



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. K. v Canada Employment Insurance Commission*, 2019 SST 1276

Tribunal File Number: AD-19-646

BETWEEN:

L. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: September 30, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, L. K. (Claimant), collected Employment Insurance benefits at the same time that she worked part-time. Although she reported that she was working on her weekly claim reports, and the income from her employment, the Respondent, the Canada Employment Insurance Commission (Commission) later determined that she had under-reported her actual income for the weeks of February 12, 2017, and February 19, 2017. The Commission decided that she had been overpaid benefits and would have to repay the benefits to which she was not entitled. The Commission also found that the Claimant knew she was under-reporting her income when she declared the amount of her income on each report, so it assessed a penalty against her and imposed a notice of violation.

[3] After the Claimant requested a reconsideration, the Commission accepted that the Claimant did not mean to misrepresent her income and it agreed to remove the penalty and the notice of violation. However, it did not change its decision on the overpayment. The Claimant appealed to the General Division of the Social Security Tribunal but her appeal was dismissed on August 16, 2019 (decision number GE-19-2126). She now seeks leave to appeal to the Appeal Division.

[4] The Claimant does not have a reasonable chance of success. She has not identified an error of law or explained how the General Division ignored or misunderstood the evidence that was before it.

ISSUES

[5] Is there an arguable case that the General Division erred in law?

[6] Is there an arguable case that the General Division ignored or misunderstood the Claimant's evidence that she was paid in the week of February 12, 2017, for work that was performed at some other time?

ANALYSIS

General Principles

[7] 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).

[8] 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.

[9] 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 case¹.

Issue 1: Is there an arguable case that the General Division erred in law?

[10] The Claimant has not said how she believes the General Division erred in law. Defining "income" and "earnings" in accordance with section 35(1) of the *Employment Insurance Regulations* (Regulations) and applying section 35(2) of the Regulations, the General Division found that the amounts paid to the Claimant by the employer in the period from the week beginning June 19, 2016, to the week beginning October 23, 2016, were earnings. It also found

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

that the Claimant had not proven that any of the earnings that the Commission allocated were for work performed before June 19, 2016.

[11] The General Division determined that the earnings should be allocated to the weeks in which it understood them to have been earned under a contract of employment for the performance of services, as it is required to do under 36(4) of the EI Regulations.

[12] The General Division appeared to apply the correct law, correctly. There is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act.

Issue 2: Is there an arguable case that the General Division ignored or misunderstood the Claimant's evidence that she was paid in the week of February 12, 2017, for work that was performed at some other time?

[13] In her application for leave to appeal, the Claimant argued that she believes the General Division did not take her evidence into account when it found that the Commission had allocated her earnings to the weeks in which they were earned. The Claimant stated that she provided evidence that her employer sometimes paid her late, such that what she was paid in a week did not always relate to the work in that week. The Claimant believes that the General Division did not take all of this evidence into account.

[14] The General Division made reference to email exchanges between the Claimant and the employer showing that there had been issues with payments for late or missing hours, and it noted that she had provided an earnings spreadsheet from 2016 to 2018 (Spreadsheet).² However, the General Division was unable to correlate any of this evidence with the particular weeks of February 12–18, 2017 and February 19–25, 2017.

[15] I have likewise reviewed the evidence that was before the General Division. According to the Claimant's Record of Employment (ROE), the Claimant was paid biweekly. The Spreadsheet identified 26 pay periods for each year and I was able to relate the Claimant's pay to specific pay periods. The pay periods on the Spreadsheet are numbered starting with the number "2" but I will start with the assumption that pay period "1" would have been January 1–14; "2" would be

² GD9-4-21

January 15–28, “3” would be January 29—February 11, and “4” would be February 12—February 25 on the Spreadsheet.

[16] The final pay period on the ROE (PP1 of box 15C) is described in box 12 as the period ending on February 25, 2017, which would be pay period 4 on the Spreadsheet. The figures given in the ROE and in the Spreadsheet are not precisely the same but they are reasonably close. However, the Commission allocated income to weeks in accordance with the Payroll. This suggests earnings for the two weeks that is actually lower than the earnings recorded in either the ROE or the Spreadsheet.

[17] Below is a comparison between the three sources of information taken at face value:

Date	ROE Pay Period	ROE pay recorded	Spreadsheet Pay Period	Spreadsheet pay	Employer information used for allocation (GD3-91) Individual weeks summed for pay-period comparison purposes
February 12–25, 2017	1	\$1679.34	4	1625.25 plus 62.50 vacation = \$1687.75	\$1560.25

[18] The Spreadsheet information is not week-specific so it does not allow me to distinguish what was actually earned in the individual weeks of February 12–18 or February 19–25. However, nothing in the Spreadsheet or other earnings evidence supports the Claimant’s contention that the Commission may have overstated her earnings for either of these two weeks.

[19] I note that, for whatever reason, the pay period numbers on the Spreadsheet run from 2–26, and not from 1 to 26. It is possible that the earnings recorded for pay period 2 should have been for the period from January 1–14, 2017, and that there was actually no work or earnings in the year’s final pay period (pay period 26). I have tested the effect of reattributing the income on the basis that the pay periods were misnumbered in the chart below. I adjusted the data to move the Spreadsheet earnings from pay period 5 down to pay period 4, and those from pay period 4 to pay period 3.

Date	ROE Pay Period	ROE pay recorded	Spreadsheet Pay Period	Spreadsheet pay	Employer information used for allocation (GD3-91) Individual weeks summed for pay-period comparison purposes
February 12–25, 2017	1	\$1679.34	4 (data moved from period 5)	1619.34 plus 60.00 vacation = \$1679.34 (data moved from period 5)	\$1560.00
January 29— February 11, 2017	2	\$1664.95	3 (data moved from period 4)	1625.25 plus 62.50 vacation = \$1687.75	

[20] Having adjusted as above, I note that the pay recorded in the ROE is now consistent with the pay recorded in the Spreadsheet. However, once again, the earnings totalled from February 12–18 and Feb 19–26 (taken from Payroll and allocated to weeks of benefits), is actually a lesser figure than the earnings that might have been used if either of the other sources had been used.

[21] I have been unable to discover how the evidence before the General Division could be interpreted in such a fashion that it would support the Claimant’s argument that some portion of her earnings were misattributed to weeks in which she did not earn them.

[22] I appreciate that the Claimant also suggested that there was other evidence that was before the General Division about how the employer may have paid the Claimant late on other occasions where that pay was then attributed to periods in which the work was not performed. As noted by the General Division, none of this evidence could help the General Division to determine whether her earnings for the week of February 12, 2017, included hours of work from other periods.

[23] There is no arguable case that the General Division based its decision on any finding that ignored or misunderstood any of the Claimant’s earnings evidence. The General Division did not err under section 58(1)(c) of the DESD Act.

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

CONCLUSION

[25] The application for leave to appeal is denied.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	L. K., Self-represented
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