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

Citation: *H. F. v. Canada Employment Insurance Commission*, 2018 SST 268

Tribunal File Number: AD-17-357

BETWEEN:

H. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 26, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant (Claimant) was laid off from his employment on September 11, 2015. He applied for Employment Insurance benefits and a benefit period was established effective September 13, 2015. Even before he was laid off, he had set in motion plans to operate an "escape room" business by applying for a business registration number. On March 1, 2016, the Respondent, the Canada Employment Insurance Commission (Commission), wrote the Claimant, indicating that it had learned about the business registration application and asking for information about his self-employment. On receipt of additional information from the Claimant, the Commission determined that the Claimant had been self-employed and that he had knowingly made 15 false representations to the contrary. The Commission imposed a penalty of $5,000.00 and issued a notice of violation. A decision to this effect was dated July 19, 2016.

[3] The Claimant applied for a reconsideration, but the Commission, in separate letters dated September 22, 2016, indicated it was maintaining its decisions with respect to the penalty, the violation, and the determination that he was not unemployed because his self-employment was not minor in extent.

[4] On appeal, the General Division of the Social Security Tribunal confirmed that the Claimant should be disentitled to benefits because his self-employment was not minor in extent. It also confirmed that the misrepresentations had been made knowingly and that the Commission had exercised its discretion properly in imposing a penalty and issuing a notice of violation.

[5] Leave to appeal the General Division's decision was granted to the Claimant, and the Appeal Division must now determine whether the General Division made an error of fact or law or failed to observe a principle of natural justice. I find that the General Division erred in law in its consideration of the factors relevant to its conclusion that the Claimant's business involvement was not minor in extent and that he should be considered to have worked a full

working week in each week that he was involved in his business. I am returning this matter to the General Division for reconsideration. Because the General Division's determination on this matter is relevant to the exercise of discretion on the issues of penalty and violation, I am also returning those issues (including the underlying determination of whether the Claimant knowingly made a false statement) to the General Division for reconsideration.

ISSUES

[6] Was the General Division's decision that the Claimant's involvement in the business was not minor in extent based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

[7] Did the General Division err in law in failing to consider and apply the legal test in determining that the Claimant's employment or engagement in the operation of the business was not minor in extent in each week in which he was engaged in the operation of his business, and that he must therefore be considered to have worked a full working week in each week?

[8] Was the General Division's decision that the Commission properly imposed a penalty under s. 38 and a notice of violation under s. 7.1 of the *Employment Insurance Act* (Act) based on an erroneous finding that the claimant had knowingly made a false statement?

[9] Did the General Division fail to observe a principle of natural justice by not giving the Claimant an opportunity to review and respond to the decision before it was finalized and issued?

ANALYSIS

Standard of Review

[10] The Commission's written submissions suggest that it considers a standard of review analysis to be appropriate. However, the Commission does not specifically argue that I should apply the standards of review, or that reasonableness is the appropriate standard.

[11] I recognize that the grounds of appeal set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) are very similar to the usual grounds for

judicial review, and this suggests that the standards of review might also apply here. However, there has been some recent case law from the Federal Court of Appeal that has not required that the standards of review be applied, and I do not consider it to be necessary.

[12] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division, but it indicated in *obiter* that it was not convinced that Appeal Division decisions should be subjected to a standard of review analysis. The Court observed that the Appeal Division has as much expertise as the General Division and that it is therefore not required to show deference.

[13] Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review.

[14] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but it did so in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court found that the principles that guide the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[15] The enabling statute for administrative appeals of Employment Insurance decisions is the DESDA, and the DESDA does not provide that a review should be conducted in accordance with the standards of review.

[16] Other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review (such as *Hurtubise v. Canada [Attorney General]*, 2016 FCA 147; and *Thibodeau v. Canada [Attorney General]*, 2015 FCA 167). Nonetheless, the Federal Court of Appeal does not appear to be of one mind on the applicability of such an analysis within an administrative appeal process.

[17] I agree with the Court in *Jean*, where it referred to one of the grounds of appeal set out in s. 58(1) of the DESDA and noted, “There is no need to add to this wording the case law that has developed on judicial review.” I will therefore consider this appeal by referring only to the

grounds of appeal set out in the DESDA, and without reference to “reasonableness” or the standard of review.

Decision on the Merits

General principles

[18] The General Division is required to consider and weigh the evidence before it and to make findings of fact. It is also required to apply the law. The law includes the statutory provisions of the Act and the *Employment Insurance Regulations* (Regulations) that are relevant to the issues under consideration, and could also include court decisions that have interpreted the statutory provisions. Finally, the General Division must reach conclusions on the issues that it has to decide, by applying the law to the facts.

[19] The appeal to the General Division was unsuccessful and an appeal of the General Division decision now comes before the Appeal Division. The Appeal Division is permitted to interfere with a General Division decision only if the General Division has made certain types of errors, which are called “grounds of appeal.”

[20] Subsection 58(1) of the DESDA sets out 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.

Issues in the appeal

The finding that the Claimant's involvement in his business was not of a minor extent.

[21] Section 9 of the Act states that Employment Insurance benefits are payable only if a claimant has a week of unemployment that falls within a benefit period. Section 11 states that a week of unemployment is a week during which a claimant does not work a full working week. For persons who are self-employed, the Regulations set out specific rules for what is considered a full working week.

[22] According to s. 30(2) of the Regulations, a claimant will not be regarded as having worked a full working week if his employment or engagement in a business in that week is considered "of such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood" (abbreviated below as "minor extent.")

[23] The Claimant argues that the General Division failed to properly consider his evidence in determining that he was not involved to such a minor extent. He asserts that the decision does not explain why the General Division Member did not believe his testimony that he spent 10 hours a week on his business once it was operating. He says that he provided evidence of the nature of the business and how little it required of him, and that he could have provided a more detailed breakdown if asked, but that the General Division Member did not ask him to elaborate further. He also suggests that the General Division's consideration of his various tasks and responsibilities at paragraph 61 was "just based on their common sense".

[24] However, the Claimant does not direct me to any specific evidence that was overlooked or misunderstood. The Claimant simply disagrees with the General Division's finding that his evidence was not credible, and he disagrees with the result. This does not lead to the conclusion that findings of fact were perverse, capricious, or made without regard for the evidence.[1]

[25] When the General Division rejected the credibility of the Claimant's statement, it was said to be in light of "his testimony that he worked 40 to 50 hours per week on the business just prior to November 11, 2015 [the date the business operations commenced]", and "the tasks and responsibilities he performed including: Scheduling employees for work, paying bills, overseeing

[1] *Griffin v. Canada (Attorney General)*, 2016 FC 874.

financing (including making bank deposits), communicating with prospective clients, booking clients, and pre-selling tickets to the escape room." Thus, it would appear that the credibility finding was based on the General Division's view that the Claimant's time estimate was implausible. Using the Claimant's term, the General Division applied "its own common sense" to reject the Claimant's statement.

[26] The Claimant was the only source of evidence relating to his involvement in operating the business. This evidence included his direct testimony as to his "time spent", in which he explained the minimal nature of some of his tasks and responsibilities. He differentiated between the nature and extent of his involvement during the business set-up phase and during the business operation phase. He said he spent 40–50 hours per week on the business leading up to his opening for business, but only 10 hours per week once the business was running.

[27] The General Division relied on a number of tasks listed at paragraph 61 to reject the Claimant's "10 hours per week" statement. It found the Claimant's statements to be not credible "in light of the tasks and responsibilities which he performed". The tasks that are listed are all found in the evidence: the Claimant's Self-Employment Questionnaire, his statements to the Commission, and his testimony. While the General Division's reasons for rejecting the Claimant's time estimate could have been more detailed, they are sufficient that I may discern its rationale: It is apparent that the General Division did not accept that the Claimant could perform all of those tasks in only 10 hours each week.

[28] I do not find that more justification is necessary,[2] and it is not my role to reassess or reweigh the evidence.[3] I find that the General Division's decision that the Claimant's involvement in his business was not of a minor extent was neither perverse nor capricious, and that the General Division had regard for the material before it.

Determining whether the business was of a "minor extent"

[29] The General Division erred in law in failing to correctly consider how several of the circumstances enumerated in s. 30(3) of the Regulations impact or influence its s. 30(2) determination that the Claimant's involvement in his business was not of a minor extent. If I

[2] *McKinnon v. Canada (Employment Insurance Commission)*, 2010 FCA 250.
[3] *Bergeron v. Canada (Attorney General)*, 2016 FC 220); *Hideq v. Canada (Attorney General)*, 2017 FC 439.

understood the Claimant's oral submissions correctly, he has argued that the General Division was selective in which of the considerations or factors it employed and that the General Division focused too heavily on the "time spent" factor. While the General Division is entitled to give more weight to one factor than another, I agree that the General Division failed to justify the manner in which several of the s. 30(2) factors influenced the decision.

[30] It is apparent that the General Division was live to the fact that s. 30(3) sets out six circumstances that must be considered in determining whether the Claimant's involvement in the business was of a minor extent. It is also apparent that the General Division had regard to the evidence and that the evidence was sorted in terms of its relationship to the individual circumstances identified in s. 30(3).

[31] However, considering the circumstances set out in s. 30(3) involves more than simply appreciating that they are relevant. The General Division must lay a foundation for the application of each circumstance with findings of relevant facts[4] and the General Division must draw the inferences from those facts by reference to the law that it is required to apply.[5] It is not apparent that the General Division made the necessary findings of fact or drew the necessary inferences, as described below.

Paragraph 30(3)(*a*): The time spent

[32] The "time spent" is one of the six considerations set out in s. 30(3) relevant to the determination in s. 30(2) of whether a claimant's employment or involvement in the operation of a business is "to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood".

[33] A determination that a claimant's involvement was not of a minor extent in relation to a week in which a claimant was self-employed or engaged in the operation of a business is required before the Commission may regard the claimant as "working a full working week" under s. 30(1).

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[4] *M.E.I. v. Carrozzella*,A-373-82
[5] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[34] As a result, in circumstances where involvement in the business is variable, the General Division must consider whether the Claimant's involvement in the business was of a minor extent in relation to each period in which the business activity/involvement is similar—even down to the individual week if necessary. The individual factors set out in s. 30(3) may or may not support that the involvement was of a minor extent, depending on how they apply week by week.

[35] On the facts of this case, the need for a more focused analysis applies particularly to the "time spent" factor. The Claimant distinguished between the set-up phase and the operational phase, and gave evidence as to his differing time involvement in each.

[36] The General Division appears to have accepted the Claimant's evidence that he worked 40–50 hours a week in the period leading up to November 11, 2015, when the business opened for business. However, it made no explicit finding in relation to the actual or presumed "time spent" by the Claimant on his business in the weeks that followed the November 11 opening.

[37] I accept that the General Division decision (and paragraph 58 in particular) implies that the General Division considered the Claimant to have spent something more than 10 hours per week on the business once it was operational, and that it is also implicit that the General Division considered the "time spent" factor to weigh against a finding that the Claimant's involvement was of a minor extent.

[38] However, the General Division did not identify where it would locate the tipping point between the amount of "time spent" that would support a "minor extent" finding and the amount that would oppose such a finding. I have allowed that the General Division implied certain findings but I cannot go further to draw an inference that the General Division resolved that "time spent" that is in excess of 10 hours a week must support a finding that a claimant's business involvement was not of a minor extent.

[39] Therefore, the implied finding that the Claimant spent more than 10 hours per week is not enough. Standing alone, it does not support the implied application of the "time spent" factor to reject a minor involvement.

[40] In my view, the General Division erred in law in failing to find necessary facts or draw necessary inferences, in order that it might deliberate how the "time spent" factor should impact its determination of whether the Claimant's involvement in the business was or was not of such a minor extent that he would not normally rely on that employment or engagement as a principal means of livelihood.

Paragraph 30(3)(*b*): The nature and amount of the capital and resources invested

[41] The General Division stated that it considered the investment to be substantial and to demonstrate a commitment to the business. It is apparent from reading paragraphs 55 and 61 of the decision that the General Division considered this factor to suggest that the Claimant's involvement was not of a minor extent. I accept that this factor was appropriately considered.

Paragraph 30(3)(*c*): The financial success or failure of the employment or business

[42] At paragraph 50, the General Division stated that the business was breaking even and that it had a closing balance of $33,806.00. The General Division also noted that it realized the Claimant did not intend to re-invest in or spend more time on the business (paragraph 42). At paragraph 59, the General Division found that the business continued to "break even".

[43] There is no discussion about the significance of the closing balance or the Claimant's intentions and it is not obvious whether the General Division considered "breaking even" to mean that the business was a success or a failure. The General Division made no finding and drew no inference, and I am unable to determine whether this factor was considered one that would support a "minor extent" involvement or one that would not.

Paragraph 30(3)(*d*): The continuity of the employment or business

[44] At paragraph 51, the General Division noted the Claimant's testimony that it was "hard to tell" whether the business would be continuing. It also noted that the Claimant has a five-year lease for the business premises. At paragraph 59, it said the business "has survived". Again, there was no analysis of this evidence or determination that the business is likely to continue, and, if so, for how long. The impact of this factor on the "minor extent" determination is unknown.

Paragraph 30(3)(*e*): The nature of the employment or business

[45] The nature of the business is simply recorded. The significance of this factor is unknown, so far as it bears on the General Division's decision that the Claimant's involvement in his business was of a minor extent.

Paragraph 30(3)(*f*): The claimant's intention and willingness to seek and immediately accept alternate employment

[46] The General Division considered evidence that the Claimant intended to find a job in his previous occupation as a petroleum engineer and that he was seeking a job in that field (in which he held a graduate degree). It also noted at paragraph 60 that the "Regulations [refer] to a willingness to accept 'alternate employment' and not just employment in a claimant's previous field of work."

[47] There was no clear finding that the Claimant did not intend or was unwilling to accept alternate employment, or on the manner in which this factor might or might not support a s. 30(2) finding. However, while the General Division did not articulate the relevance of its reference to "alternate employment", the context suggests that the General Division considered that the Claimant's job search was inadequate based on his intention to seek work within his area of professional experience and training and his records of seeking work within that area. I accept that this was the General Division's view.

[48] On that basis, it would seem that the General Division did not accept this factor as supportive of a conclusion that the Claimant's involvement was of a "minor extent". However, the reasons are wholly inadequate to determine whether the General Division erred in this regard. The General Division's reference to the Claimant's targeted job search suggests that it might have understood "alternate employment" to be broader than "suitable employment".

[49] In my view, it would be an error to read "alternate employment" in such a way as to require a self-employed person to be seeking employment across a broader spectrum of opportunities than would be required of a claimant who was not self-employed.

[50] Paragraph 18(1)(*a*) of the Act requires a claimant to be available for work in order to collect benefits and disentitles a claimant from benefits on any working day in which the claimant is not capable of and available for work and unable to obtain "suitable employment". According to the definition in s. 6(4) of the Act (and depending on whether a reasonable interval has lapsed from the date on which the Claimant became unemployed per s. 6[5]), suitable employment should not be "at a lower rate of earnings or on conditions less favourable than those that the claimant might reasonably expect to obtain, having regard to the conditions that the claimant usually obtained in their usual occupation, or would have obtained if they had continued to be so employed". One would expect, as a matter of common sense, that the Claimant's best chance of obtaining "suitable employment" would be in his previous field as a petroleum engineer.

[51] The reasons do not reveal what significance the General Division attached to this factor (intentions and willingness to obtain alternate employment). While I have accepted that the General Division found facts and drew an inference from those facts, I cannot determine from the reasons whether, in drawing that inference, it made an erroneous finding of fact, an error of law, or a mixed error of fact and law.

[52] In respect of this single factor, I consider the reasons to be insufficient.

Conclusion on s. 30(3) considerations

[53] In order to determine whether the Claimant's employment or engagement in the operation of his business was to such a minor extent that a person would not normally rely on that employment as a principal means of livelihood under s. 30(2) of the Regulations, the General Division must consider all of the circumstances in s. 30(3). In considering those circumstances, the General Division failed to make required findings of fact and failed to draw necessary inferences, such that it is not possible to determine how any or all of those circumstances led to the final decision. I find this to be an error of law under s. 58(1)(*b*) of the DESDA.

Penalty and violation

[54] According to s. 38(1)(*a*) of the Act, the Commission may impose a penalty if the claimant, in relation to a claim for benefits, makes a representation that the claimant knew was false or misleading. The General Division upheld the penalty and the notice of violation on the basis that the Claimant knew that his statements that he was not self-employed were false. The Claimant disagreed that he knew his statements were false, but he has not otherwise challenged the finding that the Commission exercised its discretion judicially in determining the nature and extent of the penalty or in the issuance of the notice of violation.

[55] This is understandable. The penalty and violation decisions are dependent on the finding that the Claimant knowingly made a false representation. If he can successfully argue that he did not knowingly make false statements, the penalty and violation cannot stand.

[56] However, the decision on the penalty and violation is also dependent on the requirement that the Commission exercise its discretion judicially, having regard to the relevant circumstances. Whether the Claimant's business involvement was of a "minor extent" in the weeks in which he was engaged in the operation of his business is a relevant circumstance.

[57] I have found that the General Division erred in law in its consideration of whether his involvement was of a minor extent in each week in which he was self-employed or engaged in the operation of his business (and whether those weeks should be considered full working weeks) and I will be returning this matter to the General Division for reconsideration. If the Claimant's business involvement is found by the General Division to be of a minor extent, this may influence the General Division's decision on whether the Commission exercised its discretion judicially in determining the penalty and violation.

[58] The issue on which I found an error of law, including the consideration of whether the Claimant's business involvement was of a minor extent under s. 30 of the Regulations (and whether the Claimant must be considered to have worked a full working week in weeks in which he was engaged in his business operations), is inextricable from the issue of penalty under s. 38 of the Act and violation under s. 7.1 of the Act. Therefore, I consider it necessary to refer the matter back to the General Division for reconsideration of both issues.

The substance of the right to be heard.

[59] The Claimant argued that he should have had an opportunity to review the decision before it was finalized and that it was a breach of natural justice for the General Division to not have offered him such an opportunity.

[60] There is no merit to this argument. The Claimant had the opportunity to present his evidence and arguments, to hear the Commission's arguments, and to respond to those arguments. This satisfies the natural justice right to be heard. There is no natural justice requirement to provide parties with editorial privileges, or to require prolonged debate or open-ended rebuttal. The finality of the decision is in everyone's best interests. The Claimant has had an additional opportunity to challenge the General Division decision, by way of the present appeal.

CONCLUSION

[61] The appeal is allowed. The matter is returned to the General Division for reconsideration on all issues.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 27, 2018
METHOD OF PROCEEDING:	Teleconference

APPEARANCES:	H. F., Appellant Susan Prud'homme, Representative for the Respondent