



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *P. S. v. Canada Employment Insurance Commission*, 2017 SSTADEI 374

Tribunal File Number: AD-17-597

BETWEEN:

**P. S.**

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: Stephen Bergen

Date of Decision: October 31, 2017

## REASONS AND DECISION

### INTRODUCTION

[1] On July 30, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant's employment or engagement in the operation of a business was not sufficiently minor as defined by subsections 30(2) and (3) of the *Employment Insurance Regulations* (Regulations) and that he was therefore unable to prove that he was unemployed per sections 9 and 11 of the *Employment Insurance Act* (Act) and section 30 of the Regulations such that benefits could be paid. The General Division also confirmed the penalties imposed by the Canada Employment Insurance Commission under section 38 of the Act and the Notice of Violation issued under section 7 of the Act.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on August 28, 2017.

### ISSUE

[3] The Member must decide whether the appeal has a reasonable chance of success.

### THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[5] According to subsection 58(1) of the DESD 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.

[6] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

## **ANALYSIS**

[7] The Applicant raised a number of issues, including the length of the delay from the time of the initial decision through to this application, which he characterized as an issue of natural justice, as well as concerns with other factual and legal errors related to the General Division's assessment and application of the factors in subsection 30(3) of the Regulations.

[8] While there may be some merit to the specific concerns the Applicant has raised, I agree more broadly that the General Division may have misapplied the subsection 30(3) factors and therefore failed to adequately address the test laid out in subsection 30(2) of the Act as to whether the Applicant's involvement in his business was to such a minor extent "that a person would not normally rely on that employment or engagement as a principal means of livelihood."

[9] The General Division sets out the subsection 30(2) test in paragraph 32 of its decision but it is not evident that it applied this test to the evidence in its consideration of the "application of the factors." Furthermore, the General Division's individual consideration of the subsection 30(3) factors does not always appear to be conducted in such a way as to necessarily assist the subsection 30(2) determination.

[10] *Martens v. Canada (Attorney General)*, 2008 FCA 240 is a Federal Court of Appeal case, similar to this one, in which the factors in subsection 30(3) were reviewed, but it was found that the subsection 30(2) test had not been explicitly answered. The Court found this to be an error of law.

[11] With respect to the analysis of the factors, the Court in *Martens* additionally noted: "It must be remembered that the factors in subsection 30(3) are required to be considered in the context of the test in subsection 30(2). That test requires an objective consideration of whether the degree of self-employment or engagement in the operation of a business constitutes a sufficient basis upon which a person would normally rely as a principal means of livelihood." (emphasis added)

[12] If the General Division failed to clearly consider and apply the subsection 30(2) test, this may well be an error of law per paragraph 58(1)(b) of the DESD Act.

[13] Therefore, I find that the appeal has a reasonable chance of success. Given this finding, it is not necessary to review the other grounds of appeal asserted by the Applicant. This does not prevent the Applicant from arguing any other ground of appeal in respect of his appeal.

## **CONCLUSION**

[14] The Application is granted.

[15] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen  
Member, Appeal Division