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

Citation: *A. S. v Canada Employment Insurance Commission*, 2019 SST 705

Tribunal File Number: AD-19-310

BETWEEN:

A. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: August 7, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Applicant, A. S. (Claimant), went on maternity and then parental leave from her employer and collected Employment Insurance benefits in 2012 and 2013, returning to work on August 28, 2013. In 2018, the Respondent, the Canada Employment Insurance Commission (Commission) determined that the Claimant had returned to work but continued to collect benefits until September 28, 2013, without declaring her wages. It also found that she had not declared other income in the form of profit sharing (PS) and an owners' performance award (OPA). The Commission found each of these amounts to be earnings and assessed an overpayment.

[3] When the Claimant requested a reconsideration, the Commission maintained its original decision. The Claimant appealed to the General Division, but the General Division dismissed her appeal. She now appeals to the General Division of

[4] The appeal is allowed. The General Division made a number of errors including the error of failing to make a finding on an essential point. The matter is returned to the General Division for reconsideration.

ISSUES

[5] Did the General Division err in law by failing to determine whether the Commission had properly exercised its authority to reconsider the Claimant's claim for benefits?

[6] Did the General Division err in fact by misunderstanding the period of time to which the Claimant's profit share (PS) and Owners' Performance Award (OPA) related?

[7] Did the General Division err in law by failing to justify its decision with adequate reasons?

[8] Did the General Division err in law by allocating the PS and the OPA across the period that generated her entitlement?

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 *Department of Employment and Social Development Act* (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 determine whether the Commission properly exercised its authority to reconsider the Claimant's claim for benefits.

[11] In its written arguments to the Appeal Division, the Commission raised the question of whether the Commission had authority to reconsider the Claimant's claim after more than 36 months from the date that benefits were paid or payable. The Commission noted that the Claimant was on maternity and parental benefits (collectively referred to as "maternity benefits") and was therefore not required to complete weekly claim reports. In this appeal, the Commission has taken the position that there was no false or misleading statement and that it did not have jurisdiction to reconsider the Claimant's claim, because more than 36 months had lapsed.

[12] The Commission is correct that its authority to reconsider a claim for benefits is ordinarily restricted by section 52(1) of the Employment Insurance Act (EI Act) to the period that is within 36 months of the date that the benefits were paid to the claimant or would have been payable. Under section 52(5), that authority may be extended out to 72 months from the paid or payable date, but only if the Commission is of the opinion that a false or misleading statement has been made.

[13] In this case, the last benefit paid to the Claimant was for the week that ended on September 28, 2013. On August 17, 2018, the Commission determined that the Claimant's wages, her profit share, and her owner's performance award were earnings. It reallocated these amounts to the weeks of benefits from September 30, 2012, to August 30, 2013. This decision was made after more than 36 months had lapsed but just within the 72-month timeframe.

[14] Given these facts, the Commission could only reconsider by forming an opinion that a false or misleading statement has been made. The Commission formed this opinion on August 17, 2018, as evidenced by a separate letter attached to the earnings and allocation decision of August 17, 2018.

[15] By the time the decision was mailed, the Claimant had moved and the decision was mailed to her previous address. Apparently, she did not receive any of the Commission's correspondence related to its re-examination of her claim. The Claimant said that she did not discover that the Commission had made a new decision on her old claim until several months after the date the Commission issued the decision letter. She immediately filed a reconsideration request in which she asserted that she had not earned income while she was on maternity leave.

[16] When asked by the Commission what it was that she was reconsidering, she said the "allocation of the money that caused her an overpayment". She is not recorded as having mentioned the false statement opinion.[1] However, it is clear from her reconsideration request form that she did not believe she had received income while on maternity leave.[2] Her failure to declare income was the substance of the "false or misleading statement" opinion.

[17] In the same discussion, the Commission told the Claimant that she had collected benefits up to September 28, 2013, but that she had returned to work on August 28, 2013. The Commission asked the Claimant why she did not report that she had returned to work or report her earnings, but she could only say that she could not recall. The Commission did not ask the Claimant anything about the profit sharing and owner performance benefits. The Commission agent simply informed her that it considered these amounts to be earnings.

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[1] GD3-39
[2] GD3-37

[18] At the General Division, the Claimant conceded that the Commission should allocate the wage portion of her earnings to the weeks after August 28, 2013, when she had also received maternity benefits.[3] She claimed that she went "online" and that she had no idea why her return-to-work date was not entered or changed.

[19] The Commission's opinion that a false or misleading statement was made in connection with the claim was foundational to its decision to reconsider after more than 36 months have lapsed. It would have had no jurisdiction to reconsider the Claimant's earnings or allocation of earnings if it had not formed such an opinion, therefore the opinion is inextricable from the decision. Even if the opinion had not been given the same date and attached to the decision, I would have to find that it was a part of the decision and that any reconsideration or appeal of the decision puts that opinion at issue.

[20] The Commission's decision to proceed on the exceptional authority of section 52(5) was before the General Division. The Federal Court of Appeal has repeatedly held that the Commission must be reasonably satisfied that such a false statement or representation has been made.[4] Therefore, the justification for the Commission's opinion is open to challenge.

[21] Despite the fact that the Claimant disputed some of the facts on which the Commission formed its opinion, the General Division made no finding on whether the Commission *reasonably* held the opinion that a false statement or representation had been made, and whether it had the authority to reconsider its decision after more than 38 months had passed.

[22] The failure to make a finding on an essential point is an error of law. As a result, I find that the General Division erred in law under section 58(1)(b) of the DESD Act.

Issue 2: Did the General Division err in fact by misunderstanding the period of time to which the Claimant's profit share (PS) and Owners' Performance Award (OPA) related?

[23] In support of her leave to appeal application, the Claimant provided submissions that suggest that she disagrees with the General Division's interpretation of the facts.

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[3] General Division decision, para. 19
[4] *Canada (Attorney General) v. Dussault*, 2003 FCA 372

[24] The General Division found that the Claimant received the PS payment because of the employer's earnings during the period of October 1, 2012, and September 30, 2013. On the basis that it should allocate the payments "equally across the period[s] that generated the entitlement",[5] the General Division allocated the PS share equally over the period from October 2012 to September 2013, in accordance with its findings of fact.

[25] The General Division had asked the Claimant if she knew how her profit share was calculated and she replied "no idea". She understood that it was a share of profits and that every employee received some PS. She also said that it was paid out twice a year, that she didn't know what it would be until she got it, and that the amount might depend on the employee's position but she didn't know what other factors were involved. However, she did not know, and said she could find no information on, the period to which the profit share payment related.[6]

[26] In reaching its findings of fact, the General Division relied heavily on the Commission's notes of a conversation with the payroll department of the employer[7] and, in particular the following notation:

> Profit Share - all employees have some ownership in the company and whatever profit is made they split it amongst the employees. The payout is every May (for October to March) and November (for March to September). Claimant was paid 7226.92 for the period October 2012 to September 2013. The payout was paid because of her return from leave.
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> Owners' Performance Award - an annual payment given every February for the period from December to January. If a person is on leave in February, they are given the money when they return. Claimant was paid 524.72 upon return.

[27] The General Division questioned her specifically about the Commission's conversation with the employer and asked about the employer's statement that the PS had been for the period

[5] General Division decision, para. 26
[6] 18:30
[7] GD3-22

from October 2012 to September 2013. The Claimant was asked if it "sounded right" and she agreed.[8]

[28] However, both the Claimant and the Commission's notes representing a conversation with the employer, confirm the following facts: The employer made a payment of PS to employees in November in relation to the period from April to September inclusive, and made a second payment of PS in May for the period from October to March inclusive. The Claimant and the employer were agreed that the employer had paid PS to the Claimant on her September cheque *because* she had returned from her leave.

[29] This is consistent with the Claimant's unchallenged evidence that employees did not know what amount they would receive as PS until they received it, that the employer did not pay PS to employees that were on leave, and that she would have actually forfeited her PS if she did not return from leave.

[30] The Claimant went on leave September 22, 2012. This means that she would have received her PS in May 2012 for the six previous months, but that she would not have received any PS for the PS related to the period from March to September 22, 2012 (when she went on leave). This payment would not be disbursed until November 2012, at which time the Claimant was on leave. According to the evidence, the PS could not have been paid to the Claimant in November because she was on leave.

[31] The General Division found that the entire $7,226.92 payment on the Claimant's September 6, 2013, paycheque was generated during the period from October 2012 to September 2013. This ignored or failed to appreciate the evidence that the total PS payment in the Claimant's cheque would have included the PS that would have been paid to the Claimant in November 2012 if she had not been on leave. The "November" payment that was likely included on her September 2013 paycheque, would have related almost entirely to a period in which the Claimant was still employed.

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[8] 21:40.

[32] The General Division found that the entire amount of PS on the Claimant's September 6, 2013, paycheque was generated during the period from October 2012 to September 2013. This is not supported by the evidence.

[33] I find that the General Division erred under section 58(1)(c) of the DESD Act by basing its decision on an erroneous finding.

Issue 3: Did the General Division err in law by failing to justify its decision with adequate reasons?

[34] I agree with the General Division that both the PS and OPA are income arising from the claimant's employment under section 35(2) of the Regulations. The question is whether it made an error in law in the manner in which it interpreted how those earnings should have been allocated.

[35] The General Division determined that the PS and the OPA must be allocated based on the trigger for the payments, which it also described as the reason for the payment. It therefore allocated the payment to the period of time that generated the Claimant's entitlement.

[36] The Claimant said that she had no way to know the amount of any PS or OPA payment before she received it. She argued that she had no entitlement to receive PS or OPA unless and until she returned to work. If she did not return, she would not receive either of these amounts. The Claimant's argument is that her PS and OPA were not earnings until she received them and that she had already returned to work at that time.

[37] The General Division referenced section 36(4) of the Regulations. Section 36(4) states that earnings payable under a contract of employment *for the performance of services* shall be allocated to the period in which the services were performed. The General Division did not say that it considered the PS or the OPA to be payable for services that she performed or make an allocation of either payment to particular weeks in which services were performed.

[38] The General Division also referenced section 36(5) of the Regulations. That section says that payments, made *without the performance of services*, shall be allocated to the period for which they are payable. Clearly, section 36(4) and section 36(5) cannot both apply since one requires the payments be made for the performance of services, whereas the other says that the

payments must be made without the performance of services. However, if the General Division intends section 36(5) to apply, it has not identified the periods in which the PS and OPA was "payable". The General Division made findings as to the different periods that the employer used to calculate its payments, but it made no finding as to when the amounts would have been payable.

[39] Finally, the General Division mentions section 36(6.2) which is applicable specifically to commissions or earnings from profit participation in cases where the earnings are neither transactional nor related to the performance of services. Section 36(6.2) states that profit share earnings should be allocated to each week in which the *earnings were earned*. While the General Division made findings as to when the employer earned its profits, it did not make a finding as to when the Claimant earned the profit share.

[40] This is not a quibble. The Claimant is not a principal in a small privately-held company in which her interests perfectly coincide with those of her "employer", or where employer profits can easily be attributed to her. The only evidence before the General Division was that the PS was related to the employer's profits, and that PS is paid out in May and November. The General Division found that the PS should be allocated equally across the period that "generated the Claimant's entitlement." If the General Division meant "earned" by "generated [her] entitlement", it should have said so, and it should have described the evidence it relied on to find that she earned the PS equally between October 2012 and September 2013.

[41] It is apparent that section 36(6.2) is intended to include earnings from profit sharing. However, the General Division did not explain whether it understood section 36(6.2) to apply to the Claimant's OPA. The OPA payments were distributed to employees because the employer outperformed its budget targets. This is not obviously a commission or a participation in profits.

[42] The General Division did not specifically determine which, if any, of sections 36(4), 36(5) or 36(6.2) of the Regulations were applicable to the appeal. Furthermore, it did determine the applicability of, or even reference, section 36(2). This section states that a claimant's earnings shall **not** be allocated to weeks during which they did not constitute earnings. The Claimant did not dispute that she would have received the PS and OPA payments if she did not return to work. She emphasized, however, that she would *not* have received the PS or the OPA if

she had *not* returned to work from her leave. In other words, the Claimant argued that they were not earnings in the weeks that she was on leave.

[43] *If* section 36(2) means that the PS and the OPA could not be considered earnings until the Claimant received, or was entitled to receive, the payments (and I make no finding on this), then they could not be allocated to any weeks prior to her return to work.

[44] The General Division determined that the Claimant was already entitled to the (PS) money at the time that she returned to work, stating that she would have received the profit share if she had not been on leave. It followed similar reasoning in relation to the OPA. The General Division addressed this as a matter of timing, saying that it needed to determine the reason for the payment and not the date of the payment. To do this it invoked *Canada (Attorney General) v. Savarie*, which found that a payment is a separation payment when it is paid because of the separation. *Savarie* said that the actual separation crystallized the payment.

[45] This begs the question. The question is what crystallized the Claimant's payment, which is the same question as when she became entitled. The Claimant's position is that the payment itself, or perhaps her return to work, triggered or crystallized the payment or payments, and that she was not entitled to those payments prior to her return to work. In other words, she could not be "entitled" to the payments while her entitlement was still contingent on her return to work. To state this in legal terms, the PS and OPA payments were either "not vested" (she had no interest in the payments until her return to work) or they were "subject to divestment" (she had some kind of contingent interest in the payments but could still lose her interest if she did not return to work).

[46] In my view, The General Division's reasons fail to engage the Claimant's argument, or to adequately explain how it reached its decision. The General Division also did not analyze the issues with regard to the applicable regulations and it rested its reasoning entirely on a distinguishable case authority.

[47] The failure to prove adequate reasons is an error of law under section 58(1)(b) of the DESD Act.

Issue 4: Did the General Division err in law by allocating the entire PS "equally" across the period that generated her entitlement?

[48] If the General Division meant to rely on section 36(5) of the Regulations, it would have had to allocate each PS payment to the period for which it was "payable". If it was relying on section 36(6.2), it would have had to allocate the PS payment to "each week within the period in which the earnings were earned." As noted above, the General Division's finding was that the Commission should allocate the profit share payment equally across the period that generated her entitlement.[9] In the case of her PS payments, the General Division used the period from October 2012 to September 2013, which was essentially her entire benefit period.

[49] According to the evidence, the employer would have made two separate PS payments during the Claimant's benefit period (November 2012 and May 2013), and it would make another payment in November 2013, three months after the Claimant had returned to work. The payment in November 2012 would have been calculated based on profits from March 2012 through to September 2012 and the payment in May 2013 would have been calculated for profits from October through to April 2013. The next anticipated payment would be based on profits from March 2013 to September 2013.

[50] Assuming that the profit share paid to employees is directly related to the employer's profits and also assuming that the time in which they are calculated is the time that they are payable, this would mean that it would be necessary to allocate each profit share disbursement to its own calculation period.

[51] Even if October 2012 to September 2013 could be said to be the period that generated the Claimant's entitlement, the evidence does not support a finding that the PS should be allocated "equally" in accordance with either section 36(5) or section 36(6.2).

[52] The assessment of "profit vs. loss" depends enormously on the particular calculation period chosen. Therefore, allocating the PS *equally* to the Claimant's weeks of benefits, regardless of calculation periods, could have negatively affected the Claimant's entitlement. To illustrate, *supposing* that the employer made profits for six months that justified paying out PS at

[9] *Supra,* note 3

a rate that is twice the Claimant's benefit rate but, in the following six months, the employer had no profits and paid out no PS. If the Commission allocated the PS that the Claimant received equally over that 12-month period, the Claimant would be required to pay back all the benefits she received. However, if the Commission instead allocated the PS in each six-month calculation period to its own six-month interval; to the weeks in which it was "payable" or "earned", then the PS would have entirely offset the Claimant's benefits in only six months, and she would still be entitled to the benefits she received in the other six months.

[53] I find that the General Division erred in law by directing that the PS be allocated equally across the period from October 2012 to September 2013.

CONCLUSION

[54] The appeal is allowed.

[55] Neither the Commission nor the Claimant identified the Commission's authority to reconsider under section 52(5) as an issue, or presented evidence or argument to the General Division as to the justification for the Commission's opinion that a false or misleading statement had been made.

[56] Therefore, I consider the record incomplete. I am exercising my authority under section 59 of the DESD Act and returning this matter to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division

HEARD ON:	July 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. S., Appellant