



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MP v Canada Employment Insurance Commission*, 2019 SST 1734

Tribunal File Number: GE-18-3627

BETWEEN:

M. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Amanda Pezzutto

HEARD ON: February 19, 2019

DATE OF DECISION: March 15, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] M. P. (the Claimant), applied for and received employment insurance benefits from September 2015 until September 2016. Several months later, the Canada Employment Insurance Commission (Commission) learned that he had been involved in a business and that he had been self-employed as a musician. The Commission decided that the Claimant was self-employed as a musician and that he was also self-employed in a construction business. The Commission decided that the Claimant was not entitled to receive employment insurance benefits because the level of his self-employment in construction was to such an extent that he was not unemployed. This resulted in a large overpayment. The Claimant requested a reconsideration but the Commission maintained its initial decisions. The Claimant appealed to the Social Security Tribunal (Tribunal).

[3] I find that the Claimant was self-employed as a musician and that he was self-employed with X. In both cases, I find that the Claimant's self-employment was minor in extent because I find that the Claimant's level of activity was such that a person would not normally rely on these self-employment ventures as a principal source of livelihood. I find that the Claimant has proven that he was unemployed and so I find that he is entitled to employment insurance benefits.

ISSUES

- Issue 1 – Was the Claimant self-employed as a musician?
- Issue 2 – Was his self-employment as a musician minor in extent?
- Issue 3 – Was the Claimant self-employed with X, X, or X?
- Issue 4 – If he was self-employed in construction, was his self-employment minor in extent?
 - How much time did he spend on his business?
 - What was the nature and amount of his investments into the business venture?
 - Was the business financially successful?
 - Is the business still operating?
 - What is the nature of the business?
 - Was the Claimant looking for other work? Was he willing to immediately accept other work?
 - Considering each of the above six factors, was the Claimant’s self-employment activity of a nature that a person would normally rely on that type of activity as a principal means of livelihood?

ANALYSIS

[4] In order to receive employment insurance benefits, a claimant must establish a benefit period. This is the window of time in which a claimant may collect employment insurance benefits.

[5] Employment insurance benefits are meant to support claimants who are unemployed. Claimants can only receive benefits during a week of unemployment.¹ A claimant who is self-employed has a job, and so they are usually not entitled to receive employment insurance benefits.² Employment insurance benefits are not a subsidy for people who are starting a business.³

¹ Section 9 of the *Employment Insurance Act* (EI Act)

² Section 30(1) of the *Employment Insurance Regulations* (EI Regulations)

³ *Canada (Attorney General) v. Jouan*, A-366-94

[6] However, there is an exception. A self-employed claimant can still receive employment insurance benefits if they are involved in a business that is so minor in extent that most people would not rely on that kind of business as a main source of income.⁴

[7] There are six factors I must consider when deciding whether the self-employment activity is minor in extent:

1. The time spent;
2. The nature and amount of capital and resources invested;
3. The financial success or failure of the employment or business;
4. The continuity of the employment or business;
5. The nature of the employment or business; and
6. The claimant's intention and willingness to seek and immediately accept alternate employment.⁵

[8] I must weigh and consider all of these factors, but the two most important factors are the time spent and the claimant's intention and willingness to seek and accept other employment.⁶

[9] In order to make a decision on this appeal, I must first decide whether the Claimant was, in fact, self-employed as a musician and in construction. Then, for each self-employment activity, I must analyze each of the six factors and decide whether his self-employment was minor in extent.

Issue 1: Was the Claimant self-employed as a musician?

[10] I find that the Claimant was self-employed as a musician.

[11] The Claimant played violin in a symphony. The symphony stated to the Commission that they dealt with all of their musicians as self-employed contractors and that the musicians should all know their employment status. At the hearing, the Claimant testified that he had made a

⁴ A claimant is not considered to be working full working weeks if they can prove that the self-employment activity is so minor in extent that a person would not normally rely on that level of activity as a principal means of livelihood (section 30(2) of the EI Regulations).

⁵ Section 30(3) of the EI Regulations

⁶ *Charbonneau v. Canada (Attorney General)*, 2004 FCA 61

mistake when dealing with his income as a musician while he was receiving employment insurance benefits. He stated that he did not dispute the Commission's decision about his employment status with the symphony.

[12] Given the symphony's description of the status of the musicians, and given that the Claimant does not dispute the Commission's decision that he was self-employed as a musician, I am satisfied that the Claimant was self-employed as a musician.

Issue 2: Was his self-employment as a musician minor in extent?

[13] Considering that the Claimant spent a minor amount of time on his work as a musician, and given that he only earned a small income, I find that the Claimant's employment as a musician was minor in extent.

[14] The symphony stated to the Commission that, during the September 2015 to May 2016 season, the Claimant was involved in 53 rehearsals and performances. The symphony stated that they expected musicians to practice about 10 hours a week on top of this schedule. The symphony provided a copy of the 2015/2016 practice and rehearsal schedule. According to the symphony's document, there were about six rehearsals or performances each month, and practices and performances were generally in the evenings or on weekends. The symphony provided copies of the Claimant's T4As for 2015 and 2016 – in each year, the Claimant earned just under \$4000.

[15] The Claimant testified that he considered his activity with the symphony to be more of a hobby. He stated that he always held other jobs while playing in the symphony and that he did not earn enough from playing in the symphony to make a living. He testified that he did not consider playing in the symphony to be his livelihood.

[16] I give particular weight to the fact that the Claimant earned less than \$4000 a year playing in the symphony. I also accept that he spent about 15 hours a week during the season, and that the rehearsals and performances were on weekends or in the evenings. I also accept the Claimant's statement that he generally held other jobs while playing in the symphony.

[17] Given the time the Claimant spent, his income from playing in the symphony, and his intention and willingness to accept other work, I am satisfied that the Claimant's work as a musician was of a minor extent. I am satisfied that a person would not normally rely on this type of activity as a principal means of livelihood.

Issue 3: Was the Claimant self-employed with X, X, or X?

[18] I find that the Claimant was self-employed with X because I find that he was involved in the operation of the business. I accept that X and X were no longer active businesses during the Claimant's benefit period in 2015 and 2016.

[19] The Claimant acknowledged, during interviews with the Commission, that he was a part-owner of X and that he was attached to the business during his benefit period. He stated that X and X were not active businesses.

[20] At the hearing, he testified that he created a website for X as a demonstration of his web design skills, but that it was not an active company. He testified that X was not a real business.

[21] I acknowledge that the Commission submitted evidence demonstrating that the websites for X and X included the Claimant's contact information. However, I note that the Claimant provided incorporation documents and financial statements for X; he did not provide any of this information for the other two businesses. Furthermore, the Commission did not provide incorporation documents, business licenses, or other documents demonstrating that X and X were active, ongoing businesses.

[22] I choose to rely on the Claimant's testimony and the fact that there is no documentary evidence, aside from the websites, demonstrating that X and X were active business. I accept that these were not active during the Claimant's benefit period, and so I find that the Claimant was not involved in either of these businesses.

[23] However, relying on the incorporation documents, the financial statements demonstrating that X operated in 2015 and 2016, and the Claimant's statements, I find that the Claimant was involved with X during his benefit period. I find that he was engaged in the operation of a business, and so I find that he was self-employed.

Issue 4: Was his self-employment with X minor in extent?

[24] Considering each of the six factors, and giving particular weight to the time the Claimant spent, the financial activity of the business, and the Claimant's intention and willingness to seek and accept other work, I find that the Claimant's involvement with X was minor in extent during his benefit period.

How much time did he spend on his business?

[25] I accept that X did not start any new building projects during the Claimant's benefit period and so I accept that the Claimant spent a limited amount of time working for X during his benefit period.

[26] The Claimant acknowledged that he started working full-time for X in September 2016. At the hearing, he testified that, before he started working as an employee for X, he spent less than ten hours a week on the business. He stated that the business started building a home in July or July 2015, that it was completed in December 2015, and then it was up for sale until it finally sold in the summer of 2016. He stated that all of the actual work on the home was done by contractors and tradespeople and that his role during the building was just to get quotes, select contractors, and sign cheques. He stated that he had done this amount of work for the business before he was laid off. He testified that the business did not start any new building projects during the benefit period.

[27] He testified that his role as an employee was different, because once he started working full-time for the business, he started actively seeking clients. He stated that the business now had more than one building project, he visited job sites more often, and went to training sessions and meetings. He testified that he did not do any of that kind of work during his benefit period because there were no new building projects during his benefit period.

[28] The Claimant testified that the financial statements support his statements. He stated that the financial statements show that they made about \$500,000 in 2016 because they just sold one house. He testified that they did not start building another house until he started as a full-time employee.

[29] I give weight to the financial statements. I find that the Claimant's statement that they only sold one house in 2016, and that the house was completed at the end of 2015 is credible, given that the business had gross revenue of about \$500,000 in 2016. I also accept that this revenue represents the sale of only one home; as a result, I also accept that the business did not start any new building projects until later in 2016. I am satisfied that the business did not start any new building projects during the Claimant's benefit period. I also accept the Claimant's argument that he was able to balance his work with X with his full-time job.

[30] As a result, I accept the Claimant's statements and I find that he spent a limited amount of time working on his business during his benefit period.

What was the nature and amount of his investments into the business venture?

[31] The Claimant testified that he had invested \$20,000 into the business, and that the other investors had invested \$150,000 each. The Commission has not submitted any evidence contradicting the Claimant's statements, and so I accept the Claimant's statements. I find that the Claimant made a financial investment into the business, but that he was not the principal investor.

Was the business financially successful?

[32] I accept that the business had revenue in 2015 and 2016; however, I find that business expenses offset the income, and so I find that the business did not make a significant profit in 2015 or 2016.

[33] The Claimant argues that the business was losing money until he started working full-time.

[34] The Commission has not submitted any evidence demonstrating that the financial reports are unreliable and so I give them weight. I acknowledge that the financial statements show that the business had significant revenue in 2015 and 2016. However, I find that the financial statements demonstrate that the business expenses completely offset the income in 2015, and that the business only made a small profit in 2016. According to the financial statements, the business had a net loss in 2015, and an income of about \$8200 in 2016; I note that the Claimant also

received about \$10,000 for salary in 2016. I find that this demonstrates that, between the Claimant's salary and the business profit, X made a profit of less than \$20,000 in 2016.

[35] I find that the financial statements support the Claimant's arguments, and so I find that the business did not make a significant profit.

Is the business still operating?

[36] The Claimant testified that he has been a full-time employee of the business since September 2016. According to his employment contract, he started as a full-time employee on September 20, 2016. At the hearing, he testified that he requested an insurability ruling from the Canada Revenue Agency (CRA) when the Commission started investigating and that the CRA ruled that he was an employee.

[37] I accept the Claimant's statement and so I find that X is still operating; I find that the Claimant is currently a full-time employee.

What is the nature of the business?

[38] The Claimant testified that X is a home-building company. He testified that he had previously worked as a project manager and that the work he does with X is similar to his usual type of work because he coordinates the building projects. I accept the Claimant's statements and so I find that the Claimant's work with X is similar to his usual type of work.

Was the Claimant looking for other work? Was he willing to immediately accept other work?

[39] I accept the Claimant's job search record as credible and so I find that the Claimant actively searched for work during his benefit period. I am satisfied that his intention during his benefit period was to find and accept alternate full-time work.

[40] The Claimant has consistently stated that he was looking for jobs throughout his benefit period. He stated to the Commission that he had applied for other jobs, other than work with X, throughout his benefit period. At the hearing, he testified that his intention had always been to find other work and that he wanted to work for a larger, more stable employer than X.

[41] The Claimant gave the Commission a list of 69 emails he sent between August 2015 and August 2016. He stated that these were emails he sent to prospective employers; while the list did not include recipients' names, I note that the subject lines of the emails are job titles such as "project manager," "data analyst," "creative director," "project coordinator," and "property manager." The Claimant also sent eight of his job application emails to the Tribunal; according to these emails, the Claimant contacted employers in 2015 and 2016, sent his resume, and set up job interviews.

[42] I accept the list of emails as credible, given the sample emails the Claimant provided to the Tribunal. I accept that the Claimant applied to various jobs throughout his benefit period. As a result, I accept that the Claimant's intention was to seek and accept alternate employment during his benefit period.

Was the Claimant's self-employment activity of a nature that a person would normally rely on that type of activity as a principal means of livelihood?

[43] Considering each of the above six factors, I find, on a balance of probabilities, that the Claimant's activity with X during his benefit period was not the type of work that a person would normally rely on as a principal means of livelihood.

[44] I am satisfied that X completed one building project in December 2015 and that the house sold in the summer of 2016. I accept that X did not start any new building projects during the Claimant's benefit period, and so I accept that the Claimant spent little time working on X during

his benefit period. I give significant weight to this factor and I find that this supports the Claimant's argument that his involvement was minor in extent during his benefit period.

[45] I find that the Claimant invested into the business, but that he was not the principal investor. I find that the business generated income, but that the business did not make a profit in 2015 and that it only made a small profit in 2016. I find that these factors support the Claimant's argument that his involvement was minor in extent.

[46] The business is still operating and the Claimant is now a full-time employee. I find that this factor weighs against the Claimant. I find that the fact the Claimant now relies on X as his principal source of income suggests that his self-employment activity was significant during his benefit period. Similarly, I find that the Claimant's work with X is similar to his usual type of work and so I find that this also suggests that his involvement with X was a significant self-employment activity during his benefit period.

[47] However, I also accept that the Claimant actively applied for jobs with various employers throughout his benefit period. He has consistently stated that he was always looking for and willing to accept work with other employers during his benefit period. I accept his statements as credible and I give this factor significant weight.

[48] I find that the fact that the X did not start any new building projects during the Claimant's benefit period, the fact that he did not spend much time working on the business during his benefit period, and the fact that he actively looked for alternate employment during his benefit period are the most important factors. I also give weight to the fact that the business did not generate significant profit in 2015 and 2016. I find that these factors outweigh all of the other factors. As a result, I find that the Claimant's self-employment with X during his benefit period was not the type of activity that a person would usually rely on as their principal livelihood. I find that the Claimant's self-employment during his benefit period was minor in extent.

CONCLUSION

[49] The appeal is allowed.

Amanda Pezzutto

Member, General Division - Employment Insurance Section

HEARD ON:	February 19, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. P., Appellant