[TRANSLATION]

Citation: ***G. D. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1400**

Date: December 7, 2015

File number: AD-13-416

APPEAL DIVISION

Between:

G. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

In-person hearing held on September 14, 2015, Rimouski, Quebec.

REASONS AND DECISION

DECISION

[1] The appeal is allowed in part, and the matter is referred to the General Division for a new hearing only on the issue of the penalty.

INTRODUCTION

[2] On April 9, 2013, a Board of Referees found that:

> - The disentitlement imposed under sections 9 and 11 of the *Employment Insurance Act* (the Act) and section 30 of the *Employment Insurance Regulations* (the Regulations) was justified because the Appellant failed to prove that he was unemployed;
>
> - The penalty imposed was justified under sections 38 and 41.1 of the Act.

[3] On May 13, 2013, the Appellant filed an application for leave to appeal with the Appeal Division. Leave to appeal was granted by the Appeal Division on January 8, 2015.

TYPE OF HEARING

[4] The Tribunal determined that an in-person hearing of this appeal would be conducted for the following reasons:

- the complexity of the issue(s);
- the fact that more than one party will attend the hearing;
- the information on record, including the kind of information that is missing, and the need for clarification;
- the fact that the parties are represented.

[5] The Appellant attended the hearing and was represented by counsel Yvan Bujold. The Respondent was represented by counsel Virginie Harvey.

THE LAW

[6] In accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (a) the Board of Referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the Board of Referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
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> (c) the Board of Referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The Tribunal must decide whether the Board of Referees erred in fact and in law in finding that:

- The disentitlement imposed under sections 9 and 11 of the Act and section 30 of the Regulations was justified because the Appellant failed to prove that he was unemployed;
- The penalty imposed was justified under sections 38 and 41.1 of the Act;

SUBMISSIONS

[8] The Appellant submits the following reasons in support of his appeal:

- The Board of Referees failed to properly assess the factors listed in subsection 30(2) of the Regulations with regard to the circumstances submitted as evidence at the hearing and the teachings of the case law;
- In particular, the Board of Referees failed to properly assess the time spent on the business and the Appellant’s willingness to immediately accept alternate

employment, determinative factors that the Board of Referees must consider to make its finding;

- Based on an assessment of the factors in subsection 30(2) of the Regulations, the Board of Referees should have found that the Appellant worked for a business to such a minor extent that he could not rely on that employment as a principal means of livelihood;

- At the hearing, it was demonstrated that the Appellant spent very little time on his business. During the periods in which he received Employment Insurance benefits, he actively sought employment in his field;

- The evidence presented at the hearing showed that he spent less than four hours per week on the business and that he did not intend to work at this job but rather to find employment in the communications field;

- The time spent working for the business must be distinguished from the time spent at the company's head office, where he went for personal reasons;

- It was demonstrated that the Appellant's business had been in operation since 2004. At the time, the Appellant worked for Astral, where he stayed until 2006;

- The Appellant involvement in his company was gradual and became more significant from the moment he stopped receiving Employment Insurance benefits;

- The net income of the business, which was in deficit when the Appellant was receiving Employment Insurance benefits, indicates that it would not have been normal or reasonable for the business to be the Appellant's principal means of livelihood;

- The business never generated income before 2008. The business was shown to be in a deplorable financial state when the Appellant was receiving Employment Insurance benefits;

- Regardless of the assessment factors in subsection 30(2) of the Regulations, no one can have as a principal means of livelihood a business that, at the time in question, is in a precarious state or failing;

- Only the intervention of a third party and the new financial capital invested by the Appellant in 2012 kept the business running;

- The Appellant had no prior experience in this field, as he had worked in communications throughout his career;

- The evidence established that the Appellant actively sought new employment but that his efforts failed because of his experience and, above all, his age;

- When the Appellant was convinced that he could not find employment in his field, he worked actively in the business and has not requested Employment Insurance benefits since that time;

- The fact that the Appellant did not find a similar job does not mean that she failed to look for one;

- Based on the criteria set out in subsection 30(2) of the Regulations, the only reasonable conclusion that could have been reached was that it would not have been normal or reasonable for the Appellant's engagement to such a minor extent in the operation of a business to be his principal means of livelihood;

- The overall analysis of the above factors, specifically the most important ones, namely, the time spent and the intention to find a job, shows that the Appellant worked at the business to a minor extent, and that his job could not at all be considered one that could meet his needs;

- In addition, the Board of Referees based its judgment on an erroneous factual background in reaching its conclusion;

- In fact, contrary to the Board of Referees' arguments, the Appellant did not work full-time for his business from 2006 until September 23, 2007. Therefore, when

he was an Employment Insurance claimant, he never received a wage or earnings from the business;

- With respect to his availability to seek new employment, the Board of Referees seemed to find that the Appellant sought work only in the automotive sector in his region. However, the evidence in this regard showed that the Appellant made numerous efforts to find a job in a field other than the automotive sector;

- According to the Board of Referees' reasoning, because the Appellant refused a job offer, he was not available to take work elsewhere. The job that the Appellant refused was in Abitibi, more than 12 hours by car from his residence and his family, which lived in X;

- The Appellant proved that he made serious efforts to find employment that were neither limited nor restrictive;

- It is reasonable to find that a reasonable person could have thought that he was not working or employed at the business when he was not receiving a wage or any earnings from the business;

- Moreover, the Appellant's answer to question as to whether he was operating a business was reasonable, as he had received information to this effect from an Employment Insurance clerk;

- As noted by the Board of Referees, it is important to state that negotiations on whether or not to grant Employment Insurance benefits took place between government agents and the Appellant, given that he was operating a business. The Department was therefore aware of the Appellant's situation;

- It is reasonable to conclude that a person who is unfamiliar with the definition of "volunteer work", as developed by the Board of Referees, may find that their sporadic engagement in the company while receiving Employment Insurance benefits constitutes volunteer work rather than work, hence the erroneous answer to the Respondent's questions;

- The Appellant is asking the Tribunal to review the Board of Referees' decision based on the specific circumstances of the case and the criteria established by the case law.

[9] The Respondent submits the following reasons against the Appellant's appeal:

- Subsection 11(1) of the Act defines a week of unemployment as a week in which the claimant does not work a full working week;

- When a claimant is engaged in the operation of a business, as stipulated in section 30 of the Regulations, there is a presumption that he is working a full working week;

- According to subsection 30(2) of the Regulations, this presumption can be rebutted by proving that he was employed to such a minor extent that he would not normally rely on that employment or engagement as a principal means of livelihood. Subsection 30(3) of the Regulations sets out the six criteria to analyze to determine this condition;

- Contrary to the Appellant's arguments, the Board of Referees did not err in conducting an overall analysis of the six criteria, without giving precedence to one or more of the criteria;

- Although in *Charbonneau v. Canada (AG)*, 2004 FCA 61, the Federal Court of Appeal determined that two factors took precedence, namely, the time spent and the claimant's intention to seek and accept alternate employment, in *Martens* it referred to an overall analysis of the six criteria, without giving precedence to one or more of the criteria.

- For each criterion, the Board assessed the credibility of the evidence and made findings of fact. The Board of Referees dealt with various contradictory statements by the Appellant and other family members in light of the evidence submitted by the Respondent;

- The Board was not satisfied that the Appellant could have sporadically left the business when there was no termination or reduction of operations;

- The Appellant is seeking to have the Tribunal reassess the facts already weighed by the Board of Referees;

- According to the Federal Court of Appeal's teachings, the Board of Referees is the trier of fact and its role is to assess the facts and all the evidence before it, in addition to the witnesses' credibility;

- It has been established that the Tribunal sitting for an appeal from a Board of Referees' decision should not substitute its opinion for that of the Board, unless the decision appears to have been made in a perverse or capricious manner or without regard for the material before it. The Tribunal's role is limited to determining whether the Board of Referees' assessment is reasonably compatible with the facts on file;

- The Board of Referees' decision was reasonably compatible with the facts on file and was consistent with the legislation and the relevant case law. Thus, the Tribunal should not intervene;

- Contrary to what was indicated by the Appellant, there was only one reasonable finding that the Board of Referees should have made;

- The Board of Referees' decision was reasonable in light of the circumstances of the case, and this Tribunal cannot intervene simply because it came to a different conclusion;

- As established by the Federal Court of Appeal in *Gates*, the onus of proof that rests upon the Respondent is to establish on a balance of probabilities, not beyond a reasonable doubt, that the Appellant made a statement or representation that he knew to be false or misleading;

- In this case, the Respondent argues that it met its onus of proof, in particular because the Appellant was informed of his rights and responsibilities when he filed his benefit claim, and he knew that he had to report any self-employment;

- The Appellant explained that a Commission officer told him that if he did not work or earn revenue from his business, he did not have to report it. Had this situation arisen, the Commission and its representatives do not have the power to amend the Act and, therefore, the interpretations which they may give of the Act do not themselves have the force of law;

- The case law has established that whether or not the Appellant was paid does not change the fact that he had to report his job and/or earnings in his benefit claims, and it is not necessary for him to be paid for working;

- Although a claimant may cite "volunteer work," this does not justify false statements when the claimant is not disinterested in the business in question and when he benefits from it;

- In this case, the Appellant knowingly reported that he did not work, whereas he testified that he was working in the business for three to four hours a week;

- According to the teachings of the case law, the Appellant's argument regarding the fact that he did not receive any earnings was without merit because he had to report his job;

- Moreover, his involvement in the business could not constitute volunteer work because he was not disinterested in the business, which he tried to keep running, and because he benefited from it, as aptly noted by the Board of Referees;

- Therefore, the Appellant failed to discharge his burden of explaining his false or misleading statement, and the Board of Referees' decision to uphold the penalty imposed was reasonable;

- Only the Respondent has the discretion to decide whether to impose a penalty. As soon as the penalty imposed is upheld by the Board of Referees, neither the

Federal Court of Appeal nor today the Tribunal's Appeal Division (formerly "the Umpire") can intervene in the Respondent's decision on a penalty, if the Respondent can prove that it exercised its discretion "judicially";

- In that regard, the Respondent argues that after taking into account all the relevant factors and ignoring the irrelevant factors, the Board of Referees was correct not to intervene;

- The Board of Referees was correct to find that the Respondent could reconsider the case after 36 months as well as impose a penalty because a false or misleading statement was made;

- The Board of Referees' decision is well founded in fact and in law, and it correctly exercised its jurisdiction.

STANDARDS OF REVIEW

[10] The parties submit and the Tribunal agrees that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees and an Umpire on questions of law is correctness, and that the applicable standard of review for questions of mixed fact and law is reasonableness – *Martens v. Canada (AG*), 2008 FCA 240; *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

Introduction

[11] The Appellant's file was submitted to the Board of Referees, along with the files of the other family members engaged in the same business, in successive hearings. The family members' statements were cited interchangeably from file to file. In addition, the situation of one family member is commented on by other family members. The family members' representative therefore submitted common evidence and arguments for each person to the Board of Referees.

[12] The representative also submitted common arguments for each person to the Appeal Division.

New evidence on appeal and after the file was taken under reserve

[13] On September 24, 2015, after the file was taken under reserve, the Appellant's representative contacted the Tribunal in writing to send it the Appellant's 2008 tax returns to show that the $124,636.00 did not match the income from the operation of the business.

[14] The Respondent objected to these tax returns being submitted as evidence because they were not new facts that were unavailable at the time of the Board of Referees' hearing. It stated that the Appellant had the chance to submit his reports before the Board of Referees' hearing, and he failed to do so. The Board of Referees even noted the Appellant's lack of submissions on this point.

[15] As mentioned by the Tribunal at the hearing on September 14, 2015, the powers of the Appeal Division are limited. The Appeal Division is not authorized to retry the factual issues, weigh the evidence again or redo what the Board of Referees did.

[16] In other words, an appeal to the Appeal Division is not an appeal in which there is a *de novo* hearing, that is, a hearing where a party can present his or her evidence again and hope for a favourable decision.

[17] The Tribunal finds that the evidence existed before the Board of Referees' hearing and should have been submitted at that time. The Tribunal notes that the Appellant wishes to submit the evidence now, despite the fact that the Respondent requested explanations on this specific point in December 2011 (AD2-109).

[18] Since the Appellant's 2008 tax returns were not submitted to the Board of Referees, the Tribunal cannot take them into account in this appeal.

Reconsideration

[19] The Board of Referees found that, given that the Appellant made false or misleading statements, the Respondent complied with the 72-month timeframe set out in section 52 of the Act to reconsider the Appellant's file.

[20] The Appellant's representative focused on his lack of false or misleading statements that would have enabled the Respondent to extend the reconsideration period to 72 months.

[21] The Federal Court of Appeal determined in *Langelier* (A-140-01), *Lemay* (A-172-01) and *Dussault* (A-646-02) that, to be granted the extended time to reconsider set out in subsection 52(5) of the Act, the Commission does not have to establish that the claimant in question made false or misleading statements but must instead simply show that it could reasonably find that a false or misleading statement was made in connection with a benefit claim.

[22] At the reconsideration stage, the Respondent therefore did not have to show that the Appellant made a false or misleading statement. The Respondent had to reasonably find that a false or misleading statement was made.

[23] In the circumstances of this case, could the Respondent have reasonably found that the Appellant made a false or misleading statement?

[24] In this case, the Respondent found that the Appellant failed to provide information on the operation of his businesses. In his electronic reports from September 2007 to July 2008, the Appellant reported that he was not self-employed and did not perform work for which he would not be paid.

[25] The Appellant stated that the Protex business was launched in July 2007 and that he and his spouse were the sole owners. The company was registered with the appropriate tax authorities at the same time. On July 1, 2007, he signed a lease on behalf of his business. The Appellant stated that he took out a $30,000 line of credit with the National Bank and that he bought a franchise for $25,000.00—two transactions to which he committed personally. He also did some advertising or client solicitation.

[26] An employee who worked for Protex from January to May 2008 stated that the Appellant was the big boss and that he was always at the garage because he was the car salesperson.

[27] With respect to his Auto-Express business, the Appellant stated that it was launched following a family decision. He stated that in 2004 he invested all his RRSPs in the business, for a total of $350,000.00. He stated that he carried the business's burden of debt, even though he and his wife owned equal shares. On May 19, 2006, *L'Avantage* newspaper published an article about the Appellant. The article states that he works at the business full-time with his two sons and his spouse. He states that the business's income and expenditures are split between him and his spouse on the tax returns. The Appellant states that he has had a company cellphone for several years and that he uses it for both personal and business needs. He also has a personal Visa credit card which he uses both for business and personal needs.

[28] The Appellant's spouse stated that her spouse worked at the garage in 2006, when he stopped working for Astral; however, in 2007, when he claimed unemployment, he stopped working but, like his spouse, would go there occasionally to help out. After receiving 45 weeks of unemployment, the Appellant started to work at the garage full-time again as manager. She stated that he made all business-related decisions and did all types of tasks—selling, managing, taking calls and communicating with suppliers.

[29] By taking into account the above-mentioned facts and by applying the Federal Court of Appeal's teachings to the issue of reconsideration, the Tribunal considers, based on the evidence, that the Respondent could have reasonably found that the Appellant made a false or misleading statement or representation in order to have a 72-month period to reconsider the Appellant's benefit claim.

Penalty

[30] When it dismissed the Appellant's appeal on the issue of the penalty, the Board of Referees found the following:

> [Translation]
>
> In all his explanations, the Appellant pointed out that a Service Canada Officer had told him to proceed this way. He also explained that, in the questionnaire (P-7) submitted to him during the review of his case, he answered "no" to the question as to whether he had worked because the company was in deficit and also answered "no" to the question as to whether he was operating a business because he was not working there. However, he should have known or should have suspected that something was wrong in his responses because he testified that he spent time at the business, and the fact that it was in deficit does not answer the question as to whether he worked. By responding that he did not work or was not self-employed, the Appellant knew that he was not telling the truth.
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> (Emphasis added by the undersigned)

[31] Based on the Board of Referees' decision, it appears that the Board found, without taking into account the Appellant's explanation, that he knowingly made false or misleading statements because [translation] "the Appellant should have known or should have suspected that something was wrong in his responses." By acting as it did, the Board seems to have applied an objective test. The Tribunal finds that the Board did not consider whether the Appellant subjectively knew that he was making false or misleading statements.

[32] To impose a penalty on the Appellant, the Board had to find, on a balance of probabilities, that he subjectively knew that the statements were false – *Canada v. Purcell*, A-694-94.

[33] There is reason for the Tribunal to intervene and refer the matter to the General Division with respect to the issue of the penalty.

Unemployment status

[34] The Appellant's representative argues that the evidence before the Board of Referees showed that the Appellant spent very little time at the business and that the business was in a deplorable financial state when the Appellant was receiving Employment Insurance benefits. Based on an assessment of the factors in subsection 30(2) of the Regulations, he argues that the Board of Referees should have found that the Appellant worked for the business to such a minor extent that he could not rely on that employment as a principal means of livelihood.

[35] 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.

[36] The case law has established that an overall analysis of the six criteria must be conducted, without giving precedence to one or more of the criteria, and that each file must be assessed on its merits – *Martens*, 2008 FCA 240; *Goulet*, 2012 FCA 62; *Inkell*, 2012 FCA 290.

[37] The Tribunal finds that the text of the Regulations must be considered in its entirety, given that a person could spend little time on their business but nevertheless make it their principal means of livelihood. In addition, a lack of sufficient income does not necessarily mean that a claimant is unemployed.

[38] Subsection 30(3) of the Regulations sets out the six factors to consider in determining whether the claimant's engagement in the operation of the business is of such a minor extent that he would not normally rely on it as a principal means of livelihood. 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;
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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;
>
> (*e*) the nature of the employment or business; and
>
> (*f*) the claimant's intention and willingness to seek and immediately accept alternate employment.

[39] The Board noted the Appellant's insistence on showing that he worked no more than three to five hours per week on his business, for about 30 minutes per day. He showed that the Respondent's documentary evidence did not indicate that he spent more time than he alleged at the business. However, the Board noted that the Appellant always immediately returned to work after his 45-week benefit period ended and that his employees and the other members of his family viewed him as the one who made all decisions on the business's operations. The Board determined that the Appellant's version concerning the time spent was not credible.

[40] The Board of Referees also considered that the Appellant invested $350,000.00 of his personal savings in creating the business in 2004 and that he purchased a Protex franchise in 2007 to improve customer service in his first car business. The Board noted that the Appellant invested not only his personal savings but also his family resources in the business.

[41] The Board of Referees noted that the business was indeed in deficit, but that the business nevertheless diversified its operations and took steps to facilitate its expansion.

[42] The Board of Referees noted the size of the Appellant's investment since its creation in 2004 as well as the signs leading it to conclude that the business was still running, namely, the signing of a lease, space planning, the debt burden, the credit lines, as well as the sums reinvested to ensure the continuity of the business.

[43] The Board determined that the Appellant's experience and qualifications in sales as a former sales manager for Astral was an asset to his business.

[44] Lastly, the Board of Referees determined that the Appellant had little intention or availability to immediately seek and accept alternate employment.

[45] After analyzing the six criteria set out in subsection 30(3) of the Regulations, the Board of Referees found the following on the basis of the evidence submitted:

[Translation]

> In general, the Appellant established a business in 2004 in which he and his spouse are shareholders. This is a family business in which their two sons are also engaged. Despite a difficult financial situation, the business's operations have never terminated, and the whole family participates in the business. The two main shareholders and funders, as well as one of the sons (S), had simultaneous unemployment periods in 2007 and 2008, and allegedly left a single family member to manage the situation, namely, É, who had very little experience in the automotive field. É also had unemployment periods at the same time as his brother S, leaving only the parents to manage the business. Each person stated that, in their respective unemployment periods, which sometimes overlapped, they spent only a few hours at the business. In addition to overlapping, the unemployment periods ended after the weeks of entitlement to receive Employment Insurance benefits were over. It was alleged that the unemployment periods were necessary for the business's survival.
>
> The Board finds that these unemployment periods were coordinated or scheduled and that the goal was to ensure the continuation of the business in which the engagement of each person was significant enough not to abandon it and to continue to make it their principal means of livelihood.
>
> (Emphasis added by the undersigned)

[46] The Board of Referees' application of the objective test set out in subsection 30(2) to the Appellant's situation shows that at least five of the relevant factors indicate that the Appellant's engagement in the business in his benefit period was not to a minor extent. The Board found based on the evidence that [translation] "the engagement of each person was significant enough not to abandon it and to continue to make it their principal means of livelihood."

[47] As mentioned previously, the Tribunal does not have the authority to retry a case or substitute its discretion for that of the Board. The jurisdiction of the Tribunal is limited by subsection 115(2) of the Act. Unless the Board of Referees failed to observe a principle of natural justice, erred in law, or 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, the Tribunal must dismiss the appeal.

[48] In *Le Centre de valorisation des produits marins de Tourelle Inc*. (A- 547-01), Justice Létourneau stated that the Tribunal's function is limited "to deciding whether the view of facts taken by the Board of Referees was reasonably open to them on the record."

[49] The Tribunal finds that the Board of Referees' decision was open to it on the evidence and is a reasonable one that complies with the legislative provisions and the case law.

[50] Nothing justifies the Tribunal's intervention on the issue of the unemployment status.

CONCLUSION

[51] The appeal is allowed in part, and the matter is referred to the General Division for a new hearing on the issue of the penalty.

Pierre Lafontaine
Member, Appeal Division