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

Citation: *K. B. v. Canada Employment Insurance Commission*, 2018 SST 133

Tribunal File Number: AD-17-672

BETWEEN:

**K. B.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: February 6, 2018

## REASONS AND DECISION

## INTRODUCTION

On September 6, 2017, the General Division of the Social Security Tribunal of Canada determined that a payment received by the Applicant (Claimant) as severance was properly allocated to the period from January 2, 2016, to December 25, 2016. The Claimant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on October 13, 2017.

## ISSUE

[1] Does the appeal have a reasonable chance of success?

## THE LAW

[2] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[3] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[4] According to subsection 58(1) of the DESD Act, the following are the only grounds of appeal:

> (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.

## SUBMISSIONS

[5] The Claimant submitted to the General Division that he could have accepted the termination on December 30, 2015, when his position was eliminated. Instead, he elected, per the terms of his collective agreement, to be laid off and remain an employee until June 30, 2016. During this period, he would be eligible for an Employment Insurance benefits top-up and be entitled to bid on positions and to have his service recognized. He also maintained his union seniority, and continued to accrue vacation, and earned sick leave and was still considered an employee of the company.

[6] In consequence of his election, the Claimant argued that he was not separated from his employment or entitled to the severance payment until he terminated the employment relationship himself or the six-month period elapsed and, therefore, that no part of the severance payment should have been allocated from January 2, 2016, to June 30, 2016.

[7] The Claimant now argues that the General Division failed to observe a principle of natural justice, made an error of law, and made an important error of fact. More specifically, the Claimant argues that severance moneys were not payable until after June 30, 2016, and that subsection 36(15) of the *Employment Insurance Regulations* (Regulations) requires moneys that are paid or payable in a lump sum to be allocated beginning with the first week that those moneys are paid or payable.

[8] The Claimant has included additional evidence in his submissions to the Appeal Division; however, I will not be considering that evidence. The evidence is not material to the question of whether the General Division made an error in considering the evidence that was before it.

## ANALYSIS

### Is there an arguable case that the General Division erred in law by determining the commencement of the allocation period with regard only to the date the Claimant's position was eliminated?

[9] Although the Claimant submitted that all three grounds of appeal applied, his arguments are directed to a potential error of law. To the extent that the Claimant relies on his

interpretation of subsection 36(15) of the Regulations, his argument has no reasonable chance of success. Subsection 36(15) refers specifically to moneys described in paragraph 35(2)(*e*), which are payments on account of or in lieu of a pension. There is no evidence or argument to suggest that any portion of the severance payments was on account of or in lieu of a pension.

[10] Following direction from the Federal Court, I have nonetheless gone beyond the Application to review the record for other possible errors.[1]

[11] It is apparent from the audio recording of the hearing that the General Division member considered the dispositive question to be the reason for the severance payment. She states (at 15 minutes, 43 seconds): "What we need to determine today is […] was: What was the reason for the payment - Why did he receive the payment." The General Division found that the Claimant's position ended on December 30, 2015, and concluded that the motive for the payment of the severance was the elimination of his position. From this, the General Division determined that the allocation should commence at the time of that elimination, i.e. the lay-off.

[12] Whether the severance payment was payable by reason of the elimination of the Claimant's "position" when the employer's obligation to pay was still contingent or whether the payment was made as a result of the Claimant's final separation from the employer when the obligation crystallized[2] is a question of fact. However, the reason for a payment determines only whether the payment may be considered earnings—and there was no dispute that the payment was severance or that it should be considered earnings. Nothing in the Regulations suggests that the reason for the payment determines the date on which the allocation is to commence.

[13] Subsection 36(9) of the Regulations states only that the allocation begins with the lay-off *or* the separation. In this case, the elimination of his position coincided with his lay-off, but it did not necessarily coincide with his separation from employment.

[14] The wording of subsection 36(9) is unclear as to whether the terms "lay-off" and "separation" are intended to be treated distinctly or to be treated synonymously, but the lay-off and separation dates may well be distinct. The Regulations do not address which of "lay-off" or

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[1] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615; *Joseph v. Canada (Attorney General)*, 2017 FC 391.
[2] See *Canada (Attorney General) v. Savarie*, 1996, A-704-95.

"separation" should be employed where they are not the same date, and there is no binding precedent that is of assistance.

[15] However, a decision of the Umpire (CUB 28611) considered the legislative reference to "lay-off or separation" to be ambiguous. The Umpire stated that the two terms are not synonymous, yet the legislation makes little sense if they are not treated as synonymous. In seeking to resolve this difficulty, the Umpire proceeded on the same basis as prior umpire decisions, which, it noted, had been consistent in holding that for the purpose of calculating the commencement of the allocation period, it is the *date of the final breaking of the employer-employee relationship that must prevail*.

[16] The General Division considered the application of subsection 36(9) to the lay-off but not to the separation date. I find that it is possible that the General Division erred under paragraph 58(1)(*b*) in that it may have misinterpreted or misapplied the law. I therefore find that the Application has a reasonable chance of success on appeal.

[17] Given my findings above, it is not necessary for me to consider whether the General Division may have erred in failing to observe a principle of natural justice or whether it made an erroneous finding of fact[3].

**CONCLUSION**

[18] The Application is granted.

[19] The Claimant is free to argue alternative or additional grounds at the hearing of his appeal on the merits of the case.

[20] This decision granting leave to appeal does not presume the result of the appeal on the merits.

Stephen Bergen
Member, Appeal Division

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[1] [3] See *Mette v. Canada (Attorney General)*, 2016 FCA 276