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

Citation: *M. S. v. Canada Employment Insurance Commission*, 2018 SST 695

Tribunal File Number: AD-18-143

BETWEEN:

M. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 25, 2018

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, M. S. (Claimant), applied for regular Employment Insurance benefits. The Respondent, The Canada Employment Insurance Commission (Commission), disentitled the Claimant from receiving benefits after finding he was involved in a business and therefore could not be considered unemployed. The Commission also issued a warning after finding that the Claimant knowingly made false representations. The Claimant requested a reconsideration of these decisions, and the Commission maintained its initial decisions. The Claimant appealed the decisions to the General Division of the Tribunal.

[3] The General Division found that the Claimant had not proven that he was unemployed within the meaning of the *Employment Insurance Act* (EI Act) and the *Employment Insurance Regulations* (EI Regulations). The General Division also found that the Claimant was properly issued a warning because he had provided information or made representations to the Commission that he knew were false or misleading.

[4] The Claimant was granted leave to appeal to the Appeal Division. He submits that the General Division erred in law in the application of sections 9 and 11 of the EI Act and section 30 of the EI Regulations. He also submits that 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.

[5] The Tribunal must decide whether the General Division erred in the interpretation and the application of sections 9 and 11 of the EI Act and section 30 of the EI Regulations by rendering a decision without regard for the material before it and whether the General Division erred when it concluded that the Claimant knowingly made false or misleading representations to the Commission.

[6] The Tribunal dismisses the Claimant’s appeal.

ISSUES

[7] Did the General Division err in fact or in law in the interpretation and application of sections 9 and 11 of the EI Act and section 30 of the EI Regulations by rendering a decision without regard for the material before it?

[8] Did the General Division err in fact or in law when it concluded that the Claimant knowingly made false or misleading representations to the Commission?

ANALYSIS

The Appeal Division's mandate

[9] The Federal Court of Appeal has determined that, when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the Appeal Division's mandate is conferred to it by sections 55 to 69 of that act.[1]

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or 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, the Tribunal must dismiss the appeal.

Issue 1: Did the General Division err in fact or in law in the interpretation and application of sections 9 and 11 of the EI Act and section 30 of the EI Regulations?

[12] This ground of appeal is dismissed.

[13] Subsection 30(5) of the EI Regulations states that, for the purposes of the self-employment section, "self-employed person" means an individual who is engaged in a business.

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[1] *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

[14] The General Division determined that, based on the Claimant's ownership of a business and activities that he said he undertook related to starting the business, he was engaged in the operation of a business.

[15] The Federal Court of Appeal has held that it is up to a claimant, as an operator of a business, to disprove the presumption that they are working a full working week.[3]

[16] The self-employment test requires an objective consideration of whether the level of such self-employment or engagement, viewed in light of the factors set out in subsection 30(3) of the EI Regulations, would be sufficient for a person to normally rely on as a principal means of livelihood.

[17] Recent case law has established that no one factor is decisive and each case must be considered on its own merits.[4] The Tribunal is of the view that the text of the legislation must be considered in its totality since a person could spend a limited amount of time on an employment or business activity but still pursue it as a principal means of livelihood. Furthermore, the failure to generate sufficient income does not in itself make a claimant unemployed.

[18] Subsection 30(3) of the EI Regulations specifies that six factors have to be taken into account when determining whether a claimant's self-employment is of a minor extent. The circumstances to be considered 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.

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[3] *Lemay v. Canada Employment Insurance Commission*, A-662-97; *Turcotte v. Canada Employment Insurance Commission*, A-664-97.
[4] *Canada (Attorney General) v. Goulet*, 2012 FCA 62; *Inkell v. Canada (Attorney General)*, 2012 FCA 290.

[19] The General Division found that the Claimant was engaged in a business and considered all the factors when determining whether the Claimant was self-employed to a minor extent.

Time spent

[20] The General Division determined that the Claimant spent a significant number of hours setting up his business. In his self-employment questionnaire, he declared that he had spent 1,568 hours setting up his business.

[21] The Claimant disagrees with the answers he gave in the questionnaire since he did not fully understand the English language and he thought he had to declare his current situation, not the situation during the benefit period.

[22] However, in his request for reconsideration and in his additional submissions to the General Division, the Claimant reiterated that it took time and effort to establish his business.[5] He later clarified during his testimony before the General Division that, although he spent seven or eight hours a day on his business "after hours," he spent the same amount or more hours looking for work.

[23] The General Division accepted the Claimant's evidence that he spent the same or more number of hours actively looking for work and that the business's machines were fully automated and could perform their tasks in his absence, but found that both factors did not minimize the significance of the time the Claimant had spent setting up his business during the benefit period.

Nature and amount of the capital and resources invested

[24] The General Division found that the Claimant's personal financial commitment associated with having signed a two-year lease, taken $50,000 from the equity in his residence and his credit cards, and secured a $60,000 business loan was significant, although minor in this type of industry.

[5] GD3-141, RGD3-4.

Financial success or failure of the employment or business

[25] The General Division considered that the business was not successful at the time the Claimant received benefits based on its financial performance. The income generated by the business was minimal, not sufficient to live off, and used to pay for business expenses.

Continuity of the employment or business

[26] The General Division considered that the business was likely to continue its operations in view of the Claimant's sustained and continuous efforts; the important financial undertakings, notably the signing of a two-year commercial lease; and the business's growth.

Nature of the employment or business

[27] The General Division found that the Claimant demonstrated a strong desire to remain in the specialized business industry for which he had training and work experience.

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

[28] Finally, the General Division determined that, although the Claimant made significant efforts and investment to set up his business, he was willing to seek and immediately accept employment, although in addition to continuing with part-time self-employment.

General Division's consideration of all six factors specified in subsection 30(3) of the EI Regulations

[29] After considering all the six factors, the General Division came to the following conclusion:

> [51] Based on the findings concerning the six circumstances referred to in subsection 30(3) of the Regulations, the Tribunal finds that the [Claimant] 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 [Claimant] 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 [Claimant] spent on the business and the investment made in it. The

> Tribunal commends the [Claimant] 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 [*sic*] the [Claimant] 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.

[30] Before the General Division, and during the appeal hearing, the Claimant vigorously asserted that the machines used by the business were fully automated and did not require his presence to perform their tasks. He therefore could and did focus on his search for alternate full-time employment during his benefit period and keep the business on a part-time basis for supplementary income.

[31] As stated previously, no one factor is decisive. While the employment search is a valuable element for determining "minor in extent," it is not the sole one, nor does the Tribunal think one can say that it is the overriding one in the same way that little time spent on a business or failure to generate sufficient income does not by itself make a claimant unemployed.

[32] Based upon the evidence, the application of the objective test contained in subsection 30(2) to the Claimant's circumstances in accordance with subsection 30(3) revealed that at least four of the relevant factors point to the conclusion that the Claimant's engagement in his business was not minor in extent after April 1, 2010.

[33] As explained during the appeal hearing, the Tribunal does not have the authority to retry a case or to substitute his discretion for that of the General Division.

[34] The Tribunal's jurisdiction is limited by subsection 58(1) of the DESD Act. Unless the General Division failed to observe a principle of natural justice, erred in law, or 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, the Tribunal must dismiss the appeal.

[35] The Tribunal finds that the General Division decision on the issue of self-employment was based on the evidence before it and that it complies with the law and the decided cases.

[36] Therefore, the Tribunal finds no reason to intervene on the issue of self-employment.

Issue 2: Did the General Division err in fact or in law when it concluded that the Claimant knowingly made false or misleading representations to the Commission?

[37] This ground of appeal is dismissed.

[38] The General Division found that the Claimant did not provide a reasonable and credible explanation for the misrepresentations regarding self-employment and it found that the Commission had proven on a balance of probabilities that the Claimant had the requisite degree of subjective knowledge at the time that the misrepresentations were made.

[39] In each of the 25 e-reports that the Claimant completed for report weeks starting March 28, 2010 and ending on March 5, 2011, the Claimant responded "no" to the simple question, "[a]re you self-employed?"

[40] The General Division concluded that, on a balance of probabilities, the Claimant knowingly provided false or misleading information since he had decided to start his own business and had invested considerable time and money to set up the business and the business became operational during his benefit period. The General Division did not accept the Claimant's explanation that he did not think he was self-employed because he was not making money from his business aside.

[41] The Tribunal finds that the General Division decision on the issue of penalty was based on the evidence before it and that it complies with the law and decided cases.

[42] Therefore, the Tribunal finds no reason to intervene on the issue of penalty.

CONCLUSION

[43] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	June 14, 2018

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. S., Appellant Vlad Kneezevic, Representative for the Appellant