



Citation: *ET v Canada Employment Insurance Commission*, 2022 SST 432

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

Decision

Appellant: E. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (424955) dated June 9, 2021 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Videoconference

Hearing date: February 9, 2022

Hearing participant: Appellant

Decision date: February 17, 2022

File number: GE-21-1216

Decision

[1] The appeal is dismissed. The Claimant has or has not proven that her self-employment was minor in extent.

Overview

[1] The Claimant applied for employment insurance regular benefits on October 2, 2020.¹ The Commission determined that she was not unemployed because she was focused on her self-employment as a real estate agent and not entitled to benefits from September 27, 2020 to April 10, 2021.²

[2] On reconsideration, the Claimant advised that she had been honest and followed all instructions from the beginning about her self-employment activities.³ She submits that her claim was due to a Commission's error. She also said that there is a lack of transparency.

[3] The Commission maintained their decision arguing that her priority was self-employment and it was not minor in extent, so she was not unemployed.⁴ This resulted in an overpayment of \$12,033.00.⁵ The Claimant appealed that decision to the Tribunal.⁶

Matters I have to consider first

[4] The Claimant wrote that some key conversations and audio recordings with the Commission were not included in the file.⁷ I wrote to the Claimant and scheduled a pre-hearing conference.⁸ There were some necessary adjournments with this file.⁹

¹ See application for benefits at GD3-3 to GD3-18.

² See initial decision dated May 5, 2021 at GD3-38.

³ See reconsideration request on GD3-40 to GD3-43.

⁴ See reconsideration decision dated June 9, 2021 at GD3-45.

⁵ See overpayment breakdown at GD22-5.

⁶ See notice of appeal forms at GD2-1 to GD2-14.

⁷ See GD5-1; GD7-1 to GD7-6; GD13-1 to GD13-2.

⁸ See GD8-1 to GD8-3; GD14-1 to GD14-3.

⁹ See GD1-1 to GD1-5; GD1A-1 to GD1A-3; GD10-1 to GD10-2; GD18-1 to GD18-3; GD24-1 to GD24-2; GD26-1 to GD26-3; GD28-1.

[5] The file was paused (in abeyance) because the Claimant wanted to submit an Access to Information and Privacy (ATIP) request and to Privacy Commissioner of Canada. Specifically, she was looking for documentation about a call with a Commission agent in late February 2021 or early March.¹⁰ She said that the agent accepted her self-employment application.

[6] In the meantime, I wrote to the Commission to see if they had the documents and audio recording the Claimant was seeking.¹¹ The Commission responded and said that the earliest documentation was created on March 9, 2021 and then April 12, 2021. Also, they said that the calls with Commission agents are not recorded.¹²

Issue

[7] I must decide whether the Claimant was self-employed. If so, was it considered minor in extent?

Analysis

[8] A “self-employed person” means an individual who is or was engaged in a business; or is employed but does not have insurable employment by reason of paragraph.¹³

[9] When an insured person makes a claim for benefits, the Act requires the establishment of a benefit period and mandates the payment of benefits to the claimant for each week of unemployment that falls within the benefit period.¹⁴ A week of unemployment is a week in which the claimant does not work a full working week.¹⁵

¹⁰ See GD17-1; GD20-1.

¹¹ See section 32 of the *Social Security Tribunal Regulations* at GD15-1 to GD15-3 and GD19-1.

¹² See Commission’s response at GD16-1 to GD16-2.

¹³ Subsection 5(2)(b) of the *Employment Insurance Act*; Subsection 30(5) of the *Employment Insurance Regulations*

¹⁴ Section 9 of the *Employment Insurance Act*

¹⁵ Subsection 11(1) of the *Employment Insurance Act*

[10] It is presumed that the Claimant has worked a full working week during that week if they are a self-employed person who is engaged in the operation of a business on the claimant's own account or in partnership, or co-adventure, or is employed in any other employment in which the claimant controls their working hours.¹⁶

[11] There is an exception. If the Claimant is employed or engaged in the operation of a business that would be considered minor in extent and would not normally rely on that employment as a principal means of livelihood, then it is not be considered as working a full work week.¹⁷

[12] If a Claimant is considered to be a self-employed person, there are six factors determine whether her employment or engagement in the operation of a business is minor extent.¹⁸ The six factors include the following:

- (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.

The Claimant agrees that she was self-employed

[13] The Claimant used to work as an Executive Assistant for a real estate agent until she was laid off. She started studying and working towards her real estate license.

[14] As of September 1, 2020, she became licensed as real estate agent and started a partnership a month prior. Her licensing fees and dues became due as September 1, 2021. She then applied for employment insurance benefits on October 2, 2021.

¹⁶ Subsection 30(1) of the *Employment Insurance Regulations*

¹⁷ Subsection 30(2) of the *Employment Insurance Regulations*

¹⁸ Subsection 30(3) of the *Employment Insurance Regulations*

[15] Accordingly, I accept that the Claimant was self-employed as a real estate agent as of September 1, 2020. This is undisputed between the parties.

The “six factors”

Time spent

[16] The Commission says that the Claimant reported spending 15 hours or more on her self-employment in her application for benefits.¹⁹ Several months later, the Commission spoke to the Claimant and she reported spending 5 to 10 hours a day on her self-employment.²⁰

[17] The Claimant disputes that she was spending 5-10 hours a day on her real estate business because it was only a past time for her. She also says that there was not enough work available to put in 5-10 hours a day. The Claimant maintains that she was always spending around 15 hours a week and submits that it is not a substantial amount of time to work in the real estate industry.

[18] I was not persuaded by the Claimant’s testimony on this factor for the following reasons.

[19] First, I preferred the evidence from the application form and her initial statements to the Commission. She reported in her application that she was spending “15 hours or more” a week shortly after she started the business.²¹ She could have picked the option that said “15 hours or less”, but she picked “15 hours or more”. Around five months later, she reported around 11-20 hours per week on her self-employment.²² The month following that discussion she told the Commission that she spent 5 to 10 hours a day working on self-employment.²³ I find that this evidence supports that she was likely

¹⁹ See application for benefits at GD3-11.

²⁰ See supplementary record of claim dated April 26, 2021 at GD3-35 to GD3-36.

²¹ See application for benefits at GD3-11.

²² See supplementary record of claim dated March 9, 2021 at GD3-33 to GD3-34.

²³ See supplementary record of claim dated April 26, 2021 at GD3-35 to GD3-36.

spending a minimum of 15 hours weekly on her self-employment, but that she more likely than not worked more than 15 hours a week.

[20] Second, I have considered that the Claimant's assertion that she worked only 15 hours a week versus 5-10 hours a day appears to have changed only after the Commission decided that she had to pay back the benefits she received.

[21] Third, the evidence shows that her work as a real estate agent was progressively increasing over the months. She had four home closures and earned commission between the dates of January 26, 2021 to May 10, 2021. This was only a few months after she started the business. She submitted a copy of hers sales pay record.²⁴

[22] I acknowledge that the last two houses listed on the pay record closed on April 22, 2021 and May 10, 2021, which was outside of the relevant disenitlement period.²⁵ She was disenitlled to EI benefits from September 27, 2021 to April 10, 2021.²⁶ However, it is possible that she had work leading up the home closures prior to April 10, 2021.

Nature and amount of the capital and resources invested

[23] The Commission says that the Claimant reported business expenses totaling over \$10,000 for the 2020 tax year.²⁷ She identified expenses related to her car lease, real estate board membership, liability insurance, brokerage fees, gas, and advertising.

[24] The Claimant testified that her expenses were only \$6,809.28 for the months from September 2020 to April 2021.²⁸ She submits that she has not invested a substantial amount.

²⁴ See agent earnings history report at GD25-4.

²⁵ The relevant period is the period she was disenitlled to benefits from September 27, 2020 to April 10, 2021.

²⁶ See initial decision dated May 5, 2021 at GD3-38 and reconsideration decision dated June 9, 2021 at GD3-45.

²⁷ See supplementary record of claim dated April 26, 2021 at GD3-35 to GD3-36.

²⁸ See expenses and invoice chart prepared by Claimant at GD25-15.

[25] I was not persuaded by the Claimant's testimony on this factor because she failed to include other expenses that she claimed previously. This resulted in underestimating her expenses.

[26] For example, she did not report her car lease payment, car insurance and fuel. When I asked her about these other expenses, she agreed that her expenses might have been higher if she had included those figures, but that she did not have much knowledge about finances.

[27] I find that the Claimant likely had expenses over \$10,000.00 based on her initial statement and admission at the hearing that some expenses were not included.

Financial success or failure of the employment or business

[28] The Commission submits when they spoke to the Claimant she had grossed approximately \$7,000 from a house sale.²⁹

[29] The Claimant testified that she three house sales by April 22, 2021.³⁰ She submits that she continues to operate at failing rate, making an average of \$1,167.57 on a monthly basis, which she says is not sufficient for her livelihood.

[30] I find that the Claimant has gross sales for three properties that totalled \$9,198.79 by April 22, 2021. This amount includes HST that she is able to expense. In my view, her business was growing and sales were increasing. She had her first sale only a few months after starting the business and had other sales. This is not a sign of a business failing.

²⁹ See supplementary record of claim dated April 26, 2021 at GD3-35 to GD3-36.

³⁰ The third house sale "closed" outside of the relevant disentitlement period, however the Claimant agreed that she likely put efforts prior to the sale of house.

Continuity of the employment or business

[31] The Commission says that the Claimant reported in her application that she was devoting her time to self-employment only.³¹ She then told the Commission that she was trying to make her business as her main source of income.³² The following discussion she told them that she would like to continue with her self-employment only on a part-time basis.³³

[32] The Claimant testified that a reality check occurred. She had intended to devote all of her time to self-employment, but things changed as it became more challenging to conduct business. For example, during the pandemic there were various restrictions, so she could not go door knocking, or host open houses, etc.

[33] I asked the Claimant when she came to the realization that she could only pursue the real estate on a part-time basis. At first, she said she did not know, but then said that it happened around November 2021.

[34] I was not persuaded that the Claimant came to the realization that she would pursue real estate as a part-time business as early as November 2021. I find that this likely occurred only around April 12, 2021 and confirmed April 26, 2021 when she told the Commission that she was trying to find full-time work and would like to have two incomes and pursue self-employment on a part-time basis only.³⁴

Nature of the employment or business

[35] The parties do not dispute this factor. Both agree that the Claimant is self-employed as a real estate agent. Accordingly, I accept this as fact.

³¹ See GD3-11.

³² See supplementary record of claim dated March 9, 2021 at GD3-33 to GD3-34.

³³ See supplementary record of claim dated April 12, 2021 at GD3-34 and supplementary record of claim dated April 26, 2021 at GD3-35 to GD3-36.

³⁴ See supplementary record of claim dated April 12, 2021 at GD3-34 and supplementary record of claim dated April 26, 2021 at GD3-35 to GD3-36.

The claimant's intention and willingness to seek and immediately accept alternate employment:

[36] The Commission submits that the Claimant reported in her application that she was not prepared to work outside of her self-employment because she wanted to devote her time to building her business.³⁵ On April 12, 2021, she told the Commission that she was seeking a full-time position outside of self-employment.³⁶ The Commission says that she was unable to provide details about which organizations or positions she had applied for outside of her self-employment.

[37] The Claimant testified that she was looking for full-time work, but could not recall when she started looking. She was receiving job alerts, but they were entry level jobs that were not suitable for her. She was also networking with people. She ended up securing a job in late September 2021 with her former employer.

[38] I find that the Claimant did not express an intention or willing to seek and immediately accept alternate employment until April 9, 2021 and then again on April 26, 2021.

[39] When I asked the Claimant about whether she had made any job applications, she did not answer the question but simply said that we were in unprecedented times during the pandemic and that she made other types of efforts to find work. I can infer that she did not make any job applications during the period of disentitlement. This further supports that she was focused on her self-employment as her main source of income. I note that the application for benefits does identify that she has a responsibility to look for work and she acknowledged her rights and responsibilities.³⁷

³⁵ See GD3-12.

³⁶ See supplementary record of claim dated April 12, 2021 at GD3-34.

³⁷ See GD3-13 to GD3-18.

“The seventh factor”

[40] The Claimant submits that there should be seventh factor considered. Namely, that the pandemic created much confusion for Canadians. She has been honest and was not acting in bad faith, or ill will. She did not take advantage of the system. As well, she expected the Commission to let her know before they paid her benefits whether she was eligible and that the deficiency in the system caused this issue.

[41] I agree with the Claimant that the pandemic was unprecedented. I acknowledge that her self-employment occurred during the pandemic when she was trying to figure things out and keep busy after being laid off. However, the six factors listed above are based in law. I do not have the authority and discretion to create and consider a seventh factor or make exceptions on this basis.

[42] Further, if the Claimant had reported the hours she worked and earnings when the first house closed on January 26, 2021, the Commission likely would have been triggered to contact her about the earnings. The question on the reports do ask Claimants if they worked or received earnings, including work that they will paid later, unpaid work or self-employment. The Claimant’s electronic reports do not report any work or earnings from October 13, 2021 to March 8, 2021.³⁸ The first time she reported the earnings was on March 9, 2021, which was several weeks after the first house closed.³⁹

The Claimant’s self-employment was not minor in extent

[43] Having considered all six factors and the submissions from the parties, I find that the Claimant’s self-employment was not minor in extent. The evidence supports that her main focus was on self-employment.

³⁸ See electronic reports submitted from September 27, 2020 to February 27, 2021 at GD3-19 to GD3-30.

³⁹ See electronic report submitted by the Claimant on March 9, 2021 at GD3-30.

Conclusion

[2] The appeal is dismissed. This means that the Claimant is not entitled to receive benefits.

Solange Losier

Member, General Division – Employment Insurance Section