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

Citation: *S. W. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 5

Tribunal File Number: GE-16-1897

BETWEEN:

S. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: December 1, 2016

DATE OF DECISION: January 12, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of her appeal via teleconference.

INTRODUCTION

[1] The Appellant applied for employment insurance regular benefits (EI benefits) on December 3, 2015 and established a claim effective November 8, 2015.

[2] On February 3, 2016, the Appellant advised the Respondent, the Canada Employment Insurance Commission (Commission) that she had started a business. The Commission reviewed the Appellant's claim and determined that she was involved in the operation of a business (a home hair salon) and that her involvement was not minor in extent. The Commission, therefore, found that the Appellant was not unemployed and imposed a disentitlement on her claim from December 3, 2015, which resulted in an overpayment of $1,664.00.

[3] On February 23, 2016, the Claimant requested the Commission reconsider its decision, stating that she had been provided with incorrect information by a Service Canada agent when she applied for EI benefits and would find it extremely difficult to repay the overpayment. However, on April 6, 2016, the Commission maintained its decision. The Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal) on June 20, 2016.

[4] The hearing was held via teleconference because that 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.

ISSUE

[5] Whether the Appellant has proven a week of unemployment for a full working week as of December 3, 2015.

EVIDENCE

[6] On December 3, 2015, the Appellant made an initial application for EI Benefits (GD3-3 to GD3-13) and established a claim effective November 8, 2015 (GD3-1). A Record of Employment provided by Mat-Son Mechanical Ltd. indicated that the Appellant's last day of work was November 5, 2012 and that her position as Office Administrator had been "dissolved" (GD3-14).

[7] The same day, the Appellant contacted the Commission and advised she was applying for a home hair salon license and looking to make the in-home hair salon her main source of income (see Supplementary Record of Claim at GD3-16).

[8] On February 3, 2016, the Appellant contacted the Commission and completed the "Self-Employment – Minor in Extent" questionnaire (GD3-17 to GD3-18), and responded to detailed questions from the Commission's agent (GD3-19), in which she provided the following information:

(a) She was licensed for a home hair salon on January 8, 2016 and began working with customers on January 18, 2016.

(b) She started preparation for the business in early December.

(c) While preparing the set-up of the business, she spent about 10 hours per week on the business; but since she began accepting customers, she has been devoting full time hours towards the business.

(d) It is her intention to devote herself to self-employment only.

(e) Her expenses to set up the business were approximately $1,000 ($700 for the license, $100 for the business name, $200 for hair products, and $30 for business cards).

(f) She has no set hours of operation, but takes clients whenever she can.

(g) She is the sole proprietor and would be directly impacted by its success or failure.

(h) She was not actively seeking employment from the time she began focusing efforts on self-employment starting on December 3, 2015. She had casually looked into what jobs were available (such as at WestJet Airline), but would not have accepted a full-time job during that period.

[9] On February 3, 2016, the Commission imposed a disentitlement effective December 3, 2015 because it determined that the Appellant was "self-employed as a Hair Salon Owner" and, therefore, could not be considered unemployed (GD3-20 to GD3-21). This decision resulted in an overpayment on the Appellant's claim in the amount of $1,664.00 (GD3-22).

[10] On February 23, 2016, the Claimant requested the Commission reconsider its decision (GD3-23 to GD3-26), stating:

> "On November 6, 2015 I was laid off from my position at Mat-Son Mechanical Ltd. I had thought about starting a home hair salon business, so I began looking in to that. I called an employment insurance agent to inquire if I would be eligible for benefits in the meantime (as I knew it was a time consuming process and my business would take time to be up and running). At the time of my call, December 3, 2015, I was still waiting for approval from the city and to have a copy of my business license. The agent, "David", did not refer me to a special agent but instructed me to being filling out my reports online (beginning from my layoff date of Nov 5). He told me to reply "no" to the question, "are you currently self employed" as technically I was not – yet. I have never tried to receive employment insurance benefits before so I took his word for it and filled out numerous reports. I was never trying to "con the system" or provide false information – I believed I was truly eligible to receive this money.
>
> Finally the day came that I received my business license and I was able to start my business. As I had been instructed to do by David, I called the agents back to explain that my situation had changed and was now "self employed". I was transferred to a special agent who asked me a few questions about my business, on February 3, 2016. This special agent informed me, through no fault of my own, that I was actually not entitled to any of the money I received. He explained that David should have transferred me to a special agent in the first place, where they would have denied my benefits and I would have been paid nothing. Since David did his job incorrectly and made a decision to not transfer my call, the special agent was forced to send me the decision letter – although he encouraged me to fill out this request for reconsideration. Again, through no fault of my own, if I was deemed not entitled to receive the benefits owed to me, I regret receiving them. But I strongly encourage you to reconsider the

> repayment of them. During the times of my online reports I was not a self employed business. I thought I was doing everything the proper way, calling in and explaining myself to employment insurance agents and special agents.
>
> I would truly appreciate this reconsideration as I now have begun my business and would find it extremely difficult to pay the money back." (GD3-25 to GD3-26).

[11] An agent of the Commission telephoned the Appellant about her request for reconsideration and documented the call in a Supplementary Record of Claim (GD3-27). The agent noted the Appellant's statements that she was not actively seeking employment from December 3, 2015 and had only looked into jobs available with WestJet Airline; and that she would not likely have accepted a full-time job if offered one from December 3, 2015 forward because she intended to open her own business from that point on. According to the Appellant, she applied for her business license in early December and expected to receive it mid-January. If she had been offered a job during that period, she would really "have to see" if it would be something she would consider doing, because it was her intent from that point to work on self-employment rather than gain a job with an employer.

[12] On April 6, 2016, the Commission advised the Appellant that it was maintaining its decision to disentitle her to benefits as of December 3, 2015 because she was operating a business and therefore could not be considered unemployed (GD3-28). The Commission confirmed its decision in a letter to the Appellant the same day (GD3-29 to GD3-30).

At the Hearing

[13] The Appellant testified that she is a "regular, honest citizen", who had her hair dressing license and wanted to explore what she could do with that. She struggled financially when she was laid off and went through a "rough time", during which she made enquiries about "collecting EI". The Appellant reiterated that she told a Service Canada agent that she was planning to start a business and was told by the agent that she could claim until her business was set up. The Appellant stated:

> "So that's what I did. I worked to create my business and looked into a job at WestJet and talked to a co-worker about an administrative position. I was keeping my options open."

[14] The Appellant further testified that, when she got her license, "I was pretty much set up", so she called Service Canada and let an agent know the business was starting up, "and that's when the nightmare began". The Appellant stated:

> "I was able to work. I never turned down a job. If I had been told I had to actively seek employment while I was trying to set up my business, I would have gone down the street and got a job at 7-Eleven. Of course I knew I couldn't sit around doing nothing. I'd read the rules, but because I'd been open about starting my business and I thought that was a special situation and that was what I was doing. I knew I wasn't going to be relying on EI, but I wasn't looking for jobs aggressively. I was just thinking about what I could do for money. I don't have evidence of resumes sent out. I was just looking on Kijiji and talking to other people about ideas of what I could do because I knew I wouldn't be making a ton of money from the hair salon at the outset. If I'd known the headache it would cause me, I'd never have applied for EI in the first place."

[15] The Appellant testified that she does not dispute the disentitlement "post-start-up".

[16] The Appellant further testified that she does not have any evidence of job search efforts during the "pre-start-up period".

SUBMISSIONS

[17] The Appellant submitted that she does not dispute the disentitlement imposed once her business was actually "up and running", but that starting up a business is a "special situation" and all of the efforts she put into starting up her home hair salon should "count" as actively seeking employment in the pre-start-up period. The Appellant further submitted that no one told her that she had to be actively seeking employment and that she made the appropriate enquiries and followed the advice of a Service Canada agent, who did not handle her claim correctly.

[18] The Commission agrees that the Appellant was straightforward in enquiring about her self-employment intentions, and no finding was made suggesting that she knowingly made misrepresentations as to her entitlement (thus no penalty was imposed). However, the Commission submitted that the Appellant indicated on her reports that she was ready, willing and capable of working when she was not actively seeking work, and consequently the overpayment is appropriate, but under section 18 of the *Employment Insurance Act* (EI Act) and not under sections 9 and 11 of the EI Act.

[19] The Commission further submitted that all six (6) factors in the statutory test for self-employment point to a finding that the Appellant's engagement in the operation of her business was that of a person who would normally rely on that level of self-employment as their principal means of livelihood. Consequently, the Appellant has not rebutted the presumption that she was working a full working week because she does not meet the exception under subsection 30(2) of the *Employment Insurance Regulations* (EI Regulations);

ANALYSIS

[20] The relevant legislative provisions are reproduced in the Annex to this decision.

[21] According to section 9 of the EI Act, in order for a benefit period to be established and a claimant to be entitled to EI benefits, she must demonstrate that she 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 EI Regulations provides direction on how to determine whether a self-employed person has worked a full working week.

[22] In the present case, the Commission determined that the Appellant's involvement in her home hair salon business in the context of the six factors set out in subsection 30(3) of the EI Regulations was not minor in extent, and disentitled her to benefits as of December 3, 2015. The Commission determined that since this was not a minor endeavor for the Appellant and she was pursuing it as principal means of livelihood during the period of disentitlement, she did not meet the exception in subsection 30(2) of the Regulations. It originally contended, therefore, that the Appellant worked a full working week and was not unemployed from December 3, 2015 pursuant to section 9 and 11 of the EI Act.

[23] On Appeal, the Commission acknowledged that the Appellant should have been disentitled under section 18 of the EI Act from December 3, 2015 (for failing to prove her availability for work), and then disentitled for operating a business under sections 9 and 11 of the EI Act and section 30 of the EI Regulations once her business was operating, "which would have been about February 3, 2016" (GD4-3); and that the overpayment of benefits remains in either case.

[24] The Appellant concedes that a disentitlement to EI benefits "post-start-up" is appropriate. The Tribunal agrees. The Tribunal finds that, upon examination and consideration of all six (6) factors in subsection 30(3) of the EI Regulations, the Appellant was actively involved in the operation of her business and that her engagement in business activities from the time she notified Service Canada on February 3, 2016 that she was "now self-employed" (see GD3-25) was ***not*** minor in extent. The Tribunal finds that the Appellant was self-employed and, from February 3, 2016 onward, was correctly regarded as working a full working week pursuant to subsection 30(1) of the EI Regulations because she did not meet the exception set out in subsection 30(2) of the EI Regulations.

[25] According to the Federal Court of Appeal, where a claimant is engaged in the operation of a business, the onus is on the claimant to rebut the presumption that she is working a full working week (*Lemay A-662-97, Turcotte A-664-97, Charbonneau, supra*). The Tribunal finds that the Appellant did not meet the onus of demonstrating that she was unemployed from February 3, 2016 according to subsection 11(1) of the EI Act and, therefore, benefits are not payable to the Appellant from February 3, 2016 pursuant to section 9 of the EI Act.

[26] As for the disentitlement imposed "pre-start-up" (which the Commission has identified as starting on December 3, 2015 – see GD3-20), the Appellant submits that no disentitlement should be imposed. However, for this period, the Tribunal agrees with the revised submissions of the Commission on appeal.

[27] In accordance with section 18 of the EI Act, in order for a claimant to be entitled to benefits, she must demonstrate that she was capable of and available for work and unable to obtain suitable employment (*Attorney General of Canada v. Bois 2001 FCA 175; Attorney General of Canada v. Cornelissen-O'Neil A-652-93; Attorney General of Canada v. Bertrand A- 631-81*).

[28] Section 18 of the EI Act requires a claimant to prove that she was capable of and available for work in order to be entitled to receive EI benefits. While the EI Act does not provide a definition of availability, the Federal Court of Appeal has consistently held that availability must be determined by analyzing three factors:

(a) the desire to return to the labour market as soon as a suitable job is offered;

(b) the expression of that desire through efforts to find a suitable job; and

(c) not setting personal conditions that might unduly limit the chances of returning to the labour market.

(*Attorney General of Canada v. Faucher A56-96; Attorney General of Canada v. Poirier A 57-96*).

[29] In the present case, the Commission submits that the Appellant is subject to disentitlement to benefits from December 3, 2015 2015 because she was unable to demonstrate her availability for work from that point.

[30] In accordance with subsection 50(8) of the EI Act, the onus is on the claimant to prove availability by demonstrating that she has made reasonable and customary efforts to obtain suitable employment in accordance with the provisions of sections 9.001 to 9.004 of the EI Regulations.

[31] The Tribunal is not satisfied that there is sufficient evidence of the Appellant's efforts to find a suitable job between December 3, 2015 and February 3, 2016, nor that the Appellant's efforts directed to starting up her home Hair Salon business did not unduly limit her chances of returning to the labour market. The Appellant, therefore, does not satisfy the second and third factors in *Faucher, supra*.

[32] The Appellant testified about the casual networking and online searches she did following her layoff from employment, but has not provided any evidence of a *bona fide* job search as contemplated by section 9.001 of the EI Regulations and, indeed, admits she did not apply for any jobs during the period in question. Furthermore, the Appellant has been consistent in her statements that she was focused on and dedicated to setting up her home business during this period (see GD3-17 to GD3-19, and GD3-27).

[33] The Federal Court of Appeal has held that availability for suitable employment is an objective question and cannot depend on a claimant's particular reasons for restricting their availability, even if the reasons provided may evoke sympathetic concern or if the claimant

believed in good faith that they were unable to work (*Gagnon 2005 FCA 321; Whiffen A-1472-92*); and that availability is a willingness to work under normal conditions without unduly limiting the chances of obtaining employment (*Whiffen, supra*). While the Tribunal is sympathetic to the Appellant's desire to start her own business, it simply cannot be said that efforts to start a business are the equivalent of bona fide job search efforts to find suitable, full-time employment. Furthermore, the Tribunal agrees with the Commission's submission that the purpose of the employment insurance program is not to subsidize self-employment efforts but to support those who are unemployed and actively seeking work (GD4-3).

[34] The Tribunal therefore finds that the Appellant has not satisfied the availability requirements for the period prior to her declared self-employment, namely from December 3, 2015 to February 3, 2016.

CONCLUSION

[35] The Tribunal finds that the Appellant has not met the availability requirements to support a claim for EI benefits between December 3, 2015 and February 3, 2016 because she has not proven that she was available for work during this period.

[36] The Appellant is, therefore, subject to a disentitlement to EI benefits from December 3, 2015 to February 3, 2016 pursuant to paragraph 18(1)(a) of the EI Act.

[37] The Tribunal further finds that the Appellant's involvement in the operation of her home hair salon business was not minor in extent and, therefore, she is regarded as having worked full working weeks starting from when she notified Service Canada on February 3, 2016 about the opening of the business.

[38] The Appellant is, therefore, subject to a disentitlement to EI benefits from February 3, 2016 pursuant to sections 9 and 11 of the EI Act.

[39] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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.

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.

18 (1) A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

> **(a)** capable of and available for work and unable to obtain suitable employment;
>
> **(b)** unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
>
> **(c)** engaged in jury service.

(2) A claimant to whom benefits are payable under any of sections 23 to 23.2 is not disentitled under paragraph (1)(b) for failing to prove that he or she would have been available for work were it not for the illness, injury or quarantine.

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.

50 (1) A claimant who fails to fulfil or comply with a condition or requirement under this section is not entitled to receive benefits for as long as the condition or requirement is not fulfilled or complied with.
(2) A claim for benefits shall be made in the manner directed at the office of the Commission that serves the area in which the claimant resides, or at such other place as is prescribed or directed by the Commission.
(3) A claim for benefits shall be made by completing a form supplied or approved by the Commission, in the manner set out in instructions of the Commission.
(4) A claim for benefits for a week of unemployment in a benefit period shall be made within the prescribed time.
(5) The Commission may at any time require a claimant to provide additional information about their claim for benefits.
(6) The Commission may require a claimant or group or class of claimants to be at a suitable place at a suitable time in order to make a claim for benefits in person or provide additional information about a claim.
(7) For the purpose of proving that a claimant is available for work, the Commission may require the claimant to register for employment at an agency administered by the Government of Canada or a provincial government and to report to the agency at such reasonable times as the Commission or agency directs.
(8) For the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment.
(8.1) For the purpose of proving that the conditions of subsection 23.1(2) or 152.06(1) are met, the Commission may require the claimant to provide it with an additional certificate issued by a medical doctor.
(9) A claimant shall provide the mailing address of their normal place of residence, unless otherwise permitted by the Commission.
(10) The Commission may waive or vary any of the conditions and requirements of this section or the regulations whenever in its opinion the circumstances warrant the waiver or variation for the benefit of a claimant or a class or group of claimants.

9.001 For the purposes of subsection 50(8) of the Act, the criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts are the following:
(a) the claimant’s efforts are sustained;
(b) the claimant’s efforts consist of
(i) assessing employment opportunities,
(ii) preparing a resumé or cover letter,
(iii) registering for job search tools or with electronic job banks or employment agencies,
(iv) attending job search workshops or job fairs,
(v) networking,
(vi) contacting prospective employers,
(vii) submitting job applications,
(viii) attending interviews, and
(ix) undergoing evaluations of competencies; and
(c) the claimant’s efforts are directed toward obtaining suitable employment