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

Citation: *N. S. v Canada Employment Insurance Commission*, 2019 SST 35

Tribunal File Number: AD-18-452

BETWEEN:

N. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 18, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, N. S. (Claimant), received Employment Insurance regular benefits. However, the Respondent, the Canada Employment Insurance Commission (Commission), determined that he had been overpaid benefits. This determination followed a ruling from Canada Revenue Agency (CRA) that the Claimant had received pay in lieu of notice from his employment from March 23, 2016, to May 16, 2015, and a salary continuance from May 17, 2016, to November 25, 2016.[1] The Commission found that the salary continuance constituted earnings. The General Division upheld the overpayment and held that it had no jurisdiction to write off any overpayment.

[3] The Claimant is now appealing the General Division's decision. He is asking the Appeal Division to recommend a write-off or altogether write off the overpayment itself.[2] I had granted leave to appeal because I was satisfied that there was an arguable case that the General Division failed to provide sufficient reasons.

[4] I must decide whether the General Division erred under section 58(1) of the *Department of Employment and Social Development Act* (DESDA) and, if so, whether there is any basis to grant the relief the Claimant seeks. I find that the General Division did not err in law or base its decision on any erroneous findings of fact that it made without regard for the material before it. I also find that there is no basis on which I can write off the overpayment. I am therefore dismissing the appeal.

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[1] CRA ruling, September 15, 2017, at GD3-44 to GD3-45.
[2] Claimant's request to recommend a write-off at AD2-2 and request for a write-off at AD8-1.

ISSUES

[5] The issues before me are as follows:

> Issue 1: Did the General Division base its decision on any erroneous findings of fact that it made without regard for the material before it when it decided on the nature of the payment that the Claimant received from his employer?
>
> Issue 2: Did the General Division err in law under section 58(1) of the DESDA by failing to explain how it determined the weekly benefit rate and the number of weeks of benefits to which the Claimant was entitled?
>
> Issue 3: Did the General Division err in law by failing to order or recommend a write-off of the overpayment?

ANALYSIS

[6] 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.

[7] In his application for leave to appeal, the Claimant raised several arguments. However, I found that the appeal did not have a reasonable chance of success on the basis of most of those arguments, other than the sole argument on which I granted leave: that the General Division may have failed to provide sufficient reasons. The Claimant has not made any additional arguments that would justify re-examining whether the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law; or

based its decision on any erroneous findings of fact. Nevertheless, the Claimant maintains that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it when it decided on the nature of the payments that he received from his employer.

[8] The Claimant is largely seeking a reassessment on the issue of the salary continuance, but section 58(1) of the DESDA provides for limited grounds of appeal. It does not give the Appeal Division any jurisdiction to conduct any reassessments.

Issue 1: Did the General Division base its decision on any erroneous findings of fact that it made without regard for the material before it when it decided on the nature of the payment that the Claimant received from his employer?

[9] No. I find that the General Division did not base its decision on any erroneous findings of fact that it made without regard for the material before it.

[10] The Claimant argues that the Commission and, consequently, the General Division failed to consider all of the facts and that they based their decisions on wrong information. He explains that his employer provided him with eight weeks of payment to tide him over from March to May 2016 and then provided him with a salary continuance from May to November 2016.

[11] The Claimant argues that, if the Commission had recognized at the beginning of his claim that he was receiving a salary continuance, the overpayment would not have occurred. Indeed, the Commission adjusted the weekly benefit rate (increasing it from $426 to $460) as well as the weeks of benefits (reducing the weeks from 29 to 26 weeks) after it received CRA's ruling and confirmed that the Claimant had received a salary continuance. The Claimant also suggests that the Appeal Division should contact his employer to verify that his employer had paid him a salary continuance.

[12] Although the Claimant demands that I contact his employer, the Appeal Division does not have any investigative role, nor does it receive any new evidence for the purposes of allowing a claimant to re-argue and prove their case. Ultimately, claimants are responsible for building their case and presenting whatever evidence is necessary to prove their case before the trier of fact. Even so, the Claimant's employer does not have any additional information to offer that was not already before the General Division. The employer prepared a letter dated May 30,

2018, in which it wrote that the Claimant's employment was terminated on March 22, 2016, "following which [it] paid him a total of 36 weeks pay by way of salary continuance. [It] did not pay a lump sum to [the Claimant]."[3] The General Division referred to this letter at paragraph 6 of its decision.

[13] I see no merit to the Claimant's allegations that the General Division based its decision on incorrect information regarding the nature of payments that the employer provided him. The General Division recognized that the Claimant received a salary continuance. Not only did it cite the letter at paragraph 6 of its decision, but it also wrote at paragraph 11:

> In this case, the Claimant was in receipt of pay in lieu of notice and a salary continuance from the date of his termination on March 22, 2016 until November 25, 2016. The Canada Revenue Agency (CRA) confirmed that from March 23, 2016 to May 16, 2016, the Claimant was in receipt of a pay in lieu of notice, and from May 17, 2016 to November 25, 2016, he was in receipt of a salary continuance.

[14] I note that CRA had advised the Claimant that if he disagreed with the ruling—particularly the ruling that a portion of the amount represented pay in lieu of notice—he could appeal it.[4] As far as I can determine, the Claimant did not dispute CRA's ruling of September 15, 2017. The General Division was bound by CRA's ruling and had no jurisdiction to rule otherwise. Ultimately, however, the nature of this amount—whether pay in lieu of notice or a salary continuance—was irrelevant for the purposes of calculating the start of the Claimant's benefit period because both would be considered insurable earnings.

[15] In short, the Claimant argues that both the Commission and the General Division should have recognized that he received a salary continuance from his employer. The General Division accepted this evidence, so I see no error in this regard.

Issue 2: Did the General Division err in law under section 58(1) of the DESDA by failing to explain how it determined the weekly benefit rate and the number of weeks of benefits to which the Claimant was entitled?

[16] The Commission has, at various points, determined that the Claimant was entitled to anywhere from 26 to 29 weeks of Employment Insurance benefits and from $426 to $460 per

[3] Employer's letter dated May 30, 2018, at GD10-2.
[4] CRA letter, *supra* note 1.

week in benefits. Ultimately, the General Division determined that the Claimant was entitled to 26 weeks of Employment Insurance benefits at $460 per week from December 11, 2016, to June 10, 2017.[5] I granted leave to appeal on the basis that the General Division may have failed to sufficiently explain how it made this determination.

[17] The Claimant has argued that he was entitled to benefits until mid-September 2017. I indicated to the Claimant in my leave to appeal decision that he should be prepared to explain why he should be entitled to benefits up to mid-September 2017, which, if proven, would effectively nullify the overpayment.

[18] The Commission argues that the General Division's decision is compatible with the evidence and is overall intelligible and understandable. The Commission further argues that the Federal Court of Appeal has established that it is unnecessary for a tribunal to refer in its reasons to each and every piece of evidence before it because it is presumed to have considered all the evidence and because the assignment of weight to the evidence lies with the trier of fact,[6] in this case, the General Division. However, the General Division simply stated that the Claimant was entitled to 26 weeks of benefits at a rate of $460 per week, without explaining what calculation was used to verify the benefit rate and the number of weeks of entitlement. In cases where the Commission varies these figures, it would be useful if the Commission showed its calculations or explained how it calculated these figures.

[19] However, the Claimant had argued that he should have been entitled to benefits until mid-September 2017. Although the Claimant failed to explain why he should have been entitled to benefits to mid-September 2017, nevertheless the General Division should have, in this particular case, explained its calculations so the Claimant could understand why he was entitled to 26 weeks of benefits and not 29 or more weeks. By failing to do so, the General Division failed to provide sufficient reasons.

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[5] General Division decision at para 13.
[6] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

Issue 3: Did the General Division err in law by failing to order or recommend a write-off of the overpayment?

[20] The Claimant alleges that the Commission allowed the Employment Insurance payments to continue before deciding that he was not entitled to a portion of those benefits. He claims that the Commission should have caught any discrepancies early on, rather than allowing any overpayment to become unmanageable for him to reimburse. He relied on the Commission to correctly determine his entitlement to benefits and, as a result, says that it is unfair that he should be held responsible for the Commission's failure to catch any overpayment early on.

[21] I note that any delays and the overpayment resulted from the fact that the employer had to clarify information that it had provided and the Commission then had to seek an insurability ruling from CRA.

[22] The Claimant submits that the overpayment should be waived or written off because he is not responsible for any errors that led to the overpayment. It is clear that the Claimant has acted in good faith throughout and that he is in no way responsible for the overpayment. The Commission argues that it is irrelevant that the Claimant is blameless for the overpayment because the Federal Court of Appeal has upheld that, when a claimant receives money to which they are not entitled, the Commission's or employer's error does not exempt them from repaying the amount.[7]

[23] I must follow decisions of the Federal Court of Appeal, and, although this result will no doubt be unsatisfactory to the Claimant, I cannot forgive or waive any overpayment, irrespective of how the overpayment came about or how it may impact the Claimant. As the General Division concluded, sections 43 and 44 of the *Employment Insurance Act* require the Claimant to repay the overpayment.

[24] The General Division noted that the Claimant may have two avenues available to him: (1) he can request that the Commission formally consider writing off the debt because of undue hardship, pursuant to section 56 of the *Employment Insurance Regulations*, and, if he is then unhappy with the Commission's response, he could appeal to the Federal Court; and (2) he can contact CRA regarding a repayment schedule. Otherwise, neither the General Division nor the

[7] *Lanuzo v Canada (Attorney General)*, 2005 FCA 324.

Appeal Division can provide the relief that the Claimant seeks. I find that the General Division did not err in law when it did not write off or recommend a write-off of the overpayment.

DISPOSITION

[25] 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.

[26] I have determined that the General Division's decision was insufficient because the General Division failed to explain its calculations. However, even if the General Division did not explain its calculations, this does not necessarily mean that the General Division erred in its determination of the weekly rate or the number of weeks of benefits to which the Claimant was entitled or that its decision was incorrect.

[27] Section 12 of the *Employment Insurance Act* defines the number of weeks of benefits to which a claimant is entitled. The number is determined in accordance with Schedule I of the *Employment Insurance Act*. One examines the regional rate of unemployment and the number of hours of insurable employment in the qualifying period to determine the weeks of benefits. Schedule I shows, for instance, that a claimant with a higher number of hours of insurable employment who resides in a region of greater unemployment than someone who has fewer hours of insurable employment who resides in a region of lower unemployment will be entitled to the same number or more weeks of benefits.

[28] Section 8 of the *Employment Insurance Act* defines the qualifying period. In this case, the qualifying period is the 52-week period immediately before the beginning of a benefit period under section 10(1) of the *Employment Insurance Act*. The Claimant's benefit period commenced on November 27, 2016. The Record of Employment, as amended orally by the

employer,[8] indicates that the Claimant had 1,526 total insurable hours within the qualifying period.

[29] When the Claimant was first entitled to claim and obtain benefits, the regional rate of unemployment[9] was 6% where he ordinarily resided.

[30] According to Schedule I and based on the regional rate of unemployment of 6% and 1,526 total insurable hours in the Claimant's qualifying period, the Claimant was entitled to 26 weeks of Employment Insurance benefits, taking into account the waiting period of one week for which benefits would otherwise be payable.

[31] Section 14 of the *Employment Insurance Act* defines the rate of weekly benefits as 55% of a claimant's weekly insurable earnings. Section 14(2) of the *Employment Insurance Act* defines a claimant's weekly insurable earnings as their insurable earnings in the calculation period divided by the number of weeks in question, which is determined by referring to the applicable regional rate of unemployment. As I have indicated above, the regional rate of unemployment is 6%, so the number of weeks under section 14(2) of the *Employment Insurance Act* in this case is 22 weeks.

[32] The Claimant's Record of Employment does not show the 22 weeks during which the Claimant had his highest earnings, but, at paragraph 11 of its decision, the General Division noted that the Claimant did not dispute that he received $836 per week from March 23, 2016, to November 25, 2016. Based on these weekly earnings, the Claimant's weekly benefit rate would be $460. This can be broken down as follows:

$$\$836 \times 55\% = \$459.80$$

[33] I do not see that the General Division erred in its calculation of the weekly benefit rate and the number of weeks of benefits. Although it may not have explained how it derived these calculations, ultimately the General Division did not err. I see no basis on which I should interfere with the General Division's decision other than to provide some explanation as to how

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[8] See amendments on Supplementary Record of Claim, January 25, 2018, at GD3-57 to GD3-58.
[9] The applicable regional rate of unemployment can be found at http://srv129.services.gc.ca/eiregions/eng/geocont.aspx

it derived its calculation of the weekly benefit rate and the weeks of benefits to which the Claimant was entitled.

CONCLUSION

[34] For the above reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	November 27, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. S., Appellant S. Prud'Homme, Representative for the Respondent (appearing only by way of written submissions)