



[TRANSLATION]

Citation: *FC v Canada Employment Insurance Commission*, 2021 SST 261

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: F. C.
Representative: Caroline Moisan

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (414305) dated February 8, 2021 (issued by Service Canada)

Tribunal member: Josée Langlois

Type of hearing: Teleconference
Hearing date: April 15, 2021
Hearing participant: Caroline Moisan, Appellant's representative
Decision date: April 16, 2021
File number: GE-21-433

Decision

[1] The appeal is dismissed. I disagree with the Claimant.

[2] The Claimant was working full work weeks from May 4, 2014. This means that he may not be able to receive Employment Insurance (EI) benefits.

Overview

[3] For the period in question, the Claimant was self-employed. He was running an excavation business with two other shareholders. The business began operating in May 2014, and the Claimant operated the machinery.

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was working full work weeks for the period in question. As a result, the Commission decided that the Claimant could not receive EI benefits. When it made its reconsideration decision, the Commission disentitled the Claimant from May 4, 2014.

[5] The Claimant disagrees. His representative argues that he should receive EI benefits. The representative indicates that the Commission's reconsideration of the claim isn't disputed, but she says that the Claimant didn't receive any earnings during the period in question. She argues that he experienced difficulties during and after that period, and she asks that he be excused from repaying the benefits he was overpaid.

[6] I have to decide whether the Claimant was unemployed from May 4, 2014.

Matter I have to consider first

The Claimant wasn't at the hearing

[7] The Claimant wasn't at the hearing. A hearing can go ahead without the Claimant if the Claimant got the notice of hearing.¹ The Claimant's representative confirmed that

¹ Section 12 of the *Social Security Tribunal Regulations* sets out this rule.

she would present arguments without the Claimant. So, the hearing took place when it was scheduled, but without the Claimant.

Issue

[8] Was the Claimant's level of involvement so limited that he wasn't actually working full work weeks?

Analysis

[9] If you are involved in a business, you may not be entitled to EI benefits.

[10] The law says that you can receive EI benefits for each week you are unemployed.² A week of unemployment means any week you don't work a full work week.³

[11] Also, if you are self-employed, the law assumes that you work full work weeks.⁴ So, you can't receive EI benefits.⁵

Exception if your involvement is limited

[12] There is an exception if your level of involvement in the business is limited.⁶

[13] The exception applies if the Claimant's level of involvement is so limited that a person would not normally rely on that self-employment as their main means of earning a living.⁷

² Section 9 of the *Employment Insurance Act* (Act) sets out this rule.

³ See section 11 of the Act.

⁴ See section 30(1) of the *Employment Insurance Regulations* (Regulations).

⁵ See *Marlowe v Canada*, 2009 FCA 102.

⁶ See section 30(2) of the Regulations. It refers to a claimant being involved to "a minor extent" (in other words, their involvement is limited). Also see *Martens v Canada (Attorney General)*, 2008 FCA 240.

⁷ See section 30(2) of the Regulations and *Martens v Canada (Attorney General)*, 2008 FCA 240.

[14] The Claimant has to prove that his involvement was so limited that the exception applies.⁸ The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that his involvement was limited.

Six factors for deciding level of involvement

[15] To decide whether the exception applies, I have to consider the following six factors:⁹

- a) How much time did the Claimant spend on his self-employment?
- b) How much has the Claimant invested in his self-employment, and what are those investments (such as money, property, goods, and resources)?
- c) Financially, has the Claimant's self-employment been a success or failure?
- d) Was the Claimant's self-employment meant to be ongoing?
- e) What was the nature of the Claimant's self-employment?
- f) Did the Claimant intend to and want to find another job quickly?

– Time spent

[16] The amount of time that the Claimant spent on his self-employment doesn't show limited involvement because the business began operating in May 2014, and the Claimant was responsible for the machinery from then on. On October 25, 2013, the Claimant left the full-time job he had had since 2010 to devote himself full-time to starting his business.¹⁰

[17] In May 2017, the Canada Revenue Agency told the Commission that the Claimant had registered the business name "X" on February 3, 2014. On May 15, 2017,

⁸ See *Canada (Attorney General) v Falardeau*, A-396-85, and *Lemay v Canada Employment Insurance Commission*, A-662-97.

⁹ Section 30(3) of the Regulations sets out these six factors. This decision paraphrases those six factors for plain language.

¹⁰ See GD3-77.

the Commission sent the Claimant a letter to inform him that he had to complete a self-employment questionnaire. The Claimant didn't complete the questionnaire. The Commission asked the Claimant to complete the questionnaire at least four times, including on August 17, 2017, October 31, 2017, and January 26, 2018.

[18] On January 26, 2018, the Commission contacted the Claimant, who said that he had moved from X to X in August or September 2014 and that this was when he had started working for his business. He indicated that they hadn't received the machinery until September 2018. However, when contacted by the Commission, one of his co-shareholders said that, even if he hadn't moved until July 2014, the Claimant had started working for the business in May 2014 because they had received the equipment then. He explained that, during that period, the Claimant was staying with one of the shareholders.

[19] On May 2, 2021, the Claimant admitted to not reporting any hours worked for the period in question when completing his reports.

[20] The Commission agent notes that one of the shareholders in the business didn't work much, while the other took care of the administrative side of things. So, the Claimant was the only on-site employee. This means that his presence was necessary for the business's operations.¹¹

[21] As for the Claimant's representative, she argues that he had depressive episodes that coincided with the Commission's attempts to obtain the requested information. She argues that he didn't intend to commit fraud but that he experienced difficulties with one of the shareholders and is thinking of declaring bankruptcy.

[22] The Claimant wasn't at the hearing and, concerning the time spent on his self-employment, I accept the statements on file that operations began in May 2014. The Claimant got a business name in February 2014, the excavation season was going to start in the spring of 2014 and, since the Claimant had left his job on October 25,

¹¹ See GD3-78.

2013, to focus on starting his business, it is plausible that the business began operating in May 2014 when the season permitted. I accept that the business was in operation from May 2014 and that the Claimant was staying with one of the shareholders.

[23] In this regard, the income statement in the Commission's file shows revenues totalling \$176,432 as at November 30, 2014. This data also points to the finding that the time the Appellant spent on his self-employment during the summer of 2014 wasn't minor in extent, especially since he was responsible for operating the machinery.

[24] I find that the Claimant was working full work weeks from May 4, 2014.¹² The Claimant's actual involvement in his self-employment wasn't minor in extent, since he devoted all of his time to performing contracts for the business from May 4, 2014. The Claimant had even left his full-time job on October 25, 2013, to focus on this.

– **Investments**

[25] The nature and amount of the Claimant's investments (such as money, property, goods, and resources) don't show limited involvement from May 4, 2014, because that is precisely when he invested in the business.

[26] The Claimant explained to the Commission that he had invested \$8,000 in purchasing equipment. In March 2014, he borrowed \$150,000 jointly with the two other shareholders to purchase larger equipment. The Claimant's investment for this equipment totalled \$50,000.

[27] The Claimant also explained to the Commission that a business account had been opened and that all three shareholders could sign. Two out of three signatures were needed to make a transaction, and he had a cell phone.

[28] The Commission argues that the Claimant intended to rely on this business as a principal means of livelihood.

¹² See section 11(1) of the Act.

[29] I find that the investment in the business during the period in question wasn't minor in extent. On the contrary, the Claimant injected his share of the investment needed to set up the business during that period. Therefore, investments after May 4, 2014, were meant to contribute to the business's success.

– **Financial success or failure**

[30] The financial situation of the Claimant's self-employment doesn't show limited involvement during the period in question because deposits were made to the Claimant's bank account.

[31] On May 1, 2018, the accountant told the Commission that, as of that day, everything was closed for the business. She sent the Commission the income statement as at November 30, 2014. On that date, the business had revenues totalling \$176,432. The documentation provided, including statements for the Claimant's bank account with Desjardins, shows that there was activity in the Claimant's account between December 9, 2013, and July 11, 2014.

[32] In the end, the only explanation the Claimant had for the Commission about these deposits was that the amounts must have come from his personal line of credit. The Claimant's representative confirmed this explanation, and she added that, even though the business had paid the Claimant money, it wasn't enough to be considered a salary, since the money was for gas or other necessities.

[33] The Commission argues that, from January 13, 2014, to July 11, 2014, deposits totalling approximately \$34,000 were made to the Claimant's bank account.¹³ It says that the Appellant hasn't explained where these deposits came from.

[34] For example, it found a deposit for \$10,100 on April 23, 2014, a deposit for \$1,204.34 on June 20, 2014, and a deposit for \$1,002.86 on July 11, 2014.¹⁴

¹³ See GD3-69.

¹⁴ See GD3-51 and GD3-56.

[35] It says that, as at November 30, 2014, the business generated revenues of \$176,432.

[36] The Claimant explained to the Commission that he had tried working for himself from 2014 to 2017 but that it hadn't worked out, and he had never paid himself a salary. At the hearing, the Claimant's representative explained that, if the business hadn't worked out, it was largely because of mismanagement, if not dishonest management of the business, by one of the shareholders, and that the Claimant had experienced financial difficulties during that period and even afterward.

[37] According to the Claimant, the deposits to his bank account must have come from his personal line of credit.

[38] Regardless, as I mentioned at the hearing, the business's net profits have to be considered even in cases where they aren't allocated. There is a difference between a business's gross revenues and its net profits. However, I accept that, during the relevant time, different amounts were deposited into or transferred to the Claimant's bank account.

[39] Even though the business wasn't a success in 2017, I have to determine whether it was a success for the period beginning May 4, 2014. During the period in question, that wasn't the case. In my view, from May 4, 2014, the Claimant was involved in his self-employment to earn a living. As mentioned at the hearing, if the Claimant has other remedies to raise in connection with the difficulties he experienced, he can contact a local legal centre for assistance.

[40] I find that, during the period in question, the Claimant might have relied on the income from his self-employment as a principal means of livelihood.¹⁵

¹⁵ See *Martens v Canada (Attorney General)*, 2008 FCA 240.

– **Ongoing self-employment**

[41] The Claimant's self-employment was meant to be ongoing. This doesn't show limited involvement because the Claimant devoted himself to his self-employment and left his full-time job to focus on it.

[42] I find that the business's operations were ongoing from May 4, 2014. That day, operations began, and the Claimant took the necessary steps to be able to run the business and keep it going. The income statement as at November 30, 2014, shows that, at that time, the business was meant to be sustainable.

– **Nature of the Claimant's self-employment**

[43] This factor considers whether there is any connection between the employment that has been lost and the business in which the claimant is engaged. If the employment that has been lost is similar to the activity undertaken in the business, it may indicate that the employment is a stepping stone into the business.¹⁶

[44] Before the business started, the Claimant had been working at X since 2010.

[45] The business associated with the Claimant's self-employment provided excavation services, and he was responsible for operating the machinery. The Claimant had mastered this task before the business started. He had the necessary training, and he was very familiar with the nature of the business. This doesn't show limited involvement.

– **Intention and willingness to find another job quickly**

[46] The Claimant wasn't looking for work and didn't want another job. This doesn't show limited involvement because the Claimant was devoting himself full-time to his self-employment, and he had even left the job he had had since 2010.

¹⁶ This is indicated in *Martens v Canada (Attorney General)*, 2008 FCA 240.

[47] During the reconsideration, the Claimant explained to the Commission that, during his benefit period, that is, from December 13, 2013, he had been available for full-time work but that he hadn't kept [a record of] his job search efforts.

[48] The Claimant can't name a single business he reportedly applied to during that period.

[49] On February 3, 2021, the Commission contacted X, the employer the Claimant worked for until October 25, 2013. According to a supervisor there, the Claimant left the job he had had since 2010 to [translation] "work for himself." The supervisor confirmed that, if he had wanted to stay on, the Claimant would have had work in both 2013 and 2014 as a driller. In this regard, the Claimant called X back in 2018, and he was rehired.

[50] The Claimant's brother, one of the co-shareholders in the business, told the Commission that the Claimant could have worked full-time elsewhere because he hadn't started working until May 2014 and that the big contracts had come in September 2014.

[51] The business began operating in May 2014. Leaving his job on October 25, 2013, when the employer had work for him doesn't show that the Claimant intended to or wanted to look for and immediately accept another job—especially since, in 2018, when he was really looking for a job, he got back in touch with his former employer, who rehired him.

[52] The facts show that the Claimant left his job on October 25, 2013, applied for a business name in February 2014, and focused on his self-employment.

[53] I note that the Commission didn't disentitle the Claimant from the start of his benefit period on December 15, 2013, but only from May 4, 2014. From May 4, 2014, the Claimant didn't show that he intended to work in a job; instead, he showed that he was devoting himself full-time to his self-employment.

[54] Your job search efforts have to show that you intend to and want to accept the job you applied for. The Claimant hasn't shown that he wanted to find a job quickly, since he was devoting himself full-time to his self-employment and hasn't shown that he made any job search efforts.

[55] I find that the Claimant hasn't shown that he intended to or wanted to find a job quickly. Although he vaguely mentioned to the Commission that he had made job search efforts, the facts show that he left his job on October 25, 2013, to focus on his self-employment. The Claimant's intention was to rely on his business as a principal means of livelihood.

So, was the Claimant's level of involvement limited enough?

[56] The Claimant's level of involvement wasn't so limited that the exception applies. A person would normally rely on this self-employment as a main means of earning a living.

[57] I have considered all six factors mentioned above. The factors about time spent on the business and willingness to find a job quickly show that the Claimant might have relied on his self-employment as a principal means of livelihood from May 4, 2014.

[58] These two factors are especially important. Case law says that how much time you spend on self-employment and whether you intend to or want to find another job quickly are important factors to consider.¹⁷

[59] The Claimant voluntarily left his job on October 25, 2013, to focus on his self-employment. Since operations began in May 2014, the Commission disentitled the Claimant only from that date.

[60] The Claimant didn't look for another job. By not looking for another job and by leaving the one he had, the Claimant shows that his intention was for his self-employment to become his principal means of livelihood.

¹⁷ See *Charbonneau v Canada (Attorney General)*, 2004 FCA 61.

[61] With all of this in mind, I find the exception doesn't apply to the Claimant's self-employment.

[62] While I understand that this situation is disappointing for the Claimant because it created an overpayment of benefits to repay, to receive EI benefits, the Claimant has to be entitled to them. The Claimant also has responsibilities: He has to declare his situation when he completes his reports.

[63] As he acknowledged, the Claimant didn't inform the Commission in any way that he was self-employed. The Canada Revenue Agency informed the Commission of this on [sic] in May 2017.

[64] From May 4, 2014, in each claimant report he completed, he answered "no" to the question "Are you self-employed?"

[65] The Claimant was working full work weeks from May 4, 2014. This means that the Claimant may not receive benefits because there weren't weeks where he was unemployed.

[66] The Federal Court of Appeal says that it is highly commendable for anyone to try to make new work for themselves or start their own business. But the idea behind the EI plan is to offer temporary benefits to people who are unemployed and looking for work. Unfortunately, the Claimant's efforts fall outside the scope of the EI plan.¹⁸

[67] I find that the Claimant wasn't unemployed from May 4, 2014, because he wasn't involved in his self-employment to a minor extent.

Conclusion

[68] I find that the Claimant was working full work weeks, so he wasn't unemployed.

¹⁸ See *Canada (Attorney General) v Jouan*, A-366-94.

[69] The appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section