



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. T. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 110

Tribunal File Number: GE-15-4238

BETWEEN:

C. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: July 12, 2016

DATE OF DECISION: August 21, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Mr. C. T., attended the hearing by teleconference.

INTRODUCTION

[1] On April 29, 2013, the Claimant applied for employment insurance regular benefits and a claim was established and paid until March 8, 2014.

[2] On August 25, 2015, the Canada Employment Insurance Commission (Commission) retroactively imposed a disentitlement to benefits having determined that the Claimant did not prove that he was unemployed for a full working week because his involvement in his business was not minor in extent. He was also advised by the Commission that based on their investigation; he knowingly made 15 misrepresentations on his biweekly reports so it also imposed a penalty.

[3] On September 25, 2015, the Claimant requested that the Commission reconsider its decision however; on October 27, 2015, the Commission maintained its decision but reduced the amount of the penalty.

[4] On December 18, 2015, the Claimant appealed late to the General Division of the Social Security Tribunal of Canada (Tribunal). On February 15, 2016, the Member extended the period of time to appeal.

[5] The hearing was held by teleconference given (a) the fact that the credibility was not anticipated to be a prevailing issue (b) the Claimant was going to be the only party in attendance (c) the information in the file, including the need for additional information and (d) the form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[6] The Member must decide whether the Claimant was unemployed for a full working week during the period of August 11, 2013 to March 8, 2014 and whether a benefit period

should have been established pursuant to sections 9 and 11 of the *Employment Insurance Act* (EI Act) and section 30 of the *Employment Insurance Regulations* (the Regulations).

[7] The Member must decide whether a penalty should be imposed because the Claimant knowingly made 15 misrepresentations to the Commission pursuant to sections 38 of the EI Act.

THE LAW

Week of Unemployment – Self-employed Person

[8] Section 9 of the EI Act stipulates that 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.

[9] Subsection 11(1) of the EI Act stipulates that a week of unemployment for a claimant is a week in which the claimant does not work a full working week.

[10] Subsection 30(1) of the Regulations stipulates that 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.

[11] Subsection 30(2) of the Regulations stipulates 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.

[12] Subsection 30(3) of the Regulations stipulates that 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.

[13] Subsection 30(5) of the Regulations stipulates that for the purposes of this section, “self-employed person” means an individual who:

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

Penalty

[14] Subsection 38(1) of the EI Act stipulates that the Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

- (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
- (b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
- (c) knowingly failed to declare to the Commission all or some of the claimant’s earnings for a period determined under the regulations for which the claimant received benefits; (Paragraph 38(1)(c) became inoperative effective 12 August, 2001.)
- (d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;
- (e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;
- (f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount of the warrant, as required by section 44;
- (g) imported or exported a page issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

(h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

[15] Subsection 38(2) of the EI Act states that the Commission may set the amount of the penalty for each act or omission at not more than

(a) three times the claimant's rate of weekly benefits;

(b) if the penalty is imposed under paragraph (1)(c),

(i) three times the amount by which the claimant's benefits were reduced under subsection 19(3), and

(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the benefits had not been reduced under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

EVIDENCE

[16] The Claimant applied and was granted employment insurance benefits effective April 7, 2013 until March 8, 2014.

[17] The Commission was advised by the Canada Revenue Agency (CRA) that the Claimant had applied for a Business Registration Number for his business 'Our Spot Café Ltd.' on August 25, 2013. The Claimant was asked to provide further information regarding his self-employment. He provided the following details (GD3-10 to GD3-38):

[18] The business is a café that operates 7 days/week from 8:00 am to 4:00 pm; the Claimant is the sole proprietor; the Articles of Incorporation, the Business Registration and Municipal Business License were all obtained on August 19, 2013; the lease was signed on August 26, 2013 for \$3,660.00/month from September 1, 2013 to August 31, 2016; he took out a personal loan for \$24,000.00; he has a business bank account; he works 20 hours per week and he controls his hours; he opens and closes the business and works during the day; he has employees; he performs all business tasks except payroll; he considers his business his principle means of livelihood although he indicates that his business is not successful/profitable; the

website had client reviews from October 2013. The Claimant confirmed to the Investigator that his business did open in October 2013. He indicated that he did not report that he was self-employed because he was not earning any money; he was seeking other employment as a call centre customer service manager.

[19] On August 25, 2015, the Commission imposed a disentitlement effective August 19, 2013 because it determined that the Claimant was self-employed. This decision resulted in an overpayment of \$14,529.00. He was also advised that based on its investigation, he knowingly made 15 misrepresentations when he indicated that he was not working and was not in receipt of wages/money on his biweekly claim reports and therefore, imposed a penalty. Since this was the Claimant's first offence the penalty was calculated at 40% of the overpayment but was set at the maximum \$5,000.00 (GD3-39 to GD3-47).

[20] The Claimant submitted biweekly on-line reports. Copies of the reports submitted from August 18, 2013 to March 8, 2014 indicate that the Claimant responded "no" on 15 occasions to the questions "Are you self-employed" and "Did you work or receive any earnings during the period of this report. This includes work for which you will be paid later, unpaid work or self-employment?" (GD3-48 to GD3-126).

[21] On September 25, 2015, the Claimant requested that the Commission reconsider its decisions indicating that he wasn't drawing an income during the said period and didn't know that he had to report anything. Besides, he obtained the business license in August but did not open the business until October 2013. He was looking for work and had he secured employment, he would have had someone else run the business (GD3-42 to GD3-44 and GD3-127).

[22] On October 27, 2015, the Commission advised the Claimant that it is maintaining its decision to disentitle him to benefits as of August 19, 2013 because he was operating a business and therefore could not be considered unemployed. He registered a business on August 19, 2013, signed a lease on August 26, 2013 and took possession of the space on September 1, 2013 and therefore, devoted his time to his business at that time. Regarding the penalty, the Commission considered the Claimant's expressed financial hardship and reduced the penalty amount to \$2,500.00 (GD3-127 to GD3-129).

[23] At the hearing, the Claimant stated that he is appealing because, although he understands that he must pay back the overpayment, he disagrees that he has to repay the entire amount since he did not start operating his business until October 3, 2013.

[24] He testified that he was involved in his business while he was collecting benefits and that it was his principal means of livelihood. He confirmed that he is the sole proprietor and that the business is open 7 days/week, 8:00 am to 3:00 pm/day. The Claimant stated that he was working about 50 hours/week; he was there all day, every day “all the time” (correcting his response to question 24, GD3-22). Just he and his wife operate the business and he (doesn’t and) didn’t have employees at the time of disentitlement; he couldn’t afford it (correcting his response to question 26, GD3-22). He testified that all other answers on GD3-19 to GD3-24 are correct. The Claimant confirmed that he continues to operate his business.

[25] The Claimant stated that it was a mistake to reply “no” on the biweekly reports to the questions of whether he was self-employed and whether he was working (he was referred to GD3-24 and GD3-63). He wasn’t paying himself so he indicated “no” to those questions. He understands what is meant by “self-employed” and admitted that he was self-employed at the time; he shouldn’t have responded “no”, it was a human error and he should have called the Commission. The Claimant testified that he knew when he was completing the biweekly reports that he had to report whether he was working, and if he was self-employed. He was very apologetic and stated that he exercised bad judgement.

[26] The Claimant testified that sometime after he opened his business (November or December) he went for an interview with a credit card company - forgot to mention this to the Commission. He is still looking through his emails for evidence of his job search efforts. The Member advised the Claimant how to submit further evidence to the Tribunal however; nothing has been received to date.

SUBMISSIONS

[27] The Claimant submitted that he was under the impression that because he wasn’t paying himself that he did not have to report his self-employment. It was a human error. He submitted that the disentitlement should not have started on August 19, 2013 because he did start

operating his business until October 3, 2013. Repayment of these monies and the penalty will cause him extreme financial hardship.

[28] The Commission submitted that the Claimant was self-employed and that a review of the Claimant's involvement in his business in the context of the six factors found in subsection 30(3) of the Regulations shows that his involvement was not minor in extent; the Claimant was operating a business and is self-employed therefore cannot be considered unemployed a full working week from August 19, 2013 to March 8, 2014. A penalty is warranted because the Claimant knew that he was engaged in the operation of a business while in receipt of benefits; despite warnings, he reported that he was not paid or working and that he was not self-employed on 15 occasions; the Claimant had been made aware of his obligation to report any work including that derived from self-employment and how to correct any mistakes on his reports. It exercised its discretion in a judicial manner when it determined the quantum of the penalty at \$2,500.00 having considered that this was his first offence and financial hardship as mitigating circumstances.

ANALYSIS

[29] According to section 9 of the EI Act, in order for a benefit period to be established and the Claimant to be entitled to employment insurance regular benefits, he must demonstrate that he had a week of unemployed during that benefit period. According to subsection 11(1) of the EI Act, a week of unemployment is defined as a week in which the Claimant does not work a full working week. Section 30 of the Regulations provides direction as to how to determine whether a self-employed person has worked a full working week.

[30] In this case, the Commission determined that the Claimant's involvement in his business in the context of the six factors found in subsection 30(3) of the Regulations was not minor in extent and disentitled him to benefits as of August 19, 2013. The Commission determined that since this was not a minor endeavor for the Claimant and he was pursuing it as principal means of livelihood during the period of disqualification, he did not meet the exception in subsection 30(2) of the Regulations. It contends therefore, that the Claimant worked a full working week and was not unemployed from August 19, 2013 to March 8, 2014 pursuant to section 9 and 11 of the EI Act. On the other hand, the Claimant testified that he understands and agrees that he

was self-employed however, disagrees that he should be considered as such from August 19, 2013.

[31] The Member first considered whether the Claimant was considered to be a self-employed person according to subsection 30(5) of the Regulations and the effective date. The Member agrees with the Commission that as of August 19, 2013, the Claimant was engaged in multiple business activities including, incorporating, registering and taking out a business licence on August 19, 2013, finding a location, coming to an agreement and signing a lease on August 26, 2013, taking possession on September 1, 2013, taking out a personal loan for \$24,000.00 and opening a business account. The Member also adds that prior to opening his doors on October 3, 2013, the Claimant would have to be engaged in other activities related to his business including buying and/or setting up equipment/chattels and/or supplies, produce, furniture, prepare menus, set up suppliers, etc. The Member also noted that the onus is on the Claimant to demonstrate that that he had a week of unemployed during his benefit period. Although given the opportunity to do so, the Claimant has not provided any evidence to the contrary. The Member finds therefore, that for the purposes of section 30 of the Regulations, the Claimant was engaged in a business and is therefore, by definition, a “self-employed person” pursuant to paragraph 30(5)(a) of the Regulations. The Member also finds that the Claimant was engaged in his business as of August 19, 2013.

[32] Further, according to subsection 30(1) of the Regulations, a claimant who is self-employed during any working week, is considered to have worked a full working week during that week unless he/he meets the exception in subsection 30(2) of the Regulations. In other words, a claimant is regarded as working a full working week unless the claimant is employed or engaged in the operation of a business, to such a minor extent, that a person would not normally rely on that employment or engagement as a principal means of livelihood. In order to determine whether the claimant is engaged in the operation of a business to a minor extent, six factors must be considered according to subsection 30(3) of the Regulations.

[33] In this case, the Member considered the submission of both parties with respect to each of the six factors and determined that the Claimant’s involvement in the operation of his business was not minor in extent and therefore, he is regarded to have worked a full working week from August 19, 2013 until March 8, 2014, for the reasons to follow.

The time spent

[34] It is undisputed evidence that the Claimant is the sole proprietor of his business which he operates with only his wife; he does not have other employees. He testified that his business was/is open 7 days/week from 8 am to 3 pm/day. The Claimant testified that he worked about 50 hours/week, that he was there all day, every day “all the time”. The Claimant also indicated that he was responsible for all business related tasks, except payroll (GD3-23). The Member finds therefore that the Claimant was actively involved and spent every day engaged in activities related to his business throughout the period of disentanglement.

The nature and amount of the capital and resources invested

[35] It is undisputed evidence that the Claimant secured a personal/family loan for \$24,000.00 and committed to a long-term rental agreement. The Member finds therefore that the Claimant’s family, he and his wife, were financially committed to the success of his business. The Claimant also contributed by offering his knowledge and time to his business on a daily basis. The Member finds therefore, that by actively engaging (personal resources) and investing (financial resources) in his business, the Claimant was very much committed to the success of his business.

The financial success or failure of the employment or business

[36] The Claimant indicated that he was not making any money, that is, he was not paying himself a salary while engaged/operating his business. The Claimant also testified that his business was pursuing the business as his principal means of livelihood. The fact, that the Claimant invested (and risked) so much money and time is indicative that the Claimant was serious in his plan to make his business successful and profitable.

The continuity of the employment or business

[37] The Claimant confirmed that he continues to operate his business and is not employed elsewhere. The Member finds that the business continues to be the Claimant’s principal means of livelihood.

The nature of the employment or business

[38] The documentary evidence shows that the Claimant owned and operated an eating establishment (café). He is the sole proprietor and although he also relied on his wife for assistance, he had no other employees so he was involved in every aspect of the business. The Member finds therefore that the nature of the business was such that he was able to contribute in a valuable way through his investment of time and obvious knowledge of the operation of such a business.

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

[39] The Claimant continues to express a willingness to seek other employment and testified that in fact, during the period of disentanglement, he applied and attended an interview with an employer in the area of customer service. The Member finds however, that despite being provided with ample opportunity, the Claimant has not provided any evidence to show that he made a concerted effort to find employment. The Member finds that one interview over several months is not demonstrative of someone that is unemployed and not working a full working week.

Application of the factors

[40] The Member finds that, upon examination and consideration of all six factors, the Claimant was actively involved in the operation of his business and his engagement in business activities throughout the period of disentanglement was not minor in extent. The Member agrees with the Commission that what has to be examined herein is the extent of the Claimant's engagement in his business. In this case, that the Claimant was actively involved in the operation of his business full-time, every day, 7 days/week. The Member placed more weight on the time the Claimant spent involved in his business than any other factor.

[41] Although the Claimant testified that he looked for other employment during the same period, there is no evidence to support his contention, even during the period that he was engaged in activities prior to opening his doors (August 19, 2013 to October 3, 2013). There is no evidence to support that he was seriously engaged in a job search commensurate of an unemployed person eager to secure employment immediately. The Member considered but

placed less weight on this latter factor than the time the Claimant spent involved in his business. The Member's considerations are supported by case law.

[42] According to the Federal Court of Appeal, when examining whether a claimant is working a full working week, the most important and relevant factor to be considered is the time devoted to the enterprise (Jouan, A-366-94, Fatt, A-496-94, Charbonneau, A-699-02).

[43] In a more recent case, the Federal Court of Appeal, agrees unequivocally with these prior cases and notes that "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, it is necessary to repeat it, we are dealing here strictly with the notion of "full working week". The Court added that not far behind the 'time' factor, in terms of importance is, is the claimant's intention and willingness to seek and immediately accept alternate employment. It noted that "a claimant will not be considered unemployed if, all the while he is receiving payments, he merely says he is available to work and does not undertake serious, real steps to find work for himself" (Charbonneau, A-699-02).

[44] The application of the six objective factors in subsection 30(3) of the Regulations, to the circumstances of this case, supports the conclusion that the Claimant's involvement in his business from August 19, 2013 to March 8, 2014, was not minor in extent. The Member finds that the Claimant was self-employed, and from August 19, 2013 to March 8, 2014, he was regarded as working a full working week pursuant to subsection 30(1) because he did not meet the exception pursuant to subsection 30(2) of the Regulations.

[45] According to the Federal Court, where a claimant is engaged in the operation of a business, the onus is on the claimant to rebut the presumption that he is working a full working week (Lemay A-662-97 and Turcotte A-664-97). The Member finds that the Claimant did not meet the onus of demonstrating that he was unemployed from August 19, 2013 to March 8, 2014 according to subsection 11(1) of the EI Act and so benefits are not payable during the said period pursuant to section 9 of the EI Act.

Penalty and Violation

[46] Section 38 of the EI Act states that the Commission may impose a penalty on a claimant, or any other person acting for a claimant, for each of the acts or omissions stated in that section.

[47] The Federal Court of appeal has established that “knowingly” or having “knowledge of a falsity” does not necessarily include ‘intent to deceive’. Further, the test is a subjective one where the decision-maker must determine, on the balance of probabilities, based on the circumstances and evidence of each case, whether the claimant has knowingly made a false or misleading statement (Gates A-600-94).

[48] The Federal Court of Appeal has also established that the initial onus is on the Commission to prove that a claimant knowingly made a false or misleading statement or representation. The onus then shifts to the claimant who must provide a reasonable explanation to show that the statement or representation was not knowingly made (Purcell A-694-94, Gates A-600-94).

[49] The Member therefore, first considered the Commission’s submission that the Claimant knowingly made 15 misrepresentations when he indicated on his claim reports, that he did not work or earn wages including self-employment (GD3-48 to GD3-126). In support of its position, the Commission submission it provided evidence that the Claimant was advised upon application, and therefore was aware, of his obligation to “report all employment, whether you work for someone else or for yourself...” and that false or misleading statements could result in penalties or prosecution (GD3-5 to GD3-7). Plus, the Commission provided evidence showing that at the beginning of every report, the Claimant was instructed to review and confirm that the responses provided are true and was warned at the end of every report that there are penalties for knowingly making false statements (GD3-48 - GD3-50 and GD3-55 - GD3-125). The Commission therefore submitted that the Claimant was aware of his obligation to report any work including that derived from self-employment and how to correct any mistakes made on his reports, however he failed to act in accordance with those obligations.

[50] On the other hand, the Member considered whether the Claimant provided a reasonable explanation that would show that he did not knowingly make a false statement to the

Commission. At the hearing, the Claimant testified that he made a ‘human error’ to reply “no” on the biweekly reports to the questions of whether he was self-employed and whether he was working. Although he understands what is meant by “self-employed” and admitted that he was self-employed at the time, he wasn’t paying himself so he indicated he “no” to those questions. He admitted that he should not have done so and should have called the Commission. The Claimant testified that he knew when he was completing the biweekly reports that he had to report whether he was working, and if he was self-employed. He was very apologetic and stated that he exercised bad judgement.

[51] The Member considered that the documentary evidence shows that the Claimant responded “no” on 15 occasions to the questions “Are you self-employed” and “Did you work or receive any earnings during the period of this report. This includes work for which you will be paid later, unpaid work or self-employment?” (GD3-48 to GD3-126). The evidence in this appeal however, shows that the Claimant was involved in the operation of a business. The Member finds therefore, that the Claimant made 15 misrepresentations to the Commission.

[52] The legal test herein however, is whether the Claimant made these misrepresentations ‘knowingly’. The Member finds that with respect to the Claimant’s explanation for indicating that he was not self-employed, the Member considered the Claimant’s testimony and the fact that he was the sole proprietor and this was his principle means of livelihood. Even if the Claimant believe that he was not making any money (earnings) because he was not paying himself a salary through his business, this does not explain why he did not indicate that he was self-employed or that he was working. His explanation for responding “no” to “Are you self-employed?” and “Did you work or receive any earnings ... includes ... unpaid work or self-employment” therefore, is not reasonable. The Member also considered that the Claimant was repeatedly warned both on application and every time he completed the biweekly reports that false statements could lead to penalties or prosecution. He responded that he did not work or have any earnings, and that he was not self-employed on 15 occasions, even though he was actively engaged in his business 7 days/week. The Member therefore finds that, on a balance of probabilities, the Claimant knowingly made 15 false representations to the Commission and a penalty must be imposed pursuant to section 38 of the EI Act.

[53] Finally, Member recognized that in determining the penalty amount and whether or not to issue a notice of violation, the Commission must exercise its discretion in a judicial manner. In other words, it must act in good faith, proper purpose and motive; must take into account any relevant factors; ignore any irrelevant factors and act in a non-discriminating manner (Dunham A-708-95, Purcell A-694-94).

[54] In this case, the Commission considered that this was the Claimant's first offence and therefore, initially reduced the penalty to 40% of the overpayment. Since the result is more than the maximum of \$5,000.00, the penalty was set at that maximum. Upon reconsideration of its decision, the Commission also considered the Claimant's submission of financial hardship and reduced the penalty further to \$2,500.00 (or 17% of the overpayment). At the hearing, no other mitigating circumstances were identified. The Member therefore finds that the Commission exercised its discretion in a judicial manner when it imposed the penalty and therefore, cannot intervene in this decision.

CONCLUSION

[55] The appeal is dismissed for both issues.

Eleni Palantzas
Member, General Division - Employment Insurance Section