Citation: *DT v Canada Employment Insurance Commission*, 2021 SST 554

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	D. T.
Respondent:	Canada Employment Insurance Commission
Representative:	Melanie Allen

Decision under appeal:	General Division decision dated July 8, 2021 (GE-21-755)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	September 21, 2021
Hearing participants:	Appellant Respondent's representative
Decision date:	October 6, 2021
File number:	AD-21-241

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) became unemployed on October 1, 2019, and applied for employment insurance (EI) benefits. The initial record of employment (ROE) indicates that the Claimant received $9,213.53 from his employer when his job ended. The Canada Employment Insurance Commission (Commission) decided this money was “earnings” under the law because it was paid to the Claimant as vacation pay and pay in lieu of notice.

[3] The employer submitted an amended ROE. It indicates that the Claimant received $17,271.97 in vacation pay and pay in lieu of notice. Five months after receiving the amended ROE, the Commission decided the additional monies were also earnings and allocated those earnings to the Claimant’s EI claim. This caused an overpayment. The Claimant requested that the Commission reconsider its initial decision but to no avail. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division concluded that the Commission had correctly calculated and allocated the Claimant’s vacation pay, pay in lieu of notice and severance pay. The General Division also concluded that it did not have the authority to award compensation for the Commission’s delay in reviewing the Claimant’s EI claim.

[5] The Appeal Division granted the Claimant leave to appeal. He submits that the General Division failed to observe a principle of natural justice, erred in law, and 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.

[6] For the reasons mentioned below, I am dismissing the Claimant’s appeal.

Issues

[7] Issue 1: Did the General Division fail to observe a principle of natural justice when it considered the Commission's additional evidence filed after the hearing?

[8] Issue 2: Did the General Division make an error in fact or in law when it concluded that the money he received constituted earnings to be allocated from the end of employment?

[9] Issue 3: Did the General Division make an error in not awarding the Claimant some kind of compensation following the Commission's handling of his file?

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*, 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*.

Preliminary matters

[13] The Claimant had requested an interpreter for the Appeal Division hearing. Unfortunately, there was no interpreter present at the hearing. After discussion with the Claimant on the possibility of adjourning the hearing, the Claimant chose to proceed without an interpreter.

[14] I nonetheless gave the Claimant the opportunity to raise any interpreter issues during the hearing. The Claimant did not raise any issues and I had no difficulty understanding his position.

Issue 1: Did the General Division fail to observe a principle of natural justice when it considered the Commission's additional evidence filed after the hearing?

[15] This ground of appeal is without merits.

[16] In accordance with a previous Appeal Division decision, the General Division requested that the Commission investigate the nature and composition of the $17,271.97 received by the Claimant. Following the hearing, the Commission was able to speak to the employer and submitted that evidence to the General Division.[3]

[17] The Claimant submits that he prepared his case with the documents that he had received prior to the hearing. However, the Commission filed supplementary evidence after the hearing. The Claimant submits that the General Division should not have allowed the Commission to file evidence after the hearing. He submits that he suffered a prejudice from the late filing because the General Division based its decision on this disputed evidence.

[3] See General Division decision, pars 8 and 9.

[18] The Appeal Division has repeatedly reiterated the risk for the General Division of accepting post-hearing evidence having regard to the principles of natural justice.[4]

[19] Accordingly, I must determine whether the Claimant had the opportunity to respond to the Commission's additional evidence submitted after the hearing considering that the General Division clearly based its decision on this evidence.

[20] The General Division indicates in its decision that it gave the Claimant an opportunity to respond to the additional evidence in writing. I note that the letter sent to the Claimant advising him of the late filing does not indicate that he can reply to the Commission's additional evidence.

[21] However, the Claimant acknowledged reception of the additional evidence after the hearing and did reply in writing to the additional evidence filed by the Commission prior to the General Division decision. He disputes the employer's additional evidence that he received the money following the loss of his job and maintains his position that the amount he received was an annual bonus. The Claimant also requests that the Commission further investigate the employer.

[22] A fair hearing includes an adequate pre-notice of the hearing date, the possibility to be heard, the right to know what is alleged against one party, and the possibility to respond to said allegations.

[23] When considering all the circumstances, I find that the Claimant had an opportunity to read and to respond to the further investigation and report submitted by the Commission prior to the General Division rendering its decision.

[24] Therefore, I do not find that the General Division failed to observe a principle of natural justice.

---

[4] *MM v Canada Employment Insurance Commission and X*, 2021 SST 2; *J. M. v Canada Employment Insurance Commission*, 2016 CanLII 78668 (SST); *Y. L. v Canada Employment Insurance Commission*, 2016, CanLII 59140.

Issue 2: Did the General Division make an error in fact or in law when it concluded that the money he received constituted earnings to be allocated from the end of employment?

[25] This ground of appeal is without merits.

[26] The General Division had to decide whether the amount received by the Claimant was earnings and whether the Commission had properly allocated it.

[27] As stated by the General Division, claimants have the burden of proving that the payments they received are not earnings under the law.

[28] Before the General Division, the Claimant disagreed with the employer that he had received $12,582.27 as pay in lieu of notice. He argued that he received a bonus of $8,058.44 for the year 2019, and that this bonus was payable even if he had not lost his job.

[29] The employer's copy of the termination letter shows two paragraphs which say the following:

> "In addition, although [employer] has no legal obligation to do so, we are prepared to offer you the further amount of $8058.44 less statutory deductions in recognition of your service to [employer]. This amount represents 5 weeks' additional salary and an additional 1.72 days of vacation pay.
>
> However, as a condition of this offer, we will require that you sign and return to [employer] by Tuesday 8th October 2019 the Release attached to this letter (the "Release")."

[30] The General Division considered that the third party payroll provider confirmed to the Commission that the Claimant was initially paid $4,523.83 in pay in lieu of notice. Then, the Claimant received another pay in lieu of notice of $8,058.44, which totals $12,582.27.

[31] The General Division considered that the amended ROE increased the pay in lieu of notice to $12,582.27. This represented an increase of $8,058.44 from the initial ROE.

[32] The General Division found that both ROE's accurately represented the information in the termination letter.

[33] The General Division found that the Claimant did not provide supporting evidence to show that he was to receive or that he had receive a bonus when his employment ended in October 2019.

[34] The General Division further considered that the employer confirmed with the Commission that no one received a bonus in 2019.

[35] The General Division considered that the Claimant admitted he had signed a "peaceful agreement" to receive this payment and end his employment. He also initially declared the amount to be a severance payment.[5]

[36] The General Division preferred the Commission's evidence showing the Claimant did not receive a bonus, but received severance pay in the amount of $8,058.44. It preferred this evidence because the termination letter provided by the employer is complete in comparison to the Claimant's version of the termination letter. The General Division found that the termination letter explains how the severance pay was calculated and the terms to be paid this money. The Claimant also signed it on October 3, 2019, at the end of his employment.

[37] Based on this evidence, the General Division found it more likely than not that the employer paid $17,271.97 to the Claimant as vacation pay, pay in lieu of notice and severance pay. It found that he received this amount because his employment ended. The General Division found that there is sufficient connection between the Claimant's employment and the money he received from

[5] See GD3-27.

his employer when his job ended. It concluded that the money the Claimant received from his employer is earnings to be allocated under the law.

[38] The General Division correctly applied the law that says that all earnings paid or payable because of separation of employment are allocated starting the week of the Claimant's loss of employment according to his normal weekly earnings. The allocation starts on that week despite when the earnings were paid or payable.

[39] As stated during the appeal hearing, I am not empowered to retry a case or to substitute my discretion for that of the General Division. The Appeal Division's jurisdiction is limited by law. 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 had made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

[40] I find that the General Division based its decision on the evidence submitted before it, and that it complies with both the legislative provisions and the case law.

[41] Therefore, I find no reason for me to intervene on the issue of the allocation of earnings.

Issue 3: Did the General Division make an error in not awarding the Claimant some kind of compensation following the Commission's handling of his file?

[42] This ground of appeal is without merits.

[43] The General Division concluded that it did not have the authority to award compensation for the Commission's delay in reviewing the Claimant's EI claim.

[44] The Claimant puts forward that the poor service he received from the Commission causes him serious trouble and inconvenience. The Claimant also puts forward that the Commission's undue delay prevented him from filing evidence in support of his position that the money he received was a bonus.

[45] As stated by the General Division, the law allows the Commission up to 36 months to reconsider a claim after benefits have been paid. Furthermore, the General Division gave the Claimant a full opportunity to explain his version of events and to contradict the employer's termination letter that does not acknowledge any bonus being paid out.

[46] I find that the General Division did not make an error when it determined that the Tribunal does not have jurisdiction to order compensation or relief for any damages suffered by him. This is true even if the Tribunal came to the conclusion that the Commission mismanaged his file. It is a dispute that must be debated in another forum.[6]

Conclusion

[47] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

[6] *DB v Canada Employment Insurance Commission*, 2021 SST 84; *D. G. v Canada Employment Insurance Commission,* 2019 SST 1327; *TT v Canada Employment Insurance Commission*, 2018 SST 43; *Canada (Attorney General) v Romero*, A-815-96; *Attorney General of Canada v Tjong*, A-672-95.