



Citation: *PM v Canada Employment Insurance Commission*, 2022 SST 932

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

## Decision

**Appellant:** P. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (440236) dated November 24, 2021 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** March 10, 2022

**Hearing participant:** Appellant

**Decision date:** March 11, 2022

**File number:** GE-22-68

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Claimant was working full work weeks from October 5, 2020. This means that he may not be able to receive Employment Insurance (EI) benefits.

## Overview

[3] The Claimant applied for employment insurance regular benefits on October 5, 2020.<sup>1</sup> After paying him several months of benefits, the Commission decided that he was not unemployed as he was focused on his self-employment as a tradesperson.<sup>2</sup> They retroactively disentitled him from October 5, 2020.

[4] The Commission maintained their decision on reconsideration arguing that his priority was self-employment and it was not minor in extent, so he was not unemployed. This resulted in an overpayment of \$12,225.00.<sup>3</sup>

[5] The Claimant appealed that decision to the Tribunal because there was ambiguity and misfeasance by Canada Revenue Agency and the Commission.<sup>4</sup> He thought was applying for benefits for self-employed person and he cannot afford to repay the overpayment.

## Issue

[6] Was the Claimant's level of involvement so limited that he was not actually working full work weeks?

## Analysis

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

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<sup>1</sup> See application for benefits at GD3-3 to GD3-20.

<sup>2</sup> See initial decision dated September 7, 2021 at GD3-161 to GD3-162 and reconsideration decision dated November 24, 2021 at GD3-172 to GD3-173.

<sup>3</sup> See notice of debt at GD3-163.

<sup>4</sup> See notice of appeal forms at GD2-1 to GD2-10.

[8] The law says that you can receive EI benefits for each week you are unemployed.<sup>5</sup> A week of unemployment means any week you don't work a full work week.<sup>6</sup>

[9] Also, if you are self-employed, the law assumes that you work full work weeks.<sup>7</sup> So, you cannot receive EI benefits.<sup>8</sup>

### **Exception if your involvement is limited**

[10] There is an exception if your level of involvement in the business is limited.<sup>9</sup>

[11] The exception applies if the Claimant's level of involvement is so limited that a person would not normally rely on that self-employment as their main means of earning a living.<sup>10</sup>

[12] The Claimant has to prove that his involvement was so limited that the exception applies.<sup>11</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 is limited.

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

[13] To decide whether the exception applies, I have to consider six factors:<sup>12</sup>

[14] At the hearing, the Claimant said that the six factors were moot because his main argument was that he received the wrong type of benefit due to the errors made by two Commission agents who should have told him he was not eligible. I explained to the

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<sup>5</sup> Section 9 of the *Employment Insurance Act* (Act) sets out this rule.

<sup>6</sup> See section 11 of the Act.

<sup>7</sup> See section 30(1) of the *Employment Insurance Regulations* (Regulations).

<sup>8</sup> See *Marlowe v Canada*, 2009 FCA 102.

<sup>9</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>10</sup> See section 30(2) of the Regulations and *Martens v Canada (Attorney General)*, 2008 FCA 240.

<sup>11</sup> See *Canada (Attorney General) v Falardeau*, A-396-85, and *Lemay v Canada Employment Insurance Commission*, A-662-97.

<sup>12</sup> Section 30(3) of the Regulations sets out these six factors. This decision paraphrases those six factors for plain language.

Claimant that I still needed to consider and assess the six factors because I have to decide whether his self-employment was limited in extent.

[15] Therefore, the following six factors were considered:

- 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) Does the Claimant intend to and want to find another job quickly?

– **Time spent**

[16] The amount of time that the Claimant spent on his self-employment **does not show limited involvement.**

[17] The Claimant testified that he had no work in October 2020. However, in the months following, he worked many hours, painting and doing repairs. For example, he worked around 50 hours a week in November 2020. In December he had around 50-60 hours and around 3 weeks of work. He explained that his self-employment work was mostly steady up to July 2021 with one client.

– **Investments**

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

[19] The Claimant valued his tools around \$3,000.00, but they were not purchased after his self-employment started. They were tools that he owned previously for many years. The only real investment he made back into his self-employment after he started was around \$100.00 for a truck repair, which is minimal in my view.

– **Financial success or failure**

[20] The financial situation of the Claimant's self-employment **shows limited involvement** because he only earned around \$13,250.00 gross revenue for a period of several months. He had not yet taken off his expenses, including harmonized sales tax (HST). I do not find that a person would normally rely on this income as a principal means of livelihood.

– **Ongoing self-employment**

[21] The Claimant's admits that his self-employment was meant to be ongoing because he does not want to work for anyone else. This does **not show limited involvement** because he has one steady client that gives him ongoing work. He also obtained one job through word of mouth. While he has advertised on kijiji, he has not obtained any new business yet.

[22] I accept that his business has the potential of being sustainable, particularly since his main client gives him a lot of work. He often works many hours on the various jobs he is assigned.

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

[23] The Claimant's self-employment is as a tradesperson. This is different from his former job as a truck driver and insurance adjuster. This shows limited involvement because it is a new career.

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

[24] The Claimant admits that he was not looking for work outside of his self-employment. This does not show limited involvement because he is not willing to accept work outside of his self-employment. His primary focus is on self-employment.

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

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

[26] I have considered all six factors mentioned above. The three factors about time spent, ongoing self-employment, and intention and willingness to accept another job suggest that his self-employment was not limited in extent.

[27] On the other hand, the three factors about investments, financial success or failure of the business and nature of self-employment suggest that there was limited involvement.

[28] Two factors are especially important. Case law says that how much time you spend on the work and whether you intend to or want to find another job quickly are important factors to consider.<sup>13</sup>

[29] With all of this in mind, I find the exception does not apply to the Claimant's self-employment. The Claimant admitted to spending many hours working on his self-employment and he has no intention of finding another job.

[30] The Claimant was working full work weeks. This means that the Claimant may not receive benefits because there were weeks where he was unemployed.

[31] 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>14</sup>

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<sup>13</sup> See *Charbonneau v Canada (Attorney General)*, 2004 FCA 61.

<sup>14</sup> See *Canada (Attorney General) v Jouan*, A-366-94.

## **What if the Claimant applied for the wrong stream of benefits at the beginning?**

[32] The Claimant admits that he made an error by applying for the wrong stream of benefits. He believed he was eligible for these benefits as a self-employed person.

[33] Part of the Claimant's argument was the first two Commission agents failed to do their job correctly because during their review, he was not asked specific questions about his self-employment. After he spoke to them, he assumed that he was doing everything correctly and was entitled to benefits. He refers to their conduct as misfeasance, with no malice. He also says that due to ambiguity about the benefits available, it should be ruled in his favour.

[34] The Commission did not attend the hearing and their written submissions do not address this particular argument.

[35] I acknowledge the Claimant's argument that if he knew he was not eligible for benefits, he would have sought other types of benefits elsewhere. I note that the Commission has the authority to review claims. I do not have the authority to rule in the Claimant's favour on the basis that the benefits available were ambiguous and confusing for Canadians.

[36] Also, even if the Commission agents made an error, the courts have said that that any commitment that the Commission or its representatives make, whether in good or bad faith, to act in a way other than that which is prescribed by the Act, is absolutely null and void.<sup>15</sup>

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<sup>15</sup> *Granger v. Canada Employment and Immigration Commission*, [1986] 3 FC 70.

## **What about the overpayment?**

[37] The Commission issued a retroactive disentitlement to benefits. They want to be paid back the benefits they paid to the Claimant.

[38] The Claimant cannot afford to pay back the overpayment. He has experienced many struggles over the past few years.

[39] My jurisdiction is limited to decisions that have been reconsidered by the Commission.<sup>16</sup> I do not have any discretion to waive the overpayment, no matter how compelling the Claimant's circumstances are. The law does not allow me to relieve the Claimant from responsibility for the overpayment.<sup>17</sup>

[40] I explained to the Claimant that if he is asking for an overpayment write-off based on financial hardship, he must take steps and ask the Commission and/or Canada Revenue Agency.

## **Conclusion**

[41] I find that the Claimant was working full work weeks, so he was not unemployed.

[42] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>16</sup> See section 112.1 of the Act.

<sup>17</sup> See sections 43 and 44 of the Act.