



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. R. T.*, 2016 SSTADEI 534

Tribunal File Number: AD-16-1222

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

R. T.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to appeal decision by: Pierre Lafontaine

Date of decision: October 28, 2016

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On September 26, 2016, the General Division of the Tribunal found that:

- Net returns do not constitute earnings within the meaning of the *Employment Insurance Act* (Act) given that these returns did not actually exist since they were allocated to offset the business's deficit, as required by generally accepted accounting principles (GAAP). Therefore, they cannot be allocated in accordance with section 36 of the *Employment Insurance Regulations* (Regulations).

[3] The Applicant filed an application for leave to appeal to the Appeal Division on October 20, 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, 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 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 hurdle for the Applicant to meet, but it is lower 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 their case.

[9] The Tribunal will grant leave to appeal if the Applicant shows 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 its application for leave to appeal, the Applicant states that the Federal Court of Appeal has reiterated the principle that the Employment Insurance scheme is designed to compensate claimants for loss of income as a result of unemployment. This is why income generated from any employment must be deducted from otherwise payable benefits, including income from self-employment as a co-adventurer.

[13] It argues that it is not necessary for the claimant to have received an actual amount from a business in which he participates for the net income generated from this business to be considered earnings under the Regulations, as the mere right to receive such income is sufficient.

[14] The Applicant maintains that the facts before the General Division show that the business had generated net returns during the period at issue. The General Division should have therefore allocated the amount attributable to the Respondent, regardless of the decision made by shareholders on whether or not to divide profits.

[15] It argues that, to eliminate the unequal treatment resulting from a business's choice of organization, the corporate veil must be lifted so that earnings generated from a self-employed claimant actively operating a company can be accounted for. The type of legal entity of the operation or business in which a self-employed worker is engaged is irrelevant.

[16] Finally, the Applicant submits that the General Division could not state that, for the purposes of the Employment Insurance scheme, net profits must be paid by way of dividends for these profits to become the property of shareholders and therefore be considered earnings. The General Division should have taken into consideration net profits regardless of the business's decision to use the profits towards offsetting its deficit.

[17] 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.

[18] The Applicant is raising a question relating to the General Division's interpretation and application of sections 35 and 36 of the Regulations. The Applicant has thus raised a question, the response to which could lead to the setting aside the decision challenged.

CONCLUSION

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

Pierre Lafontaine,
Member, Appeal Division