Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *K. N. v. Canada Employment Insurance Commission,* 2016 SSTADEI 327

Tribunal File Number: AD-15-957

BETWEEN:

**K. N.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division – Leave to Appeal

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DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 23, 2016

## REASONS AND DECISION

## INTRODUCTION

[1] On July 16, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal of a decision of the Canada Employment Insurance Commission (Commission). The Applicant had qualified to receive benefits effective January 1, 2012 and was determined by the Commission to have been overpaid due to an allocation of unreported earnings. The Commission also imposed a penalty. The Applicant requested reconsideration of this decision, and the Commission reduced the amount of the penalty because of his financial situation but maintained the remainder of its decision. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant attended the GD hearing, which was held by teleconference on June 15, 2015. The Respondent did not attend.

[3] The GD determined that:

a) The issues on appeal are an allocation of earnings received by the Applicant and the imposition of a penalty for providing false or misleading information, pursuant to the *Employment Insurance Act* (EI Act);

b) The Applicant received wages from his employer that must be allocated pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulations);

c) The Applicant had knowledge that the representations made by him in his reports were false because he knew he was employed and earning wages during the period of July 10, 2012 to August 25, 2012. Therefore a penalty should be imposed; and

d) The Commission exercised its discretion in a judicial manner when it determined the amount of the penalty because it considered all mitigating circumstances.

Based on these conclusions, the GD dismissed the appeal.

[4] The Applicant was notified of the GD decision by letter of the Tribunal dated July 23, 2015.

[5] The Applicant filed a letter which was treated as an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal August 27, 2015. It was filed within the 30 days of the Applicant having received the GD decision.

[6] The Tribunal asked the Applicant to provide further information to complete the Application. The Applicant replied prior to the deadline given.

[7] The Respondent was given an opportunity to reply to the Applicant's submissions, and it filed submissions in January 2016.

**ISSUE**

[8] Whether the appeal has a reasonable chance of success.

**LAW AND ANALYSIS**

[9] Pursuant to section 57 of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant.

[10] According to subsections 56(1) and 58(3) of the DESD Act, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[11] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[12] Subsection 58(1) of 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.

**Submissions**

[13] The Applicant's grounds of appeal are described in letters filed in August 2015 and January 2016. The Applicant's arguments can be summarized as follows:

a) The GD failed to observe a principle of natural justice;

b) He filled out his EI updates "to the best of his ability" as required;

c) The GD had the discretion to take into consideration his "limiting circumstances" and did not do so;

d) These circumstances were a "dearth of information" because he was a new to Canada and he had no support network; and

e) His circumstances warrant "leeway" in interpreting the law.

[14] The Respondent's submissions are that the Applicant has not shown that the GD committed an error that falls into the above enumerated grounds for appeal and, in light of this, the Application should be denied by the AD.

**Leave to Appeal**

[15] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of insurable hours and entitlement weeks, at pages 3 to 6, and 10.

[16] The GD decision, at pages 6 to 8, summarized the evidence in the file, the arguments made at the hearing and the Applicant's submissions and position taken on the record.

[17] The Applicant argued similar points before the GD as he stated in the Application before the AD, i.e. that the Commission's decision did not take into account his circumstances; he was a new immigrant with very little information and no one to help him.

[18] The GD noted that the Applicant's penalty had been reduced by the Commission due to mitigating circumstances. It also noted that the Applicant did not dispute that he earned wages that he did not report.

[19] In order to grant leave to appeal, the Tribunal must be satisfied that the reasons for appeal fall within one of the grounds of appeal in subsection 58(1) of the DESD Act and that the appeal has a reasonable chance of success.

[20] If leave to appeal is granted, then the role of the AD is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case anew. It is in this context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[21] The GD decision was not based on an error of law or erroneous findings of fact.

[22] The Applicant submits that the GD may have failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, in that the GD failed to exercise its discretion to "give leeway" in light of his circumstances.

[23] The GD decision set out the position and arguments of the Applicant. The GD decision explained that despite the Applicant's arguments and the GD Member's consideration of the Applicant's circumstances, the GD found that a penalty should have been imposed and that the Commission exercised its discretion in a judicial manner in determining the amount of the penalty.

[24] I have read and carefully considered the GD's decision and the record. There is no suggestion that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact which the GD may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[25] As a result, I am satisfied that the appeal has no reasonable chance of success.

**CONCLUSION**

[26] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division