



Citation: *SM v Canada Employment Insurance Commission*, 2022 SST 171

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: S. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (440448) dated December 7, 2021 (issued by Service Canada)

Tribunal member: Charlotte McQuade

Type of hearing: Teleconference

Hearing date: February 2, 2022

Hearing participants: Appellant

Decision date: February 17, 2022

File number: GE-22-129

Decision

[1] The appeal is allowed. The Tribunal agrees with S. M. (Claimant).

[2] The Claimant wasn't working full work weeks from May 3, 2021 to September 3, 2021.

Overview

[3] The Claimant was self-employed selling insurance for approximately four months in 2021.

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was working full work weeks and therefore was not unemployed from May 3, 2021 to September 3, 2021. As a result, the Commission decided that the Claimant couldn't receive EI benefits for that period.

[5] The Claimant disagrees. He says his involvement in the self-employment was so limited he wasn't actually working full work weeks. He says he invested very little money in the self-employment and spent limited time on it, only in the evenings. The Claimant says he was paid by commission but the amount and inconsistency of the payments made the self-employment not sustainable. He says this was a short lived opportunity which he tried. However, it did not work out so he stopped the self-employment by September 5, 2021. The Claimant maintains he was available for full-time work during the day, throughout the period in question.

[6] I have decided, for the reasons set out below, that the Claimant has shown that his involvement in the self-employment was to such a minor extent that a person would not normally rely on that self-employment as a principal means of livelihood. So, he was not working full working weeks from May 3, 2021 to September 3, 2021.

Issue

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

Analysis

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

[9] The law says that you can receive EI benefits for each week you are unemployed.¹ A week of unemployment means any week you don't work a full work week.²

[10] Also, if you are self-employed/involved in a business, the law assumes that you work full work weeks.³ So, you can't receive EI benefits.⁴

Exception if your involvement is limited

[11] There is an exception if your level of involvement in the self-employment or business is limited.⁵

[12] The exception applies if the Claimant's level of involvement is so limited that a person wouldn't normally rely on that self-employment/business as their main means of earning a living.⁶

[13] The Claimant has to prove that his involvement was so limited that the exception applies.⁷ 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 is limited.

Six factors for deciding level of involvement

[14] To decide whether the exception applies, I have to consider the following six factors:⁸

¹ Section 9 of the *Employment Insurance Act* (Act) sets out this rule.

² See section 11 of the Act.

³ See section 30(1) of the *Employment Insurance Regulations* (Regulations).

⁴ See *Marlowe v Canada*, 2009 FCA 102.

⁵ 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.

⁶ See section 30(2) of the Regulations and *Martens v Canada (Attorney General)*, 2008 FCA 240.

⁷ See *Canada (Attorney General) v Falardeau*, A-396-85, and *Lemay v Canada Employment Insurance Commission*, A-662-97.

⁸ Section 30(3) of the Regulations sets out these six factors. This decision paraphrases those six factors for plain language.

- 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**

[15] The amount of time that the Claimant spent on his self-employment shows limited involvement.

[16] The Commission says the Claimant's statement to them was he was devoting more than 30 hours per week towards his self-employment.⁹

[17] The Claimant testified that he wanted to find online work as he lives with his elderly father and he was concerned about putting him at risk of Covid-19. The Claimant explained that he had been working in sales at a car dealership previously and was asked to return in February 2021. However, he quit due his concern about bringing Covid-19 home. The Claimant heard from a friend about an opportunity to make up to \$100,000.00 by selling life insurance from home so he decided to try it. He was hired in April or May of 2021.

[18] The Claimant explained that he had to obtain a licence to sell life insurance, which cost him \$200.00. He obtained his licence online around the time he was hired.

[19] The Claimant said that the company he was pursuing the self-employment with had an exclusive arrangement to sell life insurance to union members. The agents would call union members in the evenings and try to sell them life-insurance. The

⁹ GD3-20.

Clamant says he never told the Commission he started his self-employment on May 3, 2021. He told the agent that the dates he was providing loose dates.

[20] The Claimant testified from May until mid-June, he only spent up to 5 hours per week, in the evenings, shadowing other agents by listening to them cold call union members. He also watched online meetings. The Claimant testified that, although the suggested work schedule from the company was from 1p.m. to 9 p.m., the union members worked during the day so all activity took place at night. He says he did not start trying to obtain sales himself until July, 2021.

[21] The Clamant explained from mid-June and in July, he was spending 15 hours a week, all in the evening on his self-employment. He explained that there was no preparation work. He just made calls. He would read a script on the computer and share his screen with information.

[22] The Claimant related that in August he started to tail off from the self-employment and worked hardly any hours. He stopped completely on September 5, 2021, when he told the company he was done. He says the maximum hours he ever worked on this self-employment was 15 hours per week and it was in the evening.

[23] The Claimant's testimony as to the time spent is different that what the Commission says the Clamant told the Commission. So, I have to decide which information is more reliable.

[24] The Commission's notes of August 19, 2021 says that the Claimant said that he worked more than 15 hours per week in self-employment, he considers it his main source of income and he is looking to make it his main source of income. The notes provide the Claimant said that he is not willing to work more than 30 hours per week outside the self-employment business. He noted his intention was to devote himself to his self-employment only. ¹⁰

¹⁰ GD3-18.

[25] The Commission's record of conversation of October 14, 2021 says the Claimant told the Commission's agent that he devoted around 40 hours per week to self employment and that he would only be able to devote around 11-20 hours to jobs in the labour market. ¹¹

[26] The Claimant denies he said that. He says he told the agent it was difficult to answer how many hours he spent per week as it varied. He says the agent was not taking full account of his answers. The Claimant says he remembers being asked several questions he could not answer and his response was that the question did not make sense for what he was doing as he was not working a standard set of hours. The Claimant says the agent asked him how many hours he could work, but he said he had no answer to that as he could not generalize, as the self-employment was so unique.

[27] The Commission's record of conversation of December 06, 2021 says the Claimant told the reconsideration agent that the information on file was not totally correct. The notes say the Claimant said that for about a month he was only training and shadowed another employee and it was not until early June that he was trained and certified for the position. The notes says the Claimant said he was spending around 30 hours a week in the training and certification during that time and from June through mid July he was fully committed to his self-employment and was doing it fulltime. The notes provide the Claimant said he spent more than 30 hours a week and would have spent more time if he had more clients. However, from mid-July to September 3 he was not fully engaged in his self-employment because in mid-July he realized he was not making a lot of money. He was spending less than 20 hours a week during this time.¹²

[28] The Claimant testified that he never told the reconsideration agent that he was spending 30 hours a week in training and certification. He says the reconsideration agent was asking leading questions and he would try to give his recollection. He says if he did say he was spending 30 hours per week, he was misled into saying it by the line of questioning.

¹¹ GD3-20.

¹² GD3-27.

[29] The Claimant testified that neither of the agents he spoke to asked him when he was working and he did not think to tell them he was only working on the self-employment in the evenings.

[30] The Commission maintains that the jurisprudence has consistently upheld the principle the initial statement carries greater weight than statements made in the face of an unfavourable decision so the Claimant's initial statements should be preferred over his later statements. I agree that, generally speaking, that is the case.

[31] However, I found the Claimant to be sincere. He was direct and answered questions openly and his evidence was provided under oath. I note that the Claimant's initial conversation on August 19, 2021 provides that he was working more than 15 hours per week in self-employment, but he was willing to work 30 hours outside of that. This response is consistent with his testimony as to the time he spent on the self-employment.

[32] With respect to the October 14, 2021 conversation, I note that the Claimant said in his reconsideration request that the agent did not fully understand his situation.¹³ He also told the reconsideration agent at the start of their conversation that the information on file was not totally correct and he would like to clarify his self-employment situation.¹⁴ Whether the Claimant did not fully explain himself or the agent misunderstood him, I find there is reason to doubt the accuracy of the information recorded in the notes of October 14, 2021.

[33] It is clear from the Claimant's testimony that he perceived the discussion with the reconsideration agent to not be a full fact finding. He says the agent's questions were leading, which impacted the answers he gave. The notes of the conversation only provide what the Claimant said, not what questions were asked. Given the Claimant's concern about the questions and given I am unable to determine what questions were

¹³ GD3-25.

¹⁴ GD3-17.

asked, I place more weight on the Claimant's testimony than the information in these notes.

[34] I therefore prefer the Claimant's testimony to the information recorded in the notes of October 14, 2021 and December 6, 2021 as to the time spent. I find the Claimant spent between 5 and 15 hours per week on his self-employment and the time was spent in the evenings.

[35] Having regard to the limited time spent per week on the self-employment and considering the time spent was only in the evenings, outside what would be a typical working day, I find the time spent only shows a limited involvement in the self-employment.

– **Investments**

[36] The nature and amount of the Claimant's investments (such as money, property, goods, and resources) shows limited involvement.

[37] The Commission says with the exception of \$200.00 for training and certificate, there was no other capital required.

[38] The Claimant says his only investments were the cost of becoming training and certified, which was about \$200.00. He also bought a \$60.00 camera for his computer. The Claimant said he had no advertising costs and he used his personal phone, computer and internet charges. He worked from home and there were no employees. All his appointments were virtual. There were no travelling costs.

[39] I find the Claimant's investment in the self-employment shows limited involvement. He only invested approximately \$260.00, which is a minimal amount of money.

– **Financial success or failure**

[40] The financial situation of the Claimant's self-employment shows limited involvement.

[41] The Commission says the Claimant told them that the estimated annual gross revenue was over \$20,000 and the Claimant said he was trying to make his self-employment as his main source of income.

[42] The Claimant explained he had been told his remuneration was to be a 50% commission of sales. As well, if other sales people were brought in, a portion of their commission was retained. It turned out that he only received commission of 75% of the 50% of sales he was supposed to get.

[43] The Claimant says at the end of June he was paid \$700.00 to \$800.00 in commission but this was a commission given to him and not his own sale. In July, 2021, he had two sales, earning in total about \$4000.00 to \$5000.00. He had no further revenue after that. The Claimant said he had to return part of the commission he earned in July because the policy was cancelled.

[44] The Claimant said that when he spoke to the Commission's agent on August 19, 2021 and said that the estimated annual income was over \$20,000, he was still optimistic at that time about the self-employment. ¹⁵His hope was that this would be a side after hours' job that he could earn an extra \$20,000.00 per year but it did not work out.

[45] The Claimant testified that he did tell the Commission's agent on August 19, 2021 that his main intention was to focus on self-employment and that he wanted to make it his main source of income because at that time he had just earned the large commission in July and he was still hopeful that that would happen. However, he says, about two weeks later that intention changed as he was making no money again.

[46] I find this factor shows a limited involvement in the business. The Claimant earned \$700.00 to \$800.00 from a commission given to him. He had two sales in July, amounting to \$4000.00 to \$5000.00, some of which he had to return due to policy

¹⁵ GD3-18.

cancellations. The Claimant had no income from the business after July 2021. The income was all commission generated.

[47] Even though it was the Claimant's intention to rely on the self-employment as his main source of income, the income was not such that the Claimant could rely on it as a principal means of livelihood. The pattern of income in this self-employment was unpredictable and fluctuating. Although the income was high in July, there was nothing in August. There was no regularity to the payments and the commissions were not even secure, given a policy could be cancelled. While it is possible that over time the income would have become more stable, at the time in question it was not. The income was not such that a person would normally rely on it as a principal means of livelihood.

– **Ongoing self-employment**

[48] This factor is indeterminate.

[49] The Claimant testified that, as of August 19, 2021 his main intention was to focus on self-employment and he wanted to make it his main source of income. However, about two weeks later that intention changed as he was making no money again. He discontinued the self-employment on or about September 5, 2021.

[50] The Commission says that the Claimant's self-employment ended as of September 3, 2021.

[51] I find this factor is indeterminate. During the period in question, the Claimant did intend the self-employment to continue and it is possible it may have been a sustainable business over the long run. This shows a more than limited involvement. However, the Claimant did end up discontinuing the self-employment between September 3 and 5, which shows a limited involvement in the self-employment.

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

[52] The Claimant's self-employment was as an insurance salesperson. His prior work was in sales at a car dealership. This shows limited involvement because, with the exception that both jobs involved sales, there was no other connection.

[53] There is no evidence that the Claimant's prior employment was a stepping stone into his self-employment.

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

[54] This factor shows more than a limited involvement.

[55] I am not persuaded that the Claimant was actively looking for work from May 3, 2021 to September 3, 2021. The evidence does not show that he was actively job searching. I am not satisfied the Claimant's intention was to find full-time work and operate the self-employment on the side.

[56] The Commission says that the Claimant said he did not start looking for other employment until September 4, 2021 because that was when he decided he would not continue his self-employment. He stated that by this time he realized he was not earnings enough and so he decided to drop it completely.¹⁶

[57] The Commission says the Claimant has not produced any evidence showing that he was seeking full-time work elsewhere.

[58] The Claimant testified that he was ready and willing to work 40 hours per week from 9 a.m. to 5 p.m. He says he was open to finding other work and would have been prepared to accept a 9 a.m. to 5 p.m. job as he was pursuing the self-employment in the evening. He says his intention was to operate the self-employment on the side, in the evenings.

[59] The Claimant says the Commission did not ask him about his job search. The Claimant says he was job searching from 9 a.m. to 5 p.m. each day. His efforts included working on his cover letter and resume and looking at job alerts from the Job Bank and speaking with friends and family and locals to see if there was any opportunity. He says he was open to construction type jobs such as plumbing and electrician work but he

¹⁶ GD3-27.

was also looking for a remote sales job. His girlfriend referred him to a person for a sales job and he applied for that but the employer did not need anyone at that time.

[60] The Claimant explained that he wanted to work remotely so as not to put his father at risk of Covid-19. He says he did not apply for more than the one job because the remote jobs required more experience than he had. He says he also was investigating how he could take his real estate licence during the summer of 2021. He contacted Job Skills to see if he could enter a second career program for this but it was not available. The Claimant ended up deciding to take his real estate licence in December, 2021.

[61] The Claimant acknowledges he could have conducted a more active job search. However, he says the reason he did not do so was not because of the self-employment but rather because he set himself a restrictive criteria about what kind of job he would accept. He says the self-employment would not have interfered with a job as he only spent time on the self-employment in the evenings.

[62] The Claimant's efforts do not show he was actively looking for work. His efforts show a very passive job search. He was only looking on one online site, and he only made one job application and a few enquiries over a period of four months.

[63] I am having difficulty reconciling the Claimant's testimony that the reason for the lack of applications was his restrictive criteria for remote work, given his testimony that he was open to plumbing and electrician type work. I find it more likely than not that the lack of a serious job search was for reason that the Claimant was focusing on his self-employment until September 3, 2021.

[64] I find this factor shows a more than limited involvement in the self-employment.

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

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

[66] The Commission submits, while the Claimant's self-employment may not have yielded sufficient income from the onset, the Claimant submitted that he was trying to make his self-employment as his main source of income. The Commission says the Claimant has not produced any evidence showing that his self-employment was only minor in extent and that he was seeking full-time work elsewhere.

[67] I have considered all six factors mentioned above. The factors about time spent, investment, nature of the employment and financial success or failure all suggest a limited involvement. The factor about continuity of the business is indeterminate. On the other hand, the factor about the Claimant's intention and willingness to find alternative employment suggest a more than limited involvement.

[68] No one factor is decisive. All the factors must be objectively considered together to decide if the engagement is to such a minor extent that a person would not normally rely on it as a principal means of livelihood.¹⁷

[69] With all of this in mind, I find the exception does apply to the Claimant's self-employment. Three of the six factors suggest a limited involvement. One is indeterminate and only one suggests a more than limited involvement. It is true that the factor of intention and willingness to find another job quickly shows a more than minor involvement. However, I find it equally significant that the self-employment was not financially successful. In that regard, the commissions over the period in question were inconsistent, and even when paid, could not necessarily be relied on, given a policy could be cancelled and part of the commission would have to be returned.

[70] Given the equal balancing of the factor of financial success and the factor of intention and willingness to find another job quickly, and considering three other factors show only a limited involvement, I find the Claimant has shown he meets the exception. He has shown his level of engagement was to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood.

¹⁷ See *Stojanovic v Canada (Attorney General)*, 2020 FCA 6.

[71] The Claimant is not regarded as working full work weeks from May 3, 2021 to September 3, 2021.

Conclusion

[72] I find that the Claimant's involvement in his self-employment is limited enough that the exception applies. He wasn't working full work weeks from May 3, 2021 to September 3, 2021, so he was unemployed.

[73] This means that the appeal is allowed.

Charlotte McQuade
Member, General Division – Employment Insurance Section