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

Citation: *W. S. v. Canada Employment Insurance Commission*, 2018 SST 290

Tribunal File Number: AD-17-612

BETWEEN:

W. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant (Claimant) applied for special benefits and established a benefit period effective June 19, 2016. He later filed a request to have his claim for special benefits antedated to the date of his surgery. In response, the Respondent, the Canada Employment Insurance Commission (Commission), determined on October 3, 2016, that the short-term disability payments the Claimant had received were earnings and therefore subject to allocation. This resulted in an overpayment of Employment Insurance benefits.

[3] The Claimant disagreed with the characterization of the payments as earnings and requested a reconsideration. The Commission maintained its original position in a letter dated November 23, 2016, and the Claimant appealed to the General Division of the Social Security Tribunal. The General Division also found that the payments the Claimant had received should be considered earnings. The Claimant sought leave to appeal, which was granted because the General Division may have erred in law by providing inadequate reasons.

[4] I dismiss the appeal. The reasons for the General Division decision were imprecise but sufficiently clear that the Claimant could be expected to understand why his appeal was denied. I find that the payments the Claimant received were because of sickness or disability and arose out of his employment and that they were not exempt from inclusion as earnings because they were not paid under a group plan. No other concern was raised concerning the manner in which the earnings were allocated, and I find no error.

ISSUES

[5] Did the General Division err in law in failing to provide sufficient reasons?

[6] Did the General Division err in basing its decision that the payments the Claimant received were earnings on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it?

ANALYSIS

Standard of review

[7] The Commission's written submissions suggest that it considers a standard of review analysis to be appropriate. However, the Commission does not specifically argue that I should apply the standards of review or that reasonableness is the appropriate standard.

[8] I recognize that the grounds of appeal set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) are very similar to the usual grounds for judicial review, and this suggests that the standards of review might also apply here. However, recent case law from the Federal Court of Appeal has not required that the standards of review be applied, and I do not consider it to be necessary.

[9] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division, but it indicated in *obiter* that it was not convinced that Appeal Division decisions should be subjected to a standard of review analysis. The Court observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference.

[10] Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review.

[11] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court

found that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[12] The enabling statute for administrative appeals of Employment Insurance decisions is the DESD Act, and the DESD Act does not provide for a review according to the standards of review.

[13] Other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review (such as *Hurtubise v. Canada [Attorney General]*, 2016 FCA 147; and *Thibodeau v. Canada [Attorney General]*, 2015 FCA 167). Nonetheless, the Federal Court of Appeal does not appear to be of one mind on the applicability of such an analysis within an administrative appeal process.

[14] I agree with the Court in *Jean* where it referred to one of the grounds of appeal set out in subsection 58(1) of the DESD Act and noted, "There is no need to add to this wording the case law that has developed on judicial review." I will therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only, and without reference to "reasonableness" or the standards of review.

Decision on the merits

General principles

[15] The General Division is required to consider and weigh the evidence before it and to make findings of fact. It is also required to apply the law. The law would include the statutory provisions of the *Employment Insurance Act* (Act) and the *Employment Insurance Regulations* (Regulations) that are relevant to the issues under consideration, and could also include court decisions that have interpreted the statutory provisions. Finally, the General Division must reach conclusions on the issues that it must decide, by applying the law to the facts.

[16] The appeal to the General Division was unsuccessful and the application now comes before the Appeal Division. The Appeal Division is only permitted to interfere with a General

Division decision if the General Division has made certain types of errors, which are called "grounds of appeal."

[17] Subsection 58(1) of the DESD Act sets out 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.

Issue 1: Sufficiency of reasons

[18] It is possible for reasons to be so inadequate as to constitute an error of law. According to *McKinnon*,[1] the central requirement is that a Tribunal's reasons explain how it reached its decision. Despite the confusion of terms in the decision, I consider the General Division's reasons to be sufficient.

[19] As noted in the decision on leave to appeal, the General Division decision was unclear as to how it would characterize the payments. The General Division referred to a wage-loss replacement plan, a wage-loss insurance plan, and a short-term disability (STD) plan and finally adopted the Applicant's "STD" terminology in its analysis section.

[20] In its submissions, the Commission agreed that the General Division must sufficiently fulfil an appellant's right to know why a decision was made. I accept that the interchanging of the terms Wage-loss Insurance Plan, Wage-loss Indemnity Plan and Wage-loss Replacement Plan created difficulties for the Claimant in determining whether his evidence was properly understood and whether the test was properly considered.

[1] *Clifford v. Ontario (Attorney General*), 2009 ONCA 670, cited with approval in *McKinnon v. Canada (Employment Insurance Commission)*, 2010 FCA 250.

[21] The insufficiency of the reasons identified earlier concerns the characterization of the plan for the purpose of consideration under s. 35(2) and s. 35(7) of the Regulations. At least part of the difficulty with the reasons derives from the Claimant's belief that there is special significance to classifying his benefits as STD benefits.

[22] The General Division had to characterize the nature of the benefits that the Commission had considered to be earnings and allocated, and it had to determine whether s. 35(7) of the Regulations could be applied. Unless a specific exception applies, the general rule under s. 35(2) is that all income arising out of employment will be considered earnings. Furthermore, s. 35(2)(*c*) specifically includes as earnings, payments under a group wage-loss indemnity plan or a paid sick leave plan. The General Division must characterize the payments in question correctly to determine whether they must be considered earnings in accordance with s. 35(2)(*c*) and, if so, to determine whether s. 35(7) is engaged to exclude the payments from earnings.

[23] The General Division analysis focused on whether there was a sufficient connection between the short-term disability payments and the Claimant's employment. If STD payments are synonymous with, or equivalent to, payments under either a group wage-loss indemnity or sick leave plan and could be characterized as such, then a "sufficient connection" analysis would not have been necessary to arrive at the decision because they would be considered income arising out of employment by definition, according to s. 35(2)(*c*) but subject to the exclusion in s. 35(7).

[24] If payments cannot be defined as arising out of employment with reference to subparagraphs 35(2)(*a*)–(*f*), then it is necessary to determine whether they have a sufficient connection to the employment to be found to arise out of the employment. "Sufficient connection" is the test by which various types of payments may be found to be income arising out of employment.[2] The General Division applied the "sufficient connection" test to assess the circumstances of the Claimant's STD plan, but it also considered the applicability of s. 35(7), whose application would be engaged (in these circumstances) only if the STD plan could be considered a wage-loss indemnity or sick leave plan.

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[2] *Canada (Attorney General) v. Roch*, 2003 FCA 356.

[25] If the General Division had considered an STD plan to be something separate from a wage-loss indemnity or sickness plan, the General Division's finding of a "sufficient connection" would still have meant that the payments were income arising out of employment and therefore earnings to be allocated.

[26] In my view, the reasons were sufficient for the Claimant to understand that the payments were considered earnings because they were connected to his employment and found to have arisen out of his employment, and that they could not be exempted because they were paid under a group plan.

[27] I do not find that the General Division decision actually depended on the manner in which the payments were characterized and I consider the basic rationale for the decision comprehensible despite the imprecise terms. The reasons are not so inadequate as to constitute a denial of natural justice or an error of law.

Issue 2: Erroneous findings of fact

Sufficient connection between employment and payments to the Claimant

[28] deductions from benefits under s. 19 of the Act, s. 35(2) of the Regulations defines earnings as comprising the entire income of a claimant arising out of any employment.

[29] The Claimant argued that STD payments are not akin to wage-loss indemnity payments or sick leave payments. Even if this were accurate, those payments would still be part of the Claimant's "entire income" unless he could establish that the payments were not sufficiently connected to his employment. The General Division found that the payments were sufficiently connected to his employment that they should be considered income arising from employment under s. 35(2).

[30] The Claimant argued that the General Division failed to take account of the fact that the employer paid only to administer the plan but that the plan benefits were fully funded by the employees, but I do not accept this. The General Division was aware of the Claimant's consistent position that the employer did not contribute to the plan (see paragraphs 10, 13, 14, 21, 22, 28, 31, 35, and 40[h]).

[31] Nonetheless, the General Division still found that the benefits were earnings under s. 35(2). The General Division found that there was a "sufficient connection" between the employment and the payments received so that the payments could be considered income arising from employment. In doing so, it relied on information from the insurance provider that stated that "[the Claimant's] benefits were to replace income lost because of a disability due to disease or injury if the disease or injury prevents him from performing the essential duties of his regular occupation." It also relied on the undisputed fact that the Claimant would not have been able to participate in the plan if he were not working for the employer (paragraph 52). The General Division weighed a number of factors, including the point emphasized by the Claimant that the payments were not funded in whole or in part by the employer. After assessing all the evidence, the General Division concluded that there was a sufficient connection.

[32] In relation to the Claimant's argument that the STD payments are not earnings for tax purposes, I cannot find that the General Division erred in fact or law. The General Division is correct that the tax status of the payments is not relevant to its determination that the payments are earnings for the purposes of the Act (see paragraph 48).

[33] The General Division's findings were neither perverse nor capricious and were made with regard to the materials before the General Division.

The STD payments should have been excluded from earnings

[34] As noted above, if the STD payments were not properly considered wage-loss indemnity plan or sick leave payments, then they could be excluded from earnings only if they were not considered "sufficiently connected." However, ss. 35(2)(*c*)(i) and (ii) of the Regulations stipulate that any payments a claimant has received or is entitled to receive under a group wage-loss indemnity plan or a paid sick leave plan will be included in the claimant's income arising out of their employment.

[35] The only way in which such payments could be excluded would be if they were not made under a group plan. According to s. 35(7) of the Regulations, payments under a sickness or wage-loss indemnity plan will still be considered earnings when they are made under a "group plan."

[36] According to s. 35(8) of the Regulations, a sickness or disability wage-loss 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).

[37] The payments must be made under a plan that meets all of the criteria of s. 35(8) in order to be considered a "group plan." The reason the General Division focused on whether the Claimant's payments were made under a group plan was so that it could determine if they could be excluded under s. 35(7). Payments are not considered earnings under s. 35(2) if they are made under either a sickness plan or a disability wage-loss indemnity plan that is not a group plan, according to s. 35(7)(*b*).

[38] The Claimant provided evidence in support of his contention that the plan was not financed in whole or in part by the employer, in keeping with s. 35(8)(*c*). However, he did not dispute that he could not opt out of the plan and that the plan was not portable. The Claimant has not suggested that the General Division mistook the evidence on these points. In fact, the Claimant seemed to concur that the payments were made under a group plan.

[39] As a result, the General Division correctly found that the Claimant did not meet all of the requirements of s. 35(8) and that the payments, whether termed short-term disability payments or wage-loss replacement payments, were paid under a group plan and therefore would not be excluded from earnings under s. 35(7).

[40] The Claimant argued that the Commission was mistaken when it found that he was receiving payments under a wage-loss indemnity plan and not a short-term disability plan. He stated that he had obtained, or was provided, information that led him to believe that benefits

payable under a short-term disability plan are not taxable and therefore would not be considered earnings.

[41] For the purpose of the *Employment Insurance Act* and Regulations, there is no meaningful distinction between STD benefits and any other disability-related payments. If the Claimant were correct that a meaningful distinction existed between STD payments and payments under a sickness or wage-loss indemnity plan, this would mean only that s. 35(7) of the Regulations (which addresses sickness or wage-loss indemnity plan payments) could not **exclude** the short term disability plan from being considered earnings, whether they were payable under a group plan or not. There is no provision that would exclude STD payments from being considered earnings, apart from the s. 35(7) exclusion.

[42] The critical distinction of s. 35(7) is between plans that are group plans and plans that are not: There is no practical distinction between plans that are considered STD plans and those termed wage-loss indemnity plans. As noted earlier, subsection 35(8) sets out the criteria for distinguishing between a group plan and a plan that is not a group plan.

[43] In the final analysis, the General Division's decision that the payments are income arising from employment does not depend on the classification of the payments as an STD benefit or on whether a STD benefit plan is, or is not, a wage-loss indemnity plan or a sick leave plan. By finding that there was a sufficient connection between the STD benefits and the Claimant's employment, the General Division determined that the payments were earnings, **regardless** of how they might be characterized. If the General Division had been clear that it considered the STD benefit plan to be a kind of group wage-loss indemnity plan or a sick leave plan, then its finding that there was a sufficient connection would have been unnecessary, but it could have served only to reinforce the effect of s. 35(2)(*c*). The payments would still be considered earnings arising out of employment either way.

[44] I do not accept that the General Division erred in law by failing to distinguish between an STD plan and a group wage-loss indemnity or sick leave plan or by failing to take all the proper considerations into account when determining whether the plan was a group plan or not. I also do not accept that the General Division ignored or misunderstood the Claimant's evidence that the payments were not taxable or that they were fully funded by employees. Nor do I accept that the

General Division otherwise determined that the plan was a group plan in a perverse or capricious manner.

[45] Having properly found the “short-term disability” payments to be earnings, the General Division confirmed that the earnings should be allocated and confirmed that they were allocated correctly. The Claimant did not challenge the manner in which the payments were allocated, and no error is apparent on the face of the record.

[46] I find no error of natural justice or error of law, and I have not discovered any erroneous findings of fact made in a perverse or capricious manner or without regard to the material before the General Division.

CONCLUSION

[47] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 6, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	W. S., Appellant Carole Robillard, Representative for the Respondent Kristen Underwood, Director, Regulatory and Revenue Policy Design, ESDC, Observer