



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *J. B. v. Canada Employment Insurance Commission*, 2018 SST 713

Tribunal File Number: AD-17-851

BETWEEN:

J. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: July 4, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, J. B. (Claimant), initially applied for Employment Insurance benefits on May 30, 2016, after working for the employer X., from November 29, 2015, to May 14, 2016, as a bowling alley manager. The Respondent, the Canada Employment Insurance Commission (Commission), informed the Claimant that it could not pay him benefits from August 1, 2016, onwards. The Commission explained that it did not consider the Claimant unemployed because he contributed to the operations of a business as of this date. The Claimant appealed the Commission's decision to the Social Security Tribunal.

[3] The General Division found that, for the period from August 1, 2016, to April 27, 2017, that the imposition on the Claimant of ineligibility for Employment Insurance benefits—because he had not shown that he was unemployed—was justified under ss. 9 and 11 of the *Employment Insurance Act* (Act) and s. 30 of the *Employment Insurance Regulations* (Regulations).

[4] The General Division found that over the period at hand, the Claimant was not performing his job or operating his business “to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood,” as set out in s. 30(2) of the Regulations.

[5] The Tribunal granted leave to appeal. The Claimant argues 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. More specifically, he argues that the General Division relied on judgements without factual basis on many occasions, without regard for the material before it, in its analysis of the six factors in the Regulations. He argues that the General Division refused to look at the facts objectively

and that most of the arguments supporting the decision have a hypothetical or theoretical basis.

[6] The Tribunal must determine whether the General Division erred when it found that the disentitlement imposed under ss. 9 and 11 of the Act and s. 30 of the Regulations was justified.

[7] The Tribunal dismisses the Claimant's appeal.

ISSUES

[8] The Tribunal must decide whether the General Division erred in law in its analysis of the six criteria regarding the status of unemployment and by basing its decision on the Claimant's status of unemployment on erroneous findings of fact made in a perverse or capricious manner or without regard the material before it.

ANALYSIS

Appeal Division's Mandate

[9] The Federal Court of Appeal has established that the Appeal Division has no mandate but the one conferred to it by ss. 55 to 69 of the *Department of Employment and Social Development Act*.

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

[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 had 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 law in its analysis of the six criteria for determining unemployment status?

Issue 2: Did the General Division err by founding its decision on the Claimant's unemployment status on findings of fact made in a perverse or capricious manner or without regard the material before it?

[12] The Commission advised the Claimant that it could not pay him benefits as of August 1, 2016. The Commission explained that it did not consider the Claimant unemployed because he was contributing to the operation of a bowling alley as of that date.

[13] An individual operating a business is self-employed under the Regulations.

[14] The evidence before the General Division clearly shows that the Claimant operated a business under the terms of the Regulations. The Claimant is the sole shareholder of the company 9345-1516 Inc. and has operated this business since it was created on August 1, 2016.

[15] A claimant who operates their own business within the meaning of the Regulations is assumed to work a full working week unless they can show that they are involved in that business to such a minor extent that a person would not normally rely on that activity as a principal means of livelihood.

[16] The General Division had to ask itself whether, objectively, the extent to which the Claimant was involved in his company during the benefit period, determined based on the factors set out in s. 30(3), was such that it could not constitute his principal means of livelihood.

[17] When it dismissed the Claimant's appeal, the General Division concluded the following:

[37] The Tribunal underscores 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, 2008 FCA 240, Jouan, A-366-94*).

[93] The Tribunal underscores that the information related to this aspect (willingness to seek and immediately accept alternate employment) are “of utmost importance” (*Charbonneau*, 2004 FCA 61).

[18] The Tribunal is of the opinion that the General Division erred in law by granting disproportionate importance to the criterion of time spent on the business and the criterion of the willingness to seek and immediately accept new employment.

[19] As the Tribunal’s Appeal Division has emphasized on numerous occasions, there is Federal Court of Appeal jurisprudence, more recent than the case law on which the General Division is based, establishing that an overall analysis of the six criteria must be conducted, without giving precedence to one or more of the criteria, and that each file must be assessed on its merits.¹

[20] The Tribunal believes that the Regulations must be considered in their entirety, given that a person could spend little time on their business but nevertheless make it their principal means of livelihood. In addition, a lack of sufficient income does not necessarily mean that a claimant is unemployed.

[21] The Tribunal also finds that the General Division did not really decide on one of the six criteria set out in s. 30 of the Regulations, namely the financial success or failure of the business.

[22] Finally, the General Division did not take into account some of the elements before it in its analysis of the criteria regarding the continuity of the business, notably the expiration of the commercial lease and the company’s obvious failure.

[23] For these reasons, the Tribunal is justified to intervene and to render the decision that the General Division should have rendered.

[24] Subsection 30(3) of the Regulations sets out the six factors to consider in determining whether the claimant’s engagement in the operation of the business is of

¹ *Canada (Attorney General) v. Goulet*, 2012 FCA 62; *Inkell v. Canada (Attorney General)*, 2012 FCA 290.

such a minor extent that he or she would not normally rely on it as his or her main source of income. The circumstances that make it possible to determine whether a claimant's employment or engagement in the operation of a business is of the minor extent described in s. 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;
- f) the claimant's intention and willingness to seek and immediately accept alternate employment.

Time Spent

[25] The Claimant emphasizes that he dedicated only ten hours to his company each week during the period in question and that he started to work in only early September 2016.

[26] However, the evidence shows that as soon as the company was founded—August 1, 2016—the Claimant assumed all of the responsibilities within his company.

[27] He was the one making all of the decisions regarding the company's operations because he was the sole shareholder and administrator. He adopted and signed a number of resolutions as the business's administrator as of August 1, 2016. He opened a bank account and took out a loan from a financial institution. He negotiated with the landlord regarding the terms and conditions of his company's operations. He visited a notary to review and sign legal documents. He rehired former employees of the bowling alley. He freshened up the bowling alley before it opened. He advertised in order to draw in customers for the upcoming bowling season, notably via an interview in a newspaper.

[28] An excerpt from the Claimant's Facebook account dated August 8, 2016, announces that he is the primary administrator and the sole party in the venture.²

[29] In a declaration made to the Commission dated October 19, 2016, the Claimant declared that the bowling alley had been completely closed until mid-August 2016.³

[30] An excerpt from the Claimant's Facebook page dated August 16, 2016, announces that the bowling alley would be open as of Monday, August 22, 2016, from 6PM to 9PM, and that the bowling league season would begin on August 30, 2016.⁴

[31] In light of the Claimant's previous declarations, as well as the materials in the record, the Tribunal does not assign much credibility to the Claimant's position that he only dedicated ten hours per week to the company until early September 2016. He was therefore very invested in ensuring the success of his company.

[32] The Tribunal finds the Claimant's participation in the various tasks involved in operating the business to be significantly greater than he would have it seem and that this has been the case since early August 2016.

The nature and amount of the capital and resources invested

[33] The Claimant argues that he never took possession of the company's equipment and that he therefore paid nothing to acquire it. He emphasizes that the commercial lease expired in November 2016 for this reason under section 6.2 of the lease signed by the parties, but the parties nonetheless agreed to pursue the venture on the basis of a verbal agreement until the official end of operations in April 2017.

[34] The uncontested proof before the Tribunal shows that the Claimant took out a personal loan in August 2016 in the amount of \$20,000 from a financial institution in order to have working capital for the company.⁵

² GD3-76.

³ GD3-23.

⁴ GD3-76.

⁵ GD3-82.

[35] The Claimant was also the personal guarantor for the company's lease up to a limit of three (3) months of rent and any additional rent, the equivalent of another \$20,000.⁶

[36] The Tribunal finds that the amount of capital and other resources invested in the company was significant.

The financial success or failure of the employment or business

[37] The General Division did not render a decision on this issue. The evidence clearly shows that the company never really took off and that it was a financial failure.

The continuity of the employment or business

[38] As the Tribunal mentioned previously, the evidence clearly shows that the company never really took off. The company's operations would obviously have ended in November 2016, three months after it opened, had it not been for the parties' dedication to extending these operations, come what may, until the end of April 2017.

The nature of the employment or business

[39] The Claimant acted as the manager of the bowling alley for the period from November 29, 2015, to May 14, 2016, before finally acquiring the bowling alley in August 2016.

[40] The nature of the business is therefore identical to the Claimant's previous employment in his field of expertise.

The Appellant's intention and willingness to seek and immediately accept alternate employment

[41] The Claimant informed his employer in summer 2016 that he would not be returning to his usual employment as a bus driver at the end of his unpaid leave, which was scheduled for August 19, 2016.

⁶ GD3-74.

[42] In a declaration made to the Commission on October 19, 2016, the Claimant declared that he had not been looking for work since he learned that he would be the administrator of his company.⁷

[43] The Claimant adopted and signed a resolution dated August 1, 2016, naming himself the administrator of the company. An excerpt from the Claimant's Facebook page dated August 8, 2016, announces that he is the primary administrator and the sole party on the venture.⁸

[44] In a subsequent declaration made to the Commission dated December 6, 2016, the Claimant declared that he had not looked for employment since August 2016.⁹

[45] The evidence clearly shows that the Claimant concentrated his energy on his company during the period in question, rather than seeking and immediately accepting employment.

Operation of a business to such a minor extent

[46] The application of the objective test set out in s. 30(2) to the Claimant's situation shows that at least four of the relevant factors lead to the conclusion that the Claimant's engagement in the business in his benefit period was not to a minor extent. The evidence shows the Claimant's involvement in the company was significant enough, as of August 1, 2016, to make it his primary source of livelihood.

⁷ GD3-23.

⁸ GD3-76.

⁹ GD3-82.

CONCLUSION

[47] The appeal is dismissed.

[48] For the period from August 1, 2016, to April 27, 2017, the disentitlement of the Claimant to Employment Insurance benefits because he had not shown that he was unemployed was justified under ss. 9 and 11 of the Act and s. 30 of the Regulations.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	June 26, 2018
METHOD OF PROCEEDING:	Teleconference
PERSONS IN ATTENDANCE:	J. B., Appellant Sylvain Bergeron, Appellant's representative