



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. K. v. Canada Employment Insurance Commission*, 2018 SST 1140

Tribunal File Number: AD-18-626

BETWEEN:

D. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: November 9, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] After being let go from his employment in April 2015, the Applicant, D. K. (Claimant), applied for and began receiving Employment Insurance benefits. In May 2015, the Claimant began working as a technician for a computer technology company. He continued to receive Employment Insurance benefits.

[3] On February 7, 2018, the Respondent, the Canada Employment Insurance Commission (Commission), wrote to the Claimant advising that, according to its records, the Claimant had failed to declare his wages from the week of May 3, 2015, to the week of February 14, 2016. The Commission adjusted the allocation of these earnings, resulting in an overpayment. The Commission concluded that the Claimant made false representations and, as a result, imposed a penalty.¹ The Claimant requested a reconsideration, on the basis that the Commission had overlooked the fact that he had a net loss from working at the computer technology company, so from his perspective, he did not have any income. At the same time, he was looking for a “real full-time or part-time job.”² On reconsideration, the Commission maintained its position on the earnings and violation issues but, taking into account “mitigating circumstances,” reduced the amount of the penalty.³

[4] The Claimant appealed the Commission’s reconsideration decision to the General Division on the basis that the Commission never gave him an opportunity to explain his case or to provide any documentation.⁴ The General Division dismissed his appeal. It found that the Commission had correctly allocated the Claimant’s wages from his employer and that it had exercised its discretion in a judicial manner when it imposed a penalty on his claim.

¹ Commission’s letter dated February 7, 2018, at GD3-149 to GD3-152.

² Request for Reconsideration, at GD3-154 to GD3-155.

³ Commission’s reconsideration decision dated April 7, 2018, at GD3-165 to GD3-166.

⁴ Notice of Appeal – Employment Insurance Form, Social Security Tribunal of Canada - General Division, at GD2.

[5] The Claimant is now seeking leave to appeal. I must now decide whether the appeal has a reasonable chance of success, meaning whether there is an arguable case on any of the grounds that he has raised.

ISSUES

[6] The following issues are before me:

- Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice?
- Issue 2: Is there an arguable case that the General Division based its decision on any erroneous findings of fact that it made without regard for the material before it?

ANALYSIS

[7] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under section 58(1) of the DESDA and that the appeal has a reasonable chance of success. This is a relatively low bar. A claimant does not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based

on a reviewable error. The Federal Court endorsed this approach in *Joseph v Canada (Attorney General)*.⁵

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice?

[9] The Claimant submits that the General Division failed to observe a principle of natural justice. Natural justice is concerned with ensuring that applicants have a fair opportunity to present their case and that the proceedings are fair and free of any bias. Natural justice relates to issues of procedural fairness before the General Division, rather than the impact of the General Division's decisions on an applicant. The Claimant's allegations do not address any issues of procedural fairness or of natural justice as they relate to the General Division. The Claimant has not pointed to or provided any evidence—nor do I see any evidence—to suggest that the General Division might have deprived him of an opportunity to fully and fairly present his case or that it exhibited any bias against him. As a result, I am not satisfied that the appeal has a reasonable chance of success on this ground.

Issue 2: Is there an arguable case that the General Division based its decision on any erroneous findings of fact without regard for the material before it?

[10] The Claimant denies that he received any wages from the computer technology company. He claims that the company merely reimbursed him for his expenses, such as transportation expenses and equipment. He argues that by failing to consider this evidence, the General Division based its decision on erroneous findings of fact without regard for the material before it.

[11] The General Division noted that the Claimant incurred travel and other expenses and that he argued that it was unnecessary to report any earnings because he sustained a net loss while working for the computer technology company. The General Division made no mention in its decision that any payment from the company was to reimburse the Claimant for his expenses. Indeed, the General Division found that the company paid the Claimant “for the performance of services.”⁶

⁵ *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁶ General Division decision at para 19.

[12] I have reviewed the documentary record and am unable to locate any evidence to support the Claimant's allegations that the payments from the employer were to reimburse him for his expenses instead of his services. It is insufficient for the Claimant to show that he had to pay travel and other expenses or that he suffered a net loss from working at the computer technology company to establish that the payments were reimbursement for expenses. In fact, the Claimant noted that he paid taxes and made Employment Insurance contributions. He also testified that he submitted timesheets and that the payments he received were based on his timesheets and an hourly wage.⁷ This does not assist the Claimant, because it suggests that the employer paid him for his services rather than reimbursing him for any expenses.

[13] The Claimant also argues that the General Division overlooked the fact that he relied on Employment Insurance benefits to sustain him and that he was looking for work: he had attended numerous interviews and sent out thousands of applications. In fact, the General Division was aware of the Claimant's evidence that he needed a stable income to support his living expenses. However, this particular evidence was irrelevant to the issue of whether the payments represented earnings, although it was relevant to the issue of whether the Claimant knowingly misrepresented his earnings to the Commission. Evidence regarding the Claimant's job search efforts was also irrelevant to any of the issues before the General Division.

[14] If the Claimant is asking that I reassess this matter, I am unable to do so under section 58(1) of the DESDA, because it sets out limited grounds of appeal. This particular provision does not provide for any reassessments as a ground of appeal.

[15] Furthermore, I have reviewed the underlying record. I do not see that the General Division erred in law, whether or not the error appears on the record, or that it failed to properly account for any of the key evidence before it.

[16] The General Division properly identified and applied the legal test before it when it decided whether the payments were earnings for the purposes of the *Employment Insurance Act*, whether the Claimant had knowingly made false representations, and whether the Commission exercised its discretion judicially when it assessed the amount of the Claimant's penalty and when it imposed a very serious violation on the Claimant. In assessing and weighing the

⁷ Starting at approximately 12:30 of audio recording of General Division hearing.

evidence before it, the General Division applied the relevant provisions of the *Employment Insurance Act* and the case law.

CONCLUSION

[17] I am not satisfied that the appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

PARTY:	D. K., self-represented
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