[TRANSLATION]

Citation: ***E. D. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1403**

Date: December 7, 2015

File number: AD-13-1088

APPEAL DIVISION

Between:

E. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

In-person hearing held on September 14, 2015, at 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 issues of the penalty and notice of violation.

INTRODUCTION

[2] On April 10, 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 disentitlement imposed under subsection 18(*a*) of the Act was justified because the Appellant failed to prove his availability for work;

- The penalty imposed was justified under sections 38 and 41.1 of the Act;

- The notice of violation issued was justified under section 7.1 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 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] Under 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;

(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

(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.

ISSUES

[7] The Tribunal must decide whether the Board of Referees erred in fact and law in finding 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 disentitlement imposed under subsection 18(*a*) of the Act was justified because the Appellant failed to prove his availability for work;

- The penalty imposed was justified under sections 38 and 41.1 of the Act;

- The notice of violation issued was justified under section 7.1 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.

- The evidence showed that, in some periods, the Appellant may have worked no more than five hours a week, and that in other periods, he was simply not engaged at all in the business.

- It was demonstrated at the hearing that the Appellant went to the business's premises sporadically and often for reasons unrelated to his work.

- The fact that he spent a few hours at the business should not result in his losing his Employment Insurance benefits.

- It is also important to note that the Appellant had to perform certain tasks in the business since the other members of the organization did not have some of his knowledge;

- It is unreasonable to find, as did the Board of Referees, that the small tasks performed by the Appellant are duties that a person would normally fulfill as a principal means of livelihood;

- 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 in 2012 kept the business running.

- At the hearing, it was submitted as evidence that the Appellant looked for employment in the retail sector.

- The Appellant submitted that the conditions of employment offered for retail jobs were unattractive and that it was unreasonable to ask the Employment Insurance claimant to accept any employment where the conditions would be significantly disadvantageous in comparison with the Appellant's usual employment.

- In the Appellant's situation, it was difficult for him to find employment in the automotive field because the car dealers in the X region were all direct competitors of the business owned jointly by his parents.

- In light of the foregoing, the Appellant argues that his specific circumstances must be taken into consideration to assess the steps that he took to find a job, and his intention and willingness to accept any alternate employment when he was receiving Employment Insurance benefits. The Board of Referees ignored these special circumstances.

- 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.

- Furthermore, the Board of Referees drew invalid inferences from the Appellant's testimony, which resulted in an incorrect decision with regard to the Appellant's credibility, in particular on the issue of the theft of inventory.

- 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.

- 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 burden 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 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 his earnings on his benefit claims, and it is not necessary for him to be paid for working.

- In this case, the Appellant knowingly reported that he did not work, whereas he testified that he was working in the business for up to five 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 erroneous because he had to report his job.

- Therefore, the Appellant failed to discharge his burden of explaining his false or misleading statements, 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

<u>Introduction</u>

[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. This decision concerns files AD-13-421, AD-13-1088, AD-13-1093 and AD-13-1094.

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 G. D.'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.

[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.

[18] Since G. D.'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 his employment at the business. In his electronic reports covering the periods between October 1, 2006, and April 7, 2007; August 3, 2008, and August 1, 2009; January 2 and July 23, 2011; December 4 and December 31, 2011; and January 1 and May 5, 2012; the Appellant reported that he did not work and was not paid.

[25] The Appellant stated that he started working as a car salesman for Auto Express not long after it opened in 2004. His tasks were mainly to sell cars, complete the sales contract, sign it and complete funding applications. He could also wash cars. Sometimes he may have to go look for cars, deliver them, answer the telephone; he did a bit of everything, except for management, which was his parents' job. He was called back to work at the end of his benefit periods.

[26] He mentioned that he did a bit of everything at Protex. Since he started working for Protex, he has not really worked for Auto Express, but he submitted that since the two businesses are under the same roof, he sometimes helps out. When he went to the garage it was to visit and to search for employment on the Internet. But he added that this did not stop him from helping out. He said it depends, helping out or working.

[27] He said he always agreed to continue working for his father, despite the long periods of unemployment, because the business did not have the financial means to pay him and, if ever the business became profitable, his parents could retire. The goal was to have him and his brother continue the business.

[28] After the investigator visited in March 2011, the Appellant reported $80/week in earnings the following week.

[29] The Appellant's father said that his son was in charge of operations and that he was his right-hand man. He added that he would not have a stranger complete his tasks because a stranger could steal from him. He also said that his son provided services to the business without being compensated because it was a family business. During their lay-off periods, his sons continue to essentially do the same tasks, but there was less work. They did their tasks without compensation to help out because the company did not have the means to pay them.

[30] The Appellant's mother admitted that the Appellant sometimes went to the garage to help out. She explained that the difference between working and helping out, for her, was that there was less work in the garage.

[31] An employee who worked for Protex as a specialist in cab shield installation stated that he reported to the Appellant because he was the manager of Protex. Another employee hired by Protex as a mechanic stated that the Appellant was his supervisor and that the owner of the place was G. D. He said the Appellant was always on site, except when his wife gave birth.

[32] There was an article about him in the newspaper *L'Avantage* on May 19, 2006. In that article, the Appellant's father indicated that the Appellant was involved full-time in the business.

[33] By taking into account the above-mentioned facts and by applying the Federal Court of Appeal's teachings to this case, 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 and Notice of Violation

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

> [Translation]
> As an explanation, the Appellant stated that he did not report any work because he did not consider himself to be working when he went to place and receive orders, and that he also was not paid for this work. The Appellant should have known or should have suspected that something was wrong in his responses because he testified that he spent time at the business while unemployed. By responding that he did not work, the Appellant knew that he was not telling the truth. It is not necessary to receive a wage to be considered working, as has been confirmed by the case law.
>
> (Emphasis added by the undersigned)

[35] 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.

[36] 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.

[37] Given the Tribunal's finding on the issue of the penalty, the Board of Referees' decision on the notice of violation cannot be upheld.

[38] There is reason for the Tribunal to intervene and to refer the matter to the General Division with respect to the issues of the penalty and notice of violation.

Availability

[39] In his testimony at the hearing before the Board of Referees, the Appellant admitted that he was not available between April 30 and May 4, 2012.

[40] There is no reason for the Tribunal to intervene on the issue of availability.

Unemployment status

[41] 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.

[42] 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.

[43] 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.

[44] The Tribunal also finds that the text of the Regulations must be considered in its entirety.

[45] 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;

(*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.

[46] The Board noted the Appellant's insistence on showing that he worked no more than five hours a week at the business. It 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 benefit periods ended. The Board also noted that the business was born of the parents' desire to leave a legacy for their children. The Board thus did not consider credible the Appellant's version that he had to sporadically leave the business, even though there was no termination or reduction of operations.

[47] The Board of Referees found that the Appellant's parents had invested a considerable amount when launching the business in 2004 to make him a resource person in the operation of the business. The Board noted that the business enabled him to incur personal expenses on the business's account, which is not the type normally reserved for a mere employee.

[48] 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.

[49] The Board of Referees considered that the business continued to pursue its activities during the Appellant's benefit periods, that the other family members worked at the business, and that the business had even hired salespeople.

[50] The Board also determined that the Appellant's sales experience and skills were an asset for the business.

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

[52] 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 works at a family business in which all his family members are engaged. The tasks that he performs show that he is a key person. 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, along with one of their sons (S. D.), had simultaneous unemployment periods. The Appellant and his brother S. D. also had simultaneous unemployment periods. At certain times only the parents were left to manage the business, even though they stated that they launched the business for their two sons. 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.
>
> 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 <u>the engagement of each person was significant enough not to abandon it and to continue to make it their principal means of livelihood</u>.
>
> (Emphasis added by the undersigned)

[53] 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".

[54] 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.

[55] 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."

[56] The Tribunal concludes 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.

[57] There is no reason for the Tribunal to intervene on the issue of the unemployment status.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division