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

Citation: *N. K. v Canada Employment Insurance Commission*, 2020 SST 399

Tribunal File Number: AD-19-644

BETWEEN:

N. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: May 8, 2020

Canada

DECISION AND REASONS

DECISION

[1] The Claimant's appeal is allowed.

OVERVIEW

[2] The Appellant, N. K. (Claimant), made a request for employment insurance benefits. He established a benefit period starting on June 18, 2017. He received benefits. The *Canada Revenue Agency* later determined that the Claimant had insurable hours between June 19, 2017, and July 15, 2017. Based on this decision, the Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant had received earnings and allocated those earnings to the weeks of June 18, June 25, July 2, and July 9, 2017. This resulted in an overpayment of benefits.

[3] The Claimant disputed the Commission's decision. He argued that the Commission knew from the outset that the issued Record of Employment (ROE) was incorrect. The Claimant submitted that he declared from the beginning that he had earnings after June 16, 2017, even though he was not paid. He argued that he should not have to pay the overpayment that resulted from the allocation of earnings from June 19, 2017, until July 15, 2017.

[4] The General Division found that the Claimant had an obligation to return the money to the Commission since he had received money by way of benefits to which he was not entitled. It determined that only the Commission had the power to write-off an overpayment. The General Division concluded that it did not have the authority to offset any overpayment debts because of the Claimant's alleged damages.

[5] The Appeal Division granted the Claimant leave to appeal. He puts forward that the whole matter is not settled. He submits that the General Division erred when in concluded that the earnings had to be allocated. The Claimant submits that the Employer never paid him and probabilities are that he will never recover the money owed to him.

[6] The Tribunal must decide whether the General Division erred when it concluded that the money received for the weeks of June 18, June 25, July 2, and July 9, 2017, were earnings that

had to be allocated pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulation).

[7] The Tribunal allows the Claimant's appeal.

ISSUE

[8] Did the General Division err when it concluded that the money received for the weeks of June 18, June 25, July 2, and July 9, 2017, were earnings that had to be allocated pursuant to sections 35 and 36 of the EI Regulations?

ANALYSIS

Appeal Division's mandate

[9] 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* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[10] 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]

[11] 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.

PRELIMINARY MATTERS

[12] A settlement conference took place regarding the Claimant's appeal files AD-19-889, AD-19-890, AD-19-891 and AD-19-644. On March 2, 2020, a different Member of the Appeal

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

Division rendered a decision based on the agreement reached by the parties in files AD-19-889, AD-19-890 and AD-19-891. However, the parties did not settle the present file. Therefore, the Tribunal will render a decision on the remaining issue.

Did the General Division err when it concluded that the money received for the weeks of June 18, June 25, July 2, and July 9, 2017, were earnings that had to be allocated pursuant to sections 35 and 36 of the EI Regulations?

[13] The present decision concerns the benefit period established on June 18, 2017. The only issue before the Tribunal is whether the General Division erred when it concluded that the money received for the weeks of June 18, June 25, July 2, and July 9, 2017, were earnings that had to be allocated pursuant to sections 35 and 36 of the EI Regulations.

[14] The Claimant submits that the General Division erred when it concluded that the earnings had to be allocated. The Claimant submits that the General Division did not consider in its decision that he never received any payment from his employer and probabilities are that he will never recover the money owed to him.

[15] The Tribunal notes that the General Division acknowledged that the Claimant had not received payment from his employer at the time of the hearing. However, it did not determine whether the moneys in question had any real prospect of being paid in order to be considered "payable" in accordance with section 35(2) (a) of the EI Regulations. This constitutes an error of law and the Tribunal must intervene.

[16] The Tribunal will render the decision that should have been given pursuant to section 59(1) of the DESD Act.

[17] For an amount to be considered payable under the EI Regulations, there must be some prospect of that amount being paid. It is well established that the purpose of allocating earnings is to prevent a claimant from receiving severance or other earnings from their employer at the same time as they are receiving benefits, even if those earnings are not actually paid at the same time as the benefits are.

[18] Employment insurance benefits are to compensate claimants for the loss of employment. If that loss has already been compensated (or will be compensated) there is no need for the benefits to be paid. Conversely, if the earnings will actually never be received, it would be contrary to that objective to say that the earnings can still be considered "payable" even though the loss of earnings remains uncompensated.

[19] The preponderant evidence before the General Division shows that the employer is vigorously denying that the Claimant worked after June 16, 2017, and that it owes the Claimant any salary after said date. The employer is not cooperating with the Claimant although a CRA ruling determined that he did in fact work from June 19 to July 15, 2017. The employer also did not amend its initial ROE. On July 25, 2019, the Claimant testified before the General Division that he did not receive any pay from his employer after June 16, 2017.

[20] Considering the preponderant evidence before the General Division, the Tribunal finds that the Claimant will not receive his unpaid salary. It is therefore not "payable" within the meaning of the EI Regulations.

[21] Because of this, the money should not be allocated.

CONCLUSION

[22] The Claimant's appeal is allowed.

[23] In regards to the benefit period starting on June 18, 2017, the monies received by the Claimant for the weeks of June 18, June 25, July 2, and July 9, 2017, should not be allocated.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	May 6, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. K., Appellant Louise Laviolette, representative

	for the Respondent