



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *FB v Canada Employment Insurance Commission*, 2020 SST 1019

Tribunal File Number: AD-20-840, AD-20-842

BETWEEN:

F. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: December 7, 2020

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, F. B. (Claimant) was laid off by his employer, effective May 25, 2018. On June 12, 2018, the Claimant left Canada and he remained outside Canada until October 18, 2018. He did not apply for Employment Insurance benefits until May 3, 2019. However, he asked the Commission to antedate his claim to May 27, 2018. This was eventually allowed by the General Division in a decision dated July 8, 2020.

[3] On July 15, 2020, the Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to benefits from June 19, 2018, to October 17, 2018. He was not entitled for two reasons. First, he was outside of Canada. Second, he was not available for work.

[4] When the Claimant asked the Commission to reconsider, it changed its decision and agreed that the Claimant was available for work. It also clarified that the Claimant was entitled to benefits for the first seven days of the time that he was outside Canada because the Claimant had left Canada to care for his ill father. It changed this decision to make June 19, 2020, the final day of those seven days of benefits. The Commission found that the Claimant was not entitled to benefits for the period from June 20, 2018, to October 17, 2018, because he was still outside Canada.

[5] When the employer laid off the Claimant in May 2018, it paid him \$485.81 (rounded to \$486.00) as vacation pay. In a decision of July 16, 2020, the Commission found that the Claimant's vacation pay was earnings. It allocated the entire \$486.00 to the week beginning May 27, 2018. The Commission did not change this decision in response to the Claimant's request for a reconsideration.

[6] The Claimant appealed the reconsideration decisions from both decisions to the General Division of the Social Security Tribunal. The General Division joined the two appeals so that it could consider them in one hearing and in one decision.

[7] The General Division dismissed both appeals. The Claimant is now asking for leave (permission) to appeal the General Division decision to the Appeal Division.

[8] Leave to appeal is refused. There is no arguable case that the General Division made an error of fact, an error of law, or a jurisdictional error.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[9] To allow the appeal process to move forward, I must find that there is a “reasonable chance of success” on one or more of the “grounds of appeal” found in the law. A reasonable chance of success means that there is an arguable case. This would be some argument that the Claimant could make and possibly win.¹

[10] “Grounds of appeal” means reasons for appealing. I am only allowed to consider whether the General Division made one of these types of errors:²

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUES

[11] Is there an arguable case that the General Division made an error of law by applying section 55(1) and not section 55(4) of the *Employment Insurance Regulations* (Regulations)?

¹ This is explained in a case called *Canada (Minister of Human Resources Development) v Hogervorst*, 2007, FCA 41; and in *Ingram v Canada (Attorney General)*, 2017 FC 259.

² This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act*.

[12] Is there an arguable case that the General Division made an error of fact or law in how it assessed the allocation of the Claimant's vacation pay?

[13] Is there an arguable case that the General Division made a jurisdictional error, or an error of law or fact, because it did not consider whether Service Canada's actions affected the Claimant?

ANALYSIS

Issue 1: Application of correct regulatory provision

[14] Section 37(a) of the *Employment Insurance Act* (EI Act) says that a claimant is not entitled to benefits for any period that the claimant is outside Canada. However, section 55 of the Regulations sets out some limited exceptions to section 37(a) of the EI Act.

[15] The Commission found that the Claimant was entitled to benefits under the exception described in section 55(1)(d) of the Regulations. Section 55(1)(d) allows a claimant to receive up to seven days of benefits when he or she is outside Canada to visit a seriously ill or injured member of the immediate family.

[16] The Claimant argued that he should be entitled to benefits for the entire time that he was outside Canada under section 55(4) of the Regulations.

[17] I can see why the Claimant thinks that section 55(4) may apply to him. Section 55(4) sets out several specific exceptions. These include exceptions for a claimant who is receiving benefits "in respect of" the care or support of a "family member", or in respect of the care or support of a "critically ill adult."

[18] However, there is no arguable case that the General Division made an error of law by not applying section 55(4) of the Regulations. The section 55(4) exceptions are quite specific. They only apply to claimants who are on certain types of benefits or receiving benefits in certain circumstances.

[19] The "family member" identified in section 55(4) of the Regulations is said to be a family member referred to in section 23.1(2) of the EI Act. Section 23.1(2) describes compassionate

care benefits. These are one kind of special benefit. It enables a claimant to care for a family member who has a serious medical condition and who is at significant risk of dying.

[20] There is also a specific context for allowing a claimant to receive benefits outside of Canada while caring for a “critically ill adult”. The EI Act identifies the “critically ill adult” in another special benefit found at section 23.3(1). This benefit is intended to support a claimant who is caring for a “critically ill adult”.

[21] In the case of the family member with a serious medical condition as described in section 23.1(2) of the EI Act, a medical practitioner must certify that the family member has a significant risk of death within 26 weeks. A different medical certificate would be required to get benefits to care for a critically ill adult under section 23.3(1) of the EI Act. The medical practitioner must certify that the adult is a critically ill adult who requires the care or support of a family member or members during a certain period.

[22] The Claimant’s benefits were not “in respect” of a dying family member or a critically ill adult family member, as would be required to apply section 55(4) of the Regulations. The Claimant applied for regular benefits. He could have applied for either of these specific benefits if he could obtain the required medical certificate, but he did not.

[23] I note that there was little or no evidence on which the General Division might have found that the Claimant would have qualified for special benefits, even if he had applied for them. The Claimant said that his father was not eating, and had high blood pressure.³ He also described his father as “seriously ill” and said that he was over 90 years old.⁴ However, this does not mean that the Claimant’s father was either critically ill or likely to die. Furthermore, the Claimant did not act as though his father’s condition was critical or terminal, or that he had taken on the “care or support” of his father. The Claimant said that he had only planned to stay (in the country where his father lived) for a week, and he said that he could be back in Canada in 12 hours if he was offered a job.⁵

³ GD3-28 (AD-20-842).

⁴ GD3-21 (AD-20-842).

⁵ GD3-29 (AD-20-842).

[24] More importantly, there was no medical evidence of his father's condition. The Claimant had not supplied the Commission with the medical certificate that he would have required to qualify for either special benefit.

[25] There is no arguable case that the General Division made an error of law by not applying section 55(4) of the Regulations.

Issue 2: Allocation of Vacation Pay

Mistake of Fact in the Allocation of Vacation Pay

[26] The Claimant agreed that he received \$486.00 from his employer as vacation pay. He agreed that this money was earnings. However, he disagreed with how the Commission allocated his vacation pay. He argued that the General Division did not understand that these earnings should not be deducted from his benefits. The Claimant argued that this was an important error of fact.

[27] The Claimant referred to information about earnings on the Government of Canada website.⁶ I understand that he means to assert that the General Division decision was inconsistent with that information.

[28] The Government of Canada website (website) gives general information on Employment Insurance benefits. It describes what the Commission considers earnings and how it allocates different earnings. This information is an interpretation of the law only. It is not evidence. It would not be evidence, even if the Claimant had printed out and submitted the website to the General Division.

[29] There is no arguable case that its failure to consult the website means it made an error of fact. The Claimant did not point to any evidence that the General Division ignored or overlooked.

⁶ AD1-3.

Mistake of Fact in Finding that the Vacation Pay Was Paid because of the Claimant's Lay-off

[30] The Claimant may also have meant to argue that the General Division made an important error of fact when it found that his vacation pay was paid or payable because of his lay-off. I note that the Claimant told the General Division that his employer paid the vacation pay to the Claimant so that he could cover a portion of his insurance payments.

[31] However, there is no arguable case that the General Division ignored or misunderstood what the Claimant was telling him or any other evidence.

[32] Regardless of the use to which the Claimant put the vacation pay, it is clear that the employer paid him his vacation pay because of the lay-off. The Claimant said that he had to use the vacation pay to cover a portion of his insurance during the lay-off. However, he admitted that the employer would not have paid out the vacation pay if the employer had not laid him off.⁷ In other words, he would not have had to pay his own insurance (or some portion of his insurance) if he had not been laid off. In addition, the Record of Employment confirms that the employer paid out the Claimant's vacation pay because he was "no longer working".⁸

Error of Law in Allocation of Vacation Pay

[33] The Claimant also argued that the General Division made an error of law. He believes the manner in which the General Division interpreted the allocation of his vacation pay is contrary to the Government of Canada interpretation. The Claimant suggests that the General Division interpreted the law differently from how the website interprets the law. In my view, this is the proper way of looking at the Claimant's concern based on the website information.

[34] However, the Claimant still does not have an arguable case that the General Division made an error.

[35] The Claimant did not cite the webpage where he discovered the Government of Canada information to which he refers in his application for leave. However, he quoted directly from information that was located under the heading "The various types of earnings". Based on this

⁷ See also GD3-23 (AD-20-840).

⁸ GD3-15 (AD-20-840).

description, I suspect the Claimant is referring to a section entitled, “The various types of earnings” which is found at a general Government of Canada webpage.⁹

[36] According to the Claimant, the webpage says that an allocation of vacation pay should have several “results”. It should result in a delay of the one-week waiting period, a delay in the date on which he would begin to receive benefits, and an extension of his benefit period. He says that the allocation of his vacation pay should only have delayed the start date of his benefits by a week and extended the end date of his benefits by a week.

[37] The Claimant is correct that it is possible for any of the results that he listed to arise when the Commission allocates vacation pay. However, the actual effect or “result” of allocating earnings depends on the facts of the particular situation. The website gives a few different examples of how earnings might be allocated in different circumstances. The Claimant appears to be citing results that arise from one of those examples. That example is only an illustration of the results of allocating certain earnings under a certain set of facts.

[38] The Digest of Benefit Entitlement Principles (Digest) is the public-facing expression of the Commission’s actual policy. At section 5.6.2.1 (types of earnings), it says the following:

Any earnings, regardless of their nature, that are truly paid by reason of a lay-off or separation, to meet all the employer’s obligations with respect to the lay-off or separation, must be allocated from the week of lay-off or separation.¹⁰

[39] However, neither the general Government of Canada website nor the Commission’s Digest are actually “the law” that the General Division must follow. They are only attempts to explain how the Commission applies the law. The *Employment Insurance Regulations* (Regulations) sets out the law that governs this situation. The General Division must apply the Regulations, not the website information.

[40] The Regulations state that any earnings paid as a result of a separation from employment must be allocated beginning with the week of the separation from employment. They also state

⁹ <https://www.canada.ca/en/services/benefits/ei/varioustypes-earnings.html#The>

¹⁰ Digest of Benefit Entitlement Principles, section 5.6.2.1: Accessed on December 1, 2020 at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-5/allocations-of-earnings.html#a5_6_2_2

that the Commission must allocate the earnings in such a way that the total earnings of the claimant from that employment are equal to the claimant's normal weekly earnings in each consecutive week.¹¹

[41] That means that the Claimant's vacation pay must be used to top up to the Claimant's normal weekly earnings amount, beginning with the week the Claimant was laid off. Any earnings that are left over after topping up that week, would be used to top up the next week to his normal weekly earnings. If the Claimant still had earnings left after the next week, they would be carried over and used in the same way the following week - and so on. Vacation pay (paid as a result of a separation or lay-off) is allocated over the weeks of a claimant's benefit period until it has been completely allocated.

[42] That is exactly what the Commission did. The General Division noted that the Claimant's earnings in the first week after his separation were already greater than his normal weekly earnings. Therefore, the Commission could not allocate any of the \$486.00 to that first week. The Commission carried the entire amount of his vacation pay over and allocated it to the following week. After the Commission allocated the \$486.00 in the second week, there was nothing left over to allocate to any later week.

[43] The General Division held that the Commission correctly allocated the Claimant's vacation pay according. There is no arguable case that the General Division applied the wrong law or misapplied the law.

Issue 3: Service Canada's Actions

[44] The Claimant must show that the General Division made an error; not that Service Canada made an error. I am assuming that the Claimant means to argue that the General Division should have decided whether the Claimant's experience with Service Canada was somehow associated with how the Commission allocated the Claimant's vacation pay.

[45] If the General Division failed to consider an issue that it should have considered this would be an error of jurisdiction. If the General Division failed to make a required finding of

¹¹ Section 36(8) of the Regulations.

fact, this could be an error of law. Alternatively, the Claimant may be arguing that the General Division ignored evidence of Service Canada's actions. This would be an argument that the General division made an important error of fact.

Refusal to Exercise Jurisdiction

[46] There is no arguable case that the General Division made an error by refusing to exercise its jurisdiction.

[47] One of the reconsideration decisions before the General Division decided determined that the Claimant was available for work, but that he was only entitled to seven days of benefits while he was outside Canada. The other reconsideration decision found that the Claimant's vacation pay was earnings and decided how it should be allocated.

[48] The General Division considered all the issues that arose out of the Commission's reconsideration decisions, as it was required to do.

[49] The General Division addressed the question of the Claimant's benefits when he was outside Canada. It confirmed the Commission decision that the Claimant was available for work at that time. It also found that he was visiting a seriously ill immediate family member outside Canada and therefore entitled to seven days of benefits (while outside Canada) under the law.

[50] The General Division reviewed whether the Claimant's vacation pay was earnings and how it should be allocated. The Claimant conceded that his vacation pay was earnings and the General Division considered how those earnings should be allocated according to the law.

Jurisdiction to Consider Quality of Service from Service Canada

[51] There is no arguable case that the General Division failed to exercise its jurisdiction. It was not required to decide whether any delay, failure to inform, misinformation or other concern with the quality of Service Canada's service may have affected the Claimant's entitlement.

[52] The quality of service provided by Service Canada was not an issue in any of either of the reconsideration decisions before the General Division. The General Division only has the

jurisdiction to consider the issues that arise out of the reconsideration decisions that are being appealed.¹²

Jurisdiction to Consider the Start Date for the Benefit Period

[53] The General Division clearly refused jurisdiction over the start date of the Claimant's benefit period and whether the Claimant could post-date the start of his benefit period. However, there is no arguable case that the General Division made an error by doing so.

[54] The General Division was correct that it could not consider either issue. As the General Division noted, another panel of the General Division had already made a decision that considered the start date of the Claimant's benefit period. That meant that the General Division could not revisit that issue.

[55] The General Division also noted that the Commission had not decided or reconsidered a request to post-date the start of the benefit period. As I have already mentioned, the General Division may only consider appeals from reconsideration decisions.

Failure to Find How Service Canada's Actions Affected the Claimant

[56] There is no arguable case that the General Division made an error of law by failing to make a finding about how Service Canada's actions affected the Claimant.

[57] None of the issues that were before the General Division obliged it to make such a finding. Even if the Claimant had made choices that were affected by what Service Canada may have done or failed to do, the General Division would still have been required to apply the law.

[58] Section 36 of the Regulations directs how vacation pay must be allocated. Section 37 of the EI Act directs that a claimant is not entitled to benefits while outside the country except as permitted by section 55 of the Regulations. The General Division could not waive the application of these provisions, just because the Claimant may have been unaware of how they applied to his situation.

¹² EI Act, sections 112, 113.

Failure to Consider or Understand Evidence of Service Canada's Actions

[59] There is no arguable case that the General Division ignored or misunderstood what the Claimant said about Service Canada's involvement in his claim.

[60] I may only find that the General Division made an important error of fact, if the General Division made a finding of fact that was **based on** its misunderstanding of some evidence or its failure to consider evidence.

[61] Evidence that Service Canada may have provided poor service or misled the Claimant in some way, would neither support nor refute any fact on which the General Division relied to make its decision. The General Division found as fact that the Claimant's former employer paid him \$486.00 as vacation pay as a result of his lay-off. It found that the Claimant was out of the country from June 12, 2018, to October 18, 2018, to attend his ill father, and that he was on regular benefits at the time. Nothing that Service Canada did, or did not do, affects these findings of fact.

[62] In any event, there was no evidence that Service Canada's advice or actions (or inaction) influenced the Claimant to accept the vacation pay from his employer. There was also no evidence that the Claimant decided to leave Canada to visit his father because of anything that Service Canada told him. To the contrary, the Claimant maintained in his prior appeal (to have his claim antedated), that he did not contact Service Canada before leaving Canada because he was relying on his employer's advice.

[63] I have considered all the Claimants arguments about possible errors. In fact, I have followed the direction of the Federal Court to look beyond his stated grounds of appeal.¹³ I have reviewed the record, but I have not discovered other significant evidence that the General Division may have ignored or overlooked.

[64] The Claimant does not have a reasonable chance of success in the appeal. This includes his appeal of his disentitlement to benefits while outside of Canada, and his appeal of the allocation of his vacation pay.

¹³ See *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

CONCLUSION

[65] The application for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

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| REPRESENTATIVES: | F. B., Self-represented |
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