



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *J. P. v. Canada Employment Insurance Commission*, 2017 SSTADEI 193

Tribunal File Number: AD-17-255

BETWEEN:

**J. P.**

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: May 9, 2017

## **REASONS AND DECISION**

### **DECISION**

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

### **INTRODUCTION**

[2] On February 21, 2017, the Tribunal's General Division determined that the Respondent was not available for work in compliance with paragraph 18(1)(b) of the *Employment Insurance Act* (EI Act).

[3] The Applicant filed an application for leave to appeal to the Appeal Division on March 23, 2017, after receiving the General Division's decision on March 6, 2017.

### **ISSUE**

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

### **THE LAW**

[5] As provided for in subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD 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 DESD 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] According to subsection 58(1) of DESD Act, the only grounds of appeal are the following:

- 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] The Applicant submits that the General Division committed an error in law or refused to exercise its jurisdiction by ignoring the evidence on file. She submits that the evidence reveals that, when the Applicant answered “no” to the three questions, at the end of April 2016, she was ready to resume her employment after a period of sickness. During her interruption of work, the Applicant was, if not for her illness, “otherwise available” for her employer and she was therefore entitled to benefits. The subsequent discovery of her pre-retirement should not change that decision.

[9] The Applicant argues that the General Division’s decision is tainted by an error in law because it ignored the principle according to which it is up to the Respondent to prove that the Applicant is the one imposing restrictions on herself that threaten her chances of being rehired. Yet, in this case, the Respondent has gathered no evidence to establish the impossibility of the Applicant finding herself a job working three days per week.

[10] The Applicant also submits that, at any time pertinent to the case, at the time of claiming regular or sickness benefits, [translation]: “[t]he claimant was in no way bound to jeopardize the employment she had in the hope of finding alternative employment” (*MacDonald*, CUB 23283 [maintained in FCA: A-672-93]).

[11] The Applicant submits that, after noticing the “unavailability” inherent in the Applicant’s pre-retirement status, the Respondent (and the General Division after it) arbitrarily assumed her unavailability for the subsequent unemployment periods.

[12] After reviewing the appeal docket, 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 an issue pertaining to the General Division's interpretation and application of section 18 of the EI Act, the answer to which may justify setting aside the decision under review.

## **CONCLUSION**

[13] The Tribunal grants leave to appeal to the Appeal Division.

Pierre Lafontaine  
Member, Appeal Division