Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *C. G. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 25

Tribunal File Number: GE-15-2547

BETWEEN:

C. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Aline Rouleau

DATE OF HEARING: December 1, 2015

DATE OF DECISION: February 17, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE AND FORM OF HEARING

[1] The Tribunal held a hearing by videoconference in Chicoutimi on December 1, 2015 for the reasons set out in the notice of hearing dated September 23, 2015, namely, the complexity of the issue, the information in the file, including the need for additional information, and the fact that credibility may be a determinative factor.

[2] The Appellant, C. G., was present at the hearing and accompanied by R. D.

[3] The Respondent Commission was not present at the hearing.

INTRODUCTION – STATEMENT OF FACTS AND PROCEEDINGS

[4] The Appellant made a claim for employment insurance benefits to begin on March 15, 2009.

[5] After an investigation, the Commission informed the Appellant on June 13, 2012 that it had reconsidered the file and determined that, as of March 16, 2009, the Appellant had not established that he was unemployed. He was disentitled under sections 9 and 11 of the *Employment Insurance Act* (the "Act") and section 30 of the *Employment Insurance Regulations* (the "Regulations").

[6] The Appellant appealed that decision by the Commission on June 27, 2012 to a Board of Referees that found, on October 17, 2012, that the Appellant had not established that he was unemployed.

[7] The Appellant appealed the decision of the Board of Referees to the Umpire on December 17, 2012. That appeal was transferred to the office of the Umpire in the Appeal Division of the Social Security Tribunal, leave to appeal being deemed to have been granted by the Tribunal on April 1, 2013 under the *Jobs, Growth and Long-Term Prosperity Act* of 2012. On September 27, 2013, the Tribunal's Appeal Division granted the appeal and sent the file back to the Tribunal's General Division for a new hearing on the ground that the Board of Referees erroneously required that the standard of proof be established beyond a reasonable doubt and did not apply the standard of proof to the matter before it.

[8] On March 26, 2014, The Tribunal's General Division found that the disentitlement imposed on the Appellant had merit because he had not established that he was unemployed.

[9] On April 30, 2014, the Appellant filed an application for leave to appeal that latest decision to the Tribunal's Appeal Division, leave to appeal being granted on February 5, 2015.

[10] On June 18, 2015, the Tribunal's Appeal Division heard that appeal, granted it and sent the case back to the General Division for a new hearing on the grounds that the hearing should have been adjourned because of the lack of recording due to an equipment failure, it appeared that the decision did not contain the evidence presented, the provisions of the Act and Regulations might not have been interpreted and applied properly, and because if the Appeal Division has concerns that a claimant may have been denied the right to justice being undoubtedly and manifestly done, it must order the issue sent back to the Tribunal's General Division.

[11] This decision is the result of that new hearing ordered by the Appeal Division and held, as stated earlier, on December 1, 2015.

ISSUE

[12] Was the appellant unemployed within the meaning of sections 9 and 11 of the *Employment Insurance Act* (the "Act") and section 30 of the *Employment Insurance Regulations* (the "Regulations") as of March 16, 2009?

THE LAW

[13] Section 9 of the *Employment Insurance Act* (the "Act") states that when an insured person is qualified under section 7 of the Act to make a claim for benefits, benefits are payable to the person for each week of unemployment that falls in the benefit period.

[14] Under subsection 11(1) of the Act, a week of unemployment is a week in which the claimant does not work a full working week.

[15] Subsection 30(1) of the *Employment Insurance Regulations* (the "Regulations") states that 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.

[16] Subsection 30(2) of the Regulations states that "*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.*"

[17] Subsection 30(3) of the Regulations lists six (6) factors to consider to determine if a person's self-employment is of a minor extent or not. The criteria are: (1) the time spent on the business; (2) the nature and the amount of the capital and resources invested; (3) the financial success or failure of the employment or business; (4) the continuity of the employment or business; (5) the nature of the employment or business; and (6) the claimant's intention and willingness to seek and immediately accept alternate employment.

[18] Subsection 52(1) of the *Employment Insurance Act* allows the Commission to reconsider a file within 36 months after the benefits were paid or would have been payable. Under subsection 52(5), if the Commission is of the opinion that a false or misleading statement or representation has been made in connection with a claim, the time for reconsideration of the file may be extended to 72 months after the benefits have been paid or would have been payable.

EVIDENCE

Evidence in the file

[19] To establish his claim for benefits, the Appellant provided a record of employment from Gardium Sécurité Inc. for which he worked from July 12, 2008 to March 12, 2009.

[20] As part of the Commission's investigation, a search of the Registre des Entreprises du Québec revealed that the Appellant was the owner of a sole proprietorship operated under the name of "Salon de quilles C. G." in X, was the sole shareholder and director of 9205-5110 Québec Inc. operated under the name of "Salon de quilles X", and the sole shareholder and

director of 9205-5144 Québec Inc., a restaurant-bar enterprise operated under the name of "Station du Quilleur".

[21] A Commission investigator met with the Appellant on November 17, 2010 and on October 26 and November 2 and 8, 2011. The information reports and interview report from the investigation found in the file indicate as follows:

a) The Appellant confirmed that he had two (2) incorporated businesses to operate bowling alleys, one in X Station belonging to 9205-5144 Québec Inc., and the other in X belonging to 9205-5110 Québec Inc.

b) The sole proprietorship, Salon de quilles C. G., in X burned down in 2008. After the fire, the insurance proceeds were reinvested in the same sector in order to eventually recover a possible capital gain for tax purposes by purchasing X Station bowling alley in early December 2008 and the one in X on December 31, 2008. At the time of the purchase of the X bowling alley, he undertook to keep the former owner and his wife on respectively as caretaker and employee of the restaurant.

c) Even after purchasing these businesses, the Appellant wanted to continue to work as a security guard, work that he had performed in the past. He had already worked at the same time that he was looking after the bowling alley in X.

d) It was after the fire at the X bowling alley that he started working at Gardium Sécurité Inc., as a supervisor, in June 2008 until March 2009. In September 2009, he worked as a replacement security guard for Fox Sécurité for about 15 hours.

e) Since the Appellant did not have enough work as a security guard, he decided to promote the operation of the bowling alleys, a type of business with which he had 28 years of experience. The Appellant stated that he was mainly involved in the management and did not look after the accounting, kitchen, bar or mechanical or electrical maintenance. At the X location, he looked after the cash, the signing of cheques, deposits, invoices, staff, cleaning and caretaking. In X Station, he had a manager who handled those things.

f) Financing for the X bowling alley came from the Caisse populaire Desjardins in Alma. Financing for X Station came from the former owner. Insurance proceeds, investments and loans that the Appellant invested were divided with $250,000 in X and $216,000 in X. No funding came from the Local Employment Centre (LEC). There are mortgages and a $10,000 line of credit with TD Bank.

g) The businesses are advertised on radio and in the local papers. The Appellant has not had a vehicle belonging to the businesses since the end of the lease in 2009.

h) The former owner of X worked until August or September. When the Appellant took his place, he found that the work did not take much time. A total of seven (7) employees worked in the bowling alleys and the Appellant did not count himself as an employee because he did not count the time he devoted to his businesses.

i) When he purchased the bowling alleys, the Appellant was working full-time as a security guard. Between March 2009 and January 2010, he was not paid a salary. He is currently (November 2010) paying himself $250 per week and anticipates increasing his pay to $500 per week this year. He would definitely like to devote all of his time to his businesses and be able to pay himself a salary. He works full-time in his business. If, at the end of the year, he cannot pay himself a salary, he will sell his business.

j) He has always worked at the same time that he looked after his business, part-time or full-time. He carried out job searches while he was receiving benefits and believes that he did what he had to do.

k) The Appellant did not report his business or his earnings as a self-employed person because he did not considered himself to be self-employed. He has two companies and considered that to be different from a business. He was unaware that he also had to report his companies.

[22] The Employer, Fox Sécurité Enr., confirmed that the Appellant had worked for it and that he had left because he found that he did not have enough hours. He worked from November 1 to December 5, 2009 for that employer.

[23] The Employer, Gardium Sécurité Inc., confirmed that there was no recall of employees after the shortage of work in March 2009.

[24] The Commission asked for the 2009 and 2010 annual balance sheets of the businesses and the Appellant, when asked about these statements, indicated that he had had to continue to operate the X business after the fire, at the same time as the X business, for the video poker machines. The 2009 and 2010income statements and balance sheets of the Salon de quilles C. G., Salle de quilles X and Salon de quilles de X were provided.

[25] When the Appellant provided the balance sheets for his businesses, he indicated that his accountant could be contacted. When the appointed accountant was contacted by the Commission, he indicated that he was not officially the Appellant's accountant and that the Appellant came to see him when he had problems. The accountant was unable to provide any documentation related to the X bowling alley for 2010 because it was no longer in operation. According to him, the X bowling alley was allegedly purchased in 2010 and therefore he had nothing before that year.

[26] On June 13, 2012, the Commission informed the Appellant that his claim for benefits that took effect on March 15, 2009 had been reconsidered and that benefits could not be paid to him as of March 16, 2009 because he was operating a business and could not be considered unemployed.

[27] The Commission prepared tables indicating the earnings to be deducted from benefits, including net profits from the Appellant's businesses.

[28] The disentitlement imposed by the Commission resulted in an overpayment of $14,733 to the Appellant.

Evidence at the hearing

[29] At the hearing, the Appellant presented his arguments against the Commission's decision and his testimony made it possible to add the information below.

[30] The Appellant explained that after the fire in X in May 2008, he had to find employment and he worked at Gardium Sécurité. Even after that employment, he was looking for other employment.

[31] When he received the insurance proceeds in October 2008, he invested them. For him, it was like investing in a registered retirement savings plan (RRSP). He invested the money in the bowling alleys mainly for tax reasons and because he had 28 years of experience as a manager of this type of business. The opportunity to purchase the two bowling alleys was easier because the bowling sector was in decline. He hoped that his investments would work and the renewal work was done to improve and protect his investments. He wanted to double the sales revenue. His role was to oversee his investments. The purchase of these businesses did not create full-time employment for him.

[32] He purchased the bowling alleys as an investor. At X Station, the structures were in place with a manager and a lease. Consequently, he did not have to be involved. However, the tenant who was there left in April 2009. He therefore asked the former manager to take over the operations again. The Appellant informed the Tribunal that the X bowling alley closed in August 2015.

[33] In X, under the agreement, the former owner and his wife looked after the bowling alley for a period of two (2) years. After that, they were old enough to retire and other employees were hired to assume these positions. There are two (2) units at that location and he lives in one. It was good to be on-site. Work was done a few days after the purchase by a team that he hired. The work was done at night to retain the daytime hours of operation.

[34] At the time of his testimony, the Appellant stated that he had 10 to 12 part-time employees handling service and food services, jobs for which he had no experience. For the bowling alleys themselves, there were split shifts and the employees who handled that were responsible for organizing the activities. He would “shoot himself in the foot” if he himself had to replace those employees. The Appellant provided details on the client groups that used the bowling alleys and the reservation times. He argued that he only oversaw his businesses and only spent some 10 minutes in the morning and afternoon on them. He mentioned that he was offered the operation of another bowling alley but he refused because of the difficult financial situation in the region.

PARTIES' ARGUMENTS

[35] The Appellant presented the following arguments:

a) He contested the Commission's decision because he considers that he was available 24 hours a day even though he was a business owner.

b) Based on the case law cited, the most important factor to consider in determining unemployment status is the time spent. The Appellant always stated that he spent between two (2) and ten (10) hours per week.

c) As for the willingness to search and find other employment, the Appellant's unchallenged testimony is that he always continued to search for employment.

d) Given that the Appellant had to reinvest mainly to save taxes, he met the conditions to be considered unemployed. He took this action on the recommendation of his accountant.

[36] The Respondent Commission presented the following arguments:

a) In his claim for benefits, the Appellant was unable to complete the self-employment questionnaire because he answered "No" to the question "Are you self-employed . . ."

b) The Commission concluded that the Appellant did not establish that he was unemployed because he spent all his time at his businesses and developing additional activities that might enable him to increase the profits and, ultimately, be able to pay himself a salary and live off it. As of March 16, 2009, the Appellant was operating his businesses full-time. He controlled and still controls his hours as a self-employed person.

c) The Commission asked itself the question: since he stopped working on March 12, 2009, did the Appellant perform his activities as a self-employed person to an extent that it is possible to consider him to be unemployed? The Commission examined the facts and under subsection 30(1) of the Regulations, the Appellant must be considered a person working a full working week. The examination of the six (6) factors in subsection 30(3) of the Regulations reveals the following:

- The Appellant decided to reinvest the insurance proceeds after the X fire in the purchase of two other bowling alleys.

- The Appellant's companies employed seven (7) employees and the Appellant had 28 years of experience in the field. He could have done the work of one of his employees and taken those earnings to have a salary.

- The investment is very large. The $400,000 in insurance proceeds was invested in the purchase and $250,000 was borrowed to improve the two bowling alleys. Salary expenses during the period that the Appellant received benefits represented a total of $186,462 based on the income statements from X and X.

- The Appellant did not carry out convincing job searches after being laid off by Gardium Sécurité. He worked to promote the growth of the bars in the bowling alleys.

- The Appellant stated in the interview that he spent all his time on his businesses. He did not count his hours.

d) The Commission determined that until March 14, 2009, the Appellant operated his businesses to such a minor extent that they could not be considered his principal means of livelihood. However, as of March 16, 2009, the Appellant no longer operated his business to such a minor extent and was not unemployed because, as of that date, he began spending more time at his business and began promoting the bar side of the bowling alleys. The Appellant's primary goal was the success of his businesses. He controlled his own working hours and worked in such a way that his businesses became his principal means of livelihood.

e) The Appellant should be declared disentitled to employment insurance benefits as of March 16, 2009. Employment insurance is intended for persons who are actually unemployed and not those who are starting a business.

ANALYSIS

[37] First, it is important to review the principles of the Act highlighted by the case law.

[38] When a claimant operates a business, as provided for under section 30 of the above-mentioned Regulations, there is a presumption that he worked a full working week and the onus is on the claimant to rebut that presumption.

[39] When it is determined, pursuant to subsection 30(2), that the operation of the business is to a minor extent, the claimant is not considered to have worked a full working week. The circumstances to be analysed to confirm or refute the existing presumption are set out in subsection 30(3) of the Regulations.

[40] In *Martens v. Canada (AG)*, 2008 FCA 240, the Federal Court of Appeal reminds that it is not enough to merely examine the factors provided for in subsection 30(3) but rather, the objective test of subsection 30(2) must be applied in light of the factors in subsection 30(3), that is, whether, viewed objectively, the extent of engagement in the business during the benefit period was such that it could not have constituted a claimant's principal means of livelihood.

[41] In *Marlowe v. Canada (AG)*, 2009 FCA 102, the Federal Court of Appeal upheld the Umpire's decision (CUB 69121) with the reminder that "*The premise upon which the legislative provisions in question are based, is that in order to be entitled to benefits, a claimant must be in the labour market, free of any commitment, occupation or interest that might limit or reduce his or her opportunity or desire to return to work.*"

[42] The question raised in this appeal is whether the exception provided for under subsection 30(2) applies to the Appellant. It must be determined whether the Appellant's activities in the business constitute activities that a person who operates a business would normally do or were simply those of a person with a completely understandable interest in an investment. What is the extent of his engagement? When a claimant's activities are close to those of a person who is making or wishes to make the employment his main source of livelihood, the claimant cannot provide the required evidence. The circumstances as a whole need to be considered in order to obtain a global view of the situation.

[43] Having reviewed these principles, the Tribunal will move on to its analysis in light of the facts in evidence and the arguments raised.

[44] We recall here the tests set out in subsection 30(3) of the Regulations, which can be used to determine whether or not the existing presumption is rebutted: the time spent on the business; 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; the nature of the employment or business; and the claimant's intention and willingness to seek and immediately accept alternative employment. Here is the Tribunal's analysis in the Appellant's case.

Time spent on the business

[45] Based on the evidence in the file, there is no question that the Appellant operated two bowling alleys for which he controlled his own hours. As for the time that he might have spent, during the Commission's investigation, the Appellant first stated that he devoted all of his time but then said that he spent 10 to 12 hours per week or 2 to 10 hours per week, before finally stating to the Tribunal that he only spent 10 to 20 minutes per day. However, through his testimony, the Appellant's comments reveal that he was well aware of everything that went on in his businesses on a daily basis. Moreover, he stated that his role was to oversee and a large part of the administrative management work fell to him. As the file progressed, the Appellant tended to minimize the time that he was able to spend on the businesses probably because he was told that this factor was the most important one based on the case law.

[46] The Appellant did not satisfy the Tribunal that he was only able to spend very little time at his businesses because of the efforts made for their expansion.

Nature and amount of the capital and resources invested

[47] The capital invested by the Appellant came from insurance proceeds from a similar business that burned down, which the Appellant had operated for several years. Since the Appellant had 28 years of experience in this field, based on his statements, he was able to take advantage of that experience and reinvest this substantial capital in not just one but two similar businesses.

[48] The Appellant's comments reveal his entrepreneurial nature when he emphasized that he had the opportunity to purchase two declining and thus less expensive businesses, implying that he had the opportunity to "rebuild" them because of his expertise in the field.

[49] The Appellant stated that these investments were only made for tax purposes on the recommendation of his accountant and that he acted only as an investor. However, in his statement to the Commission, the accountant did not seem very aware of the Appellant's situation and businesses. The Tribunal also points out that the interest of a simple investor in the investments he owns is to "not put all of his eggs in the same basket", to use a popular expression, and to favour more diversification of investments.

[50] The Tribunal does not believe that the Appellant's activities were simply those of someone with a completely understandable interest in an investment.

Financial success or failure of the business – Continuity of the business

[51] The test in subsection 30(2) requires an objective examination of the question of whether the intensity of the self-employment or operation of a business is such that a person could normally rely on it as a principal means of livelihood.

[52] The term "livelihood" is not defined in the *Employment Insurance Act* or the Regulations, but the general definition of this term relates to the idea of subsistence, of meeting one's needs and supporting one's material existence.

[53] The Appellant indicated that the X bowling alley closed in August 2015 but the Tribunal emphasizes that the facts must be assessed at the time at which the Appellant was claiming employment insurance benefits. At that time, two businesses were in operation and the Appellant reported that he worked to make them grow.

[54] The financial documents provided raise more questions than they answer. The documents provided by the accounting firm came with many reservations. At the time at issue, there was a payroll of more than $100,000 for each business. The Appellant stated that, at that time, the businesses employed about seven (7) employees and he indicated that the businesses were employing about 10 to 12 employees at the time of the hearing. If a business is at risk, there is

generally not an increase in the number of employees. And if a business can provide a means of livelihood to a growing number of employees, there is all the more reason to think that it would represent the main means of livelihood for the principal investor who spends time on developing it. It is not plausible that the most important person to the operation of a business would not receive any earnings and would focus instead on hiring and paying additional employees.

Nature of the business

[55] Although the Appellant's employment that ended in March 2009 is unrelated to the nature of the businesses he acquired, those businesses are of the same nature as the business that the Appellant had operated previously and in which he decided to invest the liquid capital that it was able to provide to him. That reinvestment was informed by the experience that the Appellant had in the field.

[56] The termination of the Appellant's employment with the security agency enabled him to devote more effort to the development of his businesses.

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

[57] The Appellant claimed that he had the intention and willingness to seek and accept other employment. He also argued that his testimony to that effect was not challenged.

[58] The Tribunal notes that the Appellant's testimony and statements changed as the file progressed. When an entrepreneur makes investments like those made by the Appellant, it is not very plausible to claim a desire to return to the labour market and that the person was free of any commitment, any occupation or any interest limiting or reducing his chances of returning to work. Regardless, the Appellant did not satisfy the Tribunal.

[59] The Tribunal finds that the application of the test provided for in Subsection 30(2) in light of the factors set out in subsection 30(3) of the Act leads to the conclusion that the Appellant was not operating the businesses acquired at the end of 2008 to a minor extent. The Appellant demonstrated special interest in the growth of those businesses more than simply as a financial

investment by him. The presumption in subsection 30(1) has not been rebutted and the Appellant was not unemployed in the period in question.

On the reconsideration

[60] The Appellant's benefit period began on March 15, 2009. The Commission proceeded with the reconsideration of the case and rendered a decision on June 13, 2012.

[61] Section 52 of the *Employment Insurance Act* provides that a decision concerning a claim for benefit may have to be modified or corrected retroactively to ensure that claimants receive only those benefits to which they are entitled. The time for this reconsideration, under subsection 52(1) is 36 months. Subsection 52(5) allows the Commission to reconsider a case 72 months from the moment that benefits were paid or would have been payable if it believes that false or misleading statements were made to obtain payment of benefits.

[62] The Commission did not offer any arguments or evidence to the Tribunal that it believed that false or misleading statements had been made by the Appellant. Consequently, under subsection 52(1) of the Act, the time for retroactive reconsideration must be limited to thirty-six (36) months from the moment that the benefits were paid or would have been payable. Thus, the reconsideration cannot apply prior to June 13, 2009. The date for the start of the Appellant's disentitlement is June 13, 2009.

CONCLUSION

[63] The appeal is dismissed with amendments. The date of the start of the Appellant's disentitlement is June 13, 2009.

Aline Rouleau
Member, General Division
Employment Insurance Section