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

Citation: *K. B. v. Canada Employment Insurance Commission*, 2018 SST 679

Tribunal File Number: AD-17-672

BETWEEN:

K. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: June 18, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division decision is varied in part.

OVERVIEW

[2] The Appellant, K. B. (Claimant), was informed that his position was being eliminated. Rather than accept termination at the end of December 2015, he exercised his option under the collective agreement (Agreement) to remain an employee and to bid on substitute positions with the employer for a period of six months. At the end of this time, the Claimant had not secured an alternate position, and his termination became final. He received a payout of $92,236.80 as severance. The Respondent, the Canada Employment Insurance Commission (Commission) found the severance payment to be earnings and allocated it from January 3, 2016. The Claimant requested a reconsideration, but the Commission maintained its decision. The Claimant appealed to the General Division of the Social Security Tribunal, arguing that his severance should not have been allocated prior to July 1, 2016.

[3] The General Division dismissed his appeal, and the Claimant now brings his appeal to the Appeal Division. The only issue is the effective date of allocation.

[4] The appeal is allowed. The General Division based its decision on an erroneous finding of fact by ignoring or misapprehending provisions of the Agreement and erred in law by failing to apply the test in s. 36(9) of the *Employment Insurance Regulations* (Regulations). The commencement date of the allocation has been varied.

ISSUE(S)

[5] Did the General Division erroneously find that the commencement of the severance should be the date the Claimant’s position was eliminated, and was this finding made without regard for the terms of the Agreement?

[6] Did the General Division err in law in its interpretation of s. 36(9) of the Regulations?

ANALYSIS

Standard of Review

[7] The grounds of appeal set out in s. 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 kind of standards of review analysis might also be applicable at the Appeal Division.

[8] 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 a decision of the Appeal Division. 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 required to consider and weigh the evidence that is before it and to make findings of fact. The General Division must apply the law to these facts in order to reach conclusions on the substantive issues raised by the appeal.

[12] For the Appeal Division to intervene in a General Division, the Appeal Division must 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.

[13] The only grounds of appeal are described 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.

Did the General Division ignore or misunderstand the terms of the collective agreement?

[14] Subsection 36(9) of the Regulations specifies that earnings paid or payable by reason of a lay-off or separation are to be allocated and that the allocation begins with the week of the lay-off or separation. The General Division stated that the reason or motive for the severance payment determines the date from which the allocation must begin[4] and it found that the elimination of the Claimant's position was the motive for the severance pay.[5]

[15] This finding was based in part on the Claimant's evidence that he could have accepted the severance payment at any time within the six-month period following December 30, 2015. However, the General Division only selectively referenced Article 24.5(*b*)(i) of the Agreement

[4] General Division decision, para. 31
[5] Ibid. para. 34

between the Claimant and the employer. In my view, the General Division failed to analyze Article 24.5(*b*) in its entirety. Article 24.5 reads as follows:

> 4.5 An employee who received notice of position elimination in accordance with this Article who does not obtain another permanent position with the Company prior to their employment termination date shall have the right to receive severance pay.
>
> Employees shall have the option of:
>
> a) Receiving severance and terminating employment upon completion of the notice period; or
>
> b) Deferring the employment termination date and receipt of severance for six (6) months and receiving Supplemental Employment Benefits (SEB) in accordance with Article 4.
>
> i) This option shall not extend the period of employment for purposes of severance calculation.
> ii) Employees who choose this option and accept a permanent position with the Company prior to their employment termination date will not be eligible to receive severance.

[16] The Claimant's selection of the second option (Article 24.5(*b*)) means that the Claimant deferred both his termination from the employer and his receipt of the severance payment. The Claimant opted to remain an employee in order to access internal employment opportunities while accruing leave entitlement, maintaining seniority, and accepting a supplemental benefit to top off his Employment Insurance benefits.

[17] Therefore, it would be more precise to say that the Claimant could have accepted the severance payment at any time within the six months, but only if he terminated his employment. For the Claimant to terminate the employment relationship, he would also have to forfeit the continuing benefits he received from that relationship, which included preferential access to employment in other positions with the employer as well as certain other incidents of employment.

[18] Not only was the Claimant's entitlement to severance within the six-month conditional on his taking action to sever the employment relationship, but he could have been disentitled to

receiving the severance entirely under 24.5(*b*)(ii) of the Agreement if he had been successful in obtaining a substitute position with the employer.

[19] The General Division's acceptance of the date that the Claimant's position was eliminated as the "lay-off or separation" date for the purposes of s. 36(9) ignored or misapprehended Article 24.5 and the effect of the Claimant's deferral of his termination under 24.5(*b*). I find this to be an error under s. 58(1)(*c*) of the DESD Act.

Did the General Division err in law in its interpretation of s. 36(9) of the Regulations?

[20] The Claimant also argued that the General Division made an error in law by allocating the severance payment to a period that was prior to the period in which he was entitled to receive it. The Claimant suggests that s. 36(9) provides two distinct reasons for earnings to have been paid or payable: lay-off or separation. He argues that his severance was paid or payable by reason of his separation from employment and not by reason of a lay-off. From this I infer that the Claimant believes that the General Division erred by selecting that "reason" that is inapplicable in the circumstances—in effect, applying the wrong test.

[21] The General Division determined that the Claimant was entitled to severance by reason of "the elimination of [the Claimant's] position." In this case, the date that the Claimant's position was eliminated coincided with the last day he worked—December 30, 2015—but the General Division does not state that the Claimant was laid off by reason of the elimination of the position. More to the point, the General Division makes no finding that the Claimant was entitled to severance by reason of the lay-off.

[22] I agree that the General Division is required by s. 36(9) of the Regulations to allocate the severance payments to either the lay-off date or the separation date, depending on whether the severance was paid or payable "by reason of" the lay-off or the separation. The Claimant seems to be arguing that the General Division mistakenly determined the allocation from the lay-off date, but I find that the General Division did not allocate the severance with reference to either the lay-off or the separation. While the effect of the General Division decision is to allocate earnings commencing at the lay-off date in this case, the date an employee's position is "eliminated" and the date of his lay-off need not necessarily coincide. The General Division does

not state that the severance payments should commence as of the date of lay-off and it is not clear that this was its intention or that the General Division applied s. 36(9) of the Regulations.

[23] I therefore find that the General Division erred in law by failing to apply s. 36(9) of the Regulations to determine the date from which the severance payment should be allocated.

Remedy

[24] Having found that the General Division erred, I must determine the appropriate remedy. Under s. 59 of the DESD Act, I may give the decision the General Division should have given; refer the matter back to the General Division for reconsideration; or confirm, rescind, or vary the decision in whole or in part.

[25] The Claimant did not argue that the General Division decision erred in finding that the severance payment in question is earnings and should be allocated, and I see no reason to disturb the General Division decision in this regard.

[26] However, both the Claimant and the Commission submit that the commencement date for the allocation should be July 1, 2016, which both parties accept as the date that severance became payable.

[27] As noted above, s. 36(9) requires that the earnings paid by reason of a lay-off or separation be allocated beginning with the week of the lay-off or separation. It is undisputed that the lay-off date is December 30, 2015. What remains to be determined is the separation date and whether the severance was paid by reason of the lay-off or by reason of the separation.

[28] According to Article 24.5 of the Agreement, an employee would not be entitled to severance until six months had lapsed from the date of the elimination of the employee's position or until the employee chose to sever the employment relationship. In the meantime, termination of the employee is deferred.

[29] The relevance and importance of terms such as Article 24.5 and the application of such terms has been considered in other cases. In *Canada (Attorney General) v. Cantin*,[6] the Federal

[6] *Canada (Attorney General) v. Cantin*, 2008 FCA 192

Court of Appeal considered a plant closure with a collective lay-off. In that case, the employer agreed to pay severance to its affected employees, but the payment was made contingent on the employees executing an agreement in which they waived their recall rights and terminated their relationship with the employer. Employees who did not sign the agreement retained the right of recall but did not receive severance. For this reason, the Court held that the collective lay-off did not constitute a separation from employment within the meaning of s. 36(9) of the Regulations. The Court considered that the final termination of the employment relationship had occurred at the later date when the waiver agreement was signed.

[30] The Federal Court of Appeal in *Canada (Attorney General) v. Savarie* also considered the application of s. 36(9) of the Regulations. It stated as follows:

> In my opinion, a payment is made "by reason of" the separation from employment within the meaning of this provision when it becomes due and payable at the time of termination of employment, when it is, so to speak, "triggered" by the expiration of the period of employment, when the obligation it is intended to fulfil was simply a potentiality throughout the duration of the employment, designed to crystallize, becoming liquid and payable, when, and only when, the employment ended. The idea is to cover any part of the earnings that becomes due and payable at the time of termination of the contract of employment and the commencement of unemployment.[7]

[31] Decisions of the Umpire are not binding on the Appeal Division, but I consider the Canadian Umpire Benefit Decision 28611 to be persuasive. In determining whether to allocate severance based on the “lay-off” or the “separation” date, the Umpire said: “it is the date of separation from employment -- the final breaking of the employer-employee relationship which must prevail.”

[32] I accept that the Claimant did not finally separate from employment until the expriry of the six month deferral period. The terms of the Agreement explicitly stated that the Claimant’s termination was deferred for six months from the position elimination (December 30, 2015), and the Claimant retained privileges specific to employees during that deferment, including preferred access to other positions with the employer. Furthermore, the Claimant could not have obtained his severance earlier than he received it unless he also forfeited his employee status and certain

[7] *Canada (Attorney General) v. Savarie, A-704-95*

benefits or privileges. He and he would not have been entitled to receive severance at all, had he been able to secure a position with the employer within the six month deferment.

[33] Because the Claimant's termination was deferred for six months and because the Claimant's entitlement to that severance depended on developments within that six-month period, I find that the severance payment did not crystallize until July 1, 2016, the day following the expiry of the six-month termination deferral. The Claimant was separated from his employment as of July 1, 2016 and, in accordance with s. 36(9) of the Regulations, his severance payment should properly be allocated to a period of weeks that begins with the week of the separation.

CONCLUSION

[34] The General Division decision is varied in part. I confirm that the severance payment of $92,236.80 is earnings and should be allocated as found by the General Division, but I vary the commencement date. The severance payment shall be allocated to a number of weeks beginning with the week of July 1, 2016, i.e. the week in which the Claimant was finally separated from his employer.

Stephen Bergen
Member, Appeal Division

HEARD ON:	June 12, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. B., Appellant Ronni Nordal, Representative for the Appellant Susan Prud'Homme, Representative for the Respondent