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

Citation: *Canada Employment Insurance Commission v J. D.*, 2019 SST 549

Tribunal File Number: AD-19-50

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

J. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: June 5, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Respondent, J. D. (Claimant), worked as a housekeeper in a X. She was laid-off as a permanent employee because the employer was moving forward on plans to transfer the X to another group to operate as a hospice. During this time, the Claimant collected Employment Insurance benefits with the expectation that she would be returning to full-time work once the conversion to a hospice was completed. Several months after the Claimant had been laid-off, a number of Xs from the X hosted the Claimant and certain other employees at a lunch at which they presented her with a cheque for $15,000.00 from the employer in recognition of her service. The Appellant, the Canada Employment Insurance Commission (Commission), determined that this payment was earnings within the meaning of the *Employment Insurance Regulations* (Regulations) and allocated it to weeks of benefits.

[3] The Claimant requested a reconsideration, but the Commission maintained its original decision. The Claimant appealed to the General Division, which found that the payment was a gift and not earnings and that it should not be allocated. The Commission was granted leave to appeal and is now appealing the General Division decision to the Appeal Division.

[4] The appeal is dismissed. The General Division did not err in law by failing to apply the test or make any extricable error of law in how it applied the test, and the General Division did not base its decision on any finding that was perverse or capricious or made without regard for the evidence.

PRELIMINARY MATTERS

[5] This matter, AD-19-50 (General Division GE-18-3049), and the matter in AD-19-47 (GE-18-3040) had been joined and heard together at the General Division due to the close similarity of facts, including the same employer and identical issues. As a result, the matters were also joined and heard together at the Appeal Division.

ISSUES

[6] Did the General Division err in law by failing to apply the "sufficient connection" test when it found that the payment from the employer was not earnings?

[7] Did the General Division make an extricable error of law in the manner in which it applied the legal test to the facts?

[8] Was it perverse or capricious for the General Division to find that the Claimant did not perform work to receive the payment from the employer?

ANALYSIS

[9] 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 DESD Act.

[10] The only grounds of appeal 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 before it.

Issue 1: Did the General Division err in law by failing to apply the "sufficient connection" test when it found that the payment from the employer was not earnings?

[11] Section 35(2) of the Regulations states that the earnings to be deducted from benefits under section 19 of the *Employment Insurance Act* (EI Act) are the entire income of a claimant arising out of any employment. Section 36 of the Regulations.

[12] The General Division correctly identified the legal authority and principles from the case law, but the Commission has argued that the General Division failed to apply the "sufficient connection" test that is described in the case law.

[13] The sufficient connection test was first described in *Côté v Canada (Attorney General).*[1] In that decision, the "sufficient connection" was required to determine whether a payment could be said to be paid in consideration of work done:

> In my opinion, there is a sufficient connection between the work done by an employee in employment and the pension arising out of that employment for the pension to be treated as earnings. The employee receives his pension because he has worked, and it seems to me that in a broad sense the pension is paid to him in consideration of the work done by him.

[14] This test was reformulated by *Canada (Attorney General) v. Roch*[2] for the purpose of determining whether certain payments might still be considered earnings, even though they were not paid in consideration of work done in the traditional sense. According to *Roch*, the test requires that the amount paid not only have a "sufficient connection" to the employee's work, but that the payment itself also be "comparable to earnings".[3] Therefore, the requirement that a payment have a sufficient connection to the payment for the payment to be considered earnings is only one arm of the legal test.

[15] The General Division's analysis included a review of a number of the attributes of the payment to the Claimant.[4] These included the form of the cheque, the absence of the usual paycheque deductions, that there was no evidence that the payment was calculated on the basis of work performed, that the employer was under no contractual obligation to make the payment, that there was no consideration given by the Claimant for the payment, and that the payment was characterized by all parties as a gift. Even though the issue may not have been stated in terms of whether the payment was "comparable to earnings", the General Division's analysis was in fact addressed to that very issue. Its conclusion that the payment was not earnings follows from this analysis.

[16] Had the General Division found the payments to be earnings, it would have had to find that the payment was comparable to earnings as well as that the payments were sufficiently

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[1] *Côté v Canada (Attorney General),*A-178-86
[2] *Canada (Attorney General) v. Roch*
[3] Ibid. at para. 41
[4] General Division decision, para. 17

connected to the employment. However, the General Division found that the payment was not earnings. It was open to the General Division reach that conclusion based solely on its analysis of the comparability of the payment to earnings.

[17] I am not satisfied that the General Division erred in law under section 58(1)(b) of the DESD Act by not analyzing whether the payments were sufficiently connected.

Issue 2: Did the General Division make an extricable error of law in the manner in which it applied the legal test to the facts?

[18] In its oral submissions to the Appeal Division, the Commission conceded that the General Division's application of settled law to the facts was a question of mixed fact and law. However, it argued that the General Division made an "extricable" error of law and that *Garvey v. Canada (Attorney General)*[5] supports the Appeal Division's intervention in errors of mixed fact and law in such a case.

[19] The Commission argued that the General Division would have had no choice but to find that the money was earnings if it had properly applied the test, because the payment was made to the Claimant by the employer. I do not agree. The fact that the payment was made to the Claimant by the employer does not mean that the payment must be earnings. In *Canada (Attorney General) v. Lawrie Vernon*[6] the court stated that it was not enough that the payment was made, "merely as a consequence of a person's employment status".

[20] The Commission also stated that the "bonus" would never have been paid if it were not for the termination of employment, and that it was therefore a retirement payment. The Commission argues that retirement benefits are "generally a form of severance pay".[7] I accept that the closure of the X's business or operations, whether completed or only contemplated, was the "trigger" for the employer to consider the payment, and that this was established at the General Division. However, the fact that the closure was the *reason for the timing* of the payment does not necessarily mean that the closure was the *reason for the payment itself*. Although, the employer was uncertain how it should describe the payment, the evidence was

[5] See *Garvey v Canada (Attorney General),* 2018 FCA 118.
[6] *Canada (Attorney General) v. Lawrie Vernon* A-597-94
[7] AD2-4

unvarying that the payment was a gratuitous payment made to recognize years of hard or dedicated work over the years.[8] The General Division considered whether the payment was a production bonus,[9] a retirement allowance or a payment upon separation,[10] or an event bonus,[11] and it gave reasons for rejecting all of these, based on facts in evidence. It is not my role to reweigh or assess the sufficiency of the evidence.[12]

[21] In my view, neither the simple fact that the payment was made by the employer to the Claimant nor the fact that it was made at or about the time of the X's closure establish that there was both a sufficient connection and that the payments are comparable to earnings.

[22] The *Roch* decision asserts that none of the cases cited before it were incompatible with its own analysis. One of the cited cases was *Lawrie Vernon,* which stated that, "to be considered earnings, a receipt must in a general way have the characteristics of an amount paid in consideration of work done by the claimant—the receipt must be from work done…".[13]

[23] It was significant in the *Roch* case that the employees had a right to a subsidy payment, in exchange for the employee's surrender of the right of reinstatement that was granted to him under the collective agreement: The court considered that the waived right pertained to conditions of work and that the payment to be comparable to consideration for working. In other words, *Roch* determined that the payment was comparable to earnings. *Roch* distinguished its facts from the facts in *Canada v Plasse*[14] where the money that the employer paid the claimant in consideration of the claimant waiving a right to reinstatement was found not to be earnings because it was a statutory right and did not arise from the terms of the employment contract.

[24] *Roch* relied on its finding that the payment was comparable to consideration for working. The payment arose in consequence of, or in relation to, contractual employment rights. In the present case, the employer had no contractual obligation to make the payment, nor did the

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[8] GD3-19, GD3-27, GD3-29
[9] General Division decision, para. 13
[10] *Ibid.*,para. 14
[11] *Ibid*. para. 15
[12] *Bergeron v Canada (Attorney General)*, 2016 FC 220; *Hideq v Canada (Attorney General)*, 2017 FC 439; *Tracey v Canada (Attorney General)*, 2015 FC 1300
[13] *Supra*, note 7
[14] *Canada* v *Plasse* A-693-99

employer have any other contractual obligation whose waiver was compensated by the payment. The facts, as found by the General Division, were that there was no contractual obligation to make the payment. Therefore, these facts are distinguishable from Roch (where the subsidy payment was found to be earnings) and there is nothing in *Roch* that would compel the General Division to a finding that the payment was earnings.

[25] Therefore, I do not find that the conclusion was so inevitable on the facts that the proper application of the legal test would have required the General Division to find that the payment was earnings. The Commission has not satisfied me of any extricable error of law. As was confirmed by the Federal Court of Appeal decision in *Quadir v. Canada (Attorney General)*, in the absence of an extricable error of law, the Appeal Division has no jurisdiction to intervene in errors of mixed fact and law.[15]

Issue 3: Was it perverse or capricious for the General Division to find that the Claimant did not perform work to receive the payment from the employer?

[26] The Commission argued that it was perverse or capricious for the General Division to find that the Claimant did not perform work to receive the payment. The Commission observed that the General Division acknowledged evidence that the payment was intended as a gift to the Claimant in recognition of all the work the Claimant had done. It argues that this evidence runs contrary to the General Division's finding that the Claimant did not perform any work to receive the sum of money and that it arose from the personal relationship between the Claimant and the employer.[16]

[27] The Commission also argued that it was an error in law for the General Division to characterize the amount received as a gift arising from a personal relationship between the Claimant and the employer. However, the Commission did not expand on how this represented an error of law and I do not accept that it is an error of law.

[28] The fact that the Commission does not agree with the General Division's findings or its conclusion does mean that the General Division made an error of law. If the Commission is suggesting that the General Division reached contradictory findings, this is clearly not the case.

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[15] *Quadir v. Canada (Attorney General),* 2018 FCA 21
[16] AD2-4

If there were a contradiction, it would have been between the evidence and the General Division's finding. Therefore, I take it that both arguments are really the one argument that the General Division's finding was perverse or capricious because it does not follow from the evidence.

[29] There are two separate General Division findings in view: The first finding is that the payment was a gift. The second finding is that the gift arose out of the personal relationship as opposed to the employment relationship.

[30] There was evidence from both the employer and the Claimant (and from the claimant in the parallel matter that was joined to this proceeding) that the payment was intended as a gift, that there was no obligation to make the payment, and that the Claimant and the other claimant were surprised by the gift at a luncheon organized in their honour. There was no evidence that the employer was obligated to make the payment, that the payment was expected by either claimant, that it was related to any specific work or calculated with reference to work, or that the payment was in consideration of the surrender or waiver of any other right or entitlement.

[31] I accept that there was evidence on which the General Division could find that the payment was a gift. I note that the Commission argued at the Appeal Division hearing that it was irrelevant that the employer had no obligation to make the payment (which is closely related to the characterization of the payment as a gift), but I disagree with that submission. In my view, the gift nature of the payment is relevant to the determination of whether the payment is comparable to earnings. *Roch* found a payment to be earnings, at least in part, because of the relationship of the payment to contractual obligations. Furthermore, the Commission's own policy as stated in the Digest of Benefit Entitlement Principles:

> Moneys or other material benefit of some kind, received as a gift, that are not given in consideration of services performed do not arise out of employment.
> …
> A gift is arising out of employment only if the employee receives the gift because of the employer's custom to give such gifts to all employees or the employer gives some indication that the gift is related to employment, such as, taking an income tax deduction for the gift. (Emphasis added.)

[32] As I understand the Commission's submissions, the commission also considered the finding that the Claimant did not perform any work to receive the money to be contrary to the evidence that it was for "all the hard work [the Claimant did] over the years".

[33] I do not see a necessary contradiction. While it is true that the Claimant would not have been given the money if she had not worked at the X, it is also reasonable to suppose that she would not have been given the money if she had not worked *hard.* The recognition was not for a certain number of hours or years of work and the payment was not shown to be commensurate with the amount of work: The General Division supported its finding by saying that the amount was not calculated on the basis of the hours of work performed.

[34] The recognition was for consistently working hard. The fact that the Claimant's hard work was appreciated by the employer does not mean that the employer demanded, as a condition of employment, the kind of ethic, attitude, or extra effort demonstrated by the Claimant, or that the extra payment was remuneration for extra-hard work. There was evidence, accepted by the General Division, that the payment was freely given. It could not have been freely given, and *earned* at the same time, and; if it was not earned, the General Division could reasonably conclude that it was not earnings.

[35] I do not accept that the General Division's finding that the Claimant did not perform any work *to receive the money* is either perverse or capricious or that it is without regard for the evidence.

[36] However, I agree with the Commission that the General Division did not support its finding that the gift arose out of the personal relationship between the Claimant and the employer (or certain X of the employer organization). There was certainly evidence that the Claimant had a personal relationship with the X, some of them. However, the existence of a personal relationship between the Claimant and certain X is not, in itself, evidence of the source or purpose of the payment. It is possible that the nature of that relationship was a significant, or even a central, factor in the decision to make the payment but there was no evidence of this. Furthermore, the payment did not come from the personal accounts of the X but from the employer, and the X did not make the payment in their personal capacity but as representatives of the employer. This remains the case, regardless of the fact that it was the X that directed the

payment; not the employer's Human Resources department,[17] and that the cheque was presented by the X to the Claimant at a luncheon that was intended to honour and recognize the Claimant.

[37] Therefore, I find that the General Division's finding that the payment arose from the personal relationship was made in a perverse and capricious or without regard for the evidence. However, for this erroneous finding to support an error under section 58(1)(c) of the DESD Act, it would have to be an erroneous finding, "on which the decision was based".

[38] The finding that the payment was a gift is relevant to whether the payment is "comparable to earnings". However, once the payment is established as a gift, the finding that it arose out of a personal relationship (and the implication that it did not arise out of the employment relationship), is relevant only to the determination of whether there was a "sufficient connection" between the gift and the employment. As noted, the General Division did not address whether there was a sufficient connection between the payment and the employer, but decided the appeal on the basis that the payment was not comparable to earnings.

[39] The General Division decision is therefore not based on the erroneous finding that the payment arose from the personal relationship of the Claimant with the employer, and this is not an error under section 58(1)(c) of the DESD Act.

[40] As a final comment, when I granted leave to appeal it was with a view to the fact that the General Division relied on its characterization of the payment as a gift to find that the payment was not consideration for work performed and did not arise out of her employment. There is little guidance in the case law as to the effect of a gift, but I noted that the Federal Court decision in *Meikle v. Canada (Attorney General)*[18] considered similar circumstances where the employer's business was being discontinued, and the claimant was paid a bonus for "services meritoriously rendered". In that case the bonus was considered as earnings.

[41] The Commission did not make submissions on the applicability of *Meikle* and the Claimant argued that it should be distinguished on its facts.

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[17] GD3-28
[18] Meikle v. Canada (Attorney General), A-384-89

[42] In *Meikle*, the parties had not disputed that the bonus was earnings, so the court was not required to make a decision on this issue. Meikle addressed the manner in which that bonus should be allocated. I agree with the Claimant that *Meikle* is distinguishable and I have not relied on it.

CONCLUSION

[43] The Commission's appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 23, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Anick Dumoulin, Representative for the Appellant J. D., Respondent X, Representative for the Respondent