I have reviewed it in its entirety.

[29] Whether the Appeal Division can receive new evidence that the Respondent wishes to adduce is a preliminary issue.

[30] Federal Court of Appeal decisions have held the following:

a) Umpires should never receive new evidence: *Canada (Attorney General) v. Taylor*, [1991] F.C.J. No. 508; *Canada (Attorney General) v. Hamilton*, [1995] F.C.J. No. 1230; *Brien v. Canada (Employment Insurance Commission)*, [1997] F.C.J. No. 492; *Canada (Attorney General) v. Merrigan*, 2004 FCA 253; and *Karelia v. Canada (Human Resources and Skills Development)*, 2012 FCA 140.

b) Umpires were allowed to receive new evidence as long as it was "new facts" under (former) section 120 of the EI Act: *Canada (Minister of Energy and Infrastructure) v. Bartone*, [1989] F.C.J. No. 21; *Canada (Attorney General) v. Wile*, [1994] F.C.J. No. 1852; *Canada (Attorney General) v. Chan*, [1994] F.C.J. No. 1916.

c) Umpires could consider new evidence that was not "new facts" in relation to a breach of natural justice: *Velez v. Canada (Attorney General)*, 2001 FCA 343.

d) Umpires could, in an exceptional case, consider new evidence that was not "new facts" on the basis of (former) section 120 of the EI Act or otherwise: *Dubois v. Canada (Employment Insurance Commission)*, [1988] F.C.J. No. 768; and *Canada (Attorney General) v. Courchene*, 2007 FCA 183.

[31] In *Rodger v. Canada (Attorney General)*, 2013 FCA 222, the Federal Court of Appeal was faced with an appellant who tried to adduce new evidence before the Umpire, tried to adduce the same new evidence as new facts on the basis of a rescind or amend application of the original Umpire's decision and later tried to adduce new evidence before the Federal Court of Appeal. The Federal Court of Appeal decision held that:

> [26] Even if a litigant does not totally understand the process in which he is engaged, or fails to appreciate the significance of particular evidence, this Court is limited to reviewing the decisions before it on the basis of the evidentiary record before the decision-maker (*Ray v. Canada.*, 2003 FCA 317, [2003] 4 C.T.C. 206 (F.C.A.) at paragraph 5). This is not one of the rare situations where an exception can be made because, for example, the Court has to determine whether there was a breach of procedural fairness. The Umpire decided the appeal on the basis of the available evidentiary record which consisted of all the documents before the Board and the oral evidence referred to in the Board's decision as there was no transcript of the hearing. We must use the same record to review the Umpire's decision.
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> [27] As of the time he filed his first appeal before the Umpire, the applicant was attempting to retry his case on the merits. Unfortunately, the role of the Umpire was not to determine *de novo* his appeal from the decision of the Commission, nor as I mentioned earlier is it the role of this Court on judicial review to do so or to determine *de novo* the issues that were before the Umpire.
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> [43] As noted in *Canada (Attorney General) v. Chan* (1994), 178 N.R. 372 (Fed. C.A.) at paragraph 10 (*Chan*), reconsideration under this section

> of the *Act* should remain a "rare commodity", and an Umpire should be careful not to let the process be abused "by careless or ill-advised claimants". As unequivocally enunciated in *Chan*, a different or more detailed version of the facts already known to the claimant or a sudden realization of the consequences of certain facts are not new facts.

[32] Pursuant to the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, sections 266–267, the Office of the Umpire was replaced with the Tribunal's Appeal Division.

[33] Determining whether the Appeal Division can receive new evidence requires the following four-part analysis:

a) Is the Appeal Division able to rescind or amend a General Division decision?

b) Is the new evidence "new facts"?

c) If the new evidence is not "new facts," then does the new evidence pertain to a breach of natural justice?

d) If the new evidence is not "new facts," are there other exceptional circumstances, such as in *Dubois* and *Courchene*?

(a) Can the Appeal Division rescind or amend a General Division decision?

[34] Paragraph 66(1)(*a*) of the DESD Act states that a decision may be rescinded or amended "if new facts are presented" or if the Tribunal is satisfied that the decision was given without knowledge of, or was based on a mistake with respect to, some material fact.

[35] The Appeal Division may rescind or amend a decision that it made, but it may not rescind or amend a General Division decision. An application to rescind or amend a General Division decision would need to be brought to the Tribunal's General Division.

[36] Given that there is a one-year time limit within which an application to rescind or amend must be made, it is too late now for the Appellant to bring an application before the General Division. Under the circumstances, I will discuss the remaining questions.

(b) Is the new evidence "new facts?"

[37] In *Chan*, the Federal Court of Appeal stated that reconsidering a decision on the basis of new facts should be a rare occurrence:

> [11] Reconsideration of a decision by an umpire on the basis of "new facts" having been submitted is and should remain a rare commodity. Unemployment insurance claimants are given an exceptionally large number of opportunities to challenge the decisions affecting them and umpires should be careful not to let the reconsideration process be abused by careless or ill-advised claimants. […]

[38] There is a difference between new facts and new evidence supporting facts already known. As stated in *Chan, supra*: "A different version of facts already known to the claimant, mere afterthoughts or the sudden realization of the consequences of acts done in the past are not new facts."

[39] Evidence available (but not produced) at the time of the hearing before the General Division, , cannot be considered as new facts: *Velez*, *supra*.

[40] "New facts" must have occurred after the decision had been rendered, or they must have occurred prior to the decision and must have been unascertainable by diligence: *Chan*, *supra*.

[41] The question is not whether the Appellant was aware that the new evidence had to be produced at the General Division hearing but whether the Appellant, acting diligently, could have produced this evidence: *Canada (Attorney General) v. Hines*, 2011 FCA 252.

[42] Here, the new evidence that the Appellant seeks to adduce is in the form of a document that is dated before the date of the General Division hearing but that was not produced at that hearing. The Appellant, acting diligently, could have produced this evidence at the time of or before the General Division hearing.

[43] The new evidence is not "new facts" within the meaning of paragraph 66(1)(*a*) of the DESD Act.

(c) Does the new evidence pertain to a breach of natural justice?

[44] The Appellant included paragraph 58(1)(*a*) in the application for leave to appeal. However, his corresponding submission appears to be that an erroneous finding of mixed fact and law "stands to bring the administration of justice into disrepute."

[45] The new evidence that the Appellant seeks to adduce does not pertain to an argument that the General Division failed to observe a principle of natural justice but rather to the argument that the General Division made an error of mixed fact and law. The Appeal Division cannot receive it under the *Velez* exception.

(d) Are there other exceptional circumstances, such as in *Dubois* and *Courchene*?

[46] *Courchene*, *supra*, and *Canada (Attorney General) v. Boulton* (1996), 208 N.R. 63 (FCA), deal with documents that settled a labour or employment dispute between an EI claimant and his former employer. *Dubois*, *supra*, was affirmed in *Courchene*.

[47] In *Courchene*, the Umpire, by way of an application to rescind and amend, allowed into evidence minutes of settlement that were not before the Board. In *Boulton*, the agreement was submitted as evidence before the Board. In *Dubois*, the Federal Court of Appeal noted that new evidence, in the form of a medical certificate, should have been admissible before the Umpire where no rescind or amend application had been brought.

[48] I note that *Dubois*, *Courchene* and *Boulton* were decided within a regime that permitted an umpire to rescind or amend a Board decision. As stated above, the Appeal Division cannot rescind or amend a General Division decision. However, the Appeal Division had been considering a General Division decision a reviewable decision using the same principles as those for a Board decision (appealed to the Umpire).

[49] Given the decisions in *Paradis*, *supra*; *Maunder*, *supra*; and *Hurtubise*, *supra*, as well as the differences between section 66 of the DESD Act and former section 120 of the EI Act (rescind and amend provision), I am uncertain whether this line of cases is binding on the Appeal Division's consideration of a General Division decision.

[50] One reading of this line of cases is to limit their application to misconduct matters in which a settlement agreement between the claimant and the employer contradicts a finding of misconduct on the part of the claimant. However, some Appeal Division decisions have held that these cases are not limited in this manner: for example, AD-14-99 (*C. B. v. Canada Employment Insurance Commission*, 2016 SSTADEI 40).

[51] The present matter does not fall within the narrow application of these cases.

[52] While there may be exceptional circumstances in which the Appeal Division can receive new evidence, this matter is not one that warrants application of an exception. The Appellant had ample opportunity to challenge the August 18, 2015, summary of a telephone conversation that the Commission agent had made. In addition, the Appellant made arguments in relation to the ROE having indicated "unknown" for a date of return throughout this appeal.

[53] For the reasons enunciated in paragraphs 25 to 52 above, the Appeal Division cannot receive the new evidence that the Appellant has submitted.

[54] In any event, I note that this appeal does not turn on whether the new evidence is received at the Appeal Division.

Erroneous findings of fact and errors of mixed fact and law

[55] The Appellant alleges that paragraphs 13, 18, 29, 38 and 40 of the General Division decision contain erroneous findings of fact (specific portions of each paragraph that are at issue have been underlined):

> [13] The Appellant submitted that he was disqualified from receiving benefits for a period of time due to having received holiday pay at the time of his layoff. The Appellant submits that the vacation pay was accrued over a 15 month period and, had the employer paid out the vacation pay to him in 2014, it would not have negatively affected his current claim. At the hearing the Appellant reiterated his position that had the employer paid out the vacation pay to him in 2014, it would not have negatively affected his current claim. <u>He submits he was not on vacation the week following his dismissal and that his vacation pay should be deemed to have been received the next time he takes a vacation from employment.</u>

> [18] The Appellant submitted that another matter was read into the documentation after the appeal was started and a Service Canada agent said he had contacted the employer about the unknown date of return to work and the employer stated there was no likelihood of the Appellant returning to that employment. The Appellant stated he did not know the state of mind of the employer when he made that statement. He stated that he and his former employer are on good terms and the employer left the door open "indicating that he would like me to return". He stated that the agent made a different or incorrect interpretation of the facts of the statement.
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> [29] In this case, the Appellant did not receive benefits for the week following his termination of employment due to the receipt of a vacation pay of $424. The Appellant argued that he was not on vacation the week following his dismissal and that his vacation pay should be deemed to have been received the next time he takes a vacation from employment.
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> [38] The Appellant also relies on CUB 8641 and 8641A, which subsequently was heard by the Federal Court of Appeal in *Canada (AG) C. L. v.* [*sic*] A-1650-83 wherein the Court stated, "We have not been persuaded that there is merit in any of the points raised by the applicant in support of this application or that there is any basis on which this court could properly interfere with the decision of the Umpire."
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> [40] Nonetheless, the Appellant relies on the decision in this CUB and on subsection 36(5) of the Regulations to support his positon. He contends that he was "under a contract of employment without the performance of services" and that the earnings in question are allocable to the period for which they were payable. The Tribunal finds, however, there is no merit in this argument as raised by the Appellant.

[56] The Appellant argues that he had not made the submissions and arguments that were attributed to him in the above-noted passages, and that the General Division made errors in its findings of fact by attributing to him submissions and arguments that he had not made.

[57] A recitation or summary of submissions is not a finding of fact. The General Division did not make a finding of fact in the above-noted passages. It is immaterial whether the General Division member's recitation or summary of the submissions is precisely as the Appellant presented them, because submissions (or a recitation/summary of them) are not "an erroneous finding of fact that [the General Division] made in a perverse or capricious manner or without regard for the material before it."

[58] I also note that the underlined portions of paragraphs 13 and 29 of the General Division decision are irrelevant to the issues on appeal. There is no dispute that, pursuant to the EI Act and the EI Regulations, the vacation pay that the Appellant received constitutes "earnings" and that these earnings need to be allocated.

[59] Paragraphs 38 and 40 relate to the CUB cases and Federal Court of Appeal decisions discussed in the "Errors of law" portion of this decision, below.

[60] The Appellant's primary arguments before the Appeal Division pertain to the "expected return date" box in the ROE (and in the amended ROE). The former employer selected "unknown"; he did not select "not returning," and he did not enter a return date into the date field.

[61] The General Division made the following findings of fact:

a) The Appellant was separated from his employment on March 31, 2015 (paragraph 35).

b) He was paid severance monies (vacation pay) as a result of the separation from this employment (paragraphs 26 and 28).

c) The ROE indicated a "not known" return-to-work date (paragraphs 15 and 32).

d) The Commission contacted the former employer and determined that he did not anticipate that the Appellant would return to work (paragraph 32).

e) The Appellant was not under contract to the former employer; he had been laid off and his employment had been severed (paragraphs 34, 40 and 41).

[62] The General Division decision at paragraph 33 reproduced the text portion of a written summary of the telephone call between a Commission agent and the former employer on August 18, 2015 (GD2-23).

[63] The Appellant submits that the Commission's agent misreported this conversation and that the Respondent's reliance on this written summary and the General Division's reliance on it constitute an erroneous finding of mixed fact and law.

[64] For an erroneous finding of fact or of mixed fact and law to be reviewable by the Appeal Division, it must be one that the General Division made and it must be one upon which the General Division based its decision.

[65] The General Division referred to the written summary and stated at paragraph 34: “As a consequence the Tribunal finds the Appellant’s argument that he should have been presumed to be under contract to his employer, and therefore still an employee, is without merit. He had been laid off and his employment was severed.”

[66] These findings of fact were not based solely on the written summary. There was other evidence in the material before the General Division upon which to make this finding, including: there was no contract of employment produced, the Appellant had been laid off and had been paid severance monies, the ROE stated “paid because no longer working.” I also note that the Appellant did not return to work with his former employer at any point since April 2015.

[67] The General Division is the trier of fact, and its role includes weighing evidence and making findings based on its consideration of that evidence. The Appeal Division is not the trier of fact.

[68] As a member of the Tribunal’s Appeal Division on this appeal, I do not have the role of reviewing and evaluating the evidence that was before the General Division with a view to replacing the General Division’s findings of fact with my own. It is my role to determine whether a reviewable error set out in subsection 58(1) of the DESD Act has been made by the General Division and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the Appeal Division to intervene. It is not the Appeal Division’s role to rehear the case.

[69] The findings of fact that the General Division made, as set out in paragraph 61 above, were not erroneous, and they were not made in a perverse or capricious manner or without regard for the material before the General Division.

Errors of law

[70] The General Division decision referred to two CUB matters and several Federal Court of Appeal decisions.

[71] CUB 8641, CUB 8641A, *Canada (A.G.) v. C. L.*, A-1650-83, and *C. L. v. Canada (Attorney General)*, A-770-85, relate to the same matter. The Appellant submits that the General Division misconstrued these decisions and that it, thereby, erred in law. Specifically, the Appellant takes issue with the General Division's conclusion—that "the final decision of the Court relative to CUB 8641 is not in the Appellant's favour"—and submits that this statement was an error of law.

[72] The Appellant in the present matter was the appellant in CUB 8641 and 8641A. A large part of the decision in CUB 8641 pertained to the apprehension of bias on the part of a member of the panel of the Board; for this reason, the Umpire rescinded the Board decision. CUB 8641 was the subject of an application for judicial review to the Federal Court of Appeal (A-1650-83). The Federal Court of Appeal set aside the decision in CUB 8641 and referred the matter, with directions, back to the Office of the Umpire. The decision in CUB 8641A was made in accordance with the judgment of the Federal Court of Appeal, and the Chief Umpire referred the matter "to a differently constituted Board for re-hearing"; the Chief Umpire summarized the issue for decision by the Board as "whether the claimant, during the period in question, was available for work or, whether he had unreasonably restricted his willingness to accept employment so as to render himself ineligible for benefit."

[73] In his application for leave to appeal, the Appellant argues that nothing in his submissions to the General Division indicates that he relies on anything in CUB 8641 or 8641A. Furthermore, before the General Division, he characterized these decisions as "a little history."

[74] I note that, after the Umpire in CUB 8641A referred the matter to a differently constituted Board for a *de novo* hearing, that hearing was held in September 1984 and the Board dismissed the appeal. The claimant (the Appellant in the present appeal) appealed the Board decision to the Office of the Umpire; he alleged, among other things, that the Board had not given him a fair hearing and that it had exceeded its jurisdiction. That appeal was dismissed in

CUB 8641B. The claimant sought judicial review before the Federal Court of Appeal. That application was heard on October 22, 1986, and dismissed (A-770-85). The portion of the Federal Court of Appeal decision quoted at paragraph 38 of the General Division decision is taken from the Court's dismissal of the application for judicial review of CUB 8641B. The Federal Court of Appeal was "not persuaded that there was merit in any of the points" that the claimant had raised, and it did not interfere with the Umpire's decision in CUB 8641B.

[75] This series of decisions concerns the Appellant's employment in the early 1980s (with an employer that is not the former employer in the present matter) and the issue of his availability during the period of his claim for a renewal of benefits in August 1982. Before the General Division, the Appellant referred to the decisions as "a little history" and, as a result, the General Division cited them in its decision. However, this series of decisions is not relevant to the present appeal.

[76] The General Division did not apply the Federal Court of Appeal decisions (either A-1650-83 or A-770-85). Its finding that "the final decision of the Court relative to CUB 8641 is not in the Appellant's favour" did not misconstrue the decisions. The passage quoted was the Federal Court of Appeal's final decision in relation to CUB 8641 (the first decision in the series), and the Court dismissed the Appellant's application.

[77] The Appellant contends that the General Division's finding in paragraph 41 of its decision (that he was not "under contract for services as an Executive or in any other capacity") was based on the paragraphs pertaining to the series of decisions related to CUB 8641 and, therefore, that that finding was an error in law. I do not agree. Reading paragraphs 41 and 42, it is clear to me that the General Division found as a fact that the Appellant was not under a contract for services with the former employer in the present matter based on the evidence in this matter.

[78] The Appellant also submits that the General Division erred in law in allocating the vacation pay pursuant to subsection 36(9) of the EI Regulations rather than subsection 36(5).

[79] In order for subsection 36(5) to apply, the earnings must be payable to a claimant "under a contract of employment without the performance of services or payable by an employer to a claimant in consideration for the claimant returning to or beginning work […]"

[80] There is no dispute about the following:

a) The Appellant's employment with Logico Carbon Solutions Inc. (former employer) ended, and a claim for EI regular benefits was established effective April 5, 2015;

b) Logico Carbon Solutions Inc. was (and is) dormant;

c) There is no contract of employment between the Appellant and his former employer in the appeal record; and

d) There was no expected date of return to work with the former employer.

[81] While the Appellant argues that "it is reasonable to assume that … payment of vacation pay … at the time of separation was to maintain a felicitous relationship with the Claimant in consideration of the claimant returning to … work" (emphasis added), the evidence before the General Division did not establish the necessary conditions for subsection 36(5) of the EI Regulations to apply.

[82] In *Sarrazin v. Canada (Attorney General)*, 2006 FCA 313, the Federal Court of Appeal stated:

> [7] […] the decisions of our Court are consistent on this point, and have taken on the character of a judicial policy that gives subsection 36(9) of the Regulations a practical and functional meaning, a meaning that reflects the intention of Parliament that vacation pay, paid or payable by reason of a lay-off or separation from an employment, be allocated to a number of weeks that begins with the week of the lay-off or separation. This is the intention of subsection 36(9) "regardless of the nature of the earnings or the period in respect of which the earnings are purported to be paid or payable."

[83] Here, the vacation pay was payable to the Appellant by reason of a lay-off or a separation from employment at Logico Carbon Solutions Inc. Subsection 36(9) of the EI Regulations applies.

[84] The Appellant argues that his lay-off or separation “is not permanent.” However, the Federal Court of Appeal has held that it is not relevant whether the lay-off or separation is temporary: *Canada (Attorney General) v. Tremblay*, [1996] FCJ 1335, (1996) 208 NR 56 (A-106-96). Subsection 36(9) of the EI Regulations covers not only permanent separation from employment but also temporary cessation of work.

[85] The General Division did not err in law in finding that subsection 36(5) of the EI Regulations does not apply to the present matter and that subsection 36(9) is applicable. The General Division did not err in law in applying or interpreting the case law pertaining to these provisions.

CONCLUSION

[86] Although the Appellant asserts that certain passages in the General Division decision contain reviewable errors, I have determined that they are not erroneous findings of fact that the General Division “made in a perverse or capricious manner or without regard for the material before it, in coming to its decision” or errors of mixed fact and law; rather, I find that the Appellant’s appeal to the Appeal Division cannot succeed under paragraph 58(1)(*c*) of the DESD Act. In addition, the General Division did not err in law in making its decision and, therefore, the appeal cannot succeed under paragraph 58(1)(*b*) of the DESD Act.

[87] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division