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

Citation: *H. Z. v. Canada Employment Insurance Commission,* 2017 SSTADEI 400

Tribunal File Number: AD-17-366

BETWEEN:

H. Z.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: November 17, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The facts of this matter are straightforward. The Applicant applied for regular Employment Insurance (EI) benefits on August 10, 2014. He provided details of monies received upon separation to a Service Canada agent on August 18, 2014. There is no indication in the file that any action was taken in this respect. Rather, the Applicant's first benefit payment was processed on August 22, 2014, and he ultimately received EI benefits of $514 gross weekly for the period from August 10, 2014 to January 24, 2015. Some nine months later, on September 21, 2015, the Canada Employment Insurance Commission (Commission) informed the Applicant that the separation monies were earnings and would be applied against his claim. As a result, on September 27, 2015, the Commission notified the Applicant of an overpayment of $11,822, being the full amount of gross benefits paid.

[2] The Applicant requested a reconsideration of the debt, stating that he had presented the required information, it was the Commission's decision to pay him benefits, had he known that he wasn't eligible for benefits he would have pursued temporary low-level jobs, and he had suffered financial damage. The Commission proceeded to review the allocation of earnings through an investigation of separation monies and average earnings. While the allocation period was adjusted slightly on reconsideration, the previous decision (that the severance monies were earnings, and had to be allocated across the benefit period) was confirmed in July 2016. There was no change to the $11,822 overpayment.

[3] The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada (Tribunal). The reconsideration decision under appeal addressed only the characterization of the severance monies as earnings, and their allocation during the benefit period. The Applicant's appeal was dismissed on March 7, 2017, on the basis that the separation monies constituted earnings and were properly allocated, pursuant to ss. 35 and 36 of the *Employment Insurance Regulations* (Regulations). It was further noted that a decision respecting the writing off of the overpayment was not within the General Division's jurisdiction.

[4] The Applicant now seeks leave to appeal the General Division decision to the Tribunal's Appeal Division.

LEAVE TO APPEAL

[5] Pursuant to s. 56(1) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division is not automatic, but rather "may only be brought if leave to appeal is granted." As set out in s. 58(2) of the DESDA, leave to appeal is refused "if the Appeal Division is satisfied that the appeal has no reasonable chance of success." A reasonable chance of success means having some arguable ground upon which the proposed appeal may succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

[6] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the DESDA:

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.

[7] The Applicant submits that the General Division made an error regarding the facts. Specifically, he points out that the General Division failed to mention that it was almost a year later when the Respondent notified him of their mistake, and that the General Division was incorrect in stating that "unfortunately it took time" to obtain accurate information from the employer, since the employer had been contacted prior to payment of benefits. He asserts that the General Division wrongly justified the incorrect payment of benefits on the basis of the employer's delay. The Applicant further notes that the General Division ignored his submissions with respect to the financial damage resulting from the late decision and resulting overpayment.

[8] While I agree with the Applicant that the General Division decision omitted to specify the date upon which the Commission made its decision to allocate the severance monies, and while it may well be that the Commission had obtained information from the employer at an earlier stage, these would not in any case constitute errors of fact upon which the decision was based. In other words, the timing of the Commission's inquiries, and the fault for the delayed notification to the Applicant, had no bearing upon the issues before the General Division. Those issues were solely whether the severance monies were earnings, and whether they were correctly allocated during the benefit period. The Applicant does not disagree with these determinations.

[9] As for the General Division's failure to consider the financial damage to the Applicant, this too had no bearing on the issues under appeal. While financial damage may be relevant to the Applicant's eligibility for a write-off of the overpayment, the General Division decision correctly pointed out that the Tribunal has no jurisdiction to address this issue. Only the Commission can write off amounts wrongly paid under s. 56 of the Regulations. Pursuant to ss. 112.1 and 113 of the *Employment Insurance Act*, the Commission's decision respecting the writing off of any amount payable may not be reconsidered by the Commission, and thus may not be appealed to the Tribunal.

[10] The Applicant has not raised an arguable ground of appeal upon which the proposed appeal may succeed since, even assuming that his arguments are correct, the General Division did not make an error with respect to the issues under appeal. Again, this matter is not about the fairness of the Commission's actions or about enforcement of the debt; it is only about the allocation of severance monies as earnings, during the Applicant's benefit period, which the Applicant has not disputed. There is no reasonable chance of success on appeal, and leave to appeal is thus refused.

THE APPLICANT'S DEBT

[11] Throughout the adjudication of this claim, the Applicant's primary concern has been the repayment of the debt resulting from the retrospective allocation of earnings, long after benefits had been received and, presumably, spent. It is not clear to me why the Commission did not respond to the Applicant's October 2015 objection to the notice of debt (which expressed

hardship in addition to the delayed notification of overpayment), by considering and issuing a formal write-off decision under s. 56 of the Regulations. This might well have resolved the matter without the need for resources to have been expended on reconsideration and two levels of appeal at the Tribunal.

[12] The potentially relevant provisions of s. 56 of the Regulations are as follows:

> 56(1) A penalty owing […] or an amount payable under section 43, 45, 46, 46.1 or 65 of the Act […] may be written off by the Commission if […]
>
> (f) the Commission considers that, having regard to all the circumstances, […]
>
> (ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the debtor, […]
>
> (2) The portion of an amount owing under section 47 or 65 of the Act in respect of benefits received more than 12 months before the commission notifies the debtor of the overpayment, including the interest accrued on it, may be written off by the Commission if […]
>
> (b) the overpayment arises as a result of
>
> (i) a delay or error made by the Commission in processing a claim for benefits […]

[13] As indicated previously, the Tribunal does not have jurisdiction over the issue of whether the Applicant's debt ought to be written off. Consequently, I can only recommend that the Commission issue a decision on this matter without further delay, in consideration of the Applicant's prompt reporting of severance monies, the unexplained 13-month delay in allocation of those earnings, and any resulting hardship, financial or otherwise, upon the Applicant. The Applicant is reminded that the Commission's write-off decisions are discretionary and cannot be appealed to the Tribunal. Such decisions are, however, subject to judicial review by the Federal Court.

DISPOSITION

[14] The application for leave to appeal is refused.

Shirley Netten
Member, Appeal Division