[TRANSLATION]

Citation: *D. M. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 117

Appeal No.: GE-14-1398

BETWEEN:

D. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Normand Morin
HEARING DATE:	August 14, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed

PERSONS IN ATTENDANCE

[1] The hearing originally scheduled for August 7, 2014, was postponed for administrative reasons linked to [translation] "unforeseen issues with the availability of the hearing room or the Tribunal member's schedule", and a new hearing date was set for August 14, 2014 (Exhibits GD1-1 to GD1-3 and GD5-1 to GD5-3).

[2] The Appellant, D. M., participated in the telephone hearing (teleconference) held on August 14, 2014.

DECISION

[3] The Social Security Tribunal of Canada (the Tribunal) concludes that the appeal of the Canada Employment Insurance Commission (the Commission) decision disentitling the Appellant from receiving Employment Insurance benefits for failing to show that he was unemployed, is without merit under sections 9 and 11 of the *Employment Insurance Act* (the Act) and section 30 of the *Employment Insurance Regulations* (the Regulations).

INTRODUCTION

[4] On December 6, 2012, the Appellant filed an initial benefit claim effective November 25, 2012. The Appellant stated that he had worked for the employer Entreprise du sommet (NDM) Inc., from March 26, 2012, to November 23, 2012, inclusively. The Appellant stated that he was one of the owners of the business for which he worked or a partner in this business (Exhibits GD3-3 to GD3-14).

[5] On June 5, 2013, the Commission told the Appellant that it could not give him Employment Insurance benefits, as of November 25, 2012, because he was engaged in a business and that it considered that he was not unemployed within the meaning of the Act (Exhibit GD3-20).

[6] On January 10, 2014 (the date Service Canada received the document according to the date stamp), the Appellant submitted a Request for Reconsideration of an Employment Insurance Decision (Exhibit GD3-22).

[7] On March 4, 2014, the Commission told the Appellant that it was upholding the decision of June 5, 2013 in his case (Exhibit GD3-25).

[8] On March 20, 2014 (the date the Tribunal received the document according to the date stamp), the Appellant filed a Notice of Appeal with the Employment Insurance Section of the Tribunal's General Division for the purpose of challenging the reconsideration decision that the Commission had made in his case on March 4, 2014 (Exhibits GD2-1 to GD2-7 and GD3-25).

[9] On April 16, 2014, the Tribunal informed the Appellant that it had received his Notice of Appeal (Exhibits GD2A-1 and GD2A-2).

TYPE OF HEARING

[10] The hearing was conducted by teleconference for the reasons set out in the Notice of Hearing dated July 10, 2014 (Exhibits GD1-1 to GD1-3).

ISSUE

[11] The Tribunal must determine whether the appeal of the Commission's decision regarding the Appellant's disentitlement from receiving Employment Insurance benefits for failing to show that he was unemployed is warranted under sections 9 and 11 of the Act and under section 30 of the Regulations.

APPLICABLE LAW

[12] The provisions concerning the disentitlement of claimants for failing to prove that they were unemployed can be found in sections 9 and 11 of the Act and section 30 of the Regulations.

[13] With respect to the establishment of a benefit period, section 9 of the Act provides for the following:

> When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

[14] Subsection 11(1) of the Act defines “week of unemployment” as follows:

> (1) A week of unemployment for a claimant is a week in which the claimant does not work a full working week.

[15] Subsections 30(1), 30(2) and 30(3) of the Regulations set out the terms and conditions surrounding the working of a “full working week” for a “self-employed person” and the “circumstances” to be considered in determining whether a claimant is employed or engaged in the operation of a business:

> (1) Subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.
>
> (2) Where a claimant is employed or engaged in the operation of a business as described in subsection (2) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.
>
> (3) The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are
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> (*a*) the time spent;
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> (*b*) the nature and amount of the capital and resources invested;
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> (*c*) the financial success or failure of the employment or business;
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> (*d*) the continuity of the employment or business;
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> (*e*) the nature of the employment or business; and
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> (*f*) the claimant's intention and willingness to seek and immediately accept alternate employment.

[16] With respect to the application of section 30 of the Regulations, under subsection 30(5) of the Regulations, “self-employed person” means an individual who:

> (*a*) is or was engaged in a business; or
>
> (*b*) is employed but does not have insurable employment by reason of paragraph 5(2)(*b*) of the Act.

EVIDENCE

[17] The evidence in the docket is as follows:

a) A Record of Employment dated November 29, 2012, shows that the Appellant worked as a day labourer for the employer Entreprise du sommet (NDM) Inc. from March 26, 2012, to November 23, 2012, inclusively, and that he stopped working for this employer because of a shortage of work (Code A – Shortage of work / End of season or contract; Exhibit GD3-15);

b) In a document giving details on the notice of debt (DH009) dated June 8, 2013, the total amount of the Appellant's debt was set at $1,120 (Exhibit GD3-21);

c) In filing his Notice of Appeal on March 20, 2014, the Appellant enclosed a copy of the Commission's letter (reconsideration decision) of March 4, 2014 (Exhibits GD2-1 to GD2-7).

[18] The evidence presented at the hearing is as follows:

a) The Appellant mentioned the key evidence in the docket. He described the history of the business in which he is a shareholder, Entreprise du sommet (NDM) Inc., and his role in that business;

b) He explained that the business in which he is a shareholder used to operate under the name of Entreprise du Sommet Enr., but that he was not a shareholder in that company. He stated that he joined the company Entreprise du sommet (NDM) Inc. when it was created in March 2012. He indicated that the manufacturing plant was set up in Saint-Just-de-Bretenières (Bellechasse) at the beginning of its operations and that the plant was relocated to Sainte-Rose-de-Watford (Bellechasse) in January 2013.

SUBMISSIONS OF THE PARTIES

[19] The Appellant made the following submissions and arguments:

a) He stated that the business in which he is a shareholder, the company Entreprise du sommet (NDM) Inc., was registered on March 8, 2012, with the Registraire des entreprises du Québec. He stated that the business specializes in factory-built traditional log construction houses (Exhibits GD3-17 to GD3-19);

b) He stated that he worked as a day labourer for the company, working 40 hours a week from Monday to Friday, and that he had no other responsibilities in the company. He explained that he found himself without work because of an unexpected lack of contracts and that he should never have to stop working again (Exhibits GD3-15 to GD3-19, GD3-23 and GD3-24);

c) He explained that he was one of the company's directors, as is indicated in the Registraire des entreprises du Québec, but that he did not do management-related work for the company (Exhibits GD3-18 and GD3-19). He explained that the company's articles of incorporation legally required that names be indicated as directors of the company. He pointed out that he had no specific duties as a director. He indicated that, for a year and a half, the company had used the services of a part-time accounting technician;

d) He stated that he did not have much education and that his strength was physical work. He explained that he looked after part of the company's production and that his role did not surpass that of a lead hand or foreman who directs employees. He pointed out that he did not participate in the company's decisions;

e) He stated that he invested $25,000 in the company when it was created in 2012. He explained that this amount was in the form of equipment and materials which he owned and which were now used by the company (e.g., machining and welding equipment; Exhibits GD3-17 to GD3-19, GD3-23 and GD3-24). He stated that he had made no further investments in the company since its creation in 2012;

f) He stated that the company had not received subsidies or financial support from government agencies;

g) He explained that his participation in the company rose from 22.5% to about one third of its shares (33⅓ %) in the spring or summer of 2013 following the departure of one of the three shareholders and the redemption of the shares held by the person who left the company (Exhibits GD3-16 to GD3-19, GD3-23 and GD3-24);

h) He stated that he did not know the company's gross revenues because they were all reinvested in the company. He said that he estimated the profits to be about 5% of sales and that 90% of that amount was set aside for operating expenses. He indicated that he believed that the financial statements were produced every quarter. He mentioned that the contracts came from the firm Maisons Ikia and that the company did not have the right to accept other contracts (Exhibits GD3-17 to GD3-19, GD3-23 and GD3-24);

i) He explained that the company did about seven (7) projects (factory-built houses) in 2012, about ten (10) in 2013, and that five (5) to ten (10) projects were to be carried out in 2014;

j) He estimated the company's gross sales to be about $300,000 in 2012 and $500,000 in 2013. He stated that, despite the company's slight growth in sales, it had registered a deficit in 2012 and no profits in 2013;

k) He stated that the company's book value was negative. He explained that the company was worth less than what the shareholders owed their creditors. He indicated that the shareholders did not own the plant. He explained that the company leased its plant in Sainte-Rose-de-Watford. He explained that the company's assets included a truck worth approximately $18,000, a pick-up truck, a leased car and cabinet-making equipment (e.g., table saws, saws). He estimated the overall value of those assets to be $100,000;

l) He stated that he received a wage as an employee only and that no wage had been paid to him as a director. He also stated that no dividends had been paid to the shareholders;

m) He explained that the company intended to increase the number of houses it built for their client, Maisons Ikia, which would increase the company's sales (Exhibits GD3-17 to GD3-19, GD3-23 and GD3-24);

n) He explained that the number of company employees varied between three (3) and eight (8), depending on orders received, and that the company currently had seven (7) employees, including the two (2) partners (shareholders), the Appellant and N. D., the other shareholder;

o) He stated that his employment with the company in which he was a shareholder was not similar to his previous experiences on the labour market, because he used to be a forestry worker (Exhibits GD3-17 to GD3-19). He also explained that he had had a job with Véhicules Némo, a company that manufactured electric trucks, vehicles for cities for public maintenance work, and that he then joined the company in which he was a shareholder. He explained that he did a bit of everything while employed at Véhicules Némo (e.g., physical work, parts handling). He also mentioned that he had worked doing welding, although he was not trained in that field, explaining that he had never worked for a welding company;

p) He stated (on December 31, 2012) that he had not yet applied for work, but that he was preparing to do so after the holidays (Exhibit GD3-18);

q) He also stated that, at the end of his employment in November 2012 (Exhibit GD3-15), he did some job searches. He explained that he was willing and able to work (Exhibits GD2-1 to GD2-7). He explained that he had not submitted résumés to prospective employers and explained that he had never prepared a résumé in his life. He stated that he had looked for work in a few places before the holidays (2012), but that he had received negative responses from the employers he contacted. He specified that he had looked for work in service stations (e.g., gas stations, corner

store) and had looked at available jobs on job websites, including the Service Canada website. He explained that there were no jobs available in his region, either as a forestry worker or a construction worker (Exhibits GD3-17 to GD3-19). He explained that he could not work on a construction site because he did not have the necessary papers (card) (Exhibits GD3-17 to GD3-19). He pointed out that, in his region, work was rare and that there were not a lot of jobs, especially before the holidays (Exhibits GD2-1 to GD2-7);

r) He stated that he helped the company move and relocate to Sainte-Rose-de-Watford beginning in January 2013 and that he was paid as an employee to do so. He specified that the company was closed in December 2012 and that there was no production at that time, either at the Saint-Just-de-Bretenières plant or at the Sainte-Rose-de-Watford plant;

s) He stated that nothing prevented him from stopping work for the company, as a paid employee, if he got a job elsewhere with good working conditions (Exhibits GD3-17 to GD3-19). He explained that he would have accepted another job with another employer for the few weeks that he was without work. He indicated that, if he had received a job offer for a part-time permanent job, he would have informed any prospective employer about his situation as a shareholder. He explained that he wanted to keep his job with his company. He said that an employer might have needed an employee for only a few weeks and he would then have accepted the job (Exhibits GD3-23 and GD3-24). He stated that it was wrong to believe that, because he held shares in the company, no one could hire him (Exhibits GD2-1 to GD2-7);

t) He explained that it was because of an unexpected lack of contracts that he found himself without work, because he should never have to stop working again (Exhibits GD3-23 and GD3-24). He stated that he was off work for a few weeks in December 2012 because, in construction, there were no contracts at that time of year and that, as of January 2013, he did not stop working again (Exhibits GD3-16, GD3-23 and GD3-24);

u) He said that he did not understand why Revenue Canada (Canada Revenue Agency) was asking him to pay back some money (ID No.: X) (Exhibit GD3-22);

v) He said that he found it unfair that he had to pay Employment Insurance premiums but that he was not entitled to receive benefits because he held shares in a company. He said that he found the situation unfair because he is an honest citizen who worked hard to earn a living and support his family (Exhibits GD2-1 to GD2-7).

[20] The Commission made the following submissions and arguments:

a) The Commission explained that a claimant who is engaged in the operation of his own business is presumed to be working a full working week, unless it can be demonstrated that the level of engagement is so minor in extent that a person would not normally rely on it as a principal means of livelihood. It specified that, to determine whether the claimant's self-employment activities are minor in extent or not, it had to apply the objective test under subsection 30(2) of the Regulations using the six factors under subsection 30(3) of the Regulations to the context of the claimant's company, over the course of his benefit period. The Commission explained that the time spent and the intention and willingness of the claimant to seek and immediately accept alternate employment are the two most important factors to be considered (Exhibit GD4-4);

b) It pointed out that, when viewed objectively, all six factors led to the conclusion that the claimant's involvement in his company was that of a person who would normally rely on that level of self-employment as a principal means of livelihood (Exhibit GD4-6);

c) It determined that the Appellant did not rebut the presumption that he was working a full working week because he did not meet the exception set out in subsection 30(2) of the Regulations (Exhibit GD4-6);

d) It pointed out that the Appellant was engaged in the operation of a business but that he was also a paid employee, according to his statement. It determined that he was

therefore an operator/paid employee. It submitted that, when he stopped working as a paid employee, the Appellant nevertheless did not stop being an operator, and that he was considered a self-employed person (Exhibit GD4-6);

e) In its view, in the Appellant's case, his company and the employment it gave him constitute his principal source of income. It determined that his business represents his principal means of livelihood and that the operation of the company is year-round, 52 weeks a year, whether the paid employees (including an operator who was also a paid employee, such as the Appellant) are working or not. It maintained that the Appellant did not show that he was carrying out this activity to a minor extent. The Commission maintained that the legal provisions are not the same, on the one hand, for a mere paid employee who has stopped working because of a shortage of work, who is available to work full time and who does job searches, and, on the other, for a claimant who owns a business, works for that business, incurs a drop in activity, and simply waits to return to it with no interest in or intention of working elsewhere in the meantime (Exhibit GD4-6);

f) It maintained that, even if he had stopped being a paid employee temporarily, because of a slowdown in contracts, as in the case of seasonal occupations, the Appellant was considered to be "not unemployed" because he continued to operate a business. In the Commission's view, the Appellant was therefore considered as having worked a full working week and the onus was on him to rebut this presumption (Exhibit GD4-6);

g) It pointed out that the Appellant had mentioned that he was looking at job offers in the construction field, but that he had not applied and that he was waiting until after the holidays. It added that the Appellant had indicated that he wanted to keep his job with his company and that he had started working again in January 2013. It pointed out that the Appellant had also stated that there had been an unexpected lack of contracts, five weeks without work, and that he should never have to stop working again (Exhibits GD4-6 and GD4-7);

h) It expressed the opinion that the Appellant's intention was to work only for his company. It also submitted that the "intention and willingness" factor was very important and that, given the Appellant's desire to keep his job with his company and his lack of active job searches, he could not be considered to be unemployed (Exhibit GD4-7);

i) It submitted that, even if the Appellant said that he had paid Employment Insurance premiums, the fact that he paid into the Employment Insurance fund did not in itself give automatic entitlement to benefits. It explained that, it is rather a right that an insured person may exercise, as in the case of any insurance policy, and that eligibility to receive benefits depended on various conditions established by the legislation, including that of being unemployed. The Commission also explained that the Canada Revenue Agency's decision regarding the insurability of the Appellant's employment could not bind the Commission when it came to deciding on the Appellant's entitlement to benefits (Exhibit GD4-7);

j) It expressed the opinion that, even if he had alleged that he held only 22.5% of the company's shares, that he was a paid employee and that he should be entitled to Employment Insurance benefits, the Appellant carried out tasks related to the operation of the business, regardless of the percentage of shares he owned (Exhibit GD4-7);

k) It maintained that the insurability of the Appellant's employment and/or the percentage of shares he held in his company must not be confused with entitlement to benefits, because they are not related (Exhibit GD4-8);

l) It concluded that the Appellant had not demonstrated that, for the weeks for which he was requesting Employment Insurance benefits, the operation of his business was so minor in extent that he could not normally rely on that activity as his principal means of livelihood. In its view, the fact that the Appellant stopped working temporarily as a paid employee has no bearing. It maintained that the presumption provided for in subsection 30(1) of the Regulations that he was working a full working week, was not reversed by the Appellant, regardless of whether or not he

was employed as a paid employee in any given week. It determined that the Appellant was therefore considered to be working a full working week under the Act (Exhibit GD4-9).

ANALYSIS

[21] In ***Lemay*** **(A-662-97)** and ***Turcotte*** **(A-664-97)**, the Federal Court of Appeal (the Court) upheld the principle that, when claimants are engaged in the operation of a business, the onus is on them to rebut the presumption that they have worked a full working week.

[22] In ***Martens*** **(2008 FCA 240 – A-256-07)**, Justice C. Michael Ryer of the Court provided the following clarifications:

> Subsection 30(1) effectively denies employment insurance benefits to a claimant who is self-employed or engaged in the operation of a business on his or her own account. That provision reads as follows: … Subsection 30(2) will negate the application of subsection 30(1) where a claimant is self-employed or engaged in the operation of a business to a minor extent. The test for minor self-employment or engagement in business operations requires a determination of whether the extent of such employment or engagement, when viewed objectively, is so minor that the claimant would not normally rely on that level of engagement as a principal means of livelihood. Subsection 30(3) requires six factors to be considered in determining whether the claimant's self-employment or engagement in the operation of the particular business is minor in extent. These factors represent a codification of the six factors outlined in *Re Schwenk* (CUB 5454).... In interpreting these provisions, it is important to consider that their objective is the determination of the extent of the self-employment or engagement in a business by a claimant in any given week in a benefit period that has been established pursuant to section 9 of the Act. If such self-employment or engagement is minor in extent, then the claimant will have overcome the presumption contained in subsection 30(1) and will not be regarded as having worked a full working week during that week.

[23] In ***Jouan*** **(A-366-94)**, Justice Louis Marceau of the Court stated:

> … the most important, most relevant and only basic factor to be taken into account has to be, in all cases, the time spent…. In the case of a claimant who spends, on a regular basis, 50 hours per week to the affairs of his own business, there is no way that he can invoke the exception of subsection 43(2). This claimant must necessarily be considered as falling under the general presumption of subsection 43(1) and be regarded as working a full working week.

[24] In ***Charbonneau*** **(2004 FCA 61)**, Justice Robert Décary of the Court stated:

> Allow me to add, however, that not very far behind the "time" factor, in terms of importance, is the factor of "the claimant's intention and willingness to seek and immediately accept alternate employment". As Marceau J.A. pointed out in *Jouan*, "The Act is designed to provide temporary benefits to those who are unemployed and actively seeking other work" (emphasis added). A claimant will not be considered unemployed if, all the while he is receiving payments, he merely says he is available to work and does not undertake serious, real steps to find work for himself... In conclusion, if it is true to say that all the factors listed in subsection 30(3) of the *Employment Insurance Regulations* must be taken into consideration, the fact is that the "time" factor (paragraph (*a*)) and the "intention and willingness" factor (paragraph *(f)*) are of utmost importance. A claimant who does not have the time to work or who is not actively seeking work should not benefit from the Employment Insurance system.

[25] In ***Mazzonna*** **(A-614-94)**, Justice James K. Hugessen of the Court dismissed the application for judicial review and upheld the decision in CUB 25617 in which the Umpire had stated:

> In opposition to these arguments, counsel for the Commission referred us to Exhibit 5 which, in her view, was sufficient in itself to allow the Board of Referees to find as it did. She said that she agreed that the work in question was seasonal and that if the claimant were a salaried employee, he would be recognized as being unemployed during the winter season. She claimed, however, that the claimant's situation was totally different because he was operating a business on his own account and this aspect of the matter did not change during the winter months. She declared that as the condition of unemployment had not been proved, the majority decision of the Board of Referees had to stand.

[26] In ***D'Astoli*** **(A-999-96)**, Justice Pierre Denault of the Court stated:

> Insurability of employment and entitlement to benefits are two factors that the Commission must evaluate in respect of two separate periods. However, Parliament intended the analysis of each of these factors to be subject to separate rules, which must not be confused, "the process for determining the insurability of employment [being] unrelated to that for determining entitlement to benefit". ... While the question of insurability must be determined by the Minister of National Revenue — and the Tax Court of Canada, if there is an appeal — and relates to the qualifying period, on the other hand, where a question of entitlement to benefit arises, it must be decided by the Commission itself — and the board of referees, if there is an appeal — and relates to the benefit period. The determination made with respect to insurability cannot be binding on the Commission with respect to that question, and not when it comes to decide entitlement to benefit.

[27] In its assessment of the evidence, the Tribunal considers the six (6) circumstances referred to in subsection 30(3) of the Regulations. These circumstances make it possible to determine whether a person's employment or engagement in the operation of a business was of the minor extent contemplated by subsection 30(2) of the Regulations. Consequently, to overcome the general presumption provided for in subsection 30(1) of the Regulations that a "full working week" has been worked, the claimant must be employed or be engaged in the operation of a business to an extent that is so minor that the employment or engagement would not normally be a person's principal means of livelihood (***Martens,* 2008 FCA 240**).

[28] Where applicable, benefits are payable "for each week of unemployment that falls in the benefit period", according to section 9 of the Act. This "week of unemployment" is thus considered to be a week in which a claimant "does not work a full working week", as described in subsection 11(1) of the Act.

[29] The Court also established the principle that much more weight must be given to initial, spontaneous statements than to subsequent statements in the wake of an unfavourable decision by the Commission (***Lévesque,* A-557-96; *Clinique Dentaire O. Bellefleur,* 2008 FCA 13**).

Time spent

[30] With regard to time spent under subsection 30(3) of the Regulations, the Tribunal notes that the Appellant typically spends 40 hours each week working as an employee of the company in which he is a shareholder and that this is his principal means of livelihood (Exhibits GD3-15 to GD3-19, GD3-23 and GD3-24).

[31] This is the most important and the most relevant factor to be taken into account in determining whether a claimant is regarded as working a full working week (***Martens,* 2008 FCA 240; *Jouan,* A-366-94**).

[32] Since the business was created, the Appellant's participation in various duties relating to its operation has been very important, and the time he normally spends clearly shows that this is his principal means of livelihood.

[33] Even if he was without work for a few weeks beginning in late November 2012, the Appellant did not cease to be a shareholder in the company Entreprise du sommet (NDM) Inc. The Tribunal considers that, overall, despite his temporary lack of work, the Appellant must be considered to have worked a full working week; he cannot be considered to have been unemployed for that reason (***Jouan,* A-366-94**).

[34] Similarly, despite the fact that he was temporarily out of work, as is the case for seasonal workers, because of a slowdown in obtaining contracts, the Appellant continued to be a shareholder and operator of his business and he cannot be considered unemployed during the period he was not working as a paid employee (***Mazzonna,* A-614-94**).

[35] The Appellant's break in employment was brief, and he in fact has had no other breaks in employment since that of November 2012 (Exhibit GD3-15). He also stated that, after the period in which he had no work, he was not expecting to ever have to stop working again (Exhibits GD3-15 to GD3-19, GD3-23 and GD3-24).

[36] The Tribunal is also of the opinion that the Appellant could not be unaware that business was going to pick up in the near future because the company was in the process of relocating, which it did in January 2013, and that he would start working again shortly thereafter. In fact, the Appellant's Record of Employment indicates that he expected to return to work, but the date was not known (Exhibit GD3-15).

[37] The Tribunal considers that the Appellant must be considered to be a "self-employed person", as provided for in subsection 30(5) of the Regulations. Even if he temporarily ceases to be a paid employee, he does not cease to be the operator of his own business and thus remains a "self-employed person" (***Mazzonna,* A-614-94**).

[38] Despite the fact that the Appellant stated that he spent time exclusively on his work as an employee or day labourer (Exhibit GD3-15), the evidence on the docket also shows that his involvement in the various duties related to the operation of his business is quite significant, as is the time he spends on the business.

[39] With regard to "time spent" on the business, the Tribunal considers that, in his testimony, the Appellant attempted to minimize his role as a shareholder in the business,

stating that he simply did the work of an employee within the business. In response to a number of questions about this, the Appellant in fact also stated that he looked after part of the company's production and that he also acted as lead hand, directing employees.

Capital and resources invested in the business

[40] With regard to "the nature and amount of the capital and resources invested" provided for in subsection 30(3) of the Regulations, the Tribunal notes that the Appellant invested the equivalent of $25,000 in the form of goods and equipment, which are used by the business, that he owns 33⅓% of the company's shares, and that he is involved, as a director of the business, in a lease for the operation of the plant in Sainte-Rose-de-Watford.

[41] Even if the Appellant stated that he had no special duties as a shareholder with the company, he is still one of the directors, and he in fact increased his engagement in the business by adding shares to those he had from the outset.

[42] In this context, the Tribunal does not find as credible the Appellant's statement that he does not participate in the decisions of a business in which he increased his shares.

[43] The Tribunal considers that, overall, the resources invested by the Appellant to ensure the operation of the business in which he is a shareholder are quite substantial, in light of the numerous investments made in this regard, the resources that he devotes, as well as the duties that he carries out for the business.

[44] In view of all these factors, the Tribunal finds that the nature and amount of the capital and resources invested in support of his business are far from minimal or insignificant.

Financial success or failure of the employment or business

[45] With regard to "the financial success or failure of the employment or business" set out in subsection 30(3) of the Regulations, the Tribunal is of the view that the evidence points to circumstances that make it possible to determine "whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2)", in the sense that the Appellant's work with the business constitutes his principal means of livelihood, a key factor in this regard.

[46] The Tribunal notes that the business is still operating and that it has a number of employees. Even if the Appellant explained that the business was in a deficit position in 2012 and that no profits were made in 2013, the business has still seen an increase in its production since its creation, as well as growth in its sales, which rose from $300,000 in 2012 to $500,000 in 2013.

[47] The Appellant also testified that, for a year and a half, the business has used the services of a part-time accounting technician.

[48] The Tribunal considers that these factors illustrate the financial success of the employment or business.

Continuity of the employment or business

[49] With regard to "the continuity of the employment or business", one of the factors referred to in subsection 30(3) of the Regulations, the Tribunal notes that the Appellant continues to contribute, regularly, to the continuity of the employment or business in which he is a shareholder, that the business is still operating and that the business is still the Appellant's principal means of livelihood.

[50] The Appellant also testified that the business intended to increase its production, and thus increase its sales (Exhibits GD3-17 to GD3-19, GD3-23 and GD3-24).

[51] In addition, the Tribunal considers that, by using the services of employees and hiring a part-time accountant a year and a half ago, the shareholders, including the Appellant, were making sustained and continued efforts to run the business and keep it afloat, with a view to deriving an economic benefit.

[52] These factors, in the Tribunal's view, are important when considering the continuity of the employment or business and they are additional factors pointing to circumstances that make it possible to determine "whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2)" as set out in subsection 30(3) of the Regulations.

Nature of the employment or business

[53] With regard to the issue of "the nature of the employment or business" referred to in subsection 30(3) of the Regulations, the Tribunal is of the opinion that the type of employment carried out by the Appellant, within the business in which he is a shareholder, is of interest to the Appellant because this employment has been his principal means of livelihood since the business was created. In fact, the Appellant invested equipment which he owned and which he had used in the past to carry out similar work. The Appellant's work experience also points to his versatility in many different fields of employment.

[54] In the Tribunal's view, these are significant factors that point to circumstances that make it possible to determine "whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) …" as set out in subsection 30(3) of the Regulations.

Claimant's intention and willingness to seek and immediately accept alternate employment

[55] With regard to the issue of "the claimant's intention and willingness to seek and immediately accept alternate employment", also referred to in subsection 30(3) of the Regulations, the Tribunal is of the opinion that the Appellant did not show such intention and willingness. In fact, the Tribunal finds the Appellant's statements in regard to this factor of the "utmost importance" to be contradictory (***Charbonneau*, 2004 FCA 61**).

[56] In a statement made on December 31, 2012, the Appellant first explained that he had not yet applied for a job, but that he was preparing to do so after the holidays (Exhibit GD3-18). However, in subsequent statements, the Appellant claimed that he had made a number of job searches after being laid off.

[57] In the present case, the Tribunal grants greater weight to the Appellant's initial statements than to his subsequent statements, which were more about trying to show that he had made a number of job searches.

[58] The Tribunal considers that the Appellant made statements after becoming aware of the Commission's decision of June 5, 2013, which disentitled him from receiving Employment Insurance benefits (Exhibit GD3-20).

[59] In this regard, the Tribunal considers that a statement made before knowing the consequences is more credible than a second statement made later in an effort to re-establish entitlement to Employment Insurance benefits.

[60] Moreover, there is considerable case law showing that more weight must be given to the initial, spontaneous statements made by the persons concerned before the Commission's decision is rendered, than to the subsequent statements that are offered in an attempt to justify or put a better face on the claimant's position when the Commission renders an unfavourable decision **(*Lévesque*, A-557-96**, ***Clinique Dentaire O. Bellefleur*, A-139-07)**.

[61] The Tribunal considers that the Appellant showed instead that he chose to give priority to the work for his business, and that he could therefore not be considered to be ready to seek and immediately accept an employment (***Martens*, 2008 FCA 240; *Charbonneau*, 2004 FCA 61; *Jouan*, A-366-94**).

[62] The Tribunal is of the opinion that, even if the Appellant said that he had made job searches, he unduly limited his availability to obtain a new job. In any case, he knew that he was going to start up again with the company where he worked, once the company's relocation had been finalized. The Appellant in fact stated that he wanted to keep his job with the business in which he was a shareholder (Exhibits GD3-23 and GD3-24), and he was well aware that it was possible for him to do so.

[63] In short, the Tribunal considers that the Appellant was an employee and a shareholder in the company Entreprise du sommet (NDM) Inc., that he was working for the company full time but that his job was interrupted for a few weeks, and that, in this context, the time he devoted to his business was not "so minor in extent that a person would not normally rely on it as a principal means of livelihood".

[64] Therefore, in reference to the definition in subsection 30(1) of the Regulations, the Appellant is considered to have worked a full working week:

> where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours …

[65] Under sections 9 and 11 of the Act, and based on the case law mentioned above, the Tribunal considers that the Appellant did not prove that he was truly unemployed for each week falling in the benefit period. The evidence shows that the Appellant did not rebut the presumption that he was working a full working week, as an employee and a shareholder in the company Entreprise du sommet (NDM) Inc. (***Lemay*, A-662-97; *Turcotte*, A-664-97**).

[66] Although the Appellant's decision to work for a business in which he is an important shareholder was supported by excellent reasons, these reasons cannot exclude him from the requirements of the Act, that is, proving that he was unemployed for each week in his benefit period, in order to be eligible to receive Employment Insurance benefits.

[67] The Tribunal does not accept his argument that it was unfair for him to be forced to pay Employment Insurance benefits when he was not entitled to receive benefits because he holds shares in the business in which he is a shareholder. Even if the Appellant also argued that he occupied an insurable employment within the meaning of the Act, he must also meet all the requirements of the Act in order to be entitled to benefits (***D'Astoli*, A- 999-96**).

[68] The Tribunal finds that the appeal of the Commission's decision regarding the Appellant's disentitlement from receiving Employment Insurance benefits for failing to show that he was unemployed is not warranted under sections 9 and 11 of the Act and under section 30 of the Regulations.

[69] The appeal on this issue has no merit.

CONCLUSION

[70] The appeal is dismissed.

Normand Morin
Member, General Division

DATE OF REASONS: October 9, 2014