



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. D. v Canada Employment Insurance Commission*, 2019 SST 306

Tribunal File Number: AD-19-189

BETWEEN:

G. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: March 28, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, G. D., applied for Employment Insurance (EI) benefits in 2015. He arguably received regular EI benefits while working.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Applicant had failed to declare his employment while on claim for benefits. The Applicant explained to the Commission that, based on the advice of Service Canada, he had not reported that he worked because he had not received any money for that period of work.

[4] Following the Applicant's request for reconsideration, the Commission notified the Applicant that the money he received as wages from X (X) constituted earnings and would be allocated to the week starting on February 7, 2016, to the week of March 6, 2016. The allocation resulted in an overpayment that the Applicant was required to repay.

[5] The Applicant appealed the Commission's decision to the General Division of the Social Security Tribunal of Canada. The General Division found that the money received by the Applicant constituted earnings and that the Commission had correctly allocated those earnings.

[6] The Applicant seeks leave to appeal the General Division decision on the basis that the General Division made an important error regarding the facts in the appeal file. He maintains that X did not pay him in the stated amounts and that he filed his EI claim and reports as instructed by Service Canada.

[7] The appeal does not have a reasonable chance of success because the Applicant simply repeats arguments that he made to the General Division and does not raise any reviewable errors.

ISSUE

[8] Is there an arguable case that the General Division made an error of law or a serious error in its findings of fact by concluding that the Applicant received earnings and that the Commission correctly allocated those earnings?

ANALYSIS

[9] An applicant must seek leave to appeal in order to appeal a General Division decision. The Appeal Division must either grant or refuse leave to appeal, and an appeal can proceed only if leave to appeal is granted.¹

[10] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there an arguable ground on which the proposed appeal might succeed?²

[11] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success³ based on a reviewable error.⁴ The only reviewable errors are the following: 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.

[12] The Applicant submits that the General Division was wrong because X did not pay him in the stated amounts and he filed his EI claim and reports based on advice by Service Canada (the Commission's agent).

¹ *Department of Employment and Social Development Act* (DESD Act), ss 56(1) and 58(3).

² *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Murphy v Canada (Attorney General)*, 2016 FC 1208 at para 36; *Glover v Canada (Attorney General)*, 2017 FC 363 at para 22.

³ DESD Act, s 58(2).

⁴ *Ibid.* s 58(1).

Is there an arguable case that the General Division made an error of law or a serious error in its findings of fact by concluding that the Applicant received earnings and that the Commission correctly allocated those earnings?

[13] I find that there is no arguable case that the General Division erred in law 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.

[14] When the Applicant was first asked to explain his failure to report earnings, he stated that he started work on February 8, 2016 but was not paid by X until March 17, 2016.⁵ On the advice of Service Canada not to report that he had worked because he had not received any money, he did not report earnings during this period.⁶

[15] The evidence in the appeal record shows that the Applicant started working on February 8, 2016 and he received his first payment on March 17, 2016. The employer submitted the Applicant's payroll information to the Commission and retained the Applicant's time sheets for the relevant period. The employer confirmed that any wages owed to the Applicant had been paid by January 2017.

[16] The Applicant initially agreed that the first paycheck he received in March 2016 included wages for the hours he worked from February 8 to 22, 2016, and that he received paychecks going forward. At the General Division hearing, the Applicant changed his position and argued that the March 2016 paycheck covered the hours he worked from March 1, 2016 and then he was paid going forward; however, he was not paid for work done before that, i.e. in February 2016.

[17] The General Division member adjourned the hearing so that the Applicant could obtain documentation to support his new position.⁷ On the second day of the hearing, the Applicant stated that he could not obtain any other documents.

⁵ Reconsideration file at GD3-30 and 3-49.

⁶ *Ibid.*

⁷ General Division decision at paras 19 to 22.

[18] The General Division noted that the onus was on the Applicant to prove that the payments were not earnings and they should not be subject to allocation.⁸ This was a correct statement of the standard of proof.

[19] The Applicant maintains that he followed the Commission's advice (given by Service Canada) for filing his claim and reports and that he should not be penalized for relying on inaccurate advice. The General Division correctly stated that misinformation by the Commission does not affect the application of the legislative provisions.⁹ This was a correct statement of the legal principles relating to misinformation given by the Commission.

[20] The General Division referred to and applied the legal principles and tests set out in binding jurisprudence on the issues of earnings and allocation.¹⁰

[21] The General Division correctly stated the binding jurisprudence and the applicable legal tests on all the issues in this matter, and, as a result, did not err in law.

[22] The appeal has no reasonable chance of success based on this ground.

[23] The General Division considered the evidence in the documentary record. It also considered the testimony that the Applicant gave during the teleconference hearing. The General Division considered the Applicant's assertion that he was never paid for his hours worked in February 2016 and had followed Service Canada's advice.

[24] The General Division found that the Applicant had no supporting evidence to prove that he had not been paid for work in February 2016 and that there was evidence in the appeal record to prove that he had been paid. These wages constituted earnings as defined in the *Employment Insurance Act* and had to be allocated in accordance with the *Employment Insurance Regulations*. The General Division found that the Commission made the allocation correctly.

[25] The General Division did not make these findings in a perverse or capricious manner or without regard for the material before it.

⁸ General Division decision at para 27.

⁹ *Ibid.* at paras 41 to 43.

¹⁰ *Ibid.* at paras 24 and 25.

[26] The Applicant seeks to reargue his case at the Appeal Division using arguments similar to those he made at the General Division. Simply repeating his arguments falls short of disclosing a ground of appeal that is based on a reviewable error.

[27] The appeal has no reasonable chance of success based on the ground of serious error in the findings of fact.

CONCLUSION

[28] I am satisfied that the appeal has no reasonable chance of success, so the application for leave to appeal is refused.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVE:	D. D., Representative for the Applicant
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