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

Citation: *A. B. v Canada Employment Insurance Commission*, 2019 SST 169

Tribunal File Number: AD-18-587

BETWEEN:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: March 1, 2019

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, A. B. (Claimant), made a claim for Employment Insurance (EI) benefits on June 4, 2017. On reconsideration, the Respondent, the Canada Employment Insurance Commission (Commission), notified the Claimant that his wage-loss insurance payments were considered earnings for EI purposes and that they would be allocated against his June 4, 2017, claim. The Claimant could have continued to receive his disability income every two weeks until he turned 65 but opted for a cash settlement of $161,093.82 to be paid to him on September 1, 2016.

[3] The Claimant appealed the Commission's decision to the General Division. The General Division concluded that the Claimant's wage-loss / disability payout was to be considered earnings in keeping with section 35(2) of the *Employment Insurance Regulations* (EI Regulations) and that it had to be allocated under section 36(12) of the EI Regulations.

[4] The Claimant was granted leave to appeal to the Appeal Division. The Claimant submits that the General Division failed to identify under which headings of the EI Regulations the lump-sum payment he received should fall. He submits that the payout does not constitute earnings under the EI Regulations and is exempt as a disability payment because of a total disability.

[5] The Tribunal must decided whether the General Division erred by concluding that the Claimant's wage-loss / disability payout was earnings.

[6] The Tribunal dismisses the appeal.

ISSUE

Did the General Division err by concluding that the Claimant's wage-loss / disability payout was earnings?

ANALYSIS

Appeal Division's Mandate

[7] The Federal Court of Appeal has determined that, when the Appeal Division hears appeals under section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[8] 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]

[9] 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

[10] The Claimant did not appear at the Appeal Division hearing, although he had received the notice of hearing. Therefore, the Tribunal proceeded in his absence following section 12 of the *Social Security Tribunal Regulations*.

Did the General Division err when it concluded that the Claimant's wage-loss / disability payout was earnings?

[11] This ground of appeal is without merit.

[12] The Claimant submits that the General Division failed to identify under which headings of the EI Regulations the lump-sum payment he received should fall. He submits that the payout does not constitute earnings under the EI Regulations and is exempt as a disability payment because of a total disability.

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

[13] The Claimant further submits that the General Division erred when it stated in its decision that he belonged to a group indemnity program. Due to the nature of his contractual relationship with X under the British Columbia's *Workers Compensation Act*, he did not belong to or participate in a group indemnity plan like regular employees of X. Also, he was not part of the X superannuation or pension plan.

[14] The General Division concluded that the Claimant's wage-loss / disability payout was earnings under section 35(2) of the EI Regulations and that it had to be allocated under section 36(12) of the EI Regulations to the appropriate weeks of the Claimant's June 4, 2017, claim for EI benefits.

[15] The evidence before the General Division shows that the Claimant was receiving a percentage of his salary. He received cheques with a pay stub from his employer. The pay stubs indicated his hourly rate, the amount paid, and a total of 75 hours, since they were for two weeks of pay each. The Claimant then chose to receive the payments as a lump sum. Normally, he would receive a payment every two weeks until he reached age 65.

[16] Under section 90 of the *Employment Insurance Act* (EI Act), the Commission requested an insurability ruling from the Canada Revenue Agency (CRA) regarding the Claimant's employment with X from March 31, 2012, to October 31, 2018.

[17] The CRA ruled that from September 1, 2015, to August 31, 2016, and from September 1, 2016, to May 31, 2017, the Claimant was an employee and his employment was insurable under section 5(1)(a) of the EI Act. The CRA also ruled that, under subsection 10(1) of the EI Regulations, the Claimant had established 1,950 insurable hours for the period from September 1, 2015, to August 31, 2016, and 1,463 insurable hours for the period from September 1, 2016, to May 31, 2017. The Claimant did not appeal these decisions.

[18] Payments are not a disability pension within the EI Regulations when they do not have any of the characteristics of a pension and when the primary intention of the payment is to compensate for loss of wages. Therefore, payments from a wage-loss indemnity group plan and payments under a short- or long-term disability group plan are earnings.

[19] Even when considering the details of the Claimant's contractual relationship with X under the *Workers Compensation Act*, the facts in this case show that the payout was issued either under a wage-loss indemnity group plan or under a long-term disability group plan rather than under a disability pension. Group plans are plans linked to employment, and payment from group plans arises from employment.

[20] The Federal Court of Appeal reaffirmed the principle that the "'the entire income of a claimant arising out of any *employment*' is to be taken into account in calculating the amount to be deducted from benefits" (emphasis in original).[3]

[21] Jurisprudence has also demonstrated that when allocating amounts, the earnings that are to be considered are the gross amount before any deductions such as income tax, Canada Pension Plan, Québec Pension Plan, or EI premiums.[4]

[22] Therefore, the payout is earnings under section 35(2)(c) of the EI Regulations and, in the absence of any exceptions outlined in section 35(7), must be allocated under section 36(12) of the EI Regulations.

[23] For the reasons mentioned above, the appeal is dismissed.

[3] *McLaughlin v Canada (Attorney General)*, 2009 FCA 365.
[4] *Canada (Attorney General) v. McCombe*, A-856-77.

CONCLUSION

[24] The Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	February 12, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	Claudia Richard, Representative of the Respondent