



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. D. v Canada Employment Insurance Commission*, 2019 SST 305

Tribunal File Number: AD-18-446

BETWEEN:

G. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: March 27, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, G. D., was laid off from his job and applied for benefits under the *Employment Insurance Act* (EI Act). He arguably received regular Employment Insurance (EI) benefits while working.

[3] The Respondent, the Canada Employment Insurance Commission, determined that the Appellant had failed to declare his employment while on claim for benefits. It issued a penalty and notice of violation and the Appellant was required to repay the overpayment of benefits.

[4] The Appellant appealed the Respondent's decision to the General Division of the Social Security Tribunal of Canada. The General Division found that the Appellant knowingly made false or misleading statements by failing to declare his work earnings and that the Respondent exercised its discretion properly in determining the amount of the penalty.

[5] The Appellant was granted leave to appeal the General Division decision on the basis that the General Division conducted the hearing in his absence and may have failed to observe a principle of natural justice by so doing.

[6] The General Division did not make any reviewable errors. The appeal is dismissed.

PRELIMINARY MATTERS

[7] The Respondent advised that it would not be participating in the appeal hearing and would rely on its written submissions.

ISSUES

[8] Did the General Division fail to observe a principle of natural justice by proceeding with the hearing in the Appellant's absence?

[9] Did the General Division err in law in making its decision by misinterpreting or misapplying the law as it relates to the penalty and violation issued to the Appellant by the Respondent?

[10] Did the General Division make a serious error in its findings of fact by concluding that the Appellant knowingly made false or misleading statements and that the Respondent exercised its discretion in a judicial manner?

ANALYSIS

[11] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, 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.¹ Because the General Division may have erred in law or made an error of mixed fact and law when making its decision, the Appeal Division granted leave to appeal.

[12] The Appeal Division does not owe any deference to the General Division on questions of natural justice, jurisdiction, or law.² In addition, the Appeal Division may find an error in law whether or not it appears on the face of the record.³

[13] When a party alleges that the General Division made an erroneous finding of fact, the decision must be based on that finding of fact. In addition, it is not enough that the finding is **just** erroneous; it must have been made in a perverse or capricious manner or without regard for the material before it, also.⁴

Issue 1: Did the General Division fail to observe a principle of natural justice by proceeding with the hearing in the Appellant's absence?

[14] No, the General Division did not fail to observe a principle of natural justice.

¹ *Department of Employment and Social Development Act* (DESD Act), s 58(1).

² *Canada (Attorney General) v Paradis* and *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19.

³ DESD Act, s 58(1)(b).

⁴ *Ibid.*, s 58(1)(a).

[15] It is settled law that an appellant has the right to expect a fair hearing with a full opportunity to present their case before an impartial decision-maker.⁵

[16] Here, the Appellant did not attend the General Division hearing and submits that he did not have a full opportunity to present his case.

[17] The General Division noted that the Appellant did not attend the hearing, despite the fact that a Notice of Hearing had been delivered and signed for.⁶ It was satisfied that the Appellant had received notice of the hearing, and it proceeded in his absence. The Respondent was not represented at the hearing.

[18] The General Division hearing was scheduled for May 16, 2018. The Tribunal file shows that the Appellant called the Tribunal on May 24, 2018, to say that he had missed his hearing because he was evicted from his apartment; he asked for another hearing date.

[19] At the Appeal Division hearing, the Appellant confirmed that he had received the Notice of Hearing for the May 16, 2018 hearing date and that he had not contacted the Tribunal before the hearing date to say he could not attend. The Appellant explained that he was under a lot of stress in May 2018; he had received threats of eviction because he could not pay his rent, and he was preoccupied with removing his personal things before he was locked out of his apartment or his things were taken away. He stated that he forgot about the hearing and only realized that he had missed it when he was unpacking after moving to a friend's place. As soon as he realized this lapse, he called the Tribunal (on May 24, 2018). The General Division decision was issued on May 23, 2018.

[20] The General Division did not prevent or interfere with the Appellant's opportunity to present his case at a hearing. It had scheduled an oral hearing by telephone to give the Appellant this opportunity.

[21] The General Division is authorized to proceed in a party's absence if it is satisfied that the party has received notice of the hearing.⁷ The Appellant was notified of the hearing; he had

⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 21–22.

⁶ General Division decision at para. 3.

⁷ *Social Security Tribunal Regulations* at s.12.

received and signed for the notice of hearing. The General Division member noted this and it did not make an error by proceeding with the matter in the Appellant's absence.

[22] While it is unfortunate that the Appellant forgot about the hearing because he had more immediate concerns, the General Division did not fail to observe a principle of natural justice when it proceeded with the case and rendered its decision.

Issue 2: Did the General Division err in law in making its decision by misinterpreting or misapplying the law as it relates to the penalty and violation issued to the Appellant by the Respondent?

[23] The General Division did not err in law in making its decision.

[24] The legal test to determine whether a claimant knowingly made a false or misleading statement is a two-part test: first the Respondent must show that the claimant knowingly made a false or misleading statement or representation, then the claimant must show that the statement was not made knowingly and provide a reasonable explanation for the incorrect information.

[25] The General Division referred to section 38 of the EI Act and binding Federal Court of Appeal decisions.⁸ It correctly stated that it needed to make its findings “on a balance of probabilities.” After reviewing the evidence, the General Division found that:

- a) the Respondent proved that the Appellant made false or misleading statements about working or receiving earnings during the period from December 5, 2016 to mid-April 2017, and that the Appellant made these statements knowingly because the Appellant “knew he worked and was earning money during these [...] periods.”⁹
- b) The Appellant did not prove that his statements were not made knowingly and he did not provide an explanation for the incorrect information.¹⁰

[26] Regarding the amount of the penalty and the imposing of a notice of violation, the General Division was required to assess whether the Respondent exercised its discretion properly. The General Division referred to sections 38 and 7.1 of the EI Act and binding Federal

⁸ General Division decision at paras 10, 13 to 15, 24 to 28, and 30 to 33.

⁹ *Ibid.* at paras 14 to 16.

¹⁰ *Ibid.* at paras 17 to 19.

Court of Appeal decisions.¹¹ After reviewing the evidence, the General Division found that the Respondent exercised its discretion in a judicial manner because it considered the Appellant's explanations and the mitigating circumstances. The General Division noted that this was the second time that the Appellant had made misrepresentations while receiving EI benefits, and that the Respondent had considered the Appellant's financial hardship and reduced the penalty.

[27] The General Division did not err in law by misinterpreting or misapplying the applicable legislative provisions or the jurisprudence as it relates to the penalty and violation issued to the Appellant.

Issue 3: Did the General Division make a serious error in its findings of fact by concluding that the Appellant knowingly made false or misleading statements and that the Respondent exercised its discretion in a judicial manner?

[28] The General Division did not base 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.

[29] The Appellant did not state what specific errors he alleges the General Division made in its findings of fact. He submits that he should not have to pay back EI benefits and penalties because:

- a) He did not receive EI benefits in the stated period.
- b) His only mistake was to report his net earnings instead of his gross earnings.
- c) He is under financial hardship and his health is poor.

[30] In the past, the Appellant conceded that, while he was receiving EI benefits, he had worked and had earnings in the relevant period.¹² If he wanted to change his position, then it was his responsibility to present evidence to the General Division, by way of documents or oral testimony, to support his new position. His assertions, now, are entirely unsupported by the appeal record. The appeal record shows that the Appellant received EI benefits in the relevant

¹¹ *Supra* note 8.

¹² General Division decision at paras 2, 18, 19 and 35.

period and that he answered “No” to the question “Have you worked or earned money during the period of these reports?” in his reports during that period.

[31] The Respondent considered the Appellant’s financial hardship and, for this reason, reduced the penalty that it initially imposed by 50%. The General Division also noted the Appellant’s financial hardship and correctly concluded that the Tribunal does not have the jurisdiction to exempt the Appellant from the provisions of the EI Act no matter how sympathetic the circumstances.

[32] The General Division considered the Appellant’s arguments and the evidence on file. It did not overlook or misconstrue any important evidence. The General Division did not make any serious errors in its findings of fact or base its decision on such errors.

CONCLUSION

[33] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	March 5, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. D., self-represented