



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. W. v Canada Employment Insurance Commission*, 2019 SST 613

Tribunal File Number: AD-18-882

BETWEEN:

N. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: June 27, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] N. W. is the Claimant in this case. He ended a seasonal job with a recreation facility in early April 2018. He then made a claim for Employment Insurance (EI) regular benefits. When his job ended, the Claimant received a lump-sum payment representing all of the vacation pay that he had accumulated while working for that employer. A question arose, however, concerning the way in which the Claimant's vacation pay affected his EI benefits.

[3] The Canada Employment Insurance Commission (Commission) initially calculated the Claimant's EI benefits in one way, then in another, and then went back to the first calculation. Because of its changing calculations, however, the Commission says that the Claimant was overpaid \$38.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division, but it dismissed his appeal. I have now decided that the General Division acted unfairly towards the Claimant and that its decision must be set aside. I have also reassessed the Claimant's case, and determined his entitlement to EI regular benefits.

ISSUES

[5] As part of this decision, I asked and answered the following questions:

- a) Did the General Division breach a principle of natural justice by not giving the Claimant an opportunity to comment on the Commission's Additional Representations, dated October 30, 2018?¹
- b) If so, what is the appropriate remedy based on the facts of this case?

¹ GD6.

c) What is the Claimant's entitlement to EI regular benefits?

ANALYSIS

[6] To succeed at the Appeal Division level, the Claimant must convince me that the General Division committed at least one of the three possible errors described in the *Department of Employment and Social Development Act* (DESD Act).²

[7] In this case, I have focused on whether the General Division proceeding was conducted fairly. If not, the General Division might have breached a principle of natural justice, which is one of the three relevant errors under the DESD Act.³ If I find that the General Division did commit an error, then the DESD Act also describes the powers that I have to fix that error.⁴

Issue 1: Did the General Division breach the principles of natural justice?

[8] Yes, the General Division breached the principles of natural justice in this case. In particular, the General Division did not give the Claimant an opportunity to respond to the Commission's Additional Representations. Indeed, it did so without explanation and contrary to a promise that the General Division member had made to the Claimant at the hearing.

[9] Towards the end of the General Division hearing, the member described the steps that would happen after the hearing.⁵ Among those steps, the General Division member said that she might ask the Commission to investigate and report on specific issues.⁶ If she made this type of request, however, the General Division member reassured the Claimant that he would receive a copy of it, and of the Commission's report. In addition, the General Division member said that she would give the Claimant a reasonable amount of time to respond to the Commission's report.

² These possible errors (also known as grounds of appeal) are set out in section 58(1) of the DESD Act. This section, and other relevant legal provisions, can also be found at the end of this decision.

³ DESD Act, s 58(1)(a).

⁴ These powers are set out in section 59(1) of the DESD Act.

⁵ General Division hearing at approximately 56:20 to 58:20.

⁶ The power to investigate and report is described in section 32 of the *Social Security Tribunal Regulations* (SST Regulations).

[10] In fact, the General Division member did ask the Commission to investigate two issues and report to her by October 29, 2018.⁷ The Commission's report came in the form of Additional Representations, which the Tribunal received on October 30, 2018.⁸

[11] Unlike what was said at the hearing, however, the General Division never gave the Claimant an opportunity to respond to the Commission's Additional Representations. Instead, the General Division sent both its final decision and the Commission's Additional Representations to the Claimant on the same day.⁹

[12] By proceeding in this way, the General Division breached the principles of natural justice. The General Division should have given the Claimant a reasonable chance to respond to the Commission's Additional Representations. The General Division recognized this during the hearing, but later failed to follow through on the promise that it had made to the Claimant.

[13] The Commission argues that I should not intervene in this case because its Additional Representations were not relevant to the General Division decision. I disagree. The General Division member specifically requested the Commission's Additional Representations and referred to them in her decision.¹⁰

[14] Since the General Division breached a principle of natural justice, I have the power to intervene in this case.

Issue 2: What is the appropriate remedy based on the facts of this case?

[15] If the General Division committed an error, the parties agreed that I should give the decision that the General Division should have given because:¹¹

- a) the amount at stake is low (\$38);
- b) the underlying facts of the case are not in dispute; and

⁷ GD5.

⁸ GD6.

⁹ See the General Division's two cover letters dated November 9, 2018.

¹⁰ General Division decision at paras 12 and 13.

¹¹ Giving the decision that the General Division should have given is one of my powers under section 59(1) of the DESD Act.

- c) the Claimant has now provided his response to the Commission's Additional Representations, so there is little value in returning the matter to the General Division.

[16] I agree. Giving the decision that the General Division should have given is appropriate in this case. In addition to the arguments above, I note that the parties have now had a full opportunity to present their case and that the *Employment Insurance Act* (EI Act) and DESD Act create a decision-making system that is meant to provide quick determinations.¹²

Issue 3: What is the Claimant's entitlement to EI regular benefits?

[17] The Claimant stopped working on April 2, 2018, because of a shortage of work. The Commission nevertheless accepted that the Claimant's benefit period was established on April 1, 2018. This means that the Claimant worked for two days in the first week of his benefit period.

[18] As part of the Claimant's final pay, his previous employer paid him his regular wages, plus \$232.82 in vacation pay.¹³

[19] The parties seem to accept that I must attribute these amounts to a particular period in time. This requirement is set out under section 36 of the *Employment Insurance Regulations* (EI Regulations). How, then, should I distribute the Claimant's vacation pay, based on the facts of his case?

[20] The Claimant argues that he was accumulating vacation pay throughout the time when he was working for his previous employer. As a result, his vacation pay should be attributed to the periods when it was earned.

[21] In support of his argument, the Claimant notes that some seasonal employers pay vacation pay to their employees at the end of each pay period. In these cases, the employee's vacation pay does not accumulate in the same way as it did for the Claimant. The Claimant argues that I should not penalize him because of an accounting choice made by his previous employer.

¹² See, for example, section 64(1) of the DESD Act along with sections 2 and 3(1) of the SST Regulations.

¹³ GD3-24.

[22] I sympathize with the Claimant. However, I must apply the EI Regulations as they are written. This is true even if a different approach might produce a seemingly better result.¹⁴

[23] In this case, the Claimant's vacation pay is income arising from his employment. In addition, the Claimant's previous employer paid this amount to him in April 2018 because it had ended his employment at that time. As a result, the EI Regulations clearly state that I must allocate the Claimant's vacation pay starting from the week of his lay-off. Plus, the amount of vacation pay that I can allocate to a particular week cannot be greater than the Claimant's normal weekly earnings from the employer who paid the vacation pay.¹⁵

[24] I conclude, therefore, that the Commission correctly allocated the Claimant's vacation pay to the period starting April 1, 2018. This is true regardless of when the Claimant earned or received his vacation pay.

[25] Whatever the result of this first issue; however, the Claimant still denies that he was overpaid \$38.

[26] The Claimant has advanced his arguments and alternative calculations with considerable skill, especially given the complexity of relevant legal provisions. Respectfully, the Commission has never provided the Claimant, or the Tribunal for that matter, with as detailed a calculation as this case deserves.

[27] To fully respond to the Claimant's arguments, therefore, I will consider the Claimant's entitlement to EI regular benefits for each of the following weeks:

- a) Week 1: April 1 to 7, 2018
- b) Week 2: April 8 to 14, 2018
- c) Week 3: April 15 to 21, 2018
- d) Week 4: April 22 to 28, 2018

¹⁴ *Canada (Attorney General) v Kneé*, 2011 FCA 301 at para 9.

¹⁵ The relevant legal provisions are sections 35(2) and 36(9) of the EI Regulations.

Allocation of Earnings

[28] Sections 35 and 36 of the EI Regulations require that I allocate any earnings the Claimant had after April 1, 2018, to a specific period. In this case, the Claimant worked on April 1 and 2, 2018. He also received the vacation pay discussed above. Both are amounts arising from his employment at the recreation facility.

[29] The Claimant said that he earned \$109 for working on April 1 and 2, 2018. However, the Commission refused to accept that figure because it was unsupported by any corroborating documents. Instead, the Commission applied a somewhat complicated formula to determine the Claimant's daily rate of insurable earnings, which it calculated as being \$31.29.¹⁶

[30] After rounding, the Commission therefore concluded that the Claimant had earned \$62 for working on April 1 and 2, 2018.

[31] Since the Commission's calculation is more favourable to the Claimant, I too am prepared to accept that the Claimant earned wages of \$62 during this week. These earnings are allocated to the week in which the services were performed: week 1.¹⁷

[32] As discussed above, the vacation pay that the Claimant received from the recreation facility must also be allocated, starting with week 1.

[33] There is a question, however, as to how much of the Claimant's vacation pay can be allocated to week 1. The Claimant argues that all of his vacation pay can be allocated to week 1. In support of this argument, the Claimant relies on having \$471 in weekly insurable earnings.

[34] I disagree. The Claimant cannot use his overall weekly insurable earnings in this way.

[35] To reach weekly insurable earnings of \$471, the Claimant relied on his wages from two employers, received throughout his entire 52-week qualifying period. However, the amount of vacation pay that can be allocated to week 1 depends on the Claimant's normal weekly earnings

¹⁶ GD6.

¹⁷ EI Regulations, s 36(4).

from the recreation facility alone.¹⁸ The Commission calculated that amount to be \$219.¹⁹ The Claimant does not appear to have challenged that calculation, and I will adopt it as being correct.

[36] As a result, \$219 is the maximum amount of earnings that can be allocated to week 1. This is made up of \$62 in wages and \$157 in vacation pay. The balance of the Claimant's vacation pay ($\$233 - \$157 = \$76$) must therefore be allocated to week 2.

[37] In this case, the parties seem to accept that the Claimant's weekly rate of benefits is \$259. Since that amount is larger than the maximum earnings that can be allocated to week 1 (\$219), the Claimant is able to serve his mandatory 1-week waiting period in this week.²⁰

Deduction of Earnings from Benefits

[38] Now that the earnings have been allocated and the waiting period has been served, I must consider the deductions to be taken from the Claimant's benefits. I will calculate these deductions based on the Claimant's weekly rate of benefits (\$259) and the amount of earnings allocated to week 1 (\$219) and to week 2 (\$76).

[39] Because the amounts allocated to week 1 fall within the waiting period, these exact amounts must be deducted from the benefits that would otherwise be payable to the Claimant in week 2. This reduces the benefit payable to the Claimant in week 2 to \$40 ($\$259 - \$219 = \40).²¹

[40] However, the \$76 in vacation pay allocated to week 2 must also be deducted from the Claimant's remaining benefits in week 2. Importantly though, a pilot project in place at the relevant time only required 50% of the Claimant's earnings from week 2 to be deducted from his benefits ($\$76 \times .5 = \38).²²

[41] After appropriately deducting all of the Claimant's earnings from the recreation facility, therefore, the Claimant remained entitled to \$2 in benefits in week 2 ($\$40 - \$38 = \$2$).

¹⁸ EI Regulations, s 36(9).

¹⁹ GD6.

²⁰ The mandatory waiting period is set out in section 13 of the EI Act.

²¹ EI Act, s 19(1); EI Regulations s 39.

²² Pilot Project 20 is set out in section 77.99 of the EI Regulations.

[42] Since all of the Claimant's earnings arising from his job with the recreation facility were deducted from his benefits in week 2, there are no further deductions that need to be made in weeks 3 or 4.

[43] I prepared this table to summarize the findings above.

	Week Starting	Weekly Benefit Rate	Deductions	Benefits Owed
1	April 1	Waiting Period		
2	April 8	\$259	\$257	\$2
3	April 15	\$259	\$0	\$259
4	April 22	\$259	\$0	\$259

[44] The precise amount of EI regular benefits that the Commission has paid to the Claimant and the amount (if any) that the Claimant has reimbursed to the Commission are somewhat unclear. Based on these reasons, the Commission should therefore recalculate the balance owing to the Claimant or the amount that he might need to reimburse to the Commission.

CONCLUSION

[45] The appeal is allowed. The General Division decision is set aside. In keeping with this decision, the Commission should now recalculate the Claimant's entitlement to EI regular benefits.

Jude Samson
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	N. W., Appellant S. Prud'Homme, Representative for the Respondent

Relevant Legal Provisions

Department of Employment and Social Development Act

Grounds of appeal

58 (1) The only grounds of appeal are that

- (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.

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Decision

59 (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

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Powers of tribunal

64 (1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

Social Security Tribunal Regulations

General principle

2 These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.

Informal conduct

3 (1) The Tribunal

- (a) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit;

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Reference of questions

32 The Employment Insurance Section may, at any time prior to its decision, refer any question arising in relation to a claim for benefits to the Commission for investigation and report.

Employment Insurance Act

Waiting period

13 A claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a waiting period of one week of unemployment for which benefits would otherwise be payable

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Earnings in waiting period

19 (1) If a claimant has earnings during their waiting period, an amount not exceeding those earnings shall, as prescribed, be deducted from the benefits payable for the first three weeks for which benefits are otherwise payable.

Employment Insurance Regulations

Determination of Earnings for Benefit Purposes

35 (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

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Allocation of Earnings for Benefit Purposes

36 (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

[...]

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

[...]

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, 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.

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Earnings in the Waiting Period

39 (1) If a claimant has earnings in respect of a period that falls in the claimant's waiting period, an amount equal to those earnings or, if paragraph 19(3)(a) or 152.18(3)(a) of the Act applies in respect of those earnings, the amount required by that paragraph to be deducted, shall be deducted from the benefits payable for the first three weeks for which benefits are otherwise payable.

(2) The maximum amount to be deducted under subsection (1) in respect of a claimant's earnings in their waiting period is an amount equal to their rate of weekly benefits.

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Pilot Project Relating to Earned Income While Receiving Benefits

77.99 (1) Pilot Project No. 20 is established for the purpose of testing whether deducting from benefits payable to any claimant who has earnings during a week of unemployment 50% of those earnings, until the earnings are greater than 90% of their weekly insurable earnings, would encourage claimants to work more while receiving benefits.

(2) Pilot Project No. 20 applies in respect of every claimant who makes a claim for benefits for any week in the period beginning on August 7, 2016 and ending on August 11, 2018 and who is ordinarily resident in a region described in Schedule I.

(3) For the purpose of Pilot Project No. 20, section 19 of the Act is adapted by adding the following after subsection (2):

(2.1) The amount to be deducted under subsection (2), except for the purpose of section 13, is equal to the total of

(a) 50% of the earnings that are less than or equal to 90% of the claimant's weekly insurable earnings used to establish their rate of weekly benefits, and

(b) 100% of any earnings that are greater than 90% of the claimant's weekly insurable earnings used to establish their rate of weekly benefits.