



Citation: *BR v Canada Employment Insurance Commission*, 2021 SST 462

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: B. R.

Respondent: Canada Employment Insurance Commission
Representative: Josée Lachance

Decision under appeal: General Division decision dated May 26, 2021
(GE-21-636)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference

Hearing date: August 31, 2021

Hearing participants: Appellant
Respondent's representative

Decision date: September 3, 2021

File number: AD-21-217

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) received regular employment insurance (EI) benefits. The Respondent (Commission) later conducted an investigation of the claim. It determined that the Claimant had received wages from his former employer. The Commission allocated the wages to the weeks he performed the services.

[3] The Commission also determined that the Claimant had knowingly provided false or misleading information when he said that he did not receive any earnings and did not work. It imposed a non-monetary penalty. The Claimant requested reconsideration of the Commission's decision, but it maintained the initial decision. The Claimant appealed the Commission's reconsideration decision to the General Division.

[4] The General Division concluded that the Commission could review the claim up to 72 months. It concluded that the Claimant had received wages from his former employer and that said wages were earnings that had to be allocated to the weeks the services were performed. The General Division also concluded that the Claimant had knowingly provided the Commission false or misleading information that justified the imposition of a non-monetary penalty.

[5] I must decide whether the General Division made errors in its interpretation of sections 38 and 52 of the *Employment Insurance Act (EI Act)*. I must also decide whether the General Division made an error in its interpretation of sections 35 and 36 of the *Employment Insurance Regulations (EI Regulations)*.

[6] I am dismissing the Claimant's appeal.

Issues

[7] Issue 1: Did the General Division make an error when it concluded that the Commission could extend to 72 months the period to review the Claimant's claim?

[8] Issue 2: Did the General Division make an error when it concluded that the sums received by the Claimant were earnings, and that they were correctly allocated?

[9] Issue 3: Did the General Division make an error when it concluded that the Claimant had knowingly provided false or misleading information that justified a non-monetary penalty?

Analysis

Appeal Division's mandate

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

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

[12] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

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

² *Idem*.

Issue 1: Did the General Division make an error when it concluded that the Commission could extend to 72 months the period to review the Claimant's claim?

[13] The Claimant submits that the General Division made an error when it allowed the Commission a period of 72 months to review his claim. He puts forward that the Commission could not review his claim because it was outside the period of 36 months following the payment of benefits.

[14] The evidence shows that the Claimant received benefits between July and September 2017. The Commission started its review of the claim in September 2018. The Claimant met with an agent in October 2018. However, the Commission only issued its initial decision and notice of debt in February 2021, a little over three years and a half after the benefits were paid.

[15] In order for the Commission to extend the period to 72 months in which it can reconsider a claim, it does not have to establish that the Claimant did in fact make false or misleading statements. The Commission must rather show that it could reasonably consider that the Claimant made a false or misleading statement in connection with his benefit claim.³

[16] I find that the General Division did not ask itself whether the Commission could reasonably believe that the Claimant made a false or misleading statement or representation **when it made the decision to reconsider the claim**. The General Division appears to have considered evidence at the hearing to determine whether the Commission could extend the period to 72 months.⁴ This constitutes an error in law.

³ *Langelier*, A-140-01, *Lemay*, A-172-01, *Dussault*, A-646-02.

⁴ See General Division decision, notably paras 23, 24 and 27.

[17] I find that although the General Division made an error, there is no reason to change its conclusion on whether the Commission could extend the period to 72 months.⁵

[18] In the circumstances of this case, could the Commission reasonably believe that the Claimant made a false or misleading statement or representation?

[19] The Commission discovered a discrepancy between information in the Claimant's records regarding his earnings and information it received from the employer. The Claimant declared no earnings for the period of July 2, 2017, to September 10, 2017. The employer declared that the Claimant received \$4963.96 in wages during the same period. The Commission asked the Claimant to explain the discrepancy.

[20] In his reply to the Commission, the Claimant declared that an agency sent him to a grocery store to gain experience during that period and that they later decided to send him checks. He declared that he gave all the checks to people who had previously helped him to pay personal expenses during hard times.

[21] Based on this evidence, I find that when the Commission made the decision to reconsider the claim, it could reasonably consider that the Claimant had made a false or misleading statement or representation in order to extend the period for reconsidering the Claimant's benefit claim to 72 months.

[22] I find that the Commission could extend the period to 72 months to review the Claimant's claim.

Issue 2: Did the General Division make an error when it concluded that the sums received by the Claimant were earnings, and that they were correctly allocated?

⁵ See section 59(1) of the DESD Act.

[23] This ground of appeal is without merit.

[24] The General Division had to decide whether the amounts received by the Claimant were earnings and if so, whether the Commission correctly allocated them.

[25] The General Division found that because the Claimant was performing services for the employer, the sums were paid in exchange for the work that he performed between July 2, 2017, and September 10, 2017. Therefore, the sum had to be allocated the weeks that the work was performed.

[26] The Claimant stated that he started his traineeship by doing delivery in a grocery store from July 2017 to August 2017. The agency was collecting money from them, and deducting their commission, and then sending the checks to him after a long delay. He gave the checks to people he had borrowed money from during hard times. He did not expect to receive wages as a beginner.⁶

[27] Before the General Division, the Claimant argued that the money is not earnings that he received because he did not cash any of the cheques that the agency gave him. He stated that when he got the cheques, he gave them directly to people who helped him while he was without income. The Claimant further argued that the money is not earnings because he understood that he was working for the employer on a voluntary basis to gain experience for his driving course.

[28] The Claimant's Record of Employment (ROE) shows that for the period of July 3, to September 15, 2017, he received the sum of \$4,963.96.⁷ In a letter written to the Commission dated October 9, 2018, the Claimant admitted that he worked in July and August 2017, doing deliveries, and that he had received the

⁶ See GD5-24.

⁷ See GD3-18.

sum of \$4,963.96 from the agency.⁸ The Claimant also declared the sum as employment income in his income tax report of 2017.⁹

[29] Although the Claimant did not expect to receive wages, the preponderant evidence shows that he did receive wages for his services. He also declared the sum as employment income in his 2017 income tax report.

[30] Furthermore, what a claimant decides to do with the money he receives from the employer is irrelevant for the purposes of the EI Act. The sum remains earnings for the purposes of calculating benefits and it must be allocated.¹⁰

[31] Did the Commission properly allocate the Claimant's earnings?

[32] The law says that earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.¹¹ The Commission allocated the Claimant's earnings in accordance with the weeks mentioned in the ROE.

[33] The General Division concluded from the evidence that the Commission correctly allocated the amounts to the weeks the Claimant rendered services.

[34] The burden of proof for disputing the employer's pay information rests with the claimant, and that mere allegations intended to show doubt are insufficient.¹² It is therefore not sufficient for a claimant to cast doubt on the veracity of the employer's evidence. He must provide countering evidence before the General Division, which the Claimant has not done.

[35] In light of the evidence before it, the General Division simply could not arrive at a different conclusion from the one at which it did arrive.

⁸ See GD5-24.

⁹ See GD5-24 and GD5-36.

¹⁰ *Canada Employment Insurance Commission v M. D.*, 2017 CanLII 77113 (SST).

¹¹ Section 36(4) of the EI Regulations.

¹² *Dery v Canada (Attorney General)*, 2008 FCA 291.

[36] I find no reason to intervene on the issue of allocation of earnings.

Issue 3: Did the General Division make an error when it concluded that the Claimant had knowingly provided false or misleading information that justified a non-monetary penalty?

[37] The General Division had to decide whether the Claimant knowingly provided false or misleading information on his claim reports and if so, whether the Commission properly decided to impose a non-monetary penalty.

[38] The only requirement of Parliament for imposing a penalty is that of knowingly—that is, with full knowledge of the facts—making a false or misleading statement. Therefore, the absence of the intent to defraud is of no relevance.

[39] The record shows that the Claimant responded “no” to the following questions:

“• Did you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self-employment.

• Is there any other money that you have not previously told us about, that you received or will receive for the period of this report?”

[40] Before the General Division, the Claimant stated that he did not knowingly provide false or misleading information because he did not believe he would receive compensation for his services. He received compensation much later. The Claimant further stated that he was with the agency to gain experience and not for the purposes of being paid.

[41] The General Division did not find the Claimant’s explanations to be credible. It found that the questions asked by the Commission were clear and simple. The first question relates to unpaid work and the second questions relates to any money that the Claimant will receive for the period of the report.

[42] The General Division did not believe that the Claimant left school to work without pay. Furthermore, even if the Claimant did not expect to receive wages, he knew that he was working during the time he was collecting benefits. It was only when he was contacted by the Commission that he apologized for failing to report his situation on time.

[43] I find that the General Division stated the relevant legal test correctly. It applied that test to the facts the Claimant raised, and it considered whether, having regard to all the circumstances, the Claimant had knowingly made false or misleading statements. It also stated the proper test to decide whether the Commission had exercised its discretion properly by imposing a non-monetary penalty.

[44] I find no reason to intervene on the issue of penalty.

Conclusion

[45] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division