



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. I. v. Canada Employment Insurance Commission*, 2018 SST 1017

Tribunal File Number: AD-18-54

BETWEEN:

N. I.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: October 16, 2018

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, N. I. (Claimant), made an initial claim for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), informed the Claimant that her vacation pay would be allocated to part of her claim period after finding that this income was considered earnings. The Claimant requested a reconsideration of this decision on the basis that the Commission should not allocate her entire vacation pay, because it was accumulated over many years of employment. The Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal.

[3] The General Division concluded that the Claimant had earnings in accordance with s. 35(2) of the *Employment Insurance Regulations* (EI Regulations) and that these earnings were correctly allocated in accordance with s. 36(9) of the EI Regulations because the earnings were paid by reason of a separation from an employment.

[4] The Claimant was granted leave to appeal the General Division's decision to the Appeal Division. She argues that General Division erred in law because the vacation pay given on separation should have been allocated first to her unpaid vacation days during her employment before being allocated to the period when weekly benefits were payable.

[5] The Tribunal must decide whether the General Division failed to observe a principle of natural justice and whether it erred in law by not allocating the vacation pay given on separation first to her unpaid vacation days during her employment.

[6] The Tribunal dismisses the appeal.

ISSUES

[7] Did the General Division fail to observe a principle of natural justice by not informing the Claimant that the vacation pay given on separation could be allocated first to her unpaid vacation days during her employment?

[8] Did the General Division err in law by not allocating the vacation pay given on separation first to her unpaid vacation days during her employment?

ANALYSIS

The Appeal Division's Mandate

[9] The Federal Court of Appeal has determined that, when the Appeal Division hears appeals in accordance with s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the Appeal Division's mandate is conferred to it by ss. 55 to 69 of that act.¹

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.²

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or 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, the Tribunal must dismiss the appeal.

[12] The Claimant requested that the Tribunal render a decision on the record although she had received a proper notice of hearing. She did not attend the hearing, and the Tribunal carried on despite the absence of both parties because it was convinced that they had received the notice of hearing, in accordance with section 12 of the *Social Security Tribunal Regulations*.

¹ *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274 (CanLII).

² *Idem*.

Issue 1: Did the General Division fail to observe a principle of natural justice by not informing the Claimant that the vacation pay given on separation could be allocated first to her unpaid vacation days?

[13] This ground of appeal is without merit.

[14] Before the General Division, the Claimant elected to argue that, since the Commission only considers the last 52 weeks of earnings when determining a claimant's eligibility for EI benefits, the Commission should only consider the vacation pay earned in the last 52 weeks and not the vacation pay accumulated in previous years. The payment of the Claimant's EI benefits should therefore not be delayed because of earnings that accrued in previous years because doing so would amount to penalizing her for saving her vacation pay from previous years.

[15] The Claimant submits that the General Division should have informed her that a vacation pay given on separation could be allocated first to unpaid vacation days during employment.

[16] The Tribunal finds that, while it was appropriate for the General Division to explain the Tribunal's procedures to the Claimant and to inform her of the issue before it, its duty did not extend so far as to require the General Division member to become surrogate counsel for the Claimant. The General Division did not have an obligation to inform the Claimant that a vacation pay given on separation could be allocated first to unpaid vacation days during employment.

[17] For the above-mentioned reasons, the Tribunal finds that the General Division did not breach procedural fairness or fail to follow the requirements of natural justice.

Issue 2: Did the General Division err in law by not allocating the vacation pay given on separation first to unpaid vacation days?

[18] This ground of appeal is without merit.

[19] The Claimant submits that the General Division erred in law by not allocating the vacation pay given on separation first to her unpaid vacation days.

[20] However, the Claimant did not present this argument before the General Division, and therefore did not present evidence to support it.

[21] In her application for leave to appeal, the Claimant requested a delay to get information from her employer about the number of days she was on vacation unpaid (with specific dates). The employer stated that it did not have a record of the Claimant's time off.³ As a result, the Claimant submitted whatever information she could derive from her paystubs.

[22] It is established jurisprudence that the Appeal Division's powers are limited by the DESD Act. The Appeal Division is not authorized to retry the factual issues, weigh the evidence again or redo what the General Division has done. In other words, an appeal to the Appeal Division is not an appeal in which there is a new hearing, where a party can present her evidence again and hope for a favourable decision.

[23] The Tribunal finds that the Claimant's evidence existed before the General Division hearing and should have been submitted at that time. As a result, the Tribunal cannot take it into account in this appeal.

[24] Therefore, the Tribunal finds that the General Division did not err when it concluded that the Claimant had earnings in accordance with ss. 35(2) of the EI Regulations and that these earnings were correctly allocated in accordance with subsection 36(9) of the EI Regulations because the earnings were paid by reason of a separation from an employment.

³ AD1B-1

CONCLUSION

[25] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

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| HEARD ON: | October 9, 2018 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | None of the parties attended. |