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

Citation: *B. T. v Canada Employment Insurance Commission*, 2019 SST 501

Tribunal File Number: AD-19-4

BETWEEN:

B. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 21, 2019

Canada

DECISION AND REASONS

DECISION

[1] I have confirmed the decision of the General Division in part, made the decision that the General Division should have made in respect of an issue over which it failed to take jurisdiction, and I have returned the decision to the General Division to reconsider a final issue.

OVERVIEW

[2] The Appellant, B. T. (Claimant) applied for Employment Insurance and received Employment Insurance benefits in 2016 based on incorrect Record of Employment information provided to the Respondent, the Canada Employment Insurance Commission (Commission) by her government's payroll system. This was not discovered until she applied for Employment Insurance again in 2018, and the payroll system again gave incorrect information to the Commission. This time the Claimant noticed that something was not right very quickly and brought it to the attention of the Commission. The Commission agreed and adjusted the Claimant's benefit entitlement which resulted in a small overpayment. The Commission also investigated the 2016 claim, and it reduced the Claimant's entitlement to both the weekly benefit entitlement and the number of weeks of entitlement, resulting in a more substantial overpayment.

[3] The Claimant asked that the Commission reconsider both decisions. The Commission reduced the amount of the overpayment under the 2016 claim, but maintained its decision on the 2018 claim. The Claimant appealed both reconsideration decisions to the General Division, questioning why she should be held responsible for someone else's mistake and also challenging the calculation of the family supplement. The General Division joined the two appeals based on their similar facts, and then dismissed both appeals. The Claimant now appeals to the Appeal Division.

[4] The General Division did not err in dismissing the appeal of the 2016 claim (GE-18-2998) on the issue of reduced weekly benefits and I confirm the General Division decision to that extent.

[5] The General Division erred by failing to exercise its discretion to determine whether the Commission correctly reduced the number of weeks of benefit entitlement for the 2016 claim. I now make this decision and find that the Commission was correct in reducing the number of weeks of benefit entitlement.

[6] There was no evidence on which the General Division could confirm that the family supplement was correct, and the General Division reasons did not disclose on what basis it confirmed the family supplement amounts. The General Division therefore erred in law by failing to provide adequate reasons to justify the basis on which it confirmed the family supplement amounts. I refer this matter back to the General Division for reconsideration.

PRELIMINARY MATTERS

[7] The General Division appeals GE-18-2997 and GE-18-2998 were joined at the General Division based on similar facts and issues, and the two appeals were heard together. Accordingly the Appeal Division also heard the two appeals of the General Division decisions at the same time. The matters are joined at the Appeal Division, however this decision concerns only the 2016 claim and the appeal of the General Division decision, GE-18-2998.

ISSUES

[8] Did the General Division overlook or misunderstand that the Claimant was not responsible for the mistake that resulted in her overpayment?

[9] Did the General Division fail to exercise its jurisdiction by failing to consider the reduction of weeks of entitlement.

[10] Did the General Division err in law by failing to adequately explain why it confirmed the family supplement amount?

ANALYSIS

[11] 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).

[12] To grant this application for leave and to allow the appeal process to move forward, I must first find that there is a reasonable chance of success on one or more of the grounds of appeal. A reasonable chance of success has been equated to an arguable case.1

[13] The grounds of appeal under section 58(1) of the DESD Act are as follows:

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.

Issue 1: Did the General Division overlook or misunderstand that the Claimant was not responsible for the mistake that resulted in her overpayment?

[14] The Claimant did not deny that she received benefits to which she was not entitled in consequence of her employer having provided two separate Record of Employments (ROEs) to the Commission. However, the Claimant submits that she should not be responsible to repay the overpayment because she is not responsible for any errors that led to the overpayment.

[15] It is clear that the Claimant has acted in good faith throughout and that she is in no way responsible for the overpayment. As argued by the Commission, and reflected in the Federal Court of Appeal cases cited by the General Division, the law requires that a claimant repay Employment Insurance benefits to which her or she is not entitled, even following a mistake by the Commission. [1] The General Division considered the Claimant's evidence and argument that she

[1] *Lanuzo v Canada (Attorney General)*, 2005 FCA 324; *Canada (Attorney General) v. Villeneuve*, 2005 FCA 440

was not responsible for the error that resulted in the overpayment.[2] However, the General Division was correct that it had no discretion to write off or extinguish the claim against the Claimant.

[16] I find that the General Division did not err under section 58(1)(c) of the DESD Act by overlooking or misunderstanding the Claimant's evidence.

Issue 2: Did the General Division fail to exercise its jurisdiction by failing to consider the reduction of weeks of entitlement in the 2016 claim?

[17] The duplicated ROEs were responsible for the entire overpayment that was determined in relation to the 2016 claim, however that overpayment was calculated based on two factors: First, the weekly benefit rate would have been less if it were based on only one of the ROEs. Second, using only one ROE would mean that the number of weeks of benefits should have been calculated using fewer hours of insurable earnings.

[18] The General Division considered only the first of these factors. It did not consider and reached no finding in relation to the appropriate number of weeks of benefits. The entire amount of the overpayment was before the General Division so this was an issue that it was required to decide. Therefore, the General Division refused to exercise its discretion and erred under section 58(1)(a) of the DESD Act.

Issue 3: Did the General Division err in law by failing to adequately explain why it confirmed the family supplement amount?

[19] The General Division understood the Claimant to have claimed that she did not receive the Family Supplement benefit. Having reviewed the Claimant's Notice of Appeal to the General Division and the audio recording of the hearing, I accept that the General Division understood the Claimant's position correctly. The Claimant asked, "Where's my family supplement?"[3] and stated that she was told she didn't get her family supplement because she hadn't paid her taxes,[4] which she denied. She later stated that the "family supplement should be taken into consideration

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[2] General Division decision, paras. 7, 10, 19
[3] Audio Recording of General Division hearing at timestamp 36:20
[4] *Ibid*. at 36:30

in the sense that [she] should have been entitled to more than what they're saying after they cut [her] earnings in half ... the family supplement … is used to top you up".[5]

[20] The General Division framed the issue as whether the Claimant was entitled to the family supplement,[6] and the member said in his decisions that he did not understand that the Appellant believes she is entitled to a greater weekly benefit than the $35.00 that the Commission argued was in her 2016 weekly benefit.[7] However, it would not be possible for the Claimant to specifically dispute the amount of the supplement paid to her, when she did not know it had been included in her benefit payments.

[21] Furthermore, it was not unreasonable for the Claimant to believe she had nor received the supplement. In the hearing, the member acknowledged that he could not find any decision on the family supplement in the documents,[8] and that he may not be able to answer why the family supplement was not considered given the lack of information available to him. The General Division is correct. There is no evidence on the file of a decision on the family supplement, of any calculation supporting the family supplements claimed to have been incorporated to the Claimant's weekly benefit rates, or of any information related to the Claimant's family income or dependents that is necessary to calculate the family supplement.

[22] In finding that the family supplement was included in the weekly benefit for the 2016 claim, the General Division implicitly confirmed that it is the *family supplement to which the Claimant is entitled* that was included. In other words, the General Division confirmed that the family supplement was calculated correctly.

[23] The General Division did not explain the facts on which it relied to conclude that the Claimant had received the family supplement to which she was entitled, or explain the calculation with reference to section 16 of the EI Act and section 34 of the Regulations or any other applicable law. In my view, the General Division made an error of law under section 58(1)(b) of the DESD Act by failing to provide adequate reasons.

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[5] *Ibid*. at 43:50
[6] General Division decision, para. 7
[7] General Division decision 18-2998, para. 22
[8] *Supra note 3*. at 37:30

CONCLUSION

[24] The Claimant has established that the General Division erred under section 58(1) of the DESD Act. I will now consider the appropriate remedy.

REMEDY

[25] I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, refer the matter back to the General Division with or without directions, or confirm, rescind or vary the General Division in whole or in part.

[26] I confirm the General Division decision that the Commission correctly established the Claimant’s weekly rate of benefits for the 2016 claim. I also confirm the General Division decision that the Claimant is required to repay any overpayment she may owe to the Commission that can be demonstrated to be a consequence of the change in benefit rate.

[27] A substantial portion of the Claimant’s overpayment on the 2016 claim related to the number of weeks of benefits paid. The General Division did not consider whether the Commission had appropriately reduced the number of weeks of benefits to which the Claimant was entitled related to the 2016 claim, and reached no decision on this issue.

[28] The number of weeks of benefits that the Commission finally found the Claimant to be entitled under the 2016 claim is not obvious on the Commission file. It is clear that the Claimant’s weeks of entitlement were increased to 42 weeks in January 2017 at the same time as the Commission increased her benefit rate. However, the Commission did not record how it determined the overpayment when it realized that it should not have used both ROEs in May 2018 or when it issued the Notice of Debt in June 2018.

[29] However, I nonetheless consider the record to be complete for the purpose of determining the number of weeks of benefits to which the claimant was belatedly determined to be entitled. The Commission represented to the Appeal Division that it determined the Claimant to be entitled to 32 weeks, based on the use of one ROE.[9] This is consistent with the overpayment

[9] AD2-1, 2016 claim–GE-18-2998

breakdown spreadsheet,[10] which indicates that the Commission considered that the Claimant was entitled to 32 weeks of regular benefits under the 2018 claim. I am satisfied that the Commission determined the overpayment using 32 weeks.

[30] The regional rate of unemployment is 14.7% for Eastern Nova Scotia (the region in which the Claimant resided in 2016) and the Claimant would have 705 hours of insurable employment from the single ROE. Using these parameters, Schedule I of the EI Act confirms that the Claimant should have been entitled to 32 weeks of benefits. I find that the Commission was correct to determine an overpayment in respect of the payment of weeks of regular benefits in excess of 32 weeks.

[31] The record is incomplete in respect of the determination of the Family Supplement. There is no decision and no calculation; only speculation.[11] The reference to a family supplement in the overpayment breakdown is not comprehensible or helpful. I return this matter to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. T., Appellant

[10] GD3-44
[11] GD3-41