



Citation: *AC v Canada Employment Insurance Commission*, 2023 SST 1961

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

Decision

Appellant: A. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (619617) dated September 28, 2023 (issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference

Hearing date: November 27, 2023

Hearing participants: Appellant

Decision date: December 20, 2023

File number: GE-23-3008

Decision

[1] The law requires me to dismiss this appeal. My decision explains why.

[2] I find that the Appellant was working full work weeks in his business. This means that he can't receive Employment Insurance (EI) benefits starting on July 24, 2023.

Overview

[3] The Appellant operates an electrical contracting business. He applied for EI benefits after he finished a short-term contract in insurable employment on July 23, 2023.

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant was working full work weeks in his business during his claim for benefits. It says his involvement was not minor in extent, which meant that he wasn't unemployed. It says that's why he couldn't receive EI benefits for the unemployed.

[5] The Appellant disagrees. He says should receive EI benefits. He argues that he often takes short contracts in the film industry when business is slow. He says he needs to do this to cover his expenses. He argues that he's entitled to benefits since he's worked enough insurable hours and paid EI premiums on that employment.

The issue I must decide

[6] Was the Appellant's level of involvement so limited that he wasn't really working full work weeks in his business during his claim for EI benefits?

Post hearing documents

[7] In response to my Investigation and Report request, the Commission submitted the Appellant's recent Records of Employment (ROEs). I accepted this information as relevant to his appeal. Then the Appellant submitted recent T4s for his business. I accepted those T4s as relevant also. I shared them with the Commission, but it didn't respond with any further submissions by the deadline I set.

Analysis

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

[9] The law says you can receive EI benefits for each week you are **unemployed**.¹ A week of unemployment means any week when you don't work a full work week.²

[10] If you're self-employed and involved in a business, the law assumes that you work full work weeks.³ That means you're not considered to be unemployed. So, you can't receive EI benefits.⁴

There's an exception if your involvement is limited

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

[12] The exception applies if your level of involvement is so limited that a person wouldn't normally rely on that business as their main way of earning a living.⁶

[13] So, the issue in this appeal is whether that exemption applies to the Appellant.

[14] This means that the Appellant must prove, on a balance of probabilities, that his involvement in his business was so limited that this exception applies.⁷ That's the test to show you're unemployed. This means he must show it's more likely than not that his involvement in his business was limited.

There are six factors for deciding your level of involvement

[15] To decide whether the exception applies in the Appellant's case, I must consider the following six factors:⁸

¹ Section 9 of the *Employment Insurance Act* (Act) sets out this rule.

² See section 11 of the Act.

³ See section 30(1) of the *Employment Insurance Regulations* (Regulations).

⁴ See *Marlowe v Canada*, 2009 FCA 102.

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

⁶ See section 30(2) of the Regulations, and *Martens*, above.

⁷ See *Canada (Attorney General) v Falardeau*, A-396-85, and *Lemay v Canada Employment Insurance Commission*, A-662-97.

⁸ Section 30(3) of the Regulations sets out these factors. This decision paraphrases them in plain language.

- a) How much time did he spend on his business?
- b) How much has he invested in his business, and what are those investments (such as money, property, goods, and resources)?
- c) Financially, has his business been a success or failure?
- d) Is the Appellant's business meant to be ongoing?
- e) What's the nature of his business?
- f) Did the Appellant intend to and want to find other insurable employment quickly rather than return to working in his business.

– **Time spent**

[16] I find that the amount of time the Appellant was spending on his business during his benefit period **shows limited involvement**.

[17] The Commission says the Appellant was spending significant time on his business. This is based on his reports that he controls his own time and regularly spends more than 15 hours and sometimes up to 50 hours a week on the business.

[18] But I accept the Appellant's sworn testimony that he wasn't involved in his business when he took on short contracts as an employee or when he claimed EI since that's when business was slow. And the issue is whether he worked in his business during his benefit period.

– **Investments**

[19] The nature and amount of the Appellant's investments (such as money, property, goods, and resources) **does not show limited involvement** in his business.

[20] I make this decision based on the Appellant's reporting of an initial \$25,000 capital cost investment, with reinvestment of \$20,000 annually. That's not an insignificant annual reinvestment for a small business with a sole proprietor.

– **Financial success or failure**

[21] The financial success of the Appellant's business **shows limited involvement**. That's because his net income according to his post-hearing evidence wouldn't be what a person would normally rely on as their main means of earning a living.

[22] The Commission submits that the Appellant's business was financially successful, with revenue of \$100,000. That's based on his reporting about his income.

[23] But that's gross revenue. The Federal Court of Appeal (FCA) say gross revenue is of limited value in determining financial success. That's because the test is whether the business is such that a person would normally rely on it as their principal means of earning a living. So, the focus should be on net income rather than gross income.⁹

[24] The evidence shows that the Appellant's net business income was little more than \$20,000 in 2022, the last year when there's been a final accounting.¹⁰ A person wouldn't normally rely on that level of income as their main means of earning a living.

– **Ongoing self-employment/business**

[25] The Appellant's self-employment in his business was ongoing, so this factor **does not show limited involvement**.

[26] The Appellant reported that he considered his business his main source of income. He'd established it June 2014 and it's still ongoing. He's said that his business activities have increased over the past three years.¹¹ He's also said that his intention was to devote his time to self employment only.¹²

[27] So, the business was ongoing and sustainable.

⁹ See *Martens v Canada (Attorney General)*, 2008 FCA 240.

¹⁰ See the Appellant's post hearing submission at GD11.

¹¹ See the Appellant's responses on page GD3-10.

¹² See the Appellant's responses on page GD3-11.

– **Nature of the Appellant’s self-employment/business**

[28] I find that this factor **does not show limited involvement**. The Appellant is a self-employed master electrician. He spends most of each year providing services as an electrician through his business. He’s the sole proprietor, with no employees.

[29] The Appellant said he spends part of each year working as an electrician for a film company where he’s paid as an employee. He said he’s been doing this for several years to make extra income to cover his expenses. He said he could have arranged payment through his business but chose to be an employee instead.¹³

[30] The FCA says if the job that was lost is similar to the operations of the business, this may indicate that the insurable employment is a stepping stone to building a business. It can also be a way of generating clients for one’s business.

[31] That’s why taking on work in insurable employment that’s just like the services you provide in your business doesn’t show limited involvement in that business.

Intention and willingness to find another job quickly

[32] This factor **does not show limited involvement**. After his job ended, the Appellant didn’t prove that he was trying to find another job quickly outside his business. He told the Commission that he’d looked for work but there were no jobs for him. The Commission then pointed to 77 jobs as an electrician listed in his area. It asked him for the names of companies where he’d handed in his resume, but he couldn’t name any.

[33] So, there’s no evidence that the Appellant was **actively** looking for a new job during his benefit period.

[34] The Appellant told the Commission he thought no one would employ him for just a short time since his plan was to return to his business. His sworn testimony confirms this. He said he’d never had to show a job search before to get EI.

¹³ The ROEs on file show three contracts from the same employer in 2023, from January 7, 2023, to February 10, 2023; March 13, 2023, to April 10, 2023; and May 5, 2023, to July 20, 2023 (GD9). There are two ROEs from 2022 from the same employer.

[35] I agree with the Commission that planning to wait on EI until he had business activities lined up shows that the Appellant wanted to return to self-employment rather than take another job as an employee.

[36] That's why I find it more likely than not that the Appellant was relying on his business as his **main** means of earning a living.

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

[37] On balance, the Appellant's involvement in his business wasn't so limited that the exception applies. He hasn't shown that he would **not** normally rely on his business as his main means of earning a living.

[38] To reach this conclusion, I considered and weighed all the above six factors.

[39] The low net revenue from the Appellant's business suggest that his involvement was limited. He also reports that he didn't spend time working in the business during his benefit period.

[40] On the other hand, all the other factors suggest that the Appellant's business was his main means of earning a living: the business was well-established and ongoing, his annual capital reinvestment was substantial relative to the revenue from his business, his work as an employee was in the same field as his business and he was not searching for other work outside his business when his job ended in July 2023.

[41] Case law says **two of these six factors** are especially important: how much time you spend on your business and whether you want to find another job quickly. So, these are the most important factors to consider in a benefit period.¹⁴

[42] After considering the case law that puts most weight on those two factors, I find that the exception doesn't apply to the Appellant's self-employment in his business.

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

[43] I accept the Appellant's sworn testimony that he wasn't working in his business during his benefit period. But he couldn't produce a job search.

[44] Of those two key factors, I give most weight to the fact that the Appellant wasn't looking for other work outside his business while he was claiming benefits. He hasn't shown that he looked for or applied to any jobs during his benefit period while he waited to return to his business activities.

[45] This supports the Commission's argument that the Appellant was relying on his business as his main means of earning a living.

[46] The FCA says it's very commendable to try to start your own business.¹⁵ And I acknowledge that it may be necessary to supplement a business with outside work from time to time.

[47] But without trying to find a job outside his business during his benefit period, the Appellant can't show that he was unemployed for the purposes of receiving benefits. EI is only for those who are unemployed **and actively looking for work**.

[48] So, the Appellant can't be considered unemployed during the weeks of his benefit period. This means that he's considered to be working full work weeks in his business at the time. So, he can't receive the EI regular benefits that he's requested.

[49] The Appellant argues that he's entitled to these benefits since he worked enough hours in insurable employment and paid EI premiums. But EI is an insurance plan. As with all such plans, you not only pay premiums. You must also fulfil all the plan's conditions.¹⁶

[50] The Appellant didn't meet these conditions since he hasn't shown that he looked for work during his benefit period outside self employment in his business.

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

¹⁶ See *Canada (Attorney General) v Pannu*, 2004 FCA 90.

Conclusion

[51] I find that the Appellant was working full work weeks during his benefit period in a business that was his main means of earning a living. So, the law doesn't consider him to be unemployed at the time. That's why he can't get EI benefits.

[52] This explains why I must dismiss his appeal.

Lilian Klein

Member, General Division – Employment Insurance Section