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

Citation: *SJ v Canada Employment Insurance Commission*, 2021 SST 89

Tribunal File Number: AD-21-70

BETWEEN:

S. J.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: March 11, 2021

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal refuses leave to appeal to the Appeal Division.

OVERVIEW

[2] The Applicant (Claimant) lost his employment due to a shortage of work on June 15, 2018. The employer initially reported that he received $23,010.25 in vacation pay owed, as well as $44,740.00 in severance pay.

[3] After allowing the Claimant's antedate request, the Respondent, the Canada Employment Insurance Commission (Commission), established the claim to start June 17, 2018. The Claimant received benefits from November 4, 2018, through the week ending May 18, 2019, for a total of 29 weeks of benefits.

[4] Upon reconsideration, the employer clarified that the Claimant received the sum of $23,010.25 in vacation pay owed, as well as $264, 408.00 in severance pay. The applied dates against his claim were now from the June 17, 2018 start week, through the week ending November 16, 2019. The Commission allocated the Claimant's corrected severance pay. This created an overpayment. The Claimant appealed the Commission's reconsideration decision to the General Division.

[5] The General Division found that the Claimant's revised severance payout along with his vacation pay were earnings as per the *Employment Insurance Regulations* (EI Regulations) and as such were to be allocated against his claim for benefits. It found that the Commission had properly allocated the earnings pursuant to sections 35 and 36 of the EI Regulations.

[6] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division.

[7] In support of his application for permission to appeal, the Claimant puts forward that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[8] I must decide whether the General Division made a reviewable error upon which the appeal might succeed.

[9] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

ISSUE

[10] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

ANALYSIS

[11] Section 58(1) of the *Department of Employment and Social Development Act* specifies the only grounds of appeal of a General Division decision. These reviewable errors are that:

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 had made in a perverse or capricious manner or without regard for the material before it.

[12] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove his case but must establish that the appeal has a reasonable chance

of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[13] Therefore, before I grant leave, I need to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

[14] In support of his application for permission to appeal, the Claimant puts forward that the Government of Canada put a lockdown in the province of Ontario and there was no way of getting a job. He submits that he followed the Commission instructions to submit reports from March 2020 to June 2020 to pay off his overpayment. However, because of the Commission's COVID emergency measures, he instead received benefits. The Claimant submits that he is now stuck with an overpayment through no fault of his own.

[15] The Claimant lost his employment due to a shortage of work on June 15, 2018. He received $23,010.25 in vacation pay owed, as well as a revised severance pay of $264,408.00.

[16] The Federal Court of Appeal has established that amounts paid because of separation from an employment constitute earnings within the meaning of section 35 of the EI Regulations and must be allocated in accordance with section 36(9) of the EI Regulations.[1]

[17] Therefore, the General Division did not err when it concluded that the Claimant had earnings pursuant to section 35(2) of the EI Regulations and that these earnings were correctly allocated pursuant to section 36(9) of the EI Regulations because the earnings were paid following a separation from an employment.

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[1] *Canada (Attorney general) v Boucher Dancause*, 2010 FCA 270; *Canada (Attorney general) v Cantin*, 2008 FCA 192.

[18] As mentioned by the General Division, the fact that everyone on a claim were automatically transferred to CERB EI and paid benefits, doesn't change the fact that the Claimant received benefits to which he was not entitled.

[19] The Claimant essentially argues that the province of Ontario has been in lockdown which prevents him from finding a job and that he should not be held accountable for following the instructions that where given to him by the Commission.

[20] Although I am sensitive to the situation of the Claimant, the Federal Court of Appeal has decided that an applicant who receives money, for which he is not entitled to, even following a mistake of the Commission, is not excused from having to repay it.[2]

[21] On the other issue of a write off, I note that the General Division did not refuse to apply its jurisdiction when it concluded that it could not write off the Claimant's debt.[3] Only the Federal Court, following a decision by the Commission on that issue, has the jurisdiction to hear an appeal on the issue of a write-off.[4]

[22] In his application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any erroneous findings of fact which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[23] For the above mentioned reasons and after reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

CONCLUSION

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[2] *Lazuno v Canada (Attorney general)*, 2005 FCA 324.
[3] Pursuant to section 56(1) of the EI Regulations.
[4] *B. P. v Canada Employment Insurance Commission*, 2019 SST 124; *M. F. v Canada Employment Insurance Commission*, 2019 SST 622.

[24] The Tribunal refuses leave to appeal to the Appeal Division.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	S. J., Self-represented