

Federal Court



Cour fédérale

**Date: February 2, 2016**

**Docket: T-1148-15**

**Citation: 2016 FC 114**

**Toronto, Ontario, February 2, 2016**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**PATTAMESTRIGE PERERA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. Perera seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal [Appeal Division] denying him leave to appeal a decision of the Board of Referees [Board]. The Board found that Mr. Perera had been employed in the operation of a business while he was collecting employment insurance benefits, and he was therefore required to repay those benefits.

[2] On December 26, 2008, Mr. Perera's employment came to an end. He applied for regular employment insurance benefits. His claim was found to have been established as of December 28, 2008, and, save for a two-week waiting period, he received benefits from that point until July 25, 2009, when he was re-hired by his former employer.

[3] On February 4, 2009, the applicant began operating a business called Extreme Health Rehab Clinic Inc. Tax information for the period from February 4, 2009, to April 30, 2009, shows that the business had total assets of \$58,198 and owed Mr. Perera \$38,682. He did not receive any income from the business during the period when he was receiving employment insurance benefits but was put on the business' payroll in October of 2009. Moreover, during the period he was in receipt of employment insurance benefits, it is agreed that the business was in start-up mode and not selling its services.

[4] On June 20, 2012, the Canada Employment Insurance Commission [Commission] found that Mr. Perera was engaged in the operation of his business as of February 4, 2009, and therefore was disentitled to employment insurance benefits as of that time. As a result, an overpayment of \$9,988 was created.

[5] On May 22, 2013, the Board dismissed Mr. Perera's appeal of the Commission's decision. It held that the only issue was whether Mr. Perera was disentitled to employment benefits because of his failure to prove that he was unemployed between February 4, 2009, and July 25, 2009. This issue turned on whether he was engaged full-time in the operation of his business pursuant to subsection 30(1) of the *Employment Insurance Regulations*, SOR/96-332, or

whether his involvement was so minor that he was not engaged full-time, pursuant to subsection 30(2).

[6] Those statutory provisions provide as follows:

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;

30 (1) Sous réserve des paragraphes (2) et (4), le prestataire est considéré comme ayant effectué une semaine entière de travail lorsque, durant la semaine, il exerce un emploi à titre de travailleur indépendant ou exploite une entreprise soit à son compte, soit à titre d'associé ou de coïntéressé, ou lorsque, durant cette même semaine, il exerce un autre emploi dans lequel il détermine lui-même ses heures de travail.

(2) Lorsque le prestataire exerce un emploi ou exploite une entreprise selon le paragraphe (1) dans une mesure si limitée que cet emploi ou cette activité ne constituerait pas normalement le principal moyen de subsistance d'une personne, il n'est pas considéré, à l'égard de cet emploi ou de cette activité, comme ayant effectué une semaine entière de travail.

3) Les circonstances qui permettent de déterminer si le prestataire exerce un emploi ou exploite une entreprise dans la mesure décrite au paragraphe (2) sont les suivantes :

a) le temps qu'il y consacre;

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|---------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|
| (b) the nature and amount of the capital and resources invested;                                  | b) la nature et le montant du capital et des autres ressources investis;                           |
| (c) the financial success or failure of the employment or business;                               | c) la réussite ou l'échec financiers de l'emploi ou de l'entreprise;                               |
| (d) the continuity of the employment or business;                                                 | d) le maintien de l'emploi ou de l'entreprise;                                                     |
| (e) the nature of the employment or business; and                                                 | e) la nature de l'emploi ou de l'entreprise;                                                       |
| (f) the claimant's intention and willingness to seek and immediately accept alternate employment. | f) l'intention et la volonté du prestataire de chercher et d'accepter sans tarder un autre emploi. |

(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

(4) Lorsque le prestataire exerce un emploi relié aux travaux agricoles auquel ne s'applique pas le paragraphe (2), il n'est pas considéré comme ayant effectué une semaine entière de travail pendant la période débutant la semaine où tombe le 1er octobre et se terminant la semaine où tombe le 31 mars suivant, s'il prouve que, durant cette période :

- |                                                                                                                                        |                                                                                                                                   |
|----------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------|
| (a) the claimant did not work; or                                                                                                      | a) ou bien il n'a pas travaillé;                                                                                                  |
| (b) the claimant was employed to such a minor extent that it would not have prevented the claimant from accepting full-time employment | b) ou bien il a exercé son emploi dans une mesure si limitée que cela ne l'aurait pas empêché d'accepter un emploi à temps plein. |

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

(5) Pour l'application du présent article, travailleur indépendant s'entend :

- |                                                                                                   |                                                                                                   |
|---------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|
| (a) is or was engaged in a business; or                                                           | a) de tout particulier qui exploite ou exploitait une entreprise;                                 |
| (b) is employed but does not have insurable employment by reason of paragraph 5(2)(b) of the Act. | b) de tout employé qui n'exerce pas un emploi assurable par l'effet de l'alinéa 5(2)b) de la Loi. |

[7] The Board concluded, through reference to the criteria in subsection 30(3), that Mr. Perera's involvement was not minor, and therefore that he was not unemployed during the relevant period.

[8] In the course of reaching its conclusion, the Board referred to several arguments made by Mr. Perera and, explicitly or implicitly, rejected them. In particular, the Board considered, and rejected, the argument that, because Mr. Perera did not receive income from his business while he was collecting employment insurance, he could not have been employed during that time. The Board held that the relevant sections of the Act and Regulations define employment in terms of work, not wages, and that the right to receive income from a business is sufficient to establish employment, even if income is not actually received.

[9] The Appeal Division denied leave to appeal. After setting out the permitted grounds for appeal under subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34, the Appeal Division explained that:

In his application, the Appellant re-states many of the arguments he made before the Board and disagrees with the Board's findings. The Appellant is essentially asking that I re-weigh the evidence and come to conclusions different from those already rendered. The Appellant also submits that "previous precedents cases, the

general division used does not have similar scenario or relevant situation to my case [*sic*]” but has not specified in what way this was done.

[10] The Appeal Division added that “[t]o assist me in my deliberations, I requested further submissions from the parties. No additional submissions were received from the Appellant.”

[11] The Appeal Division concluded that “[i]n order to have a reasonable chance of success, the Appellant must explain in some detail how in their view at least one reviewable error set out in the Act has been made. Having failed to do so, this application for leave to appeal does not have a reasonable chance of success and must be refused.”

[12] The sole issue for the Court is whether the decision of the Appeal Division refusing leave was reasonable.

[13] Although much of Mr. Perera’s memorandum of argument is framed in terms of procedural fairness, in substance it alleges that the Appeal Division erred by ignoring errors of fact that were made by the Board, as well as errors of law that pertain to the operative statutes and regulations.

[14] His submissions essentially repeat the arguments he raised before the Board, without explaining how the Board erred in rejecting them. For example, he repeats his arguments that he did not receive any income while collecting employment insurance benefits and points to the fact that he eventually returned to his previous employment as proof that he was not engaged full-time in the operation of his business.

[15] As noted, these arguments were all raised before the Board and were either explicitly or implicitly rejected by it. They do not establish that the Appeal Division was unreasonable or unfair in denying him leave to appeal.

[16] Mr. Perera also alleges a section 7 *Canadian Charter of Rights and Freedoms* violation on account of the “serious state-imposed psychological stress” occasioned by the government’s conduct during these proceedings. This stress allegedly arose from his need to answer telephone calls and draft correspondence in relation to this matter and the fact that he must do this after finishing work at 3:00 p.m., which makes things difficult because most government offices close by 4:30 p.m. Although the materials before the Appeal Division refer to his concern about the overlap between his working hours and government office hours, he did not previously frame this inconvenience as a *Charter* violation. There is simply insufficient evidence to support his bald allegation of a *Charter* violation and he ought to have raised it before the Appeal Division first.

[17] Finally, Mr. Perera alleges in his Notice of Application that, when he received the Appeal Division’s request for additional submissions, he telephoned for further clarification and was told by an employee of the Social Security Tribunal to send his submissions to the Canada Employment Insurance Commission. The implication seems to be that, as a result of this employee’s erroneous advice, he sent his additional submissions to the wrong location. Mr. Perera provides no affidavit or other evidence to substantiate this allegation. Furthermore, the letter that the applicant received was very clear that his submissions were to be sent to the Social Security Tribunal.

[18] For these reasons, I am unable to find that the Appeal Division's decision was unreasonable or unfair. The application must be dismissed. The Respondent does not seek costs and none will be awarded.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed, without costs.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1148-15

**STYLE OF CAUSE:** PATTAMESTRIGE v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 27, 2016

**JUDGMENT AND REASONS:** ZINN J.

**DATED:** FEBRUARY 2, 2016

**APPEARANCES:**

Pattamestrige Perera

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Mathieu Joncas

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Nil

SELF-REPRESENTED APPLICANT

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FOR THE RESPONDENT