



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *A. B. v. Canada Employment Insurance Commission*, 2018 SST 821

Tribunal File Number: AD-18-492

BETWEEN:

A. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: August 16, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, A. B. (Claimant), worked for X, and his employment was terminated. When the Claimant's employment was terminated, the employer paid the Claimant \$1,741.57 as vacation pay. The Claimant submitted a grievance for wrongful dismissal, and the negotiations between the union representing the Claimant and the employer resulted in a settlement agreement, providing the Claimant with an additional \$5,000.

[3] The Canada Employment Insurance Commission determined that these amounts constituted earnings and allocated them. This caused an overpayment. The Claimant requested a reconsideration of this decision on the basis that the amounts received should not be considered earnings because they were paid to him as compensation for moral damages and injury to his reputation and as reimbursement for expenses that were incurred because of his termination of employment. However, the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[4] The General Division determined that the Claimant had successfully demonstrated that a portion of the amount received should be left out of the earnings calculation, because there were particular circumstances surrounding the termination of employment and the negotiation of the agreement, and that what was left over should be allocated as of the week of the Claimant's separation from employment, in accordance with s. 36(9) of the *Employment Insurance Regulations* [(Regulations)].

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

[6] In support of his application for leave to appeal, the Claimant argues that the amount received does not constitute earnings under s. 35 of the Regulations and, for this reason, it does not have to be allocated under s. 36 of the Regulations. He submits that his credible and uncontradicted testimony, which is supported by documentary evidence, shows that the lump-sum payment was intended to compensate him for moral damages and injury to his reputation and that it was not made in return for work performed or as a result of employment.

[7] The Tribunal must decide whether there is an arguable case that the General Division made a reviewable error that may give the appeal a reasonable chance of success.

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

ISSUE

[9] In his grounds of appeal, has the Claimant raised a reviewable error made by the General Division that may give the appeal a reasonable chance of success?

ANALYSIS

[10] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) 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.

[11] An application for leave to appeal is a preliminary step to a hearing on the merits of the case. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met at the hearing of the appeal on the merits. At the application for 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, he must show that there is arguably some reviewable error based on which the appeal may succeed.

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

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

Issue: In his grounds of appeal, has the Claimant raised a reviewable error made by the General Division that may give the appeal a reasonable chance of success?

[14] In support of his application for leave to appeal, the Claimant argues that the amount received does not constitute earnings under s. 35 of the Regulations and, for this reason, it does not have to be allocated under s. 36 of the Regulations.

[15] The Claimant submits that his credible and uncontradicted testimony, which is supported by documentary evidence, shows that the lump-sum payment was intended to compensate him for moral damages and injury to his reputation and that it was not made in return for work performed or as a result of employment.

[16] The Claimant argues that the General Division erred because it made a decision without regard to the evidence brought before it.

[17] After reviewing the appeal file, the General Division's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Claimant has raised an issue concerning the General Division's interpretation of s. 35 of the Regulations that may lead to the setting aside of the decision under review.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	A. B., self-represented
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