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

Citation: *L. S. v. Canada Employment Insurance Commission*, 2018 SST 566

Tribunal File Number: AD-17-861

BETWEEN:

L. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 24, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. While I have found that the General Division erred in refusing jurisdiction over the amount of the overpayment, I find the overpayment amount to have been correctly determined by the Commission to be $1,048.00.

OVERVIEW

[2] The Appellant, L. S. (Claimant), left his employment and received vacation pay, pay in lieu of notice, and a severance settlement. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the severance should be allocated, but the full amount of the legal fees incurred by the Claimant in obtaining the settlement was not immediately determined. After deducting what it understood to be the legal fees, the Commission allocated the net severance settlement, determined that the Claimant had been overpaid benefits, and issued a Notice of Debt on November 19, 2016.

[3] After the Claimant requested a reconsideration, the Commission revised the net settlement amount and reallocated the severance to a reduced number of weeks. A new Notice of Debt dated December 31, 2016, was also issued in the amount of $1,048.00.

[4] The Claimant appealed to the General Division of the Social Security Tribunal on the basis that his new legal fee information should have erased the debt entirely and that he should not be responsible for a mistake made by the Commission. The General Division confirmed the allocation but refused jurisdiction over the amount of the overpayment.

[5] The General Division erred in refusing jurisdiction over the overpayment. However, there is no basis for interfering in the overpayment of $1,048.00, and I confirm that this amount is correct.

ISSUE

[6] Did the General Division refuse to exercise its jurisdiction in failing to consider the overpayment amount?

ANALYSIS

Standard of review

[7] The grounds of appeal set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) are similar to the usual grounds for judicial review, suggesting that the same standards of review analysis used by the higher courts might also be applicable at the Appeal Division.

[8] However, I do not consider the application of standards of review to be necessary or helpful. Administrative appeals of Employment Insurance decisions are governed by the DESD Act. The DESD Act does not provide that a review should be conducted in accordance with the standards of review. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*[1] was of the view that standards of review should be applied only if the enabling statute provides for their application. It stated that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[9] *Canada (Attorney General) v. Jean*[2] concerned a judicial review of an Appeal Division decision. The Federal Court of Appeal was not required to rule on the applicability of standards of review, but it acknowledged in its reasons that administrative appeal tribunals do not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal where the standards of review are applied. The Court also observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference.

[10] Certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review,[3] but I am nonetheless persuaded by the reasoning of the Court in *Huruglica* and *Jean*. I will therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only.

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[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93
[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242
[3] See, for example, *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; *Thibodeau v. Canada (Attorney General*), 2015 FCA 167

General principles

[11] The Appeal Division's task is more restricted than that of the General Division. The General Division is empowered to consider and weigh the evidence that is before it and to make findings of fact. The General Division then applies the law to these facts in order to reach conclusions on the substantive issues raised by the appeal.

[12] By way of contrast, the Appeal Division cannot intervene in a decision of the General Division unless it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s. 58(1) of the DESD Act, and set out below:

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.

Jurisdiction to consider overpayment amount

[13] The General Division confirmed that the severance settlement was earnings and that it was allocated correctly, but it declined jurisdiction over the overpayment amount of $1,048.00. The General Division stated that the "overpayment was created because the Claimant had exhausted his entitlement to EI benefits" and that this was a different issue than the issue under appeal.

[14] In the reconsideration decision of December 30, 2016, the Commission deducted additional legal fees from the Claimant's severance settlement and reduced the net severance settlement amount to be allocated accordingly. The number of weeks over which the severance was allocated was decreased accordingly, from 43 to 40 weeks.[4] This re-entitled the Claimant to benefits in three of the weeks for which the overpayment had been determined.

[4] GD3-68

[15] As a further consequence of the reallocation, the Commission found that the Claimant had received two more weeks of benefits than he was entitled to. Prior to the reallocation, the Claimant had received 49 weeks of benefits comprised of 36 weeks of regular benefits and 13 weeks of special benefits. When the Commission reinstated three weeks of benefits, those weeks were added to the other weeks of regular and special benefits for a new total of 52 weeks. Under s. 12(6) of the *Employment Insurance Act* (Act), the Claimant could receive a maximum of 50 weeks of combined regular and special benefits within his benefit period.

[16] The Claimant received 52 weeks of benefits when he was entitled to a maximum of 50 weeks. Thus, the General Division is correct in saying that an overpayment was created because the Claimant had exhausted his entitlement to benefits. However, I do not accept that an overpayment resulting from the Claimant's exhaustion of benefits is necessarily a different decision from the reconsideration decision of December 30, or one that would require a new reconsideration request and a new appeal. The reconsideration decision was the decision to reallocate, but this decision incorporated the incidental or consequential details of the overpayment, as is implicitly acknowledged in the Commission records that are associated with the reconsideration process and decision: The Commission informed the Claimant of the adjusted overpayment amount and of how it was calculated on December 30, and advised him of his right to appeal to the Tribunal.[5]

[17] Granted, the reallocation had two separate consequences: the Claimant was re-entitled to three weeks of benefits and, as a result of the inclusion of those additional three weeks, he had received two more weeks than the maximum 50 weeks permitted under the Act. However, neither of these consequences required the consideration of any additional facts or permitted the exercise of any discretion. If calculated correctly, the overpayment was a mathematically inevitable consequence of the reallocation.

[18] I acknowledge that the overpayment of $1,048.00 was explicitly identified in a Notice of Debt dated December 31 and that the Federal Court of Appeal in *Braga* has held that a Notice of Debt is a decision.[6] However, I do not understand *Braga* to preclude the consideration of the overpayment amount in an appeal of the allocation decision. *Braga* involved an appeal in which

[5] GD3-69
[6] *Braga et al. v. the Attorney General of Canada*, 2009 FCA 167

Notices of Debt (for multiple claimants) were the actual decisions that had been before the Board of Referees originally and then before the Umpire (the next level of appeal in the process in effect at the time). The Umpire had found that the Board of Referees erred in failing to consider the allocation issue, but the Court disagreed. The Court noted that the claimants had not argued that their severance payments were not earnings subject to allocation, and that the Umpire was not confronted with any issue with respect to the allocable earnings decision. The Court held that the Umpire should have recognized that the appeals before the Board were appeals of the Notices of Debt.

[19] In *Braga*, it was not necessary for the Court to analyze the allocation decision that supported the issuance of the Notice of Debt because the manner of allocation was not challenged. I read *Braga* as recognizing that an overpayment amount may still be open to challenge even where the decision generating the overpayment is correct, and that the overpayment amount may therefore be independently appealable. I also read the decision as placing a significant emphasis on a claimant's intentions for the purpose of determining what is properly on appeal.

[20] The Commission argued that the Claimant had clearly articulated his intention to have the November allocation reconsidered. However, the allocation decision was reconsidered– and amended as a result. Whatever the Claimant's original intention in respect of the original decision, the new determination in the reconsideration decision required a different response.

[21] Since the reconsideration decision, the Claimant's intention to appeal the resulting overpayment has been clear. From the manner in which the Commission explained its reconsideration decision, it is clear that the overpayment amount had been considered as part of the decision process[7]. The Claimant responded by framing his Notice of Appeal to the General Division to address the $1,048.00 overpayment and his arguments have related exclusively to his dissatisfaction with having to repay the overpayment. He has not disputed the manner of the allocation since before the initial Commission decision was reconsidered.

[22] The Federal Court of Appeal in *Braga* permitted the independent appeal of the Notice of Debt, but I do not accept that its intention was to *require* that an overpayment be addressed only

[7] GD3-69

through a separate appeal of the Notice of Debt. In this case, the Notice of Debt represents a non-discretionary implementation of an allocation decision in which the overpayment consequence was considered, there is no allegation of an intervening error in the manner in which the overpayment was calculated, and the Claimant's intention in appealing was to challenge the overpayment.

[23] While the Commission suggests that it must be given an opportunity to reconsider its overpayment under s. 112 of the Act before it may be appealed, I accept that the overpayment was integral to its existing reconsideration decision. Furthermore, allowing the Commission an opportunity to reconsider its overpayment separately would result in additional delay but nothing more. Put simply: The allocation added 3 weeks of benefits to the other 49 weeks of benefits the Claimant received, for a total of 52 weeks. The Commission had no discretion to find that the maximum benefits to which he was entitled should have been greater than 50 weeks of benefits.

[24] The Claimant's 52 weeks exceed the maximum by two weeks. The amount paid in benefits for each of those two weeks was $524.00 for a total overpayment of $1,048.00. These essential facts and calculations are unchallenged. Were the Commission given the opportunity to independently reconsider the Notice of Debt as it requests, it would have no choice but to maintain the overpayment.

[25] I find that the Notice of Debt was part of a reconsideration decision completed under s. 112 of the Act and therefore appealable to the General Division under s. 113. Therefore, the General Division erred in refusing to consider the overpayment amount under s. 58(1)(*a*) of the DESD Act.

Remedy

[26] The General Division record is complete, and I have all the information I require to make the decision that the General Division ought to have given.

[27] The Claimant argued to the General Division that he should not have to repay the additional two weeks of benefits because the overpayment was the result of the Commission's own delay and it was not his responsibility. He reiterated this argument at the Appeal Division.

The Claimant suggests that, if the Commission had been diligent, he would not be in a position of having to repay benefits he should not have received.

[28] I have no authority to direct the Commission as to its case management or administrative processes, and I cannot cancel overpayments or remit debts that have been properly assessed. Regardless of whether the Commission acted in a timely manner when considering the Claimant's new information, adjusting his net severance amount, and reallocating the severance to weeks of his benefit period, the Claimant received benefits to which he is not entitled and remains liable to repay them, as set out in s. 45 of the Act.

[29] As noted above, the amount of the overpayment was dictated by the change in the allocation of net severance, which is not in dispute.

[30] I find that the Claimant was properly assessed an overpayment of $1,048.00.

CONCLUSION

[31] The appeal is dismissed.

[32] Under the authority of s. 59 of the DESD Act, I will give the decision that the General Division should have given. I find that the Claimant has been overpaid $1,048.00, as described in the December 31, 2016, Notice of Debt.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 1, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. S., Appellant Susan Prud'Homme, Representative for the Respondent