



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. S. v Canada Employment Insurance Commission*, 2019 SST 21

Tribunal File Number: AD-18-371

BETWEEN:

**R. S.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Janet Lew

DATE OF DECISION: January 11, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed and the matter returned to the General Division for reconsideration.

### OVERVIEW

[2] The Appellant, R. S. (Claimant), worked as a postal clerk for Canada Post from December 1987 to September 2013, until she was injured in a motor vehicle accident. She claimed and received 15 weeks of Employment Insurance sickness benefits. However, the Respondent, the Canada Employment Insurance Commission (Commission), later determined that the Claimant had, in fact, worked within this timeframe while collecting sickness benefits and that she had undeclared earnings that should have been allocated. This effectively resulted in an overpayment of Employment Insurance benefits. The Commission also assessed a penalty for false representations. The Claimant maintains that she did not receive any payments from her employer that represented earnings during this timeframe.

[3] The General Division determined that the Claimant had received payments from her employer when she was receiving sickness benefits and that these payments constituted earnings or were presumed to be earnings, so the Commission had properly allocated them.

[4] The Claimant is now appealing the General Division's decision, claiming, amongst other things, that the General Division based its decision on an erroneous finding of fact without regard for the material before it when it found that she had received payments from her employer. The Commission acknowledges that the Claimant has grounds to appeal the General Division's decision under section 58(1) of the *Department of Employment and Social Development Act* (DESDA) and that the Claimant's appeal should be returned to the General Division for reconsideration.

[5] The appeal is allowed and the matter returned to the General Division because the General Division erred by failing to consider the Claimant's primary arguments and by failing to address the contradictory evidence before it.

## ISSUE

[6] Did the General Division err in law by failing to address contradictory evidence?

## ANALYSIS

[7] Yes. I find that the General Division erred in law by failing to address some of the evidence and the Claimant's submissions that the evidence did not support a finding that she had received the payments from her employer listed in the Record of Employment or other payroll information.

[8] Section 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

- (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.

[9] The Claimant maintains that she has never been able to return to work since a motor vehicle accident in September 2013 left her disabled. She relies on banking statements to disprove any allegations that her employer paid her for any work after September 2013. She asserts that the burden is on the Commission to prove that she received any payments and that such payments represent earnings. She also argues that if she did indeed receive any payments, I should waive any overpayment because it causes additional financial hardship.<sup>1</sup>

[10] The Commission submits that the General Division based its decision on an erroneous finding of fact without regard for the material before it or that it erred in law when it failed to address the discrepancies between the Claimant's banking statements and the Record of

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<sup>1</sup> Claimant's submissions, dated September 2, 2018, at AD2.

Employment<sup>2</sup> and the Request for Payroll Information.<sup>3</sup> The Record of Employment and the Request for Payroll Information suggest that the employer made specific payments, yet these particular amounts do not match the amounts in the Claimant's banking statements.

[11] The Commission notes that in *Bellefleur v Canada (Attorney General)*,<sup>4</sup> the Federal Court of Appeal held that the Board of Referees (the predecessor to the General Division of the Social Security Tribunal) had to justify its determinations and that, when faced with contradictory evidence, it was required to consider that evidence. If it ultimately decided that the evidence was to be dismissed or assigned little or no weight at all, it had to explain the reasons for that decision. If it did not, there was a risk that its decision would be marred by an error of law or be considered capricious.

[12] That is the case before me. There is conflicting evidence that the General Division failed to address. On the one hand, there is evidence from the employer that suggests it paid the Claimant specific amounts. On the other hand, the Claimant's banking statements show that while she did receive payments from her employer, they do not reconcile with the amounts in the employer's records. The Claimant repeatedly denied that she worked after September 2013 and denied that she had received the "disputed payments"—the amounts specified above at paragraph 9—from her employer, so she did not declare these payments as earnings. The General Division did not address either the Claimant's arguments or the discrepancies in the evidence. In fact, the General Division found that the amounts of \$207.60 each had not been identified for their purposes, but because the employer paid them while the Claimant continued to be an employee, they were presumed to be earnings. The failure to address an argument or contradictory evidence that could have been critical of the outcome constitutes an error of law. This is not to suggest that there was any evidence that would have allowed the General Division to reconcile the discrepancies, but the General Division should have at least addressed the Claimant's arguments.

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<sup>2</sup> Record of Employment dated May 1, 2014, at GD3-17.

<sup>3</sup> Request for Payroll Information, at GD3-18 to GD3-21.

<sup>4</sup> *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

## CONCLUSION

[13] Under section 59(1) of the DESDA, the Appeal Division may 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 the Appeal Division considers appropriate; or confirm, rescind, or vary the decision of the General Division in whole or in part.

[14] The Claimant asks me to waive any overpayment. However, I have not made any findings regarding any overpayment and more importantly, I do not have any jurisdiction to write off any overpayments because only the Commission has that authority.

[15] The Commission requests that the appeal be allowed and the matter returned to the General Division for a reconsideration, in accordance with section 59(1) of the DESDA. The Commission further requests leave to contact the employer again, in an effort to clarify the discrepancy between the information provided on the Request for Payroll Information, the Record of Employment, and the Claimant's banking statements. I do not see that anything precludes the Commission from contacting the employer or that an order is required, but if previous requests went unanswered, I query whether any additional requests for information would be more fruitful.

[16] The General Division erred in law by failing to address the Claimant's submissions. The General Division acknowledged the Claimant's assertions that she had not received the alleged payments from her employer and that she had received only short-term disability payments. The General Division also acknowledged the fact that the Claimant had provided copies of her banking statement, although it did not reconcile the entries with the payroll information that the employer provided. The General Division assumed that the amounts reported in the Record of Employment and the Request for Payroll Information that had been paid out to the Claimant represented earnings, without determining whether the Claimant had indeed received those amounts and for what purpose(s).

[17] The General Division should have considered all of the evidence before it, along with the Claimant's submissions that she did not receive the amounts allegedly paid to her and that she therefore could not have had any earnings after September 2013.

[18] Finally, I note that the Commission did not appeal the issue of the penalty. To be clear, that issue is now foreclosed for reconsideration by the General Division. The issue of the penalty cannot be reconsidered by the General Division.

[19] The appeal is allowed, and the matter returned to the General Division for a reconsideration on the issue of the earnings and allocation.

Janet Lew  
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	R. S., Appellant S. Prud'homme, Representative for the Respondent