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

Citation: *A H. et al. v. Canada Employment Insurance Commission*, 2018 SST 457

Tribunal File Number: AD-17-869

BETWEEN:

A. H. et al.

Applicants

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: May 2, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal (Application) is granted.

OVERVIEW

[2] The Applicants, occasional teachers with various Ontario Catholic School Boards, received benefits under the *Employment Insurance Act* (EI Act). In addition, they received a lump sum payment due to a settlement agreement with their employer, at a time that could impact their EI benefits.

[3] The Respondent, the Canada Employment Insurance Commission, determined that the lump sum payments were "earnings" and allocated the payments to the week that the Applicants had ratified the settlement agreement. This resulted in an overpayment of EI benefits that the Applicants were required to repay.

[4] The Applicants appealed the Respondent's decision to the General Division of the Social Security Tribunal of Canada. The General Division found that the lump sum payments were "earnings," were not excluded from allocation, and should be allocated to the week that the Applicants ratified the settlement agreement.

[5] The Applicants seek leave to appeal the General Division decision on the basis that the General Division made an error in law by concluding that the lump sum payment was not excluded from the definition of "earnings." In the alternative, the Applicants submit that the payment should have been allocated pursuant to a different provision of the *Employment Insurance Regulations* (EI Regulations), which would not have resulted in an overpayment.

[6] I find that this appeal has a reasonable chance of success, because the General Division may have erred in its interpretation or application of ss. 35 and 36 of the EI Regulations.

ISSUE

[7] Is there an arguable case that the General Division erred in law or made a serious error in its findings of fact by concluding that the lump sum payments constituted earnings and should be allocated under s. 36(19)(*b*) of the EI Regulations?

ANALYSIS

[8] An applicant must seek leave to appeal in order to appeal a General Division decision. The Appeal Division must either grant or refuse leave to appeal, and an appeal can proceed only if leave to appeal is granted.[1]

[9] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there an arguable ground upon which the proposed appeal might succeed?[2]

[10] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success[3] based on a reviewable error.[4] The only reviewable errors are the following: the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; it erred in law in making its decision, whether or not the error appears on the face of the record; or it 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.

[11] The Applicants submit that the General Division made errors of law and serious errors in fact finding. Their representative made detailed submissions in the Application.

[12] Although the Applicants have submitted many grounds of appeal, the Appeal Division need not address all the grounds raised at this stage. Where individual grounds of appeal are interrelated, it may be impracticable to parse the grounds. One arguable ground of appeal may suffice to justify granting leave to appeal.[5] Therefore, I will address one possible error that

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[1] *Department of Employment and Social Development Act* (DESD Act) at ss. 56(1) and 58(3).
[2] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12; *Murphy v. Canada (Attorney General)*, 2016 FC 1208, at para. 36; *Glover v. Canada (Attorney General)*, 2017 FC 363, at para. 22.
[3] DESD Act at s. 58(2).
[4] *Ibid*. at s. 58(1).
[5] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

warrants further review – the alleged error in the General Division's finding that the payments constituted "earnings" – and not every possible error.

Is there an arguable case that the General Division erred by concluding that the Applicants' lump sum payments constituted earnings?

[13] I find that there is an arguable case on the ground of appeal that the General Division may have made an error of law or an error of mixed fact and law, specifically as it relates to whether the lump sum payments constituted earnings or were exempt from the definition of earnings under s. 35 of the EI Regulations.

[14] The first issue that the General Division needed to determine was whether the sum received was "income" and "earnings" pursuant to s. 35 of the EI Regulations.

[15] There is no dispute that the lump sum payments were "income" or that they fall within a broad definition of earnings. However, the Applicants argue that this income does not constitute "earnings" pursuant to s. 35(7)(*d*) of the EI Regulations because the payments were "retroactive increases in wages or salary."

[16] The General Division found that the lump sum payments were a one-time signing bonus tied to the ratification of the terms of the settlement agreement. Therefore, the payments did not fall within the exclusion set out in s. 35(7)(*d*).

[17] The Applicants submit that the General Division erred in its interpretation of s. 35(7)(*d*) as follows:

a) by restricting the exception to instances in which the payments were for or arose out of the performance of services; and

b) by requiring that retroactivity be express and that the payment not be made in a single transaction.

[18] The General Division found that the settlement agreement did not indicate that the payments were a "retroactive increase" and concluded that the payments were a one-time signing bonus. Therefore, they could not be retroactive increases in wages or salary and could not fall within the exclusion.

[19] Paragraph 35(7)(*d*) states that the portion of a claimant's income derived from "retroactive increases in wages or salary" does not constitute "earnings." Therefore, those amounts are not to be taken into account and need not be allocated.

[20] The General Division needed to interpret the meaning of "that portion of the income of a claimant that is derived from […] retroactive increases in wages or salary" and apply it to the specific amounts and particular circumstances in this appeal.

[21] Whether the General Division erred in its interpretation or application of s. 35(7)(*d*) warrants further review because:

a) If the General Division erred in its interpretation, it would have erred in law in arriving at its decision; and

b) If the General Division erred in its application, it would have based its decision on an error of mixed fact and law.

[22] It is premature at the leave to appeal stage for the Appeal Division to conclude that the General Division did or did not err in relation to s. 35(7)(*d*). However, in the Application, the Applicants have raised arguments upon which the proposed appeal might succeed.

[23] In addition, I note that there appears to be a lack of consensus in case law in relation to whether the Appeal Division has jurisdiction on questions of mixed fact and law.[6] The Applicants have described the conclusion that the lump sum payment was a signing bonus as a finding of mixed fact and law.[7]

[24] Therefore, the parties are asked to provide submissions (on the merits of this appeal) specific to whether the Appeal Division has jurisdiction on questions of mixed fact and law, in light of recent Federal Court of Appeal jurisprudence and long-established case law.

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[6] *Quadir v. Canada (Attorney General)*, 2018 FCA 21, at para. 9; *Sharma v. Canada (Attorney General)*, 2018 FCA 48, at para. 12; *Canada (Attorney General) v. Jean*, 2015 FCA 242, at para. 14; *De Jesus v. Canada (Attorney General)*, 2013 FCA 264, at para. 45.
[7] Application at para. 40.

CONCLUSION

[25] The Application is granted pursuant to ss. 58(1)(*b*) and (*c*) of the *Department of Employment and Social Development Act*.

[26] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVE:	Bernard A. Hanson, Cavalluzzo Shilton McIntyre Cornish LLP, for the Applicants