



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *L. B. v. Canada Employment Insurance Commission*, 2018 SST 1097

Tribunal File Number: AD-18-239

BETWEEN:

**L. B.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Pierre Lafontaine

DATE OF DECISION: October 29 2018

## DECISION AND REASONS

### DECISION

[1] The Tribunal dismisses the appeal.

### OVERVIEW

[2] The Appellant, L. B. (Claimant), made an initial application for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission [(Commission)], informed the Claimant that she had received money as vacation pay and loss of wages and that the amounts had to be allocated over her benefit period.

[3] The Claimant requested a reconsideration of that decision on the basis that the amounts received followed the relinquishment of her reinstatement rights and that the amounts were not considered earnings under the *Employment Insurance Regulations* (EI Regulations). However, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[4] The General Division determined that the compensation in question had not been paid to the Claimant after she relinquished her right to reinstatement at work. It found that the amounts were set by an Administrative Labour Tribunal (ALT) decision following a complaint of wrongful dismissal and that nothing in that decision indicates that the amount was paid to the Claimant for relinquishing her right to be reinstated.

[5] The Tribunal granted leave to appeal. The Claimant argues that she received the amounts for relinquishing her reinstatement rights and that they do not constitute earnings under section 35 of the EI Regulations and, for that reason, should not be allocated in accordance with section 36 of the EI Regulations.

[6] The Tribunal dismisses the Claimant's appeal.

## **ISSUE**

[7] Did the General Division commit an error by finding that the compensation paid to the Claimant was not paid in exchange for the relinquishment of her reinstatement rights?

## **ANALYSIS**

### **The Appeal Division's Mandate**

[8] The Federal Court of Appeal has established that the Appeal Division has no mandate but the one conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).<sup>1</sup>

[9] 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.

[10] 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.

## **PRELIMINARY MATTERS**

[11] The Tribunal proceeded with the hearing in the parties' absence because it was satisfied that they had received the notice of hearing in accordance with section 12 of the *Social Security Tribunal Regulations*.

[12] The Claimant produced certain documents, which had not been presented to the General Division, in support of her appeal.

[13] The Tribunal is of the opinion that these documents existed before the General Division hearing and that the Claimant should have presented them at that time.

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<sup>1</sup> *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[14] Since the documents were not before the General Division, the Appeal Division cannot consider them during this appeal.

**Issue: Did the General Division make an error by finding that the compensation paid to the Claimant was not paid in exchange for the relinquishment of her reinstatement rights?**

[15] The Tribunal finds that the appeal is without merit.

[16] The Claimant argues that the amounts were paid to her for relinquishing her reinstatement rights and that they do not constitute earnings under section 35 of the EI Regulations, so they should not be allocated under section 36 of the EI Regulations. She argued that the reinstatement was ordered by the ALT and not proposed by the employer, which refused to comply with the ALT's order.

[17] In characterizing settlement amounts as earnings or non-earnings, it is important to keep in mind the basic principles. First, subsection 35(2) of the EI Regulations states that the earnings to be taken into account when determining whether there has been an interruption of earnings include "the entire income of a claimant arising out of any employment."

[18] Money that is paid for the relinquishment of reinstatement rights is not considered earnings for Employment Insurance purposes and is not allocated. However, three conditions must be in place, namely, the right to reinstatement exists, reinstatement has been sought, and the money is paid in exchange for the relinquishment of that right.<sup>2</sup>

[19] The General Division concluded that the sums the Claimant received were not paid for the relinquishment of her right to reinstatement.

[20] The Claimant submits that the evidence before the General Division shows that she received the sums in exchange for relinquishing her reinstatement rights.

[21] The Claimant relies heavily, if not entirely, on the ALT decision ordering her reinstatement, an order with which, in her opinion, her employer did not comply.

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<sup>2</sup> *Canada (Attorney General) v Warren*, 2012 FCA 74.

[22] It is true that the ALT decision of July 12, 2016, orders the Claimant's reinstatement.

[23] However, in a previous ALT decision, dated March 13, 2017, the ALT found that the claimant had never expressed a desire to be reinstated and that the employer had never refused to reinstate the claimant. The ALT found that the claimant had relinquished her reinstatement rights and that she had to be replaced in the same financial situation she would have been in if the wrongful dismissal had not occurred.<sup>3</sup>

[24] It is clear to the Tribunal that the amounts the Claimant received were not paid to her for relinquishing her reinstatement rights. The Claimant did not act in such a way as to be reinstated with her employer after the ALT decision on July 12, 2016. In addition, the employer never offered to pay the Claimant an amount so that she would relinquish her reinstatement rights. On the contrary, the employer wanted to follow the ALT's reinstatement order. However, the Claimant chose to not be reinstated because she had found another job and did not want to return to work for the employer.

[25] The Claimant had the burden of proving before the General Division that, on a balance of probabilities, the amounts constituted something other than earnings from employment.

[26] In light of the above, the Tribunal finds that the General Division correctly determined that the amounts were not paid to the Claimant for relinquishing her right to be reinstated.<sup>4</sup>

[27] As noted by the General Division, the statutory right to be reinstated is independent of the right to be compensated for wrongful dismissal.<sup>5</sup> Furthermore, the March 13, 2017, ALT decision is clear and specific on the amounts allocated and the reason for the payments.

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<sup>3</sup> GD3-18 to 19.

<sup>4</sup> *Canada v Plasse*, A-693-99.

<sup>5</sup> [*Ibid.*].

[28] The Tribunal finds that the General Division's decision on the issue of allocation of the Claimant's earnings was made based on the evidence before it and that this was a decision that complies with both legislation and case law.

[29] There is no reason for the Tribunal to intervene.

### **CONCLUSION**

[30] For the reasons above, the Tribunal dismisses the appeal.

Pierre Lafontaine  
Member, Appeal Division

HEARD ON:	October 23, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Neither party attended the hearing.