



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *F. Z. v Canada Employment Insurance Commission*, 2019 SST 1398

Tribunal File Number: AD-19-588

BETWEEN:

F. Z.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: December 9, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, F. Z. (Claimant), is seeking leave to appeal the General Division's decision. Leave to appeal is the first step of the appeals process. It means that an applicant has to get permission from the Appeal Division before moving on to the second and final stage of the appeal process.

[3] The Claimant entered into a termination agreement with her former employer. The Claimant received a settlement payment under the agreement. The General Division concluded that the payment was earnings. It also determined that these earnings had to be allocated.

[4] The allocation resulted in an overpayment of Employment Insurance benefits that the Claimant has to repay. The Claimant disputes the amount of the overpayment for various reasons. The Claimant argues that the General Division made legal and factual errors when it made its decision.

[5] I have to be satisfied that the appeal has a reasonable chance of success before I can grant leave to appeal. I am not satisfied that the appeal has a reasonable chance of success. I am therefore refusing leave to appeal.

FACTUAL BACKGROUND

[6] The Claimant worked at a nuclear science and technology organization. The organization dismissed the Claimant from her employment in September 2018. The Claimant applied for and began receiving Employment Insurance benefits.

[7] In December 2018, the Claimant and her employer entered into a termination settlement agreement. Under the agreement, the employer compensated the Claimant over \$47,000. The Claimant immediately let the Respondent, the Canada Employment Insurance Commission (Commission), know about the settlement agreement.

[8] At about this time, the Claimant resumed working, for a telecommunications company. She ended her claim for any Employment Insurance benefits.

[9] In March 2019, the Claimant was laid off from her new job. She renewed her claim for Employment Insurance benefits.

[10] The Commission determined that the payment under the settlement agreement was earnings. It also determined the earnings had to be applied against her Employment Insurance claim from September 23, 2018 to March 30, 2019.¹ This led to an overpayment of Employment Insurance benefits that the Claimant had to repay. The Commission calculated that the amount of the overpayment was over \$5,200. The Claimant asked the Commission to reconsider its decision, but it did not change its mind.²

[11] The Claimant appealed the Commission's reconsideration decision to the General Division. In dismissing the appeal, the General Division found that the Commission had correctly identified the settlement monies as earnings. It also found that it had properly allocated them against her benefits. The Claimant is now seeking leave to appeal the General Division's decision.

ISSUES

[12] The issues before me are as follows:

- (a) Is there an arguable case that the General Division made a factual error that the Claimant received Employment Insurance benefits for the weeks of March 17, 24, and 31, and April 7, 2019?
- (b) Is there an arguable case that the General Division made a legal error when it decided that the Commission had correctly allocated the Claimant's earnings?
- (c) Is there an arguable case that the General Division process was unfair?

¹ See Commission's letter dated May 6, 2019, at GD3-27 to GD3-28.

² See Commission's reconsideration decision dated June 17, 2019, at GD3-36 to GD3-37.

ANALYSIS

[13] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the reasons for appeal fall into at least one of the types of errors listed in subsection 58(1) of the *Department of Employment and Social Development Act*. The types of errors are:

1. The General Division process was unfair.
2. The General Division did not decide an issue that it should have decided. Or, it decided something that it did not have the power to decide.
3. The General Division made an error of law when making its decision.
4. The General Division based its decision on an important error of fact.

[14] The appeal also has to have a reasonable chance of success. A reasonable chance of success is the same thing as an arguable case at law. 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 made a factual error that the Claimant received Employment Insurance benefits for the weeks of March 17, 24, and 31, and April 7, 2019?

[15] The Claimant initially argued that the General Division made a factual error when it found that she had received Employment Insurance benefits for the weeks of March 17, 24, and 31, and April 7, 2019. The Claimant initially denied that she received any payments for these weeks. She claimed the first payment that she received was for the week starting April 15, 2019—a payment that she received 10 days later, on April 25 2019.

[16] As well, the Claimant queried why the Commission would have paid her full benefits for the week of March 17, 2019, when she had partial earnings.

[17] I held a case management conference on December 6, 2019. The Commission (represented by Isabelle Thiffault) addressed these issues.

[18] The Commission noted that the Claimant filed weekly reports for her Employment Insurance claim. She filed reports for the periods from March 17 to March 30, and from March 31 to April 13, 2019. The Commission stated that it processed these reports on April 22, 2019. It paid the Claimant on April 25, 2019.

[19] The payment on April 25 covered the period from March 17 to April 13, 2019. The amount of the payment was for a net total of \$1,948 (which may have appeared as two separate payments of \$974).

[20] The Commission made another payment to the Claimant, on April 30, 2019. This payment covered the period from April 14 to April 27, 2019. The amount of this payment was for a net total of \$974.

[21] The Commission also explained that it paid the Claimant full Employment Insurance benefits for the week of March 17, 2019. It based the amount of the payment on the information the Claimant provided at the time. The Commission believed that the Claimant did not work the week of March 17, 2019, so it paid her full benefits for that week.

[22] The Claimant was able to verify that she received these payments on April 25 and 30, 2019. The Claimant accepts that she received Employment Insurance benefits for the weeks of March 17, 24, and 31, and April 7, 2019 after all.

[23] The Claimant confirmed that the only outstanding issue before the Appeal Division is whether the General Division made a legal error. She maintains that the General Division made a legal error when it determined that her 2019 earnings had to be allocated.

(b) Is there an arguable case that the General Division made a legal error when it decided that the Commission had correctly allocated the Claimant's earnings?

[24] The Claimant argues that the General Division made a legal error when it decided that the Commission had correctly allocated the Claimant's earnings that she received from a settlement with her former employer. The General Division agreed that the separation monies of over

\$47,000 were earnings that had to be applied against the Claimant's Employment Insurance claim from the week of September 23, 2018 to the week of March 31, 2019.³

[25] The Claimant argues that both the General Division and the Commission should have limited the allocation of the earnings. The Claimant notes that she had enough hours from her second job to qualify for benefits. She did not have to rely on her hours from the nuclear science and technology organization. She argues that the Commission should not have allocated any of the severance monies against benefits she got in 2019. In other words, she asserts that she should not have to repay any Employment Insurance benefits that she received in 2019.

[26] Subsection 36(9) of the *Employment Insurance Regulations* describes how any earnings from a separation from an employment are to be allocated. They are to be allocated as follows:

to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[27] It is irrelevant that the Claimant had two employers. It is also irrelevant that she had enough hours from her second employment to qualify for benefits.

[28] The General Division determined that the Commission had correctly allocated the Claimant's earnings, starting with the week when she lost her job.

[29] At paragraph 16, the General Division determined that the Commission had calculated that the allocation of the Claimant's earnings would start on September 23, 2018 and continue until the end of March 2019. The General Division noted that the Commission allocated the remaining three weeks of severance monies to the first three weeks of the Claimant's renewal claim.

[30] I do not see any error in the General Division's interpretation of subsection 36(9) of the *Employment Insurance Regulations* or in its understanding of how an allocation was to be carried out under the subsection.

³ Commission's letter dated May 6, 2019, at GD3-27 to GD3-28.

[31] The subsection required the Commission to allocate the total amount of \$47,239.27 according to the Claimant's normal weekly earnings from September 23, 2018 to March 30, 2019. The amount of \$1,758 was the Claimant's normal weekly earnings at her previous job.

[32] The subsection also required the Commission to allocate any balance against the benefits for the last week. In this case, the last week began on March 31, 2019.

[33] The General Division properly noted that the amount of \$1,758 had to be allocated to the weeks of March 17 and 24, 2019. The General Division also properly noted that the balance of \$591 had to be allocated against the benefits for the last week.

[34] As the General Division concluded, the allocation was properly carried out and was consistent with subsection 36(9) of the *Employment Insurance Regulations*.

[35] Given these considerations, I am not satisfied that the appeal has a reasonable chance of success on this argument.

(c) Is there an arguable case that the General Division process was unfair?

[36] After the General Division hearing, the Commission filed supplementary representations. The General Division issued its decision three days later. It did not give the Claimant a chance to respond to the Commission's supplementary representations.

[37] The Claimant offered to produce banking statements, in response to the supplementary representations. She relied on the banking statements to prove that she never received any benefits for the weeks of March 17 to April 13, 2019. The banking statements were not in evidence at the General Division level.

[38] The Commission has since explained the payment history. The Claimant now accepts the Commission's explanation that it paid benefits to her for these weeks.

[39] The issue of whether the Claimant received Employment Insurance benefits is now settled. Even so, it is clear that the General Division should have given the Claimant a chance to respond to the Commission's supplementary representations. Otherwise, there may well have

been a breach of the principles of natural justice. This issue is no longer applicable. Still, I raise it as a reminder that parties should be given a fair chance to present their cases.

[40] As a footnote, I would have allowed the banking statements to be produced, for the limited purpose of showing that the Claimant might have had more arguments to make regarding what payments she received. Otherwise, generally the Appeal Division does not accept new evidence.

[41] Finally, the Claimant is asking for compensation for her time and for the stress that she has had to endure in pursuing her appeal. It likely would have been helpful if the Commission had been able to provide some detailed information to the Claimant early on. This might have precluded the Claimant from having to spend time pursuing part of her appeal. It might have reduced some of her stress too. However, I do not have any jurisdiction to grant any relief for the Claimant's time and stress.

CONCLUSION

[42] I am not satisfied that the appeal has a reasonable chance of success. As such, I am refusing the application for leave to appeal.

Janet Lew
Member, Appeal Division

APPLICANT:	F. Z., Self-represented
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