



[TRANSLATION]

Citation: *NG v Canada Employment Insurance Commission*, 2023 SST 205

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

Decision

Appellant: N. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (507255) dated August 11, 2022 (issued by Service Canada)

Tribunal member: Josée Langlois

Type of hearing: Teleconference

Hearing date: February 15, 2023

Hearing participant: Appellant

Decision date: February 16, 2023

File number: GE-22-2847

Decision

[1] The appeal is dismissed.

[2] The Appellant was working full work weeks from January 2, 2022. This means she isn't entitled to benefits.

Overview

[3] For the period in question, the Appellant was involved in a business where she held 31% of the shares. Between January 3, 2022, and April 29, 2022, she wasn't paid, but she spent each day running her business. During this time, she cleaned and took care of the plants.

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant worked full work weeks for the period in question. As a result, the Commission decided that she could not receive EI benefits from January 2, 2022.

[5] The Appellant disagrees. She argues that she should receive benefits because she isn't self-employed and only holds 31% of the company's shares. She explains that she is paid just like all employees.

[6] I have to decide whether the Appellant was unemployed as of January 2, 2022.

Matter I have to consider first

Issue

[7] Was the Appellant's involvement in her business so limited that she wasn't actually working full work weeks from January 2, 2022?

Analysis

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

[9] The *Employment Insurance Act* (Act) 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 or involved in a business, the Act assumes that you work full work weeks.³ In that case, you can't receive EI benefits.⁴

Exception if your involvement was limited

[11] There is an exception if your level of involvement in the business was limited.⁵

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

[13] The Appellant has to prove that her involvement was so limited that the exception applies.⁷ She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that her involvement was limited.

Six factors for deciding level of involvement

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

- a) How much time did the Appellant spend on her business?

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, which refers to a claimant's involvement to a limited "extent." See also *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 The six factors are listed in section 30(3) of the Regulations. They have been re-written in plain language in this decision.

- b) How much has the Appellant invested in her business and what are those investments (such as money, property, goods, and resources)?
- c) Financially, has the Appellant's business been a success or failure?
- d) Was the involvement in the business meant to be ongoing?
- e) What was the nature of her involvement in the business?
- f) Did the Appellant intend to and want to find another job quickly?

– **Time spent**

[15] The time spent by the Appellant running her business doesn't show limited involvement from January 2, 2022. The Appellant said that she spent time every day cleaning and looking after the flowers between January 2022 and April 2022. During this period, she wasn't being paid and she completed a Record of Employment indicating a shortage of work. She went back to being paid for 50 or 60 hours per week on May 2, 2022.

[16] At the hearing, the Appellant said that, in December, Centre Jardin [Garden Centre] had launched a Christmas shop. The aim is to be open year-round and activities are set up with that in mind. After the holidays, she took care of storing the Christmas shop merchandise and prepared for the opening of Centre Jardin in the spring. She took care of cleaning inside Centre Jardin while her spouse took care of snow removal outside.

[17] The Appellant said that, from January 2, 2022, she went to Centre Jardin every day and that, for that reason, she wasn't available for work elsewhere. She was in charge of washrooms, garbage, washing the floor, receiving new merchandise for the spring, and watering the plants. Watering the plants alone can take one and a half to two hours a day. She says that task is important to prevent insects from appearing. She washed and disinfected the floor for the same reason.

[18] The Appellant testified that this is her business and that, she and her spouse work all the time to make sure everything works well.

[19] The company's financial statements weren't submitted to the Commission. In making its arguments, the Commission didn't provide any additional submissions on the outcome of its reconsideration decision. It only made arguments about the Appellant's availability and indicates that the reconsideration decision should have reflected that the Appellant wasn't available for work under section 18 of the Act.

[20] The Appellant says that her spouse received benefits for that period, even though he owns 31% of the shares of the business like her. Their two boys hold 19% each.

[21] As I explained to the Appellant at the hearing, each case is assessed based on the facts in the record.

[22] Also, I can't accept the Commission's request to decide a case under a different section of the Act. The Court has already ruled on this possibility, saying that the case can be decided on from another angle when the issue is in the same section of the Act. This isn't the case here.

[23] Under section 113 of the Act, the issue before me comes from the Commission's reconsideration decision. As already mentioned, the Commission decided that the Appellant wasn't unemployed from January 2, 2022, and I will limit myself to deciding whether that was the case under sections 9 and 11 of the Act.

[24] In this case, for the first factor, the Appellant has shown that she went to Centre Jardin every day from January 2, 2022. Even though Centre Jardin was closed, the Appellant worked every day. She listed many tasks that she did daily.

[25] I find that the Appellant was working full work weeks from January 2, 2022.⁹ The Appellant's actual involvement in running her business wasn't limited because she was completely dedicated to her business.

– **Investments**

[26] The nature and amount of the investments (such as money, property, goods, and resources) in the business also don't show limited involvement from January 2, 2022.

[27] The Appellant told a Commission employee that she could not provide exact investment amounts because her spouse was in charge of that part of the job. She also indicated that she was the company's treasurer, but that, in reality, she wasn't.

[28] As she indicated at the hearing, Centre Jardin was launched in 2021. This is when she started working full-time.

[29] Although the Appellant hasn't provided any information to quantify the investments, it is more likely than not that there were investments, since this period is when Centre Jardin was opened and, in December 2021, the Appellant said that a Christmas shop had been launched. Also, at the hearing, she said that, in March 2022, she had received merchandise for when Centre Jardin would open in the spring.

[30] I find that the investments made in the business during that period were to contribute to its success.

– **Financial success or failure**

[31] The company's financial situation doesn't show limited involvement during this period.

[32] On March 3, 2022, the Appellant reported that the business generated a gross annual income of more than \$20,000. Although she didn't send the company's balance sheet, it should be noted that, even though the company didn't pay her between

⁹ Section 11(1) of the Act.

January 2022 and April 2022 and she testified that she also didn't receive a share of the company's profits during that period, it is accepted that the company's retained earnings must be considered.

[33] The Appellant explained that she was dedicating herself year-round to running her business and that efforts were being made to open Centre Jardin year-round. For example, in 2021, a Christmas shop was set up.

[34] In any event, the net earnings of the business must be considered even in cases where they aren't allocated. There is a distinction between the gross income and the net earnings of the business. But, the evidence on file isn't sufficient to draw conclusions on this point.

[35] Still, the business is expanding and it is more likely than not that it was successful on January 2, 2022.

[36] As the Court has already decided, the amount of time employees spend may be relevant in deciding the success or failure of the business.¹⁰

[37] In this case, the Appellant explained that the company could have up to 25 employees. In the winter, the company hires four employees for snow removal. The company also hires a receptionist to provide administrative support, including payroll, even during the winter months.

[38] I find that the business was successful on January 2, 2022.

– **Ongoing self-employment**

[39] The Appellant's involvement in the business was meant to be ongoing. This doesn't show limited involvement because the Appellant was invested in running her business and stopped running a maintenance business in 2020 or 2021 to dedicate herself to Centre Jardin.

¹⁰ *Martens v Attorney General of Canada*, 2008 FCA 240.

[40] She says that, during the season, she is the cashier and that she can work between 50 and 60 hours a week. In winter, the Appellant travels daily to Centre Jardin to do maintenance, clean floors, and water plants.

[41] I find that the business has been kept running since January 2, 2022. On that date, the Appellant dedicated herself to the activities of the business and carried out tasks to make sure that Centre Jardin would be ready to open in the spring. The Appellant took the necessary steps to be able to run and maintain the activities of the business. As she testified, the expansion of the business shows that, at the time, it would be viable.

– **Nature of the Appellant’s business**

[42] This factor is used to determine whether there is any connection between the employment lost and the business the Claimant is running. If the employment lost is similar to the activity of the business, this may indicate that it was just one step in starting the business.¹¹

[43] Before X was started, the Appellant was running a maintenance business. In 2021, she and her spouse started a Centre Jardin in X.

[44] The Appellant was running a business and she retrained herself to run a Centre Jardin with her spouse. She understood how to do certain tasks related to running a business before Centre Jardin opened, and she was well aware of its nature. She also said at the hearing that she performed maintenance tasks. This doesn’t show limited involvement.

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

[45] The Appellant wasn’t looking for work, and she didn’t want another job. This doesn’t show limited involvement because the facts show that the Appellant dedicated herself entirely to running her business every day, and she even closed down the

¹¹ As indicated in *Martens v Attorney General of Canada*, 2008 FCA 240 (CanLII).

maintenance business she had previously run in order to dedicate herself to Centre Jardin.

[46] As the Appellant had told the Commission, she said at the hearing that she wasn't available to work for another employer. She said there was no point in lying because it would not be true to say she is available because she wasn't.

[47] She then detailed all the tasks she did at Centre Jardin in winter and spring. Between January and April, she was dedicating herself to running her business to ensure that Centre Jardin was ready to open in spring.

[48] Not only did she not intend to or want to find a job quickly, but the facts show that she dedicated herself entirely to running her business during that period.

[49] The Appellant made no effort to find a job with another employer and her maintenance company was closed down. All her daily efforts were focused on running Centre Jardin.

[50] Job search efforts show the intention and the willingness to work, and the Appellant hasn't shown the desire to find a job right away not only because she didn't make any job search efforts with an employer, but also because she was dedicating herself entirely to running her business.

[51] I find that the Appellant hasn't shown an intention or willingness to find a job right away. Her intention was to make her business her main means of livelihood and she said that she was making the necessary efforts to have her business open year-round.

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

[52] The Appellant's involvement in her business wasn't limited to the point that the exception would apply. A person would normally rely on this self-employment as a main means of earning a living.

[53] I have considered the six factors mentioned above. The factors concerning the time spent on the business and the desire to find a job quickly show that the Appellant's business could be her main means of livelihood from January 2, 2022.

[54] These two factors are particularly important. Case law says that the time spent on self-employment and the claimant's intention and willingness to immediately accept another job are important in deciding the level of involvement.¹² In the Appellant's case, there is no doubt that she intended to make her business her main means of livelihood, since she worked each day at Centre Jardin and wasn't available for work elsewhere.

[55] She didn't look for another job. By not looking for another job, she is showing that she intended her business to become her principal means of livelihood.

[56] Having considered all of these factors, I find that the exception doesn't apply to the Appellant's involvement in her business.

[57] While I understand that this situation is disappointing for the Appellant because the company didn't pay her between January and April 2022, to receive EI benefits, a claimant must be entitled to them. She can contact Service Canada to find out what support programs are available to entrepreneurs.

[58] But, as of January 2, 2022, the Appellant was dedicating herself every day to running Centre Jardin and working full work weeks. This means that she can't receive benefits because she hasn't shown that there was a week when she wasn't dedicating herself to her business and that she was unemployed.

[59] The Federal Court of Appeal has already said that a claimant's efforts to create a new job or start their own business are very commendable. But, the purpose of the EI program is to provide temporary benefits to those who are unemployed and looking

¹² See *Charbonneau v Attorney General of Canada*, 2004 FCA 61.

for work. Unfortunately, while I acknowledge the Appellant's efforts to create her own job, this situation isn't in the scope of the EI program.¹³

[60] I find that the Appellant wasn't unemployed from January 2, 2022, because she wasn't involved in running her business to a minor extent.

Conclusion

[61] I find that the Appellant was working full work weeks, so she wasn't unemployed.

[62] The appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section

¹³ See *Attorney General of Canada v Jouan*, A-366-94.