



Citation: *ZM v Canada Employment Insurance Commission*, 2024 SST 1678

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: Z. M.
Representative: L. A.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (665095) dated May 17, 2024
(issued by Service Canada)

Tribunal member: Elyse Rosen
Type of hearing: Videoconference
Hearing date: July 4, 2024
Hearing participant: Appellant
Appellant's representative
Decision date: July 5, 2024
File number: GE-24-2007

Decision

[1] The appeal is allowed.

[2] The Appellant isn't self-employed. She isn't engaged in the operation of a business and isn't employed in employment where she controls her work hours. So, she can't be presumed to be working full working weeks.

[3] And even if I were to have found she was self-employed, I would have also found that her self-employment was minor in extent.

[4] So, the Appellant can't be denied Employment Insurance (EI) benefits on the basis that she wasn't unemployed.

Overview

[5] The Appellant was working for the X on contract. Her contract ended and she applied for EI benefits.

[6] In 2016, well prior to applying for EI benefits, the Appellant founded a charity.

[7] The Canada Employment Insurance Commission says it can't pay the Appellant EI benefits from March 27, 2023. It says the charity that the Appellant operates is a business. It argues that since the Appellant operates a business, she's presumed to be working full working weeks and cannot be considered to be unemployed.

[8] The Appellant asserts that she's been unemployed since her contract at the X ended despite her efforts to find another job. She says she isn't paid for the work she does for the charity. And she's been working for the charity since 2016 while holding down jobs at the same time.

Issues

[9] Is the Appellant self-employed?

[10] If she is, is her self-employment minor in extent?

Analysis

Is the Appellant self-employed?

[11] I find that the Appellant isn't self employed and can't be presumed to be working full working weeks.

[12] The law says you can only be paid EI benefits during weeks you are unemployed.¹ A week of unemployment is a week in which you don't work a full working week.²

[13] If you're self-employed, you're presumed to be working full working weeks. But you can overcome this presumption by proving that you don't rely on your self-employment as your principal means of livelihood (in other words, it isn't how you support yourself).³ If you can prove this, your self-employment is deemed to be **minor in extent**, and you aren't presumed to be working full working weeks.

[14] The Commission has taken the position that the charity the Appellant founded is a business and that this means she's self-employed and presumed to be working full working weeks. I don't agree.

[15] The law says you're self-employed if you're engaged in the operation of a business.⁴

[16] The law doesn't define what it means to operate a business, but the term business is commonly understood to mean the activity of buying and selling goods and services for commercial or mercantile purposes.⁵

¹ See section 9 of the Act.

² See section 11(1) of the Act.

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

⁴ See section 30 of the Regulations and section 152.01 of the Act (although this section of the Act has no application in this case, the definition it contains is helpful to understanding the meaning of the term self-employed).

⁵ See the definition of "business" set out in the Cambridge English Dictionary and the Merriam Webster Dictionary.

[17] I don't see how the charity that the Appellant founded could be considered to be a business. It's a non-profit corporation with no share capital.⁶ It has operated at a loss for its last two financial years.⁷ It doesn't engage in any commercial activities. Its activities are restricted to relieving poverty, advancing education, and promoting health.⁸ The Appellant testified that she doesn't take a salary from the charity. Her testimony is corroborated by the charity's financial statements, which show that there are no salaries, wages, or management fees paid by the charity.⁹

[18] So, I find that the Appellant isn't engaged in the operation of a business.

[19] You're also considered to be self-employed if you are employed in employment where you control your work hours.¹⁰

[20] This isn't the Appellant's situation. She isn't employed by the charity. She provides services to the charity as a volunteer. And caselaw confirms that if you provide services on a volunteer basis with no expectation of payment or some other benefit, then you aren't considered to be employed or self-employed.¹¹

[21] The Appellant testified that nothing would please her more than the charity raising enough money to be able to employ her and pay for her services. But she says that isn't the reason she volunteers there. And it's very unlikely that could ever happen.

[22] I believe the Appellant when she says she doesn't volunteer for the charity in the expectation that she'll receive something in return. Her testimony convinces me that she does this work out of the goodness of her heart. I find that she devotes time to the charity with no expectation of payment or of some other benefit.

⁶ See GD2-63.

⁷ See GD2-86.

⁸ See GD2-62.

⁹ See GD2-85.

¹⁰ See section 30(1) of the Regulations.

¹¹ See *Bérubé v Employment and Immigration Canada*, A-986-88 (FCA).

[23] Since the Appellant isn't engaged in the operation of a business, isn't employed by the charity, and doesn't expect to derive any benefit from volunteering for the charity, she isn't considered to be self-employed under the law.

[24] I note that the Appellant said that she was self-employed when she completed her application for benefits.¹² But whether or not the Appellant is self-employed is a question of law. The Appellant clearly didn't know the law when she declared that she was self-employed. Her declaration carries no weight. The evidence is clear. She doesn't meet the definition set out in the law of a self-employed person.

[25] Since the Appellant isn't self-employed, she can't be presumed to be working full working weeks. I find that she's unemployed.

[26] But even if I had found that the Appellant was self-employed, I would have found that her involvement in self-employment was minor in extent.

The Appellant's involvement in the charity is minor in extent

[27] If a claimant's employment or engagement in a business couldn't normally be relied on as their principal means of livelihood, then it's considered to be minor in extent.

[28] To determine if a claimant's involvement in self-employment is minor in extent, the law says the following factors must be considered:¹³

- 1) the time spent on self-employed work
- 2) the nature and amount of the capital and resources invested in self-employment
- 3) the financial success or failure of the claimant's self-employed work
- 4) the continuity of the self-employment

¹² See GD3-6.

¹³ See section 30(3) of the Regulations.

5) the nature of the self-employment

6) the claimant's intention and willingness to seek and immediately accept insurable employment

[29] Case law says that when assessing these factors, the most weight should be given to how much time the claimant spends on their self-employment and whether they intend to find insurable employment.¹⁴

[30] It's up to the claimant to rebut (in other words, overcome) the presumption that they are working full working weeks while self-employed. To do this, they must show, on the basis of the above-noted factors, that their self-employment is minor in extent.¹⁵ This is a factual determination that must be established on a case-by-case basis.

– **Time spent**

[31] The Appellant testified that when she founded the charity, she was running it alone. She was putting in 20-24 hours a week. This was on top of the time devoted to her job.¹⁶

[32] She says that in the last few years other volunteers have joined her cause and share in the work it involves. As a result, the time she spends has decreased to about 15-18 hours a week.¹⁷

[33] She says she would have no issue maintaining this level of involvement in her charity while working in a full-time job.¹⁸

[34] She says she intends to devote 40 hours a week to a job as soon as she can find one.

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

¹⁵ See *Hamonic v Canada*, 2002 FCA 146, confirming CUB 47481.

¹⁶ She was employed as a health care aid at the time.

¹⁷ This is consistent with what she declared on her application for benefits (GD3-11) and what she told the Commission (GD3-33).

¹⁸ This confirms what she told the Commission (GD3-33).

– **Investment**

[35] The Appellant hasn't invested anything other than her time in the charity. The charity's expenses are covered through donations.

– **Financial success**

[36] The charity is a not for profit. It operates at a loss.

– **Continuity**

[37] The charity has operated since 2016.

[38] The Appellant says that through most of its operations she held a full-time job at the same time.

– **Nature of the work**

[39] Case law suggests that when a claimant works in the same field as an employee and for their own account, it may indicate that they are using the employed work as a steppingstone for their self-employed work.¹⁹

[40] That principle has no application in this case. The Appellant started the charity because she is passionate about helping the poor. At the time she was working in a different field, as a health care aid.

[41] Her last job was with the X doing data entry and some counselling. She says there is little overlap between what she was doing in that job and what she does for the charity.

– **Willingness to seek and accept insurable employment**

[42] The Appellant insists that she's been diligently looking for work since before her contract ended with the X. Since she was aware the contract was coming to an end, she wanted to try to find another job before it did. Unfortunately, she didn't find one, and still hasn't found one despite her efforts.

¹⁹ See *Martens v Canada (Attorney General)*, 2008 FCA 240.

[43] I note that she provided a job search record to the Commission.²⁰ Although the job search record isn't part of the evidence, I assume the Commission was satisfied with it because after receiving it, it approved the Appellant's claim.²¹

[44] She says she wants and needs a job. She's been evicted from her home because she couldn't pay her rent. She needs to be able to earn a living and pay her bills. She says she'll take anything. She claims she's applied for a wide variety of jobs. She says that despite having degrees in child development and conflict resolution she would be prepared to take, and has applied for, menial jobs such as working as a cleaner.

[45] Having heard her very sincere and credible testimony, I have no doubt that the Appellant wants to find work in insurable employment and doesn't intend to make the charity her principal source of livelihood.²²

– **So, what can be drawn from these factors?**

[46] As I've already concluded, the charity the Appellant founded isn't a business and she isn't employed by it. So, she isn't self-employed. But if I had concluded otherwise, I would have found that her involvement in the charity is minor in extent.

[47] Since losing her job at the X she's devoted fewer hours to the charity, not more. She's made no investment in the charity and earns no income from it. And she has been desperately looking for insurable employment. Her work for the charity clearly isn't her principal means of livelihood. And she clearly can't intend for it to be, as it operates at a loss and doesn't have the resources necessary to pay her a salary.

[48] The Appellant said working for the charity full time would be her dream. But given her inability to secure the funding that would be required to make that a reality, she

²⁰ The Commission appears to no longer have a copy of this job search record.

²¹ See GD3-34 and GD3-35.

²² The Appellant admits that for a couple weeks in March 2024 she had lost hope she would ever find a job. She says she told the Commission that. She also told the Commission she would try to make the charity her source of livelihood because she was facing discrimination, and no one was prepared to hire her (the Appellant is a visible minority). But she says she quickly realized how unrealistic this was and resumed her job search.

recognizes it's a pipe dream. And it isn't where she is devoting her energy. Her energy is devoted to finding the paid work she desperately needs.

[49] For all of these reasons, her involvement in the charity is clearly minor in extent.

Conclusion

[50] The appeal is allowed.

[51] The Appellant isn't self-employed. She isn't presumed to be working full working weeks.

[52] This means she can't be denied EI benefits on the basis that she's not unemployed.

Elyse Rosen

Member, General Division – Employment Insurance Section