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

Citation: *A. S. v Canada Employment Insurance Commission*, 2019 SST 1464

Tribunal File Number: AD-19-850

BETWEEN:

A. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: December 20, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, A. S. (Claimant), applied for Employment Insurance sickness benefits after she was injured in a car accident and could not return to work. At about the same time, she applied for benefits through her automobile insurance company, which included income support benefits. The Respondent, the Canada Employment Insurance Commission (Commission) eventually determined that the income support payments the Claimant was receiving from the insurance company were earnings, which would have to be allocated to weeks of benefits. This reduced the Claimant's benefit entitlement in some weeks in which she had already been paid benefits, so the Commission also declared an overpayment.

[3] The Claimant asked the Commission to reconsider but it maintained its original decision. Next, she appealed the reconsideration decision to the General Division of the Social Security Tribunal. The General Division dismissed her appeal. Now the Claimant is asking the Appeal Division for permission to appeal the General Division decision.

[4] The Claimant has no reasonable chance of success. The Claimant has not made out an arguable case that the General Division acted unfairly, that it misapplied the law, or that it ignored or misunderstood the evidence.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] To allow the appeal process to move forward, I must find that there is a "reasonable chance of success" on one or more of the "grounds of appeal" found in the law. A reasonable chance of success means that there is a case that the Claimant could argue and possibly win.[1]

[1] This is explained in a case called Canada (Minister of Human Resources Development) v Hogervorst, 2007, FCA 41; and in Ingram v Canada (Attorney General), 2017 FC 259.

[6] “Grounds of appeal” means reasons for appealing. I am only allowed to consider whether the General Division made one of these types of errors:[2]

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

ISSUES

[7] Is there an arguable case that the General Division act unfairly by showing bias?

[8] Is there an arguable case that the General Division made an error of law by,

a. Considering the wrong issues?
b. Providing inadequate reasons?
c. Not considering the law for sickness benefits?
d. Not considering the Digest of Benefit Entitlement Principles?
e. Not applying section 35(7)(b) of the *Employment Insurance Regulations?*
f. Considering her private insurance payments to have been made under a provincial law?
g. Not considering the effect of section 47(3)(f) of the Regulation 34/10 to the Ontario *Insurance Act*?

[9] Is there an arguable case that the General Division made an important error of fact?

ANALYSIS

Bias

[10] The Claimant has argued that the General Division or the General Division member was biased.[3] But she has not said what causes her to believe the General Division or the member was biased in its decision.

[2] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act.*
[3] AD1-9; para. 14

[11] I understand that the Claimant disagrees with the General Division's decision and its reasons. However, according to the Supreme Court of Canada, "The test (for a reasonable apprehension of bias) is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude."[4] There is no arguable case that the decision itself, nor the actions of the member or of the General Division, would lead a reasonable person to reasonably believe that the decision was influenced by bias.

The issues that the General Division needed to decide

[12] The Claimant's appeal to the General Division concerned the reconsideration decision that maintained the decision of June 19, 2019. She disagreed with the deduction of auto insurance benefits from her Employment Insurance sickness benefits.[5]

[13] The Claimant suggests that the issues considered by the General Division were not the issues that she raised in her appeal.[6] The General Division understood that the Claimant disagreed that the insurance payments had been deducted as earnings, but that she did not dispute how the earnings were allocated.[7] However, both issues are incorporated to the original decision from the Commission that found that the Claimant's motor vehicle accident payments were earnings and would affect her benefits beginning on March 13, 2019.

[14] The General Division did not frame the issues in precisely the same manner as the Claimant explained her reasons for appeal, but there is no arguable case that the General Division misunderstood the issues that it needed to decide. It properly reviewed both the characterization of the Claimant's insurance payments as earnings, and the manner in which the Commission allocated those payments.

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[4] See the definition for reasonable apprehension of bias in the Supreme Court of Canada decision: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484
[5] Notice of Appeal, GD2-4
[6] AD1-6; para. 2
[7] General Division, para. 18

Reasons

[15] The Claimant argued that the General Division did not analyze how section 35(2)(d) should be analyzed and that its reasons were inadequate generally.[8] I have considered the adequacy of the General Division's reasons in my assessment of the other issues raised by the Claimant. The General Division gave transparent and understandable reasons for its interpretation of the law and to find the facts on which it based its decision. The reasons are sufficient to allow the Claimant to determine whether, and in what manner, she agrees or disagrees with the General Division's reasoning or conclusions.

[16] There is no arguable case that the reasons are so inadequate as to be an error of law.

The applicable law

[17] The Claimant has a large number of difficulties with the General Division's interpretation of the law. Most of the Claimant's concerns relate to the manner in which the General Division interpreted and applied section 35(2)(d) of the *Employment Insurance Regulations* (EI Regulations), or her view that the General Division reasons are inadequate.

Law for sickness benefits

[18] The Claimant appears to be arguing that the General Division erred in law by failing to distinguish between regular Employment Insurance benefits and Employment Insurance sickness benefits,[9] and submits that the General Division should have applied the Employment Insurance Sickness Benefit Regulations. I do not understand the Claimant's reference to Employment Insurance Sickness Benefit Regulations, or its argument that the General Division should have applied these Regulations. There are no "Employment Insurance Sickness Benefit Regulations". Sickness benefits are covered in section 21 of the *Employment Insurance Act* (EI Act). The relationship of earnings to Employment Insurance benefits, **including sickness benefits**, is governed generally by section 35 of the EI Regulations.

[8] AD1-6; para. 1, para. 4, para. 6
[9] AD1-9; para. 13

[19] The General Division did not err in law by failing to determine the effect of the Claimant's wage loss insurance benefits as they relate specifically to her sickness benefits.

Use of Digest

[20] The Claimant also suggested that the General Division decision is inconsistent with the Digest of Benefit Entitlement Principles (Digest), because the Digest says that insurance provided by "commercial insurance that is not under or pursuant to a provincial law are not earnings".[10]

[21] However, the General Division found that her insurance payments were, in fact, "under or pursuant to a provincial law.[11] The Claimant has not identified how the General Division decision is inconsistent with the information in the Digest. In any event, the Digest only offers information on how the Commission interprets the law and its policies. The General Division does not always interpret the law in the same way as the Digest, and it is not required by law to follow the Digest.

[22] There is no arguable case that the General Division made an error by misinterpreting, misapplying, or failing to follow the Digest.

Proper use of section 35(2)(d) of the EI Regulations

[23] The Claimant suggests that the General Division ought to have applied section 35(7)(b) of the EI Regulations which says that sickness or disability wage-loss indemnity plans are not earnings.[12] I appreciate that the inclusion of a claimant's entire income as earnings (under section 35(2)) is "subject to the other provisions" of section 35.[13] This means that the income that would otherwise be considered earnings could be restricted or qualified in some way by the subsections of section 35.

[24] One of those "other provisions" is section 35(2)(d), which says that auto insurance payments for loss of income are earnings (in certain circumstances). Section 35(2)(d) is stated to

[10] AD1-9; para. 12
[11] General Division decision, para. 7
[12] AD1-7; para. 7
[13] AD1-6; para. 3

be "*notwithstanding*" section 35(7)(b). Where a claimant's auto insurance payments meet the criteria of section 35(2)(d), the EI Regulations do not permit those payments to be excluded from earnings under section 35(7)(b).

[25] The essential question is whether the payments meet the section 35(2)(d) criteria. Section 35(2)(d) states that motor vehicle accident insurance payments will be earnings in the following circumstances[14]:

- the payments are provided under a provincial law;
- they are loss of employment earnings due to injury;
- Employment Insurance benefits have not already been deducted from the auto insurance payments.

<u>Reasons for finding payments to be, "under a provincial law"</u>

[26] The Claimant argues that the General Division was wrong to consider that the payments were provided under a provincial law. She also argues that the General Division's reasons do not explain how it found her payments under her private auto insurance company to be payments under a provincial law.[15]

[27] I disagree. The General Division explained that a payment is earnings if it is made to a claimant under a motor vehicle insurance scheme regulated by the provincial government that provides for the payment of benefits for loss of wages. The payments do not need to be payments from the government and the insurance scheme does not need to be "provincially run" insurance as the Claimant argued.[16] The requirement is that the payments be made under or pursuant to a provincially regulated scheme.

[28] The General Division supported this interpretation by referring to the Federal Court of Appeal case in *Canada (Attorney General) v Lalonde*.[17] *Lalonde* reviewed the meaning of section 57(2)(d) of the former *Unemployment Insurance Regulations*, whose language is very

[14] This is a paraphrase of section 35(2)(d) of the Employment Insurance Regulations
[15] AD1-8,9; para. 11
[16] AD1-7, 8; para. 8
[17] *Canada (Attorney General) v Lalonde* A-378-96

similar to section 35(2)(d) of the current Regulations. The specific question before the Court was whether auto insurance benefits (in Ontario) for loss of wages due to a motor vehicle accident should be considered private insurance payments or, instead; payments from motor vehicle accident insurance provided under or pursuant to a provincial law. The Federal Court of Appeal held that,

> as long as a payment is made to a claimant under a scheme of motor vehicle insurance regulated by the provincial government that provides for the payment of benefits for loss of wages, the benefits paid constitute earnings for the purposes of paragraph 57(2)(d)…

[29] The *Lalonde* case has not been overturned by a higher court and there is no more recent Federal Court of Appeal decision that comes to a different conclusion. *Lalonde* is still good law and the General Division is required to follow its lead.

[30] Therefore, there is no arguable case that the General Division made an error of law when it stated that a claimant's loss of income payments should be considered earnings when those payments are made under a provincially regulated scheme.

Reasons for finding Claimant's auto insurance payments to be made under a provincially regulated scheme

[31] The General Division found as fact that the Claimant's auto insurance "income replacement benefits" were paid under a provincially regulated scheme. The Claimant is correct that she has, or had, a contract with her insurance company. However, the benefits she received were still regulated under provincial legislation, regardless of whether they came from the insurer or from the government. The Claimant's insurance benefits were "income replacement benefits" provided in accordance with the *Statutory Accident Benefits Schedule*, which is Ontario Regulation 34/10 to Ontario's provincial *Insurance Act* (I will refer to this as Reg 34/10).

[32] The Claimant argues that the General Division did not understand that section 47(3)(f) of Reg 34/10 has the effect of excluding her income replacement benefit from consideration under section 35(2)(b) of the EI Regulations.[18] However, section 47(3)(f) of Reg 34/10 says only that

[18] AD1-7; para. 6

the insurer (the auto insurance policy insurer) may not deduct Employment Insurance benefits from the income replacement benefits payable under Reg 34/10. It does **not restrict the Commission** from reducing Employment Insurance benefits by deducting any of the Reg 34/10 insurance benefits. In fact, section 35(2)(b) of the EI Regulations states that the Commission is only permitted to deduct the auto insurance wage loss benefits from Employment Insurance benefits if the insurer did not already take the Employment Insurance benefits into account to determine the insurance payment amount.

[33] The purpose of both section 47(3)(f) of Reg 34/10 and section 35(2)(d) of the EI Regulations is to ensure that the Commission is not deducting wage loss insurance payments from a claimant's Employment Insurance benefits **at the same time** that a claimant is having Employment Insurance benefits deducted from wage loss insurance payments.

[34] There is no arguable case that the General Division made an error of law by applying section 35(2)(d) of the EI Regulations in a manner inconsistent with the *Insurance Act* of Ontario or its regulations.

<u>Consistent application of definitions</u>

[35] The Claimant also argued that the General Division interpreted "provincial benefits" and "plan established under a provincial law" inconsistently with how those phrases are used elsewhere in the EI Regulations. The Claimant refers specifically to sections 76.01 and 76.31 of the EI Regulations.[19]

[36] There is no arguable case that the General Division made an error of law by not considering the uses of these phrases for other purposes. Sections 76.01 and 76.31 are found in Part III.2 of the EI Regulations which concerns premium reductions for self-employed persons. The definitions of "provincial benefits" and "plan established under a provincial law" found in section 76.31 and referred to again in section 76.32 are specifically stated to apply in "this Part"; that is, **for the purpose of Part III** of the EI Regulations. The General Division is not required to use the same definition or interpretation for other purposes.

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[19] AD1-8; para. 9, 10

Conclusion on errors of law

[37] The Claimant has not made out an arguable case that the General Division erred in law.

Significant error of fact

[38] Finally, the Claimant suggested that her evidence was certain, and that the General Division did not address her arguments.[20] However, the Claimant has not explained how the General Division decision was based on a failure to consider evidence or to comprehend the Claimant's arguments. She did not identify either the evidence that she believed to be conclusive, or the arguments that she believed the General Division did not discuss.

[39] I have reviewed the record and the decision, but I did not discover any relevant evidence that was mistaken or overlooked, or any of the other errors described in section 58(1) of the *Department of Employment and Social Development Act*. There is no arguable case that the General Division did not consider all the evidence that was relevant to the issues it needed to decide, or that it based its decision on a correct application of the law to the facts.

Summary of analysis

[40] I have considered the various arguments advanced by the Claimant but I find that none of them make out an "arguable case". This means the Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	N. S., for the Applicant

[20] AD1-7; para. 6