



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: A. T. v Canada Employment Insurance Commission, 2019 SST 192

Tribunal File Number: AD-18-822

BETWEEN:

A. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: March 11, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] On July 10, 2017, A. T. (Claimant) learned that he was being temporarily laid off from work as of July 21, 2017. He was paid three weeks of regular Employment Insurance (EI) benefits after his lay-off. In a letter dated December 8, 2017, however, the Claimant's employer told the Claimant that he would not be recalled from his temporary lay-off because of a lack of work, that his employment was ending immediately, and that December 22, 2017, was the effective date of his termination.¹ Towards the end of December, the employer also paid the Claimant almost \$4,400, which, in the same letter from December 2017, the employer described as vacation pay and pay in lieu of notice.

[3] The Canada Employment Insurance Commission (Commission) concluded that the amounts the Claimant received in December 2017 were earnings from employment and needed to be allocated to a specific period of time, as described in the *Employment Insurance Regulations*. Initially, all of the Claimant's earnings were allocated to the weeks following his July 2017 lay-off. However, this overlapped with the weeks in which the Claimant received his EI benefits and resulted in an overpayment of over \$1,600.

[4] The Claimant challenged this decision, arguing that none of the \$4,400 should be allocated back to the period when he received his EI benefits. On reconsideration, the Commission concluded that the Claimant's vacation pay could be reallocated to a different period, but the allocation of his pay in lieu of notice remained unchanged. As a result, the Claimant's overpayment was reduced to under \$1,100.

[5] The Claimant then appealed the Commission's decision to the Tribunal's General Division, but it dismissed his appeal. Next, the Claimant requested leave to appeal the General

¹ GD5-2 to 3.

Division decision to the Tribunal's Appeal Division. I granted that request because there was an arguable case that the General Division might have committed an error of fact or law.

[6] The Commission now accepts that the General Division decision contains an error of law and that the Claimant's pay in lieu of notice should be reallocated to the period from December 8 to 22, 2017. As a result, I am allowing the appeal.

ISSUE

[7] Did the General Division commit an error of law by failing to consider whether the Claimant's pay in lieu of notice could be allocated to the period from December 8 to 22, 2017?

ANALYSIS

[8] The Commission submits that the key question the General Division had to decide in this case was what event motivated the employer to give the Claimant pay in lieu of notice. Was it the temporary lay-off that occurred in July 2017 or the permanent separation from employment that occurred in December 2017?

[9] When answering this question, the General Division relied on section 56 of Ontario's *Employment Standards Act* and concluded that the Claimant's pay in lieu of notice should be allocated to the earlier period. Indeed, the General Division does not appear to have considered allocating the Claimant's pay in lieu of notice to any other period.

[10] Based on the December 8, 2017, letter that the Claimant received from his employer, however, the Commission now accepts that it was, in fact, the Claimant's permanent separation from employment that triggered the payment of his pay in lieu of notice.

[11] I agree, therefore, that the General Division committed an error of law by failing to consider the December 8, 2017, letter and whether the Claimant's pay in lieu of notice could be allocated to the December 2017 period. I also agree that this error falls within section 58(1)(b) of the *Department of Employment and Social Development Act* (DESD Act), which allows me to intervene in this case.

[12] Finally, I have concluded that this is an appropriate case to give the decision that the General Division should have given:² the lack of work and resulting permanent separation from employment in December 2018 are the events that triggered payment to the Claimant of his pay in lieu of notice. As a result, these earnings should be allocated to the period from December 8 to 22, 2017.

CONCLUSION

[13] The appeal is allowed.

Jude Samson
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	A. T., self-represented S. Prud'Homme, Representative for the Respondent

² DESD Act, s 59(1).