Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *GL v Canada Employment Insurance Commission*, 2017 SSTGDEI 2010

Tribunal File Number: GE-16-1804
GE-16-1980

BETWEEN:

G. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: April 27, 2017

DATE OF DECISION: July 10, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

G. L., the Appellant

Jean-Guy Ouellet, the Appellant's representative

R. L., the Appellant's father and business partner

INTRODUCTION

[1] Files GE-16-1804 and GE-16-1980 were heard concurrently. The Appellant made initial claims for Employment Insurance (EI) benefits effective October 5, 2014 (GE-16-1804), and November 8, 2015 (GE-16-1980). The Canada Employment Insurance Commission (Commission) investigated and asked the Canada Revenue Agency (CRA) for a ruling on the insurability of the Appellant's jobs. Following its investigation, the Commission found that the Appellant was not unemployed and therefore could not pay benefits to the Appellant from October 5, 2014, and November 8, 2015. The Commission also cancelled the Appellant's claims for benefits because he was not without work and without earnings for at least seven consecutive days before his benefits started, resulting in an overpayment. Finally, the Commission allocated the Appellant's self-employment earnings of $2,684 to the weeks of October 5, 2014, October 12, 2014, October 19, 2014, and October 26, 2014.

[2] On February 2, 2016, the Appellant asked the Commission to reconsider its decisions. On April 7, 2016, October 2015 [*sic*], it upheld its initial decisions and changed the earnings allocated to $3,852 for each of the four weeks. The Appellant appealed the reconsideration decisions in these two cases to the Social Security Tribunal (Tribunal) on May 4, 2016.

[3] The Tribunal notes that, at the hearing, the Appellant withdrew his appeal regarding the earnings and allocation issue. Therefore, the Tribunal will not address that issue in this decision.

[4] This appeal was heard by videoconference for the following reasons:

a) the complexity of the issue(s);

b) the fact that credibility may be a determinative factor;

c) the information on file, including the need for additional information;

d) the fact that the Appellant or other parties are represented;

e) the availability of videoconferencing where the Appellant lives;

f) this form of hearing respects the requirement of the *Social Security Tribunal Regulations* (Regulations) to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

ISSUES

[5] The Tribunal must determine whether the Commission was justified in cancelling the claims for EI benefits effective October 5, 2014, and November 8, 2015, under section 7 of the *Employment Insurance Act* (Act) and subsection 14(1) of the Regulations.

[6] The Tribunal must also decide whether the Appellant was unemployed in accordance with sections 9 and 11 of the Act and section 30 of the Regulations, which would make it possible to establish benefit periods effective October 5, 2014, and November 8, 2015.

EVIDENCE

[7] The Tribunal reviewed all documents in the appeal file. The following is a summary of the evidence that the Tribunal found most relevant to its decision.

[8] Records of Employment for the Appellant, issued by X on October 20, 2014, and November 13, 2015, indicate that the Appellant worked as a journeyman bricklayer during the following periods:

- March 31, 2014, to October 3, 2014, for a total of 800 insurable hours; and

- March 23, 2015, to November 6, 2015, for a total of 1,152 insurable hours.

The reason is noted as a shortage of work/end of season or contract on the records.

[9] On September 29, 2011, the CRA ruled that the Appellant was an employee of the company X for the period from April 11, 2011, to September 29, 2011. The CRA also ruled that the employment was insurable under paragraph 5(1)(a) of the Act.

[10] On December 10, 2015, the CRA ruled that the Appellant was an employee of the company X for the period from March 23, 2015, to November 6, 2015. The CRA also ruled that the employment was insurable under paragraph 5(1)(a) of the Act.

[11] The form from the Registraire des entreprises du Québec [Quebec enterprise registrar], printed December 3, 2015, indicates that the Appellant is the first shareholder of the company X, a corporation located in X. It is also noted that the Appellant has been the president since March 23, 2011. The certificate of incorporation was filed with the registrar on April 26, 2011.

[12] On November 24, 2015, the Commission contacted the Appellant about his self-employment. He indicated that he had started his masonry business (X) in 2010 and had 33.3% of the shares with his father and another person. He also indicated that he generally spent 40 hours per week on it, but that he was not working that many hours at the time of discussion. He had invested $5,000 in his business five years earlier. The Appellant replied that his business was normally his principal means of livelihood and that he was not looking for other employment.

[13] In a later conversation with the Commission on December 2, 2015, the Appellant mentioned that his business was seasonal and that the season ended on November 6, 2015. He also indicated that there was no activity during the winter and that he was looking for a job in masonry for that period. His business resumes in the spring depending on the weather.

[14] The Commission interviewed the Appellant on December 14, 2015. He indicated that he owned 33% of the company. The Appellant also indicated that the company’s trucks are used only for work, but that he drives them around from time to time, which explains the winter gas

expenses. He said he was not submitting bids and tells customers who contact him that he will go in the spring. He explained that the company's cell phones are paid year-round; otherwise, he would have to choose new packages each year and that he wanted to keep the same phone numbers. The Appellant estimated his involvement in the business at about one hour a month when he is receiving benefits. He said that he sometimes buys equipment in the winter if it is on sale to save the company money. The Appellant said that he looked for work in the winter and offered his services at X, X, X, X and X unsuccessfully. Discussing the results of the financial statements with the Commission's agent, the Appellant said that his employees continued to work in October 2013 even though he and his father were no longer working because they intended to keep them employed as long as possible so that they would return the following year.

[15] In a telephone conversation with the Commission on March 14, 2016, the Appellant said that the masonry company that he owned with two other shareholders had an office at his father's home. He also said that he did not need financing for the company and did not have to buy equipment. He indicated that the company has two trucks that are used only for work, but that he sometimes has to drive them around a bit during the winter because they are old. The Appellant said that he lives in an apartment and that the truck is parked on the street, meaning he has to move it occasionally. He confirmed that he is the one who handles the company's invoices and estimates and that his father pays the bills and provides the information to the accountant. The Appellant said that his business was a success and he considered it his principal means of livelihood. He said he rarely submits bids in the winter and asks people to wait until the spring, but they always have to keep their cell phones on to be able to respond to customers. Telephones are paid by the company year-round. The Appellant reiterated that he does not work more than one hour per week for his business when he is unemployed and that he has looked for work.

[16] A copy of the financial statements of X states the following:

- For the period from October 1, 2014, to October 31, 2014, the company's sales were $76,382 and net profit was $50,714.50.
- For the period from November 1, 2014, to November 30, 2014, product sales were $1,100, and net profit was -$5,560.13.

- For the period from December 1 to December 31, 2014, sales were $0 and net profit was -$2,212.94.
- For the period from January 1 to January 31, 2015, product sales were $950, and net profit was -$4,068.25.
- For the period from February 1 to February 28, 2015, product sales were $0, miscellaneous income was $275, and net profit was -$6,552.36.
- For the period from March 1 to March 31, 2015, product sales were $0, and net profit was -$1,370.16.
- For the period from November 1 to November 30, 2015, product sales were $56,670.00, and net profit was $30,051.37.
- For the period from December 1 to December 31, 2015, product sales were $0, and net profit was -$4,767.91.
- For the period from January 1 to January 31, 2016, product sales were $0, and net profit was -$1,844.28.
- For the period from February 1 to February 29, 2016, product sales were $0, and net profit was -$3,827.99.
- For the period from March 1 to March 31, 2016, product sales were $0, and net profit was -$1,948.99.

[17] In a telephone conversation with the Commission on March 2, 2016, the Appellant confirmed that he had started his business in 2011 with his son and a friend to teach them how to run the business and because the two young men could not go into business for themselves, since they did not have journeyman cards like him. The three split the shares at 33.33% each. The Appellant and X. R., the other partner, each invested $5,000 in the business, and they did not need any financing. The company had about $3,000 of equipment. The Appellant confirmed that he usually worked from mid-March to November. In the winter, they could submit bids, but rarely did so. He said that, when a customer called in the winter, they told the customer to call back in March, and they would only submit a bid if the customer insisted or if it was an emergency. One bid was about 1 hour of work, 10 minutes for the document, and 30 minutes of transportation. The Appellant noted that he had submitted an average of one bid per winter and, in some years, none. He said that the company's trucks were not stored in the winter but were not

used for personal use either. He said that he used his cell phone personally and that he could not turn off his cell phone for three months, since the company was always in operation. He said that he worked about one hour a month between November and mid-March. He considered his business a success and his principal means of livelihood. He said he had contacted employers while receiving EI benefits and provided a list. He mentioned looking for a full-time masonry job at $25 per hour and said that only large contractors could work in the winter.

[18] Telephone bills from Koodo in the name of R. L., the Appellant's father, for X and X numbers were provided for November 2015, December 2015, and January 2016.

[19] A travel agency invoice in the Appellant's name dated December 5, 2013, shows the cost of a trip to Cayo Coco from December 12 to December 20, 2013.

[20] A travel agency invoice in the Appellant's name dated November 17, 2014, shows the cost of a trip to Holguín from January 18 to January 25, 2015.

[21] Copies of company bids show the following dates:

November 10, 2014 (two bids)

January 13, 2015

February 8, 2015 (three bids)

March 15, 2015

March 18, 2015

March 22, 2015

Oral Evidence

[22] The Appellant said that he spent time outside Canada during the two benefit periods at issue. He said that he travelled to Cayo Coco from December 12 to December 20, 2013 (G1). He also said that he and his father travelled to Holguín, Cuba from January 18 to January 25, 2015. He said that he did not bring or use the company's cell phone on either trip.

[23] Regarding GD3-32, which shows earnings of $1,100 from November 14, 2014, the Appellant said that M. L. was the one who did the work. He said that M. L. is his uncle and a company employee.

[24] Concerning GD3-36, which shows earnings of $950 for January 2015, the Appellant said that it was work for a major summer client. The Appellant said that he himself worked with his father R. L. on this contract and reported it to the Commission.

[25] Regarding GD3-38, which shows miscellaneous income of $275, the Appellant said that there was no work done or any income in February 2015. This is a year-end closing entry, and it was the accountant who made an adjustment.

[26] The Appellant said that his business was not in operation between November and March. He explained that, in the field of masonry, only large businesses in the commercial sector and with large construction sites work year-round. His business works on residential projects and has very little work during the winter except in insurance cases following emergencies. The only activity they can do during this period is submitting bids. He said that, for the winter of 2014-2015, he identified only one bid in March 2015. The following winter (2015-2016), he said he submitted nine bids between November 2014 and March 2015. The Appellant noted that he is the one who submits the bids. It takes him anywhere from 5 to 30 minutes on the computer, with bids already being on a template where he simply needs to change the data and print it. He reiterated that he sometimes bought equipment during the winter if he saw that it was on sale, which took him very little time.

[27] The Appellant noted that his only work experience is in the masonry industry. He said that it was his father who started his company to help him get his masonry cards and to develop his skills and gain experience so that he could succeed professionally. He explained that, increasingly, companies in the construction industry subcontract masonry, and this is how he gets his masonry contracts. For example, X construction, a major general contractor who deals with fires, is a customer of the Appellant. He said that X had been there for five years, but it was smaller and that, following its expansion, this year was the first winter that X had given work to his business. Therefore, these relationships have been fruitful for more work year-round.

[28] The Appellant said that he looked for masonry work at X, X, etc. He said that he made several calls. He said that he would have liked to have been called back and have a salary if a job had come in instead of receiving EI benefits.

PARTIES' ARGUMENTS

[29] The Appellant argued that his claims for benefits should not be cancelled for the following reasons:

a) The Commission refers to *Thériault v. Canada (Attorney General)*, 2008 FCA 283; and *Massé v. Canada* (Attorney General, 2007 FCA 82). *Thériault* does not apply at all to the Appellant. In Nancy Massé's case, it is clear from the facts that there were year-round operations and taxable benefits added to their salary throughout the year and that, as a result, there is no interruption of earnings. The facts are very different from this appeal.

b) The financial statements from December to March 2016 for the two years at issue show that there was no invoicing and no work done. The Appellant explained the few instances of sporadic earnings.

c) Section 2.1.1 of the EI Digest of Benefit Entitlement Principles (Digest) on the Government of Canada website reiterates section 14 of the Regulations, which requires an interruption of earnings to occur when a person is not working for at least seven consecutive days. Section 2.1.2 mentions any interruption of earnings that occurred during the qualifying period, so there is no need for it to be at the same time as the separation.

d) In sections 2.2.2 and 2.2.5, the Digest specifies that "seven days" means seven complete and consecutive days with no work and no pay. The concept of seven days refers to seven consecutive days and not a week from Sunday to Saturday.

e) In that case, the evidence of the Appellant's stay outside Canada between December 12 to December 20, 2013, and from January 18 to January 25, 2015, shows

an interruption of earnings for seven complete and consecutive days in both files. Both of the Appellant's stays meet the requirements of the law, namely having seven complete and consecutive days without any work activity. There were clearly no earnings during these periods, so there was an interruption of earnings at those times.

[30] On the issue of unemployment, the Appellant argued the following:

a) The evidence shows that he was unemployed from November 1, 2014, to March 22, 2015, and from December 1, 2015, to March 31, 2016. The Commission is confusing the income situation of M. L. (the Appellant's uncle) with that of the Appellant.

b) The Commission refers to *Marlowe v. Canada (Attorney General)*, 2009 FCA 102 (*Marlow*). However, at paragraphs 12 and 14, the person acknowledged that he was engaged in the start-up of his new business on a full-time basis. That is not the case here at all.

c) *Martens v. Canada (Attorney General)*, 2008 FCA 240 (*Martens*) talks about the objective test required by section 30(2) of the Regulations and says that self-employment must be the claimant's principal means of livelihood in order not to be considered unemployed. This objective test was recognized even by the Attorney General in *Goulet v. Canada (Attorney General)*, 2012 FCA 62 (*Goulet*), and *Inkell v. Canada (Attorney General)*, 2012 FCA 290, where *Martens* said that not only the six factors of the test should be considered, but also whether the person can live off their business. It is clear in this case that the Appellant's company could not be the principal means of livelihood, particularly given the industry and its seasonal nature. Can someone who spends an hour here and there a week on his business make a living from it? I do not believe so.

d) *Martens* also says that net income must be considered. In this case, the evidence shows that the business is not very profitable, but it has been shown that the business was a way to help his son.

e) At paragraph 38 of *Martens*, Pelletier J.A. indicated that it was inappropriate to attribute the time spent by others on the business to the appellant.

f) Analyzing the six factors:

- *Time spent*: Although the dispute is not the same, in *Faucher*, A-56-96, the leading decision on availability, Marceau J.A. said that people who are roofers and do not work in the winter but look for work for themselves and their business cannot be found unavailable for such limited activities. Marceau J.A. indicated that the work environment must also be considered when analyzing a situation.

- *Nature and amount of the capital and resources invested*: The evidence shows that the Appellant invested approximately $3,000. It is negligible and should not affect the Appellant's unemployment status.

- *Financial success or failure of the business*: The business has been successful over the summer but has been unsuccessful over the winter from when it was started to this year.

- *Continuity of the business*: The business is still in place. The one who qualifies the business is the father with his competency cards, but it is not the most important factor.

- *Nature of the employment or business*: The business operates in a seasonal industry, and only large companies manage to have work year-round. To eventually have a job in the winter, it is good to have contacts in the industry, which is what the Appellant is trying to maintain.

- *The claimant's intention and willingness to seek and immediately accept alternate employment*: The Appellant testified that he would always offer his services to the largest companies that are in operation year-round.

g) Since the appellants spent so little time on their business that it cannot be concluded that they could rely on it as a principal means of livelihood, the Appellant has shown that he

was unemployed from November 1, 2014, to March 22, 2015, and from December 1, 2015, to March 31, 2016.

[31] The Respondent argued that it was justified in cancelling the Appellant's claim for benefits for the following reasons:

a) In this case, there was no interruption of earnings, which is one of the qualification requirements under subsection 7(2) of the Act. The evidence shows that the Appellant was not unemployed and without pay for seven (7) consecutive days. In particular, he continued to benefit from the use of the company's cell phone, which he uses to answer clients and for personal use. He does not turn off his phone during his periods of unemployment; he continues to use it year-round for the company and for himself. He says that the company is always in operation; customers must be able to reach him.

b) The number to contact the Claimant is X. The Commission reached him at this number, and it is in his request for administrative review and appeal to the Tribunal. It is also the number that appears on his business card. There is a charge for this number on Koodo's service invoices during the months the Claimant claimed benefits.

c) The Claimant says that he continues to answer customers who contact him via the company-provided cell phone. He also continues to operate the company's truck so that he can leave when needed.

d) A claimant who stops receiving wages when the off-season begins does not have an interruption of earnings if they continue to provide services to the employer and to receive certain benefits equivalent to their earnings, such as a cell phone. Even though the Claimant receives a non-monetary benefit from his job, it is earnings.

e) Paragraph 35(10)(d) of the Regulations states that, for the purposes of subsection (2), "income" includes, (d) in the case of any claimant, the value of board, living quarters, and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

f) The Federal Court of Appeal has confirmed the principle that an interruption of earnings is an essential condition to be entitled to EI benefits. The claimant has the burden of proving that there was an interruption of earnings for at least seven consecutive days before the start of the benefit period (*Thériault v. Canada (Attorney General)*, 2008 FCA 283; *Massé v. Canada (Attorney General)*, 2007 FCA 82).

g) According to the evidence on file, the citizen did not have an interruption of earnings or work for seven (7) consecutive days. Section 7 of the Act says that an interruption of earnings is an essential condition for establishing a benefit period. The benefit periods established effective October 5, 2014, and November 8, 2015, therefore had to be cancelled, since the Claimant continued to receive benefits from his company and to provide services to the company throughout the year.

[32] The Respondent argued that it was justified in disentitling the Appellant because he was not unemployed for the following reasons:

a) A claimant who runs their own business is presumed to work a full working week unless they can show that their level of involvement in that business is so limited that a person would not normally rely on that activity as a principal means of livelihood. In order to determine whether a claimant's self-employment is minor in extent, the Commission must apply the objective test under subsection 30(2) of the Regulations to the six factors listed in subsection 30(3) of the Regulations in the context of the claimant's business during their benefit period. The two most important factors are the time spent and the claimant's intention and willingness to seek and immediately accept alternate employment.

b) In this case, the evidence on file shows the following regarding these six factors:

Nature of the employment or business:

The business X was registered on April 26, 2011. It is a masonry business. It is located at X in Montreal. The Claimant, his father, R. L., and a friend X. R, are equal partners in the business. X. R. no longer works for the company but has kept his shares.

It is a seasonal business. The Claimant has experience only in this field. He does not apply for jobs other than in masonry during the winter season. This is the only job he has had since April 2011.

Nature and amount of the capital and other resources invested:

The company's office is at the residence of the Claimant's father. He did not have to do any renovations. He says he invested $3,333.00 in the business. According to the financial statements as at February 28, 2015, the company has $11,701.00 of equipment, $502.00 of computer equipment, and $7,899.00 of rolling stock.

Financial success or failure of the employment or business:

The Claimant has a business card and advertises using the branded truck, and the Yellow and White Pages. The Claimant has no income other than his company salary during the season and EI during the off-season. The Claimant considers his business a success, and it has been his only means of livelihood.

Continuity of the employment or business:

The company's office is at his father's residence and the business pays him rent. It is a seasonal business. The Claimant only works from spring to fall.

Time spent:

The Claimant says that he does not work more than one hour a week when he is unemployed. He rarely submits bids during the winter. He tells clients who call him during the winter to wait until the spring. He also says that he also answers customers who call the company-provided cell phone because it is always in operation. The Claimant is always paid for the work he does except when he submits bids in the spring. His business card says that the estimate is free. He starts his truck and moves it so that it is in good shape when needed. The Claimant can write cheques. He produces invoices, submits bids, and makes purchases.

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

> The Claimant has looked for work, but no one has any. He contacted a few employers. He does not apply in any field other than masonry and there is no work in winter. Employers know that he has a company, and they are not too interested in hiring him, since he would be returning to work for his company in the spring. The Claimant's goal is to take over for his father within two years.

[33] Given that the Claimant is a company shareholder, that he has invested money, that he works for the company even though he is unemployed, that his business is a success and his principal means of livelihood, that he uses the company's cell phone year-round, that it is the only job he has had since April 2011, that he does not apply in any field other than masonry, and that employers will probably not hire him, the Claimant is considered not unemployed from October 6, 2014, and December 21, 2015. When considered objectively, the six factors lead to the conclusion that the Claimant's involvement in his business was to the extent that a person would normally rely on it as a principal means of livelihood. As a result, the Claimant has not rebutted the presumption that he was working a full working week because he did not meet the exception under subsection 30(2) of the Regulations.

[34] The Commission submits that the legislation supports its position. The Federal Court of Appeal has reiterated that, when a claimant is engaged in the operation of a business, that claimant is responsible for rebutting the presumption that they work a full working week. The Federal Court has reaffirmed that the most important and relevant factor in determining whether a claimant works a full working week is time spent, followed by the claimant's intention and willingness to seek and immediately accept alternate employment (*Martens v. Canada (Attorney General)*, 2008 FCA 240; *Charbonneau v. Canada (Attorney General)*, 2004 FCA 61; *Marlowe v. Canada (Attorney General)*, 2009 FCA 102).

[35] The Federal Court of Appeal has confirmed the principle that subsection 30(2) of the Regulations nullifies the application of subsection 30(1) of the Regulations if a claimant can establish that the level of involvement in the operation of a business, considered objectively in light of the six factors stated in subsection 30(3) of the Regulations, is of such a minor extent that

it would not normally constitute a principal means of livelihood for the applicant (*Martens v. Canada (Attorney General)*, 2008 FCA 240).

[36] In *Mazzona* (A-614-94), the claimant was a co-owner of a seasonal business (laying asphalt, interlocking paving stone, and sod). In the Board's view, the claimant was not unemployed, even in the winter. According to the Umpire, his situation was not the same as that of a salaried employee in the same circumstances. There was no error justifying the Federal Court of Appeal's intervention.

[37] In another case, the claimant's lawyer argued that the Umpire should consider each week of the year to determine whether the claimant was or was not employed by the business for a job where his involvement was minor in extent. It was decided that, to determine whether a person is involved in such employment, all activities must be considered throughout the entire period. Reference to the Federal Court of Appeal decision in *Robin M. Childs*, A-0418.97. Appeal dismissed (*Matthews v. Canada (Attorney General)*, 2002 CUB 56585).

[38] The same holds true for the Claimant. He is a business operator, and his business is his main source of income. There is a slowdown in the winter, but the Claimant remains a business operator during that period.

[39] In his application for appeal to the Social Security Tribunal, the Claimant indicated that he paid premiums and should be entitled to EI (GD2-2). The Claimant seemed to be confusing insurability with entitlement to EI.

In *D'Astoli* (A-0-999-06), the claimant was considered not unemployed for operating his company, in which he was a 25% shareholder. Counsel for the Respondent argued that the Minister of National Revenue's determination on the insurability of the claimant's employment was binding on the Commission in terms of his entitlement to benefits, at least with respect to whether he was unemployed, and that the rule established in *Venditelli* should be restored. The Federal Court of Appeal found that this interpretation was the result of a misunderstanding of the Act and of how it operates, and said that insurability of employment and entitlement to benefits are two factors that the Commission must evaluate in respect of two separate periods. Parliament intended the analysis of each of these factors to be subject to separate rules, which must not be

confused. The determination made with respect to insurability cannot be binding on the Commission with respect to that question, and not when it comes to decide entitlement to benefit.

[40] In this case, during the administrative review, the disentitlement for being unemployed was delayed from November 9, 2015, to December 21, 2015, because the Commission had incorrectly paid benefits.

[41] To comply with our policy of not retroactively changing a decision that had already been made by another EI section that had granted benefits based on the information in the claim, the disentitlement due to being unemployed was imposed starting when the Claimant's next report would be due, that is, from December 21, 2015.

[42] The Commission would like to inform the Tribunal that, when the decision is returned, it will assess the possibility of writing off the overpayment under section 56 of the Regulations.

ANALYSIS

[43] The relevant legislative provisions are reproduced in the annex to this decision.

[44] Because the events are identical in the Appellant's files, the appeals will be dealt with in a single decision that will apply *mutatis mutandis* to each of them.

First Issue: Cancellation of Benefit Periods

[45] To be entitled to EI benefits, a person must meet all the requirements set out in the Act to establish a benefit period. This includes having experienced an interruption of earnings from employment pursuant to subsection 7(2) of the Act (*Thériault v. Canada (Attorney General)*, 2008 FCA 283). In *Kassam v. Canada*, 2004 FCA 331, the Federal Court of Appeal confirmed that the appellant has the burden of proving that they are entitled to benefits.

[46] In this case, the Commission says that the Appellant does not meet the qualification requirements of section 7 of the Act, and as a result, it cancelled his two benefit periods starting October 5, 2014, and November 8, 2015. It specifically says that the Appellant was not

unemployed and without pay for seven consecutive days, as required under the Act. In support of its findings, the Commission says that the Appellant continued to benefit from the use of his company's cell phone, that he does not turn it off, and that he said his customers must always be able to reach him. The Commission argues that, even if the Appellant no longer had any income because of the off-season, he cannot show an interruption of earnings if he continues to receive certain benefits, such as a cell phone, under paragraph 35(10)(d) of the Regulations.

[47] The Appellant argues that the interruption of earnings required by the Act occurred when he left the country for seven consecutive days on December 12, 2013, for the October 5, 2014, benefit period and on January 18, 2015, for the November 8, 2015, benefit period. He also argues that the seven consecutive days can occur at any time during the qualifying period.

[48] The Tribunal finds that the evidence establishes that the Appellant's work was interrupted during the off-season of his business during the two benefit periods at issue. However, the Tribunal must determine whether there was also an interruption of earnings. In CUB 65896, Gobeil J.A. pointed out that "case law has established that earnings do not have to be in the form of cash, and that certain benefits granted and related to the performance of work are of an income nature and constitute earnings within the meaning of the Act." His findings were upheld by the Federal Court of Appeal in *Massé v. Canada* (Attorney General, 2007 FCA 82) (*Massé*).

[49] The Tribunal agrees with the Appellant that the facts in *Massé* are different from this case. In Nancy Massé's case, she received rent and board the same year after a break in work, which are benefits included in or added to her salary. So, it was clear that there was no interruption of earnings per se. However, beyond the facts, legal principles apply similarly when it comes to employment benefits. In that case, even though the Appellant does not receive board or lodging, the fact is that the benefit of a company-paid cell phone constitutes a benefit granted to him with respect to his employment. The Tribunal is of the view that this benefit falls under paragraph 35(10)(d) of the Regulations and therefore constitutes income that must be taken into account to determine whether an interruption of earnings has occurred under section 35(2) of the Regulations. However, the Appellant recognizes that the company paid for the cell phone service on an annual basis.

[50] So, the benefit from the Appellant's cell phone did not stop, even though there was a break in work. As little as the value of the benefit of a cell phone may be, it would be contrary to the Act and existing case law to find an interruption of earnings as defined by subsection 35(2) of the Regulations. The courts have repeatedly confirmed that the requirements of the Act cannot be ignored.

[51] However, the Tribunal accepts the Appellant's argument that there was an interruption of earnings when he was outside Canada for seven days. In cases where the appellant is outside Canada without pay, without employment benefits, without a cell phone, and without any work benefits, the Tribunal finds it logical and reasonable to find an interruption of earnings. However, the Tribunal applies it differently with respect to the present issues. It is fair to say that there is no statutory provision requiring the interruption of earnings for seven consecutive days to be immediately following an interruption of work. The Tribunal is of the view that it is entirely plausible that a situation would mean that a person would continue to receive a benefit related to their work after their employment ended, especially if they temporarily stopped working, as in the Appellant's case. In these situations, when the interruption of earnings occurs, the appellant should not be penalized because the interruption of work and interruption of earnings were not concurrent. He should meet the qualification requirement set out in section 7 of the Act from the moment the two interruptions occur.

[52] Moreover, the Tribunal rejects the Appellant's argument that his stay outside Canada from December 12 to December 20, 2013, shows an interruption of earnings for the benefit period starting October 5, 2014, and that his stay outside Canada from January 18 to January 25, 2015, shows an interruption of earnings for the benefit period starting November 8, 2015. While the Tribunal recognizes that there is no legislative provision requiring an interruption of earnings to occur immediately after a person stops working, it would be absurd to think that an interruption of earnings occurring before the period of work can be used to meet the requirement from subsection 14(1) of the Regulations. Subsection 14(1) of the Regulations states that "an interruption of earnings occurs where, <u>following a period of employment</u> with an employer, an insured person is laid off or separated from that employment […] [for] a period of seven or more consecutive days" [the Tribunal's emphasis]. The Appellant is suggesting that the interruptions

of earnings occurred before the period of employment and not after the period of employment corresponding to the benefit periods. The Tribunal is of the view that this absurd conclusion cannot reasonably reflect Parliament's intention to compensate individuals who lose their jobs and their corresponding benefits.

[53] So, for the Appellant's benefit period starting October 5, 2014, the Tribunal finds that the Appellant's interruption of earnings occurred when he left the country for at least seven consecutive days on January 18, 2015, that is, after he stopped working. The Tribunal accepts the invoice for this trip as evidence and finds that this is when the Appellant neither worked nor benefitted from the company's phone and therefore from any earnings within the meaning of the Act for seven complete and consecutive days.

[54] As for the benefit period starting November 8, 2015, unfortunately, although he did stop working, the evidence does not indicate that an interruption of earnings occurred after his period of employment because the benefit of a work cell phone is earnings within the meaning of paragraph 35(10)(d) of the Regulations.

[55] As for the advantage of the company's truck, the Tribunal accepts the Appellant's version that the vehicle was not used during unemployment, but that it was being moved around in accordance with municipal parking restrictions and that he was taking care of its maintenance. Therefore, the Tribunal finds that the company's truck was not a benefit used by the Appellant.

[56] In conclusion on the interruption of earnings, the Tribunal finds that the Appellant has shown, on a balance of probabilities, an interruption of earnings only in GE-16-1804, from January 18, 2015.

Second Issue: Unemployment

[1] When a claimant operates a business, under section 30 of the Regulations, there is a presumption that they have worked a full working week and are therefore not unemployed under the Act. It is up to the claimant to rebut this presumption if they believe that they were indeed unemployed.

[2] When it is determined, pursuant to subsection 30(2), that the operation of the business is to a minor extent, the claimant is not considered to have worked a full working week. The circumstances to be analyzed to confirm or rebut the existing presumption are listed in subsection 30(3) of the Regulations.

[3] In *Martens v. Canada (Attorney General)*, 2008 FCA 240, the Federal Court of Appeal reminded that it is not enough to merely examine the factors provided for in subsection 30(3) but rather, the objective test of subsection 30(2) must be applied in light of the factors in subsection 30(3), that is, whether, viewed objectively, the extent of involvement in the business during the benefit period was such that it could not have constituted a claimant's principal means of livelihood.

[4] In *Marlowe v. Canada (Attorney General)*, 2009 FCA 102, the Federal Court of Appeal upheld the Umpire's decision in CUB 69121, where it was noted that "[t]he premise upon which the legislative provision in question are based, is that in order to be entitled to benefits, a claimant must be in the labour market, free of any commitment, occupation or interest that might limit or reduce his or her opportunity or desire to return to work."

[5] So, it is with this in mind that the Tribunal turns to analyzing the facts before it and the Appellant's arguments. The Tribunal must decide whether the exception under subsection 30(2) applies to the Appellant. It will look at the Appellant's activities in the business and his level of involvement. All the circumstances must be considered to get an overall picture of the situation.

[6] To decide whether the existing presumption can be rebutted, the Tribunal must analyze the following criteria from subsection 30(3) of the Regulations: the time spent on the business, the nature and amount of the capital and other resources invested, the financial success or failure of the employment or business, the continuity of the employment or business, the nature of the employment or business, and the claimant's intention and willingness to seek and immediately accept alternate employment. The Tribunal's review of these criteria for the Appellant is as follows:

Time Spent on the Business

[7] The Tribunal notes, first of all, that the Commission accepts the seasonal nature of the Appellant's job and that his company's operations slow down during the winter. However, the Commission says that, although the Appellant did not work per se in his trade during the winter of 2014-2015 and the winter of 2015-2016, he remained the business operator during those periods and that all activities must be considered throughout the year. On the other hand, the Commission acknowledges that the Appellant says that he spends about one hour a week on his business when he is unemployed.

[8] The Tribunal notes from the evidence that the Appellant spent very little time on his masonry business during the winter months of 2014-2015 and 2015-2016. The Tribunal accepts the Appellant's testimony, which is consistent with the version of events he has given since the beginning of his interactions with the Commission, namely that he spends only a minor part of his time on his business in the off-season. The Tribunal also accepts that the Appellant does not personally do the accounting for the business. He handles the few bids solicited by clients, but the Tribunal accepts that this task requires very little time. He also occasionally buys equipment if he sees a sale in the winter, but that takes up little of his time. The Tribunal finds that the Appellant cannot be penalized for seizing a good opportunity when he sees one to make his business profitable.

[9] The Tribunal finds from the evidence that the Appellant's involvement in his business was minimal and did not take up a lot of his time. Specifically, for the benefit period starting October 5, 2014, the evidence shows that the Appellant's work activities and time spent on the

business stopped drastically from November 1, 2014, and picked up again on March 22, 2015. For the benefit period starting November 8, 2015, the Tribunal finds that the Appellant's work activities and time spent on his business stopped drastically from December 1, 2015, to March 31, 2016. The income entered in the company's financial statements support this conclusion.

[10] However, the evidence shows that the Appellant spent a good part of his time on his business in October 2014 and in November 2015. His testimony and the financial statements show that the company's work season was always substantial and took up a significant amount of his time.

Nature and Amount of the Capital and Other Resources Invested

[11] The Tribunal finds that the evidence shows that the Appellant invested approximately $5,000 to set up his business and that he did not take out a loan or other financing. The financial statements from February 2015 show that the company had $11,701 of equipment and $7,899 of rolling stock. The company's office is at the Appellant's residence and did not require any renovation or significant investment. The Tribunal finds that the amount of money the Appellant initially invested in the business is not so large as to bind him substantially or unconditionally. The Tribunal notes, however, that the value of his company following the acquisition of equipment and materials seems to have risen and could mean that the Appellant would have had more to lose over the years than when the company was started. Even so, the Tribunal finds that the amount of capital invested by the Appellant would not have prevented him in any way from accepting another job during the winter, when his company was not providing any work. There is no evidence that he has taken a high risk or that he cannot go back if his business is not running smoothly.

Financial Success or Failure of the Business

[12] The Appellant's masonry business began in April 2011. The Tribunal notes from the evidence, particularly from the Appellant's testimony and the financial statements, that the business has done well in the summer months, when it is in operation, so he intends to continue operating it during the coming seasons to continue in his trade. This indicates that the Appellant

is confident that he will make a good enough profit to continue in this business. The Tribunal notes, however, that the reason this business exists is the opportunity for the Appellant to create work for himself.

Nature of the Business

[13] The evidence on file shows that the Appellant has worked in masonry all his life, and his business is in the same field. The Tribunal accepts that, except for the commercial industry and large contractors, the trade is seasonal from spring to the fall, generally from April to October.

Continuity of the Business

[14] As mentioned in the previous paragraph, the Appellant's business is still in operation seasonally. It is also reasonable to believe that the business will continue to operate so that the Appellant can rely on it as his principal means of livelihood.

Intention or Willingness to Seek and Immediately Accept Alternate Employment

[15] The Appellant stated that, during his benefit periods, he was available to accept work and looked for work. He provided the names of several masonry companies he contacted to offer his services. The Tribunal notes from the financial statements that the company's net profits for the tax years of the benefit periods at issue are not very high. Adding the fact that the profits are split among three shareholders, the Appellant's income is certainly not that of a wealthy person. Therefore, the Tribunal accepts the Appellant's statement that he was looking for work during the winter. It is reasonable to believe that he could not afford to sit on his laurels for long during the off-season, and it is entirely plausible that he looked for work and actually wanted to find a job. As a result, the Tribunal finds that the Appellant showed an intention or willingness to seek and accept alternate employment until his company resumed operations at the end of March.

Conclusion on Unemployment

[16] According to the Federal Court of Appeal, the most important and relevant factor in determining whether a person is unemployed during a week is the time spent on the business *(Jouan*, A-366-94; *Fatt*, A-496-94; *Charbonneau*, A-699-02). Indeed, Marceau J.A. in *Jouan*

said that "we are dealing here strictly with the notion of 'full working week'" and "the conclusion in a particular case depends *directly* and *necessarily* on the 'time spent.'"

[17] In a more recent decision, the Court clearly reiterated its position, noting: "Whatever be the status of the other factors (be it the capital invested, or the success of the enterprise or the continuity of the business), they can never be relevant on their own, the conclusion in a particular case depends *directly* and *necessarily* on the 'time spent', since, is it necessary to repeat it, we are dealing here strictly with the notion of 'full working week.'" (*Charbonneau*, A-699-02)

[18] In this case, based on the guidance of the Federal Court of Appeal, the Tribunal gives more weight to the factor of the time spent on the business. So, the Tribunal finds from all the evidence that the Appellant spent little time on his business due to the arrival of the off-season and the very little activity at his company. The Tribunal accepts the Appellant's version of events that he spent only about one hour per week on managing his business. As a result, given that the Appellant's involvement was so limited and that he spent so little time on his business, the Tribunal finds that he did not work full working weeks when his company's service contracts ended. The analysis of this factor allows the Appellant, under subsection 30(2) of the Regulations, to rebut the presumption in subsection 30(1) of the Regulations for this period of time.

[19] However, the Tribunal finds that, before November 1, 2014 (for GE-16-1804) and December 1, 2015 (for GD-16-1980), as admitted by the Appellant and supported by the business's financial statements, he mainly spent his time on his company's operations and doing masonry work. So, the Tribunal finds that, until these dates, the Appellant should be considered to have worked a full working week, failing to rebut the presumption in subsection 30(1) of the Regulations. The Tribunal made the same findings when the company's work season resumed, on March 22, 2015, and March 31, 2016 (in GE-16-1804 and GE-16-1980, respectively). From these dates, the evidence indicates that the Appellant was working full working weeks with his business activities.

[20] In addition, in *Charbonneau*, Décary J.A. reminded that, when it comes to unemployment, it is necessary to assess "the claimant's intention and willingness to seek and

immediately accept alternate employment." Décary J.A. agreed with Marceau J.A.'s findings in *Jouan* that "[t]he Act is designed to provide temporary benefits to those who are unemployed and actively seeking other work." But, the Tribunal accepts the evidence that the Appellant's intentions were indeed to find another job. His testimony about his intentions was credible and accepted as proof of a job search during the winter season. The Tribunal also finds it reasonable to believe that only a few large commercial companies are in operation in the Appellant's trade in the winter and that it is good to have good relationships with them to develop their own small company in the future. The Tribunal also accepts the Appellant's statement that it would have been preferable to receive a salary instead of much less in EI benefits.

[21] Moreover, the subsection 30(2) test to rebut the presumption that a person who runs a business is not unemployed requires an objective consideration of whether the degree of self-employment or engagement in the operation of a business constitutes a sufficient basis upon which a person would normally rely as a principal means of livelihood.

[22] The term "livelihood" is undefined in the Act and the Regulations, but the general definition of "livelihood" refers to a means of earning money in order to live. This definition emphasizes the importance of focusing on net income rather than gross income for this factor.

[23] The Tribunal finds that the evidence shows that the Appellant's business had no income during the winter months, with one or two exceptions that were explained as deferred income and only one emergency contract. The financial statements show that the net profits for those winter months were negative. The seasonal nature of the business supports the conclusion that no income was generated during the winter. So, it is clear to the Tribunal that the Appellant's company could not normally have been his principal means of livelihood during the inactive months of the trade in the residential sector.

[24] The Tribunal finds that, in this case, the application of the subsection 30(2) test in light of the factors in subsection 30(3) of the Act and all the evidence lead to the conclusion that, on a balance of probabilities, the Appellant was operating his business to a minor extent and that it would be unreasonable to believe that this business could have been the Appellant's principal means of livelihood between November 1, 2014, and March 22, 2015, and between December 1,

2015, and March 31, 2016. Contrary to the Commission's finding, the Tribunal finds that the Appellant was unemployed for those periods in accordance with the Act. The Tribunal further finds that the analysis of the other factors in subsection 30(3) of the Regulations does not preclude its finding of unemployment for those periods.

[25] However, the Tribunal finds that, for the remainder of the Appellant's two benefit periods, his work activities in his business were significant, to the extent that he spent a lot of time on them, and that the company could be his principal means of livelihood. As a result, the presumption in subsection 30(1) cannot be rebutted for those periods.

[26] The Appellant's disentitlement from benefits must be lifted between November 1, 2014, and March 22, 2015, and between December 21, 2015, and March 31, 2016. The Tribunal indicated December 21, 2015, because the disentitlement was imposed from that date only in GE-16-1980.

CONCLUSION

[27] The appeal regarding the cancellation of the benefit period is allowed with modification in file GE-16-1804 and dismissed in file GE-16-1980.

[28] The appeal regarding unemployment is allowed with modification.

[29] The appeal regarding the allocation of earnings was withdrawn.

Lucie Leduc

Member, General Division – Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

7 (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

(2) An insured person qualifies if the person

> **(a)** has had an interruption of earnings from employment; and
>
> **(b)** has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

(3) to (5) [Repealed, 2016, c. 7, s. 209]

(6) An insured person is not qualified to receive benefits if it is jointly determined that the insured person must first exhaust or end benefit rights under the laws of another jurisdiction, as provided by Article VI of the *Agreement Between Canada and the United States Respecting Unemployment Insurance*, signed on March 6 and 12, 1942.

9 When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

Employment Insurance Regulations

14 (1) Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that

employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.

(2) An interruption of earnings from an employment occurs in respect of an insured person at the beginning of a week in which a reduction in earnings that is more than 40% of the insured person's normal weekly earnings occurs because the insured person ceases to work in that employment by reason of illness, injury or quarantine, pregnancy, the need to care for a child or children referred to in subsection 23(1) of the Act or the need to provide care or support to a family member referred to in subsection 23.1(2) of the Act or to a critically ill child.

(3) A period of leave referred to in subsection 11(4) of the Act does not constitute an interruption of earnings, regardless of whether the person is remunerated for that period of leave.

(4) Where an insured person is employed under a contract of employment under which the usual remuneration is payable in respect of a period greater than a week, no interruption of earnings occurs during that period, regardless of the amount of work performed in the period and regardless of the time at which or the manner in which the remuneration is paid.

(5) An interruption of earnings in respect of an insured person occurs

(a) in the case of an insured person who is employed in the sale or purchase of real estate on a commission basis and holds a licence to sell real estate issued by a provincial authority, when

(i) the licence of the insured person is surrendered, suspended or revoked, or

(ii) the insured person ceases to work in that employment by reason of a circumstance referred to in subsection (2); and

(b) in the case of an insured person who is employed under a contract of employment and whose earnings from that employment consist mainly of commissions, when

(i) the insured person's contract of employment is terminated, or

(ii) the insured person ceases to work in that employment by reason of a circumstance referred to in subsection (2).

(6) A period of leave referred to in subsection 11(3) of the Act does not constitute an interruption of earnings, regardless of the time at which or the manner in which remuneration is paid.

(7) Where an insured person accepts less remunerative work with their employer and as a consequence receives a wage supplement under a provincial law intended to provide indemnity payments where the continuation of a person's work represents a physical danger to them, to their unborn child or to the child they are breast-feeding, an interruption of earnings occurs on the insured person's last day of work before the beginning of the less remunerative work.

30 (1) Subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

(2) Where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

(3) The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are

(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.

(4) Where a claimant is employed in farming and subsection (2) does not apply to that employment, the claimant shall not be considered to have worked a full working week at any time during the period that begins with the week in which October 1st falls and ends with the week in which the following March 31 falls, if the claimant proves that during that period

(a) the claimant did not work; or

(b) the claimant was employed to such a minor extent that it would not have prevented the claimant from accepting full-time employment.

(5) For the purposes of this section, ***self-employed person*** means an individual who

(a) is or was engaged in a business; or

(b) is employed but does not have insurable employment by reason of paragraph 5(2)(b) of the Act.

35 (1) The definitions in this subsection apply in this section.

employment means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

income means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

pension means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

(3) Where, subsequent to the week in which an injury referred to in paragraph (2)(d) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or 7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(3.1) If a self-employed person has sustained an injury referred to in paragraph (2)(d) before the beginning of the period referred to in section 152.08 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(4) Notwithstanding subsection (2), the payments a claimant has received or, on application, is entitled to receive under a group sickness or disability wage-loss indemnity plan or a workers' compensation plan, or as an indemnity described in paragraph (2)(f), are not earnings to be taken into account for the purpose of subsection 14(2).

(5) Notwithstanding subsection (2), the moneys referred to in paragraph (2)(e) are not earnings to be taken into account for the purposes of section 14.

(6) Notwithstanding subsection (2), the earnings referred to in subsection 36(9) and allowances that would not be deducted from benefits by virtue of subsection 16(1) are not earnings to be taken into account for the purposes of section 14.

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

(8) For the purposes of paragraphs (2)(c) and (7)(b), a sickness or disability wage-loss indemnity plan is not a group plan if it is a plan that

(a) is not related to a group of persons who are all employed by the same employer;

(b) is not financed in whole or in part by an employer;

(c) is voluntarily purchased by the person participating in the plan;

(d) is completely portable;

(e) provides constant benefits while permitting deductions for income from other sources, where applicable; and

(f) has rates of premium that do not depend on the experience of a group referred to in paragraph (a).

(9) For the purposes of subsection (8), "portable", in respect of a plan referred to in that subsection, means that the benefits to which an employee covered by the plan is entitled and the rate of premium that the employee is required to pay while employed by an employer will remain equivalent if the employee becomes employed by any other employer within the same occupation.

(10) For the purposes of subsection (2), "income" includes

(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting

(i) expenses incurred by the claimant for the direct purpose of earning that income, and

(ii) the value of any consideration supplied by the claimant; and

(b) in the case of a claimant who is self-employed in farming, the gross income from that self-employment, including any farming subsidies the claimant receives under any federal or provincial program, remaining after deducting the operating expenses, other than capital expenditures, incurred in that self-employment;

(c) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

(11) Subject to subsection (12), the value of the benefits referred to in paragraph (10)(d) shall be the amount fixed by agreement between the claimant and the claimant's employer and shall be an amount that is reasonable in the circumstances.

(12) Where the claimant and the employer do not agree on the value of the benefits referred to in paragraph (10)(d), or where the value fixed for those benefits by agreement between the claimant and the claimant's employer is not reasonable in the circumstances, the value shall be determined by the Commission based on the monetary value of the benefits.

(13) The value of living quarters referred to in paragraph (10)(d) includes the value of any heat, light, telephone or other benefits included with the living quarters.

(14) Where the value of living quarters is determined by the Commission, it shall be computed on the rental value of similar living quarters in the same vicinity or district.

(15) Where the remuneration of a claimant is not pecuniary or is only partly pecuniary and all or part of the non-pecuniary remuneration consists of any consideration other than living quarters and board furnished by the employer, the value of that consideration shall be included in determining the claimant's income.

(16) For the purposes of this section, living quarters means rooms or any other living accommodation.

36 (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

(3) Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

(5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

(6.1) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from a transaction shall be allocated

> **(a)** if the aggregate amount of earnings that arise from a transaction occurring in a week is greater than the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the weeks in which the work that gave rise to the transaction was performed, in a manner that is proportional to the amount of work that was performed during each of those weeks or, if no such work was performed, to the week in which the transaction occurred; or
>
> **(b)** if the aggregate amount of earnings that arise from a transaction occurring in a week is less than or equal to the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the week in which the transaction occurred or, if the claimant demonstrates that the work that gave rise to the transaction occurred in more than one week, to the weeks in which the earnings were earned, in a manner that is proportional to the amount of work that was performed during each of those weeks.

(6.2) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(a) if they arose from a transaction, in accordance with subsection (6.1); and

(b) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(a) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant's normal weekly earnings from that employment; and

(b) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission, or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has a duration of at least 10 weeks or that costs at least $5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(b) of the Act exists, the earnings paid or payable to the claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

(12) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable:

(a) payments in respect of sick leave, maternity leave or adoption leave or leave for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act;

(b) payments under a group sickness or disability wage-loss indemnity plan;

(c) payments referred to in paragraphs 35(2)(d) and (f);

(d) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(e) payments in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act; and

(f) payments in respect of the care or support of a critically ill child.

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

(14) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable.

(15) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant in a lump sum shall be allocated beginning with the first week that those moneys are paid or payable to the claimant in such a manner that those moneys are equal in each week to the weekly amount, calculated in accordance with subsection (17), to which the claimant would have been entitled if the lump sum payment had been paid as an annuity.

(16) The moneys allocated in accordance with subsection (14) or (15) shall not be taken into account in the allocation of other earnings under this section.

(17) The weekly amount shall be calculated in accordance with the following formula, according to the claimant's age on the day on which the lump sum payment is paid or payable:

A / B

where

A is the lump sum payment; and

B is the estimated actuarial present value* of $1 payable at the beginning of every week starting from the day on which the lump sum payment is paid or payable and payable for the claimant's lifetime, as calculated each year in accordance with the following formula and effective on January 1 of the year following its calculation:

$$\mathbf{B = [\Sigma_{t=0} \text{ to infinity of } ({}_tP_x / (1+ i)^t) - 0.5] \times 52}$$

where

${}_tP_x$ is the probability that the claimant will survive for "t" years from the claimant's age "x" using the latest Canadian mortality rates used in the valuation of the Canada Pension Plan prorated in equal parts between males and females,

i is the annualized long-term Government of Canada benchmark bond yields averaged over the 12-month period beginning on the September 1 and ending on the August 30 before the January 1 on which the estimated actuarial present values are effective, expressed as a percentage and rounded to the nearest one tenth of a percentage, and

t is the number of years that the claimant survives according to the claimant's age for which the probablity of survival is estimated by ${}_tP_x$.

*Note: The estimated actuarial present values are published annually on the Service Canada website.

(18) Earnings that are payable to a claimant under a government program intended to encourage re-employment and that are payable to the claimant as a supplement to earnings arising from a contract of employment shall be allocated to the period for which they are payable.

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

> **(a)** if they arise from the performance of services, to the period in which the services are performed; and
>
> **(b)** if they arise from a transaction, to the week in which the transaction occurs.

(20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.