



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. P. v. Canada Employment Insurance Commission*, 2016 SSTADEI 564

Tribunal File Number: AD-16-496

BETWEEN:

**J. P.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Mark Borer

DATE OF DECISION: November 30, 2016

## **DECISION**

[1] On consent, the appeal is allowed. The matter will be returned to the General Division for reconsideration.

## **INTRODUCTION**

[2] Previously, a member of the General Division determined that the Appellant's appeal should be dismissed. In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[3] This decision was made on the record.

## **THE LAW**

[4] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

(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.

## **ANALYSIS**

[5] This appeal concerns whether or not the Appellant was available during the time in question.

[6] The Appellant argues that the General Division member was mistaken when he said that she did not conduct a job search and she was therefore unavailable. She now submits evidence of a job search to the Tribunal, and asks that her appeal be allowed.

[7] The Commission, having considered the file and the decision, admits that the member applied the wrong test for availability when he found (at paragraphs 36 and 40 of his decision) that the Commission had exercised its discretion judicially. They note that availability is not a discretionary determination of the Commission, and ask that the matter be returned to the General Division for a new hearing.

[8] I agree with the parties that this decision cannot stand, and I agree with the Commission that the member applied the wrong test. A new hearing is required so that the parties can make their cases in full.

## **CONCLUSION**

[9] On consent and for the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration.

*Mark Borer*

Member, Appeal Division