



Citation: *TN v Canada Employment Insurance Commission*, 2021 SST 500

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: T. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (421601) dated April 23, 2021 (issued by Service Canada)

Tribunal member: Charlotte McQuade

Type of hearing: Videoconference

Hearing date: July 20, 2021

Hearing participants: None

Decision date: August 2, 2021

File number: GE-21-1126

Decision

[1] The appeal is allowed.

[2] T. N. (the Claimant) was not an otherwise employed person working full work weeks from January 17, 2021 to January 30, 2021. ¹

Overview

[3] While in receipt of Employment Insurance (EI) regular benefits, the Claimant was working as a telemarketer and paid by commission only.

[4] EI benefits are only paid to claimants who are unemployed. Claimants are considered unemployed if they do not work a full working week.

[5] The law sets out one rule decide whether claimants who are self-employed or engaged in the operation of a business or partnership or co-adventure or are employed in any employment where they control their working hours are working a full working week. There is a different rule to decide if employees who are otherwise employed are working a full working week.

[6] For claimants who are self-employed or engaged in the operation of a business or partnership or co-adventure or any employment where they control their working hours, they are presumed to have worked a full working week. ² This means they are not considered unemployed and cannot receive regular EI benefits. However, that presumption can be rebutted if their engagement in those activities is to such a minor extent that a person would not normally rely on that employment or engagement in the operation of a business as principle means of livelihood. ³ There are specific factors set out in the *Employment Insurance Regulations* (EI Regulations) that have to be considered to decide if a person's employment or engagement or the operation of the business is of a minor extent. ⁴

¹ See subsection 31(1) of the *Employment Insurance Regulations* (EI Regulations).

² See subsection 30(1) of the EI Regulations.

³ See subsection 30(2) of the EI Regulations.

⁴ See subsection 30(3) of the EI Regulations.

[7] For claimants other than those claimants (I will call these “otherwise employed” claimants) a full working week is defined as the number of hours, days or shifts normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.⁵ But, to use this rule, there must be an employment relationship and the employee must not control their own working hours. Otherwise, the other rule applies.

[8] The Canada Employment Insurance Commission (Commission) decided that the Claimant was employed but not controlling his own work hours.

[9] The Commission decided, by comparing the hours worked by the Claimant to the hours that were worked in a calendar work by persons in the same job as the Claimant at his work premises, that the Claimant was not unemployed from January 17, 2021 to January 30, 2021. The Commission says the Claimant told the Commission he was working 42 hours per week for these weeks. The Commission says this was more than the 35 hours of employment worked in a calendar week by workers in the same grade, class or shift for the type of employment that the Claimant was employed in. As a result, the Commission decided that the Claimant couldn't receive EI benefits for the period in question. Since the Commission made this decision after the Claimant had already received benefits, an overpayment of \$757.00 arose.

[10] The Claimant disagrees. He argues that he should receive EI benefits. He says he was paid by commission, not by the hour. He says when breaks are factored in, he was working just under 35 hours a week. So he says he was not working full working weeks.

[11] I first have to decide if the Claimant was self-employed or employed but controlling his working hours when he provided his telemarketing services from January 17, 2021 to January 30, 2021. If so, then the rule for otherwise employed claimants does not apply to him to decide whether he was working a full working week.

⁵ Subsection 31(1) of the EI Regulations.

[12] I have decided, for the reasons set out below, that the Claimant was either self-employed or employed and controlling his own working hours from January 17, 2021 to January 30, 2021 so the Commission used the incorrect rule to decide if he was working full working weeks.

Matter I have to consider first

The Claimant wasn't at the hearing

[13] The Claimant wasn't at the hearing. A hearing can go ahead without the Claimant if the Claimant got the notice of hearing.⁶ I think that the Claimant got the notice of hearing because it was sent to the email address he authorized the Tribunal to use on July 12, 2021. There is no evidence that the Notice of Hearing was returned as undeliverable. The Claimant was left a message by the Tribunal staff before the hearing to go over the hearing process but that message was not returned. I asked the Tribunal to try to contact the Claimant during the hearing to see if there was any issues connecting with the hearing but he could not be reached. A message was left asking the Claimant to connect with the hearing or to contact the Tribunal as soon as possible. There was no response to this message.

[14] So, the hearing took place when it was scheduled, but without the Claimant.

The Tribunal can only review the Commission's reconsideration decision of April 23, 2021⁷

[15] The Commission said in its representations that it made another initial decision on June 1, 2021 that affects the Claimant and his overpayment. The Commission says the Claimant has not yet requested a reconsideration of that decision so it cannot be addressed in this appeal. The Commission says the only weeks of benefits that have been reconsidered are the weeks of January 17, 2021 to January 30, 2021.

⁶ Section 12 of the *Social Security Tribunal Regulations* sets out this rule.

⁷ GD3-26.

[16] The Claimant says in his Notice of Appeal that his overpayment amount has increased to \$3399.00 and the whole thing is very confusing.

[17] I do not have a copy of the Commission's June 1, 2021 decision or any information about that decision before me. In order for a Claimant to appeal a decision to the Tribunal, he must first have requested a reconsideration of that decision from the Commission and the Commission must make a reconsideration decision. This is because the Tribunal only has authority to review reconsideration decisions made by the Commission.⁸ So, I cannot review or make any decisions about the Commission's June 1, 2021 initial decision. The Claimant should contact the Commission to ensure that he has copies of all decisions made about his claim. If the Claimant disagrees with any of those initial decisions, he will have to follow the usual process by first requesting a reconsideration and then if he disagrees with the reconsideration decision, filing an appeal to the Tribunal. The only reconsideration decision that has been filed with the Tribunal is the reconsideration decision dated April 23, 2021 dealing with the Claimant's disentitlement for period from January 17 to January 30, 2021 so that is the only decision I can consider in this appeal.

Issue

[18] I have to decide whether the Claimant was self-employed or employed and controlling his own work hours. If he was not, I have to decide, using the rule for otherwise employed persons, whether he was working full work weeks from January 17, 2021 to January 30, 2021.

Analysis

[19] The law says that you can receive EI benefits for each week you are unemployed.⁹ A week of unemployment means any week you don't work a full work week.¹⁰

⁸ See sections 112 and 113 of the *Employment Insurance Act (Act)*.

⁹ Section 9 of the Act sets out this rule.

¹⁰ See section 11 of the Act.

[20] The law sets out one rule to defined a “full working week” if you are self-employed or employed but controlling your own work hours and a different rule if you are otherwise employed.

[21] If you are self-employed or engaged in the operation of a business or partnership or co-adventure or any employment where you control your working hours, you are presumed to have worked a full working week. ¹¹ This means you are not considered unemployed and cannot receive regular EI benefits. However, that presumption can be rebutted if your engagement in those activities is to such a minor extent that a person would not normally rely on that employment or engagement in the operation of a business as principle means of livelihood. ¹² There are specific factors set out in the EI Regulations that have to be considered to decide if a person’s employment or engagement or the operation of the business is of a minor extent.¹³

[22] If you are otherwise employed (meaning you are not self-employed and you are not employed and controlling your work hours), the law says that a “full working week” is defined as the number of hours, days or shifts normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed. ¹⁴

[23] I first have to decide how the Claimant was providing his telemarketing services between January 17, 2021 and January 30, 2021. In other words, I have to decide whether he was self-employed or employed in a situation where he controlled his work hours. I have to decide this first so I can determine whether the Commission applied the correct legal rule to decide whether the Claimant was working a full working week.

¹¹ See subsection 30(1) of the EI Regulations.

¹² See subsection 30(2) of the EI Regulations.

¹³ See subsection 30(3) of the EI Regulations.

¹⁴ See subsection 31(1) of the EI Regulations.

[24] The onus is on the Claimant to prove that he was not working full working weeks from January 17, 2021 to January 30, 2021 as an otherwise employed person. The Claimant has to prove this on a balance of probabilities.¹⁵

[25] The Claimant applied for EI regular benefits on October 24, 2020 and his benefit period began on October 18, 2020.

[26] On February 17, 2021, the Claimant completed claimant reports for the period from January 17, 2021 to January 30, 2021 by telephone. He reported for the week of January 17 to January 23, 2021 that he worked 42 hours and had earnings of \$220.00. He reported for the week of January 24, 2021 to January 30, 2021 that he worked 42 hours and had earnings of \$265.00. The Claimant also provided the name of his manager and his telephone number and declared zero of the earnings he reported were from self-employment.¹⁶

[27] The Commission sent the Claimant a notice of debt in the amount of \$757.00 on February 27, 2021 but no initial decision letter.¹⁷

[28] The Claimant filed a request for reconsideration on April 15, 2021, after receiving the notice of debt. The Claimant said that he was told that because he worked over 35 hours it still counts as working. He says, however, he was not paid hourly. He says, for example, in his last week of work he only earned \$20.00. He says he was paid by commission only.¹⁸

[29] The Claimant also told the Commission's reconsideration agent that his dispute was that he was not paid hourly. He confirmed that he had worked 42 hours in the week of January 17 to 23, 2021 and made \$220.00 and in the week of January 24 to 30, 2021 he worked 42 hours and had made \$265.00.

¹⁵ See subsection 49(1) of the Act.

¹⁶ GD3-13.

¹⁷ GD3-20.

¹⁸ GD3-21.

[30] The Commission's reconsideration agent noted that the Claimant had also confirmed that his employment was a contract for services (independent worker) and this was also confirmed with the Claimant's manager.¹⁹

[31] The Commission decided, based on this information, that the Claimant was considered to be working full work weeks/not unemployed from January 17 to January 30, 2021 because the hours per week he was working (42) was greater than the number of hours normally worked by employees in the same grade, class or shift type of employment, that is considered to be full-time (35 hours or more).²⁰

[32] There is no information on file from the employer as to what schedule employees in the same grade, class or shift type as the Claimant would follow in a calendar week or what is considered to be full-time hours for those employees. It is not clear where the Commission obtained the number of 35 hours as representing full-time hours. The Commission did not reference that figure.

[33] The Claimant says in his Notice of Appeal that he was working 36 hours each week. He says he worked 6 hours a day for 6 days a week. He stated that if he accounted for breaks during his workday then he would have worked under 35 hours each week. He says he took an hour lunch break and would go for a half-hour run during the day.

[34] The Commission says that even though the Claimant says in his Notice of Appeal that he only worked 36 hours each week minus time he would take for breaks, resulting in him working under 35 hours each week, on more than one occasion the Claimant admitted to working 42 hours per week in each of the weeks in question. He declared this when first providing his reports on February 17, 2021²¹ and again during his reconsideration on April 23, 2021.²² The Commission says that the Claimant's first two statements about his hours worked are more credible than the statement given in his appeal. The Commission says that, as a general rule, a spontaneous statement

¹⁹ GD3-24.

²⁰ GD3-26.

²¹ GD3-13 to GD3-14.

²² GD3-24 to GD3-25.

made before the individual had a detailed appreciation of the impact of that statement on benefits, will be preferred over a statement made after that individual has become aware of the reason benefits were denied.

[35] There is not a lot of evidence on file regarding the nature of the relationship in which the Claimant provided his telemarketing services. However, I find, based on the evidence provided, that the Claimant was providing his telemarketing services either through self-employment or he was employed and controlling his own working hours.

[36] Both the Claimant and the employer confirmed to the Commission that the Claimant was engaged in a contract for services as an independent worker.²³ Typically, the term contract “of services” refers to an employment relationship where a contract “for services” refers to a situation where the person is performing services as a person in business on his own account.²⁴ The fact both the employer and the Claimant referred to the situation as one of an “independent” worker also suggests that the nature of the relationship was one where the Claimant had some control over his work and schedule. How the parties define the relationship as is not determinative, but it is a factor to consider.

[37] Further, the Claimant was paid 100% commission. This also is not determinative, as there may be employment relationships where employers control the schedule but the employee’s remuneration involves commission. However, the fact the entire remuneration was commission does raise the suggestion that this was not a typical employment relationship.

[38] It is true that the Claimant noted in his claimant report that the earnings he reported were not from self-employment. However, I place little weight on that statement, given there is no category on the claimant report for an independent contractor relationship or employment where the employee is controlling their own work hours.²⁵

²³ GD3-24.

²⁴ See *Victoria's Five Star Cleaning Ltd. v. M.N.R.*, 2019 TCC 73 (CanLII).

²⁵ GD3-13 to GD3-14.

[39] There is no evidence that the Claimant had a formal or fixed schedule, or was required to work any specific number of hours per week. The Claimant's notice of appeal also suggests he had the ability to control his own hours. For example he described going for a half hour run each day. The employer provided no information to the Commission about what hours would be considered full-time for employees in the Claimant's situation and the Commission provided no information about where they got the number of 35 hours a week.

[40] So, considering the evidence as a whole, I find it more likely than not that the Claimant was either self-employed or in an employment relationship where he controlled his own hours. There is insufficient information on file to decide which of these two categories he falls in. However, I am satisfied the Claimant was not in an employment situation where the employer controlled the Claimant's hours.

[41] The Commission relied on subsection 31(1) of the EI Regulations which does not apply to self-employed individuals or employees who control their own working hours. Since the Claimant was either self-employed or employed in a situation where he controlled his own work hours, this provision does not apply to him.

[42] The Claimant has proven therefore, that he is not an otherwise employed person working a full working week because he is either self-employed or employed in a situation where he controlled his own work hours.

[43] So, it is not necessary for me, therefore, to decide whether the Claimant worked more than the number of hours, day or shifts normally worked in a calendar week by persons in the claimant's grade, class or shift at his workplace.

Conclusion

[44] I find that the Claimant was not an otherwise employed person who was working full work weeks from January 17, 2021 to January 31, 2021. So, the disentitlement for that reason is removed.

[45] This means that the appeal is allowed.

Charlotte McQuade
Member, General Division – Employment Insurance Section