



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: Canada Employment Insurance Commission v D. D., 2019 SST 396

Tribunal File Number: AD-19-102

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

D. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: May 1, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal allows the appeal.

OVERVIEW

[2] The Respondent, D. D. (Claimant), lost his employment on March 30, 2018, after being notified that the employer's funding had ended. On June 1, 2018, the Claimant was notified of his entitlement to \$2,711.54 as severance pay due to the loss of that employment. On June 15, 2018, the Claimant contacted the Respondent, the Canada Employment Insurance Commission (Commission), and informed them that he had received the severance pay.

[3] The Commission determined the Claimant's severance pay is earnings and allocated it retroactively, starting in the week of March 25, 2018, and ending in the week of April 15, 2018, based on his normal weekly earnings being \$1,040.00. The Claimant requested a reconsideration of this decision but the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division of the Tribunal.

[4] The General Division concluded that the Claimant had earnings pursuant to subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations) and that these earnings were correctly allocated pursuant to subsection 36(9) of the EI Regulations because the earnings were paid by reason of a separation from an employment. However, it did not agree with the Commission's allocation of the Claimant's severance pay because the EI Regulations do not provide for adjustments based on the Claimant's earnings in his last week of work. Rather, it concluded that the EI Regulations stipulate that the allocation is to commence in the week in which the Claimant was separated from his employment, based on his normal weekly earnings.

[5] The Commission was granted leave to appeal to the Appeal Division. It argues that General Division erred in law since section 36(9) of the EI Regulations provides that

separation monies are to be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the Claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[6] The Tribunal must decide whether the General Division erred in its interpretation of section 36 (9) of the EI Regulations.

[7] The Tribunal allows the appeal.

ISSUE

Did the General Division err in its interpretation of section 36 (9) of the EI Regulations when it concluded that the EI Regulations did not provide for adjustments based on the Claimant's earnings in his last week of work?

ANALYSIS

Appeal Division's mandate

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 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

[9] 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

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a

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

² *Idem*.

perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

PRELIMINARY ISSUE

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

Issue: Did the General Division err in its interpretation of section 36 (9) of the EI Regulations when it concluded that the EI Regulations did not provide for adjustments based on the Claimant's earnings in his last week of work?

[12] The General Division concluded that the Commission's allocation of the Claimant's severance pay was incorrect because the EI Regulations do not provide for adjustments based on the Claimant's earnings in his last week of work. Rather, the EI Regulations stipulate that the allocation is to commence in the week in which the Claimant was separated from his employment, based on his normal weekly earnings.

[13] As such, the General Division concluded that the correct allocation of the Claimant's severance pay should be as follows: \$1,061.50 to the two weeks from March 25 to April 7, 2018; and the balance of \$588.54 to the week starting April 8, 2018 ($\$1,061.50 + \$1,061.50 + \$588.54 = \$2,711.54$).

[14] The Commission argues that General Division erred in law since section 36(9) of the EI Regulations provides that separation monies are to be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the Claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[15] The Tribunal finds that the General Division erred in law in its interpretation of section 36(9) of the EI Regulations when it did not consider the total earnings of the Claimant arising out of his employment during the week of the lay-off or separation for

allocating his earnings. It could not ignore that the Claimant declared earnings of \$979.00 in his last week of March 25, 2018.

[16] Consequently, in accordance with the General Division revised normal weekly earnings of \$1,062, the correct allocation of the severance pay of \$2,711.54, under section 36(9) of the EI Regulations, should be as follows:

- \$83.00 – week beginning March 25, 2018 (earnings of \$979 + \$83 = \$1,062)
- \$1,062.00 – week beginning April 1, 2018
- \$1,062.00 – week beginning April 8, 2018
- \$505.00 – week beginning April 15, 2018.

[17] For the above-mentioned reasons, the appeal is allowed.

CONCLUSION

[18] The Tribunal allows the appeal.

Pierre Lafontaine
Member, Appeal Division

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| HEARD ON: | April 23, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCE: | Louise Laviolette, representative of the Appellant |