



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. D. v Canada Employment Insurance Commission*, 2019 SST 307

Tribunal File Number: AD-18-742

BETWEEN:

K. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 28, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] The Appellant, K. D. (Claimant) left his employment on May 2, 2016. He applied for sickness benefits on May 24, 2016 and Respondent, the Canada Employment Insurance Commission (Commission) established a benefit period effective May 1, 2016. The Claimant exhausted his sickness benefits but was still unable to return to work.

[3] The Claimant's employer terminated his employment effective December 22, 2016, and paid him a "buyout" as well as the vacation pay due the Claimant on separation. The Commission found the buy-out and vacation pay amounts to be earnings in its decision dated March 23, 2017. The Commission allocated these amounts to weeks of benefits for the period from December 18, 2016 to December 23, 2017, and it declared an overpayment in relation to any benefits the Claimant may have already received for weeks within that period.

[4] The Claimant asked the Commission to reconsider and the Commission changed its decision by extending his benefit period, which resulted in the near-elimination of the Claimant's overpayment. However, the Commission maintained that it had correctly allocated the Claimant's separation monies. The Claimant appealed to the General Division but the General Division dismissed his appeal, finding only that the Commission was correct to extend his benefit period. The Claimant now appeals to the Appeal Division.

[5] The Claimant's appeal is allowed. Whether the separation monies were income and whether they had been properly allocated is an issue that was properly before the General Division. By refusing to consider the issue, the General Division refused to exercise its jurisdiction.

PRELIMINARY MATTERS

[6] The hearing before the Appeal Division was originally scheduled as a telephone conference hearing. After some significant effort to establish an audio connection in which all participants could hear and understand one another, I determined that the best course of action was to either adjourn and reschedule the hearing or, alternatively, to complete the hearing on the basis of my review of the materials and submissions already on file. The Claimant and the Commission agreed that the hearing should continue on the record. I have therefore completed my decision based on the record. Any arguments or representations attempted by the Claimant at the oral hearing were so unclear that I have disregarded them.

ISSUE

[7] Did the General Division fail to exercise its jurisdiction by restricting itself to consideration of the benefit period extension?

ANALYSIS

[8] The Appeal Division cannot intervene in a General Division decision unless it can find that the General Division has made one of the types of errors described by the grounds of appeal in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) and set out 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.

Did the General Division fail to exercise its jurisdiction by restricting itself to consideration of the benefit period extension?

[9] Although the General Division was of the view that the only issue before her was whether the Claimant's benefit period could be further extended¹, I disagree.

[10] In its March 23, 2017 decision, the Commission determined that the payments the Claimant had received on separation from his employer were earnings and should be allocated from December 18, 2016 to December 23, 2017. The Claimant requested a reconsideration on April 3, 2017, arguing that he did not want his "buyout option... converted into E.I. (employment insurance)."

[11] In the course of its reconsideration, the Commission determined that it had miscalculated the overpayment. The Commission advised the Claimant that the allocation of his separation was correct but that his benefit period had not been correctly extended. It adjusted his benefit period accordingly.² A written reconsideration decision followed dated May 11, 2017, stating that the March 23, 2017, decision was changed to the following new decision:

Your separation monies were allocated correctly on your claim but the benefit period extension input in regards to these separation monies was not inputted correctly in our office. This has been corrected.³

[12] There are evidently two parts to this reconsideration decision. First, the Commission maintains that the allocation of the monies payable on separation was correct. Second, the Commission confirms that it extended the benefit period correctly.

[13] I note that there was a second reconsideration request filed by the Claimant dated June 23, 2017,⁴ but that the Commission was unclear as to what decision it was that he was requesting it to reconsider. The Commission characterized its response as more of an explanation of his current claim, and not a reconsideration.⁵

¹ General Division decision, paras. 7 and 19

² GD3-48

³ GD3-50

⁴ GD3-53

⁵ GD3-60

[14] The Commission sent another letter to the Claimant on January 25, 2018, in relation to the reactivation of his claim on December 24, 2017. This letter explains the Claimant's weeks of benefit entitlement and that his benefit period ends on April 28, 2018.⁶ The Claimant understood this to be a new decision and filed a reconsideration request on February 27, 2018.⁷

[15] The General Division stated, "the issue that I must determine under appeal is whether the benefit period can be longer than 104 weeks, which is the decision that the Commission made under section 112 of the Act, and not the issues that the Claimant argues should be determined."

[16] I suspect that the General Division framed the appeal issues in terms of the January 25, 2018, letter and the Claimant's most recent reconsideration request. The Claimant had filed these documents with his Notice of Appeal, together with extensive submissions and copies of a number of other decisions and letters he had received from the Commission.

[17] However, the issues before the General Division arose from the May 11 reconsideration decision, and not from a reconsideration of the letter of January 25. When the Commission responded to the Claimant's reconsideration request on March 12, 2018,⁸ it referred the Claimant back to the reconsideration decision of May 11, 2017, informing him that his recourse lay in an appeal of that earlier reconsideration.

[18] One of the issues that the Claimant attempted to argue to the General Division was the issue concerning how and whether his severance should be allocated. This was an issue addressed by the May 11 reconsideration, which was a decision made under section 112 of the EI Act and therefore within the General Division's jurisdiction under section 113 of the EI Act.

[19] By refusing to consider the allocation of the separation monies, the General Division member refused to exercise her jurisdiction. This is an error under section 58(1)(a) of the DESD Act.

CONCLUSION

⁶ GD3-63

⁷ GD3-65

⁸ GD3-160

[20] The appeal is allowed in part.

REMEDY

[21] Having allowed the appeal, I have the authority under section 59(1) of the DESD Act to give the decision that the General division should have given, as requested by the Commission. However, I also have the authority to refer the matter back to the General Division, or to confirm, rescind, or vary the General Division decision in whole or in part.

[22] The General Division concluded that the Claimant's benefit period cannot exceed 104 weeks and that he cannot be paid benefits after the benefit period had expired. This is consistent with sections 10(14) and 12(1) of the EI Act. No error is apparent in the General Division's determination of this issue and I confirm this part of the General Division decision.

[23] In relation to the issue of earnings and the allocation of earnings, I do not consider the record to be complete. Therefore, I cannot give the decision that the General Division should have given.

[24] I have reviewed the audio recording of the General Division hearing. The member introduced the issues by telling the Claimant that the appeal was about how long the employment insurance benefit period should be; that the only thing that [she and the Claimant] could talk about is the length of time that Employment Insurance can be active. The Claimant offered some testimony in relation to the allocation of his severance, but he was interrupted and redirected by the member who said, "We're not here to discuss whether the allocation of your separation money was done correctly or not. That issue is not before me today. The only issue we can talk about today, as I explained earlier, is the length of your benefit period."⁹

[25] Given the member's instructions to the Claimant, I am not satisfied that the Claimant had the opportunity to fully explain why he did not believe all or some of the payments he received on separation from his employment should not have been allocated to weeks of benefits, or should have been allocated differently.

⁹ Audio recording of General Division hearing at 24:48

[26] Therefore, I will exercise my discretion under section 59 of the DESD Act to refer the matter back to the General Division. The General Division is directed to consider the question of whether the Claimant's severance and vacation pay were earnings and properly allocated.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	K. D., Appellant Susan Prud'homme, Representative for the Respondent