[TRANSLATION]

Citation: M. G. v Canada Employment Insurance Commission, 2019 SST 576

Tribunal File Number: AD-18-779

BETWEEN:

M. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 14, 2019

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, M. G. (Claimant), worked for the business X several times from 2011 to 2016 inclusive. Based on this, six (6) benefit periods were established, and Employment Insurance benefits were paid to the Claimant. The Claimant is also a shareholder in the business.

[3] The Canada Employment Insurance Commission (Commission) made decisions stating that the Claimant’s applications for benefits beginning between 2011 and 2016 inclusive were cancelled because it determined that the Claimant had not been without work and earnings during seven or more consecutive days.

[4] Based on information obtained during its investigation, the Commission also found that the Claimant had made false or misleading statements by stating that he had not been available to work for several days during his benefit periods because of health reasons. The Commission imposed penalties on him because of it.

[5] The Claimant asked the Commission to reconsider its decision, but the Commission upheld its initial decision. The Claimant appealed to the General Division of the Social Security Tribunal of Canada.

[6] The General Division found that the Commission had just cause for reconsidering the Claimant’s benefit claims. It also found that the Claimant had not demonstrated that he had had an interruption of earnings during a period of seven or more consecutive days or that he was unemployed.

[7] The General Division found that the Commission had allocated his earnings according to the requirements of sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulations).

[8] The General Division also found that the Claimant had knowingly made misrepresentations by stating that he had not worked for several weeks because of illness or injury and that the Commission had exercised its discretion judicially when it imposed a penalty on him.

[9] The Tribunal granted the Claimant leave to appeal. The Claimant argues that the General Division confused the actions of two shareholders without considering what each really did for the business. He submits that the General Division erred by finding that he had had a substantial investment in the business and worked during the periods referred to in the claims. The Claimant also argues that the General Division erred by allocating the income to the months in which he received it and by failing to consider all of the expenses the business incurred to generate that income.

[10] The Tribunal must determine whether the General Division erred in law in making its decision and 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.

[11] The Tribunal dismisses the appeal.

ISSUES

Issue 1: Did the General Division err by finding that the Commission could take 72 months to reconsider the Claimant's benefit claims?

Issue 2: Did the General Division err in its assessment of the six factors stated in section 30(3) of the EI Regulations and by finding that the Claimant had not proven that his level of involvement in his business was to such a minor extent that he could not rely on it as his principal means of livelihood?

Issue 3: Did the General Division err in its interpretation of sections 14(1) and 35(10)(d) of the EI Regulations, specifically by finding that there was no interruption of earnings because the Claimant could use a cell phone paid for by the business?

Issue 4: Did the General Division err in its interpretation of section 38 of the *Employment Insurance Act* (EI Act) by finding that it was appropriate to impose a penalty on the Claimant?

Issue 5: Could the Commission be bound by the Canada Revenue Agency (CRA) insurability decision on the issue of the Claimant's entitlement to benefits?

Issue 6: Did the General Division err in its interpretation of the sections 35 and 36 of the EI Regulations?

ANALYSIS

Appeal Division's Mandate

[12] The Federal Court of Appeal has determined that the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).[1]

[13] 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]

[14] 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.

Preliminary Remarks

[15] The General Division joined the Claimant's files with those of X in accordance with section 13 of the *Social Security Tribunal Regulations* because they raise common questions of fact and law.

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

[16] During the General Division hearing, the Claimant's representative asked for the evidence in the Claimant's files to be added to X's file and vice versa. The General Division granted the request.

[17] The Appeal Division considers all of the evidence before the General Division when deciding issues.

Issue 1: Did the General Division err by finding that the Commission could take 72 months to reconsider the Claimant's benefit claims?

[18] In his appeal, the Claimant did not dispute the General Division's findings on the issue of the reconsideration of benefit claims.

[19] The Tribunal is of the view that the General Division determined correctly that the Commission did not have to show that the Claimant had "knowingly" made a false or misleading statement in order to take 72 months but rather that the Commission could reasonably find that the Claimant made a false or misleading statement or representation.

[20] The General Division found, based on the evidence, that the Commission was justified in reconsidering the benefit claims because the Claimant had failed to declare his self-employment and his net income in his reports.

[21] The Tribunal sees no reason to intervene on the issue of the reconsideration.

Issue 2: Did the General Division err in its assessment of the six factors stated in section 30(3) of the EI Regulations and by finding that the Claimant had not proven that his level of involvement in his business was to such a minor extent that he could not rely on it as his principal means of livelihood?

[22] Based on the evidence and in light of the six factors set out in section 30(3) of the EI Regulations, the General Division found that the Claimant had not proven that his level of involvement in his business was of such a minor extent that he could not rely on it as his principal means of livelihood.

[23] The Claimant registered a business on December 13, 2007, under the name X On June 11, 2008, the enterprise register was changed to show the name X. The business's three shareholders are the Claimant, X, and X, who each own one third of the shares.

[24] The Claimant argues that the General Division erred in its analysis of six factors stated in section 30(3) of the EI Regulations because it confused the actions of two shareholders, the Claimant and X, without considering what each really did for the business.

[25] The Claimant argues that the General Division erred by considering his initial investment of $10,000 a substantial investment in the construction field. He also argues that the General Division erred by ignoring the fact that he wanted to find employment but that there are few opportunities in the construction industry in the winter.

[26] The General Division found, based on the evidence, that the Claimant diligently dedicated himself to the business's operations during each of his benefit periods from 2011 to 2016. The General Division considered that the Claimant initially told the Commission that he was still looking for contracts for his business and preparing tenders while he was receiving benefits and throughout the year. His searches enabled him to have work at his business each year since its foundation and to provide work for his employees.

[27] Furthermore, X and X confirmed that the Claimant sought out contracts and that he had a company cell phone year-round so he could receive calls from potential clients.

[28] The General Division also found that the business had purchased trailers, one vehicle, and tools since its creation. It noted that the business's reported annual turnover was between $150,000 and $200,000 from 2011 to 2016. The General Division found that the fact that the business was successful, that it was still in operation, that it needed employees, and that the Claimant had worked there for more than 10 years attested to the continuity of the employment or business. It also found that the Claimant's employment with the business was of the same nature as the employment he had before.

[29] The General Division found that, during the periods in question, the Claimant's primary intention was to work for his business and keep it operating, and not to look for and immediately accept new employment. What is more, the evidence before the General Division does not show that the Claimant has worked for another employer since the creation of the business in 2007.

[30] The General Division's application of the objective test in section 30(2) of the EI Regulations to the Claimant's situation shows that at least four of the relevant factors point to the finding that the Claimant's involvement in the business was not to a minor extent during his benefit period. The General Division found based on the evidence that the Claimant's involvement was sufficiently considerable to be his principal means of livelihood.

[31] The Tribunal finds that the General Division decision on the Claimant's state of unemployment is based on the evidence before the General Division and that it complies with the provisions and the case law.

[32] Therefore, the Tribunal cannot accept the Claimant's ground of appeal.

Issue 3: Did the General Division err in its interpretation of sections 14(1) and 35(10)(d) of the EI Regulations, specifically by finding that there was no interruption of earnings because the Claimant could use a cell phone paid for by the business?

[33] As the General Division noted, the three distinct conditions set out in section 14(1) of the EI Regulations are cumulative and must all be satisfied for an interruption of earnings to have occurred within the meaning of that section: the claimant must have been laid off or separated from that employment; the claimant must have had a period of seven or more consecutive days during which no work is performed for that employer; and no earnings from that employment must be payable or allocated to that claimant.

[34] The General Division found, based on the evidence, that there was no period of seven or more consecutive days during which no earnings arising from his employment,

with the employer X, were payable or allocated, after he was laid off because of a shortage of work.

[35] The General Division assigned more weight to the initial, spontaneous statements the Claimant made before the Commission gave its decision on this issue, statements that described the tasks he performed for his business during his benefit periods.

[36] The General Division found that, even though the Claimant was laid off after performing periods of employment between 2011 to 2016, he had failed to show that he had stopped working for his employer for a period of seven or more consecutive days, that he had stopped being in the business's service, or that he had not received earnings arising from his employment that are payable or allocated to him.

[37] The General Division determined that, during the periods when he received benefits, the Claimant was travelling to find new projects and bid for contracts, as X and X confirmed. The Claimant told the Commission that he was still looking for new contracts, whether he was unemployed or not.

[38] The General Division found that the gas fill-ups the Claimant had received during his benefit periods and the cell phone he had at his disposal, which the business had paid for since at least 2013, constituted benefits granted to him or attributable to him under section 35(10)(d) of the EI Regulations.

[39] Did the General Division err by finding that there was no interruption of earnings because the Claimant could use a cell phone left at his disposal after his layoff?

[40] The Tribunal does not believe so.

[41] The evidence before the General Division shows that the Claimant has a cell phone that the business has paid for since at least 2013. He works for the business as a carpenter and supervises the worksites. He uses the cell phone for work. Since 2007, the Claimant has never worked outside the business of which he holds one third of the shares.

[42] The Tribunal notes that the evidence before the General Division shows that the use of the phone is tied or related to the Claimant's work. At the very least, there is a certain connection between the Claimant's employment and the benefit he received.

[43] The Tribunal is also of the view that using the cell phone, even if the amount is small, is still a cost. The Tribunal finds that, for an interruption of earnings to occur, the claimant must not benefit from advantages of daily value to that claimant.

[44] The employer's decision, for economic reasons, to not suspend cell telephone service after the Claimant's layoff does not change the fact that this Claimant still has access to a phone paid for by the business during the entire year.

[45] The Tribunal finds that the General Division did not err in its interpretation of sections 14(1) and 35(10)(d) of the EI Regulations, specifically by finding that there had not been an interruption of earnings because the Claimant could use a cell phone left at his disposal after the employer laid him off.

[46] Therefore, the Tribunal cannot accept the Claimant's ground of appeal.

Issue 4: Did the General Division err in its interpretation of section 38 of the EI Act by finding that it was appropriate to impose a penalty on the Claimant?

[47] The Claimant submits that he should not receive a penalty because he did not have wrongful intent and that he did not intend to make erroneous or fraudulent claims.

[48] The only thing that Parliament requires for a decision-maker to impose a penalty is that the person knowingly—meaning with full possession of the facts—made a false or misleading statement. The absence of the intent to defraud is therefore of no relevance.[3]

[49] The General Division found that the Claimant knew that his statements were false or misleading when he filled out his reports. The General Division considered the

[3] *Canada (Attorney General) v Bellil*, 2017 FCA 104.

Claimant to have acted in full possession of the facts when he stated that he was sick in his reports because he explained that he had done so to extend his benefit periods.

[50] This ground of appeal is therefore without merit.

Issue 5: Could the Commission be bound by the Canada Revenue Agency (CRA) insurability decision on the issue of the Claimant's entitlement to benefits?

[51] The Claimant argued before the General Division that, because he held insurable employment within the meaning of the EI Act, he was entitled to benefits.

[52] The Tribunal must follow the teachings of the Federal Court of Appeal, which has already answered the question raised in this appeal explicitly.[4]

[53] The Federal Court of Appeal has taught that the Commission must perform two consecutive operations when assessing a claimant's Employment Insurance claim. It must first determine whether the claimant was employed in insurable employment during their qualifying period and then establish a benefit period for the claimant during which their entitlement will be verified.

[54] Once the first operation concerning the claimant's insurability has been performed, as in this case with the CRA's decision, the Commission must establish a benefit period, and, once it is established, benefits are payable to the claimant for each week of unemployment that falls in the benefit period.[5] A week of unemployment for a claimant is a week in which the claimant does not work a full working week.[6]

[55] Section 30(1) of the EI Regulations provides that, during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

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[4] *Canada v D'Astoli*, 1997 CanLII 5609 (FCA).
[5] EI Act, s 9.
[6] EI Act, s 11.

[56] Section 30(2) of the EI Regulations provides that, where a claimant is employed or engaged in the operation of a business as described in section (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

[57] Insurability and entitlement to benefits are two factors that the Commission must assess with regard to two different periods. Parliament has determined that the analysis of these two factors would be subject to separate rules that must not be combined since the insurability process is separate from the entitlement process.

[58] There is no question that insurability must be decided by the CRA according to the terms of section 90 of the EI Act and by the Tax Court of Canada, if there is an appeal, and that insurability refers to the qualifying period. At the same time, entitlement must be decided by the Commission and by the General Division, if there is an appeal, and entitlement refers to the benefit period.

[59] As the General Division decided, the CRA's insurability decision could not be binding on the Commission for the issue of the Claimant's entitlement to benefits.

Allocation of Earnings

[60] Given the Tribunal's findings on the state of unemployment and the interruption of earnings, there is no need to analyze this ground of appeal.

[61] It is useful to restate, however, that according to the Federal Court of Appeal, the simple entitlement to dividends suffices, and dividends need not have been paid out. Therefore, according to the EI Regulations, it is appropriate to allocate the amounts owed to the Claimant, regardless of the legal status of the business and the decisions the shareholders made regarding whether to distribute profits.[7]

[7] *Canada (Attorney General) v Bernier*, A-136-96.

CONCLUSION

[62] For the reasons stated above, the Tribunal dismisses the Claimant's appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	June 6, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	M. G., Appellant Benoît Amyot (counsel), Representative for the Appellant