

[TRANSLATION]

Citation: *P. G. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 195

Date: November 13, 2015

File number: GE-15-1433

GENERAL DIVISION - Employment Insurance Section

Between:

P. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Claude Durand, Member, General Division - Employment Insurance Section

In-person hearing held in Trois-Rivières, Quebec on August 25, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, P. G., was present at the hearing.

[2] The other parties were not represented.

[3] This appeal was heard in person for the following reasons:

- a) The fact that credibility was not a determinative issue.
- b) The information in the file, including the need for additional information.
- c) The fact that more than one participant, such as a witness, could be in attendance.
- d) This type of hearing is best suited to meeting the parties' needs for accommodation.

INTRODUCTION

[4] In this case, the Employment Insurance Commission (the Commission) imposed disentitlement from November 10, 2014, to February 6, 2015, after concluding that the Appellant was engaged in the operation of a business and was not unemployed, pursuant to sections 9 and 11 of the *Employment Insurance Act* (the Act) and subsection 30(1) of the *Unemployment Insurance Regulations* (the Regulations).

[5] That decision resulted in an overpayment of \$2,591.

[6] The Appellant made a request for reconsideration. The initial decision was upheld on March 25, 2015.

[7] The Appellant appealed to the Social Security Tribunal on April 17, 2015.

ISSUE

[8] The Tribunal must determine whether the Appellant was unemployed and whether the disentitlement imposed under sections 9 and 11 of the Act and section 30 of the Regulations is justified.

THE LAW

[9] Section 9 of the Act:

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.

[10] Definition of “week of unemployment”: Subsection 11(1) of the Act.

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

[11] To determine the issue of whether the Appellant’s self-employment activities constituted a full working week, it is necessary to refer to the provisions of section 30 of the Regulations, and to the following subsections in particular.

[12] Subsection 30(1) of the Regulations illustrates the presumption of a full working week in relation to self-employed persons:

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.

[13] Subsection 30(2) of the Regulations provides for an exception that can rebut the presumption of the full working week if the claimant is employed or engaged in the operation of a business to such a minor extent that it would not constitute a principal means of livelihood:

Where a claimant is employed or engaged in the operation of a business as described in subsection (1) 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.

[14] The factors to be taken into consideration in assessing what is meant by “minor extent” are set out in subsection 30(3) of the Regulations, which provides as follows:

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

(a) the time spent;

(b) the nature and amount of the capital and resources invested;

(c) the financial success or failure of the employment or business;

(d) the continuity of the employment or business;

(e) the nature of the employment or business; and

(f) the claimant's intention and willingness to seek and immediately accept alternate employment.

EVIDENCE

Evidence in the file

[15] The Appellant established a claim for employment insurance benefits as of June 8, 2014 (pages GD3-3 to GD3-10).

[16] When the Commission learned that the Appellant had registered a business, *9312-5623 Québec Inc. / Impact Signalisation* (Impact Signalisation), the Commission started an investigation (pages GD3-11 to GD3-19).

[17] The Appellant confirmed that his business was incorporated on November 6, 2014, but that it was not in operation. He was the sole proprietor of a road signage business. He purchased signage materials, a Volvo and a Dodge Ram on December 18, 2014. On December 19, he purchased office furniture and finalized the financing arrangements for his business.

[18] The Appellant obtained a \$135,000 loan with a five-year term, secured by a mortgage against the equipment and the rolling stock along with a personal guarantee. He had a \$50,000 line of credit secured by the inventory and accounts receivable as well as the personal guarantee, a \$15,000 MasterCard credit card and a \$75,000 loan for working capital repayable over five years and secured by a personal guarantee. The Appellant also opened a commercial account. He was the signatory along with L. S., an investor who had no legal authority.

[19] In addition to completing a questionnaire, the Appellant provided the Commission with a number of documents, some of which can be found at pages GD3-20 to GD3-88. They include the certificate of incorporation for his company, the notice of confirmation for the GST and QST, the commercial lease and various documents relating to investment and his participation in the Quebec *Support for Self-Employment* program.

[20] The Appellant stated that he had spent approximately three hours a day, between 6:00 a.m. and 9:00 a.m., on the start-up of his business for a period of approximately one month. He then spent approximately 10 hours over a period of two months to present his project to financial institutions. His plan was to be in operation by March 2015.

[21] Regarding the start-up of his business, the Appellant stated that he went to Emploi-Québec on October 21 to register for the *Support for Self-Employment* program. He was referred to an official with *Innovation et Développement économique Trois-Rivières* (IDE Trois-Rivières) for an assessment of his eligibility. After he received written confirmation, he completed his admission for the program with Emploi-Québec on October 29, 2014. His admission was to be ratified and finalized on February 5, 2015.

[22] With regard to his earlier job search efforts, the Appellant stated that he did not consider himself to be self-employed and was actively looking for employment. The Appellant provided the Commission with a list of the places where he had looked for work, as found at pages GD3-30, 33 and 89.

[23] On the basis of the facts in the file, the Commission initially determined that the Appellant was engaged in the operation of a business and that he was not engaged in the operation of that business to such a minor extent. The Commission also concluded that the Appellant was not available for work during the start-up period for the business. The Commission notified the Appellant that he had not established that he was unemployed and imposed disentitlement as of November 10, 2014, pursuant to sections 9 and 11 of the Act and subsection 30(1) of the Regulations (pages GD3-121 to GD3-122).

[24] Further to the request for reconsideration, the Commission amended its initial decision. The disentitlement was upheld but was applied only to the period of November 10, 2014, to February 6, 2015, the date on which the Appellant was admitted to the *Support for Self-Employment* program. That revised decision does not refer to the Appellant's availability (pages GD3-132 and GD3-133)

Appellant's evidence at the hearing

[25] The Appellant is 62 years old and worked as a banker from 1972 to 1992. He subsequently held management positions for different companies, in the area of road signage in particular.

[26] After losing his job he actively looked for work, but without success. He then decided to start his own business in the area of road signage.

[27] He met with an official from IDE Trois-Rivières on October 29, 2014. That individual, a Ms. H., signed the letter accepting his project and recommending him to Emploi-Québec as a participant in the *Support for Self-Employment* program.

[28] He met with the committee on February 5, 1995, and was officially accepted for the program. The committee had a full agenda in November and was not sitting in January.

[29] He had always been an early bird and had developed his business plan between 6:00 a.m. and 9:00 a.m. He then spent an average of 10 hours per week on starting his business.

[30] He did not pay himself a salary and did not derive any income from his business. His first contracts came about in April 2015.

[31] Aside from the rolling stock (trucks and cars), the rest of the materials were delivered in February 2015.

[32] He made a number of attempts to find work during the benefit period. He was registered on job search sites such as Workopolis, Endeem and Monster and on the Emploi-Québec site. He also used his personal contracts with contractors and looked for work at Costco, Korvette and IGA. If he had found a job he would have accepted it.

PARTIES' ARGUMENTS

[33] The Appellant argued as follows:

- a) When he lost his job at age 61, he had difficulty finding employment at that age. He decided to start his own business in case his efforts in the labour market continued to be in vain;
- b) He had always stated that his business had been registered in November 2014 but that there had not been any ongoing activity. He did the minimum required to be ready to start his business in case he was accepted by Emploi-Québec for the *Support for Self-Employment* program;

[34] The Respondent's arguments were as follows:

- a) In this case, the Commission concluded that the Appellant was engaged in the operation of a business;
- b) To determine whether or not the Appellant's engagement was to a minor extent, the Commission applied the objective test under subsection 30(2) of the Regulations using the six factors set out in subsection 30(3) of the Regulations;

1. Time spent

- I. The claimant stated that he had spent close to three hours per day, from 6:00 a.m. to 9:00 a.m., preparing financial projections over a period of approximately one month. He subsequently spent a total of approximately 10 hours over a period of two months making

presentations to financial institutions to obtain approvals.
He participate in training, but on the weekend.

- II. As of February 9, 2015, the date on which the *Support for Self-Employment* (STA) project started, the claimant began spending all of his time on the business (GD3-31 and GD3-130).

2. Nature and amount of capital and resources invested

- I. Small business loan: \$135,000, line of credit: \$50,000, MasterCard: \$1,000, National Bank of Canada: \$75,000 and equity capital \$100,000 (GD3-31).

3. Financial success or failure of employment or business

- I. Operations were to start in March 2015 but a failure would put the claimant's financial situation in jeopardy. The claimant mortgaged his house. He stated that he had begun making the financial arrangements in the fall because he wanted to make sure everything would be in place for the start of his project with Emploi-Québec, which was supposed to begin in early February 2015 and which did in fact begin on February 9, 2015 (GD3-32 and GD3-130).

4. Continuity of employment or business

- I. On October 29, 2014, the claimant signed an agreement with Emploi-Québec regarding the *Support for Self-Employment* (STA) program (GD3-82 to GD3-85);
- II. On November 6, 2014, he registered his business with the Registraire des entreprises du Québec (GD3-104 to GD3-107);

- III. Also on November 6, 2014, a certificate of incorporation was issued to the claimant (GD3-34), and his registration for the GST/HST file and the QST file was confirmed, effective November 6, 2014 (GD3-35 and GD3-37);
- IV. On November 17, 2014, the claimant signed a three-year lease at \$1,650 per month except for the period from November 24, 2014, to December 31, 2014, when he was given a special offer to help him set up the rented premises and get his business off to a good start. The landlords would be covering the electricity costs once he took possession (GD3-38 to GD3-52);
- V. On December 4, 2014, the Régie du Bâtiment du Québec (RBQ) issued a licence to him (GD3-108);
- VI. On December 12, 2014, although delivery was not scheduled until February 2015, the claimant placed an order for \$46,136.70 worth of equipment (GD3-109 to GD3-111);
- VII. On December 18, 2014, the claimant purchased a Volvo truck for \$12,000 (GD3-112);
- VIII. On December 19, 2014, the claimant purchased some office equipment from Fournitures de bureau Denis at a cost of \$1,719.94 (GD3-113);
- IX. On December 22, 2014, the claimant purchased a Dodge truck for \$3,500 (GD3-114);
- X. Lastly, on January 9, 2015, he started sending out emails to potential customers with the business's logo, introducing himself as the managing director (GD3-115 to GD3-120).

5. Nature of employment or business

- I. The Appellant has always worked in management. He has experience in the field of road signage.

6. Intention and willingness to seek and immediately accept alternative employment

- I. The claimant confirmed that up to February 8, 2015, he was ready and available to work for an employer as an employee. Although he did not actually submit any applications to employers after July 2014, he received job alerts from different websites every day. None of the positions that were advertised matched his skills and knowledge. The claimant said that he had spoken with employers and had verbally expressed an interest in working but that no one was prepared to hire him. He said that he had not kept the names or dates associated with his efforts, as he did not know he was supposed to do so. If he had obtained a job offer he could have accepted the job up to February 8, 2015, and would then have resigned to devote himself to his business.
- c) When considered objectively, all six factors lead to the conclusion that the claimant's engagement in his business was to the extent that a person would normally rely on it as a principal means of livelihood. Despite the claimant's assertion that he had not spent many hours on the start-up of his business since November 10, 2014, and remained available for a job as an employee, his financial involvement was substantial.

d) Furthermore, the facts show that the claimant was putting in all of the effort needed for his business to be ready for the start of his Emploi-Québec-supported project in early February. The claimant was engaged in his project as of November 2014. The fact that the claimant was strongly engaged in starting up his business rather than unemployed is shown by the fact that he obtained substantial financing, signed a lease, purchased materials, solicited contracts and intended to create his own employment. Accordingly, the claimant has not rebutted the presumption that he was not unemployed because he does not meet the exception provided for under subsection 30(2) of the Regulations.

ANALYSIS

[35] The Federal Court has reaffirmed that the most important and relevant factor in determining whether a claimant worked a full working week is time spent, followed by the claimant's intention and willingness to seek and immediately accept alternate employment (*Martens v. Canada (A.G.)*, 2008 FCA 240; *Charbonneau v. Canada (A.G.)*, 2004 FCA 61; *Marlowe v. Canada (A.G.)*, 2009 FCA 102).

[36] The Federal Court of Appeal has affirmed the principle that subsection 30(2) of the Regulations nullifies the application of subsection 30(1) of the Regulations if a claimant can establish that the level of engagement in the operation of a business, considered objectively in light of the six factors set out in subsection 30(3) of the Regulations, is of such a minor extent that it would not normally constitute a principal means of livelihood for the applicant (*Martens v. Canada (A.G.)*, 2008 FCA 240).

[37] In this case, because the Appellant had lost his employment and determined that he would not be successful in returning to the labour force, he decided to start his own business. He nonetheless asserts that the time he spent on starting up his business was minimal and that during his benefit period he was unemployed, was available for work, was looking for work and would have been willing to accept employment.

[38] The relevant jurisprudence very clearly indicates that the six factors set out in subsection 30(3) of the Regulations must be taken into consideration in determining whether the exception provided for under subsection 30(2) of the Regulations applies. The most important are, first, time spent and, second, the claimant's intention and willingness to seek and immediately accept alternate employment.

[39] With regard to the time a claimant spends on the business, the Federal Court observed as follows in *A.G. v. Alfred J. Jouan*, A-366-94, at page 5:

Second, this is what common sense requires. Whatever be the status of the other factors (be it the capital invested, or the success of the enterprise or the continuity of the business), they can never be relevant on their own, the conclusion in a particular case depends directly and necessarily on the "time spent", since, is it necessary to repeat it, we are dealing here strictly with the notion of "full working week".

[40] The Tribunal will rule on this case on the basis of the principles set out in the case law.

[41] I have reviewed the evidence in the file. It appears that the Appellant has always been very transparent about his activities and his plans to start his business. At page GD4-8, the Commission acknowledges this: [Translation] "First, the Commission would like to state that the claimant's account was clear and concise regarding the chronology of events and the start-up of his business and he is completely credible when he says he provided all of the documents he had in his possession. Nor is there any doubt that the claimant replied to the best of his knowledge when he completed his claimant declaration and during his various interviews with the Commission, which has absolutely no doubts about his honesty."

[42] First, with regard to the Appellant's honesty and transparency, I share the Commission's opinion. At the hearing the Appellant expressed himself in a clear and detailed manner. I find the Appellant to be a calm, organized man who was eager to cooperate on clarifying his case. I appreciated his testimony and I note that it was fully consistent with his statements on the record. I find the Appellant to be completely credible in his explanations regarding his efforts to

find work, his efforts to start his business, the time he spent on it and the amount he had invested.

[43] With regard to the factors identified in subsection 30(3) of the Regulations, I will begin by looking at the factors other than time spent and willingness to seek and immediately accept alternate employment: that is, the nature and amount of the capital and resources invested, the financial success or failure of the employment or business, the continuity of the employment or business and the nature of the employment or business.

[44] **Nature and amount of capital invested:** I note that the Appellant has always stated that he started his business because he could not find employment. This is not contested. I note also that he registered his business in November 2014 and that most of the investment took place in December 2014, i.e. after the Appellant was recommended by IDE Trois-Rivières for the *Support for Self-Employment* program further to a meeting on October 29, 2014. The evidence shows that the Appellant gradually invested in his plan to start a business as his dealings with IDE Trois-Rivières and Emploi-Québec moved forward.

[45] **Financial success or failure of the business:** It is obvious that the Appellant would like his business to be a success. It would be surprising if he did not. However, this does not prove that he was not unemployed within the meaning of the Act before he was accepted for the STAU (*Support for Self-Employment*) with Emploi-Québec in early February.

[46] The same reasoning applies with regard to the **continuity of the business and the nature of the business.**

[47] When the matter of **being unemployed** is looked at, it cannot be assumed that as a business owner the Appellant is a self-employed worker or operates a business without also considering the fact that he cannot avail himself of the exception provided for under subsection 30(2) of the Regulations.

[48] In *Martens, Henry v. Canada (A.G.)*, A-256-07, paragraph 43 reads as follows: “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.”

[49] I note that during the period at issue, i.e. November 10, 2014, to February 6, 2015, the business did not generate any income. The business was not in operation in the sense that no work was contracted. This start-up phase unfolded gradually and did not require full-time work. Moreover, the Appellant was not receiving any income or salary from the emerging business.

[50] In light of the foregoing, I find that it would not have been normal or reasonable for the Appellant’s business to be able to constitute a principal means of livelihood during his benefit period.

[51] With regard to **time spent**, I find that the Appellant has always been consistent in his statements. He asserted that he spent approximately three hours per day on his project during the first month and an average of approximately 10 hours after that. His work experience in the area of signage and his administrative skills have been proven. There is nothing to contradict the fact that the Appellant was spending the early part of his days and his spare time on starting up his business. I find the estimate of the limited time the Appellant spent on this project from November 2014 to February 2015 to be realistic.

[52] I have also considered the email exchanges between the Appellant and his business contacts, who were potential customers, as found at pages GD3-115 to GD3-120. I find it plausible that the Appellant had the network of contacts necessary to identify and approach customers as well as the knowledge required to carry out the administrative follow-up without devoting full working weeks to it. During the period at issue the Appellant did not do any other advertising or devote any further effort to promoting his new services. Again, I have accepted the Appellant’s estimate of the average number of hours he put into starting his business and/or soliciting potential customers.

[53] The final factor to be considered is **the claimant's intention and willingness to seek and immediately accept alternate employment.** At the hearing the Appellant reiterated that he had looked for employment, mainly through job search sites and his network of contacts. He said he would have immediately accepted a job up to February 8, 2015, the date on which he was accepted for the STAU (*Support for Self-Employment*) program.

[54] I have listened to the Appellant's explanations regarding the difficulties he encountered in finding employment at age 62. I have concluded that he had the intention and the willingness to seek and immediately accept alternate employment. Unfortunately, that did not come to pass.

[55] In *Lemay* (A-662-97) and *Turcotte* (A-664-97), the Court maintained that, when a claimant operates a business, the onus is on the claimant to rebut the presumption that he worked a full working week.

[56] In light of the facts and the arguments presented, the Tribunal finds that the exception provided for under subsection 30(2) of the Regulations applies. In this case, the Appellant has established that he was engaged in the start-up and operation of the business to such a minor extent that a person would not normally rely on that engagement as a principal means of livelihood. Therefore, he has not been found to have devoted a full working week to it. The Appellant has met his burden of proof to rebut the presumption that he worked a full working week.

[57] The Tribunal finds that the Appellant was unemployed from November 10, 2014, to February 6, 2015. Accordingly, the disentitlement that was imposed does not apply.

CONCLUSION

[58] The appeal is allowed with regard to the matter at issue, i.e., the imposition of disentitlement, in accordance with sections 9 and 11 of the Act and section 30 of the Regulations. On the basis of that decision, no overpayment is applicable.

A handwritten signature in black ink, appearing to read "Claude Durand". The signature is written in a cursive, flowing style.

Claude Durand
Member, General Division - Employment Insurance Section