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

[TRANSLATION]

Citation: *L. P. v Canada Employment Insurance Commission*, 2019 SST 663

Tribunal File Number: AD-19-55

BETWEEN:

L. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: July 15, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, L. P. (Claimant), owns one third of the shares in a business for which he works as a salaried employee. The business has specialized in the field of construction since August 20, 2015, the date it obtained its licence from Québec's building authority, Régie du bâtiment du Québec. The Commission determined that the Claimant was not unemployed during his benefit period because he was heavily involved in the business. The Claimant asked the Commission to reconsider its decision, but it upheld its initial decision. The Claimant appealed to the Tribunal's General Division.

[3] The General Division found that all the factors showed that the Claimant was not engaged in the operation of his business to such a minor extent that he would not normally rely on that employment or engagement as his principal means of livelihood.

[4] The Tribunal granted the Claimant 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 because the decision is based on possibilities, not facts. He also states that the General Division erred in its interpretation of section 30 of the *Employment Insurance Regulations* (EI Regulations).

[5] The Tribunal must determine whether the General Division erred in law 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.

[6] The Tribunal dismisses the appeal.

ISSUES

Issue 1: Did the General Division err in its interpretation of the six factors stated 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?

Issue 2: Did the General Division base 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?

Issue 3: Could the Canada Revenue Agency (CRA) ruling on insurability be binding on the Commission on the issue of the Claimant's entitlement to benefits?

ANALYSIS

Appeal Division's Mandate

[7] The Federal Court of Appeal has established that the Appeal Division has no mandate but the one conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

[8] 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]

[9] 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.

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

PRELIMINARY REMARKS

[10] As the General Division noted, the Claimant had to prove his entitlement. The Tribunal cannot accept the Claimant's argument that the Commission refused evidence during its investigation because he had an opportunity to present his case fully before the General Division. The Tribunal must consider the evidence presented to the General Division to make its decision.

Issue 1: Did the General Division err in its interpretation of the six factors stated 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?

Issue 2: Did the General Division base 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 General Division found, based on the evidence and considering the six factors stated in section 30(3) of the EI Regulations, 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.

[12] 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 because the decision is based on possibilities, not facts. He also argues that the General Division erred in its interpretation of section 30 of the EI Regulations.

[13] Specifically, the Claimant argues that the evidence before the General Division showed that he devoted little time to his business and that the General Division erred by considering the future profitability of the business. Following the assessment of the factors in section 30(2) of the EI Regulations, he submits that the General Division should have found that, during his benefit period, the Claimant engaged in the operation of a business to such a minor extent that this engagement could not constitute his principal means of livelihood.

[14] A claimant who is engaged in operating their own business within the meaning of the EI 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 could not normally rely on that engagement as a principal means of livelihood.

[15] The test for limited self-employment or operation of a business requires knowing whether such employment or operation is objectively to such a minor extent that the claimant would not normally rely on it as their principal means of livelihood.

[16] Recent case law from the Federal Court of Appeal has established that an overall analysis of six factors should be conducted, without giving precedence to one or more of the factors, and that each file must be assessed on its merits.[3]

[17] The Tribunal is of the view that the EI Regulations must be considered in their entirety because a person could spend little time on their business and still make it their principal means of livelihood. In addition, not generating sufficient income does not necessarily mean that a claimant is unemployed.

[18] Section 30(3) of the EI Regulations sets out the six factors to consider when determining whether a claimant's engagement in the operation of their business is of such a minor extent that they would not normally rely on it as their principal means of livelihood. The circumstances that make it possible to determine whether a claimant is employed or engaged in the operation of a business to the extent described in section 2 are as follows:

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;

[3] *Martens*, 2008 FCA 240 (CanLII); *Goulet*, 2012 FCA 62 (CanLII); *Inkell*, 2012 FCA 290 (CanLII).

e) the nature of the employment or business; and

f) the claimant's intention and willingness to seek and immediately accept alternate employment.

[19] It is not disputed that the Claimant registered a business on February 18, 2015, under the name X. The business operates in the construction industry and has held a licence from Régie du bâtiment (RBQ) since August 20, 2015. The three shareholders for the business, who are also guarantors for the RBQ, are the Claimant, X, and X, who each own one third of the shares. The business runs its own website, which states that the three shareholders have worked to create X since 2014. The business uses an accountant and incurs advertising expenses. The three shareholders have not worked for another employer since the creation of the business.

a) Time spent

[20] The General Division found that the time the Claimant spent on the business was not to a minor extent.

[21] The General Division determined that the Claimant invested time in his business by working, preparing tenders, purchasing materials, and preparing future contracts. The website for the business does not imply that the business is seasonal. It indicates that the business offers interior and exterior renovation services and that it can be contacted almost instantly.

[22] The business's monthly financial statements show activity, including sales, material purchases, advertising expenses, truck repair costs, and travel and meal costs during the benefit periods.

[23] The General Division found that the evidence shows that the Claimant was clearly invested in the business even though he testified that he dedicated little time to the business during benefits periods.

b) The nature and amount of the capital and resources invested

[24] The General Division determined that the Claimant had invested about $10,000 in the business by transferring ownership of his tools to the business. The balance sheet shows that the Claimant invested a considerable amount in the business. Furthermore, the business has a line of credit of about $50,000 in the event of a large contract.

c) The financial success or failure of the employment or business

[25] The General Division found that the business was successful and growing with rising sales for the years 2016 and 2017. The business has no debt except a long-term debt to the administrators. The business's website highlights that the business has undergone constant changes since its creation. What is more, the Claimant has worked for the business since its creation in 2015.

[26] The Tribunal is of the view that the General Division did not err in its interpretation of section 30(3) of the EI Regulations by considering the viability of the business beyond the benefit period.

d) The continuity of the employment or business

[27] The General Division noted that the business has operated since August 2015, and it is the Claimant's primary source of income. Furthermore, the evidence shows that sales are increasing. Certain signs prove the continuity of the business, namely the use of an accountant, a website, a business line, and advertising.

e) The nature of the employment or business

[28] The Claimant held a position with the business similar to the one he had held previously. The business operates in the construction industry, and the Claimant owns one third of the business's shares. The Claimant is a carpenter-joiner. The business's website notes that the Claimant worked for a company in the construction industry for six years before creating his own business.

f) The claimant's intention and willingness to seek and immediately accept alternate employment

[29] The General Division noted that the Claimant intended and desired to work and accept other work when he did not have a contract for his business. It retained from the Claimant's testimony that he would have preferred to work for another employer rather than be unemployed. What is more, the evidence shows that the Claimant applied for jobs in the construction and food services industries. However, he has never worked for another employer since the creation of the business.

Application of section 30(2) of the EI Regulations

[30] The General Division's application of the objective test stated in section 30(2) of the EI Regulations 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 during his benefit period was not to a minor extent. The General Division found, based on the evidence, that the Claimant's involvement was significant enough for the business to be his principal means of livelihood.

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

[32] As a result, the Tribunal cannot accept this ground of appeal from the Claimant.

Issue 3: Could the CRA ruling on insurability be binding on the Commission on the issue of the Claimant's entitlement to benefits?

[33] In his written submissions to the General Division, the Claimant argued that, because he held insurable employment within the meaning of the *Employment Insurance Act* (EI Act), he was entitled to benefits.

[34] The Tribunal must follow the Federal Court of Appeal's teachings, which have already answered the question raised in this appeal.[4]

[35] The Federal Court of Appeal teaches 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.

[36] Once the first operation concerning the claimant's insurability has been performed, as in this case with the CRA's ruling, 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]

[37] 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.

[38] 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.

[39] Insurability and entitlement to benefits are two factors that the Commission must assess regarding two different periods. Parliament has determined that the analysis of the

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

two factors in question would be subject to separate rules that must not be combined since the insurability process is separate from the entitlement process.

[40] 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.

[41] The Tribunal is of the view that the CRA's insurability ruling could not be binding on the Commission on the issue of the Claimant's entitlement to benefits.

CONCLUSION

[42] The Tribunal dismisses the Claimant's appeal for the reasons above.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	June 20, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	France Simard, Representative for the Appellant L. P., Appellant