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

Citation: *M. S. v Canada Employment Insurance Commission*, 2018 SST 1406

Tribunal File Number: GE-17-2485

BETWEEN:

M. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

HEARD ON: December 11, 2017

DATE OF DECISION: February 7, 2018

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant made an initial claim for employment insurance benefits on November 17, 2009. On October 5, 2015, the Respondent disentitled the Appellant from receiving benefits after finding he was involved in a business and therefore could not be considered unemployed. The Respondent also issued a warning after finding that the Appellant knowingly made false representations. The Appellant requested a reconsideration of these decisions, and on November 24, 2015, the Respondent maintained its initial decisions. Although the Appellant filed an appeal with the Social Security Tribunal (Tribunal) on March 3, 2016, which is beyond the time limit set out in subsection 52(1) of the *Department of Employment and Social Development Act* (DESD Act), on May 24, 2016, the Tribunal allowed an extension of time within which to bring the appeal.

[2] The General Division of the Tribunal allowed the Appellant's appeal of the Respondent's reconsideration decision that the Appellant was involved in a business and therefore could not be considered unemployed. On July 14, 2017, the Appeal Division of the Tribunal allowed the Respondent's appeal and returned it to the General Division for reconsideration because the Tribunal erred in law and breached the parties' natural justice rights.

[3] The Tribunal must decide whether the Appellant is disentitled because he failed to prove that he was unemployed within the meaning of sections 9 and 11 of the *Employment Insurance Act* (Act) and section 30 of the *Employment Insurance Regulations* (Regulations). The Tribunal must also decide whether the Respondent properly issued a warning pursuant to section 41.1 of the Act because the Appellant knowingly provided false or misleading information.

[4] The hearing was held by videoconference for the following reasons:

a) The complexity of the issues under appeal.

b) The fact that credibility is not anticipated to be a prevailing issue.

c) The fact that the Appellant will be the only party in attendance.

d) The fact that an interpreter will be present.

e) 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.

[5] The following people attended the hearing: the Appellant, witness V. K., and interpreter Jelena Puric.

[6] The Tribunal finds that the Appellant has not proven that he was unemployed within the meaning of the Act and the Regulations. The Tribunal also finds that the Respondent properly issued a warning because the Appellant provided information or made representations that he knew were false or misleading. The reasons for this decision follow.

EVIDENCE

[7] On November 17, 2009, the Appellant made an initial claim for benefits and a benefit period was established effective November 8, 2009. The application for benefits included a note concerning false or misleading statements, specifically that knowingly withholding information or making a false or misleading statement could result in an overpayment of benefits and penalties or prosecution. The Appellant indicated that he had read and understood, and accepted his rights and responsibilities.

[8] On February 18, 2015, the Respondent wrote to the Appellant and told him that it had received information from the Canada Revenue Agency (CRA) indicating that he had applied for a Business Registration Number on April 19, 2010, for his business, and that because he had an employment insurance benefit period in the same year, the Respondent asked that the Appellant provide additional information about his self-employment.

[9] On March 19, 2015, the Appellant signed a declaration concerning a self-employment questionnaire that he completed with respect to his business. He indicated in the questionnaire that he had incorporated the business on April 16, 2010, and that it was a co-adventure in which his partner had 50% ownership. He indicated that a 2-year lease had been signed on March 30, 2010, and that lease costs were $1,600 per month. The Appellant's business was financed using

a $50,000 loan from the equity in his personal residence and credit cards. The Appellant added that his partner contributed to finance the equipment. He also indicated that he took a $60,000 private loan that he had to repay at a rate of $1,000 per month. The Appellant indicated that in 2010, he spent a total of 1,568 hours to set up the business, but he did not make any income. He said that he advertised his business by printing flyers and delivering them to companies. He detailed his involvement as eight hours per day for 22 days a month, and that normally his hours were Monday to Friday, 9:00 a.m. to 5:00 p.m.

[10] The Appellant said that he made an initial claim for employment insurance benefits in November 2009, and registered his business in April 2010. He said that it took a while for him to set up the business and that his first invoice was billed on September 21, 2010, and that from September 21, 2010 to December 31, 2010, his business income was $6,748.91. The Appellant stated that he did not work in the business during his benefit period, but only set it up, and that since he was doing it on his own, it took him longer. He said that he did not have any earnings during the time he was receiving employment insurance benefits, and therefore did not report any. The Appellant said that he considered the business to be successful, that he had steady work, and that the business had been open for almost five years. He said that he considered the business to be his principal means of livelihood. The Appellant attached copies of the following documents to the completed questionnaire:

- an Agreement Offer to Lease with a term of two years from April 1, 2010 to March 30, 2012, with a monthly lease cost of $1,600 plus GST/PST, plus additional fees;
- a list of invoices to different companies and the respective amounts with dates ranging from September 21, 2010 to December 28, 2010;
- a Business Number Summary of Accounts from the CRA showing that the Appellant's business was incorporated on April 16, 2010, listing the Appellant as contact person and director of the business.

[11] On June 9, 2015, the Respondent prepared a note further to its investigation of the Appellant's alleged self-employment and availability. It noted that the Appellant received regular benefits up to March 5, 2011, and that he did not report work or earnings throughout his claim. The Respondent summarized details provided by the Appellant in his self-employment

questionnaire. It noted that the Appellant considered the business to be his principal means of livelihood, that it was successful, that he had steady work since the business opened five years ago, and that aside from the self-employment, the Appellant was not seeking work. It stated that the Appellant did not discuss his self-employment with the Respondent because he knew it would take 10 months to set up the business, and that any money that the business made went directly to pay rent, utilities and other business expenses, leaving no money for him to take a wage, and that he had to add money from his credit card to make the business run. The Respondent noted that even if the Appellant did not understand the requirement to report time spent setting up the business, he still answered "no" to questions asking if he worked between September 21, 2010 and February 5, 2011. It noted that this was a first misrepresentation and that a warning should be issued.

[12] On September 12, 2015, the Respondent determined that the Appellant is not considered to be unemployed because he was working full work weeks in his self-employment business, and was deemed to be not unemployed. It noted that an overpayment would result from this disentitlement. The Respondent also noted that the Appellant accepted his rights and responsibilities when he completed his initial claim for benefits and he was notified to report all employment, whether he worked for someone else or himself, and that he was to accurately report all employment earnings. The Respondent concluded that the Appellant made false statements knowingly and that it was considered a first misrepresentation. The Respondent noted the language barrier as a mitigating circumstance and it decided to issue a warning.

[13] On October 5, 2015, the Respondent notified the Appellant that according to its records, and contrary to what the Appellant said, he had been carrying on a business. It also notified the Appellant that it had concluded that he knowingly made a false representation, specifically that he commenced self-employment effective April 1, 2010.

[14] On October 10, 2015, the Respondent sent the Appellant a notice of debt in the amount of $21,635 for an overpayment that resulted due to an indefinite disentitlement.

[15] The Appellant sent a reconsideration request to the Respondent dated October 22, 2015. In his request, the Appellant said that he did register a business on April 16, 2010, but he did not make any money until September 2010, and he reported this on his employment insurance

reports. He stated that for tax years 2010 and 2011, his only source of income was from employment insurance benefits in the amounts of $23,244 and $4,917, respectively, and that his business was not fully running to the point where he would have income from it. The Appellant said that instead of going on welfare because he did not have a job, he decided to start his own business, and that he did not think he would be penalized for trying to make a living for himself and his family by doing so. The Appellant attached the notice of debt from the Respondent, his 2010 and 2011 tax return summaries, and the Respondent's two letters to him dated October 5, 2015.

[16] On November 24, 2015, the Respondent told the Appellant that it had determined that he was self-employed effective the date he signed his lease, and that a retroactive disentitlement resulted in a debt of $21,635. It said that following the lease signing, the Appellant failed to report that he was self-employed or that he made any money once production commenced. The Respondent told the Appellant that he had provided no evidence that he was engaged in an active search for work in an employer/employee relationship, and that in the absence of new information, it notified the Appellant that it was maintaining its decisions of October 5, 2015.

[17] The Appellant sent a letter to the Respondent dated December 29, 2015, concerning his overpayment. He gave a summary of the creation of his business and reiterated that he had not made any money from the business and said that he had concentrated his efforts on finding a job. The Appellant attached to his letter a log of his job search activity from April 8, 2010 to September 29, 2010.

[18] On February 16, 2016, the Respondent notified the Appellant that it could not proceed with his reconsideration request of December 29, 2015, because a reconsideration decision had already been rendered on November 24, 2015.

[19] On March 3, 2016, the Appellant filed a notice of appeal with the Tribunal. The Appellant attached to his notice of appeal the letter dated December 29, 2015, that he had sent to the Respondent along with his job search activity log.

[20] On March 8, 2016, the Respondent prepared a document that detailed how the Internet Reporting Service system functions, and certified copies of the Appellant's internet e-report

questions and answers. In each of the 25 e-reports that were completed for report weeks starting March 28, 2010 and ending on March 5, 2011, the Appellant responded "no" to the questions, "[a]re you self-employed" and "[d]id you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self-employment". Each bi-weekly e-report contained a confirmation statement in which the Appellant declared that the answers he provided in the report were true to the best of his knowledge.

[21] At the hearing, the Appellant testified that he was looking for work but could not find any, so his friend suggested that he open his own business and that in that way he could find more customers as a subcontractor. He confirmed that he rented space for his business on April 1, 2010, and registered the business on April 16, 2010. In response to a question from the Tribunal, the Appellant stated that he started setting up the business from April 2010, and that from that time he was purchasing machines, and learning about and starting to operate them, adding that he spent most of his days trying to find work. He clarified that although he said that he spent 1,568 hours setting up the business, he spent seven or eight hours a day on his business, and the same amount or more hours looking for work, adding that the time he spent on his business did not take over the time that he was looking for work. He said that he opened his business in order to have extra part-time work, or possibly full-time work eventually. The Appellant reiterated that he did not make any income during this period. He also clarified that in completing the self-employment questionnaire, when he said that he was personally involved in the operation of his business for eight hours per day, 22 days a month, he was referring to the moment that he was completing the questionnaire. The Appellant stated that his job searches included looking for work on the internet, phoning companies, visiting them in person, and that this is how he got the idea for his business. His witness clarified that sometimes the employers said they did not have positions available, but said that they could give the Appellant work if he had his own business.

[22] The Appellant clarified that the machines that he operates are fully automated, can work automatically for 12 to 14 hours, and that it is not necessary that he be present while they are operating. He said that he was also able to check the machines' progress over the internet. The Appellant said that for 2010, he had $6,758 in sales, but had no income from the business. He stated that because the employment insurance benefits were not sufficient to live on, he had to

rely on his credit cards and withdraw $22,000 from his RRSPs. The Appellant said that he made a mistake by not advising the Respondent that he had a registered business. He said that he did not think that he had to do so because he was not making any income from the business. The Appellant testified that he now makes a decent living from his business.

SUBMSSIONS

Weeks of entitlement

[23] The Appellant submitted that the Respondent's reconsideration decision is incorrect and that the he registered his business with the intent to have the option of working for an employer through a business-to-business relationship rather than in a traditional employee-to-employer relationship. He argued that it was not his intent to concentrate on building a business at that time, and that this is evident from the lack of any sales or transactions taking place between April 1, 2010 and September 1, 2010. The Appellant said that the lease agreement that was signed in April 2010, was done to establish an address for the business and support its registration, but the space was not occupied until September 2010, when he established contact with his first customers. He submitted that during this time, he was solely concentrating on finding a job and getting off employment insurance, as demonstrated by his daily job search activity log.

[24] The Appellant sent the Tribunal updated submissions in which he requested that a full review be completed of the transcript or recording of his initial appeal hearing before the General Division of the Tribunal. He stated that he made a mistake of not notifying the government about the business that he registered in April 2010, and that this was due to the fact that he was not earning income for the majority of time that he received employment insurance benefits, and that when he was earning income, it was insufficient to live off and went towards business expenses. The Appellant said that he thought that if he was not making any money from his business and his primary goal was to find full-time work, then he could not claim to be self-employed, but that this was his error for which he took full responsibility.

[25] The Appellant addressed the six factors referred to in section 30 of the Regulations. Concerning time spent, the Appellant said that he spent countless hours searching for employment opportunities online and in person. He said that he should not be penalized because

he expanded his options for finding work and took on greater risk than most in order to get off employment insurance. Concerning the nature and amount of the capital and resources invested, the Appellant said that the capital and resources invested in the business comprised any available time he had after searching for full-time employment, and credit/loans he obtained from equity in his home, credit cards and private loans. He said that the personal time he invested in the business would be considered "after hours" because his primary focus was finding full-time employment. He said that he saw the business as a job opportunity if full-time employment with a company was not available, but also as a good secondary source of income even if he was employed full-time by another company.

[26] Concerning the financial success or failure of the business, the Appellant indicated that the income generated by the business during the time that he was on employment insurance benefits was extremely minimal and not sufficient to live off, but was used to pay for business expenses he had incurred. He added that while he was receiving benefits the business would not be considered to be successful based on its financial performance. Concerning the continuity of the employment or business, he said that establishing the business and his investment in it was to provide an option for potential employers to give him work as a sub-contractor and as a potential future source of secondary income. He said that when on employment insurance benefits, he never operated the business on a full-time basis. Concerning the nature of the business, the Appellant said that the business is highly specialized and relates to his training and work experience. Concerning his intention and willingness to seek and immediately accept alternate employment, the Appellant reiterated that his primary goal was to find full-time employment. He said that his business was specifically designed to allow for part-time operation, so he could take on full-time work and still operate the business.

[27] The Appellant's witness submitted that the Appellant did his best to find work because he wanted steady work and the last thing he wanted was to remain on employment insurance benefits. He disputed the Respondent's submission that the Appellant did not say how much time he spent on his job searches, stating that there are only so many websites that apply to a particular person's experience, and without the right experience, one cannot apply for the job. He also stated that the Respondent did not understand how the Appellant's business operated when it said that the Appellant's understanding of English did not impact his ability to find

comparable work. The witness stated that the business that the Appellant started was entirely different from his previous job, and that because 90% of the workers spoke the same language as the Appellant, there was no need for the Appellant to speak English. In response to the Respondent's submission that the larger the financial commitment to an enterprise, the more likely it is that the business is intended to be or become the claimant's principal means of livelihood, the witness argued that the Appellant was simply looking at his business as a long-term investment, and that because the machines he operates do not require him to be present, he would have been able to set up the machines in the morning, then go to a full-time job, and return to his machines at the end of the day to finish up. The witness also disputed the Respondent's submission that it would be unlikely that the Appellant would risk leaving product for a lengthy period of time without monitoring it, stating that the Appellant would risk losing clientele if the product was ruined and that it would be difficult for him to maintain a co-investor where the Appellant was leaving product unattended for lengthy periods for full-time work. The witness stated that if anything happened, the machine would just stop, arguing that it was possible to survive through automation.

[28] The Respondent submitted that 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 it as a principal means of livelihood. It argued that given the amount of money and time devoted to the business, the Appellant was not willing to accept alternate employment while in receipt of benefits. It stated that employment insurance benefits were never intended to provide income to support an individual seeking to establish a business-to-business relationship, but are intended to provide temporary income support to those individuals who are looking for work in an employer-employee relationship. The Respondent argued that the Appellant has failed to demonstrate a willingness to search for alternate employment. It concluded that the list of companies that the Appellant provided were contacted in an effort to advance his business and that given that he had invested $110,000 into his business, it is unlikely that he was making contact with these companies looking for a job. It stated that when viewed objectively, all factors point to a finding that the Appellant's engagement in the operation of his business was that of a person who would normally rely on that level of self-employment as their principal means of livelihood and

submitted that the Appellant has not rebutted the presumption that he was working a full working week because he does not meet the exception under subsection 30(2) of the Regulations.

[29] In its updated submissions, the Respondent submitted that the lack of financial success of the Appellant's business does not prove that he was engaged in self-employment activities to a minor extent. It argued that the larger the financial commitment to an enterprise, the more likely it is that the business is intended to be or become the claimant's principal means of livelihood. It stated that the Appellant put his limited income from self-employment back into the business while it struggled and had a significant amount of debt, and it maintains that the Appellant has a significant financial investment in his self-employment and his intention is to make it his principal means of livelihood. The Respondent stated that it doubted the Appellant's statement that he spends minimal time on customer's orders and that this allowed him to find full-time work. It submitted that the Appellant's insufficient job search activities indicate that his focus was on finding customers for his self-employment and that he took advantage of his period of unemployment to focus on his self-employment.

Penalty

[30] The Appellant submitted that his English is broken and therefore his understanding of the employment insurance system is minimal and this has resulted in miscommunication that has led to misunderstandings.

[31] The Respondent submitted that the Appellant made misrepresentations because he knew that he was engaged in self-employment from the date he signed the lease in April 2010, and that while engaged in the production or set-up phase of the business, he was engaged in developing his business on a full-time basis even prior to signing the lease, but reported no work and no earnings. The Respondent pointed out that where a claimant has either received benefits to which he or she is not entitled, or has not received benefits to which he or she is entitled, section 52 of the Act gives the Respondent the authority to reconsider that individual's claim for benefits within 36 months after the benefits have been paid or would have been payable, and that if the Respondent is of the opinion that the claimant provided false or misleading information, whether or not the claimant provided the false or misleading information knowingly, the Respondent may reconsider that individual's claim for benefits up to 72 months after the benefits have been paid

or would have been payable. The Respondent submitted that it rendered its decision concerning the penalty in a judicial manner because all pertinent circumstances were considered when assessing the penalty amount.

[32] In its updated submissions, the Respondent maintained that the Appellant was generating income while in self-employment and failed to indicate this income on his claimant reports, despite the reports clearly advising him to include his work and income from self-employment. It argued that the Appellant knew or ought to have known that by not reporting his involvement in self-employment on his claimant's reports would mislead the Respondent into paying him benefits to which he was not entitled.

ANALYSIS

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

Weeks of entitlement

[34] The first issue to be decided is whether the Appellant failed to prove that he was unemployed within the meaning of sections 9 and 11 of the Act and section 30 of the Regulations.

[35] Section 9 of the Act states that when an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

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

[37] Subsection 30(1) of the Regulations states that subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

[38] Subsection 30(2) of the Regulations states that where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

[39] Subsection 30(3) of the Regulations states that the circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are

a) the time spent;

b) the nature and amount of the capital and resources invested;

c) the financial success or failure of the employment or business;

d) the continuity of the employment or business;

e) the nature of the employment or business; and

f) the claimant's intention and willingness to seek and immediately accept alternate employment,

[40] Subsection 30(5) of the Regulations states that For the purposes of this section, self-employed person means an individual who

a) is or was engaged in a business; or

b) is employed but does not have insurable employment by reason of paragraph 5(2)(b) of the Act.

[41] The Federal Court of Appeal has held that as an operator of a business, it is up to the claimant to rebut the presumption that he is working a full working week.

> *Lemay v. Canada Employment Insurance Commission*, A-662-97; *Turcotte v. Canada Employment Insurance Commission*, A-664-97

[42] The Appellant requested that the Tribunal review the recording of his first hearing before the General Division. The Tribunal notes that his testimony remained fairly consistent with the statements he made to the Respondent and with that from the second hearing before the General Division. The Appellant's evidence is that during the course of looking for full-time work, a friend recommended that instead of looking for work as an employee, he should open his own business and find customers as a subcontractor. His witness said that some employers told the Appellant that they did not have a position for him, but that they could give him work if he had his own business. The Appellant indicated in his self-employment questionnaire that his business was incorporated on April 16, 2010, and that he signed a two-year lease on March 30, 2010, with lease costs of $1,600 per month. The Appellant said that he had taken a $50,000 loan from the equity in his personal residence and credit cards, and received a contribution from his partner to finance equipment. He also said that he had taken a private loan in the amount of $60,000 for which he had to make payments of $1,000 per month. The Appellant indicated in the questionnaire that he spent 1,568 hours to set up the business in 2010, but testified at the hearing that if he had spent seven or eight hours a day on his business, he spent the same amount or more looking for work, and that his work on his business did not take over any time from his looking for work. The Tribunal finds that based on the Appellant's ownership of a business and activities that he said he undertook related to the start-up of the business, he was engaged in the operation of a business.

[43] The Tribunal will now assess the six circumstances described in subsection 30(3) of the Regulations to determine whether the Appellant's involvement in the operation of the business was to such a minor extent that a person would not normally rely on that engagement as a principal means of livelihood. In doing so, the Tribunal is guided by the Federal Court of Appeal that held that the time spent is the most important and the most relevant factor to consider in determining whether a claimant is working a full working week.

Martens v. Canada (AG), 2008 FCA 240; *Canada (AG) v. Jouan*, A-366-94

Time spent

[44] The Appellant indicated in his self-employment questionnaire that he spent 1,568 hours setting up his business. He later clarified that although he spent seven or eight hours a day on his

business, he spent the same amount or more hours looking for work. The Appellant testified that he started setting up his business from April 2010, and that from that time, he purchased machines, learned about them and started operating them. He also testified that while visiting companies in person as part of his job search, he used the opportunity to get ideas for his business. Notwithstanding the Appellant's submission that he spent countless hours searching for employment opportunities and should not be penalized because he expanded his options for finding work and took on greater risk than most related to his business, the Tribunal finds that the Appellant spent a significant number of hours setting up his business. The Tribunal accepts the Appellant's evidence that he spent the same or more number of hours looking for work, and he is to be commended for that. However, the Tribunal does not find that this minimizes the significance of time the Appellant spent setting up his business.

[45] Although the Appellant testified that the machines at his business are fully automated and can work automatically for 12 to 14 hours, meaning that it is not necessary that he be present while they are operating, the Tribunal finds that the time spent in actual operation of the Appellant's business after the business was set up is more an indicator of how the business operates than it is of whether the time the Appellant spent operating the business was such that it would not normally be relied upon as a principal means of livelihood.

Nature and amount of the capital and resources invested

[46] The Appellant said that he financed his business using a $50,000 loan from the equity in his residence and from his credit cards, and that he obtained a $60,000 business loan for which he was required to make payments of $1,000 per month. The Appellant also signed a two-year lease that required monthly payments of $1,600 per month plus GST/PST and additional fees. The Tribunal finds that the Appellant's financial commitment associated with having signed a two-year lease and having taken $50,000 from the equity in his residence and his credit cards, and having secured a $60,000 business loaned, at a total cost of more than $2,600 per month, was significant.

Financial success or failure of the employment or business

[47] The Appellant submitted that while he was on employment insurance benefits, the business would not have been considered to be successful based on its financial performance. He said that the income generated by the business was extremely minimal and not sufficient to live off, and was used to pay for business expenses. The Appellant's evidence is that from September 21, 2010 to December 31, 2010, his business income was $6748.91. In his self-employment questionnaire, the Appellant indicated that monthly income of the business was $13,000 and the monthly expenses were $13,000. He also indicated that he considered his business to be successful, that the business had been open for almost five years, and that he considered the business to be his principal means of livelihood.

Continuity of the employment or business

[48] The Respondent received information from the CRA that the Appellant had applied for a Business Registration Number on April 19, 2010. The Appellant had previously signed a two-year lease to operate his business, and indicated that he spent 1,568 hours setting up the business. Although the Appellant indicated that his only source of income in 2010 and 2011 was from employment insurance benefits, the business continued to operate to the point that the Appellant assessed it as being successful. The Appellant submitted that he established the business to provide an option for potential employers to give him work as a subcontractor, and also as a potential future source of secondary income. Notwithstanding the Appellant's stated intent in establishing his business, in view of the continued existence of the Appellant's business from September 21, 2010, when the Appellant billed his first invoice, from having business income of only $6,748.91 from September 21, 2010 to December 31, 2010, to the point where the business became the Appellant's principal means of livelihood , the Tribunal finds that the Appellant made sustained and continuous effort to advance his business from the date that he signed the lease for his business.

Nature of the Employment or business

[49] The Appellant submitted that his business is highly specialized and relates to his training and work experience. The Tribunal finds that this is consistent with his statement that as he

conducted in-person job searches, he got the idea for his own business, and is also consistent with his witness' testimony that employers said that they could give the Appellant work if he had his own business. The Tribunal finds that the Appellant demonstrated a strong desire to remain the specialized business industry for which he had training and work experience.

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

[50] The Appellant submitted a log of his job search activity from April 8, 2010 to September 29, 2010. At the hearing, the Appellant said that as part of his job search, he looked for work on the internet, phoned companies and visited them in person. He insisted that he was concentrating on finding a job so that he could stop receiving employment benefits. The Appellant said that he spent as much or more time looking for work than he did setting up his business. The Tribunal notes that other than saying generally that he continued to look for work, the Appellant did not submit additional evidence of job search activity beyond September 29, 2010. Notwithstanding, based on the Tribunal's understanding of how the Appellant's business operated, specifically that the Appellant was able to set-up the machines, and that they are fully automated and able to operate without him being present for 12 to 14 hours, the Tribunal accepts the Appellant's evidence that his intention was to find full-time employment and, at least for a period of time, operate his business on a part-time basis. The Tribunal therefore finds that although the Appellant made significant efforts and investment to set up his business, he was willing to seek and immediately accept employment, albeit in addition to continuing with part-time self-employment.

[51] Based on the findings concerning the six circumstances referred to in subsection 30(3) of the Regulations, the Tribunal finds that the Appellant has not rebutted the presumption that he was working full working weeks, pursuant to subsection 30(1) of the Regulations. The Tribunal does not find that the Appellant has demonstrated, based on his involvement and efforts in the set-up and operation of his business, that his engagement was to such a minor extent that a person would not normally rely on that engagement as a principal means of livelihood. In coming to this conclusion, the Tribunal notes in particular the time the Appellant spent on the business and the investment made in it. The Tribunal commends the Appellant for the risk that he took to expand his employment opportunities through self-employment, in part in an attempt

to minimize his receipt of employment insurance benefits. However, the Tribunal concludes that from time the Appellant signed the lease for his business on March 30, 2010, he was engaged in the operation of a business and is therefore considered to have worked full working weeks.

Imposition of a penalty

[52] The second issue to be decided is whether a penalty should be imposed because the Appellant knowingly provided false or misleading information.

[53] Paragraph 38(1)(b) of the Act states that the Commission may impose a penalty on a claimant if the Commission becomes aware of facts that, in its opinion, establish that the claimant, being required under the Act or the regulations to provide information, provided information or made a representation that the claimant knew was false or misleading. Section 41.1 provides that the Commission may issue a warning instead of setting the amount of a penalty under section 38.

Knowingly providing false or misleading information

[54] According to the Federal Court of Appeal, whether information is provided knowingly is determined on the balance of probabilities on the circumstances of each case or the evidence of each case. It must be decided whether the Appellant subjectively knew that the statement was false or misleading.

> *Canada (AG) v. Gates*, 1995 FCA 600; *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206

[55] The Appellant submitted that his understanding of the employment insurance system is minimal because of his broken English and that this resulted in miscommunication. He said that he did not have any earnings from his business during the time that he was receiving employment insurance benefits, so he did not report any. He testified that he had made a mistake by not advising the Respondent that he had registered a business. In each of the 25 e-reports that the Appellant completed for report weeks starting March 28, 2010 and ending on March 5, 2011, the Appellant responded "no" to the questions, "[a]re you self-employed" and "[d]id you work or receive any earnings during the period of this report? This includes work for which you will be

paid later, unpaid work or self-employment". Having found that the Appellant was self-employed from March 30, 2010, when he signed a lease for his business, the Tribunal finds that Appellant's responses to these questions were false.

[56] The Tribunal acknowledges that the Appellant's understanding of and ability to communicate in English is limited, which necessitated the use of an interpreter at the hearing. However, the Tribunal finds that it was the Appellant's responsibility to ensure that he understood both his initial claim for benefits and the bi-weekly claims that he made during his benefit period. The Tribunal notes that the Appellant indicated that he had read, understood and accepted his rights and responsibilities when he made his initial claim for benefits, including a note concerning the consequences of knowingly withholding information or making a false or misleading statement, and that he declared that the answers that he provided in his e-reports were true to the best of his knowledge. The Appellant submitted that he thought that if he was not making money from his business and because his primary goal was to find full-time work, he could not claim to be self-employed, but added that this was his error. However, the Appellant also stated in his request for reconsideration that he decided to start his own business instead of going on welfare, and that he should not be penalized for doing so. The Tribunal finds that notwithstanding the Appellant's statement that he did not think he was not self-employed because he was not making money from his business, because the Appellant said decided to start his own business, because he invested time and money to set up the business, and because the business became operational during his benefit period, the Appellant had subjective knowledge that information he was providing was inaccurate and that, on a balance of probabilities, he knowingly provided false or misleading information. The Tribunal is supported in this finding by the Federal Court of Appeal which held that common sense as well as objective factors should be taken into account when determining if the claimant had subjective knowledge that the information she provided was false.

Mootoo v. Canada (AG), 2003 FCA 206; *Canada (AG) v. Gates*, 1995 FCA 600

Decision to issue a warning

[57] The Tribunal is guided by the principle of the Federal Court of Appeal that discretionary decisions of the Respondent should not be disturbed unless it failed to act in a judicial manner,

meaning acting in good faith, having regard to all the relevant factors and ignoring any irrelevant factors.

Canada (AG) v. Sirois, A-600-95; *Canada (AG) v. Chartier*, A-42-90

[58] The Tribunal notes that paragraph 40(b) of the Act states that a penalty shall not be imposed under section 38 if 36 months have passed since the day on which the act or omission occurred, and that subsection 41.1(2) of the Act states that notwithstanding paragraph 40(b), a warning may be issued within 72 months after the day on which the act or omission occurred. The Respondent took into consideration the Appellant's circumstances when assessing the penalty, noting that even if the Appellant did not understand that he was required to report the time spent setting up his business in his e-reports, he still responded that he did not work between September 21, 2010 and February 5, 2011. The Respondent also noted that this was a first misrepresentation for the Appellant and decided that a warning should be issued. The Appellant attributed his miscommunication to his broken English, which the Respondent considered as a mitigating circumstance. In spite of the reasons given by the Appellant for the misrepresentation, the Tribunal finds that the Respondent has considered all pertinent circumstances and that there is no reason to disturb its decision to issue a warning. The Tribunal therefore finds that a warning should be issued pursuant to section 41.1 of the Act because the Appellant knowingly provided false or misleading information, and that the Respondent exercised its discretion in a judicial manner in issuing a warning.

[59] Based on the foregoing, the Tribunal finds that the Appellant failed to prove that he was unemployed within the meaning of sections 9 and 11 of the Act and section 30 of the Regulations. The Tribunal also finds that because the Respondent exercised its discretion in a judicial manner, the Respondent properly issued a warning pursuant to section 41.1 of the Act for making misrepresentations by knowingly providing false or misleading information to the Respondent.

CONCLUSION

[60] The appeal is dismissed.

Audrey Mitchell

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.

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

> **(a)** in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
>
> **(b)** being required under this Act or the regulations to provide information, provided

information or made a representation that the claimant or other person knew was false or misleading;

(c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;

(d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

(e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

(f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;

(g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

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

(2) The Commission may set the amount of the penalty for each act or omission at not more than

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

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

(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and

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

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

(3) For greater certainty, weeks of regular benefits that are repaid as a result of an act or omission mentioned in subsection (1) are deemed to be weeks of regular benefits paid for the purposes of the application of subsection 145(2).

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.