



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *H. P. v. Canada Employment Insurance Commission*, 2016 SSTADEI 156

Tribunal File Number: AD-15-1000

BETWEEN:

**H. P.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division– Appeal Decision**

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DECISION BY:: Pierre Lafontaine

HEARD ON: March 17, 2016

DATE OF DECISION: March 18, 2016

## **REASONS AND DECISION**

### **DECISION**

[1] The appeal is dismissed.

### **INTRODUCTION**

[2] On August 10, 2015, the General Division of the Tribunal concluded that:

- The appeal of the Appellant on the allocation of earnings was to be summarily dismissed.

[3] On September 11, 2015, the Appellant filed an appeal of the summary dismissal decision of the General Division after receiving the decision on August 12, 2015.

### **TYPE OF HEARING**

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was present at the hearing. The Respondent was not present at the hearing although duly notified of the hearing.

### **THE LAW**

[6] Subsection 58(1) of the *Department of Employment and Social Development Act*

(the “*DESD Act*”) states that the only grounds of appeal are the following:

- a. the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b. the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- c. 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.

## **ISSUE**

[7] The Tribunal must decide if the General Division erred in fact and in law when it summarily dismissed the appeal of the Appellant.

## **ARGUMENTS**

[8] The Appellant submits the following arguments in support of the appeal:

- He believes there is nothing he could have done to prevent the overpayment at the time he received the severance package from his employer;
- He emphasizes that he did not return to work between his temporary lay-off period until his termination that occurred 26 weeks later;
- He had no other options than to apply for EI benefits since he needed assistance to cover his living expenses and had no other source of income;
- If he had received his severance package in May 2014, he would have applied later for his EI benefits;
- He reported honestly all earnings received in November 2014 in his EI weekly report upon receiving the monies;

- He understands that the monies paid are considered earnings but he is asking the Tribunal to consider the circumstances. He believes he was treated unfairly since he has done nothing wrong that would justify this money being taken away from him;
- He wants the Tribunal to take the time to audit his actions and honesty. He did his best to report everything to avoid this overpayment.

[9] The Respondent submitted the following arguments against the appeal:

- The General Division considered all the evidence and found that the earnings have been properly allocated pursuant to subsection 36(9) of the *Regulations*;
- The Appellant received separation payments and the Respondent proceeded with the allocation in reference of the type of the payment and the reason why they were paid;
- The General Division decision is reasonable. It committed no error in fact or law in summarily dismissing this appeal with the conclusion that the Appellant's appeal had no reasonable chance of success;
- There is nothing in the General Division decision to suggest that it was biased against the Appellant in any way, or that it did not act impartially; nor that there is any evidence to show there was a breach of natural justice present in this case.

## **STANDARD OF REVIEW**

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the standard of review applicable to a decision of a board of referees or an Umpire regarding questions of law is the standard of correctness

-*Martens v. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Canada (AG) v. Hallee*, 2008 FCA 159.

[12] The Tribunal finds that the grounds of appeal in section 58 of the *DESDA Act* are identical to the grounds of appeal applicable to the former Employment Insurance Umpires in subsection 115(2) of the *Act*. Therefore, the Federal Court of Appeal jurisprudence on the nature of the appeal regarding former EI Umpires is relevant and persuasive.

[13] The Tribunal is of the opinion that the degree of deference the Appeal Division accords to the General Division decisions should be consistent with the deference accorded to the decisions of former board of referees by the Employment Insurance Umpires. An appeal before the Appeal Division is not an appeal in the usual sense of that word but a circumscribed review – *Canada (AG) c. Merrigan*, 2004 CAF 253.

[14] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Martens c. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Canada (PG) v. Hallée*, 2008 FCA 159.

## **ANALYSIS**

[15] The Tribunal proceeded with the appeal hearing in the absence of the Respondent since it was satisfied that it had received proper notice of the hearing, in accordance with section 12(1) of the *Social Security Tribunal Regulations*.

[16] The Tribunal must decide if the General Division erred when it summarily dismissed the appeal of the Appellant.

[17] Subsection 53(1) of the *Department of Employment and Social Development Act* states that “the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success”.

[18] Although the Federal Court of Appeal has not yet considered the issue of summary dismissals in the context of the *Social Security Tribunal* legislative and regulatory framework, they have considered the issue many times in the context of their own summary dismissal procedure. *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, and *Breslaw v. Canada (AG)*, 2004 FCA 264, serve as representative examples of this group of cases.

[19] In *Lessard-Gauvin*, the court stated that:

“[8] The standard for a preliminary dismissal of an appeal is high. This Court will only summarily dismiss an appeal if it is obvious that the basis of the appeal is such that the appeal has no reasonable chance of success and is clearly bound to fail...”

[20] The court expressed similar sentiments in *Breslaw*, finding that:

“[7] ...the threshold for the summary dismissal of an appeal is very high, and while I have serious doubt about the validity of the appellant’s position, the written representations which he has filed do raise an arguable case. The appeal will therefore be allowed to continue.”

[21] In view of the above, the Appeal Division of the Tribunal as determined that the correct test to be applied in cases of summary dismissal is the following:

- Is it plain and obvious on the face of the record that the appeal is bound to fail?

[22] To be clear, the question is not whether or not the appeal must fail after a full and complete airing of the facts, jurisprudence, and submissions. Rather, the true question is whether or not that failure is pre-ordained no matter what evidence or arguments might be presented at the hearing in support of the written representations in appeal.

[23] In the present case, the General Division examined the record and the Appellant’s representations in appeal and determined that it was plain and obvious on the face of the record that the appeal was bound to fail. The Tribunal agrees with the conclusion of the

General Division, As such, the General Division member's determination that this appeal should be summarily dismissed was correct.

[24] Unfortunately for the Appellant, since he received money that he was not entitled to, he must repay it – *Lanuzo v. Canada (AG)*, 2005 FCA 324.

## **CONCLUSION**

[25] The appeal is dismissed.

*Pierre Lafontaine*

Member, Appeal Division