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

Citation: *R. G. v Canada Employment Insurance Commission*, 2019 SST 1322

Tribunal File Number: AD-19-270

BETWEEN:

**R. G.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

---

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

---

DECISION BY: Janet Lew

DATE OF DECISION: November 4, 2019

Canada

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed.

### OVERVIEW

[2] The Applicant, R. G. (Claimant), is appealing the General Division's decision dated March 14, 2019. The General Division decided that a lump sum payment that the Claimant received from her employer in 2015 represented retroactive short-term disability benefits for the period from February 8, 2013 to August 16, 2013. The General Division also decided that these short-term disability benefits were earnings that had to be allocated to February 13, 2013 to August 17, 2013. However, because the Claimant had received Employment Insurance benefits, the allocation led to an overpayment of Employment Insurance benefits that she had to repay.

[3] The Claimant argues that the General Division erred in law and based its decision on erroneous findings of fact without regard to the material before it. The Claimant argues that the only conclusion that the General Division could have logically drawn from the evidence was that the lump sum payment represented earnings for 2015, rather than short-term disability benefits for 2013. The Claimant also argues that the General Division failed to observe a principle of natural justice or refused to exercise its jurisdiction because it did not consider the Claimant's request to add parties to the proceedings.

[4] For the reasons that follow, I am dismissing the appeal.

### FACTUAL BACKGROUND

[5] The Claimant's employer prepared two documents relating to a lump-sum payment it paid to the Claimant in 2015: (1) a Record of Employment dated October 14, 2015[1] and (2) a T4 Statement of Remuneration Paid slip.[2] The Claimant argues that these two key pieces of evidence are contradictory because one document shows that the lump sum payment was for 2013, even though the employer prepared the document in 2015, while the other document

[1] See Record of Employment dated October 14, 2015, at GD3-73.
[2] See T4 Statement of Remuneration Paid for taxation year 2015, at GD14-12.

shows that the lump sum payment was for income earned in 2015. The lump sum payment must be for either 2013 or 2015, but it cannot be earnings for both years.

[6] In the ROE, the employer stated that it paid the Claimant over $35,000 in July 2015 for the period between February 8, 2013 and August 16, 2013. The ROE showed that the Claimant first worked on February 8, 2013 and last worked for this employer on August 16, 2013.[3] The ROE did not say what this payment represented.

[7] The Commission contacted the employer who advised that the payment it made in 2015 represented short-term disability benefits for 2013 and that the dates represented the start and end dates when the Claimant was eligible for these benefits.[4]

[8] The T4 Statement of Remuneration Paid slip for 2015 showed that the Claimant had employment income of over $32,000 for 2015. The T4 Statement of Remuneration Paid slip for 2013 showed that the Claimant had employment income of just under $9,900.[5] There is no suggestion that the Claimant worked for the employer in 2015.

[9] The Claimant claims that the payment in 2015 represents income for that year. She disputes that the lump sum payment that her employer paid in 2015 represented short-term disability benefits for 2013.

[10] The Claimant argues that the 2015 payment could not have represented short-term disability benefits for 2013 because she was ineligible for short-term disability benefits. She maintains that the payment represented income that she earned in 2015. Her employer issued her a T4 slip in 2015 that included the lump sum payment. She paid income taxes on this payment for the taxation year 2015. She argues that the General Division should have accepted the timing of the lump sum payment in 2015, the issuance of the T4 slip for 2015, and the fact that she paid income taxes on the payment in 2015 as conclusive proof that the payment was income for 2015, rather than short-term disability benefits for 2013.

---

[3] As the General Division noted in its overview, the Claimant's employer dismissed her on April 3, 2013, but after she contested the dismissal, the employer reinstated her on August 25, 2014.
[4] See Investigation Information Sheet, dated January 13, 2017, at GD3-79 to GD3-80.
[5] See T4 Statement of Remuneration Paid for taxation year 2013, at GD14-16.

[11] The Claimant also notes that Canada Revenue Agency wrote to her in December 2016, advising that T4A slips are used to show wage loss replacement, including any short-term disability benefits. CRA wrote that the Claimant's T4 slip and record of employment were conflicting because the T4 slip indicated employment income for 2015,[6] whereas the record of employment indicated that the payment was for 2013. The Claimant argues that because her employer did not issue her a T4A slip, this ruled out the possibility that the lump sum payment could have represented short-term disability benefits.

[12] Thus far, the Claimant has been unable or unprepared to ask her employer to confirm the nature of the lump sum payment. There has been a breakdown in the employer-employee relationship and likely future litigation.

## ISSUES

[13] The following issues are before me:

> **Issue 1:** Did the General Division fail to adequately explain its decision or fail to address the contradictory evidence?
>
> **Issue 2:** Did the General Division breach any principles of natural justice regarding the Claimant's request to add parties to the proceedings?

## ANALYSIS

### Issue 1: Did the General Division fail to adequately explain its decision or fail to address the contradictory evidence?

[14] The Claimant argues that the General Division failed to explain its decision adequately. In particular, the Claimant argues that the General Division failed to address the contradictory evidence between the ROE and the T4 slip. The Claimant also argues that the General Division failed to explain why it gave more weight to the ROE than to the employer's policy #60.06.07,

---

[6] See letter dated December 2, 2016, from Canada Revenue Agency, at GD14-9.

the T4 slip, and the employer's correspondence that said the Claimant was not entitled to receive any short-term disability benefits.[7]

[15] The employer's policy #60.06.07 gave short-term disability benefits to employees. The benefits were equal to 75% of an employee's gross salary from the 4th to the 130th working day of an absence due to illness or injury, if the employee met the eligibility requirements.[8]

[16] The Claimant argues that she was not entitled to any short-term disability benefits under the terms of the policy, so the employer was mistaken when it suggested that the lump sum payment represented short-term disability benefits. She says that the employer even confirmed that she was ineligible for short-term disability benefits in an email.

[17] The employer concluded in an August 2014 email that the Claimant was not entitled to receive short-term disability benefits and "her absences from February 8, 2013 to date will be unpaid,"[9] but the employer based its conclusion on its February 13, 2013 email.

[18] In the February 2013 email, the employer said that the Claimant at that point had not worked 20 consecutive days in 2013 to qualify for a new set of short-term disability benefits. The Claimant had just started working on February 8, 2013, so she had only accumulated four working days. This was far short of the 20 consecutive days she needed to qualify for short-term disability benefits under the terms of the employer's policy. Clearly, the Claimant did not qualify for short-term disability benefits when the employer wrote its email on February 13, 2013.

[19] When it wrote its email in August 2014, it is not clear whether the employer was mindful that when it wrote its email on February 13, 2013, the Claimant had just started working for the company and would have yet to have accumulated 20 consecutive days to be eligible for short-term disability benefits. It seems that the February 13, 2013 email likely was an unreliable indicator of the Claimant's eligibility for short-term benefits in August 2014. Seemingly, the Claimant would have easily accumulated more than 20 consecutive working days from the time

---

[7] Employer's internal email correspondence dated August 22, 2014, at GD14-4.
[8] Employer's #60.06.07 for Short and Long Term Disability, dated December 14, 2011, at GD14-6 to GD14-7.
[9] Employer's internal email correspondence dated August 22, 2014, at GD14-4.

that she first starting working on February 8, 2013, until the time when her employer dismissed her on April 3, 2013.

[20] Indeed, according to the August 2014 email, the Claimant had accumulated 920.75 hours of short-term disability from the short-term disability plan up until then. The email of August 2014 suggests that the employer removed these short-term disability hours that she had accumulated, based on its February 13, 2013 email that she had not worked 20 consecutive days in 2013. Yet, for the reasons that I have cited above, the Claimant would not have qualified for any short-term disability benefits after she had just started working, so the employer was wrong to have based her eligibility on the February 2013 email. On the other hand, the Claimant should have accumulated sufficient hours by August 2014.

[21] It is unclear whether the employer reassessed the Claimant's eligibility for short-term disability benefits again after February 13, 2013, before it made the lump sum payment to the Claimant in 2015. The General Division recognized that there was a problem with relying on the employer's 2014 email because something could have happened between 2014 and 2015 to cause it to reevaluate the Claimant's eligibility and determine that she was in fact eligible for short-term disability benefits.

[22] The General Division wrote that the August 2014 email "had no effect on the monies paid … at a later date" because the email "was prior to their decision to release Short-Term Disability monies."[10] In other words, the General Division concluded that sometime after August 2014, the employer decided, for whatever reason, that it would pay short-term disability benefits to the Claimant after all. The General Division found that the employer's August 2014 letter did not bind or limit it from paying out retroactive short-term disability benefits in 2015.

[23] The August 2014 email may have been problematic to begin with because the employer relied on a February 13, 2013 email to determine the Claimant's eligibility in August 2014. The facts upon which the employer relied to determine the Claimant's eligibility in February 2013 vastly changed by August 2014. By then, it appeared that she had accumulated more than 20 consecutive working days, which had not been the case in February 2013.

---

[10] At para. 9 of the General Division decision.

[24] I do not see how the employer's short-term disability policy and the August 2014 email—read together—assist the Claimant. The disability policy seems to support a finding that the Claimant was entitled to receive short-term disability benefits. However, even setting aside the employer's short-term disability policy and its February 2013 and August 2014 emails, this still leaves the conflicting ROE and the 2015 T4 slip.

[25] At paragraph 10, the General Division also addressed the absence of a T4A slip, which would have been the appropriate form to reflect short-term disability benefits, rather than a T4 slip. Essentially, the General Division found that the Claimant had "not been able to show that her Record of Employment and the statements from the employer about her Short-term Disability monies was incorrect." The General Division acknowledged the Claimant's arguments that the lump-sum payment could have represented settlement of a grievance while the Claimant was on an extended leave, but the General Division found this speculative and did not accept this argument without a "Minutes of Settlement."

[26] The General Division explained why it preferred the ROE to the T4 slip, saying that it preferred the ROE to the T4 slip because it considered the ROE to be payroll information.[11] The problem with this reasoning however is that the 2015 T4 slip also represents "payroll information."

[27] Given that it was her appeal, the Claimant had to prove that the lump sum payment represented income for 2015. As I see it, ultimately, the General Division concluded that the evidence fell short. There simply was insufficient evidence to enable it to find that the 2015 T4 slip conclusively proved that the lump sum payment represented income for 2015, in light of the conflicting evidence before it. Although this is likely an unsatisfactory explanation for the Claimant, given that it was impossible to reconcile the ROE and the T4 slip, the General Division was entitled to conclude that there was insufficient evidence to prefer the T4 slip to the ROE.

[11] See para. 11 of the General Division decision.

**Issue 2: Did the General Division breach any principles of natural justice or refuse to exercise its jurisdiction regarding the Claimant's request to add parties to the proceedings?**

[28] The Claimant submits that the General Division had an obligation to address or rule on the Claimant's request to add parties to the proceedings. The Claimant argues that the Social Security Tribunal should have added both her employer and union as parties to the proceedings because they had vital evidence that she could not get anywhere else.

[29] The Claimant claims that she repeatedly asked the Tribunal—before and during the hearing—to add her employer and union as parties. In the Notice of Appeal that she filed with the General Division,[12] the Claimant wrote, "Additionally, the employer in this matter …. should be added as a party given that they control critical documentation and evidence that needs to be entered as exhibits." The Claimant confirmed her request in her adjournment application on February 1, 2019. The Claimant sought an adjournment at that time so that she could add her union as a party "to substantiate critical relevant details involving payments made."[13]

[30] During the[14] General Division hearing, the Claimant's legal counsel argued that the Claimant was at a disadvantage because "the organizations that are in control of critical documents are not present and can't be compelled to produce any documents in their possession".[15] She says that this amounts to a request to add parties to the proceedings.

[31] The Claimant argues that the General Division failed to address her requests and make a decision about naming her employer and union as parties. The Claimant argues that the General Division breached principles of procedural fairness[16] when it failed to address the Claimant's requests and make a ruling, one way or the other. In particular, she argues that the General Division deprived her of the opportunity to fully and fairly present her case by failing to add her employer and union as parties to the proceedings. (This assumes of course that the General Division would have rubber-stamped the Claimant's request to add parties.)

[12] See Notice of Appeal, at GD2-3.
[13] See Claimant's email dated February 1, 2019, at GD8.
[14] Part 1 of audio recording of General Division hearing, at approximately 6:35.
[15] See Claimant's submissions dated September 6, 2019, at AD5-2, and part 1 of audio recording of General Division hearing, at approximately 11:26 to 12:20.
[16] *Benitez et al. v. M.C.I.*, 2006 FC 461.

[32] However, during the General Division hearing, the Claimant's counsel stated that the Claimant was ready to proceed, without objecting to the fairness of the hearing. The Claimant noted that it would have been far simpler if the employer and the union were present to answer questions, but as they were not, the Claimant's counsel stated that the General Division member would have to make a decision based on the evidence before him.[17]

[33] I do not see any indication that the Claimant re-visited her requests to add parties to the proceedings or that she even objected with the hearing going ahead in the absence of her employer or union. I find that the Claimant's failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. An applicant has to raise issues dealing with procedural fairness at the earliest practical opportunity when it is reasonable to expect an objection to be raised.[18]

[34] Although there may not have been a violation of the principles of natural justice when the General Division went ahead with the hearing, even so, it would have been far more preferable had the General Division addressed the Claimant's requests to add parties when the requests arose.

[35] If the General Division had considered the Claimant's requests to add parties, it would have had to consider section 10(1) of the *Social Security Tribunal Regulations*. The subsection allows the Tribunal, either on its own initiative or if a request is filed, to add any person as a party to a proceeding. However, the subsection requires that person to have a direct interest in the decision. I do not see any evidence showing what direct interest either the Claimant's employer or union had in the General Division's decision.

[36] I recognize that the Claimant states that she expects that she will be pursuing future litigation involving her employer. While that may be so, the employer has not indicated that it had any interest in the outcome of the General Division's decision. As well, the Claimant is relying on the employer and her union because they each have "critical relevant details."

---

[17] Part 1 of audio recording of General Division hearing, at approximately 44:26.
[18] *Benitez et al. v. M.C.I.* 2006 FC 461 at paras. 220-221, 232 & 236.

However, the fact that each may have had "critical relevant details" does not translate into a direct interest in the General Division's decision.

[37] My colleagues on the Appeal Division have come to the same conclusion when dealing with requests to add parties. It is clear that a person must have a direct interest in the decision.[19]

[38] While the General Division should have recognized the Claimant's request to add her employer and union to the proceedings, ultimately I am unconvinced that the Claimant would have succeeded in meeting the rules and the test for adding parties to the proceedings.

[39] In summary, in light of the Claimant's failure to object to the hearing proceeding without any determination from the General Division on whether to add parties, I find that the Claimant has not established that the General Division breached principles of natural justice. In any event, as I find that the employer and union have no direct interest in the outcome, the Claimant would not have met the requirements to add them as parties to the proceedings under subsection 10(1) of the Regulations.

**CONCLUSION**

[40] Given the above considerations, the appeal is dismissed.

Janet Lew
Member, Appeal Division

| HEARD ON: | August 19, 2019 |
|---|---|
| METHOD OF PROCEEDING: | Videoconference |
| APPEARANCES: | R. G., Appellant<br><br>Andrew K. Langille (Counsel), Representative for the Appellant<br><br>S. Prud'Homme, Representative for |

[19] See, for example, *J.S. v. Minister of Employment and Social Development*, 2018 SST 769 and *L.L. v. Minister of Human Resources and Skills Development and A.C.*, 2013 SSTAD 12.

| | |
|---|---|
| | the Respondent (by way of written submissions only) |