



Citation: *TB v Canada Employment Insurance Commission*, 2023 SST 1741

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

Decision

Appellant: T. B.
Representative: S. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (507007) dated August 12, 2022
(issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference
Hearing date: February 14, 2023
Hearing participants: Appellant
Appellant's Representative

Decision date: March 28, 2023
File number: GE-22-3372

Decision

[1] I'm dismissing the Claimant's appeal. This decision explains why.

[2] The Claimant was **working full work weeks** in self-employment. So, **he wasn't unemployed** when he wanted to claim Employment Insurance (EI) parental benefits. This means that he can't receive these benefits.

Overview

[3] The Claimant in this appeal is T. B. He's the sole owner of a renovation and home repair business. He left his full-time job on August 20, 2021, to focus on his business. His baby was born prematurely on January 10, 2022. On March 4, 2022, he applied for EI parental benefits. He established a claim with a start date of February 27, 2022.

[4] The Canada Employment Insurance Commission (Commission) decided that it couldn't pay the Claimant parental benefits because he was working full work weeks in self-employment. So, he wasn't unemployed. To get EI benefits, you must be unemployed.

[5] The Claimant disagrees. He says although he owns a business, he was **unemployed** between January 10, 2022 (the date his baby was born) and March 5, 2022. That's because he had to look after the baby and an older child while his wife was recovering from the birth, the surgery that followed and an ICU stay. So, he couldn't work.

[6] The Claimant says he's applying for parental benefits based on his previous work in insurable employment. He argues that he has enough insurable hours to qualify.

[7] The Claimant first asked to antedate (backdate) his claim to August 21, 2021. The Commission refused his request. On appeal, he asked to backdate his claim to January 10, 2022. But since the Commission hasn't made a **reconsideration** decision about his antedate, I don't have the power to consider it. So, I'm **only looking at self-employment**.

The issue I must decide

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

Analysis

[9] If you're involved in a business as a self-employed person, you may not be entitled to EI parental benefits.

[10] The law says you can get EI for each week that you're **unemployed**.¹ A week of unemployment means **any week when you don't work a full work week**.²

[11] If you're self-employed, the law assumes that you work full work weeks in your business.³ So, you can't receive benefits under the EI plan for those in insurable employment.⁴

There's an exception if your involvement is limited

[12] There's an exception to the above rule if your level of involvement in your self-employment is limited. In other words, if it's minor in extent.⁵

[13] So, the exception would apply if the Claimant's level of involvement in his business was so limited that a person **wouldn't normally rely on it** as their main way of earning a living.

[14] It's up to the Claimant to prove that his involvement was so limited that the exception applies.⁶ He has to prove this on a balance of probabilities. This means he must show it's more likely than not that his involvement in self-employment was limited.

I'll look at six factors to decide the Claimant's level of involvement

[15] To decide whether the exception applies to the Claimant, I must consider and weigh the following six factors:⁷

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. There's a separate plan for special benefits for the self-employed.

⁵ Section 30(2) of the Regulations refers to a claimant being involved to "a minor extent" (in other words, their involvement is limited). See *Martens v Canada (Attorney General)*, 2008 FCA 240.

⁶ See *Canada (Attorney General) v Falardeau*, A-396-85, and *Lemay v Canada Employment Insurance Commission*, A-662-97.

⁷ Section 30(3) of the Regulations sets out these six factors. I'm paraphrasing them for plain language.

- i. How much time did the Claimant spend on his self-employment?
- ii. What resources did the Claimant invest in his business?
- iii. Was the Claimant's business a success or a failure financially?
- iv. Did the Claimant plan to continue his self-employment?
- v. What was the nature of the Claimant's self-employment?
- vi. Did the Claimant intend to find another full-time job quickly?

– **The Claimant worked more than 15 hours a week on his business**

[16] The time the Claimant spent on his self-employment **doesn't show limited involvement**. On his application for benefits, he reported working **15 hours or more** on his self-employment. The choices on the application were either **more** or **less** than 15 hours a week. The Claimant reported working **no** hours in insurable employment.

[17] The Claimant says between **January 10, 2022, and March 5, 2022**, he worked **no hours** at all. He had to care for his baby and his older child while his wife recovered from surgery after giving birth. She had to be in the ICU. So, it was physically impossible for him to do any renovations or home repairs. He says that's why he applied for EI parental benefits.

[18] But the law says **claimants who control their own working hours** are not unemployed during times when they choose not to, or cannot, work in their business.⁸

[19] So, even if the Claimant didn't do renovations or service calls at the time, his business was still operating. He reported on his application for benefits that it never stopped operating.

[20] The Claimant's bank statements show more than a dozen purchases at home renovation and paint stores from late January 2022 to early March 2022. I find it more likely than not that these purchases were for pending jobs. This shows that the Claimant **was** spending time on his business, even if only to prepare for jobs he'd do later.

⁸ See CUB18501. I don't have to follow CUBs, but I can choose to follow their logic as I do in this case.

[21] So, for the above reasons, I find that the Claimant's involvement in his business **doesn't show limited involvement**.

[22] The Claimant's argument that he wasn't conducting his usual business activities would only apply if he were claiming parental benefits under EI's **special benefits for the self employed**.⁹ But he was claiming benefits under the regular EI plan.

– **The Claimant invested resources in his business**

[23] The Claimant's level of investment in his business **doesn't show limited involvement**. He didn't build, purchase or lease premises, but he had to purchase or lease **\$10,000 to \$15,000** in equipment. He also reported between **\$2,500 to \$10,000** in gross annual operating expenses.

– **The Claimant's business was financially successful**

[24] The financial state of the Claimant's business **doesn't show limited involvement** since he reported annual earnings of **over \$20,000**. That's the highest earnings category you can choose on the EI benefit application. The Claimant said these employment earnings were his **main source of income**.

[25] The Claimant argues that he had **no business income** between January 10, 2022, and March 5, 2022. He says his bank statements show that he wasn't paid for any work he did during those eight weeks. He says this proves that he was **unemployed**.

[26] But it's **overall** financial success that counts, not earnings in specific months. In businesses, some months are slower than others.¹⁰ You might be paid **before** or **after** you do the work. As an example, the Claimant said the money deposited into his account on February 17, 2022, was a deposit for a job that he only did **in** March 2022.

[27] The Claimant reported that his business was successful enough for him to rely on it as his main source of income. That's why I find that the financial success of his business **doesn't show limited involvement** in his self employment.

⁹ Cutting work activities by at least 40%, or not doing usual business activities are factors when applying for special benefits under the separate EI plan the self employed (see section 30 of the EI Regulations).

¹⁰ See CUB 68745.

– **The Claimant's self-employment was ongoing**

[28] The ongoing nature of the Claimant's self-employment **doesn't show limited involvement**. He quit his job in August 2021 to focus on his business. He reported that his business activities had remained constant since that date. He said he intended to continue to rely on his business as his main source of income.

[29] This suggests that the Claimant was self-employed in a **sustainable** business.¹¹

– **The Claimant's self-employment was not in the same field as his day job**

[30] The Claimant's self-employment wasn't in the same field as his previous job. But this factor doesn't appear to make a difference to his level of involvement in his business.

– **The Claimant didn't intend to find another job quickly**

[31] The Claimant's decision to devote himself to his self-employment **doesn't show limited involvement**. He didn't intend to look for other work since he was relying on self-employment as his main way of earning a living. As he wrote on his benefit application: "My self-employment takes up all of my time and provides me with sufficient income."¹²

[32] The Claimant says having to show he'd be available for other work outside his business shouldn't be a factor since he's not applying for **regular** benefits. He argues that having to prove that you're **otherwise available** for work only applies to **sickness** benefits. And you don't have to prove that you're available for work while getting **parental** benefits.

[33] Some case law agrees that whether you intend to find other work shouldn't be included in the test for self-employment.¹³ That's because being **available for work** and being **unemployed** are two different concepts.

[34] But, in the overall review of the Claimant's self-employment, his decision not to look for work outside his business **doesn't show limited involvement** in his self-employment.

¹¹ See *Martens v Canada (Attorney General)*, 2008 FCA 240.

¹² See the Claimant's application for benefits at GD3-18.

¹³ See, for example, CUB 68745,

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

[35] I find, on balance, that the Claimant's level of involvement **wasn't so limited** that the exception applies. Many Canadians would normally rely on this level of involvement as their main way of earning a living.

[36] Before making this finding, I weighed all six factors mentioned above. **Five of the six factors** support the Commission's argument that the Claimant's self-employment **doesn't show limited involvement**.

[37] To sum up: the Claimant was focusing only on self employment; he invested resources in his business; it was financially successful; operations were ongoing; and he had no intention of looking for other work outside the business. The last factor on the nature of his business compared with his old job isn't relevant in this case.

[38] Case law says **two of the six factors** are especially important: how much time he spent on his self-employment **and** whether he intended to find another job quickly.¹⁴

[39] On these two factors alone, the Claimant **doesn't show limited involvement** in his self-employment. He's said he had no intention of finding other work outside the business. He's also reported spending all his work efforts on self-employment. I've also given weight to his reliance on his self-employment as his **main source of income**.

[40] In other words, the Claimant's self-employment **wasn't minor in extent**.

[41] So, **the Claimant was working full work weeks** in self-employment starting on August 20, 2021. Since **there were no weeks when he was unemployed**, he can't receive EI benefits. You can only get these benefits if you're unemployed.

[42] The Federal Court of Canada (FCA) commends those who try to create new work opportunities for themselves. But the FCA confirms that EI offers temporary benefits **only to those who are unemployed**.¹⁵ That's what EI covers.

¹⁴ See *Charbonneau v Canada (Attorney General)*, 2004 FCA 61.

¹⁵ See *Canada (Attorney General) v Jouan*, A-366-94.

[43] The Claimant says he applied for parental benefits after paying EI **employee** contributions up to August 20, 2021. He argues that he should be able to get parental benefits based on those contributions and the insurable hours he accrued.

[44] I sympathize with the Claimant's circumstances, but I can't change the law.¹⁶ It's not enough to pay into EI. As with all insurance plans, you must meet the conditions to get benefits.¹⁷ The Claimant didn't meet those conditions since he was self-employed.

[45] The Claimant didn't leave his insurable employment to take parental leave; he quit to focus on his business. That's when he became self-employed and began to rely on the business as his main source of income. **When you're self-employed, you're not unemployed.** So, the Claimant wasn't unemployed when he applied for parental benefits.

[46] This means that the Claimant **can't qualify for what EI covers** despite his past contributions to the plan when he worked in insurable employment. Unfortunately, he isn't eligible under the **special benefits plan for the self-employed** that EI offers as an alternative form of insurance for those who run their own business.¹⁸

Conclusion

[47] The Claimant was **working full work weeks** during his claim for EI parental benefits. So, **he wasn't unemployed.** You must be unemployed to get these benefits.

[48] This explains why I must dismiss the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

¹⁶ See *Attorney General of Canada v Knee*, 2011 FCA 301.

¹⁷ See *Pannu v Canada (Attorney General)*, 2004 FCA 90.

¹⁸ You must register for the special benefits plan for the self-employed and pay premiums into that plan for at least a year before you can apply for any of those benefits.