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

Citation: *R. B. v Canada Employment Insurance Commission*, 2019 SST 8

Tribunal File Number: AD-18-424

BETWEEN:

R. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: January 8, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. B. (Claimant), worked as a security guard for multiple employers for much of 2016 and into 2017. His last employment ended due to a shortage of work. The Claimant applied for Employment Insurance regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission), allowed his claim for benefits. On reconsideration, the Commission ultimately determined that the Claimant was entitled to a weekly benefit rate of $258 over 21 weeks, which was less than it had previously calculated. This effectively resulted in an overpayment. The Claimant appealed this reconsideration decision to the General Division. In dismissing the appeal, the General Division member found that the Commission had properly calculated the Claimant's weekly benefit rate, the number of weeks of benefits, and the amount of the overpayment.

[3] The Claimant is now seeking leave to appeal the General Division's decision on the grounds that the General Division erred in law and based its decision on an erroneous finding of fact without regard for the material before it. I must determine whether the appeal has a reasonable chance of success; in other words, I must decide whether there is an arguable case. I am refusing the application because there is no reasonable chance of success on appeal.

ISSUES

[4] The issues are:

> Issue 1: Did the General Division err in law by holding the Claimant liable for the overpayment?
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> Issue 2: Did the General Division err in law by failing to deduct the amount of any provincial financial assistance he could have received from the amount of the overpayment?

Issue 3: Did the General Division base its decision on an erroneous finding of fact by failing to consider some of the evidence?

ANALYSIS

[5] 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;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[6] 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. Claimants do 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)*.[1]

[7] The Claimant argues that the General Division erred under sections 58(1)(b) and (c) of the DESDA.

Issue 1: Did the General Division err in law by holding the Claimant liable for the overpayment?

[8] The Claimant wrote that "[t]he legal culpability of the decision is on Mrs. Khan [the Commission's representative]."[2] In the Claimant's opening submissions before the General

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[1] *Joseph v Canada (Attorney General)*, 2017 FC 391.
[2] Request for leave to appeal, at AD1-2.

Division, he argued that he should not be held responsible for any overpayment because he did not create it. He did not calculate his Employment Insurance weekly benefit rate or weeks of benefits and relied on the Commission to perform all these calculations. He argues that the Commission made multiple errors and that it miscalculated the weekly benefit rate or weeks of benefits—at one point even crediting him with 60% more insurable hours than he had actually worked. He argues that the Commission alone should bear the responsibility for any overpayment that resulted from its errors.

[9] I agree that the Commission made multiple errors, including failing to send the Claimant timely notices of adjustments, and that any explanations it provided for any calculations were difficult to follow. The worksheet and breakdowns of overpayment, for instance, provide little explanation. The General Division also noted that the Commission acknowledged that it had made clerical errors. The General Division addressed these errors.

[10] Over time, the Commission recalculated the weekly benefit rate and the weeks of benefits based on information that it received. As the documentation shows, some of the Claimant's employers were either late or unprepared to provide him with a Record of Employment. Indeed, the Claimant even had to make requests for a Record of Employment from three of his employers.[3] He also had to seek a worker status ruling from the Canada Revenue Agency.[4] In addition, the Canada Revenue Agency issued rulings on September 15, 2017, establishing his earnings over a certain time frame, for three of the Claimant's places of employment. The Commission also requested rulings.

[11] On August 2, 2017, the Commission reduced the weekly benefit rate and the weeks of benefits, based on amended records of employment.[5] On October 20, 2017, following the rulings from the Canada Revenue Agency, the Commission maintained its decision on the weekly benefit rate and the weeks of benefits.[6]

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[3] Requests for Record of Employment, at GD3-44 to GD3-49.
[4] Request for a Ruling as to the Status of a Worker under the Canada Pension Plan and/or the *Employment Insurance Act*, at GD3-50.
[5] Commission's letter dated August 2, 2017, at GD3-85 to GD3-86.
[6] Commission's reconsideration decision dated October 3, 2017, at GD3-102 to GD3-104. Note: there was also a reconsideration decision dated October 30, 2017, at GD3-106 to GD3-107, which replaced the letter of October 3, 2017. The October 3, 2017, letter incorrectly referred to an older weekly benefit rate of $389, instead of $263.

[12] Despite the fact that an overpayment arose because the Commission adjusted its calculation of the weekly benefit rate and the number of weeks of benefits to incorporate additional information it received, section 43(b) of the *Employment Insurance Act* requires a claimant to repay any benefits to which they are not entitled. As a result, the Commission is not responsible for any overpayments that resulted after it adjusted its calculations when it received complete or amended information. Because of section 43(b) of the *Employment Insurance Act*, I find that the appeal does not have a reasonable chance of success on this particular ground.

Issue 2: Did the General Division err in law by failing to deduct the amount of any provincial financial assistance the Claimant could have received from the amount of the overpayment?

[13] The Claimant claims that he would have applied for and received provincial financial assistance if he had been aware that he was entitled to only a vastly reduced Employment Insurance benefit. He argues that, as such, the General Division should have deducted the amount of provincial financial assistance for which he might have qualified (which he calculates would have been approximately $3,000) from any overpayment he owes to the Commission.

[14] There are no provisions under the *Employment Insurance Act* that allow for any deductions of provincial financial assistance that the Claimant might have received under the circumstances that the Claimant encountered. Accordingly, the General Division did not err in law in this regard.

Issue 3: Did the General Division base its decision on an erroneous finding of fact by failing to consider some of the evidence?

[15] The Claimant argues that the General Division based its decision on several erroneous findings of fact without regard for the material before it. In particular, he asserts that the decision does not reflect the evidentiary record for the following reasons:

(a) the decision does not reflect what took place at the General Division hearing on May 2, 2018;

(b) the General Division referred to several telephone calls that he denies ever took place; and

(c) he has a letter that reads, "Total Balance' 19$."[7] He argues that even his member of Parliament agrees with him that that letter is legally binding and his overpayment is therefore limited to $19.

[16] The Claimant does not explain why the General Division's decision does not reflect what took place during the hearing on May 2, 2018, but, as the General Division member explained during the hearing, the General Division's jurisdiction was limited to issues that arose from the Commission's reconsideration decision. The Claimant gave considerable evidence, but a decision-maker does not need to write exhaustive reasons addressing all the evidence and facts before it. As the Federal Court of Appeal held in *Simpson v Canada (Attorney General)*,[8] a tribunal is not required to refer to all of the evidence before it, but it is presumed to have considered all the evidence.

[17] When determining whether the Commission had properly calculated the weekly benefit rate, the General Division had to identify the 20 highest weeks of insurable earnings within the Claimant's qualifying period between January 17, 2016, and January 14, 2017. The General Division noted that the Commission set out the Claimant's earnings on a worksheet and, from this, derived the 20 highest weeks of insurable earnings.[9] I note that some weeks of earnings on the worksheet do not match the estimated earnings that the Claimant initially provided with his application for Employment Insurance benefits. These figures generally reconcile, but there are 4 weeks where he underestimated his earnings and 2 weeks where he overestimated his earnings. However, the net difference from the worksheet was in the Claimant's favour. Significantly, the Claimant does not contest the General Division's findings regarding his earnings for these 20 weeks now. For this reason, I find that there is no arguable case that the General Division made an erroneous finding regarding the earnings for the 20 highest weeks of insurable earnings in a perverse or capricious manner or without regard for the material before it.

[18] One of the Claimant's primary arguments before the General Division was that the Commission had erred when determining some of his work start dates.[10] For instance, the

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[7] Request for leave to appeal, at AD1-3.
[8] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[9] Commission's worksheet – Allocation of insured and/or prescribed hours, at GD3-114 to GD3-115.
[10] Starting at approximately 11:44, 13:05, and 16:30 of audio recording of General Division hearing.

Commission relied on a Record of Employment[11] from one of his employers when finding that he had started working there on September 8, 2016, but he notes that the Canada Revenue Agency ruled that he had worked there since August 26, 2016.[12] Similarly, the Commission found that he had started his employment with another employer on May 10, 2016,[13] but the Canada Revenue Agency ruled that he started on January 15, 2016.[14] That employer provided two records of employment for two different time frames in 2016, and, collectively, they totaled 428 insurable hours. The Claimant argues, in other words, that both the Commission and the General Division neglected to include earnings in their respective calculations.

[19] Unless the Claimant's earnings during these weeks were among the 20 highest weeks of insurable earnings in his qualifying period, they were irrelevant to the calculation of his weekly benefit rate. The Claimant did not identify the weeks between January 15 and May 10, 2016, or the weeks between August 26, 2016, and September 8, 2016, as part of his 20 weeks when he had the highest earnings.[15] The Claimant identified the week of May 8, 2016, as one of his weeks of highest earnings, but the Commission included this week in its calculation and did not overlook the earnings for this week. Indeed, the earnings set out in the worksheet for the week of May 8, 2016, match the Claimant's estimate of earnings for this week. I find that there is no arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it on this issue.

[20] The Claimant denies that the telephone calls that the General Division referred to in its decision ever took place. In fact, the General Division referred to the notes in the hearing record that suggested that these telephone calls had indeed taken place. The General Division was entitled to rely on the evidentiary record before it. However, I find that the General Division did not base its decision on the substance of these telephone calls or on whether these telephone calls ever took place. From this standpoint, it is irrelevant whether these telephone calls ever took place. As such, I find that the appeal does not have a reasonable chance of success based on the argument that these telephone calls did not take place.

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[11] Record of Employment dated March 30, 2017, at GD3-80.
[12] Canada Revenue Agency Employment Insurance ruling dated September 18, 2017, at GD3-91 to GD3-92.
[13] Record of Employment dated July 26, 2017, at GD3-84.
[14] Canada Revenue Agency Employment Insurance ruling dated September 15, 2017, at GD3-93 to GD3-94.
[15] Claimant's "best weeks" estimate, at GD3-11 to GD3-13.

[21] The Claimant relies on a Notice of Debt dated November 17, 2017, issued by the Commission, in the amount of $19.[16] He argues that the document is legally binding and establishes the full extent of any net overpayment that he owes. The General Division addressed the Claimant's arguments in this regard at paragraph 42, so there is no issue that the General Division ignored this evidence. As the General Division explained, the Commission made several recalculations, which led it to issue several notices of debt. Ultimately, the General Division found that it was bound by the provisions of the *Employment Insurance Act* when calculating the weekly benefit rate and weeks of benefits and when determining the amount of any overpayment. As a result, it did not err in law or base its decision on an erroneous finding of fact without regard for the material before it.

[22] 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.

[23] I note that the Claimant suggested that the General Division should waive any overpayment because he is not responsible for any errors that led to the overpayment. However, the Federal Court of Appeal has maintained that when a claimant receives money to which they are not entitled, any errors that an employer or the Commission may have made do not exempt a claimant from repaying the amount of any overpayment.[17] As the General Division concluded, sections 43 and 44 of the *Employment Insurance Act* require the Claimant to repay the overpayment.

[24] The Claimant may have two options available to him: (1) he can request that the Commission formally consider writing off the debt in accordance with section 56 of the *Employment Insurance Regulations* and can appeal the matter to the Federal Court if he is unhappy with the Commission's response, or (2) he can contact the Canada Revenue Agency regarding a repayment schedule. Otherwise, neither the General Division nor the Appeal Division can waive or write off the overpayment.

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[16] Notice of Debt Details, GD3-101.
[17] *Lanuzo v Canada (Attorney General)*, 2005 FCA 324.

CONCLUSION

[25] Given the above reasons, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

SUBMISSIONS:	R. B., Applicant No submissions from the Respondent