



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *O. L. v. Canada Employment Insurance Commission*, 2016 SSTADEI 408

Tribunal File Number: AD-16-906

BETWEEN:

O. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal decision by: Pierre Lafontaine

Date of decision: August 10, 2016

REASONS AND DECISION

DECISION

[1] The Tribunal grants leave to appeal before the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On May 27, 2016, the Tribunal's General Division found that the Applicant's appeal on the issue of earnings and allocation pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations) should be dismissed with amendments.

[3] The Applicant filed an application for leave to appeal to the Appeal Division on July 4, 2016.

ISSUE

[4] The Tribunal must determine whether the appeal has a reasonable chance of success.

THE LAW

[5] As stated in subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, “[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted” and the Appeal Division “must either grant or refuse leave to appeal”.

[6] Subsection 58(2) of the *Department of Employment and Social Development Act* states that “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success”.

ANALYSIS

[7] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

- (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The Board of Referees erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The Board of Referees based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[8] An application for leave to appeal is a preliminary step to a hearing on the merits. It is a first, and lower, hurdle for the applicant to meet than the one that must be met on the hearing of the appeal on the merits. At the application for leave to appeal stage, the applicant does not have to prove his case.

[9] The Tribunal will grant leave to appeal if it is satisfied that any of the above grounds of appeal has a reasonable chance of success.

[10] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact, or jurisdiction to which the response might justify setting aside the decision under review.

[11] In light of the foregoing, does the Applicant's appeal have a reasonable chance of success?

[12] To begin with, the Applicant's application for leave to appeal was three days late. However, the Tribunal considers that it is in the interest of justice to grant the Applicant an extension of time to file an appeal.

[13] In his application for leave to appeal, the Applicant states that the period beginning on January 2011 was allocated capriciously and did not take into account the company's actual earnings for this period, but rather for the complete unemployment period. This resulted in an allocation of \$ 233.56 per day, every day between January and April 2011.

[14] He argues that in his partner's file, there was an allocation of \$ 63.03 per day for the month of January and for the first 13 days of February 2011, in correspondence with his unemployment period. He maintains that since the General Division itself recognized the fact that he was an equal partner with regard to the allocation of the company's earnings, it would be impossible to have a different allocation for the same days.

[15] Moreover, he argues that the manner in which the General Division had calculated the allocation over the entire unemployment period was unfair because it was done after the fact. He could not know his exact earnings during his benefit period.

[16] Upon review of the appeal file, the General Division's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has raised questions relating to the General Division's interpretation and application of sections 35 and 36 of the Regulations that may lead to the setting aside of the decision challenged.

CONCLUSION

[17] Leave to appeal is granted.

Pierre Lafontaine,
Member, Appeal Division