



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *V. A. v Canada Employment Insurance Commission*, 2019 SST 759

Tribunal File Number: AD-19-511

BETWEEN:

V. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: August 13, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] After his employer dismissed him, the Applicant, V. A. (Claimant) brought a claim against his employer for unjust dismissal that he eventually settled. The Respondent, the Canada Employment Insurance Commission (Commission) determined that part of the settlement monies that the Claimant received were earnings and it allocated those earnings, which resulted in an overpayment. The Claimant requested a reconsideration of the decision and the Commission responded by making one change: It deducted an additional \$3,391.25 for legal fees from earnings, and therefore from the amount that was allocated.

[3] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed the appeal with modifications. It confirmed the reconsideration decision except that it reduced the amount of legal fees that the Commission had deducted from earnings. The Claimant now seeks leave to appeal to the Appeal Division.

[4] The Claimant has no reasonable chance of success. He has not made out an arguable case that the General Division made an error of jurisdiction or of law, or that it based its decision on a finding of fact that ignored or misunderstood the evidence.

ISSUE

[5] Is there an arguable case that the General Division refused to exercise its jurisdiction or erred in law by failing to consider that the Claimant's earnings may have been a "relief grant" under section 35(7) of the *Employment Insurance Act* (EI Act)?

[6] Is there an arguable case that the General Division failed to exercise its jurisdiction or erred in law by failing to address whether the Commission should have required the Claimant to serve a waiting period in the weeks beginning May 8, 2016, and May 15, 2016?

[7] Is there an arguable case that the General Division ignored or misunderstood evidence in reducing the total compensation paid to the Claimant by a portion of his legal fees and expenses?

ANALYSIS

[8] The Appeal Division may intervene in a decision of the General Division, only if it can find that the General Division has made one of the types of errors described by the “grounds of appeal” in s.58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[9] The only grounds of appeal are described below:

- 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.

[10] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. A reasonable chance of success has been equated to an arguable case.¹

Issue 1: Is there an arguable case that the General Division refused to exercise its jurisdiction or erred in law by failing to consider that the Claimant’s earnings may have been a “relief grant” under section 35(7) of the EI Act?

[11] There is no arguable case that the General Division refused to exercise its jurisdiction. The General Division acknowledged those circumstances raised by the Claimant as “special circumstances”² but found that those circumstances did not establish that the payment was something other than income arising out of employment.³ The General Division referred to the Federal Court of Appeal decision in *Bourgeois v Canada (Attorney General)*⁴, for the principle

¹ *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Ingram v. Canada (Attorney General)*, 2017 FC 259

² General Division decision, para. 25

³ Para. 30

⁴ *Bourgeois v Canada (Attorney General)*, 2004 FCA 117

that it the onus is on the Claimant to prove that all or part of the money he received as a result of his dismissal is something other than earnings.

[12] There is no arguable case that the General Division erred under section 58(1)(a) by refusing to exercise its jurisdiction.

[13] The General Division considered the Claimant's argument that the lump sum payment of \$24,435.00 was a "relief grant" under section 35(7)(c) of the Regulations.⁵ However, the General Division relied on the language of the settlement agreement, which stated that the payment was for 2.92 months of pay in lieu of notice and would be paid as a lump sum retiring allowance. The General Division found that the evidence did not establish that the payment did not meet any of the specific exceptions under section 35(7) of the Regulations. Therefore, it found that the lump sum payment was income from employment and therefore earnings to be allocated.

[14] Therefore, there is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act by not considering the amount paid to the Claimant to be a relief grant. The General Division decision that the Claimant's circumstances do not fall within one of the section 35(7) exceptions is a question of what is called "mixed fact and law" because it was required to apply settled law to the specific facts of the case. The Appeal Division does not have the jurisdiction to consider mixed questions of fact and law⁶ unless the error of law is extricable.⁷ In this case, there is no extricable error of law.

Issue 2: Is there an arguable case that the General Division failed to exercise its jurisdiction or erred in law by failing to address whether the Commission should have required the Claimant to serve a waiting period in the weeks beginning May 8, 2016, and May 15, 2016?

[15] There is no arguable case that the General Division failed to exercise its jurisdiction or erred in law. In the hearing, the Claimant had questions about whether the waiting period was properly designated in the Commission's calculation sheet.⁸ While the General Division member appeared willing to consider the question as it related to the allocation of benefits, he was unwilling to provide the Claimant with advice. However, the Claimant specifically said that he

⁵ Para 28

⁶ *Quadir v Canada (Attorney General)*, 2018 FCA 21

⁷ *Garvey v Canada (Attorney General)*, 2018 FCA 118

⁸ GD3-29

was “not disputing this”⁹ and therefore, the General Division member did not consider it to be an issue.¹⁰

[16] In light of the Claimant’s position, and the absence of an obvious error on the face of the document, I find that there is no arguable case that the General Division erred by failing to address the issue, under either section 58(1)(a) or 58(1)(b) of the DESD Act.

Issue 3: Is there an arguable case that the General Division ignored or misunderstood evidence in reducing the total compensation paid to the Claimant by a portion of his legal fees and expenses?

[17] The Claimant disagrees with the General Division’s decision to remove a particular lawyer’s legal account from the legal fees. The General Division relied on the Claimant’s statement to the Commission that the fees paid on this account were related to his response to a complaint to a securities association.¹¹ It was not satisfied that the complaint was directly related to the Claimant’s Labour Board settlement. Therefore, the General Division disallowed the \$1,657.50. It also disallowed \$181.45 in travel expenses because the Claimant had not proven the expense was related to the Labour Board settlement as opposed to his other securities complaint matter.

[18] The General Division is the trier of fact. Although, the Claimant may not agree with the General Division’s assessment of the evidence of its findings of fact, he has not pointed to any evidence that the General Division ignored or misunderstood.

[19] The Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal. In *Karadeolian v. Canada (Attorney General)*¹², the Court states as follows: “[T]he Tribunal must be wary of mechanistically applying the language of section 58 of the [DESD] Act when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party”.

[20] In accordance with the direction of *Karadeolian*, I have reviewed the record for any other significant evidence that might have been ignored or overlooked and that may, therefore, raise an

⁹ Audio recording of General Division hearing at timestamp 35:45

¹⁰ General Division decision, para. 4

¹¹ GD3-92

¹² *Karadeolian v. Canada (Attorney General)*, 2016 FC 615

arguable case. However, I have not been able to discover significant, relevant evidence that the General Division ignored or overlooked that might give rise to an arguable case.

[21] There is no arguable case that the General Division based its decision on any finding that ignored or overlooked evidence or that did not follow rationally from the evidence, which means that there is no arguable case that the General Division erred under section 58(1)(c) of the DESD Act.

[22] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

[24] This decision to grant leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	V. A., Self-represented
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