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

[TRANSLATION]

Citation: *P. K. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 122

Tribunal File Number: GE-15-4305

BETWEEN:

P. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: September 13, 2016

DATE OF DECISION: September 30, 2016

Canada

REASONS AND DECISION

APPEARANCES:

[1] The hearing initially scheduled on July 19, 2016 was adjourned and a new hearing date was set for September 13, 2016.

[2] The Appellant, P. K., attended the hearing held by videoconference on September 13, 2016. He was represented by Counsel Gilbert Nadon of the firm Ouellet Nadon et associées.

INTRODUCTION

[3] On December 14, 2013, the Appellant made an initial claim for benefits effective December 15, 2013. The Appellant reported that he had worked as a “director of communications--sales and marketing" for Thermex inc. from February 4, 2008 to December 13, 2013 inclusive, and that he had stopped working for this employer because of a shortage of work. The Appellant said he was not self-employed other than in fishing or farming (Exhibits GD3-3 to GD3-12).

[4] On September 18, 2015, the Respondent, the *Canada Employment Insurance Commission* (the “Commission”), informed the Appellant that he had omitted to provide information 23 times. The Commission told him that it had discovered he had been starting a business since November 2013 and that he later operated this business. The Commission said it had adjusted his total income prior to deductions based on the new information he provided for the period covering the week commencing March 30, 2014 to the week commencing July 27, 2014. The Commission concluded that the Appellant had knowingly made 22 false statements, for which he was assessed a $5,000.00 penalty. Notice of a violation classified as "very serious" was also sent to the Appellant (Exhibits GD3-67 to GD3-70).

[5] On October 1, 2015, the Commission informed the Appellant that it could no longer pay him Employment Insurance benefits starting on December 16, 2013 because he was operating a business and it therefore did not consider him to be unemployed (Exhibits GD3-73 and GD3-74).

[6] On October 15, 2015, the Appellant, represented by the *Comité Chômage de Montréal* (CCM), filed a Request for Reconsideration of the Commission's decisions in his case on September 18, 2015 and October 1, 2015 (Exhibits GD3-75 to GD3-91).

[7] On November 25, 2015, the Commission notified the Appellant that it was maintaining its decision in his case of October 1, 2015 concerning the "week of unemployment" (unemployment status). The Commission informed the Appellant that it had reconsidered its position on the penalty imposed and the notice of violation issued to him. It specified that the decisions on these matters (penalties and notice of violation) dated October 1, 2015 (sic) [September 18, 2015], had been cancelled (Exhibits GD3-102 and GD3-103).

[8] On December 22, 2015, the Appellant filed a Notice of Appeal with the Employment Insurance Section of the Social Security Tribunal of Canada's General Division (the "Tribunal") (Exhibits GD2-1 to GD2-5).

[9] This appeal was heard by videoconference for the following reasons:

a) The complexity of the issue(s) under appeal;

b) The fact that the Appellant or other parties are represented;

c) Because video-conference is available in the Appellant's location (Exhibits GD1-1 to GD1-4 and GD1A-1 to GD1A-4).

ISSUE

[10] The Tribunal must determine whether there was just cause to disentitle the Appellant from Employment Insurance benefits because he had failed to prove that he was unemployed within the meaning of sections 9 and 11 of the *Employment Insurance Act* (the "Act"), and s. 30 of the *Employment Insurance Regulations* (the "Regulations").

EVIDENCE

[11] The evidence in the record is as follows:

a) A record of employment, dated December 20, 2013 indicates that the Appellant worked as a "sales person" for the employer Thermex inc., from February 6, 2012 to December 13, 2013 inclusive, and that he stopped working for that employer because of a shortage of work (Code A – Shortage of work), (Exhibit GD3-13);

b) A copy of a document entitled “Search for an Enterprise in the Enterprise Register,” published by the enterprise registrar (Quebec) on March 24, 2015, states that the Portes et fenêtres Thermex 2.0 inc. enterprise was registered on November 19, 2013 in the juridical form of a business corporation or company under the Business Corporations Act (CQLR, C. S-31.1). The document specifies that the Appellant is the majority shareholder and the enterprise’s president and secretary (Exhibits GD3-14 to GD3-17);

c) On April 7, 2015, the Commission (Integrity Services Branch, Service Canada) asked the Appellant to fill out a questionnaire concerning self-employment and to provide it with the statements of monthly revenues and expenditures of the Portes et fenêtres Thermex 2.0 inc., for November and December 2013, and for January to October 2014, in order to determine his eligibility for des Employment Insurance benefits (Exhibits GD3-18 to GD3-20);

d) On June 2, 2015, the Appellant responded to the Commission’s request of April 7, 2015, by submitting the duly completed self-employment questionnaire. In the said document, he provided background information about Portes et fenêtres Thermex 2.0 inc. and his responsibilities in the company. The Appellant stated that the company was incorporated on November 14, 2013, and that he is the sole proprietor (100%), (Exhibits GD3-26 to GD3-33);

e) On or about June 2, 2015, the Appellant provided the Commission with a copy of the following documents:

i. Estimate of the cost of a project completed by the Portes et fenêtres Thermex 2.0 inc. enterprise for a client on February 18, 2014, stating that the total cost of the project was $4,915.18 (Exhibits GD3-22 and GD3-23);

ii. Logos for products sold by the Portes et fenêtres Thermex 2.0 inc. company (Exhibits GD3-24 and GD3-25);

iii. Letter from the Business Development Bank of Canada (BDC) dated November 28, 2013, informing the Appellant that it was offering him a loan in the amount of $60,000.00 to finance the purchase and fit-up of a trailer and to create a working capital fund. This document also states that in addition to the offer of a $60,000 loan, the Appellant made a capital investment of $21,000.00 and received a $5,000.00 grant. These amounts constitute an overall investment of $86,000.00 ($60,000.00 + $21,000.00 + $5,000.00 = $86,000.00), (Exhibits GD3-34 and GD3-35);

iv. "Certificate of Constitution" (Quebec) stating that the joint stock company Portes et fenêtres Thermex 2.0 inc. was constituted under the Business Corporations Act on November 14, 2013 (Exhibit GD3-36);

v. A comparative statement of income for Portes et fenêtres Thermex 2.0 inc. that provides the following information: no income for the period from November 14, 2013 to November 30, 2013, loss of $3,263.88 in December 2013, loss of $9,805.67 in January 2014, loss of $2,564.59 in February 2014, loss of $6,988.14 in March 2014, net profit of $6,459.30 in April 2014, loss of $3,053.92 in May 2014, loss of $14,629.34 in June 2014, net profit of $19,303.75 in July 2014, - 6 - loss of $11,116.13 in August 2014, loss of $340.44 in September 2014 and loss of $11,473.42 in October 2014 (Exhibits GD3-37 to GD3-39);

vi. List of job searches by the Appellant (potential employers, job search sites visited and dates of searches (calendar for the period from December 2013 to October 2014), (Exhibits GD3-40 to GD3-52);

vii. Calendar of the company's activities for the period from November 2013 to October 2014, including a list of the Appellant's bids and contracts with the different dates marked on the calendar (Exhibits GD3-53 to GD3-64).

f) A chart prepared by the Commission on June 3, 2015 concerning the applicable daily profit earned from 2008 to 2015 (gross monthly income, monthly sales-related expenses, fixed monthly expenses, net monthly profit (loss), has been added to the file (Exhibits GD3-65 and GD3-66);

g) In a document providing details on the notice of debt (DH009) dated September 19, 2015 and reproduced on January 6, 2015 (sic) [January 6, 2016], the total amount of the Appellant's debt was determined to be $20,624.00 (Exhibit GD3-71);

h) On September 30, 2015, the Appellant said he was being represented by the Comité Chômage de Montréal (CCM), (Exhibit GD3-72);

i) In his Request for Reconsideration filed on October 15, 2015, the Appellant provided the Commission with a copy of the following documents:

i. Letters from five people (ex.: the Appellant's common-law spouse, family members and friends) stating that they helped the Appellant start up his company (ex.: telephone reception, delivery, bank deposits and other related administrative tasks and mobile exhibition hall design), (Exhibits GD3-79 to GD3-84);

ii. Email from the Appellant to the Commission on August 25, 2015 concerning its self-employment questionnaire request (Exhibit GD3-21 or GD3-85);

iii. Financial statements dated January 31, 2015 for Portes et fenêtres Thermex 2.0 inc. indicating a net loss of $13,069.00 for two months in 2014 and a net loss of $11,000.00 for the year ending January 31, 2015 (Exhibits GD3-86 and GD3-87);

iv. "General Index of Financial Information – GIFI" of the Canada Revenue Agency (Schedule 100) stating that the Portes et fenêtres Thermex 2.0 inc. company had total assets of $145,155.00, total liabilities of $158,214.00 and retained earnings of (- $13,069.00) for the January 31, 2014 taxation year (Exhibit GD3-88);

v. “Revenu Québec – Net Income for Income Tax Purposes” official form stating that the Portes et fenêtres Thermex 2.0 inc. company earned a net income of (- $13,069.00) and a net income for income tax purposes of (- $3,338.00) for the January 31, 2014 taxation year (Exhibits GD3-89 to GD3-91).

j) On October 22, 2015, the Appellant’s representative, the Comité Chômage de Montréal (CCM) sent the Commission a copy of letters and documents stating that the Appellant had applied for a job with the following prospective employers: Java U catering/traiteur, Lotus Blanc (florist), Pierrefonds (a landscaping and snow removal company based in Pierrefonds), and Sao Sao (a restaurant), (Exhibits GD3-92 to GD3-97);

k) On January 5, 2016, the Appellant informed the Tribunal that he was represented by Gaël Morin-Greene, Counsel, of the firm Ouellet Nadon et associées (Exhibits GD2A-1 to GD2A-3);

l) On September 9, 2016, the Appellant’s representative, Gilbert Nadon, Counsel, sent the Tribunal a copy of the following documents:

i. Tables containing the sales figures of the Portes et fenêtres Thermex 2.0 inc. company between March 2014 and October 2014 (Exhibits GD6-1 to GD6-4);

ii. Decisions by the Federal Court of Appeal (the “Court”) in ***Martens*** **(2008 FCA 240)**, (Exhibits GD7-2 to GD7-16), ***Proulx*** **(A-361-98)**, (Exhibits GD7-17 and GD7-18), ***Jouan*** **(A-366-94)**, (Exhibits GD7-19 to GD7-23) and ***Fatt*** **(A-406-94)**, (Exhibits GD7-29 and GD3-30);

iii. Decisions CUB 24884 (Exhibits GD7-24 to GD7-28), CUB 24884A (Exhibits GD7-31 to GD7-34), CUB 20259 (Exhibits GD7-35 to GD7-37) et CUB 37953A (Exhibits GD7-38 to GD7-42).

m) On September 13, 2016, the Appellant’s representative sent the Tribunal a copy of the letter from the Employer, Rona, confirming that the Appellant had been hired to start work on September 9, 2016 (Exhibit GD8-1).

[12] The evidence presented at the hearing is as follows:

a) The Appellant provided background information on the company in which he is a shareholder and his role in it. He explained that he had started working for the employer Thermex inc. in 2008 as a “window consultant” and stopped working for the company in December 2013 (Exhibit GD3-13). The Appellant said that this company had approximately four salaried employees, including the owners, and that he was simply a salaried employee of the company at the time. He explained that the owners of the company were approaching retirement and suggested he do something with the business, which is how he came by the opportunity to create his own company based on his preferred business model: a door and window company with a mobile showroom. The Appellant said he founded Portes et fenêtres Thermex 2.0 inc. in November 2013, about a month before he stopped working for his employer Thermex inc. due to a shortage of work (Exhibit GD3-13);

b) He said that he was once a student in the bachelor of business administration program at the Université du Québec à Montréal (UQAM) and had completed about 50% of his training in this field;

c) The Appellant said that the sole vocation of his company is to sell doors and windows, not to install them. He explained that the partnership he developed with Rénovation Janeiro inc. was to refer the company in question to clients interested in having the doors and windows they purchased installed. The Appellant stated that his company and the Rénovation Janeiro inc. company are two separate entities (Exhibits GD3-26 to GD3-33);

d) The Appellant’s representative said he sent a copy of the letter from the employer Rona confirming that it had hired the Appellant to start work on September 9, 2016 (Exhibit GD8-1).

ARGUMENTS

[13] The Appellant and his representative, Gilbert Nadon, Counsel, made the following submissions and arguments:

a) The Appellant said he had personally participated in the start-up and daily operation of his company at a rate of zero to three hours a day, four days a week, at night and on weekends. He mentioned that the days he spent operating the business varied depending on customer requirements, and that he also performed Internet research. The Appellant claimed that he operated his business to a limited degree, from December 2013 to October 2014, spending little time on it, for about 12 hours a week, on average and that his business was in the start-up phase. He explained that family and friends had helped him start up his business because he did not want to take on too much responsibility and he also wanted to divide the tasks among the people who wanted to help him. The Appellant explained that his situation was comparable to that of someone whose friends help him out with a painting project, for example (Exhibits GD3-21 and GD3-26 to GD3-33);

b) He said he performed the following tasks: purchasing, estimates, cheques, invoice payment, invoicing, bank deposits and account reconciliation (Exhibits GD3-26 to GD3-33);

c) The Appellant explained that, generally, to perform his work and finalize a sales contract, potential clients would leave messages in his voice mail or send him an email to obtain information about his products (for example, prices). He said that based on the information obtained, he would provide them with quotations by telephone or email. The Appellant said that every client had specific needs. He said that he did not necessarily visit a potential client in person to estimate the costs of the products he sold, and that for many projects, he never had to travel. The Appellant underscored that these were former clients of the company he worked for (Thermex inc.) or new clients referred by these former clients or people closely associated with them. He said that the clients he usually dealt with had often seen the product of interest to them already, and did not require him to visit them, and that he rarely had to travel to provide a quotation

(ex.: potential clients would send photos or dimensions of the desired windows and doors). The Appellant explained that developing an estimate is a highly mathematical task and can be done based on dimensions provided by potential clients. He said that in more complicated cases, he is willing to visit clients in person, but this does not usually occur at the first call. The Appellant underscored that the whole purpose of his company was precisely to better contain the demand, and pre-screen clients. He also said that he does not visit clients to follow-up on door and window installation because he acts as a "window consultant" and the installers are responsible for follow-up. He explained that his role is limited to ordering products from manufacturers and then referring the company that installs the doors and windows. He pointed out that he never said he did not visit potential clients, but that he only did so occasionally;

d) He explained that the company's gasoline costs entered in the comparative statement of income (gasoline, washing and parking) amounted to approximately $5,886.46 for the period from December 2013 to October 2014, and related to travel in the vehicle he uses (Exhibits GD3-37 to GD3-39). The Appellant said that he would pick up goods for delivery to clients (doors and windows) at a meeting point arranged with the manufacturer. When the goods arrived, he had to haul them in his vehicle. He said that the goods he purchased came from manufacturers based in cities like Rivière-du-Loup or Saint- Apollinaire. The Appellant explained that he did not travel to these locations to pick up doors and windows because the manufacturers deliver to Montreal, Laval or to other locations in the metropolitan area. Once he received the goods in question, he would contact the installer to arrange a pick-up time. The Appellant said that the company's gas costs were paid with a company credit card. He said that his average monthly gas expenses of approximately $535.00 were not a lot considering how much gas a van like his uses. The Appellant estimated that he uses 20-25 litres of gas per 100 kilometers in town. He underscored that using the van was extremely expensive;

e) The Appellant said he invested a total of $86,000.00 to start up his business ($60,000.00 in financing, a $21,000.00 capital investment and a $5,000.00 grant). He personally negotiated a loan for $60,000.00 with the Business Development Bank of Canada (BDC). The Appellant said that repayment of the loan was spread over several years,

and that interest charges were repaid in the first year after he obtained his loan. He said that the $21,000.00 capital investment was used to finance the company and develop his business model (mobile business) instead of having a storefront business. The Appellant also received a $5,000.00 start-up grant from the Centre local de développement (CLD) de l'Ouest de l'Île de Montréal (Exhibits GD3-26 to GD3-33);

f) He said he had purchased equipment, tools, inventory and supplies to start-up or operate the business. In December 2013, the Appellant purchased a van (GMC Sierra 1500 Crew Cab) for approximately $60,000.00. He also spent approximately $ 25,000.00 to buy a trailer which he used as a showroom and to haul doors and windows (Exhibits GD3-26 to GD3-33);

g) The Appellant explained that the vehicle expenses entered in the comparative statement of income amount to approximately $3,000.00 ($2,882.25) for the period between December 2013 and May 2014 (Exhibits GD3-37 to GD3-39), representing the costs of converting the vehicle he uses for door and window deliveries (ex.: the mobile showroom retrofit);

h) He said he has a business account with the BMO financial institution, to which he is the signatory. The company has an Internet site, which costs $143.72 per month to maintain. The Appellant mentioned that he has used a business telephone line since December 2013 and has advertised on the Internet (Exhibits GD3-26 to GD3-33);

i) The Appellant explained that the company's purchases between December 2013 and October 2014 appear in the comparative statement of income (Exhibits GD3-37 to GD3-39), namely, $127,337.13 used to purchase doors and windows for clients, as well as sample products and various materials. He said he did not stockpile the products he sells, and that he orders nothing but the products requested by clients;

j) He said he has not made further investments in his business. The Appellant estimates the current value of his business as $0, considering that it is not making money. He explained that the company's assets primarily consist of the van and trailer he uses. The Appellant pointed out that a high sales figure does not necessarily mean high profits,

and that competition in the door and window field in Montreal is ferocious. He underscored that the opening for a door or window can cost up to $4,000.00 (ex., bow window), (Exhibits GD3-26 to GD3-33);

k) The Appellant said that the company is still active and has no employees. He stated that he is not being paid and does not receive a salary for the work he does for his company. The Appellant mentioned that the company does not pay him dividends because it has not generated an income;

l) He explained that the fees of approximately $5,000.00 shown in the comparative statement of income (Exhibits GD3-37 to GD3-39) for the period from December 2013 to October 2014 ($1,991.00 in December 2013, $1,800.00 in May 2014, $600.00 in June 2014, $450.00 in August 2014 and $150.00 in October 2014 for a total of $4,991.00) were paid entirely to the company's accountant (Exhibits GD3-37 to GD3-39);

m) In the self-employment questionnaire, the Appellant said he was available for work and searching for work. He said he had answered "no" to the question "Are you self-employed or engaged in the operation of a business?" because the company was just starting up and the little work he was doing took place in the evening or on weekends. The Appellant said he answered "no" to the question, "Did you work during the period of this report?" because he thought that working meant being employed full time or part time, with a salary. The Appellant also answered "no" to the question, "Are you seeking an employment other than self-employment?" (Exhibits GD3- 26 to GD3-33);

n) He said he had applied to several prospective employers for jobs in fields of work in which he had gained experience while he was a student (ex., flower delivery or server), (Exhibits GD3-94 to GD3-97);

o) The Appellant's representative pointed out that the Appellant had the opportunity to develop his own version of a business model developed by the company he worked for in the past, because the previous business model of his former employer did not appeal to him. He explained that this new business model allowed him to spend about 15 hours

a week on his company. The representative underscored that the Appellant received help to start-up his company, and that the help was given to assist with the company's start-up and design (ex.: mobile showroom);

p) He explained that the most important and relevant factor to take into account concerns the time spent on the business (Joua***n*****, A-366-94**, CUB 20259, CUB 37953A), (Exhibits GD7-19 to GD7-23 and GD3-35 to GD3-41). The representative pointed out that based on the number of hours that the Appellant spent on his business, his position is similar to the one described in ***Proulx* (A-361-98),** where the Court found: "[…]The board of referees had to determine whether the applicant, who worked as a real estate agent while receiving unemployment insurance benefits, had devoted enough time to this employment to have followed it as a principal means of livelihood. […] In our view, the board erred in law in answering this question in the affirmative. […] As it accepted the applicant's testimony that he had devoted only ten hours per week to this apparently unpaid employment, the board erred in finding as it did." (Exhibits GD7-17 and GD7-18);

q) The representative pointed out that the Appellant had invested capital and had received assistance from several people, but set aside time to search for employment. The representative said that the situation was similar to the one described in **Fatt (A-406-94)**, where the Court found as follows: "[…] the decision of the umpire [CUB 24884] cannot be reconciled with the judgment of this Court in Attorney General of Canada v. Jouan (A-366-94, January 23, 1995). The application will therefore be allowed, the decision under attack set aside and the matter referred back to the Chief Umpire or another umpire designated by him for decision on the basis that, in a case of this kind, under subsection 43(2) of the Unemployment Insurance Regulations, the real question to be asked is whether the amount of time spent in self-employment was so insignificant that a person would not normally pursue that employment as a principal means of livelihood." (Exhibits GD7-29 and GD7-30). The representative said that the umpire's decision (CUB 24884A), following the decision by the Court **(*Fatt,* A- 406-94)** states: "There is no evidence here that Mr. Fatt's activities were anything other than a claimant spending a small amount of time doing unpaid work for a family business, while

seriously engaged in a search for gainful employment. There is certainly nothing to indicate that the time he spent on the business in question was anything more than a few hours per week. That being the case, his involvement must be considered to be so minor in extent as to fall within the exemption provided in Regulation 43(2). For these reasons, the Board of Referees decision is set aside and the claimant's appeal is allowed." (CUB 24884A), (Exhibit GD7-34). The representative also pointed out that the fact that a person spends 15 hour a week on his business does not mean that the work in question constitutes his principal livelihood or means of subsistence (CUB 37953A), (Exhibits GD7- 38 to GD7-41);

r) He explained that the Appellant's investments in his company may seem sizeable, but should be placed in perspective. The representative underscored that the van and trailer used by the Appellant represented a major investment, but could easily be resold if necessary. He underscored that the Appellant did not use storage space and had not invested in this area. The representative explained that the Appellant's van used a great deal of fuel and strained to pull the trailer or haul doors and windows. He said that the Appellant had to pick up the doors and windows at a specified meeting place arranged with the manufacturer and deliver them to construction sites or the installer's place of operation. The representative said that the Appellant's sales began in March 2014 and that things were difficult in the winter months given the nature of the business. He said that the Appellant's sales amounted to approximately $100,000.00 during the period in question, which represented approximately one hundred or fewer units (i.e., at least $1,000.00 per opening, i.e., one window or one door);

s) The representative contended that the Appellant's business did not generate net profits and that it continues to operate at a loss. He explained that the situation is similar to the one described in the decision in ***Martens*** **(2008 FCA 240)**, where the Crown stated: "It must be remembered that the factors in subsection 30(3) are required to be considered in the context of the test in subsection 30(2). That test requires an objective consideration of whether the degree of self-employment or engagement in the operation of a business constitutes a sufficient basis upon which a person would normally rely as a principal means of livelihood. In that regard, the term livelihood is undefined in the Act and the

Regulations. However, Black's Law Dictionary, 7th ed., defines livelihood as 'a means of supporting one's existence, especially financially'. That definition, in my view, underscores the importance of focusing on net income rather than gross income, in the context of this factor. In that regard, it seems obvious that the gross income from the operation of a business by a person in any particular period, however large, cannot provide that person with any such financial means of support where the full amount of such gross income is offset by an equivalent amount of expenses incurred in that period. […]In my view, the relatively modest average net income generated by Mr. Martens' farm in the years referred to in the record, indicates that reliance by Mr. Martens on the engagement in the farming operations in the Benefit Period as a principal means of livelihood in those years would not have been normal or reasonable," (Exhibit GD7-12);

t) He underscored that the Commission had allocated the Appellant's daily profits, but its decisions did not concern this aspect. The representative explained that the documents prepared by the company's accountant showed that the company had operated at a loss in each month of its activity (Exhibits GD3-65 and GD3-66);

u) The representative explained that he disagreed with the Commission's argument that: [translation] « […] the claimant is a business operator. Because he is developing this company in order to live from its eventual earnings, his intention is clearly to make it his principal means of livelihood […]" (Exhibit GD4-4). He contended that this argument digressed from the present only to broadly speculate about the future. In the representative's opinion, the Commission erred in its position, considering that no one can reach a decision about the claimant's intention to eventually make the business his principal means of livelihood. He underscored that the time of relevance to determining whether or not the business is his principal means of livelihood is not some uncertain time in the future, but rather here and now (CUB 20259);

v) He said that the company was incorporated in the winter of 2013 (November 2013), that its first sales were made in the spring of 2014, and that the Appellant was able to find work in the meantime. The representative pointed out that the Appellant had searched

for work a number of times. He said that the Appellant accepted a new job on September 9, 2016 as a handler for the employer Rona, at a pay rate of $12.00 per hour (Exhibit GD8-1). The representative said that the Appellant's new employer was aware that he owned a business. He pointed out that the door and window-related products of his new employer are different than those sold by the Appellant, which are medium and high-end products. The representative said that the Appellant's company does not target the same type of clientele as the Appellant's new employer;

w) The representative stated that the Appellant's situation was covered by the exceptions provided, claiming that he was not making his business his principal meals of livelihood, that he had lost money and continues to lose money;

x) The Appellant's representative from the Comité Chômage de Montréal pointed out that in his very first statement, in response to the "self-employment questionnaire," the Appellant said he spent no more than 10 to 15 hours a week on his business, and that he was in the midst of a start up. The representative underscored that letters from witnesses (such as friends and relatives) show that they helped the Appellant perform various tasks for the company. He explained that the company is a full-fledged corporation intended to serve as an intermediary between manufacturers, installers and clients in the door and window field. The representative underscored that the work essentially occurs in locations away from the Appellant's home, and that visits made to give estimates to clients with quotes take place at night and on weekends. He explained that the Appellant was available to work and had searched for work, because the company was not generating any income at the time. The representative underscored that the Appellant made a mistake when he answered in the negative to the question, "Are you looking for work other than your self-employment?" (Exhibits GD3-73 to GD3-78, GD3-99 and GD3-100).

[14] The Commission made the following submissions and arguments:

a) The Commission explained that a claimant who is operating his own business is presumed to be working full weeks, unless he can prove that his involvement in the business is limited to such a minor extent that a person would not normally rely on that

employment or engagement as a principal means of livelihood. It specified that to determine whether the work of a self-employed claimant is limited in scope or not, it had to apply the objective test set out in subsection 30(2) of the Regulations to the six factors listed in subsection 30(3) of the said Regulations in the context of the claimant's business, during his benefit period. The Commission stated that the time spent and the claimant's intention and willingness to seek and immediately accept alternate employment are the two prevailing factors (Exhibit GD4-4);

b) It determined that the evidence on file revealed the following concerning these six factors:

c) Time spent: the Appellant spent approximately 10 to 15 hours a week to start-up his company. He pointed out that he spent very little time on the business during the period in question because it was just starting up. He also received help from friends and family. Nevertheless, the Appellant is the only employee, the only shareholder and director of the company, and his involvement is therefore important. The Commission therefore considers that the Appellant is engaged in operating a business. Because he is developing the business in order to eventually live on its profits, his intention is clearly to make it his principal means of livelihood (Exhibit GD3-74), (Exhibit GD4-4);

d) The nature and amount of the capital and resources invested: The Appellant invested a total of $86,000 in starting the business: $60,000.00 from a bank loan, a $21,000.00 capital investment and a $5,000.00 grant. The Appellant's rather large investment shows that the business is a significant investment and his priority is to develop it. It would be unreasonable otherwise to risk losing such an investment (Exhibit GD3-34), (Exhibit GD4-4);

e) The financial success or failure of the employment or business: In 2014, the statement of income shows a relatively high, and sometimes very high, monthly income, despite a loss of $13,069.00. The Appellant alleges that he could not live on the income generated by the company of the company's poor financial health: the statement of income reports a loss of $13,069.00 in 2014. Once again, the Appellant's large investment in starting the company shows that he hoped to develop it and live on the income it generated. A

loss in the first year of operation is not a sign of poor financial health (Exhibits GD3-85 to GD3-87), (Exhibit GD4-4);

f) The continuity of the employment or business: The Appellant hoped that the company would make a profit. He is the only employee. His involvement in the company is important. The Appellant pointed out that the work was done away from his home, and he visited clients at night and on weekends. He also said that he was helped by relatives and friends to start of the business. Regardless of his work schedule or the location where he performed his other duties with clients, he was nevertheless bound by his obligations to clients, which limited his availability (Exhibits GD3-30, GD3-31 and GD3-82), (Exhibits GD4-4 and GD4-5);

g) The nature of the employment or business: In his last job, the Appellant worked as director of communications (sales and marketing); business/salesman for a door and window company, while his business is active in the door and window sales field. Since the business is a priority for the Appellant, given his major investment in it, and the fact that he is the sole proprietor, there is no doubt that if he had to choose between a possible job and the company, he would choose the company. Moreover, the company operates in the same field as the claimant's normal field of work. The Appellant is deeply involved in developing the company, given that it corresponds to his field of expertise. He has extensive experience in this field of employment. The Appellant would therefore be in a conflict of interest with a potential employer in his field. This therefore limits the types of employment that the Appellant could accept (Exhibits GD3-7, GD3-13 and GD3-26), (Exhibit GD4-5);

h) The claimant's intention and willingness to seek and immediately accept alternate employment: Despite the information provided by the Appellant concerning his job search, his availability was subject to limits. The Appellant states that he was available for full-time work and was actively seeking employment. As mentioned above, the fact that the Appellant is the sole proprietor and had invested a great deal clearly shows that the company is his priority and that he plans to develop it so that its profits become his principal means of livelihood. Of itself, the Appellant's intention to develop the

business as an operator shows that he was not unemployed during the period in which he received Employment Insurance benefits, namely, starting on December 16, 2013. The Appellant provided only Internet addresses as references for his job searches. This does not prove that he took concrete action (Exhibits GD3-40 to GD3-52, GD3-91 to GD3-95), (Exhibit GD4- 5);

i) The Commission pointed out that, when considered objectively, all six (6) factors lead to the conclusion that the Appellant's involvement in his business was that of a person who would normally rely on that employment or engagement as a principal means of livelihood. It argued that Appellant did not deny the presumption that he was working a full week because he does not meet the exception set out in subsection 30(2) of the Regulations (Exhibit GD4-5);

ANALYSIS

[15] The relevant statutory provisions are appended to this decision.

[16] To establish a " benefit period," section 9 of the Act provides:

> 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.

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

[18] Subsection 30(1) of the Regulations contains a general presumption whereby:

> […] 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.

[19] However, this presumption can be overturned pursuant to subsection 30(2) of the Regulations:

> 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.

[20] Subsection 30(3) of the Regulations specifies the circumstances used to determine whether an employment or engagement in the operation of a business is of the "minor extent" within the meaning of subsection 30(2) of the Regulations. These circumstances are as follows: 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.

[21] In **Lemay (A-662-97)** and **Turcotte (A-664-97)**, the Court maintained the principle that when a claimant operates a business, the claimant is under an onus to refute the presumption of having worked a full working week.

[22] In **Martens (2008 FCA 240 – A-256-07)**, the Court provided the following clarifications:

> […]Subsection 30(1) effectively denies employment insurance benefits to a claimant who is self-employed or engaged in the operation of a business on his or her own account. […]Subsection 30(2) will negate the application of subsection 30(1) where a claimant is self-employed or engaged in the operation of a business to a minor extent. 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. Subsection 30(3) requires six factors to be considered in determining whether the claimant's self-employment or engagement in the operation of the particular business is minor in extent. These factors represent a codification of the six factors outlined in Re Schwenk (CUB 5454). […]In interpreting these provisions, it is important to consider that their objective is the determination of the extent of the self-employment or engagement in a business by a claimant in any given week in a benefit period that has been established pursuant to section 9 of the Act. If such self-employment or engagement is minor in extent, then the claimant will have

> overcome the presumption contained in subsection 30(1) and will not be regarded as having worked a full working week during that week.

[23] In **Jouan (A-366-94)**, the Court found:

> […] the most important, most relevant and only basic factor to be taken into account has to be, in all cases, the time spent. […]In the case of a claimant who spends, on a regular basis, 50 hours per week to the affairs of his own business, there is no way that he can invoke the exception of subsection 43(2). In the case of a claimant who spends, on a regular basis, 50 hours per week to the affairs of his own business, there is no way that he can invoke the exception of subsection 43(2). This claimant must necessarily be considered as falling under the general presumption of subsection 43(1) and be regarded as working a full working week.

[24] In **Charbonneau (2004 FCA 61)**, the Court stated:

> […] not very far behind the "time" factor, in terms of importance, is the factor of "the claimant's intention and willingness to seek and immediately accept alternate employment". As Marceau J.A. pointed out in Jouan, "The Act is designed to provide temporary benefits to those who are unemployed and actively seeking other work" (emphasis added). 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. In conclusion, if it is true to say that all the factors listed in subsection 30(3) of the Employment Insurance Regulations must be taken into consideration, the fact is that the "time" factor (paragraph (a)) and the "intention and willingness" factor (paragraph (f)) are of utmost importance. A claimant who does not have the time to work or who is not actively seeking work should not benefit from the Employment Insurance system.

[25] In **Newhook (A-977-96),** the Court stated:

> […] in Taschuk v. Canada (Attorney General) [1996] F.C.J. No. 669, this Court held that preliminary steps taken by a claimant to start up a business are to be taken into account in determining whether the subsection 43(2) exception applies. In our view, the Umpire correctly determined that the exception is not available to the applicant having regard particularly to the time spent in preparing the "Beckford" for the forthcoming crab fishing season for which he held a license and the size of his investment.

[26] In **Taschuck (A-616-95)**, the Court found: "The Umpire clearly erred in deciding that the taking of preliminary steps to start a company is an involvement so minor that it does not attract the application of subsection 43(3) of the Regulations."

[27] Herein, the Appellant is the only shareholder (sole proprietor) of the company Portes et fenêtres Thermex 2.0 inc. and has operated the business since its creation in November 2013

(Exhibit GD3-27). In the Tribunal's opinion, the Appellant must be considered a "self-employed person," which subsection 30(5) of the Regulations defines as follows: a) [...]“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).”

[28] From the moment he created his business, the Appellant became its operator, and was therefore a “self-employed person” under subsection 30(5) of the Regulations.

[29] In weighing the evidence, the Tribunal considers the six (6) circumstances mentioned in paragraph 30(3) of the Regulations. These circumstances allow us to determine whether employment or operation of a business was of a “minor extent” within the meaning of subsection 30(2) of the Regulations.

Time spent

[30] Concerning the “time spent” item in subsection 30(3) of the Regulations, the Tribunal considers that as of December 16, 2013, the date on which the Commission determined that the Appellant was not unemployed, he was regularly engaged in the activities of his business in order to make it his principal means of livelihood.

[31] The Tribunal underscores that “the time spent” is the preponderant and most relevant factor to consider in determining whether a claimant is working a full working week **(Martens, 2008 FCA 240, Jouan, A-366-94)**.

[32] The Appellant said he spent an average of 12 hours a week (10 to 15 hours) on the activities of his business, namely, from 0 to three hours a day, four days a week (Exhibits GD3-30 and GD3-32). He also said that he worked for his business at night and on weekends (Exhibit GD3-30). The Appellant also mentioned that the number of days he spent on his business depended on his clients’ needs (Exhibit GD3-30).

[33] Considering all of his duties within his business and the amount of his initial investment $86,000.00, the Tribunal considers the Appellant’s statement that he spent only 10 to 15 hours a week on these activities, during the period he was receiving Employment Insurance benefits, strange at best, if not lacking in credibility.

[34] The Tribunal considers that the Appellant, in his testimony and previous statements, tried to minimize the time he spent on his business during the period in question.

[35] The evidence shows that the Appellant performed the following duties for his business: purchasing, estimates, cheques, bill payments, invoicing, bank deposits and account reconciliation (Exhibits GD3-26 to GD3-33). The Appellant serves as the company's president and secretary (Exhibit GD3-16).

[36] The Appellant served as an intermediary between his clients, the companies that manufacture doors and windows and companies that install them. He explained that given the nature of his company and his chosen business model, his role was to place orders at the client's request with a manufacturer and then refer the client in question to a company that would install the doors and windows.

[37] The Appellant's testimony also shows that he used his van to pick up goods for clients at a meeting place arranged with the door and window manufacturers. He underscored that to finalize a sales contract, he did not necessarily have to travel to meet with his clients in person, or did not have to do so often.

[38] Although the Appellant pointed out that he was in the start-up phase, the situation does not change the fact that he was continuously focused on planning and implementing his business plan to one day make it profitable enough to become his principal means of livelihood. The Appellant was the person responsible for all of the tasks involved in promoting and implementing his business plan.

[39] An assessment of time spent also had to include the initial steps taken by the Appellant to create his company, as well as the size of the investment involved **(Newhook, A-977-96, Taschuck, A-616-95)**.

[40] Based on the considerable investment that the Appellant made to start his business, the Tribunal believes that he was fully in charge of performing the many tasks associated with his undertaking, and that he would have had to spend time on them, even though various people helped him.

[41] The Tribunal also believes that the Appellant's fuel expenses for his vehicle also show that he was spending a lot of time on his business.

[42] The comparative statement of income document indicates that the Appellant expended a total of $5,886.46 (item: fuel, washing, parking: $150.61 + 582.09 + 313.03 + 508.81 + 733.91 + 542.91 + 558.99 + 554.02 + 586.00 +746.83 + 609.26 = $5,886.46) in the period from December 2013 to October 2014, for travel in the vehicle he uses (Exhibits GD3-37 to GD3-39). This amounts to approximately $535.00 per month, primarily for gasoline ($5,886.46 ÷ 11 months = $535.13).

[43] Even though the Appellant pointed out that $535.00 is not a lot to spend on fuel per month considering the type of vehicle he uses, the amount is indicative of the intensity of his company's activities and the time he spent on them during the period in question. Assuming that gasoline sells for $1.50 per litre, the Appellant's van used approximately 357 litres of gasoline in a month ($535.00 ÷ 1.50 = 357 litres) or approximately 90 litres of gasoline a week. The Appellant estimated that his van used 20-25 litres per 100 kilometers.

[44] These estimates show that the Appellant drove hundreds of kilometers every week to operate his business, and invested time in doing so (ex.: transporting products, using the mobile showroom) in addition to the many other tasks incumbent on him to ensure that it functioned properly.

[45] The Tribunal believes that the Appellant's participation in the various tasks involved in starting and operating his business are very important and that the time he spent on these tasks was not of such minor extent that it would prevent him from making it his principal means of livelihood (***Martens*, 2008 FCA 240, *Jouan*, A-366-94**, ***Newhook*, A-977-96, *Taschuck*, A-616-95**).

[46] Considering the Appellant's many responsibilities in his company, the Tribunal believes that his participation in its various activities was quite significant.

The capital and resources invested

[47] As for the matter of the nature and amount of the capital and other resources invested in the business provided in subsection 30(3) of the Regulations, the Tribunal took account of the fact that the Appellant invested heavily in his business.

[48] The Appellant invested a total of $86,000.00 to start his company, i.e., financing of $60,000.00, a capital investment of $21,000.00 and a grant of $5,000.

[49] He personally negotiated a loan for $60,000.00 with the Business Development Bank of Canada (BDC). The Appellant has a commercial account with the BMO financial institution, to which he is signatory.

[50] The Appellant said he purchased a van (GMC Sierra 1500 *Crew Cab*) for approximately $60,000.00. He said he also spent approximately $25,000.00 to buy and retrofit a trailer that he uses as a mobile showroom and to haul doors and windows.

[51] In addition to these basic investments, the Appellant said he pays $143.72 per month to maintain his Internet site and for a business telephone line since December 2013 (Exhibits GD3-26 to GD3-33).

[52] The Appellant determined that his company had no value ($0) and that his assets essentially consist of the van and trailer he uses.

[53] The Tribunal believes, overall, that the resources that the Appellant has invested in operating his business are considerable based on the amount of his investments, the resources he devotes to it and his responsibilities, not to mention the duties he performs on its behalf.

[54] Based on all of these factors, the Tribunal deems that the nature and amount of the capital and other resources invested in his business are by no means minor or insignificant. The Appellant has had a very large financial stake in his business from the start.

The financial success or failure of the employment or business

[55] Concerning the "financial success or failure of the employment or business" item set out in subsection 30(3) of the Regulations, the Tribunal believes that the evidence presented shows 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) […]," since the work performed by the Appellant for the company since it was created is that of a person who would normally rely on that self-employment as a principal means of livelihood or source of income, which is a basic factor in this regard.

[56] The Appellant pointed out that even companies with a high volume of sales may not necessarily generate a profit. He estimated that his business had no value ($0), and that his assets primarily consisted of the van and trailer he uses.

[57] The document entitled, "General Index of Financial Information – GIFI of the Canada Revenue Agency (Schedule 100)" shows that the Appellant's company had total assets of $145,155.00, that his total liabilities were $158,214.00 and retained earnings of (- $13,069.00) for the January 31, 2014 taxation year (Exhibit GD3-88).

[58] This document shows that the company's assets are not limited exclusively to the van and trailer used by the Appellant for company activities.

[59] The Appellant explained that the company made total purchases between December 2013 and October 2014, as shown in the comparative statement of income document (Exhibits GD3-37 to GD3-39) of $127,337.13 (total purchases: $288.82 + 19.86 + 72.26 + 9,484.50 + 6,467.24 + 6,991.87 + 30,274.38 + 16,670.64 + 20,082.29 + 843.47 + 28,141.80 = 127,337.13) to acquire doors and windows for clients, as well as sample products and miscellaneous materials.

[60] The fact that the company reported a net loss of $13,069.00 in 2014 (Exhibits GD3-88 to GD3-91) does not necessarily mean it is not successful.

[61] The evidence on file shows that the company generated considerable income despite the lost reported in 2014. From January 2014 to October 2014, the comparative statement of income

shows that the company's income amounted to 133,756.91 (1,333.33 + 1,333.33 + 4,328.33 + 17,129.58 + 8,867.13 + 19,010.87 + 38,639.33 + 11 475,33 + 12 486,33 + 19 153,35 = 133 756,91 $), (Exhibits GD3-37 to GD3-39).

[62] The Appellant said he wanted to take steps to make his company profitable one day (Exhibit GD3-31).

[63] The Tribunal sees no indication that the Appellant's company was headed for financial failure. The Appellant's efforts to develop it show that he wanted to make it a success.

Continuity of the employment or business

[64] Concerning the "continuity of the employment or business," another of the factors mentioned in subsection 30(3) of the Regulations, the Tribunal considered the fact that the Appellant continues to make a sustained contribution to the continuity of the employment or business, which is still in operation.

[65] The Appellant said that the company also used the services of an accountant, who was paid close to $5,000.00 in the period from December 2013 to October 2014, based on information in the comparative statement of income (under the "professional fees" item: $1,991.00 + 1,800.00 + 600.00 + 450.00 + 150.00 = $4,991.00), (Exhibits GD3-37 to GD3-39).

[66] The evidence shows that the company has a Website and a business telephone line and that it also advertises (Exhibits GD3-26 to GD3-33 and GD3-37 to GD3-39). The comparative statement of income shows that the company spent a total of $8,741.20 (advertising and promotion: $697.74 + 1,337.89 + 499.22 + 649.99 + 1,343.87 + 809.82 + 805.98 + 883.44 + 833.86 + 879.39 = $8,741.20) on advertising the business between January 2014 and October 2014 (Exhibits GD3-37 to GD3-39).

[67] Although the Appellant pointed out that he did not pay himself and did not receive a salary or dividends for his work for his company, the Tribunal believes that he made a sustained effort to operate and advance the company in order to make it his principal means of livelihood.

The nature of the employment or business

[68] In the Tribunal's opinion, on the matter of the "nature of the employment or business" mentioned in subsection 30(3) of the Regulations, the type of work performed by the Appellant for his business would clearly seem of interest to him since it is comparable to his work as a window consultant for the employer Thermex inc., from 2008 to 2013 (Exhibit GD3-13).

[69] In his application for benefits, the Appellant indicated that he worked as "director of communications – sales and marketing" for this employer (Exhibit GD3-7).

[70] The Appellant received instruction through a business administration program.

[71] The Appellant's business specializes in the sale of doors and windows, the same specialty as that of his former employer. The Appellant is president and secretary of the company (Exhibits GD3-14 to GD3-17).

[72] The door and window sales field clearly seems to represent the Appellant's field of expertise.

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

[73] On the matter of "the claimant's intention and willingness to seek and immediately accept alternate employment," also provided in subsection 30(3) of the Regulations, the Tribunal believes that the Appellant did not show such intention or willingness during his benefit period. - 25 -

[74] The Tribunal underscores that the information related to this aspect is of the "utmost importance (***Charbonneau*, 2004 FCA 61**).

[75] The Appellant said he was available to work and had searched for work during his benefit period (Exhibits GD3-26 to GD3-33).

[76] Despite the list of potential employers that the Appellant said he contacted during his search for employment and the job search sites he said he consulted (Exhibits GD3-40 to GD3-

52 and GD3-92 to GD3-97), the Tribunal believes that his primary intention was to operate the business he had just created to make it profitable, and not to look for and immediately accept a new job.

[77] The fact that the Appellant said he found work with the employer, Rona, starting on September 9, 2016, does not change this situation.

[78] In the Tribunal's opinion, once he launched his company in November 2013, his efforts were essentially intended to operate the business and someday make a profit.

[79] The Tribunal considers it unlikely that the Appellant, after investing $86,000.00 to launch and operate his business, and after obtaining help from people close to him to do so, would have simultaneously began actively searching for work with the intention of immediately accepting another job.

[80] The Tribunal believes that the Appellant, starting December 16, 2013, chose instead to give priority to working for his own company, and he therefore cannot be considered ready to seek and immediately accept alternate employment (**Martens, 2008 FCA 240, Charbonneau, 2004 FCA 61, Jouan, A-366-94**).

[81] To summarize, the evidence shows that as proprietor of the company Portes et fênêtres Thermex 2.0 inc., the Appellant did not refute the presumption that he was working a full working week, pursuant to subsection 30(1) of the Regulations (**Lemay, A-662-97, Turcotte, A-664-97**).

[82] Based on the definition in subsection 30(1) of the Regulations, the Tribunal believes that the Appellant is:

> […] 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.

[83] The Appellant was not employed or engaged in operating his business "[…] to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood […]," as set out in subsection 30(2) of the Regulations.

[84] The Tribunal stated that the time that the Appellant spent on his business, the nature and amount of capital and other resources that he invested in it, and the fact that he did not prove his intention and willingness to look for and immediately accept alternate employment, are the most decisive criteria that led to this conclusion.

[85] The Appellant did not show that he was truly unemployed in each of the weeks in question during his benefit period, starting on December 16, 2013 under subsection 11(1) of the Act (**Jouan, A-366-94**).

[86] Therefore, a "benefit period" cannot be established for the Appellant pursuant to section 9 of the Act since he does not qualify under section 7 or 7.1 of the said Act. He is not entitled to benefits "for each week of unemployment that falls in the benefit period" under section 9 of the Act.

[87] Although the reasons for the Appellant's decision to start and promote his own company are excellent, they do not exclude him from the requirements set out in the Act that he prove his eligibility to receive Employment Insurance benefits

[88] The Tribunal finds that the disentitlement to Employment Insurance benefits imposed because the Appellant did not prove that he was unemployed is justified within the meaning of sections 9 and 11 of the Act, and section 30 of the Regulations.

[89] The appeal is without merit on this issue.

CONCLUSION

[90] The appeal is dismissed.

Normand Morin
Member, General Division - Employment Insurance Section

APPENDIX

THE LAW

Employment Insurance Act

9 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.

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

(2) A week during which a claimant's contract of service continues and in respect of which the claimant receives or will receive their usual remuneration for a full working week is not a week of unemployment, even though the claimant may be excused from performing their normal duties or does not have any duties to perform at that time.

(3) A week or part of a week during a period of leave from employment is not a week of unemployment if the employee (a) takes the period of leave under an agreement with their employer; (b) continues to be an employee of the employer during the period; and (c) receives remuneration that was set aside during a period of work, regardless of when it is paid.

(4) An insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if (a) in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment; and (b) the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.

Employment Insurance Regulations

30 (1) 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.

(2) 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.

(3) 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.

(4) Where a claimant is employed in farming and subsection (2) does not apply to that employment, the claimant shall not be considered to have worked a full working week at any time during the period that begins with the week in which October 1st falls and ends with the week in which the following March 31 falls, if the claimant proves that during that period

(a) the claimant did not work; or

(b) the claimant was employed to such a minor extent that it would not have prevented the claimant from accepting full-time employment.

(5) 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.