



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v L. D. et al.*, 2020 SST 311

Tribunal File Number: AD-19-714

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

L. D. et al.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: April 17, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Elementary Teachers Federation of Ontario (ETFO) is the bargaining agent for all public elementary teachers in Ontario. The ETFO negotiates collective agreements with the Crown and the Ontario Public School Boards' Association.

[3] The last complete collective agreement covered the period from September 1, 2014, to August 31, 2017. In 2017, the ETFO negotiated an extension to this agreement (the "Extension Agreement"). The Extension Agreement provided for a reimbursement of professional expenses to all teachers employed or on an approved leave, paid sick leave, or statutory leave as of September 1, 2017. Specifically, the re-imbusement was a lump-sum payment representing 0.5 percent of wages earned in the 2016-to-2017 school year.

[4] The Respondents (Claimants) were off work and receiving Employment Insurance (EI) maternity or parental benefits on September 1, 2017. During the fall of 2017, while in receipt of EI benefits, the Claimants received the lump-sum payments from their school board. The Appellant (Commission) determined that the lump-sum payments received by the Claimants were earnings to be allocated to the week of September 1, 2017. The allocation created overpayments of EI benefits for the Claimants to reimburse. They requested a reconsideration of the decision and the Commission maintained its decision. The Claimants then filed their appeals to the General Division of the Tribunal.

[5] The General Division held a representative appeal with the consent of the parties. Under this way of proceeding, each Claimant is considered a party to the joined appeal, but only the evidence and submissions of the one representative Claimant are before the Tribunal. Only the Representative Claimant appears at the hearing, gives evidence and makes oral submissions, and only one decision is rendered by the Tribunal, which would then apply to all Claimants.

[6] The General Division found that the lump-sum payments the Claimants received from the employer were not earnings. The General Division determined that the lump-sum payments received had nothing to do with work performed or compensation for services rendered. Instead, the Claimants received in advance a fixed amount for job-related expenses incurred or to be incurred during the life of the Extension Agreement. The General Division found the preponderant evidence showed that the teachers generally incur these expenses and that they did not gain anything from the lump-sum payments they received.

[7] The Tribunal granted the Commission leave to appeal. The Commission submits that the General Division erred when it denied the Commission's request not to continue proceedings under the form of a representative appeal. It submits that the General Division also erred in fact or in law when it concluded that the lump-sum payments the Claimants received from the employer were not earnings under the *Employment Insurance Regulations* (EI Regulations).

[8] The Tribunal must decide whether the General Division erred when it denied the Commission's request not to continue with a representative appeal and whether the General Division erred in fact or in law when it concluded that the lump-sum payments the Claimants received from the employer were not earnings under the EI Regulations.

[9] The Tribunal dismisses the Commission's appeal.

ISSUES

[10] Did the General Division err when it denied the Commission's request not to continue with a representative appeal?

[11] Did the General Division err in fact or in law when it concluded that the lump-sum payments the Claimants received from the employer were not earnings under the EI Regulations?

PRELIMINARY MATTERS

[12] The present decision applies to all Claimants mentioned in Annex A.

ANALYSIS

Appeal Division's mandate

[13] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.¹

[14] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.²

[15] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

Issue no 1: Did the General Division err when it denied the Commission's request not to continue with a representative appeal?

[16] A representative appeal occurs when a number of cases have shared legal and/or factual issue(s) to be resolved that would apply jointly to the claimants. Usually, one holds a representative appeal because there are few differences between the various claimants and no need to consider their cases individually. In such cases, a tribunal renders one decision that applies to all the claimants involved in the appeal.

[17] Whether cases should be heard individually or joined together for hearing as a representative appeal are clearly administrative decisions. The Federal Court of Appeal has recognized that the practice of hearing one case as a representative case and applying its findings to a large number of other cases involving identical issues is very often adopted and is a useful and desirable means of proceeding.³

¹ *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.

² *Idem*.

³ *Lemieux v Canada (Attorney general)*, T-1343-77.

[18] In the present matter, the parties had the opportunity to provide to the General Division written submissions on how they wished for the appeal to proceed.

[19] On July 24, 2018, the Claimants advised the General Division that they wished to proceed by way of a representative appeal, using the lead file of L. H (the Representative Claimant). They put forward that the issue under appeal was common to all Claimants.

[20] The Claimants also advised that, in addition to the documentary evidence from the Representative Claimant's appeal file, they intended to call her as a witness to give evidence about the nature and purpose of professional expenses incurred by teachers, including the amounts, timing and frequency of the reimbursements. The Claimants indicated that they wished to present this evidence to demonstrate the existence of expenses that public elementary school teachers incur during their employment.

[21] On July 28, 2018, the Commission agreed to proceed with a representative appeal using the lead file of the Representative Claimant.

[22] The General Division held a pre-hearing conference where it decided, with the parties' agreement, to proceed with a representative appeal.

[23] The in-person hearing took place and proceeded in the usual course, until the Commission made its closing submissions. The Commission then requested that the General Division proceed to decide the appeals individually, contrary to the agreed-upon representative appeal.

[24] The Commission submitted that while the evidence and oral testimony of the Representative Claimant did establish that it was common practice that teachers buy materials for their classrooms, it did not establish that all teachers effectively incurred expenses. The Commission offered to allow the Representative Claimant's appeal because she had filed her expenses receipts. However, the Commission further submitted that specific evidence of incurred expenses by the other teachers was necessary for the remainder of the appeals to be allowed.

[25] The Claimants argued that most of the Representative Claimant's evidence was not subjective or specific to her, but was evidence that supported factual conclusions of general and equal application to all the teachers' appeals.

[26] After considering further submissions from the parties, the General Division denied the Commission's request to change the type of hearing. The Commission's arguments did not persuade the General Division that the appeals should proceed differently.

[27] In appeal, the Commission submits that the General Division erred when it refused to change the type of hearing in order to hear the appeals individually.

[28] The Tribunal disagrees with the Commission's position, which it considers untenable when considering all the circumstances in this case.

[29] The parties agreed after numerous discussions and written exchanges that the Representative Claimant would appear at the hearing, give evidence and make oral submissions, and that only one decision would be rendered by the General Division, which would then apply to all Claimants.

[30] The Commission specifically agreed that the oral submissions given by the Representative Claimant would include:

- the nature and purpose of professional expenses incurred by elementary school teachers;
- the timing and frequency of those expenses for all the ETFO teachers in general;
- the reimbursement of such expenses for all ETFO teachers in general; and
- the factual background of the expenses incurred by public elementary school teacher in the course of their employment.

[31] The General Division made the following findings of fact based on a review of all the evidence presented before it, namely that:

- the lump sum payment was not provided to teachers in exchange for work performed or as compensation for services that they had rendered;

- the purpose of the lump sum payment was to provide reimbursement for job related expenses that teachers incurred or would incur during the course of the Extension Agreement;
- there was no evidence that suggested the lump-sum payment was in fact an attempt to provide a signing bonus to teachers; and
- the expenses incurred by the Representative Claimant were not specific to her, but rather were typical of the expenses incurred by other teachers.

[32] Based on these findings of fact, the General Division concluded that the lump-sum payments the Claimants received from the employer were not earnings pursuant to the EI Regulations.

[33] The Tribunal is of the view that it was too late for the Commission to take the position that the evidence could not apply to all the Claimants involved in the appeal after the closing of the evidentiary stage.

[34] The Commission did not object at any time to the oral testimony of the Representative Claimant. It proceeded to cross-examine the Representative Claimant on the expenses, the consumables budget, reimbursement policy, whether the employer required her to provide receipts, and whether she had participated in a survey about her expenses, without raising any issues during her testimony regarding the representative nature of the appeal.

[35] The Commission knew or should have known that the Representative Claimant's evidence introduced at the General Division hearing would apply to all the Claimants. The Commission had an opportunity during the Representative Claimant's testimony to raise the issue of whether a representative appeal was still the appropriate procedure for the appeals, and yet it did not.

[36] Furthermore, and most importantly, the Tribunal finds that the General Division made several findings of fact in support of its decision that went beyond merely relaying specific expenses that the Representative Claimant had incurred and for which she provided receipts.

[37] Among all its findings, the General Division found that the Claimants were paid in advance a fixed amount for job-related expenses to be incurred during the life of the Extension Agreement, for which there could be no receipts available at the time of the payments.

[38] The Tribunal finds that nothing occurred during the General Division hearing that rendered the use of a representative appeal inappropriate.

[39] For the above-mentioned reasons, the Tribunal dismisses this ground of appeal.

Issue no 2: Did the General Division err in fact or in law when it concluded that the lump-sum payments the Claimants received from the employer were not earnings under the EI Regulations?

[40] This ground of appeal has no merit.

[41] The onus is on the Claimants to prove, on a balance of probabilities, that monies received constitute something other than earnings.

[42] The General Division found that the lump-sum payments the Claimants received from the employer were not earnings pursuant to the EI Regulations.

[43] The General Division determined that the lump-sum payments received by the Claimants had nothing to do with work performed or compensation for services rendered. Instead, the Claimants received in advance a fixed amount for job-related expenses incurred or to be incurred during the life of the Extension Agreement. The General Division found that the evidence showed that the teachers generally incur these expenses and that they did not gain anything from the lump-sum payment they received.

[44] The Commission argues that the General Division err in law by misapplying *Vernon* in failing to consider whether the lump sum payment was not referable “in any manner” to the work performed by them.⁴

⁴ *Canada (Attorney General) v Vernon*, [1995] FCJ No. 1394 (CA) at paras. 1, 4.

[45] The Federal Court of Appeal has clearly established in *Vernon* and its subsequent decisions that for a payment to constitute earnings, the relevant question is whether a payment to an employee was “earned by labour” or was “given in return for work done”, not whether it was “not referable in any manner to particular work performed”.⁵ The Tribunal finds that the General Division applied and administered the proper legal test in the present matter.

[46] The Commission further argues that 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 when it concluded that all the Claimants had effectively incurred expenses.

[47] As stated previously, the General Division made several findings of fact in support of its decision that went beyond merely relaying specific expenses that the Representative Claimant had incurred and for which she provided receipts.

[48] While it is true that the Claimants do not have to account for their expenses, the preponderant evidence before the General Division established that it was common practice that teachers buy supplies and materials for their classrooms. The General Division found that the Extension Agreement provided for the re-imbursement of professional expenses that were regular, legitimate, expected, and universal.

[49] The preponderant evidence before the General Division shows that the purpose of the lump-sum is to compensate the Claimants for expenses incurred or to be incurred during the extended term while working as teachers. It therefore does not fall into the category of earnings under the EI Regulations.

[50] Furthermore, the evidence before the General Division does not support a conclusion that the Claimants gained or benefited from the lump-sum payment or that the monies provided were in consideration for work performed or to be performed.

[51] Although not binding on the Tribunal, the *Digest of Benefit Entitlement Principles* (Digest) can be persuasive. The Digest recognizes that not all money paid by an employer constitutes earnings. In addressing expense reimbursement, it provides that receipts are not

⁵ *Canada (Attorney General) v King*, [1996] FCJ No. 483 (CA) at para. 10, *Canada v Plasse*, [2000] FCJ No. 1671 (CA) at para. 17, *Canada (Attorney General) v Vernon*, [1995] FCJ No. 1394 (CA) at paras. 1, 4.

required when an employer compensates an employee for job-related expenses or job-required considerations.⁶

[52] The Tribunal finds that the General Division did not err neither in fact nor in law when it concluded that the Claimants met their burden of proving, on a balance of probabilities, that the monies received constitute something other than earnings.

[53] As stated during the appeal hearing, the Tribunal is not empowered to retry a case or to substitute its discretion for that of the General Division. The Tribunal's jurisdiction is limited by subsection 58(1) of the DESD Act. Unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

[54] The Tribunal finds that the General Division based its decision on the evidence submitted before it, and that it complies with both the legislative provisions and the case law.

[55] For the reasons mentioned above, the Tribunal dismisses the Commission's appeal.

CONCLUSION

[56] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	March 10, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Sylvie Doire, representative for the Appellant Christine Davis, representative for the Respondent

⁶ *Digest*, §5.3.3.1.

Annex "A"

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