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

Citation: *C. C. v Canada Employment Insurance Commission*, 2019 SST 783

Tribunal File Number: AD-19-491

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: August 19, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, C. C. (Claimant), a mechanic who worked for X, is seeking leave to appeal the General Division's decision. This means that he has to get permission from the Appeal Division before he can move on to the next stage of his appeal.

[3] The General Division found that the Claimant received a retiring allowance from his employer. However, the employer issued a corrected record of employment to include the retiring allowance, only after the Respondent, the Canada Employment Commission (Commission), had already paid Employment Insurance benefits to the Claimant. The General Division determined that the retiring allowance were earnings that had to therefore be allocated, starting on May 20, 2018. This left the Claimant with an overpayment of Employment Insurance benefits of approximately $8,200 to repay.

[4] The Claimant argues that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it, when it found that he was at fault and responsible for repaying any benefits. He maintains that his employer made all of the errors and that it should repay any overpayment. If his employer had issued an accurate record of employment in the first case, the Commission would not have paid him any benefits to which he was not entitled, and there would have been no overpayment of benefits.

[5] I have to decide whether there is an arguable case for the appeal. I am not satisfied that there is an arguable case and I am therefore refusing the Claimant's application for leave to appeal.

PRELIMINARY MATTERS

[6] The Claimant's Application to the Appeal Division – Employment Insurance did not disclose any grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). I held a telephone pre-hearing conference to confirm whether the Claimant intended to pursue an appeal of the General Division's decision, or was simply looking to have some of the overpayment reduced, or possibly, looking for repayment options.

[7] During the pre-hearing conference, the Claimant claimed that he has contacted Service Canada several times. Sometimes Service Canada told him that he no longer has to repay $8,200, while, at other times, Service Canada told him that he still has to repay the amount. Susan Prud'homme, a representative for Commission, claims that she has not been able to confirm this information and says that her review indicates that the overpayment remains outstanding. She suggests that possibly the Claimant could have been in contact with Canada Revenue Agency.

[8] I advised the Claimant that he was supposed to provide reasons for his appeal and identify any errors that the General Division might have made, such as any errors of law or erroneous findings of fact. The Claimant submits that what he is after is "for the Tribunal to review their [General Division] decision and put the blame entirely on the company and not [him]."[1]

[9] Ms. Prud'homme agrees that the Claimant's oral submissions can form part of his materials for his application for leave to appeal.

ISSUE

[10] Is there an arguable case that the General Division made any errors under subsection 58(1) of the DESDA?

ANALYSIS

[11] Before the Claimant can move on to the next stage of his appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the three grounds of appeal listed in

[1] At approximately 5:22 of pre-hearing teleconference on August 16, 2019.

subsection 58(1) of the DESDA. The appeal also has to have a reasonable chance of success. 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;

(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.

[12] A reasonable chance of success is the same thing as an arguable case at law.[2] 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.

[13] In his Application to the Appeal Division – Employment Insurance,[3] the Claimant did not identify any errors in the General Division's decision or identify any grounds of appeal that fall into subsection 58(1) of the DESDA. There is no suggestion in the Application that the General Division failed to observe a principle of natural justice, erred in law, or based its decision on any erroneous findings of fact.

[14] In oral submissions on August 16, 2019, however, the Claimant argues that 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. He says that the General Division failed to recognize his employer's mistakes. The employer issued a record of employment with the wrong information, and then was late when it issued a record of employment with the correct information. He says that it should be clear that it was the company's fault entirely that an overpayment even exists. He did nothing to contribute to or cause the overpayment. He suggests that if the General Division had properly found that his company issued an inaccurate record of

[2] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[3] See Application to the Appeal Division – Employment Insurance, at AD1-2.

employment and was late when it issued a corrected record of employment, he would not be left with an overpayment.

[15] The General Division acknowledged this background. At paragraphs 2 and 18 of its decision, the General Division noted that the employer issued a revised record of employment that included the sums that the Claimant received as a retiring allowance.

[16] The General Division also addressed the Claimant's arguments that the employer should be held responsible for the overpayment. If the employer had issued an accurate record of employment in June 2018, rather than in October 2018, the Commission would not have paid any Employment Insurance sickness benefits within that time. The General Division accepted the evidence that the employer issued an inaccurate record of employment by initially neglecting to include the amount of the retiring allowance, and that it got around to correcting the record of employment only after the Commission had already paid benefits to the Claimant. This led to the overpayment. The General Division acknowledged that the Claimant did nothing wrong and that he was placed in the unfortunate position of having to repay an overpayment because of his employer's mistakes.

[17] I do not see that the General Division overlooked or did not consider the facts that the Claimant says it missed. I do not see that the General Division erred under subsection 58(1)(c) of the DESDA.

[18] In any event, what caused the overpayment was not relevant. The fact that there was a payment was relevant because it meant that the General Division had to decide whether that payment represented earnings and, if so, how it should allocate them.

[19] In other words, while the employer made mistakes, the General Division could not ignore the retiring allowance, even if it came to the Commission's attention late in the day. Ultimately, the General Division still had to determine whether the retiring allowance were earnings and how it should allocate them. I do not see that the General Division erred in law when it decided that the retiring allowance were earnings and that it had to allocate them starting on May 20, 2018.

[20] For he most part, the Claimant is asking me to reconsider the General Division's decision and to give a different decision that is favourable to him. However, subsection 58(1) of the

DESDA does not allow for a reassessment of the evidence or a rehearing of the matter. Apart from that, I would have come to the same determination as to the General Division.

[21] I am not satisfied that there is an arguable case that the General Division failed to consider the fact that the employer's mistakes led to the overpayment, but this issue was not relevant in any event.

[22] I have also reviewed the underlying record, to ensure that the General Division neither erred in law nor overlooked or misconstrue any important evidence or arguments. The General Division member's summary of the facts is consistent with the evidentiary record and her analysis is sound and comprehensive. As such, I am not satisfied that the appeal has a reasonable chance of success.

[23] Finally, as the General Division and the Commission have explained, the Social Security Tribunal does not have any authority to write-off any of the overpayment. If the Claimant is looking for a write-off, or a reduction of the overpayment, his recourse lies with the Federal Court.

CONCLUSION

[24] I am refusing the application for leave to appeal.

Janet Lew
Member, Appeal Division

PARTIES:	C. C. Applicant Susan Prud'homme Representative for the Respondent