



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. J. J.*, 2017 SSTADEI 46

Tribunal File Number: AD-17-42

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

J. J.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: February 7, 2017

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On December 21, 2016, the Tribunal's General Division found that:

- The Respondent had not made false or misleading statements and, therefore, the Applicant could not proceed with the reconsideration of his claims beyond 36 months;

- The net profits of a business incorporated under Quebec law, if not paid out by declaring a dividend to shareholders in accordance with the applicable law, cannot be considered earnings received by a claimant within the meaning of the *Employment Insurance Act* (Act) and 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 January 19, 2017.

ISSUE

[4] The Tribunal must decide if 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*, "An 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] A leave to appeal proceeding 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 leave stage, the Applicant does not have to prove the 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 submits that the General Division erred in law in making its decision by determining that the net profits of an incorporated business could not be considered earnings received by the claimant if they had not been paid out by declaring a dividend.

[13] The Applicant submits that the evidence is undisputed that the Respondent owns 26% of a business and that he operated it in his capacity of co-adventurer. His business generated a net profit during the period of time in dispute. The Respondent's statements on file show that he did not claim the amount of net profits. The Applicant submits that it was therefore entitled to proceed with the reconsideration of his claims within the 72 months as required by subsection 52(5) of the Act and apply the net profits that are attributable to the claimant pursuant to sections 35 and 36 of the Regulations.

[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 has raised a question relating to the General Division's interpretation and application of sections 35 and 36 of the Regulations and 52 of the Act. The Applicant has raised a question the answer to which may lead to the setting aside of the decision under review.

CONCLUSION

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

Pierre Lafontaine

Member, Appeal Division