



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. I. v. Canada Employment Insurance Commission*, 2018 SST 609

Tribunal File Number: AD-18-54

BETWEEN:

N. I.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: May 24, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, N. I. (Claimant), made an initial claim for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), informed the Claimant that her vacation pay would be allocated to a period during her benefit period, after finding that this income was considered earnings. The Claimant requested a reconsideration of this decision on the basis that the Commission should not allocate her entire vacation pay payout because this was accumulated over many years of employment. The Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal.

[3] The General Division concluded that the Claimant had received earnings pursuant to s. 35(2) of the *Employment Insurance Regulations* (Regulations) and that these earnings were correctly allocated pursuant to s. 36(9) of the Regulations because the earnings were paid by reason of a separation from an employment.

[4] The Claimant now seeks leave to appeal the General Division's decision to the Appeal Division. She argues that the General Division erred in law since the vacation pay paid on separation should have first been allocated toward the unpaid vacation time used during the accrual period before being allocated to the weeks in which benefits were payable.

[5] The Tribunal must decide whether the Claimant's appeal has a reasonable chance of success based on a reviewable error committed by the General Division.

[6] The Tribunal grants leave to appeal because the Claimant's appeal has a reasonable chance of success.

ISSUE

[7] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error committed by the General Division?

ANALYSIS

[8] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) specifies the only grounds of appeal of a General Division decision. These reviewable errors are that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; or 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.

[9] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove her case; rather, she must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, the Claimant must show that there is arguably some reviewable error upon which the appeal might succeed.

[10] Therefore, 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.

[11] This means that the Tribunal must be in a position to determine, in accordance with s. 58(1) of the DESD Act, whether there is an issue of natural justice, jurisdiction, law, or fact that may lead to the setting aside of the General Division decision under review.

Issue: Does the Claimant's appeal have a reasonable chance of success based on a reviewable error committed by the General Division?

[12] In her application for leave to appeal, the Claimant argues that the General Division erred in law since the vacation pay paid on separation should have first been allocated toward the

unpaid vacation time used during the accrual period before being allocated to the weeks in which benefits were payable. She essentially submits that the General Division erred in its interpretation of s. 36 of the Regulations.

[13] After reviewing the appeal docket and the General Division decision and considering the Claimant's arguments in support of her request for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success.

CONCLUSION

[14] The Tribunal grants leave to appeal to the Appeal Division.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	N. I., self-represented
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