



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *CS v Canada Employment Insurance Commission*, 2020 SST 1074

Tribunal File Number: AD-20-821

BETWEEN:

**C. S.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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Leave to Appeal Decision by: Stephen Bergen

Date of Decision: December 17, 2020

## **DECISION AND REASONS**

### **DECISION**

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

### **OVERVIEW**

[2] The Applicant, C. S. (Claimant), established an initial claim for Employment Insurance (EI) benefits effective September 25, 2016, and he collected benefits. On May 18, 2017, he applied to renew his claim effective May 14, 2017, and he collected additional benefits.

[3] The Canada Employment Insurance Commission (Commission) received information that the Claimant may not have declared all of his earnings while he was collecting benefits. The Commission conducted a review and found that the Claimant had made false and misleading statements for his claim reports for the three biweekly benefit periods that included the four weeks from January 22, 2017, to February 18, 2017. In a separate review, the Commission found that the Claimant also had made a false and misleading statement in his claim report for the two weeks from July 9, 2017, to July 22, 2017. The Commission determined that the Respondent had been overpaid benefits and it assessed a penalty and imposed a notice of violation for each period of review (which I will call “review periods”). The Commission reconsidered these decisions at the Claimant’s request, but neither reconsideration changed the decision.

[4] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed his appeals. He is now applying for leave (permission) to appeal the General Division decision to the Appeal Division.

[5] Leave to appeal is refused because the Claimant has no reasonable chance of success. The Claimant has not made out an arguable case that the General Division acted unfairly or that it made an important error of fact.

### **PRELIMINARY MATTERS**

[6] The Claimant provided submissions in support of his application for leave to appeal. Those submissions referred to additional evidence, which was attached. The evidence included the following:

1. A Record of Employment (ROE) with serial number XXXXXXXXXX for the period from January 26, 2017, to February 18, 2017;
2. March 2017 text messages about settlement negotiations;
3. A second ROE with serial number XXXXXXXXXX for the period from August 25, 2017, to December 23, 2017;
4. A Canada Revenue Agency reassessment of the Claimant's 2017 taxes.

[7] When the Appeal Division first received the application for leave to appeal, it noted that the Claimant was submitting new evidence. Because of this, it sent the Claimant a November 10, 2020, email, telling the Claimant that the Appeal Division does not generally accept new evidence. The letter suggested that there was another way that the Claimant might be able to have that evidence considered. It informed the Claimant that he could apply to the General Division to rescind or amend its decision in a different process. The General Division would decide whether the new evidence was "new facts" and whether it should change its original decision based on those new facts.

[8] The Appeal Division offered to place this appeal on hold if the Claimant wished to apply to rescind or amend the General Division. It also said that it would proceed with this appeal if it did not hear from the Claimant by November 24, 2020.

[9] The Claimant did not contact the Appeal Division to discuss his response to the November 10, 2020, email, and efforts to reach him have been unsuccessful. However, the Claimant sent the Appeal Division an email on December 8, 2020. In that email, he briefly asked the Appeal Division to apply his evidence in the present leave application. He said that it is "general background information to understand the history of the case."

[10] Therefore, I am proceeding with the Claimant's leave to appeal application. However, I will not be reviewing the Claimant's evidence or considering how that evidence may or may not support any of his arguments.

[11] The Federal Court has suggested that it may consider "general background information" as an exception to the rule that would otherwise exclude new evidence.<sup>1</sup> However, this was said in the context of a court's judicial review of an administrative decision. The principles that guide the role of the courts do not necessarily apply within administrative appeals.<sup>2</sup>

[12] I am unaware of any authority that directs the Appeal Division to consider new evidence. However, the Federal Court of Appeal has repeatedly confirmed that the Appeal Division may not consider new evidence.<sup>3</sup>

[13] In any event, the Claimant's evidence would not meet the limited exception for "general background information" by which courts sometimes allow new evidence to be introduced in a judicial review. The Claimant is not providing general background information to help me understand his argument. Instead, he believes the evidence will help him to prove that his appeal has merit. The Claimant is asking the Appeal Division to use his new evidence to find that the payments he received in each review period were settlements (which he argues should not be earnings), and to find that he was not working during the review periods.<sup>4</sup>

## **WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?**

[14] 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

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<sup>1</sup> *Chopra v Canada (Treasury Board)*, T-200-99; *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

<sup>2</sup> *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

<sup>3</sup> *Parchment v Canada (Attorney General)*, 2017 FC 354; *Marcia v. Canada (AG)*, 2016 FC 1367.

<sup>4</sup> AD1-5,6.

chance of success means that there is an arguable case. This would be some argument that the Claimant could make and possibly win.<sup>5</sup>

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

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**

[16] Is there an arguable case that the General Division acted unfairly by relying on a recording of the Claimant’s conversation with a Commission agent?

[17] Is there an arguable case that the General Division ignored or misunderstood failed to consider evidence that he actually had no earnings in the review periods?

## **ANALYSIS**

### **Unfairly Relying on Recording**

[18] The Claimant argued that the General Division relied on an improperly recorded conversation between himself and a Commission agent. He also says that the General Division did not give him a copy of the recording to allow him to prepare for his appeal. His argument suggests that he believes he did not have an opportunity to respond to the Commission’s case or

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<sup>5</sup> 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.

<sup>6</sup> 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*.

to be heard properly. This is an argument that the General Division failed to observe a principle of natural justice.

[19] However, there is no arguable case that the General Division acted unfairly by considering evidence of the Claimant's discussion with the Commission. There is also no arguable case that it failed to disclose to the Claimant any evidence on which it relied.

[20] The Claimant misunderstands the nature of the evidence on which the General Division relied. The General Division did not have access to an audio recording of the Claimant's conversation with the Commission. Neither do I.

[21] There is nothing in the appeal record to suggest that the Commission sent the General Division an audio recording or a transcript of an audio recording. Likewise, the General Division did not receive or rely on any oral evidence or oral argument from the Commission. The Commission did not attend the scheduled oral hearing.

[22] The General Division decision referenced a "transcript" in its decision. However, it footnoted that reference to direct the reader to the Commission's notes of a September 9, 2020, telephone call.<sup>7</sup> It is obvious from how the notes are written, including how they express the Claimant's position in the third person, that the notes are not a verbatim transcript. These notes are similar to notes of Commission agents in many other cases. An agent created these notes to document the phone call with the Claimant. The same notes that were available to the General Division would have been included in the full file disclosure that the Claimant received in advance of the scheduled General Division hearing.<sup>8</sup>

### **Failure to Consider that Claimant had No Income during Review Periods**

[23] There is no arguable case that the General Division made an important error of fact. The General Division found that the Claimant made false or misleading statements when he declared

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<sup>7</sup> General Division decision, para 22: refers to GD3A-63,64, and 65. (See also GD3B-69 – identical to GD3A-65).

<sup>8</sup> The GD3A and GD3B files.

that he had no income during the review periods. It based this decision on the evidence that was before it.

[24] The Claimant argued that the General Division made a mistake because he was not working at the time he made the reports. He said that the payments he received during the review periods represented some kind of settlement.

[25] However, the Claimant did not point to any evidence that the General Division ignored or overlooked. The only evidence available to the General Division was the evidence in the Commission's reconsideration files. The Claimant did not send any additional evidence to the General Division with his notice of appeal, or afterwards. There is no documentation of a settlement in the evidence that was before the General Division. He had never told the Commission about any settlement or made any argument that the earnings reported by his earnings were from a settlement.

[26] The Commission reconsideration files included information from the employer that showing that the Claimant worked and had earnings in the weeks from January 22, 2017, to February 18, 2017, and from July 9, 2017, to July 22, 2017.<sup>9</sup> These files document the Claimant's declarations that he did not work or have earnings in both of these periods.<sup>10</sup> If the Claimant did not actually earn any income—as he declared—this is not what he told the Commission when the Commission investigated his earnings. According to the Commission's notes, he instead told the Commission agent that he made a mistake on his claim reports and he apologized.<sup>11</sup> If the Claimant had wanted to dispute the accuracy of the Commission's notes, he could have done so by participating in the scheduled General Division hearing. He did not appear for his hearing, or give the General Division any explanation for his failure to appear.

[27] There was evidence to support the General Division's finding that the Claimant provided false or misleading information. It is not my job to reassess or reweigh that evidence.<sup>12</sup> There is

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<sup>9</sup> GD3B-56, GD3A-48.

<sup>10</sup> GD3B-25, 30, 35; GD3A-40.

<sup>11</sup> GD3B-69; GD3A-65.

<sup>12</sup> *Hideq v. Canada (Attorney General)*, 2017 FC 439, *El Haddadi v. Canada (Attorney General)*, 2016 FC 482.

no arguable case that the General Division ignored or misunderstood the evidence about the Claimant's earnings.

[28] I have also considered whether the Claimant has made out an arguable case in some other way. I have looked for an obvious error of law and I have reviewed the appeal record for any other evidence that the General Division may have ignored or overlooked.<sup>13</sup> However, I have not found anything that could support an argument that the General Division made an error.

[29] The Claimant has no reasonable chance of success.

## CONCLUSION

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

Stephen Bergen  
Member, Appeal Division

REPRESENTATIVES:	C. S., Self-represented
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<sup>13</sup> This is following the lead of the Federal Court in decision such as *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.