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

Citation : *M. D. v Canada Employment Insurance Commission*, 2019 SST 1238

Tribunal File Number: AD-19-618

BETWEEN:

M. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: September 25, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. D. (Claimant), started working as a millwright for a construction company (X) in March 2017, but left by September 1, 2017, due to a shortage of work.[1] In November 2017, he applied for and began receiving Employment Insurance regular benefits.

[3] A Record of Employment shows that the Claimant resumed working for X on September 19, 2017. He left this employment on February 2, 2018 because of a shortage of work.[2] In February 2018, the Claimant began working as a welder millwright for another company (X) until he was dismissed later that month.[3]

[4] The Respondent, the Canada Employment Insurance Commission (Commission) obtained information regarding the Claimant's earnings from his employment with X and C. The Commission determined that the Claimant had undeclared earnings from his employment with both X and C between the weeks of September 17, 2017 and February 4, 2018. The Commission adjusted the allocation of these earnings. This resulted in an overpayment of Employment Insurance benefits.[4] The Commission also determined that the Claimant had knowingly made false representations so it imposed a penalty of $1,083. It also issued a notice of a serious violation, which meant that, in future, the Claimant would have to work more insurable hours to qualify for benefits.

[5] The Claimant asked for a reconsideration. He explained that he had requested copies of information on his account, to which he no longer had access. He wanted to verify whether he might have reported his earnings later because his employer did not immediately pay him. Although he had yet to receive this information, the Commission did not change its decision on

[1] See application for Employment Insurance benefits, dated November 16, 2017, at GD3-53 and GD3-54.
[2] See Record of Employment dated April 24, 2018, at GD3-107.
[3] See Record of Employment dated March 9, 2018, at GD3-105.
[4] See Commission's letter dated December 6, 2018, at GD3-121 to GD3-123.

reconsideration. It found that the Claimant had not provided any new information regarding his earnings or the penalty and violation issues.[5]

[6] The Claimant appealed the Commission's reconsideration decision to the General Division, which dismissed his appeal. The Claimant is now seeking leave to appeal the General Division's decision, on several grounds. I have to decide whether the appeal has a reasonable chance of success. For the reasons that follow, I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing leave to appeal.

ISSUES

[7] The following issues are before me:

(a) Is there an arguable case that the General Division failed to give the Claimant a fair hearing?

(b) Is there an arguable case that the General Division erred in law by disregarding his arguments and in thereby misinterpreting subsection 36(4) of the *Employment Insurance Regulations*?

ANALYSIS

[8] Before the Claimant can move on to the next stage of the 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 subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). The appeal also has to have a reasonable chance of success.

[9] 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;

[5] See Commission's reconsideration decision dated May 7, 2019, at GD3-132 to GD3-133.

(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] 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.

(a) Is there an arguable case that the General Division failed to observe a principle of natural justice?

[11] The Claimant argues that the General Division failed to observe a principle of natural justice. Natural justice in this context refers to the fundamental rules of procedure. 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 the fundamental rules of procedure that have to be observed, rather than on the impact a decision might have on a party.

[12] The Claimant notes that he was no longer able to access the original reports that he filed with the Employment Insurance Commission. He argues that the Social Security Tribunal should have included them in the appeal file. That way, he could have verified his earnings for the purposes of calculating the amount of the overpayment. However, the Tribunal is not responsible for adducing any of the evidence on behalf of any of the parties. If there is any evidence that a party wants to rely on, that party is responsible for trying to get that evidence. Or, if that evidence is no longer available, to try to secure the best evidence—whatever it might be—that is available.

[13] The Claimant suggests that he needed his original reports so he could determine what he might have reported, against what the Commission claimed that he reported. In this case, I see that in fact the hearing file included copies of the original electronic reports that the Claimant

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[6] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

filed.[7] They show what the Claimant reported as his total gross amount of earnings before deductions.

[14] For instance, for the period from January 21, 2018 to February 3, 2018 to February 17, 2018, the Claimant reported that he received and would be receiving $304 in total gross earnings before deductions for this reporting period.[8] Similarly, he reported the same amount of gross earnings for the period from February 4, 2018 to February 17, 2018.[9]

[15] Given that this information was in the hearing file, I am not satisfied that there is an arguable case based on this ground.

[16] However, the Claimant suggests that the information may be inaccurate because the reports do not appear in the same format that the Claimant saw when he completed the reports on-line, but he needs some evidence to support his allegations that the information may be wrong. I see that the Claimant also questioned the accuracy of the Records of Employment, but in that case, he did not produce any evidence to show or to suggest that the Records were inaccurate.

[17] The Claimant has not otherwise pointed to nor suggested that the General Division failed to provide him with adequate notice, that it might have deprived him of an opportunity to fully present his case, or that it might have exhibited any bias against him. I do not see any evidence that the General Division failed to give the Claimant adequate notice of the hearing, that it might have deprived the Claimant of a fair opportunity to present his case, or that it was biased against him. The Claimant attended the hearing and did not object to proceeding with the hearing. Upon listening to the audio recording of the General Division hearing, I see that the General Division member gave the Claimant a full and fair opportunity to present his case. There are no allegations of bias and I do not see any basis or indication that there was any bias.

(b) Is there an arguable case that the General Division erred in law by disregarding his arguments and in thereby misinterpreting subsection 36(4) of the

[7] See for instance, E-Report Questions and Answers, for period September 17, 2017 to September 30, 2017, at GD3-17 to GD3-21. There are E-Reports for other periods, at GD3-22 to GD3-49, and GD3-64 to GD3-104.
[8] See Script Number 1135 at page GD3-92.
[9] See Script Number 1135 at page GD3-100.

Employment Insurance Regulations?

[18] The Claimant argues that the General Division erred in law by disregarding his arguments about how it should interpret subsection 36(4) of the *Employment Insurance Regulations* when it came to allocating his earnings. The Claimant argues that the General Division erred in law by defining the period as "14 days."

[19] Subsection 36(4) of the Regulations reads,

> Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

[20] At paragraph 13 of its decision, the General Division noted the Claimant's argument that the term "period" in subsection 36(4) of the Regulations is vague and does not define a specific term and that, as such, there was no legal requirement to allocate any earnings to a 14-day period. The General Division considered the Claimant's arguments in this regard.

[21] At paragraph 14, the General Division then wrote, "As the Claimant performed the work in the weeks between September 17, 2017 to February 4, 2018 (inclusive), I find his allocation of earnings should begin on September 17, 2017 in accordance with his weekly earnings."

[22] From this, it is clear that the General Division member defined the period as the period between the weeks starting September 17, 2017 and February 4, 2018. This interpretation of the period is consistent with subsections 36(3) and 36(4) of the Regulations, which requires allocation of earnings "to the period in which the services were performed."

[23] The member did not define the period as "14 days," as the Claimant suggests. Rather, the member looked to the period of the contract in which services were performed. Generally, where a claimant is hired and paid for a specific period, the earnings are allocated for the whole period of the contract, even if the claimant did not perform any services during part of that period,[10]

[10] See CUB 71122, where the Umpire referred to CUB A-769-90, in which Justice Pratte wrote, "…it is now certain that, in order to apportion the remuneration paid under a contract of service in the course of which some services were not always rendered, it is necessary to have regard to the period for which the remuneration was payable rather than the dates on which the employee performed his or her duties."

such as in this case. In effect, the General Division accepted the Claimant's arguments that the period referred to in subsection 36(4) of the Regulations is not restricted to a 14-day timeframe.

[24] Subsection 36(3) of the Regulations defines how earnings are to be allocated, where the period for which the earnings of a claimant do not coincide with a week. Although the General Division member did not refer to subsection 36(3) of the Regulations, it is clear that the member determined that Claimant's earnings should be allocated as set out by the subsection. Irrespective of when the Claimant's employer paid him, earnings would still be allocated "to any week that is wholly or partly in the period …"[11]

[25] The General Division determined that earnings were to be allocated "in accordance with his weekly earnings." While the Claimant may dispute the amount of the earnings that were to be allocated on a weekly basis, I note that he has not provided any evidence to contract the Commission's evidence regarding his weekly earnings. As such, the General Division was entitled to accept that the Claimant's weekly earnings reflected when he performed services for his employer.

[26] I am not satisfied that there is an arguable case that the General Division erred in its interpretation and application of subsection 36(4) of the Regulations or that it defined a "period" under the subsection as being limited to 14 days.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	M. D., Self-represented

[11] See subsection 36(3) of the Regulations.