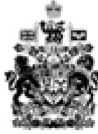

Citation: *JA v Canada Employment Insurance Commission*, 2021 SST 386

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. A.
Representative:	Justin M. Dalton
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 20, 2021 GE-21-97

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	July 21, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	July 30, 2021
File number:	AD-21-134

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) was working in the oilfield industry. He made an initial claim for regular Employment Insurance (EI) benefits and established a benefit period. The Claimant collected 47 weeks of regular EI benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), conducted a post audit review. It determined that the Claimant had failed to report that he was self-employed and working on his biweekly claim reports.

[4] The Commission imposed a retroactive stop payment (disentitlement). This resulted in a $25,132.00 overpayment of benefits. The Commission also issued the Claimant a $269.00 penalty and a warning letter because it determined he had knowingly provided false information by failing to report he was self-employed and working, on his biweekly claim reports.

[5] Upon reconsideration, the Commission maintained its decision to impose the disentitlement, monetary penalty, and warning letter. The Claimant appealed to the General Division.

[6] The General Division found that the Claimant was self-employed and engaged in the operation of a business while collecting regular EI benefits and that his involvement in the business was not minor in extent. It concluded that the Claimant had failed to rebut the presumption that he was working a full workweek while collecting EI benefits.

[7] The General Division also concluded that the Claimant knowingly provided false or misleading information on his biweekly reports and that the Commission properly issued the $269 penalty and warning letter.

[8] The Claimant was granted leave to appeal. He puts forward that the General Division ignored evidence and erred in law in its interpretation of sections 9, 11, 38 and 52 of the *Employment Insurance Act* (EI Act) and section 30 of the *Employment Insurance Regulations* (EI Regulations).

[9] I must decide whether the General Division ignored evidence and whether it made an error in law in its interpretation of sections 9, 11, 38 and 52 of the EI Act and section 30 of the EI Regulations.

[10] I am dismissing the Claimant's appeal.

Issues

[11] Issue 1: Did the General Division make an error by finding that the Commission could take up to 72 months to reconsider the Claimant's benefits claim?

[12] Issue no 2: Did the General Division ignore evidence and make an error in law when it concluded that the Claimant had not demonstrated that his level of involvement in his business was to such a minor extent that it could not be his principal means of livelihood?

[13] Issue 3: Did the General Division make an error by finding that it was appropriate to impose a penalty on the Claimant?

Analysis

Appeal Division's mandate

[14] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of*

Employment and Social Development Act, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[15] 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]

[16] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, I must dismiss the appeal.

Issue 1: Did the General Division make an error by finding that the Commission could take up to 72 months to reconsider the Claimant's benefits claim?

[17] The Claimant disputes the General Division findings on the issue of the reconsideration of the benefits claim.

[18] I find that the General Division correctly determined that the Commission did not have to show that the Claimant had "knowingly" made a false or misleading statement to extend the review period to 72 months, but rather that it could reasonably find that the Claimant made a false or misleading statement.

[19] A claim for regular EI benefits was established effective 27 March 2016. It was determined that the Claimant was entitled to 47 weeks of regular benefits.

[20] On each of the 27 biweekly claim reports provided in evidence, the Claimant answered "No" to the question, "Are you self-employed?" He also answered on each report "No" to the question, "Did you work or receive any

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

[2] *Idem*.

earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self-employment."

[21] On or about September 21, 2017, the Commission received information from the *Canada Revenue Agency* that the Claimant had applied for two (2) separate business registration numbers, on July 15, 2015, and November 2, 2016.

[22] During a first interview held on November 8, 2017, the Claimant confirmed that he was 50% owner of a business that started around October 1, 2015.[3]

[23] Based on this evidence, The General Division concluded that the Commission could reasonably find that the Claimant had made a false or misleading statement or representation and therefore could reconsider the Claimant's benefit claim within the extended 72-month period.

[24] The evidence shows that the Commission informed the Claimant of the outcome of its review, the imposition of the retroactive disentitlement and the imposition of a penalty on March 19, 2020, within the extended 72-month period.

[25] There is no reason for me to intervene on the issue of the reconsideration period.

Issue no 2: Did the General Division ignore evidence and make an error in law when it concluded that the Claimant had not demonstrated that his level of involvement in his business was to such a minor extent that it could not be his principal means of livelihood?

[26] The period at issue is from March 27, 2016 to March 25, 2017.

[3] See GD3-220.

[27] The Claimant argues that the General Division erred in its analysis of the six factors that need to be considered in determining whether a claimant's self-employment is of a minor extent.

[28] The Claimant puts forward that the evidence shows that he spent minimal time at the business, that he took no part in the operations of the business and that he only went to see his wife at her business during the claim period.

[29] The Claimant submits that the evidence demonstrates that he spent 8 to 10 hours per week at his wife's business and that he received no income from the business up to or during the claim period. He further submits that the General Division ignored the evidence that he wished to return to his previous field of employment in oil and gas but was unable to find suitable alternative employment despite searching for such employment.

[30] When 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, the claimant is considered to have worked a full working week during that week.[4]

[31] The burden is on the claimant to rebut the presumption that he is working a full working week.[5]

[32] The test requires an objective consideration of whether the level of such self-employment or engagement, would be sufficient to enable a person to normally rely upon that level of self-employment or engagement as a principal means of livelihood.[6]

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[4] Section 30(1) of the EI Regulations.
[5] *Lemay v Canada Employment Insurance Commission*; A-662-97; *Turcotte v Canada Employment Insurance Commission*, A-664-97
[6] Viewed in light of the factors set forth in section 30(3) of the EI Regulations.

[33] Recent case law has established that an overall analysis of the six criteria must be conducted, without giving precedence to one or more of the criteria, and that each file must be assessed on its merits. Placing greater significance on any of the criteria constitutes an error in law.[7]

[34] This means that the text of the legislation must be considered in its totality considering that a person could spend a limited amount of time at an employment or business activity but still follow it as a principal means of livelihood. Furthermore, the failure to generate sufficient income does not necessarily make a claimant unemployed.

[35] Six factors have to be taken into account in determining whether a claimant's self-employment is of a minor extent.[8] The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of a minor extent are:[9]

(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;

(e) the nature of the employment or business; and

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

[36] The General Division found that the Claimant was engaged in a business and considered all the six factors in determining whether the Claimant's self-employment was of a minor extent during the claim.

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[7] *Stojanovic v Canada (Attorney General)*, 2020 FCA 6; *Goulet* 2012 FCA 62; *Inkell* 2012 FCA 290.
[8] Section 30(3) of the EI Regulations.
[9] Section 30(2) of the EI Regulations.

[37] I find that, even if the General Division appears to have committed an error of law by assigning more weight to the time spent and willingness to seek alternate employment factors, there is no reason to intervene to amend the General Division's finding on the Claimant's unemployment status.[10]

Time spent

[38] The General Division clearly did not believe the testimony of the Claimant and his wife during the hearing. It found from the evidence that the Claimant dedicated himself to his business's activities during the benefit period.

[39] The General Division found that the evidence supported a finding that the Claimant offered to be laid off from his job five months after the first store opened successfully so that he could spend more time in his self-employment and engaged in the operation of his business.

[40] The General Division considered that the Claimant initially stated to the Commission that he went to the store on a regular basis, but it was more on a volunteer basis. The Claimant stated that he went in most days and helped. He considered it volunteer work, just something to do while he did not have a job. The Claimant also stated that he did not consider himself an employee because he was not paid.[11]

[41] The General Division considered that in his application for reconsideration, the Claimant stated that when he was filing for employment insurance benefits, he worked in his business for absolutely no pay. He stated that he did not know that he was not allowed to collect benefits in these circumstances.[12]

[10] General Division decision, par. 39: the member states that these two factors are the most important but that she must still consider all six factors.
[11] See GD3-222, GD3-223.
[12] See GD3-237.

[42] The General Division considered that the Claimant had also previously stated to the Commission that it was “ **maddening to be laid off and to start his own business to better himself so that he didn’t have to go on claim again and to create employment for others and then to be penalized for it and be hit with this bill** ”.[13]

[43] These initial statements simply do not support the Claimant’s position that he went to the store for approximately 8 to 10 hours per week during his benefit period just to see is wife and bring her meals and to perform minor tasks.

[44] These initial statements made by the Claimant also clearly demonstrate that he was not a simple investor in his wife’s business or a silent shareholder.

[45] The General Division further considered that the Claimant and his wife opened their second store in June or July 2016, while he was collecting EI benefits.

[46] The General Division considered the Claimant’s Record of Employment (ROE) that indicates his first day worked, April 10, 2017, only 16 days after his EI claim ended. The ROE also shows that that the Claimant was working 40 hours per week on average, giving weight to the evidence that he had already dedicated himself to his business during the claim period.[14]

[47] Based on the preponderant evidence, the General Division determined that the Claimant was fully dedicated to the company’s activities during his benefit period.

Nature and amount of the capital and resources invested

[48] The General Division found that the Claimant’s $40,000.00 personal investment, the length of the signed commercial leases, and the additional

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[13] See GD3-239
[14] See GD3-224

corporate loans to start the companies, constituted a significant amount of capital and resources invested.[15]

Financial success or failure of the employment or business

[49] The General Division considered that the Claimant's business is a financial success, which he continues to expand. He started to pay himself a salary right after the end of his EI claim, which supports a conclusion that the business was successful during the benefit period.

Continuity of the employment or business

[50] The General Division considered that the business was likely to continue its operations in view of its rapid expansion since October 3, 2015.

Nature of employment or business

[51] The General Division does not appear to have made a clear determination regarding this factor but it did point out the Commission's submission that the Claimant had enough knowledge in the business industry to operate several franchises.

Claimant's intention and willingness to seek and immediately accept alternate employment

[52] Finally, the General Division determined that the Claimant had failed to show he had a willingness to seek and immediately accept alternate employment. It found that the Claimant restricted his job search to a specific job that he knew was no longer available.

[53] The General Division considered that the Claimant's corporations hired and paid other employees at the time he was collecting EI benefits.

[15] See GD3-209

[54] The General Division determined that the evidence showed no serious efforts by the Claimant to find an alternate type of employment and supported a conclusion that the Claimant focused his time and energy on expanding his knowledge and growing his self-employment.

Consideration of all factors – Minor extent

[55] The General Division's application of the objective test to the Claimant's situation shows that at least five of the six 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 from the evidence that the Claimant's involvement was sufficient to rely on it as a principal means of livelihood.

[56] The Appeal Division case law has consistently stated that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the General Division, which is better able to make a decision on it.[16]

[57] I will intervene only if it is obvious that the General Division's decision on the issue is untenable, in light of the evidence before it.

[58] I do not find any reason to intervene in this case on the issue of credibility as assessed by the General Division.

[59] Furthermore, I do not have the authority to retry a case or to substitute my discretion for that of the General Division. The Appeal Division's jurisdiction is limited by section 58(1) of the DESD Act. Unless the General Division failed to observe a principle of natural justice, erred in law, 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, I must dismiss the appeal.

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[16] *P. K. v Canada Employment Insurance Commission*, 2017 CanLII 40707 (SST); *A. M. v Canada Employment Insurance Commission*, 2015 SSTAD 1463 (CanLII).

[60] I find that the General Division decision on the Claimant's unemployment status is based on the evidence before it, and that the decision is consistent with the legislative provisions and case law.

[61] There is no reason for me to intervene on this issue.

Issue 3: Did the General Division make an error by finding that it was appropriate to impose a penalty on the Claimant?

[62] The General Division found that the Claimant did not provide a reasonable and credible explanation for the misrepresentations regarding self-employment and it found that the Commission had proven on a balance of probabilities that the Claimant had the requisite degree of subjective knowledge at the time that the misrepresentations were made.

[63] The Claimant submits that there should be no penalty, given that there was no wrongful intent on his part and that he did not mean to make false or misleading statements. He simply did not see himself as self-employed during the benefit period.

[64] The only requirement for imposing a penalty is that of knowingly—that is, with full knowledge of the facts—making a false or misleading representation. The absence of the intent to defraud is therefore of no relevance.

[65] The General Division did not believe the Claimant's explanations. It found that the Claimant's answers on his 27 biweekly claims were misrepresentations, knowingly made because the Claimant knew he owned 50% of his first and second corporation. He knew he was working without pay while engaged in the operation of both corporations during the period under review.

[66] The General Division found that despite his involvement in both corporations, the Claimant did not attempt to clarify his circumstances with the Commission. Rather, he knowingly answered "No" to the questions, "Are you self-employed?" and "Did you work or receive any earnings during the period of

this report? This includes work for which you will be paid later, unpaid work or self-employment."

[67] The General Division also found that the Commission exercised its discretion properly when setting the monetary penalty at $269 and issuing the warning letter.

[68] I find that the General Division decision on the penalty is based on the evidence before it, and that the decision is consistent with the legislative provisions and case law.

[69] I find no reason to intervene on this issue.

Conclusion

[70] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division