



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. B. v Canada Employment Insurance Commission*, 2020 SST 70

Tribunal File Number: AD-20-24

BETWEEN:

R. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: February 3, 2020

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. B. (Claimant), originally qualified for Employment Insurance benefits based on hours of insurable employment that he reportedly accumulated by working for an employer, "MH". The Respondent, the Canada Employment Insurance Commission (Commission), later investigated both MH and the Claimant, and it determined that the Claimant had not been employed by MH. This meant that he should not have qualified for benefits, and that the benefits that he had been paid would need to be repaid to the Commission. In addition, the Commission assessed a penalty against the Claimant for making a false statement. At the request of the Claimant, the Commission reconsidered its decision, but the decision was not changed.

[3] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed the Claimant's appeal on the issue of whether he worked at MH and accumulated hours of insurable employment at MH. However, it found that the Commission should have taken the Claimant's financial circumstances into account when it determined the penalty. The General Division reduced the penalty. The Claimant is now asking for leave (permission) to appeal the General Division decision to the Appeal Division.

[4] There is no reasonable chance of success. The Claimant has not pointed to any evidence that was ignored or misunderstood or any finding of fact that is entirely inconsistent with the evidence. Nor have I discovered any such instance in my own review of the record.

PRELIMINARY MATTER:

[5] The Claimant's appeal was heard consecutively with the appeal for his wife, but resulted in different decisions from the General Division. The General Division considered the testimony taken from each spouse in the decision of the other spouse.

[6] Each General Division decision was appealed separately. Like the General Division, I have issued a separate decision in respect of the appeal from each spouse. This decision relates to the husband's appeal.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[7] 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 an arguable case. This would be some argument that the Employer could make and possibly win.¹

[8] "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.

ISSUE

[9] Did the General Division make an important error of fact by basing its decision on a finding that was "perverse or capricious"³ or that ignored or misunderstood relevant evidence?

ANALYSIS

Important error of fact

[10] When the General division found that the Claimant was not employed by MH, this meant that it could not accept that any of the hours or employment associated with MH could be used to

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.

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 This is taken from the language of section 58(1)(c) of the DESD Act. It may help to think of a "perverse or capricious" finding as one which is not rationally connected to the evidence, or which is inconsistent with the evidence.

qualify for benefits. As a consequence, the General Division determined that the Claimant did not qualify to receive benefits on July 3, 2016, and it confirmed the cancellation of the benefit period established on that date.

[11] The Claimant does not agree with the General Division's finding that he was not employed by MH.

[12] The General Division also found that the Claimant knowingly made a false statement when he claimed to have worked for MH and submitted a Record of Employment in support of that employment. As a result, the General Division agreed that the Commission had the discretion to impose a penalty. However, the General Division found that the Commission did not take into account the Claimant's financial circumstances so it reduced the penalty.

[13] The Claimant's leave to appeal application does not specifically challenge the Commission's ability to impose a penalty. However, the penalty was based on a determination that he had knowingly made false statements that she worked for MH. He maintains that he did work for MH in fact, which means that he also maintains that his statement was not false. Therefore, I accept that the Claimant meant to challenge the Commission's ability to impose a penalty. He has not made specific representations as to what the penalty should be, if the finding that he knowingly made a false statement were to stand.

[14] The Claimant argues that he has done nothing wrong and that he is being unfairly prejudiced by MH's wrongdoing. As I understand his position, the Claimant is suggesting that his appeal was denied because MH did not conduct its business properly or maintain records of its contracts, the employees on its payroll, and its payments to its employees.

[15] When the Commission investigated, it sought records from the employer, from the Claimant and his wife, and from connected financial institutions. Everything that it discovered was in the Commission file that was considered by the General Division. The Claimant submitted additional evidence to the General Division that he believed would support his position that he had been employed by MH. He attached some evidence to Notice of Appeal, and

he submitted additional evidence just before the hearing,⁴ and post-hearing.⁵ This additional evidence was before the General Division, as was the Claimant's testimony and the testimony of his wife.

[16] I acknowledge that the employer was not particularly forthcoming in responding to the Commission's document requests. However, the General Division is not mandated to conduct an independent investigation.⁶ It is charged with weighing the evidence that is before it and reaching a decision on a balance of probabilities. That means that the General Division had to focus on the evidence that was on the record. Based on that evidence, it had to decide whether it was more likely than not that the Claimant worked the hours as an employee of MH that he reported. The Claimant also argued that the Commission should have appeared to support its decision at the General Division but the Commission is not required to appear.

[17] The Claimant argued that the General Division made an important error of fact and I would only be able to grant leave to appeal, if I could find an arguable case that the General Division made such an error. This means that there would need to be an arguable case that the General Division based its decision on a finding that it made in a manner that was perverse or capricious, or which ignored or misunderstood relevant evidence.⁷ I cannot discover an arguable case by substituting my own view of the evidence for that of the General Division.⁸

[18] My own review of the record has not discovered any instance in which it is apparent that evidence was ignored or misunderstood. I acknowledge that the audio record of the General Division hearing was unavailable for my review. However, the General Division decision does rehearse the testimony of the Claimant as to the nature of his work for MH and his view of his employment relationship with MH. The Claimant did not suggest that the General Division AD-20-24's assessment of the evidence was incomplete or that it mischaracterized his evidence or that of his wife. Nor did he point to any part of his evidence, including his testimony, that the General Division ignored or misunderstood.

⁴ GD-6

⁵ GD-10

⁶ See *T.W. v. Minister of Employment and Social Development*, 2018 SST 58

⁷ *Marcia v. Canada (Attorney General)*, 2016 FC 1367

⁸ *Tracey v. Canada (Attorney General)*, 2015 FC 1300, *Rouleau v. Canada (Attorney General)*, 2017 FC 534

[19] Furthermore, the General Division decision is based on the Claimant's earlier statements to the Commission,⁹ and on limitations in his Claimant's documentation.¹⁰ Where the General Division chose to prefer certain evidence over other evidence, it explained why it did so.¹¹ The General Division's findings that the Claimant did not work for MH and that he knowingly made false statements to the contrary are both findings that follow rationally from its weighing of the evidence.

[20] The Commission assessed the penalty at \$2148.00. The General Division said that the Commission should have taken into account financial hardship and it reduced the penalty to 5% of the total overpayment, which calculated to \$1047.00.

[21] The Claimant has not argued that General Division erred in how it reassessed the Claimant's penalty or suggested that there was some other relevant circumstance that was in evidence and that the General Division should have considered. However, in the event that the Claimant meant to appeal the amount of the penalty, he has not made out an arguable case that the General Division made any important error of fact in reassessing the penalty.

[22] The Claimant has not made out an arguable case that the General Division made an important error of fact by finding that he did not work for MH or that he knowingly made a false statement.

[23] The Claimant has no reasonable chance of success in the appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	R. B., Applicant
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⁹ General Division, para 27.

¹⁰ General Division decision, para 26 and 30

¹¹ General Division decision, para. 27