



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *M. O. v Canada Employment Insurance Commission*, 2019 SST 440

Tribunal File Number: AD-19-321

BETWEEN:

M. O.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: May 10, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal refuses leave to appeal to the Appeal Division.

OVERVIEW

[2] The Applicant, M. O. (Claimant), applied for sickness benefits on June 18, 2014, because he had stopped working due to an injury. On August 19, 2014, the Claimant resumed working for the employer as part of a gradual return to work.

[3] The Canada Employment Insurance Commission (Commission) determined that the Claimant had not reported earnings he received as part of his reports for August 17, August 24, and August 31, 2014. The Commission assessed an overpayment against the Claimant accordingly. Furthermore, the Commission considered that the Claimant had knowingly made false or misleading statements and imposed a non-monetary penalty on him. The Commission then denied his reconsideration request. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[4] The General Division determined that the amounts that the Claimant received from his employer constituted earnings that had to be allocated under section 36(4) of the *Employment Insurance Regulations* (EI Regulations).

[5] The Claimant now seeks leave from the Tribunal to appeal the General Division decision.

[6] In support of his application for leave to appeal, the Claimant argued that the General Division did not consider all the evidence. He submits that he did not receive a salary from his employer from September 22 to October 13, 2014.

[7] The Tribunal must determine there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[8] The Tribunal refuses leave to appeal to the Appeal Division.

ISSUE

[9] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

ANALYSIS

[10] Section 58(1) of the *Department of Employment and Social Development Act* (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; instead, he must establish that his appeal has a reasonable chance of success. In other words, he must establish that there is an arguable case that there is a reviewable error based on which the appeal has a reasonable chance of success.

[12] The Tribunal will grant leave to appeal if it is satisfied that at least one of the Claimant's stated grounds of appeal has a reasonable chance of success.

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

Issue: Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

[14] In support of his application for leave to appeal, the Claimant argued that the General Division did not consider all the evidence and that he did not receive a salary from his employer from September 22 to October 13, 2014. However, this matter

concerns earnings the Claimant received and did not declare in his reports for August 17, August 24, and August 31, 2014.

[15] The employer informed the Commission that the Claimant had received the following amounts:

- Week of August 17, 2014, to August 23, 2014: \$342.24;
- Week of August 24, 2014, to August 30, 2014: \$513.36; and
- Week of August 31, 2014, to September 6, 2014: \$941.16.

[16] According to the Claimant's medical note, he began a gradual return during the weeks in question:

- Week of August 17, 2014, to August 23, 2014: two days per week;
- Week of August 24, 2014, to August 30, 2014: three days per week; and
- Week of August 31, 2014, to September 6, 2014: four days per week.

[17] The General Division therefore determined, based on the evidence, that the amounts the Applicant received as salary between August 18, 2014, and September 6, 2014, constituted earnings that had to be allocated to the period in which the services were performed according to section 36(4) of the EI Regulations.

[18] The Federal Court of Appeal has determined 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.¹

[19] It is therefore not enough for a claimant to merely cast doubt on the veracity of the employer's remarks. They must provide countering evidence before the General Division, which the Applicant has not done. Based on the evidence before it, the General Division could not simply arrive at a different conclusion from the one that it reached.

¹ *Déry v Canada (Attorney General)*, 2008 FCA 291.

[20] After reviewing the appeal file, the General Division's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has no reasonable chance of success. The Applicant has raised no issue that could lead to the setting aside of the decision under review.

CONCLUSION

[21] The Tribunal refuses leave to appeal to the Appeal Division.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	M. O., self-represented
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