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

Citation: *P. S. v. Canada Employment Insurance Commission*, 2018 SST 195

Tribunal File Number: AD-17-597

BETWEEN:

**P. S.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Stephen Bergen

DATE OF DECISION: February 27, 2018

Canada

## DECISION AND REASONS

## DECISION

[1] On the issue of disentitlement to benefits by reason of the Appellant's self-employment in the period from November 2009 to March 2011, the appeal is allowed.

[2] On the issue of the Commission's exercise of discretion in respect of penalty and violation, the appeal is allowed and the monetary penalty is changed to a warning and the notice of violation is changed to a warning violation.

## OVERVIEW

[3] On July 30, 2017, the General Division of the Social Security Tribunal of Canada determined that the Appellant's employment or engagement in the operation of a business was not sufficiently minor as defined by subsections 30(2) and (3) of the *Employment Insurance Regulations* (Regulations) and that he was therefore unable to prove that he had weeks of unemployment per sections 9 and 11 of the *Employment Insurance Act* (Act) and section 30 of the Regulations such that benefits could be paid. The General Division also confirmed the penalties imposed by the Canada Employment Insurance Commission (Commission) under section 38 of the Act and the Notice of Violation issued under section 7 of the Act.

[4] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on August 28, 2017, and leave to appeal was granted on October 31, 2017.

[5] This appeal proceeded on the record for the following reasons:

a) The Member has determined that no further hearing is required.

b) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

c) The partial concession of the Respondent and the qualified consent of the Appellant.

## ISSUES

**[6] Issue 1: Did the General Division err in law in failing to analyze whether the Appellant's self-employment was such that a person would not normally rely on that employment or engagement as a principal means of livelihood?**

**[7] Issue 2: Did the General Division err in law in finding that the Appellant knowingly make a false statement?**

**[8] Issue 3: Did the General Division base its decision that the Commission exercised its discretion judiciously on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the evidence before it?**

## THE LAW

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the following are the only grounds of appeal:

> **(a)** the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> **(b)** the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> **(c)** the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

## SUBMISSIONS

### Appellant's submissions

[10] The Appellant agrees with the Respondent's submissions to the extent that the appeal should be allowed on the issue of disentitlement. He argues that the General Division ignored or misinterpreted the evidence in its findings in relation to various factors set out in section 30 of the Regulations.

[11] The Appellant also submits that the General Division erred in law by misinterpreting section 30 of the Regulations by conflating paragraphs 30(3)(*c*) and 30(3)(*b*).

[12] So far as the penalty and notice of violation are concerned, the Appellant argues that the General Division erred in law by failing to state whether the Respondent met the onus of establishing that he had knowingly made a false statement to the Commission. He also argues that the minor nature of his business involvement and the fact that he did not rely on it as a principal means of livelihood are now accepted in the Respondent's position. This should be accepted as evidence that he did not make a false statement *knowingly*.

[13] In the event that the Appeal Division accepts the Respondent's recommendation that the appeal be "dismissed with modifications" on the issues of penalty and violation, with both the penalty and violation being changed to warnings, the Appellant admits a willingness to concede to those changes.

**Respondent's submissions**

[14] The Respondent submits that the General Division erred in law by misapplying the subsection 30(3) factors set out in the Act and that it failed to adequately address the legal test in subsection 30(2). The Respondent further contends that the General Division erred under paragraphs 58(1)(*b*) and 58(1)(*c*) of the DESD Act in finding that the Appellant could rely on his business as a principal means of livelihood. According to the Respondent, the General Division failed to consider the evidence of the time spent and intention and willingness to seek and accept alternate employment in relation only to the specific "period under review."

[15] In relation to the penalty and notice of violation, the Respondent maintains that the false representations in terms of "self-employment" and "earnings during the period of this report" were made knowingly. However, in light of its present understanding of the circumstances, the Respondent recommends that both the penalty and the violation be reduced to warnings.

## ANALYSIS

### Issue 1: Did the General Division err in law in failing to analyze whether the Appellant's self-employment was such that a person would not normally rely on that employment or engagement as a principal means of livelihood?

[16] In my leave to appeal decision I set out reasons why I thought the appeal had a reasonable chance of success on appeal in connection with the General Division's application of the factors in subsection 30(3) to the test in subsection 30(2) of the Regulations. The Respondent now recommends that the appeal be allowed on the issue of the Appellant's disentitlement to Employment Insurance benefits for having engaged in self-employment activities.

[17] The Appellant is also supportive of allowing the appeal on the issue of disentitlement.

[18] The General Division considered the six factors identified in subsection 30(3), and based on its review of those factors, found that the Appellant's involvement was not minor in extent. The circumstances described in subsection 30(3) of the Regulations are intended to be considered for the purpose of determining whether a claimant's employment or engagement in the operation of a business is of a minor extent.

[19] "Minor extent" is defined in subsection 30(2) to be such as a person would not normally rely on that employment or engagement as a principal means of livelihood. The General Division analyzed the individual factors but nothing in the decision suggests that the General Division turned its mind to the test laid out in subsection 30(2) of the Act, i.e. whether the Applicant's involvement in his business was "to such a minor extent *that a person would not normally rely on that employment or engagement as a principal means of livelihood*." I find that the General Division did not objectively consider whether the degree of self-employment or engagement in the operation of a business constituted a sufficient basis upon which a person would normally rely as a principal means of livelihood and therefore it did not complete its

analysis and correctly apply the test.[1] This is an error of law as described in paragraph 58(1)(*b*) of the DESD Act.

[20] I accept that the Appellant presented sufficient evidence to the General Division to establish that his self-employment was of such a minor extent that a person would not normally rely on it as a principal means of livelihood. I further note that the Commission now concedes that the evidence on "time spent" and "intention and willingness to seek and accept alternate employment" is insufficient to support a finding that the Appellant's involvement was not minor in extent. Accordingly, I find that the Appellant should not be disentitled to benefits by reason of his self-employment in the period from November 2009 to March 2011.

[21] The Respondent acknowledges additional errors in the General Division's decision on the issue of disentitlement, but given my finding above and that both the Appellant and the Respondent agree that the appeal should be allowed on the issue of disentitlement, it is not necessary for me to consider any additional grounds.

**Issue 2: Did the General Division err in law in finding that the Appellant knowingly made a false statement?**

[22] The General Division did not err in law in finding that the Appellant knowingly made a false statement. It recorded the Appellant's testimony that he did not feel that he was self-employed, and that he considered himself to be "not working." At the same time, the Appellant had testified that he understood what was meant by "self-employed" and he admitted he was self-employed. He explained that he had indicated he was not self-employed because he was not paying himself. Whether or not he could support himself with his self-employment activities, the Appellant has acknowledged that he knew he was self-employed when he said he was not self- employed. To make a false statement "knowingly" does not require that he made the statement with the intent to defraud—only that he knew it was false.

[23] The Appellant has not identified an error in the General Division's understanding of the test set out in paragraph 38(1)(*d*), and I am unable to find such an error. There is no basis on

[1] See *Martens v. Canada (Attorney General)*, 2008 FCA 240.

which to disturb the General Division's finding that the Appellant made a claim or declaration that he knew was false or misleading.

**Issue 3: Did the General Division base its decision that the Commission exercised its discretion judiciously on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the evidence before it?**

[24] The General Division erred in finding that the Commission exercised its discretion judiciously. The General Division was correct that the penalty and notice of violation that were imposed by the Commission in consequence of the Appellant's misrepresentation are within the Commission's discretion. However, its finding that the Commission exercised its discretion was made without regard to the evidence that the Appellant had only a minor involvement in self-employment.

[25] I have accepted that the Appellant's involvement was minor. The minor extent of the Appellant's self-employment is relevant to the exercise of that discretion but it was not factored into the penalty and violation determinations.

[26] The Federal Court of Appeal has held that the Umpire (in the administrative appeal scheme under the former *Unemployment Insurance Act*) had the authority to determine the legality of the Commission's exercise of discretion as well as the appropriateness of the penalty.[2] The Federal Court has also held that even facts that were unknown to the Commission at the time it exercised its discretion may be taken into consideration in determining whether that discretion was properly exercised.[3] I accept that the principles from these cases also apply to appeal decisions under the current Act and that I also have the authority to determine whether the discretion was exercised judiciously.

[27] I find that the Commission did not exercise its discretion judiciously. This is further to my finding that the Appellant's self-employment involvement was minor in extent, that the minor extent is relevant to the exercise of discretion, and that it was not considered by the Commission.

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[2] *Morin v. Canada (Employment and Immigration Commission)*, 1996 CanLII 12466 (FCA).
[3] *Canada (Attorney General) c. Dunham*, 1996 CanLII 3967 (FCA).

[28] The decision by the Federal Court of Appeal in *Morin* also permits me to address the penalty and violation. In light of the Respondent's willingness to reduce both the penalty and the violation to warnings only, and the Appellant's willingness to accept these modifications, I do not consider it necessary or expedient to return the matter to the General Division to determine the appropriateness of the penalty or violation. I accept the position of the parties and I agree that the minor extent of the self-employment justifies a warning in respect of both the penalty and the violation.

**CONCLUSION**

[29] In respect of the disentitlement, the appeal is allowed. The Appellant shall not be disentitled to benefits for the period from November 2009 and March 2011.

[30] In respect of the Commission's exercise of discretion regarding the penalty and violation, the appeal is allowed. I direct that the monetary penalty shall be changed to a warning and the notice of violation shall be changed to a warning violation.

Stephen Bergen
Member, Appeal Division