



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. B. v Canada Employment Insurance Commission*, 2019 SST 925

Tribunal File Number: GE-19-2287

BETWEEN:

B. B.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

DATE OF DECISION: August 19, 2019

DECISION

[1] The appeal is dismissed. The Claimant has not proven that he was unemployed because he has not met the exception to self-employment as required by the *Employment Insurance Regulations*.

OVERVIEW

[2] The Appellant, who I shall call the Claimant, is an X performing work for a business in which he owns 38% of the company shares. He applied for employment insurance (EI) benefits because there was a shortage of work. To be paid EI benefits the law says that a claimant must have a week of unemployment for each week the claimant claims EI benefits.¹ The law also says claimants who are self-employed or engaged in the operation of a business in a partnership is considered to have worked a full week.² The Commission decided the Claimant could not qualify for EI benefits because he was not unemployed due to the amount and type of activity he engaged in on behalf of the business. The Claimant disagrees because the Canada Revenue Agency (CRA) issued a ruling that his employment was insurable for the purposes of EI, he is an employee of the company, is not self employed and he has paid EI premiums while he was employed.

PRELIMINARY MATTERS

[3] The Claimant's appeal was received by the Tribunal on June 12, 2019, more than 30 days after the Reconsideration Decision was communicated to him on April 4, 2019. By way of interlocutory decision, dated June 26, 2019, I allowed an extension of time for the appeal.

[4] The Claimant requested that the hearing be held via questions and answers because the Claimant has a serious hearing problem. I granted that request. My questions were sent to the Claimant with the deadline of August 8, 2019, for reply. The Claimant's Representative requested that the deadline for reply be extended to September 9, 2019. I granted that request.

¹ *Employment Insurance Act*, section 9.

² *Employment Insurance Regulations*, section 30

The Claimant's responses were received by the Tribunal on August 7, 2019. A transcript of my questions and the Claimant's answers is in the Annex to this decision

ISSUE

[5] Was the Claimant unemployed from February 10, 2019?

ANALYSIS

[6] Once a claim for EI benefits is established, EI benefits are paid to a claimant for each week of unemployment.³ A week of unemployment is defined as a week in which a claimant does not work a full working week.⁴

[7] The *Employment Insurance Regulations* say if a claimant is engaged in the operation of a business on his own account or in a partnership, also known as self-employment, during any week, the claimant is deemed to have worked a full working week during that week.⁵ As a result, a claimant is not entitled to EI benefits during those weeks because they are not unemployed during those weeks.

[8] The exception to this *Regulation* is when the amount of involvement in the business is so minor that a claimant would not rely on his employment in the business as his means of livelihood.⁶ I must decide if the Claimant meets this exception by looking at the Claimant's degree of involvement in his business. I do this by considering several factors laid out in the *Employment Insurance Regulations*. The factors to be considered are: the time spent; the nature and amount of money and resources invested; the financial success or failure of the business; the continuity of the employment or business; the nature of the employment or business; and, the claimant's intention or willingness to seek and immediately accept alternate employment.⁷ I

³ *Employment Insurance Act*, section 9

⁴ *Employment Insurance Act*, section 11(1). A week is defined as the 7 day period beginning on a Sunday (*Employment Insurance Act*, section 2)

⁵ *Employment Insurance Regulations*, section 30(1)

⁶ *Employment Insurance Regulations*, section 30(2)

⁷ *Employment Insurance Regulations*, section 30(3)

must consider each of the factors, but the most important factors to consider are time spent and the intention or willingness to accept other employment.⁸

[9] A claimant has the burden of demonstrating that they meet the requirements for receiving EI benefits and that no circumstances exist that will disentitle or disqualify them from receiving EI benefits.⁹

Issue 1: Was the Claimant unemployed from February 10, 2019?

[10] No, I find the Claimant's involvement in his business was not minor in extent from February 10, 2019. Accordingly, the Claimant was not unemployed and is disentitled from receiving EI benefits.

[11] I accept that the Claimant's reason for applying for EI benefits was due to a shortage of work for the business and consequently for himself. However, because he is also a part owner of the business that employs him and is able to control his employment, I must decide if the Claimant has proven that he is unemployed by demonstrating that his involvement in his business is minor in nature. To make that decision I must consider the Claimant's circumstances against each of the factors listed in the *Regulations* (see paragraph 8 above).

[12] The Commission says that the Claimant is an owner in the company of which he is a shareholder. The Commission says that the issue is "not unemployed" and "has nothing to do with insurability" and because the Claimant continues to seek employment only for his company he is considered to be not unemployed. The Commission looked at and applied the six factors listed in the *Employment Insurance Regulations* to the Claimant's circumstances. It says the six factors point to a finding that the Claimant's engagement in the operation of his business was that of a person who would normally rely on that level of self-employment as their principal means of livelihood. As a result, the Commission says, the Claimant does not meet the

⁸ *Charbonneau v. Canada (Attorney General)*, 2004 FCA 61. The law requires me to apply the principles set by courts of competent jurisdiction, so you will see reference to a number of different cases in this decision.

⁹ *Employment Insurance Act*, section 49(1); *Canada (Attorney General) v. Picard*, 2014 FCA 46; *Canada (Attorney General) v. Peterson*, A-370-95

exception that allows a Claimant who is engaged to a minor extent in the operation of a business to be not regarded as working a full week.

[13] With his request for reconsideration the Claimant included a letter from the CRA which stated “We are of the opinion that [Claimant name] is your employee for the purposes of the Canada Pension Plan, and is in insurable employment for the purposes of the Unemployment Insurance Act.”

[14] When he applied for EI benefits the Claimant indicated that he was self employed. As part of the application process he answered a series of questions about “your business.” The Claimant is an X, who wires houses. The business is a corporation and was operating at the time he applied for EI benefits. The business is a contracting company that bears his and his brother’s last name. The Claimant owns 38% of the business. The Claimant answered that his personal investment in the business for the equipment purchased or leased was between \$10,001 to \$15,000. The gross annual revenue was between \$2,501 to \$10,000, and gross annual operating expenses were between \$2,501 and \$10,000. The Claimant indicated that he did not run the business while he worked elsewhere and the work he did in the business was the same as his usual occupation. The Claimant indicated that he controlled the time of day his work was performed, the number of hours he worked each day, the days of the week the work was performed, and his rate of pay. He also worked more than 15 hours a week. He considered his business to be his main source of income and it was his intention to devote his time to self-employment only. The Claimant indicated on his application that he was seeking employment outside his business and was willing to work over 30 hours a week elsewhere.

[15] With respect to the time spent on the business the Claimant told the Commission that the most the business was without work was three weeks. During those three weeks the Claimant and his brother would spend an hour or two a day visiting subdivisions under construction to see if there was work available and to drop off business cards. The Claimant told the Commission that he would take part in the daily paperwork and give it to the business’ accountant at month end. In his written answers to the Tribunal, the Claimant indicated that his investment in the business was \$38 for the shares and that at the year ending September 30, 2018, the business owed him \$166 in the form of a shareholder loan. He has not made any personal investment in

equipment as the business has purchased its own equipment through profits earned. The Claimant wrote, in his answers to the Tribunal, that the gross annual revenue of the business for the year ended September 30, 2018, was \$130,136 and gross annual operating expenses, not including wages and material purchases, were \$15,993. I note the Record of Employment issued to the Claimant reported \$24,790 insurable earnings, which represents 27 weeks' earnings as the Claimant is paid weekly. There is no other evidence of the Claimant having income from a source other than the business. The Claimant wrote in his answers to the Tribunal's questions that the business started operating shortly after its incorporation on September 23, 1988. A CRA ruling issued on October 11, 1994, stated that the CRA was of the opinion the Claimant was in insurable employment for the purposes of the Unemployment Insurance Act.

[16] In answer to the Tribunal's questions, the Claimant was quite clear that he did not seek alternate employment because the shortage of work was only temporary based on the assurances from the business' clients. The clients had to be considered because they were long term who had supported the business for many years. To accept alternate employment meant that he would not be able to readily return to employment with the business so the clients would not be readily served. It would also be unfair for the Claimant to accept new employment with another employer because with the assurance of new work in the near future he would have to leave the new employer very suddenly.

[17] The *Employment Insurance Act* is designed to provide temporary relief to those who are unemployed and actively seeking other work. It cannot be used to subsidize entrepreneurs who are starting their own business¹⁰ or, in my opinion, continuing to operate their own business. The Claimant's evidence is that he continued to seek contracts for X work for his business and was relying, in part, on the business' clients to contract with the business to provide electrical work. He did not attempt to look for work, as an X or otherwise, from any other employer. While it is the case that any contracts the business was able to acquire would result in employment for the Claimant, I find that his unwillingness to seek work elsewhere, other than through seeking work for his business, means that he was devoting the whole of his time to his business and was relying solely on his efforts on behalf of the business to provide him with

¹⁰ *Canada (Attorney General) v. Jouan*, (1995) 179 N.R. 127 (F.C.A.)

income. As a result, in accordance with the law, I cannot consider his involvement in his business to be so minor such that he was unemployed. Accordingly, the Claimant has not proven that he was unemployed because he has not met the exception to self-employment as required by the *Employment Insurance Regulations*.

[18] I do not agree that a claimant is entitled to benefits because he pays employment insurance premiums. Even if a claimant makes contributions to the EI program, this does not automatically entitle him to receive benefits during a period of unemployment. The *Employment Insurance Act* is an insurance plan and like other insurance plans, claimants must meet all the conditions of the plan to obtain benefits.¹¹

CONCLUSION

[19] The appeal is dismissed.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	August 7, 2019
METHOD OF PROCEEDING:	Questions and answers
APPEARANCES:	B. B., Appellant Don Hennessey, Representative for the Appellant

¹¹ *Pannu v. Canada (Attorney General)*, 2004 FCA 90

ANNEX

Transcript of the Appellant's answers to the Tribunal's questions.

The issue under appeal is the Commission's decision of March 30, 2019, at pages GD3-32 and GD3-33, which states, in part:

Issue: Week of Unemployment

We regret to inform you that we have not changed our decision regarding this issue. The decision as communicated to you on March 7, 2019, is therefore maintained.

The Commission's decision of March 7, 2019, is at page GD3-25. The decision states, in part:

We are unable to pay you Employment Insurance benefits from February 11, 2019 because you were self-employed as an X and therefore cannot be considered to be unemployed.

In terms of the legal test, which the Tribunal must apply to your circumstances to decide your appeal, Appellants have the burden of demonstrating that they meet the requirements for receiving employment insurance. In this case, you have the burden to prove that you were unemployed for each week you wish to receive benefits and must demonstrate that your engagement in self employment was minor.

The burden of proof is a balance of probabilities, which means it is more likely than not that the events occurred as described.

The relevant legislation is located at pages GD4-7 and GD4-8.

Please answer the following questions:

Affirmation:

1. *Do you, [Claimant name], solemnly affirm that the testimony you give, in the form of answers to these questions, will be the truth, the whole truth and nothing but the truth?*

Yes I do

Beginning correction – GD3-6

[Claimant name] is an employee of X. This is a limited liability incorporated company.

Week of Unemployment:

The Commission has stated that when you applied for Employment Insurance because you continued to seek employment only for your company you are not considered unemployed.

2. *Pages GD3-3 to GD3-20 contain a copy of your application for Employment Insurance. Beginning on page GD3-8 and ending on page GD3-14, you answered a series of questions about self employment. Are the answers you gave to the questions on pages GD3-8 to GD3-14 accurate?*
3. *If the answers to the questions are not accurate, please indicate which questions were not answered accurately and provide the correct response.*

GD3-8

[Claimant name] is not self employed in the legal sense of the word. He does not operate a business in the form of a proprietorship.

[Claimant name] is an employee of X. There is no such entity or business in any form using the name X.

Correct address for X:

c/o [Representative's name] [Representative's address]

GD3-9

The Corporation X was incorporated 1988-09-23 and started operating very shortly after.

GD3-10

There is no self employment personal investment since [Claimant name] is not self employed. [Claimant name] has purchased shares in X in the amount of \$38. As of the latest year end Sept. 30/18 the company owes him \$ 166 as a shareholder loan. That is his total investment. X has purchased its own equipment over the 30 years using funds from profits earned with a Sept. 30/18 year end net book value of \$7,637.

[Claimant name] has no business and is not self-employed. He does own shares in X as described above.

Gross Revenue for X for the year ended Sept. 30/18 was \$ 130,136. Gross annual expenses for X for year ended Sept. 30/18 was \$ 15,993. This does not include wages and material purchases.

There is no advertising except gifts given to clients at Christmas in the amount of \$1,303.

4. *On page GD3-23, there is a Supplementary Record of Claim, containing a record of a conversation you held with the Commission on February 25, 2019. Is the record of the conversation accurate?*

Yes it is.

5. *If the record is not accurate, please indicate the inaccuracies and provide the correct information about your day-to-day activities running the business, your control over the time of day worked in running the business, the number of days in the week you performed those activities and the rate of pay you received for those activities.*

6. *On page GD3-24, there is a Supplementary Record of Claim, containing a record of a conversation [Representative's Name] held with the Commission on March 5, 2019. Mr. [Representative's last name] is recorded as stating that the gross annual revenue of X was \$130,136. Is that amount accurate?*

Yes it is.

7. *If the amount is not accurate, please provide an accurate amount.*
8. *What would be the amount of income that you would receive from the gross annual revenue, as reported at page GD3-24 or corrected in response to question 7, of X?*

My employment income is not based on the revenue of my employer X. My income is, as most employees, based on the hours I work. I receive a gross weekly wage based on hours worked. For a 40 hour week I received \$830.

9. *At GD3-27, you have provided a letter from Revenue Canada dated October 11, 1994, which is addressed to Mr. [B. U.]. Who is [B. U.]?*

[B. U.] is the other employee of X.

10. *As the letter concerns the insurability of your employment, why was the letter written to [B. U.] and not to you?*

The letter was written to him because he requested a ruling on behalf of the corporation X.

11. *Since this ruling was made, has Revenue Canada changed its ruling with respect to the insurability of your employment?*

No I have received no change in ruling and do not expect one since my terms of employment have not changed since the original ruling.

Conclusion:

12. *On page GD4-4 beginning under the heading "The Commission's Position" and continuing on to page GD4-6 is the Commission's argument as to why you are not entitled to receive Employment Insurance regular benefits. If you wish to do so, please provide a response to their argument.*

Correction to GD4-1

The Claimant was employment (*sic*) with X from September 1, 1994 until February 8, 2019 (GD3-21 to GD3-22)

Actually employment began in 1988 shortly after the 1988-09-23 incorporation.

A. Regarding accepting alternate employment:

Reasons [Claimant name] did not seek alternate employment:

- the shortage of work was only temporary based on assurances by clients of X that work would begin in the near future,
- the clients of X had to be considered. Most of them were long term clients who had supported the business for many years. To accept alternate employment means that [Claimant name] would not be able to readily return to employment with X so these clients would not be properly served.
- also to accept alternate employment would not be fair to the new employer. With the assurance of work in the near future [Claimant name] may have to leave the new employer very suddenly thus leaving that new employer with no employee to complete the work they have for their client.
- with the downturn in the residential housing market other X firms are not hiring. [Claimant's name] X license is only for residential work so he can only be employed in that area.

13. *On pages GD4-7 to GD4-8 is the legislation the Commission relied upon to make its decision to not allow your claim for Employment Insurance regular benefits. If you wish to do so, please provide your argument as to how you think the legislation should have been applied in your circumstances.*
14. *Please provide any additional information or argument you wish to have considered.*

X was incorporated on 1988-09-23 and started operating very shortly after. [Claimant name] has been employed with the company for 31 years. His earnings were insurable so he has contributed to EI for 31 years.