Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *C. C. v Canada Employment Insurance Commission*, 2019 SST 608

Tribunal File Number: AD-19-424

BETWEEN:

C. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: June 25, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, C. C. (Claimant) is seeking leave to appeal the General Division's decision of May 22, 2019. This means that she has to get permission from the Appeal Division before she can move on to the next stage of her appeal.

[3] The General Division found that the Claimant had employment earnings that she did not declare when she was receiving Employment Insurance benefits. Once these earnings were allocated to the weeks in which she earned them, it resulted in an overpayment of benefits that had been paid to the Claimant. There was an overpayment during some weeks because the Claimant received benefits that the Respondent, the Canada Employment Insurance Commission (Commission), would not have paid if it knew that the Claimant had earnings and was going to be paid for her work.

[4] The Claimant argues that the General Division erred in law and based its decision on an erroneous finding of fact when it calculated her weekly earnings. She argues that if the General Division had properly calculated her weekly earnings, her overpayment would not be so high. She also says that the General Division failed to observe a principle of natural justice because it did not fully consider her personal circumstances. I have to decide whether the appeal has a reasonable chance of success.

[5] For the reasons that follow, I find that the appeal has no reasonable chance of success and I am therefore refusing the Claimant's application for leave to appeal.

FACTUAL BACKGROUND

[6] In July 2017, the Claimant applied for Employment Insurance regular benefits, claiming that she was available but unable to find a job. She subsequently found work as a sessional instructor of religious studies at a university. According to the Record of Employment, she

started this position on September 1, 2017 and stopped working on April 30, 2018, when her contract ended.

[7] The Claimant declared that she did not have any earnings for the first three weeks and last two weeks of her employment.[1] She received Employment Insurance benefits for some of these weeks. However, the Commission received payroll information from the employer and learned that she did have earnings for these weeks. The Commission wrote to the Claimant, telling her that it had adjusted the allocation of these earnings, so she would have to pay back any benefits that she should not have earned. It also issued a penalty.[2]

[8] The Claimant requested a reconsideration, saying that the earnings should have been calculated by taking the total earnings under her contract and dividing it by the number of weeks that she worked under that contract.[3] (This would also require further dividing it by the number of business days within a particular week.)

[9] The Claimant also noted that her employer did not pay her until September 15, 2017 and that its last payment was on April 30, 2018.

[10] The Commission contacted the employer to find out how it calculated the Claimant's weekly earnings. The employer told the Commission that it had made an error, so it recalculated the earnings by taking the total earnings under the contract and dividing it by the number of days that she worked under that contract.[4]

[11] Based on these recalculations, the Commission adjusted the Claimant's weekly earnings for the first three weeks and last two weeks of her employment. Taking into account the Claimant's circumstances, it also reduced the amount of the penalty.[5] However, the adjustment to her earnings effectively increased the amount of the overpayment.

[12] The Claimant is disputing whether there should have been a recalculation because the initial calculation was more favourable to her. She notes that she is a single parent and is

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[1] See Report Questions and Answers: GD3-22, GD3-27, and GD3-32.
[2] Commission's letter of November 14, 2018 with Notice of Debt, at GD3-46 to GD3-48.
[3] Request for Reconsideration, at GD3-49
[4] Supplementary Record of Claim, at GD3-63.
[5] Commission's reconsideration decision dated February 15, 2019, at GD3-64 to GD3-65.

struggling to look after two children. She also notes that, despite being highly educated, she has had a lot of trouble finding work in her field of study.

ISSUES

[13] The issues are:

> **Issue 1:** Is there an arguable case that the General Division made a legal error by ignoring her main argument?
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> **Issue 2:** Is there an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, when it decided that she earned $179 for the week beginning April 29, 2018?
>
> **Issue 3:** Is there an arguable case that the General Division failed to observe a principle of natural justice?

ANALYSIS

[14] Before the Claimant can move on to the next stage of her appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the three grounds of appeal that are listed in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). The appeal also has to have a reasonable chance of success.

[15] The only three grounds of appeal under subsection 58(1) of the DESDA are:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[16] A reasonable chance of success is the same thing as an arguable case at law.[6] This is a relatively low bar because claimants do not have to prove their case; they simply have to show that there is an arguable case. At the actual appeal, the bar is much higher. The courts have said that this approach to deciding applications for leave to appeal should be followed.[7]

Issue 1: Is there an arguable case that the General Division erred in law by ignoring her main argument?

[17] The Claimant argues that the General Division ignored her main argument. She claims that this then resulted in a larger overpayment. As she has maintained all along, she says that the calculation of her weekly earnings should have been based on the number of weeks worked, rather than the number of days that she worked. For instance, under one of her contracts, the employer paid her $17,415 in eight semi-monthly instalments. She says that under this contract, her weekly earnings should have been calculated as follows:

> $17,415/8 pay periods then dividing this number by the number of business days within a particular week
>
> vs.
>
> $17,415/84 days x number of days worked = $207.32.
>
> $207.32/day x 5 days = $1,037.

In other words, she claims that the General Division made a legal error by using the wrong formula to calculate her weekly earnings and by not explaining what formula it used to calculate her weekly earnings.

[18] As the General Division pointed out, under the *Employment Insurance Regulations*, one has to allocate earnings to the period when a claimant performed those services.[8] In this regard, I note that the Commission called the employer directly to find out what the Claimant earned for a particular week.[9] The employer stated that it had miscalculated the earnings before. It recalculated the weekly earnings, based on the number of days actually worked, as illustrated

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[6] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[7] This is what the Federal Court said in *Joseph v. Canada (Attorney General)*, 2017 FC 391.
[8] See subsection 36(4) of the *Employment Insurance Regulations*.
[9] See Supplementary Record of Claim, at GD3-63.

above. Unfortunately, this resulted in a greater overpayment for the Claimant, but that alone does not mean that the initial calculation should be used when the employer says that that calculation was wrong in the first place.

[19] At its very core, the Claimant is asking me to change the amount of her insurable earnings for these weeks, but I do not have any jurisdiction to resolve any disputes over the amount that she earned. For that matter, neither does the General Division. Only the Canada Revenue Agency can decide the amount of insurable earnings. Even if I had the jurisdiction to change the amount that she earned, the Claimant has not shown that the General Division committed a legal error.

[20] Because neither the General Division nor I have the power to decide whether the Claimant's earnings were lower than she claims, I am not satisfied that the appeal has a reasonable chance of success.

[21] As a footnote, an employee can ask Canada Revenue Agency to make a ruling on the amount of any insurable earnings,[10] but there is a time limit to do this.

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, when it decided that she earned $179 for the week beginning April 29, 2018?

[22] At paragraph 9 of its decision, the General Division listed the Claimant's earnings, including for the week beginning April 29, 2018. The General Division wrote that she earned $179 for the week. The General Division said that it got this information from the employer. The Claimant argues that the General Division got this number wrong because she had testified that, according to her employer, she actually made $143.33 for this period.[11]

[23] It is true that the General Division did not mention this evidence, but at the end of the day, what the Claimant is asking me to do is to adjust her earnings for the week of April 29, 2018, from $179 to $143.33.

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[10] See subsection 90(1) of the *Employment Insurance Act*.
[11] At approximately 9:13 to 9:25 of the General Division audio recording on May 13, 2019.

[24] As I stated above, I do not have any jurisdiction or authority to make any rulings about the amount of earnings the Claimant she had. Neither does the General Division. Besides, I do not see any documents or records to support her claims that her earnings were less than what the employer reported to the Commission. In fact, her employer said that the Claimant's gross earnings for that week were $178.62.[12]

[25] Because neither the General Division nor I have the power to decide what the Claimant earned, I am not satisfied that the appeal has a reasonable chance of success.

Issue 3: Is there an arguable case that the General Division failed to observe a principle of natural justice?

[26] The Claimant says that she would have been better off if she had not requested a reconsideration. After she requested a reconsideration, the employer provided a recalculation of her earnings and this resulted in a greater overpayment. The Claimant says that this is unfair because she did not receive any payment for her work until September 15, 2017, and she did not receive any payment after April 30, 2018. And yet, she has paid taxes and Employment Insurance premiums for over 40 years, and has bills that have to be paid. She argues that the Employment Insurance scheme should be designed to provide "stop-gap income" for those times when there is a gap in employment and someone is not working or receiving any pay. The Claimant argues that not providing adequate "stop gap income" is unfair and a breach of the principles of natural justice.

[27] The principle of natural justice refers to the fundamental rules of procedure that apply in judicial or quasi-judicial environments. The principle exists to ensure that all parties receive adequate notice of any proceedings, that all parties have a full opportunity to present their case, and that proceedings are fair and free of bias or the reasonable apprehension of bias. It relates to issues of procedural fairness, rather than the impact a decision has on a party or on how unfair the law might appear.

[28] Here, the Claimant has not pointed to nor suggested that the General Division failed to provide her with adequate notice, that it might have deprived her of an opportunity to fully

[12] See Supplementary Record of Claim, at GD3-63.

present her case, or that it was biased against her. For this reason, and despite the Claimant's personal circumstances, I am not satisfied that there is an arguable case that the General Division failed to observe a principle of natural justice.

CONCLUSION

[29] For the above reasons, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

APPLICANT:	C. C., Self-represented