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

[TRADUCTION]

Citation: *H. D. v Canada Employment Insurance Commission*, 2019 SST 255

Tribunal File Number: GE-18-3649

BETWEEN:

H. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARING DATE: February 1, 2019

DATE OF DECISION: February 22, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant has worked as a carpenter for X (business) for many years. He owns 34% of shares in the business. On January 27, 2018, the Appellant was laid off by reason of a shortage of work.

[3] The Appellant filed a claim for Employment Insurance benefits with the Commission.

[4] The Commission refused to pay the Appellant Employment Insurance benefits because the period in question was not considered a week of unemployment.

[5] According to the Commission, the Appellant operates a business and was considered to have worked a full week.

[6] According to the Appellant, he is an employee and is entitled to receive Employment Insurance benefits. Therefore, when he works fewer hours a week for the business, this employment is not normally his principal means of livelihood. Also, the Tribunal allowed the Appellant's appeal in previous years.

ISSUE

[7] Was the Appellant unemployed for a full week during the period starting March 5, 2018?

ANALYSIS

[8] According to section 9 of the *Employment Insurance Act* (the Act), a benefit period is established for persons who qualify and benefits are then payable to the person for each week of unemployment that falls in the benefit period.

[9] Subsection 11 (1) of the *Act* defines a week of unemployment as: "a week in which the claimant does not work a full working week." Additional rules are set out in the *Employment Insurance Regulations* (the *Regulations*).

[10] According to the Federal Court of Appeal, the provisions of the *Act* are based on the principle that in order to be entitled to benefits, a claimant must be in the labour market and free of any commitment, occupation or interest that might limit or reduce his or her opportunity or desire to return to the workforce.[1]

[11] The Tribunal notes that the Appellant is a shareholder in the business along with his spouse and son. He owns 34% of the shares. He admits that he is a business operator.

[12] When someone operates a business, he or she is presumed to work full weeks. [2] However, persons engaged in the operation of a business can overturn this presumption by showing that they do not normally rely on such activity as their principal means of livelihood.

[13] To do so, we must analyze the six circumstances specified in subsection 30(3) of the *Regulations*. If the Appellant operates his business to a minor extent, it cannot be considered his principal means of livelihood. He is therefore not working a full working week.[3]

[14] Accordingly, the Appellant must show on a balance of probabilities that the operation of his business is not his principal means of livelihood.[4]

Time spent

[15] The Tribunal notes that the Appellant works from 30 to 40 hours per week overall on his business. He sometimes works on weekends to finish certain jobs. He prepares bids, purchases materials needed to carry out contracts and hires employees in summer. He also prospects for clients.

[16] The Tribunal notes that the Appellant works for his business year-round. He does not work for one or more employers during the year or during periods of slow business activity.

[17] The Tribunal reproduced certain periods of hours worked by the Appellant. The Appellant is claiming benefits for periods during which he worked fewer hours per week. He

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[1] *Malowe v. Canada (Attorney General), 2009 FCA 102*
[2] Subsection 30(2) of the *Regulations*
[3] *Martens v. Canada (Attorney General), 2008 FCA 240*
[4] *Canada (Attorney General) v. Falardeau, A-396-85; Lemay v. Canada (Attorney General), A-662-97*

alleges that the hours worked during these weeks were insufficient to meet his needs. In other words, the business was not his principal means of livelihood.

Week beginning February 25, 2018	Number of hours worked: 40
Week beginning March 4, 2018	Number of hours worked: 35.50
Week beginning March 11, 2018	Number of hours worked: 23.50
Week beginning March 18, 2018	Number of hours worked: 32
Week beginning March 25, 2018	**Number of hours worked: 6**
Week beginning April 1, 2018	**Number of hours worked: 13**
Week beginning April 8, 2018	Number of hours worked: 32
Week beginning April 15, 2018	Number of hours worked: 20
Week beginning April 22, 2018	Number of hours worked: 29

Week beginning November 25, 2018	Number of hours worked: 26
Week beginning December 2, 2018	Number of hours worked: 25
Week beginning December 9, 2018	Number of hours worked: 38
Week beginning December 16, 2018	Number of hours worked: 38
Week beginning December 23, 2018	**Number of hours worked: 9.25**

[18] The Appellant contends that, as an employee, he is entitled to claim benefit when the activities of the business slow down. The Canada Revenue Agency (CRA) has recognized him as an employee, and his hours of work as insurable.

[19] The Tribunal finds that the Appellant's hours of work are indeed insurable. His employment is therefore insurable.

[20] However, these are two separate questions, and the fact that CRA acknowledges that hours of work are insurable does not mean that a self-employed person or business operator is entitled to receive Employment Insurance benefits.

[21] In fact, the Federal Court of Appeal has held that once CRA determines that a person's employment is insurable, the person in question must satisfy the second part of the test by showing that he or she is entitled to Employment Insurance. Therefore, the CRA decision concerning insurability is not binding on the Commission with regard to entitlement to benefit.[5]

[22] The Appellant also contends that the time spent circumstance must be analyzed week-by-week. Thus, when the Appellant did not work a certain week, or if he worked only a few hours, he was spending less time on the operation of his business. Therefore, the operation of his business was not his principal means of livelihood.

[23] The Federal Court of Appeal decided in *Childs*[6] that the circumstances cannot be analysed by week:

> "Moreover, that approach would lead to the absurd result that in one week a claimant would be deemed to be self-employed, but not in others. In my view, the week-to-week analytical framework being advocated is incompatible with the legislative scheme as a whole."[7]

[5] Canada (Attorney General) v. D'Astoli, 1997 CanLII 16849 (FCA).
[6] *Canada (Attorney General) v. Childs*, A-418-97
[7] Paragraph 11 *Childs supra*

[24] Therefore, time spent cannot be limited to the number of hours billed during periods when the Appellant claimed benefit; it must be analyzed as a whole. Accordingly, the Tribunal deems that it must consider the overall hours worked and invested in the business.[8]

[25] From this perspective, the Tribunal notes that a member of the Tribunal did not give consideration to this Federal Court of Appeal decision in reaching a decision in the Appellant's cases GE-738, GE-18-739, GE-18-740 and GE-18-741.

[26] Therefore, the Tribunal does not consider itself bound by the findings of the Tribunal member in question.

[27] Moreover, the Tribunal disagrees with the Appellant that subsections 3 and 28 of *Martens* supports the possibility of a week-by-week analysis. In fact, at paragraphs 3 and 28 of the decision, the Court sets out the principles and the exception provided in the *Regulations*. Accordingly, when the Court analyzes the established time test, it considered the time that Mr. Martens spent prior to the benefit period.[9]

[28] Herein, the Appellant has been operating his business for many years. His time is spent primarily on his business. The mere fact that the activities of his business diminished for a few weeks does not suddenly overturn this presumption.

[29] Consequently, the time spent on the business was not minor in extent, in objective terms.

The nature and amount of the capital and resources invested

[30] The Tribunal notes that the Appellant has invested very little in his business over the past few years. He has a $10,000 line of credit and no inventory. In fact, he purchases the material necessary to perform work as needs require.

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[8] Paragraph 12 *Childs*, *supra*
[9] *Martens supra*: paragraph 37

[31] The Tribunal notes that the business owns tools to perform work. The question is not to determine whether the tools belong to the Appellant or the business. The point is that investments were made to acquire the tools.

[32] In the Tribunal's opinion, the evidence objectively points to involvement of a more minor extent in the business.

Success or failure of the business

[33] The Tribunal notes from the evidence that the Appellant's business was established in 1999. He is the majority shareholder and President. The company has been in operation for almost 20 years, and he received dividends in 2016. In 2018, he obtained many work contracts. It is recognized that the Appellant worked many hours that year.

[34] In objective terms, the Tribunal finds that the business is successful.

Continuity of the business or employment

[35] The business has been in operation for over twenty some years, and constitutes the Appellant's main source of income.

[36] In the Tribunal's opinion, the evidence objectively shows that operation of the business is the Appellant's main source of income and principal means of livelihood.

Nature of the business

[37] The Tribunal notes that the Appellant has vocational training as a carpenter. He has trade papers as a journeyman from the *Commission de la construction du Québec*. He has a licence issued by the *Régie du bâtiment du Québec*. The business has been providing services in the construction field for almost 20 years.

[38] In the Tribunal's opinion, the evidence objectively tends to show that the business is his principal means of livelihood.

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

[39] According to the Appellant, he was willing to seek and immediately accept alternate employment. At the hearing, the Appellant stated that he had searched for work but without success. He stated that he was available for work and that he had searched for work. He submitted a list of businesses.

[40] The Appellant denies that he told the Commission he had not searched for work. He has hearing problems, which may explain his failure to understand.

[41] The Tribunal accepts that the Appellant did indeed search for work. However, the Tribunal is not satisfied that he would have accepted other employment immediately. Indeed, the Appellant was working during the weeks at issue. He admitted that he resumed work full time on April 1, 2018.

[42] The Tribunal understands that the activities of the Appellant's business declined, but he did not show that he was willing to accept another employment given that he was spending time on his business.

[43] According to the Appellant, he was not obliged to accept alternate employment because he had to remain available for his business. The Appellant submitted a few decisions on availability. He cited *MacDonald,*[10] *Carpentier*[11] and *Faucher*[12] in support of his contentions.

[44] In the Tribunal's opinion, *MacDonald* does not apply herein. In *MacDonald,* the Federal Court of Appeal had to rule on a question of availability. The Appellant was accustomed to taking university courses while working for Canadian National.

[45] *Proulx*[13] cannot apply to the case herein. In *Proulx,* the claimant was working for an insurance company. He was dismissed. While he was receiving Employment Insurance benefits,

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[10] *Canada (Attorney General) v. MacDonald, A-672-93*
[11] *Carpentier v. Canada (Attorney General),* A-474-97
[12] *Faucher v. Canada (Attorney General), A-56-96, A-57-96*
[13] *Proulx v. Canada (Attorney General), A-361-98*

he took a training course as a real estate agent and signed a contract to act as a real estate agent for a broker. He started working a few hours a week and did not receive commissions.

[46] The Tribunal does not consider *Faucher* applicable to the case herein. In that case, Mr. Faucher was employed as a roofer. He lost his job and filed a claim for Employment Insurance benefits. He decided to start his own roofing company. He was accused of not making himself available to find work because he was spending time looking for clients, but in February, when no work for roofers is available.

[47] The Tribunal believes that the Appellant's situation was different. He has worked for his business for many years. And, he worked hours for his business during the periods at issue.

[48] Lastly, *Carpentier* is not relevant. In *Carpentier*, the Tribunal did not take certain facts on the record into account to determine the Appellant's availability. The case was returned to the Chief Umpire for reconsideration by a new Board of Referees.

[49] In the circumstances, the Tribunal considers that the Appellant has proven his willingness to find work, but not his willingness to accept other employment.

[50] In the Tribunal's opinion, this objectively shows that the Appellant was not engaged in his business only to a minor extent.

Application

[51] The Federal Court of Appeal has held that the time spent on operating a business and the intention and willingness to seek and immediately accept alternate employment are the two most important factors.[14]

[52] According to the Appellant, an analysis of the six circumstances shows that the Appellant operated his business to such a minor extent during the benefit periods that it was not his only means of livelihood.

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[14] *Charbonneau v. Canada (Attorney General), 2004 FCA 61*

[53] According to the Commission, the Appellant did not refute the allegation that he was not unemployed. He spent many hours during the year on his business, except for a few weeks when he worked fewer hours. The Appellant spends his time exclusively on his business.

[54] After analyzing and weighing the six circumstances, the Tribunal finds that, based on the objective test, the Appellant did not operate his business to a minor extent. In fact, at least five circumstances, including the two most important, lead us to find that he was not operating his business to such a minor extent.

[55] The Tribunal finds that operation of the business is the Appellant's principal means of livelihood. According to the Commission, the Appellant did not refute the presumption under subsection 30(1) of the *Regulations*.

CONCLUSION

[56] The Tribunal finds that the Appellant was not unemployed for a full week during the period commencing March 5, 2018.

[57] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARING DATE:	February 1, 2019
TYPE OF HEARING:	In person
APPEARANCES:	H. D., Appellant Kim Bouchard, Counsel for the Appellant