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

[TRANSLATION]

Citation: J. G. v Canada Employment Insurance Commission, 2019 SST 577

Tribunal File Number: AD-18-799

BETWEEN:

J. 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, J. G. (Claimant), worked several periods of employment for the company X between 2011 and 2016 inclusively. Based on this, six (6) benefits periods were established, and Employment Insurance benefits were paid to the Claimant. The Claimant is also a shareholder in the company.

[3] The Canada Employment Insurance Commission (Commission) made decisions according to which the Claimant's benefit claims beginning between 2011 and 2016 inclusively were cancelled because it determined that the Claimant had not been without work and earnings for seven or more consecutive days.

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

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

[6] The General Division found that the Commission was justified in 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 also found that the Claimant made false statements, with full knowledge of the facts, 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.

[8] The Tribunal granted the Claimant leave to appeal. The Claimant argues that the General Division mixed up the actions of two shareholders without considering what each really did for the company. He submits that the General Division erred by finding that work was performed during the periods covered by the claims.

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

[10] 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 set out in section 30(3) of the *Employment Insurance Regulations* (EI Regulations) and by finding that the Claimant had not shown 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 continue to benefit from a cell phone paid for by the company?

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 when deciding the Claimant's entitlement to benefits?

ANALYSIS

Appeal Division's Mandate

[11] The Federal Court of Appeal has established 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]

[12] 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]

[13] 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.

Introductory Remarks

[14] 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.

[15] At the General Division hearing, the Claimant's representative requested that the evidence in the Claimant's files be added to X's file and vice versa, which the General Division allowed.

[16] The Appeal Division considers all the evidence before the General Division in deciding the issues.

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

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

[17] The Claimant has not disputed, on appeal, the General Division's findings on the issue of the reconsideration of the benefit claims.

[18] The Tribunal is of the view that the General Division rightly found that the Commission did not have to show that the Claimant had "knowingly" made a false or misleading statement to take 72 months, but rather that it could reasonably find that the Claimant made a false or misleading statement.

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

[20] The Tribunal does not see any reason to intervene on the issue of the reconsideration period.

Issue 2: Did the General Division err in its assessment of the six factors set out in section 30(3) of the EI Regulations and by finding that the Claimant had not shown 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?

[21] 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 shown 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] The Claimant registered a company on December 13, 2007, under the name of X. On June 11, 2008, the name was changed in the enterprise register to X. The company's three shareholders are the Claimant, X, and X, who each have 1/3 of the shares.

[23] The Claimant argues that the General Division erred in its analysis of the six factors set out in section 30(3) of the EI Regulations because it allegedly mixed up the actions of two shareholders—the Claimant and X—without considering what each really

did for the company. He submits that X dealt with actively searching for contracts and travelled to submit bids.

[24] The Claimant submits that he spoke on behalf of X during initial interviews with the Commission because he was not dealing with finding contracts or taking care of bids. He also argues that the General Division erred by considering his initial investment of $15,000 to be a significant investment in the construction industry. The Claimant also argues that the General Division erred by ignoring that he wanted to find employment but that the construction industry offered few opportunities during the winter season.

[25] The General Division found that the evidence indicates that, during each of his benefit periods from 2011 to 2016, the Claimant was tirelessly dedicated to the company's activities. It considered that the Claimant first told the Commission, **and on more than one occasion**, that, while he was receiving benefits and throughout the whole year, he was always looking for contracts for his company, preparing bids, and acting as a supervisor for his employees.

[26] Furthermore, X and X confirmed that the Claimant searched for contracts and that he kept a company cell phone number in service year-round, ready to receive any calls from potential clients.

[27] The General Division also found that the company had bought trailers, a vehicle, and equipment since its founding. It noted that the company's reported annual turnover was between $150,000 and $200,000 during the 2011 and 2016 period. The General Division found that the company was successful and that the fact that the company was still operating, that it had need for employees, and that the Claimant worked there for more than 10 years was testament to the continuity of the employment or business. It also found that the nature of the Claimant's employment with the company was the same as the employment he had before.

[28] The General Division noted that the Claimant had initially told the Commission that he had never looked for employment and that he did not intend to do so. It found that, during the periods in question, the Claimant's primary intention was to work for his

company and keep it operating, and not to look for and immediately accept a new employment. Furthermore, the evidence before the General Division does not show that the Claimant has worked for another employer since the company was founded in 2007.

[29] The General Division's application of the objective test set out in section 30(2) of the EI Regulations to the Claimant's situation shows that at least four of the relevant factors indicate that the Claimant's engagement in the business during his benefit period was not to a minor extent. The General Division found that the evidence indicates that the Claimant's involvement was significant enough that he could rely on it as his principal means of livelihood.

[30] The Tribunal finds that the General Division's decision on the Claimant's unemployment was made based on the evidence before it and that this is a decision that complies with both legislation and case law.

[31] Therefore, the Tribunal cannot accept this ground of appeal from the Claimant.

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 continue to benefit from a cell phone paid for by the company?

[32] 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 met for an interruption of earnings to have occurred within the meaning of that paragraph: The claimant must have been laid off or separated from their employment; the claimant must have had a period of seven or more consecutive days during which no work was performed for their employer; and no earnings from that employment must be payable or allocated to the claimant.

[33] Based on the evidence, the General Division found that, after the Claimant was laid off because of a shortage of work, there was no period of seven or more consecutive days when earnings from the Claimant's employment with the employer Construction Girard were not payable or allocated to him.

[34] The General Division gave more weight to the Claimant's initial, spontaneous statements that he made describing the activities he performed for his company during his benefit periods before the Commission made decisions on this issue.

[35] The General Division found that, even though the Claimant had been laid off after periods of employment between 2011 and 2016, he had not shown that he stopped working for his employer for a period of seven or more consecutive days, that he had separated from that employment, or even that he had not received payable or allocated earnings from his employment.

[36] The General Division found that, during the periods in which he received benefits, the Claimant travelled to secure new projects and submit contract bids, as X and X confirmed. The Claimant himself told the Commission that he was not staying at home doing nothing because he was always looking for new contracts.

[37] The General Division found that the fact that the Claimant had fuel costs covered during his benefit periods and the fact that, since at least 2013, he had a cell phone at his disposal paid for by that company constituted benefits that he had received or that were allocated to him, under section 35(10)(d) of the EI Regulations, when he was reportedly laid-off.

[38] Did the General Division err by finding that there was no interruption of earnings because the Claimant could continue to benefit from a cell phone left at his disposal after the employer laid him off?

[39] The Tribunal does not believe so.

[40] The evidence before the General Division shows that the Claimant has had a cell phone—paid for by the company—since at least 2013. He works for the company as a carpenter and oversees the building sites. He uses the cell phone for work. Since 2007, the Claimant has never worked outside the company, of which he has 1/3 of the shares.

[41] For the Tribunal, the evidence before the General Division shows that the use of the cell phone is connected 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 receives from it.

[42] The Tribunal is also of the view that using a cell phone, even if the fee is not significant, is still a cost. The Tribunal finds that, for an interruption of earnings to occur, the Claimant must not take advantage of benefits that are of a daily value to him.

[43] Whether the employer decided not to suspend the cell phone service after the Claimant's layoff for financial reasons does not change the fact that the Claimant still benefited from the cell phone paid for by the company all year round.

[44] The Tribunal is of the view 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 was no interruption of earnings because the Claimant could continue to benefit from a cell phone left at his disposal after the employer laid him off.

[45] Therefore, the Tribunal cannot accept this ground of appeal from the Claimant.

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?

[46] The Claimant argues that there should be no penalty because there was no wrongful intent on his part and he did not intend to make fraudulent or incorrect statements.

[47] The only requirement of Parliament for imposing a penalty is that of knowingly—that is, with full knowledge of the facts—making a false or misleading statement. Therefore, the absence of the intent to defraud is of no relevance.[3]

[48] The General Division found that the Claimant knew that his statements were false or misleading when he completed his reports. The General Division found that the

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

Claimant acted with full knowledge of the facts when he stated that he was ill in his claimant reports since he himself explained that he did this to extend his benefit periods.

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

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

[50] Before the General Division, the Claimant argued that, since he was employed in insurable employment within the meaning of the EI Act, he was entitled to receive benefits.

[51] The Tribunal must follow the teachings of the Federal Court of Appeal, which has already specifically answered the issue that was raised in this appeal.[4]

[52] The Federal Court of Appeal tells us 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, then establish a benefit period for the claimant during which their entitlement will be verified.

[53] 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]

[54] 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

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

claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

[55] 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.

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

[57] 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.

[58] As the General Division decided, the Commission could not be bound by the CRA's insurability decision when deciding the Claimant's entitlement to benefits.

CONCLUSION

[59] The Tribunal dismisses the appeal for the reasons stated above.

Pierre Lafontaine
Member, Appeal Division

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