



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. N. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 94

Tribunal File Number: GE-16-3421

BETWEEN:

M. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Amanda Pezzutto

HEARD ON: April 28, 2017

DATE OF DECISION: June 23, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant – M. N.

INTRODUCTION

[1] The Appellant established a benefit period in 2010. The Canada Employment Insurance (Commission) conducted a post-audit investigation and determined that, during his benefit period, the Appellant was self-employed, and that the self-employment was not minor in extent. As a result, the Commission determined that the Appellant had failed to prove that he was unemployed and entitled to benefits. The Commission also determined that the Appellant knowingly made false or misleading statements when he failed to report his self-employment on his biweekly reports. Because the Commission made these decisions retroactively, it resulted in an overpayment. The Appellant requested a reconsideration but the Commission maintained its decisions. The Appellant appealed to the Tribunal.

[2] The hearing was held by teleconference for the following reasons:

- a) The complexity of the issues under appeal.
- b) The information in the file, including the need for additional information.
- c) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[3] The Tribunal must determine whether the Appellant was engaged in self-employment during his benefit period. If the Tribunal finds that the Appellant was engaged in self-employment, the Tribunal must decide whether the self-employment was so minor in extent that he would not normally rely on the self-employment activity as his principal means of livelihood.

[4] The Tribunal must also determine whether the Appellant knowingly made false or misleading statements when he failed to report his self-employment activity on his biweekly reports. If the Tribunal finds that the Appellant knowingly made false or misleading statements, the Tribunal must determine whether the Commission judicially exercised its discretion when it imposed a non-monetary penalty in the form of a warning.

EVIDENCE

The Application and the Appellant's biweekly reports

[5] The Appellant applied for employment insurance regular benefits on August 4, 2010 (GD3-3 to GD3-17). The Commission established a benefit period commencing August 1, 2010.

[6] The Appellant completed biweekly reports online for the period of December 26, 2010 to August 13, 2011. On each of the 17 reports for the period, the Appellant responded "no" to the question asking, "Are you self-employed?" On the 12 biweekly reports for the period of March 6, 2011 to August 13, 2011, the Appellant reported that he worked 18 hours and earned \$182 in each week (GD3-18 to GD3-84).

The Commission's post-audit investigation

[7] The Commission learned that the Appellant had obtained a municipal business license on January 7, 2011 and so, in January 2015, the Commission started a post-audit investigation (GD3-85).

[8] The Commission spoke to the Appellant's wife. She stated that she and the Appellant had moved from Alberta to Victoria, British Columbia (BC), after she sold her business and the Appellant lost his job. She stated that she purchased a bakery with the money from the sale of her prior business. She stated that the bakery was incorporated in both of their names but she handled the day-to-day operations and the Appellant mostly worked from home, doing the books and paying the business's bills. She stated that the Appellant also looked after their child while she worked in the bakery every day. She stated that he occasionally went into the bakery to bake or serve customers, as needed. She stated that the Appellant had started another job in July 2014 (GD3-87).

[9] The Commission conducted a brief interview with the Appellant. He stated that he was an architect and was trying to find work in his field in Victoria in 2010 and 2011. He stated that he did the payroll, paid bills, and did an operational plan for the bakery. He stated that his involvement in the business was mostly administrative. He stated that he declared earnings on his biweekly reports because he knew that he was only able to earn up to a certain threshold of earnings before it affected his employment insurance benefits (GD3-88).

The Appellant's responses to the Commission's questionnaire

[10] The Appellant responded to a questionnaire about the business. On the questionnaire, he stated that:

- a) He and his wife purchased the business in December 2010 and started operating in January 2011. The business was set up as a partnership and he and his wife each owned 50% of the business.
- b) They had a business bank account and both he and his wife had signing authority.
- c) He spent about eight hours a week on payroll and accounting duties and he controlled his own working hours. He wrote the cheques, paid the bills, produced invoices, reconciled accounts, and did the payroll. His wife made deposits, did the purchasing, controlled inventory, and received products. He stated that their accountant now did the tasks he used to do.
- d) He considered the business the principal means of livelihood but was also collecting employment insurance benefits.
- e) He contacted the Commission to inquire about the effect of the business on his entitlement but could not remember who he spoke to or when. The Commission representative told him that part-time employment was okay if he continued to seek other work. He stated that he was seeking work in his usual field while working part-time at the bakery (GD3-92 to GD3-101).

The Appellant's second interview

[11] The Commission conducted a second, lengthier interview with the Appellant. In the second interview, the Appellant stated that:

- a) He and his family moved from Alberta to BC because they had an opportunity to purchase a business. He stated that neither he nor his wife had experience running a bakery, but they had both owned their own businesses in the past. He stated that they each contributed equally to purchasing the business. He stated that his role in the family was to care for their child while his wife ran the day-to-day operation of the business. He stated that they did not want to put their child in daycare or have his wife's parents care for their child every day.
- b) His wife's role was to work in the bakery, hire and schedule staff, place orders with vendors, and look after inventory. He stated that he did the payroll and remittances to the Canada Revenue Agency (CRA), did reconciliations and accounts payable, wrote the cheques, and wrote the employee manuals. He stated that he worked "behind the scenes" because he was caring for their child. He stated that there was a lot of work in the beginning and it was more than one person could have done. He stated that the business did not have much profit in the beginning and they relied on his employment insurance benefits for support.
- c) He contacted the Commission for information on how much earnings he could declare before it would be deducted from his benefits and he used that information to determine how much he earned from his work in the bakery. He stated that he did not keep track of his hours and used minimum wage and the maximum allowable earnings to calculate the number of hours he needed to declare on his biweekly reports. The Commission asked why his salary doubled after his benefit period terminated and he stated that he needed more income. He stated that he did the same amount of work but received more pay from the business after his benefit period terminated.
- d) The business cost \$130,000. He stated that he and his wife each put about \$40,000 into the business, including a \$25,000 down payment. He stated that the previous owners of

the business financed them for the remainder of the purchase price. He stated that he and his wife made monthly payments of \$1650.

- e) He restated that he stayed home to care for their daughter and do administrative work while his wife ran the front-end of the business. He stated that he also looked for work online in 2011. He stated that they had not arranged for childcare but intended to make arrangements if he received a job offer.
- f) He found other work in July 2014. He stated that he trained his wife to take over the duties he had been doing, but she eventually transferred those duties to the accountant.
- g) The business was doing very well, and business had increased by 65%, but he was used to a six-figure salary. He stated that the income from the bakery was not enough for both him and his wife.
- h) The business credit card was solely in his name because his credit rating was better than his wife's.
- i) He answered "no" to the questions asking if he was self-employed on his biweekly reports because he considered the business to be his wife's business (GD3-89 to GD3-91).

The documentary evidence

[12] As a part of its investigation, the Commission gathered physical evidence about the finances of the business, including documents related to the purchase of the business, the lease, the general ledger, tax returns, tax documents for the Appellant and other employees, invoices, bank statements, journal entries, and financial statements. As evidence, the Commission submitted:

- a) A certificate of incorporation, dated December 6, 2010 (GD3-105).
- b) A purchase agreement, bill of sale (dated January 4, 2011), and other documents related to the sale of the business, dated between December 2010 and January 2011. On all of the documents, the Appellant is listed as one of the purchasers (GD3-106 to GD3-111).

- c) A commercial lease for the site of the bakery, identifying the Appellant and his wife as the business owners, and signed by both the Appellant and his wife on January 1, 2011 (GD3-112 to GD3-120).
- d) A general ledger report showing wages paid to all employees between January 1 and December 31, 2011. The general ledger report stated that the Appellant received wages from the business on a biweekly basis beginning March 24, 2011 through to the end of the year. From March 24 to August 31, 2011, the Appellant received \$352.65 on each pay. Beginning with the September 8, 2011 payday and through to the end of the year, the Appellant received \$712.73 on each pay. The Appellant's wife received \$712.73 on a biweekly basis throughout the year. The wages of the other employees varied from one pay period to the next, but other employees rarely earned more than \$650 per pay period (GD3-123 to GD3-126).
- e) A 2011 T4 summary dated June 8, 2012, signed by the Appellant, identifying the Appellant as the business owner, and directing the CRA to contact the Appellant for information about the return (GD3-127).
- f) Copies of 2011 T4s issued to the employees of the business, including the Appellant and his wife. The Appellant's T4 stated that his employment income was \$12030.72. According to the T4s, the Appellant earned more than all but three other employees (his wife and two other employees) (GD3-128 to GD3-145).
- g) Credit card statements from January to December 2011, for a Capital One credit card in the Appellant's name, with notes on the statements referring to the general ledger (GD3-146 to GD3-169).
- h) General ledger reports showing credit card transactions from January to December 2011, corresponding with the purchases shown on the credit card statements referred to above (GD3-170 to GD3-182).
- i) Credit card statements from February to December 2011 for a Costco American Express credit card in the Appellant's name, with notes on the statements referring to general

ledger entries and showing transactions made both by the Appellant and by his wife (GD3-183 to GD3-200).

- j) Bank statements for the business account from January to December 2011. According to the cancelled cheques, the Appellant signed nearly all of the business's cheques (GD3-201 to GD3-379).
- k) General ledger reports and bank reconciliation statements associated with the business bank account from January to December 2011 (GD3-380 to GD3-406).
- l) Additional general ledger reports and journal entries. However, the Tribunal notes that many of the pages in this set of documents are at too low a resolution to read (GD3-407 to GD3-435, GD3-484).
- m) The Appellant's 2011 tax return, where he stated that he worked from home and deducted related expenses. On the 2011 tax return, the Appellant stated that he earned income from the bakery and from employment insurance benefits (GD3-489 to GD3-515).
- n) The Appellant's 2012 tax return, where he stated that he worked from home and deducted related expenses. According to his 2012 T4 and the tax return, he earned \$22,892.39 from the bakery and this was his sole source of employment income in 2012 (GD3-516 to GD3-539).
- o) The business's 2011 corporate tax return. According to the tax return, the Appellant owned 50% of the shares of the business and his wife owned the other 50%. The business had a net loss of \$33,113 for the 2011 tax year (GD3-540 to GD3-580).
- p) Balance sheets and income statements showing the business's financial situation as of December 31, 2011 (GD3-581 to GD3-610).
- q) The business's 2012 corporate tax return with income statements comparing 2011 to 2012 (GD3-611 to GD3-613).

The Commission's initial decision

[13] As a result of its investigation, the Commission determined that the Appellant could not be considered unemployed as of January 1, 2011, when he and his wife took possession of the bakery, because his self-employment activity was not minor in extent. As a result, the Commission determined that the Appellant was not entitled to employment insurance benefits from January 3, 2011 (GD3-615 to GD3-620). The Commission also determined that the Appellant knowingly made 17 false representations on his biweekly reports when he failed to report his self-employment activity and imposed a non-monetary penalty in the form of a warning letter (GD3-615 to GD3-616, GD3-621 to GD3-622). Because the Commission made these decisions retroactively, it resulted in an overpayment (GD3-623).

The reconsideration request

[14] The Appellant requested a reconsideration. In a letter included with his reconsideration request, he stated that he was transparent when declaring earnings on his biweekly reports and that he had believed that he was able to earn a certain amount of money while still seeking employment in his usual field of work. He stated that he received advice from "CRA reps" prior to filing any of his employment insurance claims. He stated that no one ever told him that being a partner in a business with his wife would have an effect on his entitlement to employment insurance benefits and that no one ever told him that self-employment could be an issue (GD3-624 to GD3-628).

[15] The Commission contacted the Appellant and noted that the previous representative had considered the six factors set out in the *Employment Insurance Regulations* (Regulations) and had determined that he was not self-employed to such a minor extent that he would not normally rely on the self-employment activity as a principal means of livelihood (GD3-629).

[16] The Commission maintained its initial decisions (GD3-630) and notified the Appellant verbally (GD3-629) and by letter (GD3-631 to GD3-632).

The Appellant's appeal to the Tribunal

[17] The Appellant appealed to the Tribunal. On his notice of appeal, he stated that he spoke to the Commission prior to submitting his first claim and was told that he could work a certain number of hours, remain below a certain income threshold, and continue to seek work in his usual field. He stated that he was simply the joint-owner as a matter of legal semantics because he and his wife had leveraged their jointly owned home in order to buy the business. He stated that, before the purchase of the business, he spoke again with a Commission representative to explain his circumstances and told the Commission that he would likely help his wife run the business. He stated that the Commission representative told him that his benefits would not be affected as long as he remained below a certain threshold of hours and income. He stated that the Commission representative never told him that self-employment would affect his entitlement to benefits.

[18] The Appellant stated that he conducted "minor marketing and administrative duties" and took a "meager hourly wage" for his work. He stated that he reported this income on his reports. He stated that no one ever told him that he was doing anything wrong, even during the Commission's investigation.

[19] He stated that he was actively seeking work in his own field throughout this time (GD2-2 to GD2-6).

The Appellant's hearing

[20] At the hearing, the Appellant stated that he spent 18 hours a week working for the bakery during his benefit period. He stated that he made an error when he told the Commission otherwise. He stated that he could have worked more than 18 hours a week, but chose not to because he knew that was the most he could work without compromising his entitlement to employment insurance. He stated that his intention was always to support his wife as she worked full-time in the business. He stated that he controlled his own hours and did not work according to a set schedule.

[21] The Tribunal asked why his hours did not fluctuate from week to week and the Appellant stated that he knew that there was an earnings threshold of \$182 a week. The

Tribunal asked why the Appellant calculated his hours and earnings based on minimum wage and the Appellant stated that it was a recognized number he could use. He stated that, for the sake of argument, he could have paid himself \$20 an hour and then he would have only worked nine hours a week. He stated that he knew he had to stay under \$182 a week, so he just divided that number by minimum wage and got 18 hours, so he knew he had to work no more than 18 hours a week. The Tribunal asked why it was so important that he remain under \$182 a week and the Appellant stated that it was so he could collect employment insurance benefits. The Tribunal asked again if the Appellant actually worked 18 hours a week and the Appellant stated that he did.

[22] He stated that his role was administration and marketing. He stated that he did bookkeeping, payroll, and wrote policy manuals. He stated that he did not do these tasks anymore for the business and that there was an accountant doing the bookkeeping and payroll. He stated that he did not know how much time the accountant spent on doing these tasks and did not know how much the accountant was receiving for his work.

[23] The Appellant stated that the prior owners stayed on for the transition and helped his wife with the business. He stated that they did not have the cash flow to hire an accountant so he started to help out in areas where he had knowledge. He stated that the prior owners did their own bookkeeping and payroll and so he and his wife continued doing things the same way. He stated that there was not a formal transition plan to have his wife assume the bookkeeping. He stated that his wife had successfully run her own businesses before.

[24] The Appellant stated that he started declaring income from the business in March 2011 because that was when he became involved with the business. He stated that he was not involved earlier in the year.

[25] The Appellant stated that he became more actively involved in the bakery after his benefit period terminated. He stated that he would have worked more than 18 hours a week after his benefit period terminated because he was physically at the business more often, helping with baking and serving customers. The Tribunal asked why his role and hours changed after his benefit period terminated, and the Appellant stated that it was necessary in order to bring more income into his household.

[26] The Appellant stated that he and his wife contributed equally to the business on a financial basis. He stated that they provided shareholder loans to the business in order to keep it afloat. He stated that they leveraged the home that they both owned in order to finance the purchase of the business, so he had to be on title as the co-owner of the business. He stated that the business made money, but that did not equate to making profit. He stated that the business was still in operation.

[27] The Appellant stated that he had owned a business in the past and had done the bookkeeping, administrative work, and payroll for his own business.

[28] The Tribunal asked if the Appellant sought other work while he was collecting employment insurance benefits. The Appellant stated that he intended to get back into his usual field of architecture but it turned out to be difficult for him to find work. He stated that he was seeking work with builders, land developers, with different levels of government, and trade associations. He stated that he was mainly looking for full-time work but would have accepted anything. He stated that he kept records of all the places he applied, but the Commission had never asked him to provide a record of his job search.

[29] The Appellant stated that he eventually started up his own self-employment venture in his own field. He stated that he started his self-employment venture in 2011 or 2012. He stated that it could have been after his employment insurance claim ended. He stated that, once his employment insurance claim ended, he was receiving income through the bakery and his own self-employment venture. He stated that he found a contract position in late 2013 or early 2014, and after that, went back to his own self-employment venture, and then started a job in 2016.

[30] The Appellant stated that, when he and his wife were considering moving to BC and purchasing the bakery, he called the Commission for advice. He stated that he asked questions about how it would affect his benefits and the Commission representative told him that there were a certain number of hours he could work. He stated that he did not answer “yes” to the question on his biweekly reports asking about self-employment because he never saw it as his own self-employment venture, since it was his wife’s business. He stated that he did not think he would have described it to the Commission representative as self-employment but would have told the Commission representative that he was a joint owner of the business.

[31] He stated that the business credit card was in his name because he had a better credit score. He stated that there was a supplemental card in his wife's name and she did most of the purchasing.

[32] The Appellant stated that repaying the overpayment would cause financial hardship.

Post-hearing documents

[33] After the hearing, the Appellant submitted a job search record showing where he had submitted resumes between April 2010 and March 2016. In particular, the Appellant applied for 36 jobs in 2011, mostly with municipal and provincial government agencies, construction and real estate companies, and non-profit organizations (GD9-2 to GD9-7).

[34] The Appellant also resubmitted a letter, dated March 27, 2017, which had not been previously added to his appeal file. In the letter, he stated that he did not begin working in the bakery serving customers until after his benefit period terminated in August 2011, and that this was why his pay increased. He stated that he did track the number of hours he worked and reported those hours on his biweekly reports. He stated that he did have childcare arrangements in case he secured other work, because his in-laws could have cared for their child if he found other work (GD9-8 to GD9-12).

SUBMISSIONS

[35] The Appellant submitted that:

- a) The business was always intended to be his wife's occupation and he simply helped out. For legal and financial reasons, he was a 50% owner and invested equally into the business, but his wife ran the day-to-day operations. He limited his engagement to 18 hours a week because a Commission representative advised him that he could work up to a certain income threshold before his earnings would be deducted from his employment insurance benefits.
- b) He searched for work in his regular profession throughout his benefit period and throughout the time he helped with the business. It was only after his benefit period

terminated that he increased his involvement with the business and so as a result, he drew more income from his work with the bakery.

- c) He did not act with any malice and if there was an error, it was not made knowingly. He was forthcoming and transparent with the Commission throughout the investigation.

[36] The Commission submitted that:

- a) A claimant who is operating his own business is presumed to be working a full working week unless he can show that his level of engagement in the business is so minor in extent that a person would not normally rely on the business activity as a principal means of livelihood. In order to determine whether the engagement is minor in extent, subsection 30(2) of the Regulations set out six factors to consider: the time spent; the resources invested into the business; the financial success or failure of the business; the continuity of the business; the nature of the business; and the claimant's intention and willingness to accept other work. Jurisprudence affirms that the most important factors are the time spent and the willingness to accept other work.
- b) In this case, the Appellant has provided varying statements about the time spent on his business and also stated that he calculated the hours with regard to the earnings threshold. As a result, his statements about the time spent on the business are not credible. The fact that his wage increased to match his wife's wage after his benefit period ended suggests that he worked on the business as much as his wife did.
- c) He invested \$40,000 into the business and invested an equal amount as his wife. He had signing authority on the bank account and the credit cards were in his name. The business became profitable in its second year and it still in operation.
- d) The Appellant has a prior history of self-employment.
- e) While he may have looked for other work during his benefit period, his contributions to the business were critical to its success and his actions suggest that his role was greater than simply that of an investor. Considering all of the six factors, his self-employment cannot be considered minor in extent.

- f) While the Appellant was forthright during the investigation, while he was completing his biweekly reports, he answered “no” to the questions asking if he was self-employed. This is a simple question and so the Appellant knowingly made false statements on his biweekly reports.

ANALYSIS

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

[38] Considering the complexity of the issue, the Tribunal will first refer to the relevant legislation and jurisprudence on the issue of self-employment. Next, the Tribunal will consider the six factors set out in the legislation, relate these factors to the Appellant’s circumstances, and determine whether the Appellant’s self-employment can be considered minor in extent. Finally, the Tribunal will consider whether the Appellant knowingly made false or misleading statements when he completed his biweekly reports; if the Tribunal finds that there were false statements made knowingly, the Tribunal will consider whether the Commission exercised its discretion in a judicial manner when imposing a non-monetary penalty in the form of a warning.

Was the Appellant engaged in self-employment?

[39] The Tribunal is satisfied that the Appellant’s involvement in the bakery should be considered self-employment. The Tribunal acknowledges that the Appellant argued that he considered the business to be his wife’s self-employment venture and that he was merely assisting her. However, the Tribunal notes that the Appellant, legally, owned 50% of the business, that he had signing authority on the business bank account, and that the credit cards for the business were in his name. The Tribunal is satisfied that the Appellant was engaged in the operation of a business in a partnership, as described in subsection 30(5) of the Regulations.

[40] The Commission argues that the Appellant was self-employed as of January 1, 2011. However, the Tribunal also notes that the Commission disentitled the Appellant as of January 3, 2011. The Tribunal notes that the bill of sale, transferring the business from the prior owners to the Appellant and his wife, is dated January 4, 2011. Accordingly, the Tribunal finds that the Appellant was self-employed as of the week beginning January 2, 2011.

What are the questions to consider in an appeal on the issue of self-employment?

[41] The Tribunal must consider the six factors set out in the Regulations to determine whether the Appellant's self-employment can be considered minor in extent.

[42] Section 9 of the *Employment Insurance Act* (Act) states that benefits are payable for each week of unemployment in a benefit period. Subsection 11(1) of the Act defines a week of unemployment as a week in which a claimant does not work a full working week. In other words, a claimant is only entitled to receive benefits if he is unemployed.

[43] Subsection 30(1) of the Regulations states that a claimant is considered to have worked a full working week in any week where he is self-employed or engaged in the operation of a business, either on his own account, in a partnership, or a co-adventure. That is, a self-employed person cannot be considered unemployed, and as a result, a self-employed person is not entitled to receive benefits.

[44] However, subsection 30(2) of the Regulations sets out an exception to the general rule disentitling self-employed claimants. If a claimant is engaged in the operation of a business to such a minor extent that a person would not normally rely on that self-employment activity as a principal means of livelihood, then the claimant may be considered unemployed for the purposes of section 9 of the Act.

[45] Subsection 30(3) of the Regulations sets out six factors to consider when determining whether a self-employment activity can be considered "minor in extent": the time spent; the nature and amount of the capital and resources invested; the financial success or failure of the business; the continuity of the business; the nature of the business; and the claimant's intention and willingness to seek and immediately accept alternate employment.

[46] The Federal Court of Appeal has held that, of the six factors, the two most important factors to consider are the time spent and the intention and willingness to accept other work (*Charbonneau v. Canada (Attorney General)*, 2004 FCA 61).

[47] Accordingly, the Tribunal must consider each of the six factors, giving particular weight to the time Appellant spent on the business and his willingness to accept other work.

How much time did the Appellant spend on the business?

[48] The Tribunal finds that it is difficult to determine the exact number of hours the Appellant spent on the business, given the way he used his earnings threshold to calculate his hours. However, the Tribunal finds that the Appellant spent the number of hours required to conduct the bookkeeping, payroll, and other administrative and financial tasks, and that this required, at minimum, 18 hours of work a week.

[49] The Appellant argued that he limited himself to 18 hours a week working on the business because he did not wish to exceed the earnings threshold that would affect his entitlement to employment insurance benefits.

[50] The Commission argues that the Appellant's statements about the number of hours he spent on the business are not credible, given his varying statements and given the wide range of tasks he performed for the business.

[51] The Appellant stated that he wrote the cheques, paid the bills, produced invoices, reconciled accounts, wrote employee manuals, and did bookkeeping, payroll, and marketing. The Appellant stated that his wife did not like the financial tasks and so he took on those duties. The Tribunal accepts the Appellant's statements. The Tribunal also notes that the credit card statements suggest that the Appellant did some of the purchasing.

[52] The Tribunal also accepts the Appellant's statement that he controlled his own hours and did not have a set schedule.

[53] The Appellant consistently declared 18 hours a week, beginning with the week of March 6, 2011. The Tribunal notes that the Appellant did not declare varying hours from week to week. Given the nature of the financial tasks the Appellant did for the business, the Tribunal finds it unusual that his hours did not vary from week to week. For example, if the Appellant was responsible for payroll, the Tribunal finds that it would have been reasonable for his hours to fluctuate depending on the pay schedule or staff turnover. The fact that the Appellant's hours did not vary from week to week suggests that 18 hours a week was, in some sense, an arbitrary number. Indeed, during the Commission's initial investigation, the Tribunal notes that the

Appellant stated that he did not keep track of his hours, although the Appellant later told the Tribunal that he did track his hours.

[54] The Tribunal finds that it is reasonable to give more weight to the Appellant's earlier statements, since he made those statements spontaneously; in contrast, he made his later statements with the knowledge that his earlier statements had resulted in an adverse decision about his entitlement. Accordingly, the Tribunal gives more weight to the Appellant's earlier statements that he did not track his hours. The Tribunal also notes that the Appellant has not submitted supporting evidence, such as time sheets, showing that he tracked many hours he worked on a weekly basis.

[55] The Tribunal notes that, throughout his communication with the Commission and Tribunal, the Appellant focused more on his earnings rather than the number of hours he actually worked. Indeed, during the hearing, the Appellant stated that he could have paid himself a higher hourly wage and then worked fewer hours, highlighting the fact that his primary concern was keeping his earnings below a certain threshold, rather than keeping careful track of the actual hours he spent working for the business.

[56] The Tribunal also notes that the Appellant told the Commission, during the second interview, that there was lots of work to do at the beginning and that it was more than could be done by one person. However, the Appellant did not begin to declare hours on his biweekly reports until March 2011, even though he and his wife purchased the business in January 2011. The Tribunal notes that the Appellant's name is on the documents for the purchase and lease, beginning in December 2010. The Tribunal also notes that the Appellant stated that he wrote employee manuals. Accordingly, the Tribunal finds, on a balance of probabilities, that the Appellant was involved with the business from the beginning of January 2011, when the business officially started.

[57] The Tribunal finds that the Appellant's earnings from the business increased after his benefit period terminated. During an interview with the Commission, the Appellant stated that he increased his earnings because he needed more income after he stopped receiving employment insurance benefits. However, at the hearing, the Appellant testified that his earnings increased because he increased the number of hours he devoted to the business. The

Tribunal gives more weight to the Appellant's earlier statements, for the reasons already described above. The Tribunal finds, on a balance of probabilities, that the Appellant's earnings increased but the number of hours devoted to the business remained comparable after his benefit period terminated.

[58] The Tribunal notes that, according to the T4s issued for the 2011 tax year, the Appellant earned more than nearly all of the other employees of the bakery; only his wife and two other employees had higher earnings in 2011. The Tribunal finds that this highlights the importance of the Appellant's role to the operation of the business.

[59] Finally, the Tribunal notes that the Appellant testified that the business now employs an accountant to do the financial tasks previously done by the Appellant. The Tribunal acknowledges that the Appellant did not know how many hours the accountant works on these tasks on a weekly basis, but the Tribunal accepts that the nature of the tasks required enough hours to necessitate the engagement of an accountant after the Appellant secured other work.

[60] The Tribunal considers the nature of the tasks performed by the Appellant, the evidence suggesting that he focused more on keeping his earnings below a certain threshold rather than tracking his actual hours of work, the fact that the hours did not vary from week to week, even though it the Tribunal finds that it would have been reasonable for the hours to vary, and the Appellant's increase in earnings after his benefit period terminated. The Tribunal also considers the fact that the business hired an accountant to take on the work the Appellant had done. Considering all of these factors, the Tribunal finds that the Appellant spent a minimum of 18 hours a week working for the business, beginning with the purchase of the business in January 2011, and that it was likely that he spent more than 18 hours a week. The Tribunal finds that the Appellant's focus was on completing the tasks related to bookkeeping and finances, rather than tracking and limiting his hours.

What was the nature and amount of capital and resources the Appellant invested?

[61] The Tribunal finds that the Appellant was an equal financial partner in the business with his wife. The Tribunal finds that the Appellant invested the same amount of money for start-up

costs and contributed financially to the business throughout its first year. The Tribunal also finds that the Appellant contributed financially to the business by undervaluing his labour.

[62] The Appellant testified that he and his wife each contributed about \$40,000 to the business, that they leveraged the home that they jointly owned, and that they both contributed shareholder loans to the business. The Tribunal also notes that the tax documents for 2011 and 2012 list the Appellant as a 50% owner. Accordingly, the Tribunal finds that the Appellant had an equal financial interest in the business as his wife, even though he testified that the business was meant to be his wife's business.

[63] The Tribunal also notes that the Appellant consistently stated that he paid himself minimum wage for his work for the business. While he did not provide evidence describing the rate of pay for the accountant who took over his duties, the Tribunal finds that it is unlikely that the business pays the accountant minimum wage. Accordingly, the Tribunal finds that the Appellant also contributed financially to the business by paying himself minimum wage for bookkeeping and financial services.

Was the business financially successful?

[64] The Tribunal finds that the business was a financial success, since the earnings increased from 2011 to 2012.

[65] During an interview with the Commission, the Appellant testified that the business was financially successful and that business had increased by 65%. The Tribunal also notes that the tax returns for 2011 and 2012 suggest that the gross income from the business increased from 2011 to 2012.

[66] The Tribunal acknowledges that, during the hearing, the Appellant distinguished between gross income and actual profit. The Tribunal also acknowledges that the Appellant told the Commission that the income from the bakery was not sufficient to support both him and his wife, since they were accustomed to a higher income.

[67] Nevertheless, the Tribunal finds that the business was financially successful.

Has the business remained in operation?

[68] The Appellant testified that the business is still operating and so the Tribunal accepts his statement.

What was the nature of the business, and how did it compare to the Appellant's usual employment?

[69] The Tribunal finds that the Appellant had not previously worked as a baker; however, the Tribunal finds that the Appellant had previously been self-employed and engaged in bookkeeping on his own account.

[70] The Appellant testified that the business was a bakery and the Tribunal notes that the Commission submitted business documents also stating that the business was a bakery. The Appellant told the Commission that he had not previously worked in a bakery and that he was trained as an architect. The Tribunal accepts the Appellant's statements.

[71] However, the Appellant told the Commission that he had previously run his own business and that he had done bookkeeping and financial work for his prior self-employment. The Tribunal also notes that the Appellant testified that he launched a self-employment endeavour on his own account sometime after his benefit period ended.

[72] Accordingly, the Tribunal finds that, although the Appellant had not worked in a bakery before, he had prior experience doing bookkeeping for self-employment ventures, and so the nature of his work for the bakery was comparable to work he had done in the past.

Was the Appellant's intention to seek and immediately accept other work?

[73] The Tribunal finds that the Appellant sought other work throughout his benefit period, and that he hoped to secure a job in his usual field.

[74] The Appellant consistently told the Commission and the Tribunal that he was seeking other work throughout his benefit period and throughout the time he worked with the bakery. During the hearing, he testified that he eventually started a second self-employment venture in

his own field, although the Tribunal notes that the Appellant's 2012 tax return does not show that he had any other income in 2012, other than his work with the bakery.

[75] The Appellant also submitted a job search record, stating that he applied for several jobs in his field and other related areas throughout 2011; the Appellant stated that the Commission had never asked him to submit a record of his job search. The Tribunal accepts the Appellant's job search record and accepts that he had not had a prior opportunity to submit evidence of his job search.

[76] Considering the Appellant's statements and his job search record, the Tribunal is satisfied that the Appellant sought other work throughout the time he was engaged with the bakery and that he was prepared to accept a job outside of his work with the bakery.

Considering all of the six factors, was the Appellant's self-employment activity minor in extent?

[77] The Tribunal finds that the Appellant's self-employment activity cannot be considered minor in extent.

[78] The Tribunal notes that it is not a question of whether the Appellant meant to rely on the activity as a principal means of livelihood; rather, the question is whether an average person would rely on the activity as a principal means of livelihood. Even though the Appellant was accustomed to a higher income than the bakery provided, it does not preclude a finding that a person could rely on the work with the bakery as a principal means of livelihood. The question to consider is whether the Appellant's engagement in self-employment was "so insignificant that a person would not normally pursue that employment as a principal means of livelihood"? (*Rory v. Attorney General of Canada*, A-406-94).

[79] The obvious comparison for assessing the Appellant's level of self-employment activity is with the Appellant's wife. She contributed an equal financial amount into the operation of the business, she was a 50% owner, and after the Appellant's benefit period ended, they each collected the same salary from the business. In short, the Appellant's wife meant to rely on the bakery as her principal means of livelihood.

[80] Furthermore, the Appellant told the Commission that he relied on the bakery and his employment insurance benefits as his principal means of livelihood in 2011, and the Tribunal notes that the Appellant's 2011 tax return does not show any other income source. After the Appellant's benefit period ended, his 2012 tax return suggests that the Appellant completely relied on the bakery as his principal means of livelihood, as his 2012 tax return states that he did not have any other source of earnings.

[81] The Tribunal acknowledges that the Appellant's role in the business was different from his wife's role. However, considering all of the evidence, including the business documents, the Tribunal finds that the Appellant's role was just as critical as his wife's role to the operation of the business.

[82] The Tribunal considers all of the six factors, but gives particular weight to the amount of time spent on the business. The Tribunal has already found, for reasons described above, that the Appellant's statements about the number of hours he spent on the business are not reliable, as the Appellant focused more on keeping his earnings below a certain threshold, rather than keeping track of his actual hours worked. The Tribunal gives weight to the fact that the Appellant contributed time to the bookkeeping and other financial paperwork, as well as doing some purchasing for the business. The Tribunal also gives weight to the financial success and continuity of the business, the Appellant's 50% financial interest in the business, and the fact that the Appellant had prior experience doing bookkeeping for self-employment ventures. The Tribunal gives weight to the Appellant's job search and intention to accept other work, but the Tribunal finds that this one factor is insufficient to outweigh the other five factors.

[83] The Tribunal is guided by *Caron v. Attorney General of Canada*, 2007 FCA 371, where the Federal Court of Appeal found that a claimant who was engaged in a business to the same extent as his business partner (who devoted all of his time to the business) was not self-employed to a minor extent. The Tribunal is also guided by *Alaie v. Attorney General of Canada*, 2003 FCA 416, where, in similar circumstances, the Federal Court of Appeal held that it was an error in law to focus solely on whether the claimant intended to engage in a self-employment activity on a full-time basis, rather than considering all of the six factors set out in the Regulations.

[84] Considering all of the evidence in its entirety, the Tribunal finds, on a balance of probabilities, that the Appellant was engaged in the self-employment activity to such an extent that a person would have relied on that self-employment activity as a principal means of livelihood. The Tribunal finds that the self-employment activity cannot be considered minor in extent.

Did the Appellant knowingly make false or misleading statements on his biweekly reports?

[85] The Tribunal finds that the Appellant knowingly made misleading statements on his biweekly reports when he answered “no” to the question asking if he was self-employed.

[86] The Appellant argues that he did not act with any malice and that he sought advice from the Commission before he engaged in any self-employment activity.

[87] The Tribunal notes that the Commission has not submitted evidence of any records of phone calls with the Appellant prior to the investigation that started in 2015. The Tribunal finds it unusual that, if the Appellant had reported concrete details of his purchase of a business to the Commission in 2011, the Commission did not gather more details or investigate the issue further in 2011. The Tribunal notes that the Appellant has provided varying statements describing when and how often he attempted to contact the Commission and even suggested that he spoke to the CRA about his entitlement. The Tribunal gives little weight to the Appellant’s statement that he explained his situation to the Commission prior to purchasing the bakery.

[88] Nevertheless, the Tribunal notes that there is no obligation to prove that there was an intention to defraud the Commission when considering whether false statements were knowingly made (*Canada (Attorney General) v. Bellil*, 2017 FCA 104). Rather, the question is simply whether the Appellant had subjective knowledge that his statements were false. The Tribunal may consider “common sense and objective factors” when considering whether the Appellant had subjective knowledge of the falsity of the statements (*Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206).

[89] In this case, the Tribunal finds that the Appellant had subjective knowledge that he was a part-owner of the bakery. He had contributed a significant amount of money into the business,

was a co-signer on the business bank account, and the business credit cards were in his name. He signed the cheques and did the bookkeeping. The Tribunal also notes that the Appellant knew that, for the purposes of income tax returns, he had to report his 50% stake in the business.

[90] Considering these objective factors, the Tribunal finds, on a balance of probabilities, that the Appellant had subjective knowledge that answering “no” to the question asking whether he was self-employed on his biweekly reports was misleading. Even if the Appellant had believed that he had received advice from the Commission about how his self-employment activity would affect his entitlement to employment insurance benefits, the Tribunal notes that the Appellant did not testify that the Commission had advised him to answer “no” to the question asking if he was self-employed on his biweekly reports.

[91] The Appellant completed 17 biweekly reports between December 26, 2010 and August 13, 2011. On each of the biweekly reports, the Appellant answered “no” to the question asking if he was self-employed. Accordingly, the Tribunal finds that, pursuant to paragraph 38(1)(a) of the Act, the Appellant knowingly made 17 misleading statements.

Did the Commission judicially exercise its discretion when it imposed a non-monetary penalty in the form of a warning?

[92] The Tribunal is satisfied that the Commission judicially exercised its discretion when it imposed a non-monetary penalty in the form of a warning.

[93] Section 40 of the Act does not permit the Commission to impose a penalty if more than 36 months have passed since the day the act occurred. Section 41.1 of the Act permits the Commission to impose a non-monetary penalty in the form of a warning within 72 months of the day the act occurred.

[94] In this case, the Appellant completed the biweekly reports between December 26, 2010 and August 13, 2011 and the Commission made its initial decision on January 21, 2016. The Tribunal finds that the Commission made its decision more than 36 months but less than 72 months after the misleading acts, and so a non-monetary penalty in the form of a warning is the only sanction permitted by the Act.

[95] Accordingly, the Tribunal finds that the Commission exercised its discretion judicially when it determined the form of the penalty.

CONCLUSION

[96] The appeal is dismissed.

Amanda Pezzutto

Member, General Division – Employment Insurance Section

ANNEX

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.

41.1 (1) The Commission may issue a warning instead of setting the amount of a penalty for an act or omission under subsection 38(2) or 39(2).

(2) Notwithstanding paragraph 40(b), a warning may be issued within 72 months after the day on which the act or omission occurred.

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.