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

Citation: *J. K. v. Canada Employment Insurance Commission*, 2018 SST 942

Tribunal File Number: AD-18-217

BETWEEN:

J. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: September 21, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] The Appellant, J. K. (Claimant), worked for X until August 2, 2016, when he was laid off due to a shortage of work. He applied for and began receiving Employment Insurance regular benefits. Later that same year, he filed a complaint against his former employer, under the B.C. *Employment Standards Act*, in a dispute over wages. He and the employer then entered into a settlement agreement, in which the employer agreed to pay the Claimant wages totalling $1,628.84.[1] The settlement agreement indicated that the settlement amount referred to gross wages from which the employer could deduct statutory deductions. The Claimant notified the Respondent, the Canada Employment Insurance Commission (Commission), that he had received settlement monies in the amount of $1,628.84.

[3] The Commission determined that the settlement payment of $1,628.84 constituted earnings and initially applied them against the Claimant's Employment Insurance claim for the period from January 29, 2017 to February 11, 2017.[2] The Claimant sought a reconsideration, insisting that the settlement amount represented overtime pay earned from February 2, 2016 to August 2, 2016.[3] On reconsideration, the Commission allocated money relating to his settlement pay "at [his] normal weekly earnings from July 31, 2016 to November 12, 2016."[4]

[4] The Claimant appealed the reconsideration decision to the General Division; he appealed the determination of earnings and the allocation, claiming that the "$1,309.00 [*sic*] represented a settlement for a portion of overtime owing."[5] He claimed that the wages had been accumulated in the six-month period before August 2, 2016, when his employment had been terminated. The General Division conducted a hearing on February 20, 2018. The Claimant filed additional

---

[1] Settlement agreement, at pages GD3-17 to 18.
[2] Commission letter dated March 13, 2017, at pages GD3-23 to 24.
[3] Claimant's request for reconsideration, at page GD3-25.
[4] Commission letter dated May 10, 2017, at pages GD3-28 to 29.
[5] Notice of appeal filed with the Social Security Tribunal – General Division, at GD2.

documents following the hearing to establish that the settlement payment represented unpaid overtime between August 4, 2015 and August 2, 2016.[6] The General Division dismissed the appeal. It determined that the settlement monies were "wages from overtime lunches for the period from February 2, 2016 to August 2, 2016" and the sum of $1,628.84 constituted employment earnings that had to be allocated under s. 36(9) of the *Employment Insurance Regulations* (Regulations).[7] The General Division also found that the earnings had been correctly allocated by the Commission, beginning with the week of the separation from July 31, 2016.

[5] The Claimant sought leave to appeal the determination of earnings and the allocation of earnings. I granted leave to appeal because I was satisfied that there was an arguable case that the General Division erred in law in its allocation of the earnings when it determined that the settlement payment was in connection with the Claimant's lay-off or separation from employment, despite the fact that it had determined that the settlement payment was to compensate him for "unpaid overtime for lunches." The Commission now concedes the appeal.

ISSUES

[6] There are two issues before me:

(a) Did the General Division err either in law or in fact when it determined that the settlement monies represented earnings?

(b) Did the General Division err either in law or in fact when it determined that the settlement monies were to be allocated to the period between July 31, 2016 and November 2, 2016?

ANALYSIS

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

---

[6] Post-hearing documents filed with the Social Security Tribunal, at GD6-1 to 11.
[7] General Division decision, at paragraphs 38 to 39 and 42 to 43.

(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.

[8] The Claimant submits that the General Division erred under each of these paragraphs. He argues that the General Division erred, firstly, in determining that the settlement payment represented earnings and, secondly, in allocating the monies beginning with the week of separation, rather than to the period in which he had provided services.

Issue 1: Did the General Division err either in law or in fact when it determined that the settlement monies represented earnings?

[9] The Claimant submits that the General Division erred in law when it determined that the settlement monies represented earnings because it failed to assess whether s. 35(7) of the Regulations applied. The subsection provides that any retroactive increases in wages or salary (among other things) do not constitute earnings for the purposes of s. 35(2) of the Regulations.

[10] In my review of this matter, there was no evidence before the General Division to suggest that the settlement monies represented a retroactive increase in wages or salary. Indeed, the Claimant has maintained throughout that the settlement monies represented unpaid overtime. Overtime is not an increase in wages or salary, and s. 35(7) of the Regulations therefore did not apply. The General Division correctly determined that the settlement monies constituted earnings under s. 35(2) of the Regulations, and it therefore did not err in law or in fact when it did not apply s. 35(7) of the Regulations.

[11] I will turn now to the allocation issue.

Issue 2: Did the General Division err in law or in fact when it determined that the settlement monies were to be allocated to the period from July 31, 2016 and November 2, 2016?

[12] The Commission filed submissions on July 10, 2018 and August 15, 2018. The August 15 submission was in response to my questions regarding the composition of the settlement monies.

[13] The Commission is of the position that, although the General Division referred to the documents that the Claimant filed after the hearing, it was unclear whether the General Division actually considered them. The General Division wrote that the Claimant submitted documents to the Social Security Tribunal on February 20, 2018, regarding his employment and the allocation of earnings that were discussed during the hearing.

[14] The Claimant's three documents include the following:

1. Article titled "Employment Insurance Regular Benefits for Terminated Employee"—the author of this article wrote, "Even though unpaid wages, such as unpaid overtime hours, would seem to fall within the definition of 'earnings', these amounts would also not be considered for the purposes of repaying the EI benefits but would instead be used to recalculate your allowable benefits."

2. X document titled Annual Employee Bonus Plan produced for the Employment Standards hearing—this document purports to show that the employer rejected the Claimant's claim to a bonus. The employer wrote, "Based on the actual 2016 profit number and the eligible employees sharing the bonus pool, [the Claimant] was paid $72.34 over and above the bonus amount available."

3. Employment Standards Complaint Form, dated December 16, 2016—in this form, the Claimant reported that he was making a claim for overtime and for a bonus payment and indicated that he believed that he was owed "30% of bonus," estimated to be $559.72, from August 4, 2015 to August 2, 2016.

[15] The Claimant states that his employer rejected his Employment Standards December 2016 claim to a bonus because the employer had already paid the bonus in July 2016,

as evidenced by the employer's document titled Annual Employee Bonus Plan. The employer was of the position that no bonuses remained outstanding.[8] Therefore, the settlement monies represented unpaid overtime only.

[16] The Commission suggests that these documents had some probative value and that they should have been considered because they could have impacted the allocation issue, although it does not explain how in the circumstances of this case. The Commission claims that the General Division had a duty to explain why it dismissed or assigned little, if any, weight to the evidence and that, in failing to do so, "there is a risk that its decision will be marred by an error of law or be qualified as capricious."[9] I agree that it would constitute an error of law if the General Division failed to consider any material evidence that could have impacted the allocation issue or the outcome of the proceedings.

[17] The Commission further notes that the Federal Court of Appeal has also held that a tribunal must justify its determinations and must carefully address the issues presented and explain its findings in a coherent and consistent manner. In this regard, the Commission submits that the General Division failed to consider or explain why it did not apply s. 36(4) of the Regulations when it determined the allocation of earnings, having found that the settlement amount represented overtime lunches for the period from February 2, 2016 to August 2, 2016. The subsection stipulates that earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

[18] By relying solely on s. 36(9) of the Regulations, the General Division's analysis fell short. Having found that the settlement monies of $1,628.84 represented "wages from overtime lunches for the period from February 2, 2016 to August 2, 2016,"[10] the General Division should have determined the applicability of s. 36(4) of the Regulations and assessed whether the earnings should have been allocated to the period from February 2, 2016 to August 2, 2016. The General Division did not refer to s. 36(4) of the Regulations. By failing to consider the

---

[8] I note that the employer also wrote in the summary of the Annual Employee Bonus Plan that the "2016 bonus amount paid to [the Claimant] in July, based on estimated profits = $1306.00" and that the "2016 bonus amount available based on actual profit number and eligible staff = $1,233.66."
[9] *Bellefleur v. Canada (Attorney General)*, 2008 FCA 13.
[10] General Division decision, at paragraph 38.

applicability of s. 36(4) of the Regulations, the General Division erred in law. The appeal is allowed on this basis, pursuant to s. 58(1)(*b*) of the DESDA.

RELIEF SOUGHT

[19] Subsection 59 of the DESDA empowers me to 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 I might consider appropriate, or confirm, rescind, or vary the decision of the General Division in whole or in part.

[20] In its initial submissions, the Commission requested that this matter be returned to the General Division for a redetermination.

[21] The General Division found that the settlement payment was to compensate the Claimant for unpaid overtime for lunches between February 2, 2016 and August 2, 2016.

[22] The Commission argues that the General Division failed to appropriately analyze the post-hearing documents—that is, the settlement payment could have represented payment for something other than unpaid overtime. However desirable it would have been for the General Division to directly address the post-hearing documents, I find that they support the Claimant's assertions that the settlement payment represented unpaid overtime, rather than any component of a bonus.

[23] Initially the Commission suggested that the settlement monies could have included a component for a bonus, although this would be inconsistent with the employer's own document that indicates that it had already paid a bonus and that no further bonus was warranted or forthcoming. The Commission now concedes that the employer's lump sum payment of $1,628.84 was made to compensate the Claimant for "unpaid overtime for lunches." The Commission states that such a finding is compatible with the evidence and is reasonable, particularly because the Claimant's complaint filed with the Employment Standards Branch was based on unpaid overtime.

[24] Furthermore, the Claimant's recent submissions filed on August 22, 2018, confirm that he accepted his employer's arguments in his Employment Standards dispute that it had already

paid him the bonus. He verifies that none of the settlement monies were designated for or represented any bonus.

[25] The record before the General Division is complete. Coupled with my own findings that the settlement monies represent unpaid overtime (and no component for any bonus), I see no reason against providing the decision that the General Division should have rendered regarding the allocation of the earnings.

[26] I agree with the General Division that the settlement monies of $1,628.84 were wages from overtime lunches for the period from February 2, 2016 to August 2, 2016. However, the earnings should be allocated to that time frame, pursuant to s. 36(4) of the Regulations. As I noted above, s. 36(4) of the Regulations stipulates that earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed. Here, the General Division found that the earnings were generated in connection with services performed from February 2, 2016, to August 2, 2016. Subsection 36(9) of the Regulations does not apply to the circumstances of this case because the earnings were not "paid […] by the reason of a lay-off or separation from an employment."

CONCLUSION

[27] The appeal is allowed in part, as I have set out above. The settlement amount of $1,628.84 constitutes earnings that shall be allocated to the time frame between February 2, 2016 and August 2, 2016, pursuant to s. 36(4) of the Regulations.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers
PARTIES:	J. K., Appellant S. Prud'Homme, Representative for the Respondent