



Citation: *AT v Canada Employment Insurance Commission*, 2024 SST 575

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

Decision

Appellant: A. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (545259) dated October 4, 2023 (issued by Service Canada)

Tribunal member: Ambrosia Varaschin

Type of hearing: Videoconference & In Writing

Hearing date: April 9, 2024

Hearing participants: Appellant
Respondent

Decision date: May 16, 2024

File number: GE-23-2847

Decision

[1] The appeal is allowed. The Appellant does have enough self-employed earnings to qualify for benefits.

Overview

[2] The Appellant is a registered psychologist who operates her practice as a professional corporation. She signed an agreement with the Canada Employment Insurance Commission (Commission) for Employment Insurance (EI) benefits for self-employed persons effective August 5, 2019.¹

[3] The Appellant established a claim for maternity and parental benefits for the self-employed starting March 6, 2022. Since she had not filed her income tax at the time of her application, she estimated her amount of self-employed earnings for 2021 as \$65,000. The claim was established, and benefits were paid on a temporary basis.

[4] The Commission told the Appellant her claim would be recalculated if her self-employment income assessed by the Canada Revenue Agency (CRA) was less than the amount required to establish a claim for benefits.

[5] The CRA later notified the Commission that the Appellant's amount of self-employment earnings for year 2021 was \$15. The Commission reviewed the claim and determined the Appellant did not qualify for benefits because her self-employment earnings in the qualifying period were less than the \$5,289 she needed to qualify.

[6] The Appellant said that she has over \$49,000 of self-employment earnings, well above the \$5,289 required, so she should qualify for benefits. She argued that she owns 100% of the shares in her professional corporation and pays herself in dividends instead of drawing a salary. She submitted her Notice of Assessment for the 2021 tax year, which shows her total income was \$49,465. She said this was proof that she earned far more than the minimum requirement to qualify for benefits.

¹ See GD03-61.

[7] The General Division decided the Appellant's self-employment earnings were \$49,465, which was more than \$5,289, so she qualified for benefits.

[8] The Commission disagreed with the General Division's decision and appealed to the Appeal Division. It argued the General Division exceeded its jurisdiction and ignored important facts when it determined the amount of the claimant's self-employment earnings. It said that:

- Only the CRA has the authority to determine what would have been the Appellant's insurable earnings had her employment not been excluded from insurable employment. Therefore, only the CRA has the authority to determine the amount of the Appellant's self-employment earnings.
- There was no evidence before the General Division to support that all of the Appellant's dividends should be considered employment earnings. It argued that the General Division failed to analyze the source of the dividends when deciding that all of the Appellant's total income was self-employment income. It said there could be other sources of income included in the dividends that are not considered self-employment earnings.
- The General Division didn't explain why it disregarded the confirmed self-employment earnings as declared on the Appellant's Schedule 13 of her tax return.

[9] The Appeal Division allowed the appeal, and decided to return the matter to the General Division because:

- The Appellant's dividends needed to be analyzed to determine how much of that amount could be considered self employment earnings.
- Only the CRA can decide what insurable self employment earnings are.

Issue

[10] Does the Appellant have the required amount of self-employment earnings to qualify for benefits?

Analysis

Is the Appellant Self-Employed?

[11] The Appellant is self-employed.

[12] The EI Act defines self-employed persons as anyone who operates a business or controls more than 40% of a corporation's voting shares.²

[13] The Appellant says that she owns 100% of the voting shares of her professional corporation. The Commission doesn't dispute this, and I see no evidence to the contrary, so I accept it as fact.

Does the Appellant qualify for benefits?

[14] In general, self-employed persons can't collect EI benefits.³ But, the law says they can access special benefits if they decide to enter into an agreement with the Commission and pay into the EI program.

[15] In order to qualify for special benefits, a self-employed person must:

- Have a valid agreement with the Commission at the time of the application and for at least 12 months before the application.
- Experience an interruption of earnings.
- Meet the minimum required annual earnings from self-employment within their qualifying period.⁴

[16] The Appellant signed an agreement with the Commission on August 5, 2019.⁵ Since she applied for benefits on March 6, 2022, she had a valid agreement for at least 12 months.

[17] The Commission agree that the Appellant had a valid agreement for the minimum amount of time at the time of her application, and that she experienced an interruption of earnings. I see no evidence to the contrary, so I accept them as fact.

[18] So, my analysis will focus on whether or not the Appellant had enough self-employment earnings to qualify for benefits. Specifically, the Appellant needs to

² See sections 5(2)(b) and 152.01(1) of the EI Act.

³ See section See section 5(2)(b) of the EI Act.

⁴ See section 152.02 of the EI Act.

⁵ See GD03-61.

have earned at least \$5,289 in her qualifying period, which is between January 1, 2021, and December 31, 2021.⁶

CRA Jurisdiction

[19] According to the EI Act, the CRA has the sole jurisdiction to decide whether employment is insurable, when insurable employment begins and ends, how many hours of insured employment exist in a period, and the amount of any insurable earnings.⁷

[20] Since the Appeal Division agreed with the Commission that the CRA has the sole jurisdiction to decide the amount of insurable earning the Appellant might have,⁸ I requested a ruling on the matter.⁹

[21] The CRA ruled that the Appellant was an employee, but her employment was not insurable because she controlled more than 40% of the voting shares of X.¹⁰

[22] The CRA said it couldn't rule on what the Appellant's insurable earning would be if they weren't excluded by section 5(2)(b) of the EI Act. It said that insurability rulings can only be done for insurable earnings. Since it had already ruled that the Appellant's employment was not insurable, requesting a ruling on what the insurable earnings "could be" is a hypothetical situation and rulings could only be made on facts. So, the CRA declined to provide a ruling on the amount earnings that could have been insurable if the Appellant was not the owner of her own business.

[23] I agree with the CRA's determination of its own jurisdiction. This is because section 90 of the EI Act specifically says that the CRA has jurisdiction over whether or not employment is insurable and how many hours or dollars of insurable employment a

⁶ See The Budget Implementation Act, 2021, Bill C-30, which implemented temporary measures to provide support as the job market recovered from the pandemic. This legislation simplified and broadened access to EI benefits for benefit periods between September 26, 2021, and September 24, 2022. It reduced the threshold to access benefits for the self-employed by 30% to \$5,289 in the qualifying period.

⁷ See Section 90(1) of the EI Act.

⁸ See AD-23-384 at para 37.

⁹ See RGD05 and RGD13.

¹⁰ See RGD08.

claimant has. It doesn't say the CRA has the jurisdiction to determine self-employment earnings. That is because the EI Act provides the calculations and definitions in Part VII.1.

[24] So, the CRA can only rule on whether or not a person's income is uninsurable because they are considered self-employed, and the Tribunal has the jurisdiction to calculate a self-employed person's earnings for benefit purposes.

Types of Self-Employment Earnings

[25] In Canada, businesses can generally be separated into:

- Sole-Proprietorship: where one person is responsible for all of the decisions, the profits, the losses, and doesn't have separate legal status from the business.
- Partnership: where multiple people (or groups or corporations) share in the decisions, profits, and losses according to their agreement.
- Corporation: where a separate legal entity is created for the business operations. Corporations are governed by their own bylaws and agreements, as well as their officers and board of directors. Corporations can be wholly owned by one person, or owned by multiple people, all of whom are called shareholders.¹¹

[26] Regardless of the corporate structure, business owners can receive income from their business simply by owning it (investment income), by working in it (self-employment income), or both. They can also choose to draw a salary (a paycheque), rely on the business's success (profit, distributions, or dividends), or a combination of the two.¹²

¹¹ I am taking official notice of this fact. However, overviews of these business structures can be found on the "Setting Up Your Business" section of the CRA's website.

¹² I am also taking official notice of this fact. However, the Appeal Record and case law also reference this fact: See RGD12-37 through RGD12-45. See, also: *Laforest v Canada Employment and Immigration Commission*, FCA 1987; *Canada (Attorney General) v Bernier*, 1997 FCA A-136-96; *Cote v Canada Employment and Immigration Commission*, 1986 FCA A-178-86; *Canada (Attorney General) v Carr*, 1996 FCA A-572-95; *Palmer v Canada (Attorney General)*, 2024 FC 518; *Aryan v Canada (Attorney General)*, 2022 FC 139; *Crook v Canada (Attorney General)*, 2022 FC 1670; and *Singh v Canada (Attorney General)*, 2024 FC 51.

[27] Because there are multiple ways a business owner can receive income from their business, it is important to determine how much of a claimant's self-employment income is from investing in their business, and how much is from self-employment earnings.

– **Schedule 13 from the Appellant's Income Tax Return**

[28] The Commission consistently argues that only the amounts listed on Schedule 13 of the Appellant's income tax return count as self-employed earnings. It says that, as part of the agreement, claimants are required to complete and submit Schedule 13 to calculate their entitlement to benefits.¹³ It submitted a copy of the *Registration for Employment Insurance Benefits for Self-Employed People: Terms and Conditions* as evidence to support this argument.¹⁴

[29] It is important to note that the agreement is not law, and the EI Act actually dictates how we calculate self-employment earnings.¹⁵ The Income Tax Act also governs some of those calculations.

[30] What the agreement and the law both say, is “the self-employed person is obligated to file a return with the **Minister of National Revenue** setting out their self-employed earnings for the year, **in the form and manner, and containing the information, specified by that Minister.**”¹⁶ (emphasis my own)

[31] Schedule 13 is specifically titled “Employment Insurance Premiums on Self-Employment and Other Eligible Earnings.” It is a calculation sheet that uses specific lines from a claimant's tax return to calculate what their EI premium should be. Claimants have no option but to submit Schedule 13 using only the income tax line values specified in the form, they can't add values from other sections of their tax return.¹⁷

¹³ See RGD12-2 and 3.

¹⁴ See RGD12-19 through RGD12-35.

¹⁵ See *Canada (Attorney General) v Hudon*, 2004 FCA 22; and *Canada (Attorney General) v Gagnon*, 2004 FCA 351.

¹⁶ See 7.1(b) of the agreement and section 152.22 of the EI Act.

¹⁷ See RGD12-17 and 18.

[32] So, I find that Schedule 13 is the form and manner specified by the Commission and Minister of National Revenue that is used to calculate EI premiums for self-employed persons. It is not actual evidence of self-employment earnings.

– **Amount of Premiums Paid**

[33] The Commission argues that allowing income not declared on Schedule 13 would be contrary to the text and intent of the legislation. Since the Appellant only declared \$15 on Schedule 13, she only paid premiums on that amount. So, the Commission says her entitlement must be based on that amount.

[34] The Commission and the Minister of National Revenue **choose** to use specific lines from a claimant's tax return on Schedule 13 to calculate premiums, rather than using the calculations in the EI Act. What the law requires is a premium on the lesser of the claimant's self-employed earnings for the year, and the maximum yearly insurable earnings for the year.¹⁸ The lines included on Schedule 13 only cover some of the ways the law says self-employment earnings are calculated.

[35] The law says that, if a self-employed person is required to pay a premium, a return of the person's self-employed earnings shall be filed with the Minister of National Revenue in the way specified by that Minister, according to the Income Tax Act.¹⁹

[36] The Appellant filed both her corporation and personal income taxes with the Minister of National Revenue, in "the form and manner and containing the information specified" by the Minister of National Revenue. The Appellant has no control over the Commission and the CRA deciding to calculate premiums based solely on the income tax lines listed in Schedule 13, instead of on the calculations provided in the EI Act and the applicable sections of the Income Tax Act.

¹⁸ See section 152.21 of the EI Act.

¹⁹ See section 152.22 of the EI Act.

[37] I find that qualifying for benefits is not dependent on the amount of premiums a claimant paid. The Appellant is not prevented from qualifying for benefits if she didn't pay enough premiums.

[38] There is no section in the EI Act, the *Employment Insurance Regulations* (EI Regulations) or the *Insurable Earnings and Collection of Premiums Regulations* (Insurable Earnings Regulations) that state a self-employed person doesn't qualify for benefits if premiums haven't been paid.

– **Calculating Self-Employment Earnings**

[39] The CRA ruled that the Appellant “was not insurable because of paragraph 5(2)(b) of the Employment Insurance Act.” So, the Appellant's self-employment earnings are the amount that would have been her insurable earnings for 2021 if she hadn't been excluded from insurable employment.²⁰

[40] The Commission says that by choosing to be paid through a dividend rather than a salary, the Appellant chose certain tax advantages over others. If she was paid by a salary, that amount would have been reported on Schedule 13 and considered by the CRA and the Commission as self-employment earnings. Instead, she obtained \$5,395.18 in tax credits from being paid in dividends.

[41] The Commission argues that finding taxable dividends are self-employment earnings would result in unfairly allowing the Appellant to obtain advantages that should be mutually exclusive.

[42] I don't accept this argument because the EI Act requires self-employment earnings to be calculated based on specific criteria, and not based on how that income is taxed. Determining whether a claimant qualifies for benefits is not an exercise in looking at how a claimant pays taxes on their earnings.

²⁰ See Section 152.01(2) of the EI Act.

[43] So, I must determine what the Appellant's earnings from employment would be if that employment wasn't excluded as uninsurable.

[44] The EI Regulations say that earnings for benefit purposes include any income arising out of employment.²¹ It also says that "income" includes any monetary or non-monetary benefits received from employment activities unless they are specifically excluded by the regulations, case law, or policy.²² Dividend payments are not specifically excluded. Instead, they are mentioned in case law as employment income.²³

[45] So, income can include salary payments, dividend payments, stock options, royalties, living and vehicle expenses, bonuses, vacation pay, and many other benefits, so long as they are the direct result of doing work for the business.

[46] The EI Regulations says employment is any kind of employment, regardless of whether or not it is insurable, that occurs under any form of contract. It specifically includes any self-employment, regardless of the business structure or the percentage of the company that the claimant owns.²⁴

[47] As previously mentioned, business owners can receive income from their business simply because they own it, which is a return on investment, or because they are working in it, which is employment. There is a difference between business income and employment earnings, and this is important when deciding what income qualifies for self-employment earnings.

[48] Specifically to this case, the Appellant owns 100% of the shares of a professional corporation. Her corporation is a separate legal entity, which means the income and profits of the corporation belong to the business, not the Appellant. She only receives income from her corporation when the corporation uses a vehicle to divest capital, like issuing dividends, or if she draws a salary.

²¹ See section 35(2) of the EI Regulations.

²² See section 35(7) of the EI Regulations.

²³ See *Dery v Canada (Attorney General)*, 2008 FCA 291; and *Laforest v Canada Employment and Immigration Commission*, FCA 1987.

²⁴ See sections 35(1) and 30(5) of the EI Regulations.

[49] The Federal Court of Appeal has said that a claimant who owns shares in a corporation can also work for that corporation as an employee. This could be under an employment contract, or through managing the business operations. It also said that these claimants don't necessarily need to be paid a wage or salary for the functions they perform.²⁵

[50] The Federal Court of Appeal says to be considered employment earnings, the income must clearly be consideration given in return for work done by the claimant.²⁶ This is echoed in the EI Regulations, which says that as long as the claimant is engaged in the operation of a business, the income from that self-employment is considered earnings for EI benefit purposes.²⁷

[51] So, as long as the income the Appellant received is directly tied to her doing work for her business, it is earnings for benefit purposes.

[52] Any income the Appellant receives simply because she owns the business is a return on investment. If she receives income from directing others who operate the business, or for protecting her business interests, then that income is a return on investment. A return on investment can be from things like buying, holding, or selling property, interest on invested money, and profits from contributing money or capital to the business so it can generate revenue. The Federal Court of Appeal has said that returns on investment are normally paid in interest, dividends, rent, equity payments, profit payments, and capital gains.²⁸

[53] So, any income the Appellant received from her business that isn't directly tied to working for herself is considered investment or business income, and is not considered self-employment earnings for EI benefit purposes.

²⁵ See *Laforest v Canada Employment and Immigration Commission*, FCA 1987 A-296-86, and CUB 12019.

²⁶ See *Canada (Attorney General) v Bernier*, 1997 FCA A-136-96; *Canada (Attorney General) v Vernon et al*, 1995 FCA A-597-94; and *Cote v Canada Employment and Immigration Commission*, 1986 FCA A-178-86.

²⁷ See section 35(2) of the EI Regulations.

²⁸ See *Canada (Attorney General) v Carr*, 1996 FCA A-572-95.

[54] Considering all of the above, I find that the Appellant's dividend payment can be considered when calculating her self-employment earnings.

– **Which Dividends are Self-Employment Earnings?**

[55] I find that all of the Appellant's dividend payment from her corporation qualifies as employment income.

[56] The Appellant provided a copy of the T5 her corporation issued to her for 2021. It says she received a dividend of \$43,000, and a taxable dividend amount of \$49,450.²⁹ This means that the Appellant received \$43,000 from her company, but needs to pay income tax as though she received \$49,450 because of corporate and personal tax integration rules.

[57] The Commission says the Appellant hasn't proven that the dividend she received from her corporation wasn't the result of passive income arising from investing in the corporation, or any source other than her own work performed for the corporation during her qualifying period.

[58] I agree with the Commission that in order to qualify for the earnings calculation, the work must be performed by the Appellant during the qualifying period and paid to her as a result of that work. This is the same standard set for claimants with insurable employment.

[59] While there is limited direct case law on this subject, relevant case law can be found in the administration of the Covid Response Benefit (CRB). Since the Income Tax Act intersects with the EI Act when determining self-employment earnings, any case law involving the Tax Act and self-employed persons could be applicable to this case. Requiring self-employed claimants to prove their employment activities occurred during

²⁹ See RGD20

the qualifying period, and that they were compensated for doing them, is supported by Federal Court rulings for similar issues in CRB appeals.³⁰

[60] The Appellant provided copies of invoices from her corporation for psychology services to Park Integrated Health. The invoices list the Appellant as the service provider, and as the contact for any issues. I have excluded one invoice because it is dated January 1, 2022. Since the invoices don't specify the dates of service or payment, I must assume it is outside of the qualifying period. The rest of the invoices total \$58,040.50.³¹

[61] The Appellant provided copies of electronic transfers from the Alberta Worker's Compensation Board. The statements list the Appellant as the vendor and provide the dates of deposit and dates of service. They also indicate they are payments for psychology services. I have excluded two of these statements because the services were provided in 2020, which is outside of the qualifying period. The rest of the statements total \$18,330.³²

[62] So, I find that the Appellant generated \$76,370.50 in revenue for her corporation through her employment activities during the qualifying period.

[63] The Appellant testified that she has no employees, not even a receptionist, and she is the only person that generates revenue for her corporation. Since she is the only psychologist, and the only employee, it stands to reason that the only way her corporation can generate revenue is through her labours as a psychologist. The invoices she provided clearly indicate that she provided psychology services throughout the qualifying period, and her corporation was paid for those services.

³⁰ See *Palmer v Canada (Attorney General)*, 2024 FC 518; *Aryan v Canada (Attorney General)*, 2022 FC 139; *Crook v Canada (Attorney General)*, 2022 FC 1670; and *Singh v Canada (Attorney General)*, 2024 FC 51.

³¹ See RGD04-2 to RGD04-26.

³² See RGD04-30 to RGD04-51.

Did the Appellant earn enough self employment earnings?

[64] I find the Appellant earned \$43,000 in self-employment earnings from her dividend payment, and an additional \$15 in professional income, for a total of \$43,015.³³

[65] While the Appellant may have generated over \$76,000 in revenue in the qualifying period for her corporation, she was only paid \$43,000 in dividends. The Appellant chose to leave the remaining \$33,000 of revenue (minus expenses) in the business as an investment in the corporation's future profits.

[66] Since the Appellant only requires \$5,289 to qualify for benefits, she has enough self-employment earnings to qualify for self-employment benefits.

Conclusion

[67] The appeal is allowed.

Ambrosia Varaschin
Member, General Division – Employment Insurance Section

³³ See RGD04-27.