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

Citation: *Canada Employment Insurance Commission v V. A.*, 2020 SST 400

Tribunal File Number: AD-19-575

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

V. A.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: May 11, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, the Canada Employment Insurance Commission (Commission), is appealing the General Division's decision of July 25, 2019.

[3] The General Division determined that the $2,000 that the Respondent, V. A. (Claimant), received from a "Hardship Fund" did not constitute earnings. Therefore, the amount did not have to be allocated or applied against her claim for Employment Insurance benefits. This meant that she did not have any overpayment of benefits.

[4] The Commission argues that the General Division based its decision on an error of fact. The Commission also argues that the General Division misinterpreted and failed to properly apply the *Employment Insurance Regulations* (Regulations).

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

PRELIMINARY MATTERS – CONFIDENTIALITY ORDER

[6] When I granted leave to appeal, I temporarily extended the General Division's confidentiality order of July 25, 2019. This was subject to finding out the parties' positions on the confidentiality order. Having received and considered the parties' positions, I am suspending my order that extended the original confidentiality order.

[7] The Claimant is asking me to modify the terms of the July 25, 2019, confidentiality order. The General Division then amended the order on February 10, 2020. However, the Claimant argues that both the initial and amended confidentiality orders remain overly broad and do not reflect the order that she requested.

[8] The Claimant did not seek leave to appeal the General Division's confidentiality order of July 25, 2019. However, the Claimant filed an application for leave to appeal the General

Division's decision of February 10, 2020. The Claimant argues that the General Division made an error in law and based its decision on an erroneous finding of fact when it amended its original order.

[9] The Claimant does not object if the Appeal Division joins her application for leave to appeal to the Appeal Division with the Commission's appeal. In her view, joining both appeals is the most efficient and effective way to proceed.

[10] The Commission takes no position on the Claimant's leave application. The Commission does not object to the Appeal Division incorporating the Claimant's proposed relief into the Appeal Division's decision regarding the Commission's appeal.

Claimant's Application for Leave to Appeal

[11] The Claimant argues that the General Division misinterpreted her initial request. The Claimant argues that she had originally asked that only one word be made confidential. The word could have identified the source of the Hardship Fund because it refers to the personal financial X of an individual who is a party to the proceedings before the Social Security Tribunal.

[12] Despite the Claimant's limited request, the General Division ordered that the documents marked GD7-17 and GD7-18, and its decision of July 25, 2019, remain confidential.

[13] When the General Division amended its order, it directed that any references to the source of the Hardship Fund be removed or blacked out before the decision is published or shared with anyone who is not a party to the appeal. The General Division also ordered that the documents marked GD7-16 to GD7-18 remain confidential.

[14] The Claimant described the legal test for imposing a confidentiality order set out in *Sierra Club of Canada v Canada (Minister of Finance)*.[1] Such an order must be necessary and proportional. This includes weighing the salutary (positive) effects against the deleterious (negative) effects of such an order.

[1] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53.

[15] The Claimant argues that the confidentiality order she requested is necessary to prevent a serious risk of disclosure of important information. Here, the information the Claimant seeks to protect consists of personal financial information. She argues that simply redacting the word "X" in both the General Division and the Appeal Division decisions protects the individual's personal financial information. She argues that redacting the word would not result in any negative effects.

[16] At the same time, the Claimant argues that the General Division's broad confidentiality orders fail to meet the test set out in *Sierra Club of Canada*. The positive effects of a broad confidentiality order do not outweigh the negative effects. The Claimant argues that an overly broad confidentiality order would greatly diminish any value her case would have for future cases.

[17] The Claimant argues that this case will be important for employees of insolvent employers who receive money from a fund similar to the Hardship Fund. This case will be important because it will resolve the issue of whether such fund money is earnings or a relief grant. The classification of those funds as either earnings or a relief grant could affect whether and how much a claimant might receive in Employment Insurance benefits. The Claimant argues that employees in a similar position are unable to refer to or rely on the decision when there are such broad confidentiality orders. The Claimant argues that this represents a significant harmful effect.

Claimant's Requested Relief

[18] The Claimant is seeking the following relief, to make sure the individual's personal financial information is protected and that any decision retains any value for future cases and arguments. The Claimant requests

a. that only the word "X" is redacted from any General Division and Appeal Division decisions on this matter;
b. or, that the Appeal Division describes the source of the Hardship Fund without referring to the terms "X" or "bonus." The Claimant cites an example of how the Appeal Division may describe the source of the Hardship Fund as "monies which would have been paid to

a beneficiary of the Key Employee Retention Plan but for such beneficiary renouncing a portion of his entitlement which was then used by the department store chain to establish the Hardship Fund;"[2] and

c. that the Tribunal gives any other and further relief it determines is appropriate.

Appeal Division Confidentiality Order

[19] I accept the Claimant's submissions. Therefore, I am granting leave to appeal and allowing the Claimant's appeal of the General Division's decision of February 10, 2020. I am modifying the General Division's original confidentiality order and amended confidentiality order to reflect the terms of the order she requested.

[20] In particular, I am limiting the scope of the General Divisions' confidentiality orders. I am ordering that the word "X," as it relates to the source of the Hardship Fund, remains confidential in the documents marked GD7-17 and GD7-18, and in the General Division and the Appeal Division decisions about this matter.

BACKGROUND FACTS

[21] The Claimant worked for a national department store chain. The chain filed for protection under the *Companies' Creditors Arrangement Act*[3] (CCAA) on June 22, 2017.

[22] On the same day, the chain terminated or gave a notice of termination to its employees, to take effect at a later date. The Claimant's termination was effective on June 22, 2017.[4] The Claimant did not receive any notice or pay in lieu of notice. The Claimant's health and dental coverage also ended on June 22, 2017, again without any notice.

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[2] See Application to the Appeal Division – Employment Insurance, at AD10-12.
[3] The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 is a federal law that allows insolvent corporations to restructure their business and financial affairs or to wind down their business under the court's supervision.
[4] See notice of termination dated June 22, 2017, at GD2-77 and GD3-82.

[23] Some employees received entitlements under the *Wage Earner Protection Program Act*,[5] but otherwise they did not receive any termination pay, severance pay, or other amounts that may have been owed to them.

[24] The Ontario Superior Court of Justice expressly prohibited the department store chain from making any termination or severance payments to former employees without the Court's permission. The Court has not ordered or allowed any termination or severance payments. Indeed, there has been a stay of proceedings of any pre-CCAA claims made against the department store chain.

[25] Employees are unsecured creditors under the CCAA. According to the Claimant, employees will likely receive only a very nominal share of any proceeds, after the distribution of amounts to those who hold interests in priority to them. Even so, it may take a considerable period, perhaps years, before employees realize any share of the proceeds.

[26] The Hardship Fund was established to assist employees.[6] The parties agree that none of the revenue or direct assets of the department store chain went towards the Hardship Fund.

[27] The funds were derived solely from money that would have been paid to a beneficiary under a key employee retention plan (KERP). That beneficiary renounced a portion of his entitlement under the KERP. The department store chain then used that money to establish the Hardship Fund. The Hardship Fund would not exist without this money.

[28] Under the terms of the Hardship Fund Order and Amended Hardship Fund Order, the department store chain, the monitor,[7] employee representative counsel, and employee representatives are responsible for administering the Hardship Fund.[8]

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[5] *Wage Earner Protection Program Act*, S.C. 2005, c. 47.
[6] See para 3 of the Employee Hardship Fund Order dated August 18, 2017, at AD6-204 to AD6-219.
[7] The court ordered a third party—a monitor—to oversee the business and financial affairs of the department store chain and to regularly report to the court.
[8] See para 5 of the Employee Hardship Fund Order, at AD6-206, and para 9 of the Employee Hardship Fund Term Sheet Amendment Order, at AD6-223.

[29] Employees must meet certain eligibility requirements to qualify for funding under the Hardship Fund.[9] An applicant:

- must be a former employee of the department store chain.
- must be a resident of Canada.
- must have had no available source of income when they applied to the Hardship Fund.
- must have no reasonable expectation of receiving income during the application period,[10] as defined by the Amended Employee Hardship Fund Term Sheet.[11]
- must be unable to work because of illness and must be incurring treatment or healthcare costs because of the illness of a family member who is dependent on the former employee for support, or must not be receiving Employment Insurance (either because of ineligibility or exhaustion of benefits) and must demonstrate some other significant hardship in dealing with financial obligations.

[30] The Claimant applied to the Hardship Fund. She received $2,000 from it.[12]

[31] The Claimant argues that payments from the Hardship Fund are not earnings that must be subject to allocation. Alternatively, she argues that, if I decide that the payment of Hardship Funds constitutes earnings, she is relieved from allocation because the funds represent relief grants.

[32] The Commission is of the position that any money that the Claimant received from the Hardship Fund constitutes earnings that have to be allocated.

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[9] See Schedule A, Employee Hardship Fund Term Sheet, to Employee Hardship Fund Order, at AD6-209, and Schedule A, Amended Employee Hardship Fund Term Sheet, to Employee Hardship Fund Term Sheet Amendment Order, at AD6-224.
[10] The application period is a defined term under the Amended Employee Hardship Fund Term Sheet, at AD6-226. The application period is the period from the date of the Court approval of the Employee Hardship Fund to October 4, 2017, or in the event of the extension of the stay of proceedings, such further date as determined by the Court.
[11] The Amended Employee Hardship Fund Term Sheet starts at AD6-224.
[12] See Claimant's application to the Hardship Fund, dated September 2, 2017, at Tab 12, AD6-241 to AD6-245.

ISSUES

[33] The issues before me are as follows:

> Issue 1: Did the General Division misinterpret "earnings" as defined by the Regulations?
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> Issue 2: Did the General Division base its decision on an erroneous finding of fact when it determined that payment from the Hardship Fund did not constitute earnings under the Regulations?
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> Issue 3: If amounts paid out of the Hardship Fund are earnings, are the amounts exempt from being allocated as a relief grant?

ANALYSIS

General Division Decision

[34] The General Division noted that, for income to be considered earnings under section 35(2) of the Regulations, the income must be earned by labour or given in return for work. It can also be earnings if there is a sufficient connection between a claimant's employment and the sum received.[13]

[35] The General Division presumed that, generally, amounts received from an employer are earnings that must be allocated. The General Division noted that, under section 35 of the Regulations, earnings include amounts paid because of the severance of an employment relationship.[14]

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[13] General Division decision, at para 10.

[14] The General Division cited *Canada (Attorney General) v Boucher Dancause*, 2010 FCA 270 and *Canada (Attorney General) v Cantin*, 2008 FCA 192. In *Boucher Dancause*, the Federal Court of Appeal found that there was a sufficient connection between Boucher Dancause's employment and the amount she received after the severance of her employment relationship, so this amount constituted earnings. In *Cantin*, the issue was under which paragraph of section 36 of the Regulations the severance pay should be allocated. There was no issue on appeal that the severance pay represented earnings under section 35 of the Regulations.

[36] The presumption would fail if the amount falls within an exception under section 35(7) of the Regulations, or if the amount does not arise from employment.[15]

[37] The General Division concluded that the $2,000 that the Claimant received from the Hardship Fund was not earnings under the Regulations. It found that there was an insufficient connection to the Claimant's employment because it was "awarded to the Claimant for reasons other than a loss of wages and that it did not arise out of her employment."[16]

[38] The General Division came to this conclusion primarily because the Hardship Fund did not come from the employer's general revenue. It was funded independently from the employer. The Hardship Fund came solely from another source.

[39] The General Division found that a key executive of the employer financed the Hardship Fund. This individual was entitled to payment under the KERP. He freely offered to forego some of his entitlement so that he could divert it to financing the Hardship Fund, although there was no obligation on him to do this. He did it to alleviate the obvious financial hardships that some former employees would experience. The employer had no influence on the executive's decision to forego some of his entitlement.

[40] The General Division found that there was enough evidence to establish that the $2,000 was awarded to the Claimant "for reasons other than a loss of wages and that it did not arise out of her employment."

Issue 1: Did the General Division misinterpret "earnings" as defined by the Regulations?

The Commission's Position

[41] The Commission argues that the General Division made a legal error by failing to properly interpret and apply section 35(2) of the Regulations. The Commission argues that the section is clear that "the entire income of a claimant arising out of any employment" is to be treated as earnings.

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[15] General Division decision, at para 11.
[16] General Division decision, at para 20.

[42] The Commission argues that, as long as there is a sufficient connection between the amount received and the Claimant's employment, that money must be considered earnings.

[43] The Commission submits that the money that the Claimant received from the Hardship Fund arose out of her employment. The Commission argues that several key factors show a sufficient connection between the amount received and the Claimant's employment:

- To qualify for funding from the Hardship Fund, an applicant had to be a former employee.[17]
- The amount of the payment was tied to an applicant's wages.[18]
- The Hardship Fund traces the source of its funding directly to the employer because the funds originated from the employer in the first place.
- Any remaining funds in the Hardship Fund are to be returned to the employer, rather than to the executive.
- Payment under the Hardship Fund was designed to assist former employees in situations of precarious hardship who would have been otherwise eligible for severance payments when they lost their jobs.
- Payment under the Hardship Fund was intended to compensate for the loss of healthcare benefits when employment ended.

[44] The Commission relies on *Canada (Attorney General) v Roch*.[19] In that case, the employer downsized. In addition to paying employees termination benefits, including vacation pay, sick leave credits, and severance payments, it also paid additional amounts under a program referred to as the "Plan d'aménagement et de réduction du temps du travail" ["Work Time Reduction and Distribution Plan" (ARTT plan or the plan)]. Gaston Roch received an additional $12,000 under this plan.

[17] See eligibility criteria under Amended Employee Hardship Fund Term Sheet, at AD6-224 to AD6-225.
[18] See payment parameters under Amended Employer Hardship Fund Term Sheet, at AD6-225 to AD6-227.
[19] *Canada (Attorney General) v Roch*, 2003 FCA 356.

[45] Gaston Roch denied that these amounts were earnings because the money came from another source, rather than the employer. The employer got financial assistance from Emploi-Québec [Quebec's employment services] to operate the ARTT plan.

[46] Even though Gaston Roch denied that the money he got under the ARTT plan was earnings, the Federal Court of Appeal determined that the additional money was earnings because it had the characteristics of earnings. The Court recognized that payment had not been made in consideration of work done in the traditional sense and that the Regulations did not expressly include this type of payment as earnings. Even so, the Court found that there was a sufficient connection between Gaston Roch's employment and the money from the ARTT plan.

[47] The Federal Court of Appeal looked at the rationale and terms of the ARTT plan. The employer set up the ARTT plan to maintain jobs for those threatened by layoffs because it would encourage people to give up their work hours in exchange for payment. To some extent, the money was compensation for a worker's promise not to work. The ARTT plan would reduce the impact of job losses on laid-off workers. The Court wrote, "Even if there is no specific equivalence between the sum received and the former salary, and even if it was received when the respondents had already left their jobs, the sum of $12,000 had all the characteristics of earnings."[20]

[48] The Federal Court of Appeal noted that section 35(1) of the Regulations addressed any concerns that the money came from a third party, and not from the employer, even though the employer paid out the money. Section 35(1) of the Regulations defines income as any income that is or will be received by a claimant "from an employer or **any other person**" (my emphasis). Under the plan, the employer had to make the payments to employees who agreed to free up hours of work for the benefit of other employees.

[49] The Court also found that the umpire was right to say that the sum received was a "benefit based on a commitment not to resume a given position."[21] The Court also noted that it

[20] *Ibid*, at para 44.
[21] *Ibid*, at para. 46.

was, however, incorrect for the umpire to state that the benefit had nothing to do with the beneficiary's past or present work.

[50] The Commission argues that the General Division should have adopted the reasoning and approach taken by the Federal Court of Appeal in *Roch*. That way, it would have properly applied section 35(2) of the Regulations and found that any payments from the Hardship Fund were earnings.

The Claimant's Position

[51] The Claimant denies that any amount that she received from the Hardship Fund represented earnings. She denies that there was a sufficient connection between payment from the Hardship Fund and her employment.

[52] The Claimant heavily relies on the Commission's own website. There is a section on the website titled "Digest of Benefit Entitlement Principles." The website examines what constitutes "earnings."[22]

[53] The section states, in part, that the Commission's authority to make regulations that specify and clarify what constitutes earnings is limited to include "only those moneys or advantages that are earned by labour or that resemble them." The money has to be "earned by labour or resemble them when they relate to, are attached to, or arise out of employment." They have to display the characteristics of a "consideration given in return for work done by the recipient."

[54] The section also states that money earned by labour is different from money earned by investment or capital, through chance, through charity, or through a personal relationship because there clearly is not any sort of employment relationship.

[55] The Claimant argues that her employment status alone is not enough to establish a sufficient connection between payments from the Hardship Fund and her employment. She

[22] Digest of Benefit Entitlement Principles, Chapter 5 – Section 5.2.0, "The determination of earnings under regulation 35," at AD6-305 to AD6-315.

stresses that any payment has to be the result of work performed. She relies on section 3 of the Digest of Benefit Entitlement Principles, which states:

> Simply being an employee of an employer is not sufficient to establish that any payment made by that employer arises out of employment. **In order to be considered to arise out of employment, the payment must display the character of compensation given in return for the work done by the recipient**. It must arise out of the employment itself, and not merely as a consequence of the employment status of the recipient.[23](Claimant's emphasis)

[56] The passage above in turn refers to two decisions from the Federal Court of Appeal.[24] The Claimant also relies on these two authorities.

[57] In *Attorney General of Canada v Vernon* and *Attorney General of Canada v Fillion*, the respondents received money under a housing and rental subsidy as part of a severance package. Payment by the employer was discretionary, as there was no obligation to provide the subsidy. One of the eligibility requirements for the subsidy was that the respondent had to have been employed by one of the mines.

[58] The Federal Court of Appeal looked at the rationale for the subsidy. It asked whether the housing subsidy was a "receipt arising out of work done by the employees and [did] it bear a sufficient connection to that work to be properly found to be consideration for the work?"[25]

[59] The Court found that the subsidy was not paid for work done, but to compensate eligible employees for the decrease in value of their principal residence resulting from the mine closure. The Court noted that payment was at the employer's sole discretion. In determining that the housing subsidy was not earnings, the Court found that the subsidy was not referable "in any manner"[26] to particular work performed.

[60] The Federal Court of Appeal also addressed the issue of whether the subsidy was a relief grant. The Court found that a relief grant suggests financial assistance that is given to alleviate

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[23] Digest of Benefit Entitlement Principles, Chapter 5 – Section 3, 5.3.1, "Arising out of employment," at AD6-317 to AD6-355. The passage in turn relies on *Attorney General of Canada v Vernon* (A-597-94, CUB 25472) and *Attorney General of Canada v Fillion* (A-598-94, CUB 25473).
[24] *Vernon*, A-597-94, and *Fillion*, A-598-94 (October 20, 1995), at AD6-136 to AD6-141.
[25] *Ibid*, at para 12.
[26] *Ibid*.

hardship. This includes, but is not limited to, circumstances of personal destitution, emergency, or disaster. It could also include the broader circumstances of financial or other adversity, not necessarily amounting to destitution, emergency, or disaster. The Court found that the loss in value of employees' primary residences from the mine closure was envisioned by the language "relief grant." It was an obvious financial hardship that all employees were expected to endure.

[61] The Claimant argues that her circumstances are similar to those in *Vernon* and *Fillion*:

- She did not provide any labour or service to her employer.
- She received payment from the Hardship Fund because of hardship caused by her employer's insolvency. She claims that her employer's insolvency affected her disproportionately.
- Payment was made to alleviate the hardship of paying for her spouse's monthly prescription medications. The Claimant acknowledges that all employees experienced some hardship, but hers was exceptional. Her husband's medication costs alone were over 20% of her income after termination.[27] Her spouse was not an employee and never worked or performed any services for the employer.
- The employer did not pay into the Hardship Fund. Instead, an individual renounced a portion of his entitlement under the KERP. That portion was then used to establish the Hardship Fund. She argues that the employer could not have financed the Hardship Fund because it would have been contrary to the principles of insolvency law.
- Payments made under the Hardship Fund were not based on employees' seniority, classification, or wages.
- Under the Term Sheet Amending Order, payments from the Hardship Fund will not be deducted from any amounts recovered from the employer and will not impact employee claim payments.

[62] The Claimant argues that all of these factors, considered together, establish that the payment did not bear a sufficient connection to her employment.

[27] See Claimant's submissions at AD6-16, para 70.

Deference

[63] The Commission argues that the Appeal Division should show no deference to the General Division on questions of natural justice, jurisdiction, and law. On questions of law, the Appeal Division has as much expertise as the General Division and is therefore not required to show deference to the General Division.

[64] On the other hand, the Commission acknowledges that the Appeal Division should show deference to the General Division on findings of fact. The Commission argues that the Appeal Division is limited to intervening in instances where 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. The Commission agrees that this is consistent with the General Division's role as the trier of fact.

[65] In *Hussein v Canada (Attorney General)*,[28] the Federal Court held that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

[66] Here, the Commission argues that the General Division misinterpreted section 35(2) of the Regulations. The Commission maintains that the General Division had to determine whether there was a sufficient connection between the amount received and the employment. The Commission asserts that the General Division failed to do this.

[67] I do not find that that was the case. The General Division correctly identified the applicable test for earnings. It referred to section 35 of the Regulations.

[68] Section 35 of the Regulations defines income as follows:

> **35(1)** […] **income** means **any pecuniary** or non-pecuniary **income** that is or will be received by a claimant **from an employer or any other person**, including a trustee in bankruptcy.
>
> […]

[28] *Hussein v Canada (Attorney General)*, 2016 FC 1417.

> (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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> (a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;
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> […]
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> (c) payments a claimant has received or, on application, is entitled to receive under
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> (i) a group wage-loss indemnity plan,
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> (ii) a paid sick, maternity or adoption leave plan,
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> (iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act[.]
>
> [Emphasis added]

[69] At paragraph 10, the General Division noted that, for income to be considered earnings:

- the income must be earned by labour or given in return for work, OR
- there must be a sufficient connection between the Claimant's employment and the sum received.

This was the same test that the Commission identified.

[70] The General Division then examined whether there was a sufficient connection between the payment from the Hardship Fund and the Claimant's employment.

[71] In assessing whether there was a sufficient connection, the General Division was mindful of the evidence and arguments from both parties. Indeed, it set out and considered most of the same facts on which the Commission relied. The General Division noted that the applicant had to be a former employee. It also noted the source of the funding, how the Hardship Fund would dispose of any remaining funds, and the Claimant's basis for a claim under the Hardship Fund.

The Commission listed these same types of considerations in its Digest of Benefit Entitlement Principles that the Claimant referred to.[29]

[72] There, the Commission stated that the true nature of the payments must be established to determine whether they are "advantages related to, attached to or arising out of employment."[30] When there is any doubt about the true nature of a payment, it is necessary to examine the parties' intentions. This could involve reviewing all of the records and contacting all of the parties involved.

[73] The Commission provided some guidance as to how to identify whether the amounts are earnings for benefit purposes. The Commission acknowledged in the Digest of Benefit Entitlement Principles that the questions were by no means an exhaustive list and that other questions could emerge, depending on the circumstances. Ultimately, for a payment to be earnings, there must be some link between the payment and the Claimant's employment.

[74] The Commission listed questions that could be used in the determination process.[31] They include:

- What is the payment or what name is given to the payment? Does it reflect what it claims to be under the circumstances?
- Who is making the payment? If someone other than the employer is making the payment, it must be established whether there is a link with the employment.
- Why is the payment made?
- From where and to where is the payment going?

[75] The General Division did not address each of these questions, but it did seek to find the true nature of the payment. While the General Division gave considerable weight to the source of the Hardship Fund, ultimately, it did look at why the Hardship Fund was created and what it intended to accomplish. The General Division found that payment was a "gesture to alleviate the

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[29] Digest of Benefit Entitlement Principles, Chapter 5 – Section 2, at AD6-306 to AD6-315.2.3.
[30] Digest of Benefit Entitlement Principles, Chapter 5 – Section 5.2.0, "The determination of earnings under regulation 35," at AD6-307 to AD6-308.
[31] Digest of Benefit Entitlement Principles, Chapter 5 – Section 5.2.3, "Questions in the determination process," at AD6-311 to AD6-313.

obvious financial hardships that some former employees would experience."[32] Payment was not available to all employees. It was available to only those who experienced particular hardship and who met the eligibility requirements.

[76] Characterized in this manner, the General Division did not find that the payment had a sufficient connection to the Claimant's employment. Indeed, the payment from the Hardship Fund more closely resembled the situation in *Vernon* and *Fillion* than in *Roch*.

[77] The General Division properly interpreted section 35(2) of the Regulations. Even if the General Division might have given, in my view, disproportionate weight to some factors over others, it applied the same test under section 35(2) of the Regulations that the Commission says it should have applied.

[78] To some degree, it seems that the Commission is asking me to reweigh and reassess the evidence, but section 58(1) of the *Department of Employment and Social Development Act* (DESDA) precludes me from conducting my own assessment. As the Federal Court of Appeal held in *Quadir v Canada (Attorney General)*,[33] disagreeing with the application of settled principles to the facts of a case does not give the Appeal Division grounds to intervene. After all, the application of settled principles to the facts is a question of mixed fact and law, and not an error of law. The Federal Court of Appeal makes it clear that the Appeal Division has no jurisdiction to interfere in such cases unless an error of mixed fact and law discloses an extricable legal issue.[34] In other words, there has to be a distinct legal error that can be sorted out from the facts. That is not the case here, as there is no extricable legal error.

[79] This still leaves me to determine whether the General Division based its decision on an erroneous finding of fact without regard for the material before it. The Commission argues that, in this case, I should show no deference to the General Division's finding of facts because it overlooked some of the evidence, and also made a perverse or capricious finding.

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[32] General Division decision, at para. 19.
[33] *Quadir v Canada (Attorney General)*, 2018 FCA 21; *Cameron v Canada (Attorney General)*, 2018 FCA 100. .
[34] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 9.

Issue 2: Did the General Division base its decision on an erroneous finding of fact when it determined that payment from the Hardship Fund did not constitute earnings under the Regulations?

[80] The Commission listed several facts (as set out above in paragraph 43) that it says establish a connection between the payment under the Hardship Fund and the Claimant's employment. The Commission argues that, if the General Division had considered all of these factors, it would have concluded that there was a sufficient connection between the payment and the Claimant's employment.

[81] The General Division concluded that money from the Hardship Fund did not originate with the employer. The Commission argues that the employer was in effect the source of the funds.

[82] The General Division did not specifically describe or address the following factors:

- That payment from the Hardship Fund was intended to compensate for the loss of healthcare benefits when employment ended.
- That the amount of the payment was tied to an applicant's wages.[35]
- That the payment was not tied to seniority or classification.

[83] The Commission argued the first two points, while the Claimant argued the last point, in support of their arguments. I will focus on the first two points, given that the Commission argues that overlooking them resulted in an erroneous finding of fact.

[84] Before I consider whether the General Division overlooked any of this evidence, I will examine whether the General Division made a perverse or capricious finding regarding the source of the Hardship Fund.

- **the source of the Hardship Fund**

[85] The General Division concluded that the Hardship Fund effectively did not come from the employer. It found that the Hardship Fund consisted of funds from a beneficiary who renounced a portion of his entitlement under the KERP.

[35] See payment parameters under Amended Employer Hardship Fund Term Sheet, at AD6-225 to AD6-227.

[86] The Commission argues that the General Division made an error in making this finding. While the beneficiary might have renounced a portion of his entitlement under the KERP, the Commission argues that the funds nevertheless originated with the employer.

[87] While that may be so, the employer was unable to provide any financing to the Hardship Fund. The General Division found that the Hardship Fund did not come from the employer's general revenue. It found that the Court had already allocated and approved payment to the executive.

[88] Neither the beneficiary nor the employer were under any obligation to provide money to establish the Hardship Fund. The Hardship Fund relied entirely on the beneficiary re-directing money he was entitled to and would have otherwise received. The Hardship Fund would not exist without the beneficiary. From this perspective, the General Division was entitled to conclude that the Hardship Fund came from the beneficiary.

[89] I do not find that the General Division made a perverse or capricious finding of fact regarding the source of the Hardship Fund.

- **why payments under the Hardship Fund were made**

[90] The Commission's position is that the Hardship Fund was designed to compensate for the loss of healthcare benefits when employment ended. The Commission says that the payment was the same thing as healthcare benefits that an employee received. Therefore, those payments relate to employment. The Claimant denies that payments under the Hardship Fund were to compensate for the loss of healthcare benefits.

[91] The General Division did not make any explicit findings as to whether the Hardship Fund was limited to healthcare benefits. In the Claimant's case, she sought benefits because of financial hardship brought on by her spouse's medical needs.

[92] The eligibility criteria for the Hardship Fund confirms that payments are not limited to cases where a former employee is unable to work due to illness and is incurring treatment-related costs greater than 20% of their disability or Employment Insurance payments.

[93] Eligibility may also include cases where that former employee is not receiving Employment Insurance and "demonstrates some other significant hardship in dealing with financial obligations."[36]

[94] In all cases, the former employee had to demonstrate urgent or immediate hardship in dealing with their financial obligations. The former employee also had to show that they did not have any alternative sources of funding.

[95] In other words, the eligibility criteria seems to support the Claimant's claims that the Hardship Fund was designed to assist those experiencing urgent or immediate financial hardship of some nature, and not for some other purpose.

[96] I do not find that the payments under the Hardship Fund were necessarily intended or made to compensate for the loss of healthcare benefits. Payments also served another purpose: They were designed to provide assistance during urgent or immediate financial hardship.

[97] In *Canada (Attorney General) v King*,[37] the Federal Court of Appeal examined the payment in *Vernon*. Payment was made to offset losses that employees suffered in the value of their homes following the mine closure. The Federal Court of Appeal acknowledged that this type of loss was unique to a certain type of employment, and that it was not ordinarily experienced by the general workforce, unlike, say, a loss in salary. The Federal Court of Appeal also found that the value of one's home has no direct connection to one's employment relationship.

[98] Similarly, the circumstances leading to the Claimant's financial hardship (her spouse's medical needs) did not have a direct connection to her employment relationship.

[99] This undercuts the Commission's argument that, because payments relate to the loss of healthcare benefits, those payments therefore had to relate to employment.

- **whether payments under the Hardship Fund were tied to an applicant's wages**

[36] See eligibility criteria under Amended Employee Hardship Fund Term Sheet, at AD6-224 to AD6-225.
[37] *Canada (Attorney General) v King*, A-486-95. See also *King* at AD2-172 to AD2-176, and at AD6-143 to AD6-150.

[100] The Commission argues that payments under the Hardship Fund are tied to an applicant's wages. The Commission also argues that, when payments are tied to wages, it establishes a connection to the Claimant's employment. The Claimant denies that payments under the Hardship Fund are tied to wages.

[101] There is indeed a relationship between payments under the Hardship Fund and an applicant's wages. The Amended Employee Hardship Fund Term Sheet[38] shows that a successful applicant may be approved for a maximum payment of up to eight weeks of the applicant's regular wages. (The Term Sheet also shows that the Hardship Fund Committee has the discretion to approve additional amounts in cases of medical and other emergencies.) Payments would also take into consideration the amount payable that was stayed or suspended under court proceedings.

[102] The General Division did not explicitly address the fact that payments were tied to an applicant's wages, in the sense that payments were determined in relation to the amount of their regular wages, and any amounts payable stayed under court proceedings.

[103] Did the General Division in fact consider whether payments were tied to an applicant's wages, but found that it was unnecessary to mention? Or, did it overlook this fact and it resulted in an erroneous finding of fact?

[104] There is a general presumption in law that a decision-maker is presumed to have considered all of the evidence before it. After all, as the Federal Court of Appeal stated in *Canada v South Yukon Forest Corporation*,[39] it is unnecessary for a decision-maker to write exhaustive reasons addressing all of the evidence and the facts before it. Stratas J. A. remarked:

> [t]rial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[38] See payment parameters under Amended Employer Hardship Fund Term Sheet, at AD6-225 to AD6-227.
[39] *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 50.

[105] This presumption can be set aside. It will be set aside when the "probative value of the evidence that is not expressly discussed is such that it should have been discussed."[40]

[106] In determining the probative value of the evidence, I need to assess the strength of the evidence, the extent to which it supports the Commission's claim that it establishes a sufficient connection to employment, and the extent to which the matters it tends to prove are at issue in the proceedings.[41] In short, could the fact that payment was tied to the Claimant's wages be a determinative or decisive factor?

[107] I find that the fact that the payment was tied to the Claimant's wages did not have such probative value that the General Division should have directly addressed it.

[108] One, both parties identified several factors that supported their respective claims regarding the nature of the payment. There is no suggestion by either party that any one particular factor—such as whether payment was tied to employment—settled the question as to whether the payment was earnings.

[109] Two, while the payment was tied to the Claimant's employment, that connection is slight at best. The relationship was simply one to decide the amount of payment, but, unlike *Roch*, the payment did not have the characteristics of earnings. The payment did not intend to replace the Claimant's earnings, compensate her in exchange for a promise not to work, or anything in that nature. As the Court concluded in *Vernon* and *Fillion*, the payment did not relate "in any manner" to particular work performed.

[110] This was unlike the situation in *King*. Payments in that case were to compensate employees for wages or benefits earned but not paid. The Federal Court of Appeal found that such payments directly related to one of the most critical aspects of the employment relationship. They were clearly earnings that could not be considered a relief grant.

[111] Finally, the slight connection between the payment and the Claimant's employment diminished the strength of that evidence.

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[40] *Singer v Canada (Attorney General)*, 2010 FC 607 at para 20.
[41] *Cammack v Martins Estate*, 2002 CanLII 11072 (ON SC).

[112] Given these considerations, I find that the General Division did not base it decision on an erroneous finding of fact without regard for the material before it. These factors did not have such probative value that the General Division should have considered them.

Issue 3: If amounts paid out of the Hardship Fund are earnings, are the amounts exempt from being allocated as a relief grant?

[113] In light of my findings above, it is unnecessary for me to consider this issue.

CONCLUSION

[114] I find that the General Division did not make any legal error that would allow me to intervene in this case. It noted the applicable law and the underlying test to determine whether the payment to the Claimant under the Hardship Fund constituted earnings. The General Division applied that test by examining whether the payment had a sufficient connection to the Claimant's employment. This involved considering the purpose of the Hardship Fund.

[115] I also find that the General Division did not make a factual error. It was entitled to discuss only the evidence it considered to be of some probative value. While re-weighing and reconsidering the evidence could lead to a different outcome, section 58(1) of the DESDA does not give the Appeal Division the authority to carry out a reassessment.

[116] The payment that the Claimant received from the Hardship Fund does not constitute earnings under section 35 of the Regulations. The payment is not subject to being allocated. The appeal is dismissed.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Rachel Paquette, Representative for

	the Appellant V. A., Respondent Erin Epp (counsel), Representative for the Respondent