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

Citation: *D. S. v Canada Employment Insurance Commission*, 2019 SST 170

Tribunal File Number: AD-18-373

BETWEEN:

D. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 1, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division decision is varied in that the earnings attributed to severance and vacation pay should be allocated using reduced weekly earnings of $547.40.

OVERVIEW

[2] After the Appellant, D. S. (Claimant), applied to renew his Employment Insurance benefit claim, the Respondent, the Canada Employment Insurance Commission (Commission), discovered that he had received severance and vacation pay. The Commission determined that these additional amounts were earnings and allocated them to weeks of benefits.

[3] The Claimant asked the Commission to reconsider, arguing that he had not received the full amount allocated, but the Commission maintained its decision. The Claimant appealed, and the General Division of the Social Security Tribunal dismissed his appeal. He appealed again to the Appeal Division, which found that the General Division had not satisfactorily resolved a discrepancy in the earnings information that the employer had provided to the Commission. The Appeal Division allowed the appeal, referred the matter back to the General Division, and instructed the Commission to clarify the discrepancy before the rehearing. The Commission investigated the discrepancy with the employer and made a relatively minor adjustment to its proposed allocation. The General Division accepted the allocation adjustment but otherwise dismissed the appeal. The Claimant is now appealing to the Appeal Division once again.

[4] The appeal is allowed. The General Division confirmed the Commission’s allocation based on a misunderstanding of the evidence of normal weekly earnings. I have varied the decision to reduce the normal weekly earnings.

ISSUES

[5] Did the General Division make an error of law when it included in the earnings total those amounts that had been paid as vacation pay and severance pay before the Claimant applied for Employment Insurance benefits?

[6] Did the General Division base its decision on a misunderstanding of the Claimant's normal weekly earnings for the purpose of allocating his severance?

ANALYSIS

[7] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] The only grounds of appeal are described below:

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.

Issue 1: Did the General Division make an error of law when it included as earnings those amounts paid as vacation pay and severance pay before the Claimant applied for Employment Insurance benefits?

[9] The Claimant argued that his vacation and severance pay should not have been deducted from his benefits because he received these amounts before he applied for Employment Insurance benefits. He does not say whether he believes the General Division erred in fact or in law.

[10] According to the General Division, the Claimant submitted a benefit renewal application on March 5, 2013. The General Division notes that his severance was paid in two instalments on

March 2 and March 9, 2013,[1] and that he received vacation pay for the period following termination on March 16, 2013.[2] Therefore, it appears that some part of the severance was paid before the Claimant's application for benefits. However, the General Division decision does not specify that the Claimant received all or any part of the severance and vacation pay after he applied for Employment Insurance benefits. The General Division reviewed the pay stub documentation that was before it and found that the Claimant received the vacation and severance pay "in March 2013,"[3] based on. This finding is consistent with the evidence. I therefore presume that the Claimant means to suggest that the General Division made a mistake of law.

[11] There was no dispute that the Claimant actually received vacation and severance pay from his employer, or that these payments arose out of the Claimant's employment. It is also apparent that neither the severance pay nor the vacation pay falls within any of the exceptions under section 35(7) of the *Employment Insurance Regulations* (Regulations). Therefore, these payments are presumed to be earnings, as the General Division found.

[12] Section 36(9) of the Regulations states that earnings that are paid or payable to a claimant by reason of a lay-off or separation from an employment shall, *regardless of the period in respect of which the earnings are purported to be paid or payable*, be allocated to a number of weeks that begins with the week of the lay-off or separation…" (emphasis added).

[13] Where the Commission has already considered and allocated earnings before it learns of additional earnings that arise from the lay-off or separation, section 36(10) of the Regulations states that a revised allocation shall be made in accordance with section 36(9), again; *"regardless of the period in respect of which the earnings are purported to be paid or payable*…" (emphasis added).

[14] In other words, according to the Regulations, it does not matter whether the vacation pay and severance, or any portion of them, may have been paid before a claimant's application for

[1] General Division decision at para 15.
[2] General Division decision at para 16.
[3] General Division decision at para 14.

benefits; the Commission would still be required to allocate them to the period that immediately follows the claimant's actual lay-off or separation.

[15] The General Division did not err in law under section 58(1)(a) of the DESD Act by confirming that the vacation pay and severance were earnings and should be allocated.

[16] Because it does not matter at law when the Claimant received the severance and vacation payments so long as they were payable because of the separation or lay-off, I cannot find the General Division to have "*based its decision* on an erroneous finding of fact" for having mistaken the timing of the payments. There is therefore no error under section 58(1)(c) of the DESD Act.

Issue 2: Did the General Division base its decision on a misunderstanding of the Claimant's normal weekly earnings for the purpose of allocating his severance?

[17] In support of his leave to appeal application in the earlier appeal to the Appeal Division, the Claimant argued that his normal weekly earnings should be calculated—based on his hourly rate of $11.34—as $369.00[4] (which is the product obtained by multiplying his rate of pay by 35 hours). In his oral representations to the Appeal Division in this appeal, the Claimant did not state the basis for his calculations other than to say that his income should be calculated based on a five-day week, not a seven-day week. However, he did state that his normal weekly earnings should be $369.05, which suggests that he continued to use the same basic calculation.

[18] The General Division employed the "average" normal weekly earnings obtained by dividing the total earnings showing on the Record of Employment (ROE) by the number of weeks for which those earnings were paid. The provision for allocation of earnings under section 36(9) of the Regulations references "normal weekly earnings" but does not refer to *average* normal weekly earnings. However, the use of "average" normal weekly earnings is consistent with the decision in *Chaulk v Canada (Attorney General)*,[5] in which the normal weekly earnings were calculated by taking an average of the earnings of a teacher from that period within her qualifying period in which she was actually paid.

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[4] AD1-9, ADN4-1.
[5] *Chaulk v Canada (Attorney General)*, 2012 FCA 190.

[19] Using an approach similar to the one approved in *Chaulk*, the Commission calculated the average normal weekly earnings using a formula in which the total earnings taken from the ROE were divided by the total number of employable days in which they were earned to arrive at a daily rate that was then multiplied by seven days (in a calendar week).[6]

[20] In finding that the amounts received by the Claimant were properly applied to create an overpayment, the General Division implicitly confirmed the manner in which the Commission calculated the normal weekly earnings. However, as I noted in the leave to appeal decision, the total earnings used by the Commission to calculate the normal weekly earnings, appeared to include the amount originally understood to be the vacation pay ($416.62) and the bonus amount ($1,300.00). As stated in *Attorney General of Canada v Fox*[7]: "The term normal weekly earnings means the ordinary, usual earnings that a claimant receives or earns on a regular basis and does not include [amounts for vacation pay, an annual incentive allowance, and a long-service service award], which are more properly characterized as fringe benefits or extra amounts."

[21] In its submissions to the Appeal Division, the Commission conceded that it omitted to remove the vacation pay and bonus from the total earnings before completing its calculations to determine the average normal weekly earnings.

[22] I find that the General Division misunderstood the evidence supporting the normal weekly earnings and, as a result, erred when it upheld the allocation. This is an error under section 58(1)(c) of the DESD Act.

CONCLUSION

[23] The appeal is allowed.

REMEDY

[24] I consider the record to be complete, and I will therefore exercise my authority under section 59 of the DESD Act to vary the General Division decision in part.

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[6] ADN-5.
[7] *Attorney General of Canada v Fox,* A-841-96.

[25] I confirm that the severance payment and the vacation pay should be allocated as earnings. However, the manner in which these earnings were allocated was based on incorrect total earnings.

[26] In accordance with the decision in *Fox*, I accept that the bonus and the vacation pay should not be included in the earnings total for the purpose of determining normal weekly earnings. Therefore, the total earnings of $14,525.20 taken from the Claimant's ROE should be reduced by the bonus (in the amount of $1,300.00) and by the vacation pay that was used at that time ($416.62). This results in total earnings of $12,808.58.

[27] The manner in which the Commission calculated the Claimant's normal weekly earnings is consistent with the method used in *Chalk* except in one respect: The Commission calculated the Claimant's normal weekly earnings by dividing his salary by the number of days he could be required to work to arrive at a daily rate and then multiplying that daily rate by the seven days in a calendar week. In *Chaulk*, the court accepted that the daily rate should be multiplied by the **five** days of the appellant's regular working week.

[28] I asked the Commission to clarify how it arrived at the normal weekly rate, but its August 14, 2018 response[8] did not explain why it multiplied its calculated daily rate by the seven days in a calendar week, rather than the five days per week that the Claimant worked.

[29] The Digest of Entitlement Principles (Digest) is a guide describing how the Commission generally interprets and applies the *Employment Insurance Act* and Regulations Although the Digest is not binding on me, I note that it agrees with *Chalk* in that it uses the days of a regular working week in its calculations, rather than a calendar week. The Digest states that where the employee is paid an hourly rate, normal weekly earnings are calculated by multiplying the number of hours **normally** worked by the hourly rate of pay.[9]

[30] The Claimant submitted that his usual weekly rate of pay should be $369.00, a figure which is consistent with a 35-hour work-week, at his rate of pay. The 35-hour week is usually associated with a five-day, seven-hour-per-day schedule. Finally, the Claimant stated at his

[8] ADN5-1.
[9] Accessed at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-5/allocations-of-earnings.html#a5_6_2_1

Appeal Division hearing that, "[the Commission] based his income on seven days, but actually it's five."[10]

[31] The Claimant insists that the Commission was incorrect to base his income on seven days and not five. Based on the Claimant's argument and the evidence that was before the General Division, I find that the average normal weekly earnings should be calculated using a five day work-week, and as follows:

> The total earnings of **$12,808.58** (as adjusted above)
> divided by 117 total employable days = **$109.48 per day**.
> The calculated daily rate of $109.48 x **five** working days per week = $547.40.

I find the average normal weekly earnings to be **$547.40**.

[32] In the hearing, I explained to the Claimant the meaning of normal weekly earnings and how that calculation affects the allocation, but the Claimant maintained that his normal weekly earnings were just under $370.00. It is unfortunate, but the reduction in normal weekly earnings that I have determined is likely to extend the period in which his severance pay and vacation pay are allocated, and it may therefore increase the amount that the Claimant is required to repay.

[33] I leave it to the Commission to reallocate the Claimant's earnings based on average normal weekly earnings of $547.40.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. S., Appellant

[10] Audio recording of Appeal Division hearing at 00:21:45.