



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. M. D.*, 2016 SSTADEI 566

Tribunal File Number: AD-16-1345

BETWEEN:

**Canada Employment Insurance Commission**

Applicant

and

**M. D.**

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: December 13, 2016

## **REASONS AND DECISION**

### **DECISION**

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

### **INTRODUCTION**

[2] On November 15, 2016, the Tribunal's General Division found as follows:

- The appellant was unemployed within the meaning of sections 9 and 11 of the *Unemployment Insurance Act (Act)* and section 30 of the *Employment Insurance Regulations (Regulations)*;

- The net profits of a business incorporated under Quebec law, if not paid out through the declaration of a dividend to shareholders in accordance with the applicable legislation, cannot be considered earnings received by a claimant within the meaning of the *Act* and cannot be allocated in accordance with section 36 of the *Regulations*.

[3] On December 6, 2016, the Applicant filed an application for leave to appeal to the Appeal Division.

### **ISSUE**

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

### **THE LAW**

[5] As provided 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* provides 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 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 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 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 Act, whether there is a question of law, fact or jurisdiction the answer to which may 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 argues that the General Division exceeded its jurisdiction in ruling on a matter that was not before it and in respect of which the Applicant had never rendered a decision, namely earnings.

[13] The Applicant argues that a person who operates a company, even as a co-adventurer, is a self-employed person and that the income the person earns from it must be allocated in accordance with subsection 36(6) of the *Regulations*. It argues that, for the purposes of the employment insurance system, the General Division could not rightly argue that net profits must be paid in the form of dividends in order to become the property of shareholders and to be considered earnings.

[14] After reviewing the appeal book, the General Division's decision and the arguments in support of the application for leave to appeal, and in light of the Appeal Division's decision in *Canada Employment Insurance Commission v. M. T.*, 2016 SSTA DEI 190, the Tribunal determines that the appeal has a reasonable chance of success.

[15] The Applicant is raising a question relating to the General Division's jurisdiction and its interpretation and application of sections 35 and 36 of the *Regulations*. The Applicant has therefore raised a question the answer to which may lead to the setting aside of the decision under review.

## **CONCLUSION**

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

Pierre Lafontaine

Member, Appeal Division