



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *L. B. v. Canada Employment Insurance Commission*, 2018 SST 624

Tribunal File Number: AD-18-239

BETWEEN:

L. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: June 8, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, L. B. (Claimant), made an initial claim for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), informed the Claimant that she had received an amount as vacation pay and lost salary, and that the amounts had to be allocated over her benefit period. The Claimant requested a reconsideration of that decision on the basis that the amounts received followed the relinquishment of her reinstatement rights and that the amounts were not considered earnings under the *Employment Insurance Regulations* (Regulations). The Commission maintained its decision. The Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal.

[3] The General Division determined that the compensation had not been paid to the Claimant after she relinquished her right to reinstatement. It found that the amounts were set by an Administrative Labour Tribunal (ALT) decision following a complaint for wrongful dismissal, and that nothing in that decision indicates that the amount was paid to the Claimant for relinquishing her right to be reinstated.

[4] The General Division found that the sums the Claimant received were earnings under s. 35(2) of the Regulations and that those amounts should be allocated as of the week she stopped working, in accordance with s. 36(9) of the Regulations.

[5] The Claimant now seeks leave from the Social Security Tribunal to appeal the General Division's decision.

[6] In support of her application for leave to appeal, the Claimant argued that the sums were paid as compensation for relinquishing her reinstatement rights, that they were not earnings under s. 35 of the Regulations, and that, for that reason, they did not need to

be allocated under s. 36 of the Regulations. She argued that the reinstatement was ordered by the ALT and not proposed by the employer, which refused to comply with the ALT's order.

[7] The Social Security Tribunal must decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal could succeed.

[8] The Social Security Tribunal grants leave to appeal because the appeal has a reasonable chance of success based on at least one of the grounds of appeal raised by the Claimant.

ISSUE

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

ANALYSIS

[10] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the only grounds of appeal for an Appeal 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.

[11] 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 his case, but he must establish that his appeal has a reasonable chance of success. In other words, the Claimant must show that there is arguably some reviewable error based on which the appeal might succeed.

[12] The Social Security Tribunal will grant leave to appeal if it is satisfied that at least one of the Claimant's stated grounds of appeal has a reasonable chance of success.

[13] This means that the Social Security Tribunal must be in a position to determine, in accordance with s. 58(1) of the DESDA, whether there is an issue of natural justice, jurisdiction, law, or fact that may lead to the setting aside of the 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?

[14] In support of her application for leave to appeal, the Claimant argued that the sums were paid as compensation for relinquishing her reinstatement rights, that they were not earnings under s. 35 of the Regulations, and that, for that reason, they did not need to be allocated under s. 36 of the Regulations. She argued that the reinstatement was ordered by the ALT and not proposed by the employer as the General Division found. Nevertheless, the employer refused to comply with the ALT's order

[15] The Claimant claims the General Division erred in law by not applying the teachings of the Federal Court of Appeal, which instruct that sums paid as compensation for the relinquishment of reinstatement rights are not earnings under s. 35 of the Regulations.¹

[16] After reviewing the appeal file, the General Division's decision, and the arguments in support of the application for leave to appeal, the Social Security Tribunal finds that the appeal has a reasonable chance of success. The Claimant has raised an issue of law that may lead to the setting aside of the decision under review.

¹ *Meechan v. Canada (Attorney General)*, 2003 FCA 368.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	L. B., self-represented
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