



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *B. K. v Canada Employment Insurance Commission and X*, 2019 SST 1275

Tribunal File Number: AD-19-642

BETWEEN:

**B. K.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

and

**X**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision by: Janet Lew

Date of Decision: September 30, 2019

**Canada**<sup>ca</sup>

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] The Applicant, B. K. (Claimant), is seeking leave to appeal the General Division's decision. Leave to appeal means that an applicant has to get permission from the Appeal Division before they can move on to the next stage of the appeal process.

[3] The General Division decided that the Claimant voluntarily left his employment as a general labourer for a X without just cause. The General Division did not accept the Claimant's arguments that had to work excessive hours, or that his working environment jeopardized his health and safety.

[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 for the material before it. In particular, he argues that the General Division "glossed over the 160.75 hours missing on the Employee detail but shown on the Record of Employment."<sup>1</sup>

[5] In addition to seeking leave to appeal, the Claimant is also seeking general damages, costs, and any other relief that I might deem appropriate. However, I do not have any jurisdiction or authority to award damages, costs, or any discretionary relief.

[6] I have to decide whether the appeal has a reasonable chance of success. A reasonable chance of success is the same thing as an arguable case at law.<sup>2</sup> 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. For the reasons that follow, I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing the application for leave to appeal.

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<sup>1</sup> See Claimant's letter dated September 19, 2019, at AD1-3.

<sup>2</sup> This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

## ISSUE

[7] Is there an arguable case that the General Division overlooked some of the Claimant's hours, when it examined whether the Claimant had been working excessive hours?

## 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;
- (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] The Claimant argues that the General Division erred under subsection 58(1)(c) of the DESDA.

[11] The Claimant maintains that he worked excessive hours and that he therefore had just cause to voluntarily leave his employment under subsection 29(c) of the *Employment Insurance Act*. Under that subsection, just cause for voluntarily leaving an employment may exist if the claimant had no reasonable alternative to leaving, having regard to all the circumstances, which may include excessive overtime work or refusal to pay for overtime.

### **Average Weekly Hours**

[12] The Claimant says that there is a disparity between the hours that his employer recorded on the Record of Employment and the Employee detail. The Record of Employment shows that the Claimant had 2,334 insurable hours over 27 pay periods.<sup>3</sup> The Employee Detail shows the Claimant's pay details, including the hours he worked from January 6, 2017 to March 1, 2019.<sup>4</sup> The Claimant argues that the General Division "glossed over the 160.75 hours missing on the Employee detail but shown on the Record of Employment."

[13] The General Division acknowledged that there was a difference of 160.75 hours between the number of insurable hours on the Record of Employment and the total of the bi-weekly hours listed on the Employee Detail. For the purposes of determining whether the Claimant worked excessive hours, the General Division in fact accepted that the Claimant worked 2,334 hours. Because the General Division was prepared to accept that the Claimant worked the hours set out in the Record of Employment—a greater number of hours than on the Employee Detail—I am not satisfied that it overlooked the additional 160.75 hours that the Claimant claims is missing.

[14] The General Division noted that the most hours that the Claimant worked was an average of 44 hours per week, based on 88 hours over a two-week span. Overall, the General Division calculated that the average number of hours that the Claimant worked per week was 43.2 hours,<sup>5</sup> which it did not find was excessive. On the other hand, the Claimant calculates that he worked an average of 42 hours for the day shift and 48 hours for the afternoon shift, totalling an average of 90 hours per week—more than double the number of hours the General Division calculated for the week. The Claimant arrived at his figures by assuming that each pay period covered one week.<sup>6</sup>

[15] The Claimant's calculations suggests that the General Division erred in calculating the average number of hours he worked per week, by overlooking two important facts:

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<sup>3</sup> See Record of Employment dated February 27, 2019, at GD3-24.

<sup>4</sup> See Employee detail at GD2-36 to GD2-37.

<sup>5</sup> The General Division divided the total number of hours by the number of pay periods and then further divided it by two, to find the average weekly hours: 2,334 hours / 27 pay periods / 2 weeks per pay period = 43.2 hours / week.

<sup>6</sup> The Claimant effectively argues that the pay periods were weekly when he argued that one has to divide the total number of hours by 26 weeks, to get the number of hours worked per week, at AD1-2.

1. the company had both a day shift that ran from 7 a.m. to 3 p.m. and an afternoon shift that ran from 3:30 p.m. to whatever time an employee finished his work, and
2. the pay periods were weekly.

[16] For the purposes of determining whether the Claimant worked excessive hours, it simply had to examine the total number of hours that the Claimant worked in a pay period. It did not have to differentiate between whether the Claimant worked a day shift or an afternoon shift. Whether the Claimant worked a day shift or a night shift had no bearing on the issue of whether he worked excessive hours during a pay period.

[17] Once the General Division had the total number of hours for a pay period, it had to determine how long each pay period was. This way, it could see whether the hours worked per week, on average, was excessive.

[18] On its face, the Record of Employment does not seem to identify the length of each pay period. But, when comparing the pay periods on the Record of Employment to the pay periods on the Employee Detail, it is apparent that the pay periods on the Record of Employment cover a two-week period.<sup>7</sup> Indeed, the General Division made the same observation, finding that the gross earnings listed on the Employee Detail were the same as the insurable earnings on the Record of Employment.<sup>8</sup>

[19] As well, the General Division noted that the employer testified that the column on the Employee Detail, titled “Regular Hrs.,” showed the regular hours that the Claimant worked in a two-week span. There is no evidence that the Claimant worked any additional hours during the 27 pay periods listed in the Record of Employment and Employee Detail.

[20] I do not see any evidence that supports the Claimant’s suggestion that each pay period represented a week. I am not satisfied that there is an arguable case that the General Division overlooked 160.75 hours of work for the past 27 pay periods or that it misinterpreted the length of the pay periods on the Record of Employment.

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<sup>7</sup> Appendix A (attached to this decision) shows the length of each pay period.

<sup>8</sup> See para. 16 of the General Division decision.

**Pay period “10/13/17” – 44.00 hours under title “Regular 2 Hrs.”**

[21] The Claimant argues that the General Division made an erroneous finding at paragraph 18 when it determined that he was on vacation during the pay period 10/13/17. The Employee Detail documents 44.00 hours under the column titled, “Regular 2 Hours.” The Claimant argues that his employer lied when it suggested that he might have been on vacation. He claims he was at work for these 44.00 hours.

[22] The General Division acknowledged that the employer was uncertain whether these hours related to vacation. The General Division found that it was reasonable that the 44.00 hours represented vacation because the hours for that pay period, including the Claimant’s regular work hours, totalled 84.50 hours. The General Division found that this was consistent with the employer’s statement that employees normally worked 40 to 44 hours per week. There was no documentary evidence before the General Division to prove what these 44.00 hours actually represented. The General Division was entitled to accept or reject the Claimant’s or employer’s evidence regarding these hours, with reasons, having considered the evidence.

[23] Even so, I find that the General Division did not base its decision on whether the 44.00 hours for the pay period 10/13/17 represented vacation or actual work hours. Even if the Claimant had worked the 44.00 hours, that would mean that he worked 84.50 hours for the two-week pay period. This was consistent with the average hours that he usually worked per pay period, which the General Division determined was not excessive. In other words, an additional 44.00 hours of work for the 10/13/17 pay period would not have proven that the Claimant worked excessive hours.

[24] Hypothetically, if the 44.00 hours of non-regular hours represented overtime hours, on top of the 40.50 regular hours for the pay period, I note that the 44.00 non-regular hours arose just once in the two years that the Claimant worked for the X. The Claimant continued to work regular hours for more than a year before leaving his employment, without any non-regular hours. The Claimant resigned in September 2017, but returned later that month. The fact that the Claimant continued working and asked to be re-hired after he allegedly worked the 44.00 non-regular hours in October 2017 signalled that the Claimant accepted working non-regular hours, if

it were to arise again. However, the Employee Detail shows that the Claimant did not work any non-regular hours again after that.

[25] Largely because the 44.00 hours did not have any impact on the issue of whether the Claimant worked excessive hours, I am not satisfied that the General Division based its decision on an erroneous finding of fact when it determined that these hours likely represented the Claimant's vacation.

**CONCLUSION**

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

Janet Lew  
Member, Appeal Division

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|-----------------|-------------------------|
| REPRESENTATIVE: | B. K., Self-represented |
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**APPENDIX A**

**CLAIMANT'S PAY PERIODS**

| <b>Pay Period on ROE</b> | <b>Pay Period on Employee Detail</b> | <b>Insurable Earnings on ROE (\$)</b> | <b>Gross Earnings on Employee Detail (\$)</b> | <b>Regular Hours on Employee Detail</b> |
|--------------------------|--------------------------------------|---------------------------------------|---|---|
| 1                        | 03/01/19<br>02/15/19                 | 1,549.36                              | 259.61<br>1,289.75                            | 0.00<br>88.00                           |
| 2                        | 02/01/19                             | 1,363.25                              | 1,363.25                                      | 87.25                                   |
| 3                        | 1/18/19                              | 1,317.05                              | 1,317.05                                      | 71.00                                   |
| 4                        | 01/04/19                             | 1,286.96                              | 1,286.96                                      | 75.00                                   |
| 5                        | 12/22/18<br>12/21/18                 | 1,911.50                              | 100.00<br>1,811.50                            | 00.00<br>86.50                          |
| 6                        | 12/07/18                             | 1,060.50                              | 1,060.50                                      | 75.75                                   |
| 7                        | 11/23/18                             | 1,177.75                              | 1,177.75                                      | 83.00                                   |
| 8                        | 11/09/18                             | 1,134.00                              | 1,134.00                                      | 81.00                                   |
| 9                        | 10/26/18                             | 1,184.58                              | 1,184.58                                      | 76.25                                   |
| 10                       | 10/12/18                             | 1,127.00                              | 1,127.00                                      | 80.50                                   |
| 11                       | 09/28/18                             | 1,214.50                              | 1,214.50                                      | 86.75                                   |
| 12                       | 09/14/18                             | 1,265.95                              | 1,265.95                                      | 80.50                                   |
| 13                       | 08/31/18                             | 1,253.00                              | 1,253.00                                      | 88.00                                   |
| 14                       | 08/17/18                             | 1,478.75                              | 1,478.75                                      | 88.00                                   |



|              |          |                        |           |                        |
|--------------|----------|------------------------|-----------|------------------------|
| 15           | 08/03/18 | 1,505.00               | 1,505.00  | 88.00                  |
| 16           | 07/20/18 | 1,356.16               | 1,356.16  | 88.00                  |
| 17           | 07/06/18 | 1,004.50               | 1,004.50  | 44.00                  |
| 18           | 06/22/18 | 187.25                 | 187.25    | 0.00                   |
| 19           | 06/08/18 | 1,460.67               | 1,460.67  | 82.00                  |
| 20           | 05/25/18 | 1,772.75               | 1,772.75  | 88.00                  |
| 21           | 05/11/18 | 1,447.25               | 1,447.25  | 88.00                  |
| 22           | 04/27/18 | 2,125.62               | 2,125.62  | 88.00                  |
| 23           | 04/13/18 | 1,248.33               | 1,248.33  | 80.00                  |
| 24           | 03/29/18 | 1,288.00               | 1,288.00  | 87.50                  |
| 25           | 03/16/18 | 1,221.50               | 1,221.50  | 87.25                  |
| 26           | 03/02/18 | 1,229.08               | 1,229.08  | 79.50                  |
| 27           | 02/16/18 | 1,141.00               | 1,141.00  | 81.50                  |
| <b>TOTAL</b> |          | 35,311.26 <sup>9</sup> | 35,311.26 | 2,129.25 <sup>10</sup> |

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<sup>9</sup> Box 15B on the Record of Employment shows only the last 14 pay periods, totaling \$18,324.15. The above total of \$35,311.26 shows the insurable earnings for 27 pay periods.

<sup>10</sup> The Record of Employment shows that the total insurable hours over 27 pay periods was 2,334 hours. There is a 204.75 hour different between what appears on the Record of Employment and the Employee Detail (2,334 – 2,129.25 = 204.75). The General Division however accepted that the Claimant worked 2,334 hours over the 27 pay periods.