



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. H. v Canada Employment Insurance Commission*, 2019 SST 514

Tribunal File Number: AD-19-347

BETWEEN:

**J. H.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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

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Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: May 27, 2019

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] The Applicant, J. H., applied for Employment Insurance (EI) benefits in 2017. He 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 Commission asked the Applicant to explain the discrepancy and, after he did not respond, the Commission notified him of the resulting overpayment and imposed a penalty and violation.

[4] Following the Applicant's request for reconsideration, the Commission notified the Applicant that the money he received as wages from X constituted earnings and would be allocated to the week starting October 15, 2017, to December 2, 2017. The allocation resulted in an overpayment that the Applicant was required to repay. The Commission also considered the Applicant's mitigating circumstances, reduced the monetary penalty and rescinded the violation.

[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. It also found that the Commission used its discretion judicially when it set the penalty amount.

[6] The Applicant seeks leave to appeal the General Division decision on the basis that the General Division failed to observe a principle of natural justice. He maintains that the General Division member promised to "think about"<sup>1</sup> removing the penalty and interest but did not do so.

[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.

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<sup>1</sup> AD1 – Leave to appeal application, filed by the Applicant on May 14, 2019.

## ISSUES

[8] For the application for leave to appeal to be considered, an extension of time to apply for leave to appeal must be granted.

[9] Is there an arguable case that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction by refusing to remove the penalty and interest?

[10] 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 has to pay the penalty set by the Commission?

## ANALYSIS

[11] 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.<sup>2</sup>

[12] 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?<sup>3</sup>

[13] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success<sup>4</sup> based on a reviewable error.<sup>5</sup> 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.

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<sup>2</sup> *Department of Employment and Social Development Act* (DESD Act), ss 56(1) and 58(3).

<sup>3</sup> *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.

<sup>4</sup> DESD Act, s 58(2).

<sup>5</sup> *Ibid.* s 58(1).

[14] The Applicant submits that the General Division promised to consider his request to remove the penalty and the interest on his overpayment but did not do so.

### **Issue 1: Late Application and Extension of Time**

[15] The Applicant was late in filing his application for leave to appeal with the Appeal Division.

[16] The General Division decision was mailed to the Applicant on March 13, 2019.<sup>6</sup> The Applicant is deemed to have received the decision 10 days after the date that it was mailed,<sup>7</sup> namely on March 23, 2019.

[17] The period within which the Applicant was required to file an application for leave to appeal was 30 days from March 23, 2019,<sup>8</sup> that is by April 22, 2019.

[18] The Applicant filed an application for leave to appeal on May 14, 2019, 22 days after the end of the appeal period.

[19] Because the Applicant was late filing his application for leave to appeal, in order to move forward with the application, the Appeal Division would have to grant an extension of time.

[20] The Applicant explained that he was late because he had mental health problems and could not concentrate sufficiently to complete the application for leave to appeal.

[21] In *Canada (Attorney General) v Larkman*,<sup>9</sup> the Federal Court of Appeal held that, when a decision-maker is determining whether to allow an extension of time, the overriding consideration is that the interests of justice be served.

[22] If the appeal has a reasonable chance of success, then it would serve the interests of justice to grant the extension of time. Therefore, I will consider whether the appeal has a reasonable chance of success.

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<sup>6</sup> General Division decision cover letter, dated March 13, 2019.

<sup>7</sup> *Social Security Tribunal Regulations*, s 19(1)(a).

<sup>8</sup> DESD Act, s 57(1)(a).

<sup>9</sup> *Canada (Attorney General) v Larkman*, 2012 FCA 204.

**Issue 2: Is there an arguable case that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction or erred in law by refusing to remove the penalty and interest?**

[23] I find that there is no arguable case that the General Division failed to observe a principle of natural justice or refused to exercise its jurisdiction.

[24] “Natural justice” refers to fairness of process and includes such procedural protections as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against them. It is settled law that an applicant has the right to expect a fair hearing with a full opportunity to present their case before an impartial decision-maker.<sup>10</sup>

[25] The Applicant has not raised concerns with the fairness of process at the Tribunal or the impartiality of the General Division member. He argues that he asked the General Division member to consider his specific circumstances and that she promised she would. He was not denied an opportunity to submit evidence or raise his arguments at the General Division.

[26] The Applicant had a full opportunity to present his case before the General Division. He filed documents and attended the hearing with an interpreter. He argues that the General Division did not accept all of his evidence and did not consider his request.

[27] Natural justice does not mean that oral evidence given at the hearing or documentary evidence in the appeal file must be accepted or that a decision-maker must grant the remedy requested by the Applicant. Natural justice requires that a party have a right to be heard and to know the case against them.

[28] The Applicant had the right to be heard and he was heard, in writing and orally. He also knew the case against him: he had the Commission’s reconsideration file and the employer’s documentary evidence to review long before the hearing date.

[29] The appeal does not have a reasonable chance of success based on this ground.

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<sup>10</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 22.

**Issue 3: 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 has to pay the penalty set by the Commission?**

[30] 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.

[31] When the Applicant was first asked to explain his failure to report earnings, he did not respond. In the reconsideration stage, he explained that his wife completed the weekly reports online on his behalf and he was not aware of the errors she made in answering “no” to whether he was working. The Commission accepted the Applicant’s explanation. So did the General Division.

[32] The General Division noted that the Applicant received wages for work performed and that these wages are considered earnings according to the law. It also found that the Commission allocated these earnings correctly.

[33] The General Division referred to and applied the legal principles and tests set out in binding jurisprudence on the issues of earnings and allocation.<sup>11</sup>

[34] Similarly, the General Division referred to and applied the legal principles and tests set out in binding jurisprudence on the issues of whether the Applicant knowingly failed to report his earnings and whether the Commission used its discretion judicially when it set the penalty amount.<sup>12</sup>

[35] 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.

[36] The appeal has no reasonable chance of success based on an error of law.

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<sup>11</sup> General Division decision at paras 4-10.

<sup>12</sup> *Ibid.* at paras 13-19 and 20-22.

[37] 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 circumstances, his arguments and his requests.

[38] The General Division found that the Applicant had knowingly failed to declare that he was employed and had earnings while on a claim for EI benefits and that the Commission used its discretion judicially when it set the penalty amount. The General Division noted that, at first, the Commission had set the penalty amount at 50% of the overpayment and then reduced the penalty to 10% of the overpayment because of the Applicant's mitigating circumstances. The General Division concluded that there were no other mitigating factors upon which the penalty could be further reduced.

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

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

[41] 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.

## CONCLUSION

[42] 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:	J. H., self-represented
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