



Citation: *JS v Canada Employment Insurance Commission*, 2022 SST 894

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

## Decision

**Appellant:** J. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (464493) dated April 6, 2022  
(issued by Service Canada)

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**Tribunal member:** Linda Bell

**Hearing Date:** July 11, 2022

**Type of hearing:** Videoconference and Questions & Answers

**Decision date:** July 20, 2022

**File number:** GE-22-1492

## Decision

[1] I am dismissing the appeal. I disagree with the Claimant.

[2] The Claimant was self-employed, working full work weeks as of October 4, 2020. This means he is not entitled to the Employment Insurance (EI) benefits he received.

[3] The Claimant is liable (responsible) to repay an overpayment of EI benefits. This means I am not writing off or reducing the overpayment.

## Overview

[4] The Claimant established a claim for the EI Emergency Response benefit (EI-ERB) effective July 12, 2020.<sup>1</sup> A subsequent claim for regular EI benefits was established effective October 4, 2020.

[5] After paying the Claimant several months of regular EI benefits, the Commission conducted a review. It decided that the Claimant wasn't entitled to EI benefits because he wasn't unemployed. The Commission determined the Claimant's involvement in self-employment wasn't minor in extent. The Commission imposed a retroactive disentanglement from October 4, 2020. This resulted in a \$9,741.00 overpayment of regular EI benefits.

[6] The Claimant appeals to the Social Security Tribunal. He says his primary reason for disputing the overpayment is he paid into the EI program for over 20 years but he never used EI in his entire life. He argued he was penalized due to the shut down of the economy and couldn't earn a normal income. He needed the EI benefits to pay his bills.

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<sup>1</sup> In March 2020, the government made amendments to the *Employment Insurance Act* (Act), in response to the COVID-19 pandemic. One of the amendments added a new temporary benefit called the Employment Insurance Emergency Response Benefit (EI-ERB).

## **Matter I have to consider first**

### **Adjournment**

[7] After the July 11, 2022, hearing, I adjourned the matter to allow the Claimant more time to respond to the Commission's supplementary representations and present any additional evidence he wished to rely upon. Here is what I considered when deciding to adjourn the hearing.

- The Claimant appeared without a representative. At times during the hearing, he refused to confirm or deny previous statements he made to the Commission about his self-employment. Specifically, he said he didn't want to go on record without speaking to his accountant.
- After I concluded the July 11, 2022, videoconference hearing, I received notification that the Tribunal received supplementary representations (GD08) from the Commission. Those representations were submitted by the Commission a few hours before the hearing had started.
- Copies of the supplementary representations (GD08) were emailed to the Claimant shortly before the hearing started. But they weren't reviewed during the hearing because I wasn't aware the Commission submitted them until after the hearing.

[8] So, in order to ensure the Claimant was provided a full and fair opportunity to be heard and present all evidence he wished to rely upon, I adjourned the hearing to a written question and answer format. I granted the Claimant until July 19, 2022, to provide a written response to the Commission's supplementary representations (GD08) and any other statements or documents he wished to submit in support of his appeal.

[9] On July 13, 2022, the Claimant submitted an email to the Tribunal with receipts for medication and an office chair. No other submissions were received, so I will now proceed with determining the merits of this appeal.

## Issues

[10] Was the Claimant's level of involvement in self-employment so limited that he wasn't actually working full work weeks?

[11] Has the Claimant shown he was otherwise available for work to be entitled to EI sickness benefits?

[12] Did the Commission conduct its review within the required time limit?

[13] If so, is the Claimant responsible for the overpayment of EI benefits?

## Analysis

[14] If you are involved in a business (self-employed), you may not be entitled to EI benefits.

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

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

### **Exception if your involvement in self-employment is limited**

[17] There is an exception if your level of involvement in self-employment is limited.<sup>6</sup>

[18] The exception applies if the Claimant's level of involvement is so limited that a person wouldn't normally rely on that self-employment as their main means of earning a living.<sup>7</sup>

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<sup>2</sup> Section 9 of the Act sets out this rule.

<sup>3</sup> See section 11 of the Act.

<sup>4</sup> See section 30(1) of the *Employment Insurance Regulations* (Regulations).

<sup>5</sup> See *Marlowe v Canada*, 2009 FCA 102.

<sup>6</sup> 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.

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

[19] The Claimant has to prove that his involvement was so limited that the exception applies.<sup>8</sup> 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 in self-employment is limited.

### **Six factors for deciding level of involvement**

[20] To decide whether the exception applies, I have to consider the following six factors:<sup>9</sup>

- 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**

[21] The amount of time the Claimant spent on his self-employment doesn't show limited involvement.

[22] The Claimant says his company was incorporated on June 3, 2020. He owns 100% of the shares.

[23] At the Hearing the Claimant was hesitant to confirm how much time he spent working on his self-employment. Upon review of the Commission's submissions, the Claimant agreed he told the Commission he spent 17 hours working on one client plus

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

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

about 15 hours working on three other clients. Upon further clarification, the Claimant said he has a “small amount” of clients. He didn’t know the exact number of hours he spent on each client but confirmed he maintained client relationships.

[24] The Claimant told me he was spending time doing self-study, reading books, looking for government grants, and looking on line for other work. He says his strategy was to hold onto his business and maybe do some part time work. He confirmed that he didn’t apply for any other jobs while collecting EI benefits.

[25] After consideration of the foregoing, I give more weight to the Claimant’s initial statements to the Commission. This is because his initial statements to the Commission were forthright, plausible, and were made before he learned of the \$9,741.00 overpayment of EI benefits. So I accept that the amount of time the Claimant spent on his self-employment was approximately 30 to 32 hours per week, which doesn’t show limited involvement.

– **Investments**

[26] The nature and amount of the Claimant’s investments (such as money, property, goods, and resources) doesn’t show limited involvement.

[27] The Claimant doesn’t dispute he told the Commission he invested more than \$20,000 into his business, his expenses were about \$125,000, while the cost of goods for the business was about \$300,000. Instead he said he couldn’t go on record to confirm this unless he spoke with his accountant. The Claimant says he had to take on debt. Specifically, his business was approved for a \$10,000 loan with RBC.

[28] As stated above, the Claimant was given until July 19, 2022, to submit any additional evidence he wished to rely upon. He didn’t provide additional evidence specific to his self-employment. Instead he provided receipts for medication and a new office chair.

[29] When I consider the Claimant's initial statements to the Commission, along with the fact his business was approved for a \$10,000 loan, I find the nature and amount of investments doesn't show limited involvement in his self-employment.

– **Financial success or failure**

[30] The financial situation of the Claimant's self-employment doesn't show limited involvement.

[31] At the hearing, the Claimant confirmed the business made money. He refused to go on the record to say how much money the business has made. He didn't deny telling the Commission his business had a gross annual revenue of \$20,000 and made approximately \$50,000 to \$75,000 since it began on June 3, 2020.

[32] I find the evidence supports a finding that the Claimant's self-employment has been financially successful. The financial situation of the Claimant's self-employment doesn't show limited involvement because it is financially viable.

– **Ongoing self-employment (continuity)**

[33] There is no dispute the Claimant's self-employment was meant to be ongoing. This doesn't show limited involvement.

[34] The Claimant acknowledged that when he spoke with the Commission he planned for his self-employment to be his primary employment. He confirmed his business is still operating. He says he is now working full-time, 5 days per week, 30 hours per week. The Claimant didn't dispute he told the Commission he was devoting all of his time to his self-employment.

[35] So, because the Claimant's self-employment was meant to be ongoing and continues full-time, this doesn't show limited involvement.

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

[36] The Claimant’s self-employment is focused on marketing and selling advertising products. The Claimant doesn’t dispute his self-employment is directly related to his previous experience in marketing.

[37] At the hearing, the Claimant confirmed his career path was in marketing. So his previous employment was a stepping stone into his self-employment. This doesn’t show limited involvement.

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

[38] I find the Claimant provided insufficient evidence to show he had any intention or willingness to find another job quickly.

[39] The Commission submits the Claimant said he wasn’t seeking other employment outside of his self-employment activities. He said he wants this self-employment to be his primary source of income, and is not willing to look for or accept other employment outside of his self-employment.

[40] The Commission states the Claimant made no job search efforts nor has he availed himself to any employment outside of his self-employment activities. The Claimant stated that he is attempting to make his self-employment his primary source of income and has placed all of his focus into that pursuit.

[41] At the hearing, the Claimant provided contradictory testimony saying he was looking for other work when he first started the business in June 2020. When asked why he told the Commission that he wasn’t willing to look for or accept other employment, the Claimant didn’t dispute his previous statements. Instead he said he was trying to be resourceful during the COVID-19 pandemic.

[42] At the hearing, the Claimant said he was networking, speaking with former colleagues, doing self-study, while looking on-line at Indeed and Linked In. He confirmed he didn’t apply for any other jobs since starting his business on June 3, 2020.



[43] In addition, the Claimant submitted evidence showing he was involved in a motor vehicle accident (MVA) on January 7, 2021. This occurred during the last month he collected EI benefits.

[44] Initially he said he didn't work in his self-employment after his MVA. Then he said he did continue to work 3 to 4 hours per week maintaining client support and checking emails.

[45] In the absence of documentary evidence to prove otherwise, I give more weight to the Claimant's initial statements that he wasn't seeking other employment outside of his self-employment activities. He admits that he has had 4 clients and was spending about 30 to 32 hours per week on his self-employment, prior to his accident. He later confirmed he is now working full-time, 5 days per week, 30 hours per week.

[46] Overall, I find the evidence on file confirms the Claimant's efforts were primarily towards his self-employment. This doesn't show limited involvement in his self-employment.

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

[47] No. I have considered all six factors mentioned above and determined 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.

[48] The factors about time spent, investment, financial success, continuity and the nature of self-employment suggest the Claimant's self-employment was not limited in extent.

[49] On the other hand, the factor about the Claimant's willingness to seek and accept other employment may suggest his involvement was limited had he presented reliable evidence to support he was actively seeking and available to accept suitable employment, for every working day he claimed EI benefits. However, in this case the Claimant failed to provide credible evidence that he was willing to seek or accept other employment.

[50] With all of this in mind, I find the exception doesn't apply to the Claimant's self-employment. So, the Claimant was working full work weeks. This means that the Claimant wasn't entitled to the EI benefits he received because there weren't any weeks when he was unemployed.

[51] 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.<sup>10</sup>

### **Sickness benefits**

[52] To be eligible for sickness benefits, a claimant must establish that they are unable to work and if it were not for their illness, they would be available for work.<sup>11</sup>

[53] The Commission says if the claimant is attempting to argue that he was entitled to sickness benefits for this period, he has still not presented any evidence that would show he is not self-employed to a major extent, and therefore would not be entitled to sickness benefits. I agree.

[54] As stated above, the Claimant was working full work weeks in his self-employment. The Claimant didn't prove he wanted to go back to work as soon as a suitable job was available or that he made efforts to find a suitable job. Instead, the evidence supports his involvement in self-employment was a personal condition that unduly limited his chances of going back to work. This means he hasn't shown he meets the requirements to be entitled to EI sickness benefits while operating his business.

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<sup>10</sup> See *Canada (Attorney General) v Jouan*, A-366-94.

<sup>11</sup> See section 18(1)(b) of the Act.

**Did the Commission conduct the review within the required time limit?**

[55] Yes. The Commission completed its review on April 21, 2021. This is 6 months after the weeks for which benefits were payable or paid.

[56] The Commission has the authority to review previous claims.<sup>12</sup> The law states that the Commission has 36 months after paying EI benefits, to reconsider a claim for benefits.<sup>13</sup> This period is extended to 72 months in cases where, if in the opinion of the Commission, a false or misleading statement or representation has been made in connection to a claim.<sup>14</sup>

[57] The Federal Court of Appeal recognizes that the Commission can't review changes to claims at the exact time they happen. It is precisely for that reason that the Act allows the Commission time to rescind or amend a decision given in any particular claim for EI benefits.<sup>15</sup>

[58] The Commission states the Claimant never mentioned his self-employment or earnings. The Claimant says he didn't report his self-employment because he wasn't taking a salary. He was only withdrawing dividends from his company.

[59] The Claimant explained his personal circumstances in detail. He says he needed access to funds from EI to pay for his basic needs and bills. He argued he paid into the EI fund for years and never collected benefits before. He is asking the Tribunal to look at his total picture. He argues that people had no freedom during the COVID-19 pandemic. He feels he was penalized when the economy was shut down so he couldn't earn a normal income.

[60] I recognize that the Claimant said he didn't report his self-employment because he wasn't taking a salary. While this may explain why he didn't report he had earnings

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<sup>12</sup> See section 52 of the Act.

<sup>13</sup> Section 52 of the Act.

<sup>14</sup> See subsection 52(5) of the Act.

<sup>15</sup> *Canada (Attorney General) v Landry*, A-532-98.

on his biweekly reports, it doesn't explain why he answered "No" to the question, "Are you self-employed, other than fishing or farming?"<sup>16</sup>

[61] Entitlement to EI benefits is not based entirely on earnings. Instead, as set out above, the law states that you can't receive EI benefits if you are self-employed, because you are assumed to be working full work weeks.<sup>17</sup>

[62] In response to the Claimant's argument he paid into the EI fund for over 20 years, the EI plan is an insurance scheme. It is not a pension fund or a needs-based program that can be withdrawn at will. Although the entitlement to benefits requires contributions to the EI fund, it also depends on qualifying conditions and compliance with the requirements set out in the Act.

[63] I sympathize with the Claimant given the circumstances he presented. But my decision is not based on fairness or financial hardship. Instead, my decision is based on the facts before me and the application of the law. There are no exceptions and no room for discretion. I can't interpret or rewrite the Act in a manner that is contrary to its plain meaning, even in the interest of compassion.<sup>18</sup>

[64] I recognize that the Commission's decision results in an overpayment of benefits. But the Commission conducted its assessment in accordance with the law so the overpayment is valid.

### **Is the Claimant liable to repay the overpayment of EI benefits?**

[65] Yes. I find the Claimant is liable for the \$9,741.00 overpayment of EI benefits.<sup>19</sup>

[66] The law states that a claimant is required to repay benefits they were not entitled to receive.<sup>20</sup>

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<sup>16</sup> See page GD3-6.

<sup>17</sup> See section 30(1) of the Regulations.

<sup>18</sup> *Canada (Attorney General) v Knee*, 2011 FCA 301

<sup>19</sup> See page GD3-24.

<sup>20</sup> See sections 43(b) and 44 of the Act.

[67] At the hearing, the Claimant offered to pay \$1,000. He asks for the remainder of the overpayment to be forgiven. But I don't have the jurisdiction to decide on requests to write off or reduce an overpayment. That authority belongs to the Commission.<sup>21</sup>

[68] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue.<sup>22</sup> So if the Commission refuses to write off the debt, the Claimant may proceed with filing a request for appeal at the Federal Court of Canada.

[69] If the Claimant is wishing to negotiate repayment arrangements, he may contact the Canada Revenue Agency (CRA) to discuss repayment options.

## **Conclusion**

[70] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

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<sup>21</sup> See section 56 of the Regulations.

<sup>22</sup> See *Steel v Canada (Attorney General)*, 2011 FCA 153, and *Bernatchez v Canada (Attorney General)*, 2013 FC 111.