



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. B. v Canada Employment Insurance Commission*, 2019 SST 377

Tribunal File Number: AD-19-219

BETWEEN:

K. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 25, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] After leaving his employment in the food services industry, the Applicant, K. B.(Claimant), applied for Employment Insurance regular benefits. He declared that he did not have any earnings for several weeks in August and September 2014, but the Respondent, the Canada Employment Insurance Commission (Commission), subsequently determined that the Claimant had in fact received earnings during these weeks and that, accordingly, there had been an overpayment of benefits. Additionally, the Commission determined that the Claimant had knowingly made false representations, resulting in a penalty.¹

[3] The Claimant appealed the Commission's reconsideration decision to the General Division, arguing that he should not have to pay a penalty.² He did not otherwise appeal the overpayment. The General Division dismissed the appeal with modification by reducing the amount of the penalty of \$836 "by a further 25% to \$418."³

[4] The Claimant is now seeking leave to appeal the General Division's decision, largely on the basis that the General Division ignored some of the evidence. In deciding whether to grant leave to appeal, I must be satisfied that the appeal has a reasonable chance of success. For the reasons that follow, I am refusing the application for leave to appeal because I am not satisfied that the appeal has a reasonable chance of success.

ISSUES

[5] The issues are:

¹ Commission's letter dated April 8, 2016, at GD3-36 to GD3-39. The Commission overturned the imposition of a serious violation in its reconsideration decision of October 25, 2016, at GD3-50 to GD3-51.

² Notice of Appeal filed with General Division, at GD2-5.

³ General Division decision, at paras. 20 to 22.

Issue 1: Is there an arguable case that the General Division acted beyond its jurisdiction by deciding the overpayment issue?

Issue 2: Is there an arguable case that the General Division erred in law when it decided whether the Claimant should pay a penalty?

Issue 3: Is there an arguable case that the General Division based its decision on erroneous findings of fact that it made without regard for the material before it by failing to consider the Claimant's financial circumstances?

ANALYSIS

[6] Subsection 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.

[7] 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 and is akin to an arguable case at law.⁴ At the leave to appeal stage, 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 acted beyond its jurisdiction by

⁴ *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

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

deciding the overpayment issue?

[8] The only issue that the Claimant appealed to the General Division was the imposition of a penalty.⁶ He did not appeal the matter of the overpayment that resulted from the allocation of earnings. Yet, I see that the General Division examined whether the payments that the Claimant received from his employer constituted earnings for benefit purposes and, if so, whether they should be allocated.

[9] The General Division acted beyond its jurisdiction in deciding this issue. However, given that it arrived at the same conclusion as the Commission and there is no suggestion that the General Division otherwise erred in determining that there was an overpayment, it would serve no purpose to grant leave to appeal on this ground.

Issue 2: Is there an arguable case that the General Division erred in law when it decided whether the Claimant should pay a penalty?

[10] The Claimant argues that he should not have to pay a penalty because he declared that he had not been working (when he had been working), for the simple reason that he did not want to jeopardize his entitlement to Employment Insurance benefits. He explains that he had returned to work after having been on sickness benefits initially and was uncertain whether he would be able to perform his duties and continue working. He wanted to preserve his entitlement to benefits without having to re-qualify.

[11] The General Division noted the Claimant's fears that if he declared that he was working, that the Commission would conclude his claim. Clearly, the General Division determined that this explanation did not excuse the Claimant from having to pay a penalty because the Commission had established that the Claimant had knowingly made false or misleading statements and that the Claimant had subjective knowledge that his statements were false.

[12] The General Division stated that to impose a penalty, the claimant must have knowingly made the false or misleading statement and the claimant must have subjective knowledge that that statement was false. It was immaterial why a claimant made a false or misleading statement.

⁶ Notice of Appeal to the General Division, at GD2-5.

The General Division noted that the Commission has the sole discretion to impose a penalty but that it is nevertheless required to exercise this authority judiciously. This requires the Commission to examine all relevant factors, including any mitigating circumstances.

[13] I find that the General Division correctly restated the law as it relates to the imposition of a penalty and to the determination of the quantum of that penalty. I note that the General Division also cited the applicable jurisprudence.

[14] The Commission imposed a penalty of \$836, given that the Claimant had knowingly made three misrepresentations. The General Division determined that the Commission had acted judiciously in assessing the amount of the penalty because it had considered all the pertinent circumstances when assessing the penalty amount. The General Division noted that there were mitigating circumstances of which the Commission had been unaware, and consequently, it reduced the quantum of the penalty.

[15] I find that, having considered any mitigating circumstances that had been unavailable to the Commission, the General Division acted appropriately in reducing the amount of the penalty to an amount that it considered commensurate with those mitigating circumstances.⁷

[16] The General Division reduced the amount of the penalty from \$836 “by a further 25% to \$418.” The member did not specify what amount he reduced by 25%. If he was reducing the penalty of \$836 by 25%, the penalty would have been recalculated at \$627, and this would have constituted a mathematical error. For greater clarity, clearly the member reduced the amount of the overpayment of \$1,671 by a further 25%, to arrive at \$418, as illustrated by:

Amount of overpayment	\$1,671.00	
Reduced by 50% (\$1,671 x 50%)	(835.50)	
Reduced by 25% (\$1,671 x 25%)	<u>(417.75)</u>	
Total penalty payable	<u>\$ 417.75</u>	(rounded to \$418)

⁷ *Canada (Attorney General) v. Gauley*, 2002 FCA 219.

[17] I am not satisfied that there is an arguable case that the General Division erred in law in determining whether the Claimant should pay a penalty or that he could consider mitigating circumstances to reduce the amount of that penalty.

Issue 3: Is there an arguable case that the General Division based its decision on erroneous findings of fact that it made without regard for the material before it by failing to consider the Claimant’s financial circumstances?

[18] The Claimant asserts that the General Division based its decision on an erroneous finding of fact that it made without “tak]ing] his financial situation into full consideration.”

[19] However, I see that the General Division considered the Claimant’s financial circumstances. At paragraph 21 of its decision, it noted that the Claimant’s “financial situation is difficult. He works part-time 25 hours per week and makes \$15.00 per hour. He pays rent \$300.00, car payments \$600.00 and cell phone \$100.00.”

[20] Clearly, the General Division considered the Claimant’s financial situation as a mitigating circumstance and it was on this basis that the General Division reduced the amount of the penalty. Accordingly, I am not satisfied that there is an arguable case on this ground.

CONCLUSION

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

Janet Lew
Member, Appeal Division

SUBMISSIONS:	K. B. Applicant (self-represented)
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