



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *B. S. v Canada Employment Insurance Commission*, 2019 SST 11

Tribunal File Number: AD-18-771

BETWEEN:

**B. S.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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Decision on Request for Extension of Time by: Pierre Lafontaine

Date of Decision: January 10, 2019

## DECISION AND REASONS

### DECISION

[1] The Social Security Tribunal of Canada (Tribunal) refuses to grant an extension of time to file an application for leave to appeal.

### OVERVIEW

[2] The Applicant, B. S. (Claimant), made an initial claim for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), notified the Claimant that it had adjusted the allocation of his total earnings before deductions based on new information provided by his employer. The Claimant requested a reconsideration of this decision, and the Commission maintained its initial decision. The Claimant appealed to the General Division of the Tribunal.

[3] The General Division found that the amounts the Claimant received from his employer were earnings under section 35(2) of the *Employment Insurance Regulations* (EI Regulations) and that the earnings were paid to the Claimant for services performed under his employment contract. As such, they had to be allocated to the period in which the services were performed, as per section 36(4) of the EI Regulations.

[4] The Claimant now seeks leave to appeal the General Division's decision to the Appeal Division.

[5] In support of his application for leave to appeal, the Claimant puts forward that he worked less than what his employer declared.

[6] The Tribunal sent a letter to the Claimant requesting a detailed explanation of his grounds of appeal in accordance with section 58 of the *Department of Employment and Social Development Act* (DESD Act). It also informed him that it was insufficient to simply repeat what he had said before the General Division. The Claimant did not reply to the Tribunal's request.

[7] The Tribunal must decide whether the application for leave to appeal was filed before the legal deadline, if not, whether it will allow an extension of time to file the application, and, if it does, whether the appeal has a reasonable chance of success.

[8] The Tribunal refuses to grant an extension of time to file the application for leave to appeal.

## **ISSUES**

[9] The Tribunal must decide whether the application for leave to appeal was filed before the legal deadline, if not, whether it will allow an extension of time to file the application, and, if it does, whether the appeal has a reasonable chance of success.

## **ANALYSIS**

[10] Section 58(1) of the 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 had 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, he must instead 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.

[12] 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.

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

**Issue no 1: Was the application for leave to appeal filed before the legal deadline?**

[14] No. The Claimant filed his application for leave to appeal on November 20, 2018. The General Division decision was communicated to the Claimant on February 16, 2018.

**Issue no 2: Will the Tribunal allow an extension of time for the Claimant to file his application for leave to appeal?**

[15] No. In deciding whether to grant the Claimant an extension of time to file an application for leave to appeal to the Appeal Division, the overriding consideration is whether the interest of justice favours granting the extension.<sup>1</sup>

[16] In determining whether the interest of justice favours granting an extension of time, the relevant factors to consider are whether:

- a) there is an arguable case on appeal;
- b) special circumstances justify the delay in filing the notice of appeal;
- c) the delay is excessive; and
- d) the Commission will be prejudiced if the extension is granted.

[17] Although the Commission will not be prejudiced by the delay involved with filing the application for leave to appeal, the Tribunal finds that the delay of over eight months before filing the leave to appeal application is excessive. The Claimant has not identified any special circumstances that prevented him from filing a leave to appeal application before the legal deadline.

[18] Furthermore, the Tribunal is not convinced that the Claimant has an arguable case or that the appeal has a reasonable chance of success.

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<sup>1</sup> *X (Re)*, 2014 FCA 249; *Grewal v Minister of Employment and Immigration*, [1985] 2 FC 263 (FCA).

[19] In support of his application for leave to appeal, the Claimant puts forward that he worked less than what his employer declared.

[20] The General Division did not find the Claimant's evidence about his work for the employer to be credible due to inconsistencies and discrepancies and because he was unable to give details or a complete explanation of the discrepancies. It gave more weight to the employer's business records and the supporting time sheets of its client than to the Claimant's inconsistent and evasive statements.

[21] The Federal Court of Appeal has found that the burden of proof for disputing the employer's pay information rests with the claimant and that mere allegations intended to show doubt are insufficient.<sup>2</sup>

[22] It is therefore not sufficient for a claimant to merely cast doubt on the employer's evidence. Claimants must provide countering evidence before the General Division, which the Claimant has not done. In light of the evidence before it, the General Division could not simply arrive at a different conclusion than it did.

[23] In his leave to appeal application, the Claimant would essentially like to present his case again to the Appeal Division.

[24] Unfortunately for the Claimant, an appeal to the Appeal Division of the Tribunal is not a new hearing where a party can present its evidence again and hope for a new, favourable outcome.

[25] After considering all the above factors, the Tribunal is not convinced that the interest of justice favours granting the extension.

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<sup>2</sup> *Déry v Canada (Attorney General)*, 2008 FCA 291.

## CONCLUSION

[26] The Tribunal refuses to grant an extension of time to file an application for leave to appeal.

Pierre Lafontaine  
Member, Appeal Division

REPRESENTATIVE:	B <del>ounphet</del> S <del>oukphonh</del> , self-represented
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