Citation: *RC v Canada Employment Insurance Commission*, 2022 SST 1446

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	R. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated October 31, 2022 (GE-22-2998)

Tribunal member:	Charlotte McQuade
Decision date:	December 10, 2022
File number:	AD-22-879

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] R. C. is the Claimant. The Claimant was laid off from a seasonal job and applied for Employment Insurance (EI) regular benefits. While in receipt of EI benefits, the Claimant worked doing snow plowing. He received standby pay and pay for plowing snow. However, the Claimant did not declare either of these types of payments on his biweekly claims.

[3] The Canada Employment Insurance Commission (Commission) decided the standby pay and pay from plowing snow were earnings and allocated the unreported earnings to the Claimant's claim. The Commission also decided that the Claimant had knowingly made 11 false representations, so it imposed a monetary penalty of $981.00 and issued a notice of violation.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division decided the Claimant's snow removal pay and standby pay were earnings and that the Commission had properly allocated those earnings. The General Division also decided the Claimant had knowingly made false statements, so the Commission had properly imposed a penalty. The General Division found the Commission had exercised its discretion properly in issuing a notice of violation, but it had not done so when it decided on the amount of the penalty. So, the General Division substituted its decision for the Commission and reduced the penalty to $400.00.

[5] The Claimant is now asking to appeal the General Division's decision concerning the imposition of the penalty and violation to the Appeal Division. However, he needs permission for his appeal to move forward. The Claimant argues that the General Division accepted his testimony that he had received incorrect advice from Service Canada that he didn't have to report his standby pay. However, the General Division concluded, in error, that he had knowingly made false statements.

[6] I am satisfied that the Claimant's appeal has no reasonable chance of success, so I am refusing permission to appeal.

Issue

[7] Is it arguable that the General Division decided that the Claimant had knowingly made false statements without having regard to the Claimant's testimony that had received incorrect advice from Service Canada that he didn't have to report standby pay?

Analysis

[8] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[9] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[1] The law says that I can only consider certain types of errors. These are:[2]

- The General Division hearing process was not fair in some way.
- The General Division made an error of jurisdiction (meaning that it did not decide an issue that it should have decided, or it decided something it did not have the power to decide).
- The General Division based its decision on an important error of fact.
- The General Division made an error of law.

[1] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I must apply.
[2] Section 58(1) of the DESD Act describes these errors.

[10] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[3]

It is not arguable that the General Division based its decision on an important error of fact

[11] The Claimant says the General Division made a mistake regarding fairness.

[12] The Claimant had testified before the General Division that he had been told by several Service Canada agents that he didn't have to claim stand by pay from his snow removal job.[4]

[13] The Claimant explains in his Application to the Appeal Division that the General Division said it had no reason to doubt the advice he was given from Service Canada, yet the General Division still decided he knowingly made false statements. He questions why he would report the earnings, given the advice he received.

[14] I understand the Claimant to be arguing that the General Division decided that he knowingly made false or misleading statements without regard to his testimony that he had received incorrect advice from several Service Canada agents that he didn't have to report his standby pay.

[15] The Appeal Division can intervene only in certain kinds of errors of fact. The Appeal Division can only intervene only if the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.[5]

[16] If the General Division makes a factual finding that squarely contradicts or is unsupported by the evidence, its determination may be said to have been made perversely, capriciously, or without regard to the evidence.[6]

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[3] See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.
[4] See paragraph 28 of the General Division decision.
[5] See section 58(1)(c) of the DESD Act.
[6] See *Garvey v Canada (Attorney General),* 2018 FCA 118.

[17] The law says that to impose a penalty, the Commission must prove that a claimant knowingly made a false or misleading statement or representation.[7]

[18] The initial onus is on the Commission to prove that a claimant knowingly made a false or misleading statement or representation.

[19] If it is clear from the evidence that the questions were simple and the claimant answered incorrectly, then it can be inferred that the claimant knew the information was false or misleading.[8]

[20] The onus then shifts to the claimant who must provide a reasonable explanation to show that the statement or representation was not knowingly made.[9]

[21] The question is whether, on a balance of probabilities, the claimant subjectively knew that he was making false or misleading statements.[10]

[22] To determine if there was subjective knowledge the General Division may take into account common sense and objective factors.[11]

[23] If a claimant has knowingly provided false or misleading information, in addition to the penalty, the Commission also has the discretion to impose a violation. The violation increases the number of hours of insurable employment that the claimant requires to qualify for benefits.[12]

[24] The Claimant was employed to do snow removal, while he was claiming EI benefits. The Claimant received standby pay and pay for plowing snow.

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[7] See section 38(1) of the *Employment Insurance Act* (EI Act).
[8] *Nangle v Canada (Attorney General),* 2003 FCA 210 (CanLII).
[9] See *Canada (A.G.) v Gates*, [1995] 3 F.C. 17 (C.A.).
[10] See *Mootoo v Canada (Minister of Human Resources Development)*, A-438- 02.
[11] See *Canada (A.G.) v Purcell*, [1996] 1 F.C. 644 (C.A.).
[12] See section 7.1(4) of the EI Act.

[25] The Claimant was asked if he worked and had earnings in his biweekly reports. The Claimant didn't report either the standby pay or the pay for plowing snow in his biweekly claims for the period from November 11, 2018, to April 7, 2019.[13]

[26] The General Division decided that the Claimant had made false statements, since he worked, was on standby and did have earnings.[14]

[27] The General Division then considered whether the Claimant subjectively knew that the answers he gave on his claims were false or misleading. The General Division noted that it could take into account common sense and objective factors when determining if the Claimant had subjective knowledge that the information provided was false.[15]

[28] The Claimant testified that he went to a Service Canada office when he applied for EI benefits. He asked if he could use a computer there, and an officer helped him. He said he told her that he would be on standby for snow removal and asked if he had to claim this. The Claimant testified that the Service Canada officer told him he didn't have to. He said he asked another officer who said the same thing. The Claimant said he was shocked but went with what they said.[16]

[29] The General Division accepted the Claimant's testimony that when he spoke to an officer at Service Canada, he understood that he didn't have to report his earnings.[17] So, the General Division did not overlook this evidence. However, the General Division decided that, despite that advice, subjectively, the Claimant knew when he answered the questions concerning whether he worked and had earnings on his biweekly statements, the statements were false.

[30] In that regard, the General Division noted the Claimant was asked simple questions in his biweekly statements about whether he worked and had earnings. The

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[13] See paragraph 41 of the General Division decision.
[14] See paragraph 30 of the General Division decision.
[15] See paragraph 32 of the General Division decision.
[16] See paragraph 28 of the General Division decision.
[17] See paragraph 36 of the General Division decision.

General pointed out that even if the Claimant thought he didn't have to report the standby pay, he knew that he worked and was paid when he actually removed snow.

[31] The General Division also considered the Claimant's testimony that he was shocked by the advice he was given by Service Canada which the General Division found supported the Claimant's subjective knowledge. Further, the General Division noted that the claimant had had access to other, clear information such as the application for EI benefits which noted one of the claimants' rights and responsibilities was to "accurately report all employment earnings before deductions in the week(s) in which [they] earn them, as well as any other money [they] may receive." Having regard to all those factors, the General Division decided the Claimant had made the false or misleading statements knowingly.

[32] The General Division stated and applied the correct law. The General Division considered whether the Claimant subjectively knew he was making false or misleading statements. The law permits the General Division to consider objective factors such as the questions on the biweekly claim forms and the information on the application when it decided whether the Claimant had subjective knowledge that the information he provided was false.[18]

[33] The Claimant is essentially asking me to reassess or re-weigh the evidence about his subjective knowledge and to come to a different conclusion. However, I cannot do that. I cannot intervene in the General Division's conclusion where it applies settled law to the facts.[19]

[34] The General Division's findings were consistent with the evidence. Aside from the Claimant's argument, I have reviewed the documentary file, and listened to the audio recording from the General Division hearing. I did not find any key evidence that the General Division might have ignored or misinterpreted.[20]

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[18] See *Canada (A.G.) v Purcell*, [1996] 1 F.C. 644 (C.A.).
[19] See *Garvey v Canada (Attorney General),* 2018 FCA 118.
[20] See *Karadeolian v Canada (Attorney General)*, 2016 FC 615, which recommends doing such a review.

[35] The Claimant has not pointed to any procedural unfairness on the part of the General Division, and I see no evidence that the General Division breached procedural fairness.

[36] The Claimant has not pointed to any error of jurisdiction on the part of the General Division, and I don't see any. The General Division did not decide anything it did not have authority to decide, and it decided the issues it had to decide.

[37] The Claimant has not raised an arguable case that the General Division made any reviewable errors.

[38] Having regard to the record, the decision of the General Division and considering the argument made by the Claimant in his Application to the Appeal Division, I find that the appeal has no reasonable chance of success. So, I am refusing leave to appeal.

Conclusion

[39] Permission to appeal is refused. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division