



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. K. v Canada Employment Insurance Commission*, 2019 SST 1020

Tribunal File Number: GE-19-2505

BETWEEN:

A. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: August 22, 2019

DATE OF DECISION: September 20, 2019

DECISION

[1] I am allowing the appeal in part as follows:

- a) I am allowing in part the Claimant's appeal of the Commission's finding that he was not unemployed during his benefit period. The start date for this disentitlement should be July 24, 2013.
- b) I am dismissing the Claimant's appeal of the Commission's finding that he was not available for work while receiving regular benefits from June 24, 2013, to July 12, 2013.
- c) I am allowing in part the Claimant's appeal of the Commission's finding that he was not otherwise available for work while receiving sickness benefits. The start date for this disentitlement should be July 24, 2013.
- d) I am allowing the Claimant's appeal of the warning, which should be removed.

OVERVIEW

[2] After the Claimant's employment as a licensed optician ended, he applied for employment insurance (EI) benefits. His benefit period began on December 2, 2012, and he started receiving regular benefits. Since he could not find suitable work, he began preparing to start an optician's business of his own. He opened his store on September 15, 2013. He received sickness benefits from July 14, 2013, to October 18, 2013.

[3] On April 23, 2019, the Commission disentitled him from receiving regular benefits starting on June 24, 2013, for failing to prove he was unemployed as of that date. It disentitled him from June 24, 2013, to July 12, 2013, for failing to prove availability for work. It disentitled him from receiving sickness benefits from July 14, 2013, to October 18, 2013, since he failed to prove he would have been otherwise available for work if he had not been sick. It imposed a warning for knowingly providing false or misleading information about his self-employment.

[4] The Claimant is appealing all four of the Commission's findings. He says he was not self-employed since he did very little to set up his business and his store only opened on September 15, 2013. He says he was looking for a job right up to November 2013, and would have

abandoned his business to accept suitable employment. His sickness was the only reason he was not available for work. He did not know he had to report activities to set up a business as self-employment, or his part-time hours after the store first opened because there was little revenue.

[5] The Claimant wants me to remove the three disentitlements and cancel his overpayment.

PRELIMINARY MATTERS

[6] After the hearing, on August 27, 2018, the Claimant submitted a job search dated from May to November 2013, which included a list of optical centres. I shared his submission with the Commission, which responded on August 29, 2019. I accepted both the Claimant's submission and the Commission's response as relevant to this appeal.

ISSUES

[7] **Issue 1: Was the Claimant unemployed during his benefit period and if so, when?**

[8] **Issue 2: Was the Claimant available for work from June 24, 2013, to July 12, 2013, while receiving regular benefits?**

[9] **Issue 3: Would the Claimant have been otherwise available for work if not for the sickness he reported from July 15, 2013, to October 18, 2013?**

[10] **Issue 4: Did the Commission prove the Claimant knew his statements were false or misleading?**

ANALYSIS

Issue 1: Was the Claimant unemployed during his benefit period and if so, when?

[11] I find that the Claimant was only unemployed up to July 24, 2013. He can be considered to have worked a full working week in his business starting on this date, since this is when he got possession of his new premises.¹ He began constructing his office space and equipping the store, which required him to invest significant financial resources.

¹ GD2-66; GD2-95.

[12] You can only receive benefits for a week in which you were unemployed.² If you are self-employed, you are considered to be working a full working week in your business.³ It is up to you to prove that this was not the case.⁴

[13] Self-employment does not just mean the operational phase of your business. Preparing to set up your business may also count as self-employment, depending on the extent of your involvement.⁵ EI benefits are not subsidies for setting up a business.⁶

[14] However, there is an exception. You may still be able to receive benefits if your involvement in your business was so minor that most people would not normally rely on that level of activity as their principal source of income.⁷ You have to prove that your level of involvement in your business was minor enough that this exception applies.⁸

[15] The Claimant maintains that he was not self-employed during his benefit period. However, he initially told the Commission he was self-employed as of September 15, 2013, the date his store opened. He wrote on his self-employment questionnaire that he was not available to accept any “outside job” from September 15, 2013, to October 19, 2013. He later said his self-employment only began on November 4, 2013, when he started working full-time.

[16] The Claimant says he spent little time setting up his business, especially before he got possession of the premises on July 24, 2013. He insists that he would have been willing to abandon his business to accept a job right up to the date his store opened. He argues that I should give most weight to those two factors.⁹

[17] However, I have to consider the following six factors to decide whether his involvement in self-employment was minor:¹⁰

² S 9 of the *Employment Insurance Act* (EI Act).

³ S 30(1) of the *Employment Insurance Regulations* (EI Regulations).

⁴ *Marlowe v Attorney General of Canada*, 2009 GCA 102. The Claimant has to prove this on a balance of probabilities, which means something is more likely than not.

⁵ *Newhook v Her Majesty the Queen*, A-977-96.

⁶ *Attorney General of Canada v Jouan*, A-366-94.

⁷ S 30(2) of the EI Regulations; *Martens v Attorney General of Canada*, 2008 FCA 240.

⁸ *Lemay v Canada Employment Insurance Commission*, A-662-97.

⁹ *Charbonneau v Attorney General of Canada*, 2004 FCA 61.

¹⁰ S 30(3) of the EI Regulations; *Inkell v Attorney General of Canada*, 2012 FCA 290.

a) *The time he spent working on his business*

[18] The amount of time the Claimant spent does not show a minor level of engagement because he was essential to the business even when his hours were limited.

[19] The Commission says the Claimant spent significant time preparing for self-employment, starting on June 24, 2013, the date he signed his lease. He was involved in negotiating the lease, planning and supervising the design and construction, and buying office and optical equipment. He opened and closed the store daily once it opened.

[20] The Claimant first said his involvement in setting up the business was only about an hour a week to monitor the progress of the renovation.¹¹ He later reported that it was two to eight hours a week from June 24, 2013, to July 31, 2013, mostly by email.¹² He said the business required an additional 10 hours per week for bookkeeping, maintaining inventory and accounting. He was the signing authority on all the cheques. At the hearing, he said he spent 10 hours a week on the business after he got sick on July 15, 2013.

[21] The Claimant says his wife and son took over most of the work after that date. He had first reported that he ordered all the equipment himself, a task that took him ten hours.¹³ He now says his wife and son did all the research on what to buy; he just finalized the order. Their work does not count towards the time he spent setting up the business.¹⁴

[22] The Claimant agrees that he opened and closed his store from the date it opened, but says he only worked one to two hours a day there until September 30, 2013. He started seeing clients as the store's sole optician, dispensing eyeglasses and contact lenses. He began working full-time on November 4, 2013. He argues he was not self-employed until then since his hours before that date were nothing like working a full working week.

[23] I find that the Claimant was actively involved as the mastermind of the business from the date he got possession of the store, and even after he became sick. He visited the premises to

¹¹ GD3-80.

¹² GD8-2 to GD8-3.

¹³ GD3-100.

¹⁴ *Martens*, see above.

inspect the construction work, including two weeks later on July 31, 2013. He dealt with business communications personally, including arrangements for the store opening. He says he did this mostly by email, but communicating remotely is still time spent setting up a business.

[24] I give low weight to the Claimant's testimony that his involvement was minor even after his store opened on the basis that he did not at first work full-time hours. I find that his time, even when limited, was essential to the business since he was the only optician. He controlled all the decisions and supervised the preparations and operations. This is not minor involvement.

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

[25] The financial resources that the Claimant invested in his business do not show a minor level of engagement. They demonstrate a significant investment. He took on a five-year lease at an annual rent of \$33,715 plus HST. He had to give a \$10,000 deposit when signing the lease. He spent over \$80,000 to construct his office space. He had to pay close to \$27,000 of this amount as early as July 26, 2013. He had to buy specialized optical equipment.

[26] The Claimant argues that he financed these expenses through a \$120,000 home equity loan rather than a business loan. He did not originally intend to use the loan for business purposes. However, he intended to pay it off through his business income. Whatever his original intention and the type of loan he secured, the result was the same: a significant financial liability that shows his level of engagement in his business was not minor.

c) The financial success or failure of his business

[27] The financial success or failure of the Claimant's business does not show a minor level of engagement because self-employment does not only start when a business shows profits.

[28] The Claimant says he was not self-employed because his business only started generating income when the store opened and there was little profit at first because of the initial set-up costs. However, gross business revenue is the relevant factor, not net income.¹⁵ EI benefits do not provide start-up funding for a business until it becomes profitable. The Claimant intended to

¹⁵ *Martens*, see above.

rely on his store as his principal means of livelihood. Entrepreneurs often have to rely on a business with limited or no profits as their main source of income in the early stages.

d) The continuity of his business

[29] The continuity of the Claimant's business does not demonstrate a minor level of engagement. His business was not just an interim measure until he found a job. He took on a five-year lease, which shows he wanted to ensure its continuity and make it sustainable.¹⁶

e) The nature of his business

[30] The nature of the Claimant's business does not show a minor level of engagement given that it was in the same field as the job he lost. He had the qualifications, experience and contacts to become a successful owner/operator, which gave him a natural "stepping stone" into self-employment.¹⁷

f) His willingness to seek and immediately accept suitable employment

[31] The Claimant's actions do not demonstrate that he wanted to find work and would immediately accept a suitable job. He has not shown a minor level of engagement in this way.

[32] The Commission says he was concentrating on ensuring the success of his business and would not have abandoned it to go back to being an employee.

[33] The Claimant says he was looking for a job right up to the date his store opened. He would have accepted a job offer immediately and sold the business because he was worried about the stress of self-employment. He wanted to be prepared in case the store was not successful. He says his goal was to find a job rather than set up a business.

[34] However, the Claimant had made a long-term investment into building his future livelihood. The store was also going to provide employment for his wife and son. This is why I find it more likely than not that his goal by July 24, 2013, was to prepare for self-employment. I find it unlikely that he would have abandoned his business right up to the date the store opened

¹⁶ *Martens.*

¹⁷ *Martens.*

given the debt he took on to get it up and running. He would have to rely on finding someone who could immediately buy his business. Selling it would also put his wife and son out of work.

[35] I have considered the above six factors. While I find they are all relevant, I give most weight to the Claimant's essential role in all aspects of the business and his significant financial investment in its continuity and success.

[36] With these factors in mind, I find that the exception for minor involvement in setting up a business only applies up to July 24, 2013. Before that date, his activities were mainly limited to incorporating the business, looking for premises and negotiating the terms of his lease.

[37] I find that this exception no longer applies starting on July 24, 2013, when the Claimant got possession of his premises. He then began a major construction project that increased his financial stake in the business. At this point, his involvement was no longer so minor that a claimant would not normally rely on it as a principal means of livelihood.

[38] This is why I find that the Claimant worked a full working week in self-employment starting on July 24, 2013. As a result, he was no longer unemployed as of that date. You have to be unemployed to get EI benefits.

Issue 2: Was the Claimant available for work from June 24, 2013, to July 12, 2013, while receiving regular benefits?

[39] The Claimant did not show he was available for work during this period, since he did not meet the test to measure availability. You cannot receive benefits unless you can do this.¹⁸

[40] According to this test, you have to prove you were capable of working and available for work on each working day, but could not find suitable employment.¹⁹ You do this by showing

¹⁸ A disentitlement applies under s 18(1)(a) of the EI Act. You have to meet all the conditions to receive regular benefits (*Attorney General of Canada v Renaud*, 2007 FCA 328). This includes being available for work.

¹⁹ *Attorney General of Canada v Cloutier*, 2005 FCA 73. A working day is every day of the week except Saturday and Sunday (s 32 of the EI Regulations).

that you wanted to return to the labour market as soon as possible, tried to find a job and had no restrictions that unduly limited your chances of being hired.²⁰

[41] As well, you cannot receive regular benefits unless you can prove that you made “reasonable and customary” efforts to find suitable work.²¹ To do this, you have to show that you made sustained efforts to find a job, carried out the job-search activities listed in your benefit application and directed your efforts to obtaining suitable employment.²²

[42] The Commission says that the Claimant did not meet the test for availability because he was concentrating on setting up his self-employment rather than finding insurable employment.

[43] The Claimant says that finding a job had been his “first priority.” He preferred to work in Scarborough, but he would have accepted a job in Toronto. He was willing to work full-time, with a commute of up to an hour each way.

[44] He told the Commission that the community of opticians in Toronto is very small. He reached out to them by phone or sometimes in person about job opportunities, but with no success. They also knew he was trying to start his own business. His work was specialized so all suitable vacancies were posted on his professional association’s website. He checked it regularly. He applied by email to a job as an optometrist’s assistant.

[45] I find that the Claimant was no longer meeting the test to prove availability as of June 24, 2013. He has not shown that he made sustained efforts to find a suitable job after this date.

[46] On the timeline that he submitted with his appeal, he did not report any job search activities in June and July 2013. According to this timeline, his job search ended in May 2013.

[47] I give little weight to the evidence the Claimant submitted after the hearing to prove he carried out a serious and sustained job search from May to November 2013. This list of optical stores and phone numbers has no dates or details showing there were vacancies at these stores at his level of seniority after June 24, 2013, and if and how he applied for them. As well, the date

²⁰ The Federal Court of Appeal set out this test in *Faucher v. Canada Employment and Immigration Commission*, A-56-96. The three criteria in the test are called the “*Faucher* factors.”

²¹ S 50(8) of the EI Act and s 9.001 of the EI Regulations. The disentitlement applies under s 50(1) of the EI Act.

²² S 9.001 of the EI Regulations.

range covers the month of November, which is well after his store opened. He was already working full-time hours there starting in early November 2013, while his list says he was still searching for work. For these reasons, I do not find his evidence reliable.

[48] I accept that finding another job was initially the Claimant's goal after he lost his job. However, by June 24, 2013, I give more weight to his statement that "[w]hen I could not find full-time work after some time I was preparing to start my own first business where I could become self-employed."²³ I find it more likely than not that the type of job search he described was not taking him 30 hours a week by June 24, 2013. It was therefore no longer sustained.

[49] I find that the Claimant has not shown he was available for work starting on June 24, 2013. As a result, he cannot receive regular benefits as of that date.

Issue 3: Would the Claimant have been otherwise available for work if not for the sickness he reported from July 15, 2013, to October 18, 2013?

[50] I find that the Claimant has only shown he was otherwise available for work from July 15, 2013, until July 23, 2013, when his involvement in self-employment was still minor. I find that he was not otherwise available starting on July 24, 2013, because his involvement was no longer minor.

[51] To get sickness benefits, you have to prove you could not work because of illness or injury. You also have to prove you were otherwise available for work.²⁴ This means showing you could have worked in insurable employment if you had not been sick or injured.

[52] The Claimant reports that he survived a stroke in April 2012. He was sick again starting on July 15, 2013. He was on diabetes and hypertension medication, so he could not manage all an optician's duties. He says he would have been available for work if he had not been sick.

[53] The Commission agrees that he was unable to work because of his sickness. However, it says this was not the only reason he could not work. It argues that he was not otherwise available

²³ GD3-171.

²⁴ S 18(1)(b) of the EI Act. See *Faucher* for the criteria to prove availability, such as showing you wanted to return to the labour market as soon as possible.

for work because he was self-employed. His goal of establishing his business and working there meant he would not have been trying to return to the labour market as soon as possible.

[54] I find that the Claimant was not otherwise available for work as of July 24, 2013. This is when he started to work a full working week in self-employment. For this reason, he has not shown that his sickness was the only reason he was unable to work. To receive sickness benefits, you must be otherwise available for work as well as incapable of working.²⁵

Issue 4: Did the Commission prove the Claimant knew his statements were false or misleading?

[55] No. While the Commission showed that the Claimant made false or misleading statements about his self-employment, it did not prove he made them knowingly.

[56] To issue a warning, the Commission must first find that you made a false or misleading statement.²⁶ It must then prove that you did this knowingly, that is, with the subjective knowledge that it was false.²⁷ To do this, it must provide evidence of the questions it asked, as well as the answers you gave.²⁸ If the Commission shows that you answered a very simple question incorrectly, it is up to you to explain why you gave an incorrect answer.²⁹

[57] The Commission says that the Claimant knowingly gave false and misleading information about his self-employment. It argues that he should have checked if he did not understand what self-employment meant before concluding that he was not self-employed until his business became profitable. It provided the relevant questions and answers from his self-employment questionnaire and benefit claim reports. It pointed out the inconsistent information he gave about his inability to work while claiming sickness benefits.

[58] The Claimant says he misunderstood the questions and the definition of self-employment because of his limited English-language skills. He found the questionnaire confusing. He

²⁵ *Attorney General of Canada v X*, A-479-94.

²⁶ S 41(1) of the EI Act.

²⁷ *Mootoo v Canada - Minister of Human Resources Development*, 2003 FCA 206; *Attorney General of Canada v Gates*, A-600-94. This finding is made on a balance of probabilities, based on the circumstances and evidence.

²⁸ *Caverly v Minister of Human Resources Development of Canada*, 2002 FCA 92.

²⁹ *Attorney General of Canada v Purcell*, A-694-94.

completed it several years after the period in question. He was not always sure whether the questions related to his current or past self-employment.

[59] I agree that the Claimant made false or misleading statements. However, I give weight to his testimony that he did not knowingly do this since he had a language barrier. I note that he required an interpreter for his hearing.

[60] I find it more likely than not that the Claimant did not fully understand the questions on self-employment. The Commission has not proved that he knew his responses were false and misleading when he made them. I therefore find that the warning should be removed.

[61] The Claimant has asked me to cancel his overpayment. However, the Commission has already decided not to waive it, so this issue is not before me.³⁰ All the Claimant can do is make that request to the Federal Court of Canada.³¹

CONCLUSION

[62] The appeal is allowed in part, as follows:

- a) The Claimant's disentitlement for failing to prove he was unemployed during his benefit period should start on July 24, 2013. He did not work a full working week before that date since his involvement in self-employment was still minor at the time.
- b) The Claimant is disentitled from receiving regular benefits between June 24, 2013, and July 12, 2013, since he did not show he was available for work during this period.
- c) The Claimant's disentitlement for not being otherwise available for work while claiming sickness benefits should begin on July 24, 2013. He has not shown that his illness was the only reason he could not work starting on that date.
- d) The warning should be removed since the Commission did not prove that the Claimant knew he was providing false and misleading information about his self-employment.

³⁰ The Commission may decide to waive an overpayment for such reasons as financial hardship. If it decides not to waive it, I do not have the authority to review this decision (s 112.1 of the EI Act).

³¹ *Attorney General of Canada v Mosher*, 2002 FCA 355.

Lilian Klein

Member, General Division - Employment Insurance Section

HEARD ON:	August 22, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	A. K., Appellant X, Representative