



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *E. S. v. Canada Employment Insurance Commission*, 2018 SST 253

Tribunal File Number: AD-18-122

BETWEEN:

**E. S.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: March 21, 2018

## DECISION AND REASONS

### DECISION

[1] The Tribunal refuses leave to appeal to the Appeal Division.

### INTRODUCTION

[2] On January 17, 2018, the General Division of the Tribunal determined that the money the Applicant received from his employer in September 2015 was earnings within the meaning of the *Employment Insurance Regulations* (Regulations) and that the money was properly allocated by the Respondent under the Regulations.

[3] The Applicant is deemed to have requested leave to appeal to the Appeal Division on February 22, 2018, after receiving the General Division decision on February 7, 2018.

### ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

### THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (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.”

[6] Subsection 58(2) of the DESD Act provides that “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

### ANALYSIS

[7] 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.

[8] In regards to the application for permission to appeal, before leave can be granted, the Tribunal needs to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

[9] The Applicant, in support of the application for leave to appeal, submits that he was dismissed from his employment of the previous 16 years on November 12, 2014, and that the reason given by his employer was misconduct. On November 13, 2014, his union filed a grievance (A0965) on his behalf. On September 1, 2015, a memorandum of settlement was prepared in relation to Grievance A0965. On September 2, 2015, he signed a settlement agreement, which allowed him to maintain his full seniority without interruption, put him on the payroll as of September 2, 2015, and granted him a one-time lump sum payment of money. The settlement agreement did not fulfill all of the conditions of the grievance.

[10] It was the Applicant's belief, at the time of settlement, that the benefits and monies were paid to him to settle the grievance, thereby eliminating the need for an arbitration hearing. Believing the employer was acting in good faith, he was surprised to receive the lump sum monies less deductions. It was not the amount he expected to receive from his employer.

[11] The Federal Court of Appeal has long held that a settlement payment made for wrongful dismissal is "income arising out of employment" unless the claimant can demonstrate that, due to "special circumstances," some portion of it should be regarded as compensation for some other expense or loss.

[12] The General Division concluded that the Applicant had failed to demonstrate that all or part of the sum he received as a result of his grievance amounted to something other than earnings within the meaning of the Regulations.

[13] The evidence before the General Division supports its conclusion that the monies received were to compensate for the period of time he was off and the lost wages for that period and that they had been negotiated through the union and the mediation process.

[14] The Applicant provided the General Division with a copy of the pay stub from his employer, which clearly demonstrates that income tax, Employment Insurance and Canada Pension Plan premiums were all deducted from the payment. This further supports that the money was paid to him as income and not for some other purpose. The Applicant has not provided a copy of the settlement agreement or any documentation to rebut the presumption of earnings, therefore an allocation of the monies per subsection 36(5) of the Regulations is supported.

[15] For the above-mentioned reasons and after reviewing the docket of appeal and the General Division decision and considering the Applicant's arguments in support of his request for leave to appeal, the Tribunal finds that the appeal has no reasonable chance of success.

## **CONCLUSION**

[16] The Tribunal refuses leave to appeal to the Appeal Division.

Pierre Lafontaine  
Member, Appeal Division