



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DT v Canada Employment Insurance Commission*, 2021 SST 170

Tribunal File Number: AD-21-26

BETWEEN:

D. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: April 30, 2021

DECISION AND REASONS

DECISION

[1] I am allowing the appeal and returning the matter to the General Division to reconsider.

OVERVIEW

[2] The Applicant, D. T. (Claimant), left his employment and applied for Employment Insurance benefits. His employer submitted a Record of Employment (ROE) and an amended ROE, both dated the same day. The Respondent, the Canada Employment Insurance Commission (Commission), originally assessed and allocated his earnings based on the first ROE. The amended ROE documented an additional lump sum payment that was not included on the first ROE. Six months after the Commission's first allocation decision, it reallocated the Claimant's earnings based on the information from the second ROE. Because of the reallocation, the Commission determined that it had overpaid the Claimant.

[3] The Claimant did not think it was fair that the Commission should ask him to pay back benefits, when it had all the correct information at the beginning. He also did not agree that all of the lump sum payments he received at the end of his employment should be subject to allocation.¹ He asked the Commission to reconsider, but it would not change its decision.

[4] The Claimant appealed to the General Division of the Social Security Tribunal, which agreed with how the Commission allocated earnings. It dismissed his appeal. The Claimant now appeals to the Appeal Division.

[5] I am allowing the appeal. The General Division made an error of law because its reasons do not adequately explain how it weighed the evidence. I am returning the matter to the General Division to reconsider because I do not accept that the Claimant had a full and fair opportunity to present his case.

¹ "Allocation" is when the Commission makes certain deductions from the weekly benefit amount that would otherwise be payable because earnings were paid or payable to the claimant in relation to those weeks.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[6] Grounds of appeal” are the reasons for the appeal. To allow the appeal, I must find that 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.

PRELIMINARY ISSUES

The Commission’s delay

[7] Much of the Claimant’s difficulty with the Commission decision stems from the fact that the Commission had both ROEs when it made its first decision, and that it took several months for the Commission to reconsider its decision based on the amended ROE.³ The Commission’s delay in evaluating the evidence and reconsidering its decision has caused him problems for him, including tax problems. He feels that the Commission’s actions are unacceptable and is asking to be compensated for associated costs.

[8] I have not considered whether the General Division made any error associated with the Commission’s delay in reviewing the Claimant’s evidence and I have not considered how the delay may have resulted in costs or damages to the Claimant.

[9] The Claimant did not say how his dissatisfaction with the Commission meant that the General Division made some kind of error in how it reached its decision. I told the Claimant that I could only consider whether the *General Division* made an error. I have no authority to supervise the Commission’s internal practices.

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* (DESD Act).

³ AD1-5.

New Evidence

[10] The Claimant provided the Appeal Division with submissions that included new evidence. He also provided new evidence in his post-hearing submission. As I told the Claimant, and as the Commission points out in its recent submission, the Appeal Division cannot consider evidence that was not before the General Division.⁴

ISSUE

[11] Did the General Division make an important error of fact or law when it found that the employer paid the Claimant \$17,271.97 because of his lay-off or separation from employment?

ANALYSIS

[12] The Claimant received \$17,573.56 from his employer in his final pay period. This included his pay for one final day of work, and another \$17,271.97. The Commission allocated the \$17,271.97 to the period beginning with the first week after he left his employment.

[13] The Claimant argued that a portion of this amount was not earnings. He said that they were not earnings, because he would have received it (or some of it) even if he had not left his employer.

[14] All of the \$17,271.97 is earnings. The Claimant did not dispute that he received the entire \$17,271.97 from his employer, or that he received it because of his employment. Earnings under the *Employment Insurance Regulations* (Regulations) includes a claimant's entire income arising out of employment.⁵

[15] At his Appeal Division hearing, the Claimant seemed to be under the impression that the Commission allocated the \$17,271.97 to the period beginning with the first week after he left his employment because it determined that it was all earnings. However, the Commission did not allocate the \$17,271.97 as it did because that it was all "earnings." The Commission allocated the payment in the way that it did because of how it *characterized* the earnings.

⁴ AD12-1, with reference to the Federal Court decision, *Marcia v Canada (Attorney General)*, 2016 FC 1367

⁵ Section 35(2) of the Regulations

[16] The Commission considered that the employer had paid the entire amount to the Claimant *because of his separation* from employment. It was the *reason* for the payment that meant it had to be allocated to the period after the Claimant left his employment.⁶

[17] The Claimant's real concern is that the Commission's allocation offset his entitlement to benefits during his benefit period. This is what resulted in the overpayment claimed by the Commission.

[18] To address the Claimant's concern, I need to decide whether the General Division made an error when it confirmed that the employer paid the \$17,271.97 to the Claimant because of the lay-off or separation from employment.

Did the General Division adequately explain why it found that the employer paid the entire \$17,217.29 to the Claimant because of his lay-off or separation from employment?

[19] The General Division decided that the Claimant received \$4,689.70 as vacation pay and \$12,582.27 as pay in lieu of notice for a total of \$17,271.97 due to his lay-off.⁷ It found that there was insufficient evidence that the amounts paid to the Claimant included a bonus.

[20] At the Appeal Division hearing, the Commission conceded that the General Division made an error because its decision reasons were inadequate. According to the Commission, the General Division did not say how it weighed the Claimant's evidence that part of the money he received was a bonus. The General Division's reasons do not explain why it concluded that the employer paid \$12,582.27 of the \$17,271.97 "in lieu of notice."

[21] I agree with the Commission and accept its concession. The General Division made an error of law by failing to provide adequate reasons.

[22] The Claimant testified that a portion of the \$17,271.97 that he received from the employer was a bonus, and he explained the formula by which that bonus was calculated. The Claimant's employer provided an ROE and an amended ROE, which identified payments to the Claimant as either "vacation pay" or as "Other: Pay in lieu of notice." Neither ROE identified a

⁶ Section 36(9) of the Regulations.

⁷ General Division decision, para 30.

“bonus” payment as such. However, the employer did not testify or provide statements in support of either ROE, and there was otherwise no evidence to contradict the Claimant’s testimony.

[23] Whatever the General Division meant by its reference to peaceful lay-off, or how it understood the bonus calculation, it did not state that it was rejecting the Claimant’s evidence as not reliable or not credible. It is not clear how the General Division weighed the Claimant’s evidence with all the other evidence.

[24] The General Division seemed to imply that there were other reasons to disregard the Claimant’s evidence. It referred to how the Claimant had spoken of a “peaceful lay-off” when he discussed his bonus. However, it is not clear what inference, if any, the General Division drew from that fact. There was no evidence that what the Claimant asserted as a bonus had depended on the terms of separation in some way. The Claimant never suggested that any portion of his payment was a payment for settling with the employer.

[25] The General Division also said that it was “doubtful” that the Claimant’s salary could produce the bonus that he had reported for 2018. The General Division’s doubts came from its own “factoring.” However, the General Division did not explain what figures or assumptions it used in its factoring, or what caused it to be doubtful.⁸

[26] The General Division made an error of law by not explaining how it weighed the evidence to decide that the Claimant had not received a bonus, and to decide that he received the entire \$17, 271.97 because the employer laid him off.

[27] Because I have found that the General Division made an error in how it reached its decision, I must consider what I should do about the error (the remedy).

⁸ General Division decision, para 27.

REMEDY

[28] I have the authority to change the General Division decision or make the decision that the General Division should have made. I could also send the matter back to the General Division for it to reconsider its decision.⁹

[29] The Claimant accepts that he had the opportunity to present his evidence to the General Division. He asks me to make the decision the General Division should have made.

[30] However, the Commission does not agree that I have the evidence I would need to make the decision and suggests that I return the matter to the General Division to reconsider.

[31] I have decided to send the matter back to the General Division for reconsideration.

[32] In order to substitute my decision for the General Division, I would have to be satisfied of the reason the employer made the payments to the Claimant that total \$17,271.97. If I accepted that the employer paid the Claimant any portion of the \$17,271.97 that it would have had to pay the Claimant regardless of the lay-off, I would need to be able to determine the dollar value of that amount from the evidence.

[33] I am not satisfied that I can make the decision the General Division should have made. In my view, the Claimant has not had a full and fair opportunity to present evidence to identify the nature of the different parts of the payment he received. Or, evidence of the dollar value of those different parts. At the same time, I cannot receive or consider new evidence.

Uncertainty in the Evidence Before the General Division

[34] At the Appeal Division hearing, the Claimant tried to clarify his earlier General Division testimony. He seemed to be saying that he had not claimed that the entire \$12,582.27 was his bonus and that the General Division mistook his evidence. The General Division decision does seem to associate the \$12,587.27 figure with a discussion of the Claimant's evidence on his bonus and bonus calculations.¹⁰ At the same time, the General Division decision is not clear

⁹ My authority is set out in sections 59(1) and 64(1) of the DESD Act.

¹⁰ General Division decision, para 22.

about whether the member understood the Claimant to be claiming that \$12,587.27 had been the amount of his bonus.

[35] At the General Division hearing, the member asked the Claimant about the \$12,582.27, that was identified in the amended Record of Employment as “pay in lieu of notice.”¹¹ The Claimant confirmed that he received a payment totalling \$17,271.97 but disagreed that the employer paid \$12,587.27 “in lieu of notice.”¹²

[36] Later on, the Claimant said “The money was a bonus,” but he immediately shifted from speaking about his bonus to speaking about his vacation entitlement.¹³ It is possible that the Claimant meant to tie his entitlement to payment for unpaid vacation into the \$12,587.27 figure. In an earlier written submission, the Claimant had noted that his employment allowed him to “sell” his annual leave. He said that he had “sold” some of his annual leave before his unemployment, so he did not think this should be considered (allocated).¹⁴

[37] The Claimant also told the General Division that he was probably entitled to get about \$12,000.00 of the total \$17,000.00, even if he had not been laid off.¹⁵ From this, it sounds like he understood the \$12,587.27 to include his bonus as well as everything else that he thought he would have received even if he had not been laid off. However, I cannot be certain whether he was telling the General Division that the entire \$12,587.27 was a bonus, or that this figure included his entire vacation pay entitlement, or some portion of it.

[38] At the Appeal Division, the Claimant said that he agreed with the Commission’s initial decision of October 10, 2019, to allocate \$8,150.00 based on his first ROE.¹⁶ The Claimant said that the second ROE included additional money that he received as a bonus. The Claimant asked me to find that he received the difference between \$17,271.97 and the \$8,150.00 as a bonus (\$8150.00 is actually the Commission’s approximation. The actual amount is \$8,145.39.)

¹¹ GD3-16.

¹² Audio recording of General Division hearing at timestamp, 00:03:40.

¹³ Audio recording of General Division hearing at timestamp, 00:06:35.

¹⁴ GD5-2.

¹⁵ 00:06:44. The Claimant actually said “something that, I even been laid off, I was entitled to get.” However, from the context and the Claimant’s consistent argument, I accept that he meant he would receive this amount whether he was laid off or not.

¹⁶ GD3-18.

[39] I had some difficulty following the Claimant's arguments and his calculations, so I asked him to send me a written submission after the hearing. I asked him to break out the different kinds of payments he received. I also asked him to explain again how he characterized each of those payments and I asked him to identify the evidence in the file that supported his characterizations.

[40] In his post-hearing submission, the Claimant agreed with an allocation of an amount that closely tracked the first ROE. The Claimant said he received \$4,686.03 in vacation pay and a total of \$4,528.85 as severance. These two amounts total \$9,218.55. From this amount, the Claimant believes \$1,068.14 should be deducted, which he labels as a "transfer paid annual 2018." He explained that this was unused vacation that he had carried over from 2018 into 2019. He said that his employer was supposed to have paid him for the vacation carry-over by July 2019, well before he was laid off.¹⁷

[41] Once the vacation carry-over is deducted from the total of vacation pay and the "pay in lieu of notice," the difference is \$8,145.39. This the amount the Claimant accepts as earnings that were paid to him because of his lay-off.

[42] The Commission later allocated \$17,271.97, based on an amended ROE. This amount is the final pay found in PP1 of the amended ROE (\$17,573.56) after \$301.59 is deducted, which is approximately the same amount the Claimant asserts for his final day of pay (\$299.62).

[43] I now understand that the Claimant disagrees with the allocation of his vacation pay carry-over from 2018 and the allocation of his 2019 performance bonus. He is arguing that he would have received both amounts even if his employer had kept him on. Furthermore, I gather that the Claimant believes he was entitled to \$1,068.14 for the 2018 vacation carry-over and that he is asserting a separate performance bonus of \$8,058.44¹⁸ and not a bonus of \$12,582.27.

[44] However, I cannot say whether the Claimant believes this vacation carry-over amount was mistakenly included in his vacation pay or in his severance. The \$12,582.27 appears to be the total of his bonus and a severance representing three weeks of salary. He says that the

¹⁷ AD10-2.

¹⁸ \$17,271.97 - \$1068.14 - \$8,145.39 = \$8058.44

severance amount is \$4,528.85 based on 3 weeks of salary. This is very close to my own calculation.¹⁹ \$4,523.83 (severance) added to \$8,053.83 (claimed bonus) equals \$12,582.27.

[45] That means that the \$1,068.14 that the Claimant now says he received for vacation carry-over could not have been included in the severance. It would have had to be included in the total vacation entitlement of \$4,689.70. (All of this assumes that the Claimant actually carried an entitlement to untaken vacation from 2018 into 2019 with a value of \$1,068.14 (which is not in evidence), and that he received the bonus he claims to have received).

[46] At the same time, the Claimant told the Commission on December 11, 2020, that he agreed that his severance was \$8,160.00—by which he probably meant that he agreed the Commission could allocate \$8,160.00. The Commission suggested to him that \$4,689.70 was the vacation pay and \$3,470.30 (which is the remainder after the vacation pay of \$4,689.70 is subtracted from \$8,160.00) was severance, and the Claimant agreed.²⁰

[47] Assuming the Claimant was careful in accepting the values put to him by the Commission, his response would suggest that the \$1,068.14 vacation pay for 2018 could not have been included in the vacation pay total. It would have to have been included in the amount that was a payment in lieu of notice. That seems to be different from how he is trying to explain the various amounts now.

[48] I am not satisfied that I can get to the bottom of this using only the evidence that was before the General Division. I do not have the evidence I need to assign some certain sum to a “sale of annual leave” or to a bonus.

[49] The 2018 vacation carry-over seems to be a necessary piece of the puzzle. However, this is the first time that the Claimant offered details about his ability to sell annual leave. The Claimant’s assertion that he sold annual leave before he lost his job was the only evidence before the General Division.²¹ The Claimant did not tell the Commission or the General Division that he had a vacation carry-over from 2018 of 5.3 days. He did not mention that he had to take the

¹⁹ $\$6,534.42 \times 12 \text{ months} / 52 \text{ weeks} \times 3 \text{ weeks} = \$4,523.83$.

²⁰ GD3-27.

²¹ GD5-2.

vacation in the first six months of 2019 or have its value paid to him. He has not said before that the dollar value of that carry-over was \$1,068.14.

[50] While I appreciate that the Claimant was trying to clarify what he told the Commission and the General Division about how he sold his annual leave, the additional details he has given me were not before the General Division. \

Claimant's Opportunity to Present Evidence

[51] I am not satisfied that the General Division gave the Claimant a full and fair opportunity to obtain and present additional evidence. In response to the General Division's offer to allow post-hearing evidence, the Claimant said that he could not access any documentation of his bonus because he no longer had access to his former work email.

[52] Instead, the Claimant offered to give the General Division contact information for his former manager and company (employer). The General Division said it could not contact the company or his manager. The member then told the Claimant that he was going to "go with what [the Claimant] told [the General Division]."22

[53] In my view, the Claimant could reasonably have interpreted the General Division's comment to mean that additional evidence would not be required because the General Division could rely on what the Claimant had already said. However, the General Division ultimately denied the appeal because it considered the evidence of the Claimant's bonus to be "insufficient."²³ The General Division had offered the Claimant an opportunity to submit additional evidence, but it did not caution him that he risked losing his appeal if he did not.

[54] At the same time, the Claimant told me at the Appeal Division hearing that he did not expect he could have obtained additional information, even if the General Division had been willing to accept documents after the hearing. He told me that he could not access his email at his former employer and his employer was out of business.

²² Audio recording of General Division hearing at timestamp, 00:15:50

²³ General Division decision, para 28.

[55] Despite his assertion that he could not access additional evidence, the Claimant has submitted new evidence for consideration by the Appeal Division. At his Appeal Division hearing, the Claimant agreed that AD6-9 and AD-6-10 were new evidence. When the Claimant sent his first post-hearing submission on April 21, 2021, he provided supplemental evidence on the details of his vacation carry-over, and he referred to AD6-10 once again.²⁴ Furthermore, he sent a second post-hearing submission in which he attached new evidence in the form of a termination letter from his employer.²⁵ As the Commission has noted, the termination letter may itself be significant, if it were legible.²⁶

[56] I have not considered any of the new evidence the Claimant has submitted to the Appeal Division when I decided that the General Division made an error. If I were to make the decision that the General Division should have made, I would still not be able to use any evidence that was not available to the General Division when it made its decision.

[57] However, I accept that the Claimant should have a full and fair opportunity to have all of his evidence considered. Therefore, I am sending the matter back to the General Division for a new hearing. The Claimant should ensure that he obtains and submits to the General Division any evidence that might support his assertions that he would have been entitled to certain amounts even if his employer had not laid him off.

CONCLUSION

[58] I am allowing the appeal and I am sending the matter back to the General Division for a new hearing.

[59] The Claimant has already told the General Division about some of the difficulties he has had to obtain evidence from his former employer. As the Commission observed, section 32 of the *Social Security Regulations* gives the General Division a discretionary power to refer questions to the Commission. It is open to the General Division to ask the Commission to further investigate the nature and composition of the \$17,271.97 received by the Claimant.

²⁴ AD10-3.

²⁵ AD11-2.

²⁶ AD12-1.

Stephen Bergen
Member, Appeal Division

HEARD ON:	April 20, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. T., Appellant Melanie Allen, Representative for the Respondent