



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *S. P. v. Canada Employment Insurance Commission*, 2016 SSTADEI 462

Tribunal File Number: AD-16-1067

BETWEEN:

**S. P.**

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: Pierre Lafontaine

Date of Decision: September 7, 2016

## REASONS AND DECISION

### DECISION

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

### INTRODUCTION

[2] On July 25, 2016, the Tribunal's General Division found that the earnings from the Applicant's business should be allocated with amendments under sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] The Applicant filed an application for leave to appeal to the Appeal Division on August 23, 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 General Division erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) The General Division based its decision or order 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] In his application for leave to appeal, the Applicant notes that:

- The General Division erred in its decision by refusing to analyse the actual status of claimants, namely, if they were self-employed or employees.
- The General Division concluded that the claimants were self-employed; however, it did not justify this substantial classification given the various schemes used to identify earnings.

- The General Division did not consider the decision by the Tax Court of Canada in 2001 that the claimants held insurable employment and were bound by an employment contract.
- The General Division erred in its understanding of what constitutes income within the meaning of the Regulations.
- The claimants' total income must be included in the income considered when calculating of benefits.
- If income is considered an accumulation of the claimants' various earnings within the meaning of subsection 35(10) of the Regulations, the General Division erred by failing to take their weekly pay into account.
- After taking their wages into consideration, the General Division should have determined whether the claimants were also able to perform work as self-employed workers and whether they received income for this work.
- Given that the "Société" [corporation] does not manage any profits, that there are no bonuses or any dividends paid to claimants, the net income for their work as self-employed workers is nil.
- The General Division erred in its calculation of the business' net profits before allocating it amongst all the claimants.
- The General Division dismissed the claimants' appeals with amendments without providing the details of these amendments.

[13] 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 several questions relating to the General Division's interpretation and application of sections 35 and 36 of the Regulations, the answers to which may lead to the setting aside of the decision under review.

## **CONCLUSION**

[14] Leave to appeal is granted.

Pierre Lafontaine

Member, Appeal Division