



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *D. A. v. Canada Employment Insurance Commission*, 2016 SSTADEI 554

Tribunal File Number: AD-16-1285

BETWEEN:

**D. A.**

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: November 22, 2016

## **REASONS AND DECISION**

### **DECISION**

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

### **INTRODUCTION**

[2] On October 7, 2016, the Tribunal's General Division concluded that the allocation of the amount received by the Applicant as pension was justified pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] On November 13, 2016, the Applicant filed an application for leave to appeal before the Appeal Division after receiving the General Division's decision on October 13, 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, 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 support of his application for leave to appeal, the Applicant states that the General Division failed to exercise its jurisdiction and erred in law. He submits that section 19 of the *Employment Insurance Act* (Act) must take precedence over section 77.95 of the Regulations because it is illegal (*ultra vires*). Therefore, the General Division should have rendered a decision regarding the inapplicability of the Regulations to his file as it would go against the Act.

[13] Furthermore, he submits that section 77.95 of the Regulations, for which Pilot Project No. 18 was established, should have had [translation] "the approval of the Governor in Council".

This section is not indicated in the new or revised version of the Regulations at issue that has received Governor approval. He argues that it therefore does not legally exist.

[14] 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 raised a question to which the response may justify setting aside the decision under review.

## **CONCLUSION**

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

Pierre Lafontaine  
Member, Appeal Division