

[TRANSLATION]

Citation: *S. M. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 67

Appeal #: GE-14-803

BETWEEN:

S. M.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Charline Bourque

HEARING DATE: May 15, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal dismissed

PERSONS IN ATTENDANCE

[1] S. M., the Claimant, participated in the teleconference hearing.

DECISION

[2] The Tribunal finds that the Claimant failed to show that he was available for work throughout his training period.

INTRODUCTION

[3] The Appellant filed an Employment Insurance benefit claim effective December 1, 2013. On January 15, 2014, the Canada Employment Insurance Commission (the Commission) informed the Claimant that he could not receive Employment Insurance benefits as of December 2, 2013¹ because he was taking a training course on his own initiative and he failed to show that he was available for work (GD3-27). Following the Claimant's request for reconsideration, the Commission informed him on March 15, 2014, that the decision rendered on January 15, 2014, was upheld. The Claimant submitted documents to appeal from the reconsideration decision to the Tribunal on February 11, 2014. He completed his appeal docket, which enabled his appeal to be filed on March 27, 2014.

TYPE OF HEARING

[4] This appeal was heard in a teleconference hearing for the reasons set out in the Notice of Hearing dated April 14, 2014. The teleconference hearing was held on May 15, 2014.

¹ The Commission stated that the notice of decision dated January 15, 2014, contained a clerical error because it read: [translation] "we cannot grant you Employment Insurance benefits as of November 24, 2013" when it should have read "we cannot grant you Employment Insurance benefits as of December 2, 2013" (GD4-2).

ISSUE

[5] Was the Claimant entitled to receive Employment Insurance benefits under section 18 of the *Employment Insurance Act* (the Act), and was he available for work while taking a full-time training course?

APPLICABLE LAW

[6] Subsection 18(1) of the Act reads as follows:

A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

- (a) capable of and available for work and unable to obtain suitable employment;
- (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
- (c) engaged in jury service.

[7] Section 32 of the *Employment Insurance Regulations* (the Regulations) defines a working day as follows:

For the purposes of sections 18 and 152.19 of the Act, a working day is any day of the week except Saturday and Sunday.

[8] The Court has established that availability must be determined by analyzing three factors (*Michel, Faucher, Denis, Poirier v. Canada (Attorney General)* FCA A-56-96, A-57-96):

- the desire to return to the labour market as soon as a suitable job is offered,
- the expression of that desire through efforts to find a suitable job,
- not setting personal conditions that might unduly limit the chances of returning to the labour market, and that the three factors must be considered in reaching a conclusion.

[9] The Court has also stated that a person enrolled in a full-time training course is presumed not to be available for work. However, this presumption of fact can be rebutted by evidence of exceptional circumstances (*Canada (Attorney General) v. Cyrenne* 2010 FCA 349, A-109-10).

[10] The presumption that a person is not available for work may be rebutted if the Claimant can provide evidence of a history of full-time employment while studying (*Canada (Attorney General) v. Rideout* 2004 FCA 304, A-670-02).

EVIDENCE

[11] The Claimant filed an Employment Insurance benefit claim effective December 1, 2013. He stated that he was taking full-time training. The Claimant also stated that he had experience working while taking training and that he had done so on a number of occasions. He detailed his hours worked versus his hours of training for each of his previous employers.

[12] On January 15, 2014, the Commission informed the Claimant that he could not receive Employment Insurance benefits as of November 24, 2013, because he was taking training on his own initiative and he failed to show that he was available for work.

[13] On January 27, 2014, the Claimant submitted a request for reconsideration of his Employment Insurance decision.

[14] On March 15, 2014, the Commission rendered a decision on the Claimant's request for reconsideration. The Commission stated that it was upholding the decision rendered on January 15, 2014,² regarding the Claimant's availability.

[15] The Claimant appealed from the reconsideration decision to the Tribunal on March 27, 2014.

SUBMISSIONS OF THE PARTIES

[16] The Claimant stated the following:

² A correction was made by the Commission to the first version of the letter, which contained an incorrect date since it initially indicated January 16, 2014, instead of January 15, 2014.

a) There was an inconsistency between the Employment Insurance decision to grant him payments for his second claim, which took effect on March 24, 2013, and the decision not to grant him payments from January 8, 2013, to March 23, 2013, even though his personal situation had not changed and he took his training throughout the period.

b) He stated that there were two overruns in the file. The payment of January 2 was delayed beyond the processing time allowed. He also stated that there was an overrun in the amounts deposited in his second claim.

c) He indicated that his statements duly made online seem to have been set aside in the justification for the decision to deny a reconsideration of the claim on May 16, 2013.

d) Lastly, the Claimant added: [translation] “My situation with respect to my desire to work and my status as a student did not change in the entire period from January 8, 2013, to now. I also find that Employment Insurance cannot justify having two different decisions regarding my Employment Insurance payments” (GD2-2).

[17] The Respondent stated the following:

a) [Translation] “The Claimant failed to rebut the presumption of non-availability while taking a full-time course because his availability for work was limited to the time outside his courses and he was not ready to withdraw from his training for a job that conflicted with his course” (GD4-4).

b) The Claimant failed to show that his training was of such little importance that it would not limit his chances of obtaining employment.

c) The Claimant’s employment from December 2013 to February 2014 was part-time in accordance with the availability that he gave his employer, which shows that he was not

available for full-time work on the labour market. His availability instead was limited to a part-time job outside his course hours.

d) The Claimant's primary intention was to finish his training rather than to quickly re-enter the labour market.

ANALYSIS

[18] Paragraph 18(1)(a) of the Act establishes that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

[19] The Federal Court of Appeal has also taken into consideration that it is the Claimant's responsibility to show that he was available for work. The case law established three criteria that must be met by the Claimant to show his availability for work. According to the criteria, he must demonstrate his desire to return to the labour market as soon as a suitable job is offered, make the necessary efforts to find a suitable job, and not set personal conditions that might limit his chances of returning to work (*Faucher* A-56-96, A-57-96).

[20] Regarding the first criterion, namely, the demonstration of his desire to return to the labour market as soon as a suitable job is offered, the Claimant stated that he looked for a job so that he could work. In fact, he held different jobs during his training, and he stated that he would immediately start looking for another job as soon as his previous job ended. He stated that the fact that he qualified three times to receive Employment Insurance benefits showed his desire to work. Nevertheless, the Claimant stated on a number of occasions that he would not be ready to withdraw from his training to accept a full-time job. He also stated that he looked for a job whose schedule enabled him to continue his training. However, he stated that he was ready to work nights, which he also did in his last part-time job.

[21] Consequently, the Tribunal cannot be satisfied that the Claimant showed a desire to return to the labour market as soon as a suitable job was offered since he stated that he would not accept a full-time job if the job prevented him from continuing his studies.

[22] The second availability criterion concerns the efforts to find a suitable job. The Claimant stated that he was actively looking for employment. He worked for different employers throughout his training, and he stated that he qualified three times to receive Employment Insurance benefits in his training period. He stated that this showed his availability and readiness for work.

[23] The Claimant stated that he was available for full-time work and that he did in fact work full-time on a few occasions. He stated that he was ready for full-time work but that he was not offered the possibility. He stated that, for example, if his employment did not give him enough hours, he would look for another job. In fact, the Claimant showed that he worked for a number of employers. He also stated that he would start looking for a job as soon as his employer stopped giving him enough hours or his employment ended.

[24] The Tribunal is satisfied that the Claimant showed that he made efforts to find a suitable job.

[25] The third availability criterion involves not limiting chances of employment by setting personal conditions. The Claimant stated that he was looking for a job whose schedule enabled him to continue his training. He was therefore looking for a night job (as of 10:00 p.m.) or a day job (until 2:00 p.m.) He was available for a night job both during the week and the weekend, and he could also work during the week until around 2:00 p.m., which enabled him to carry out a full day's work. He stated that he would not withdraw from his studies if he were offered a full-time position from 8:00 a.m. to 4:00 p.m.

[26] In the case of a Claimant taking full-time training, the case law has clearly established that a person enrolled in a full-time training course is presumed not to be available for work. However, this presumption of fact can be rebutted by evidence of exceptional circumstances (*Canada*

(Attorney General) v. Cyrenne 2010 FCA 349, A-109-10), such as when a Claimant can show a history of full-time employment while studying (*Canada (Attorney General) v. Rideout*, 2004 FCA 304, A-670-02).

[27] The Federal Court of Appeal also stated that a person cannot limit his or her availability to the irregular hours that remain after the training schedule is taken into account, which significantly restricts availability. Availability must be shown during regular hours for every working day (*Canada (Attorney General) v. Bertrand*, A-613-81).

[28] The employment history record (GD3-32) shows that the Claimant worked 19.32 hours a week on average for 9231 8724 Québec Inc. The employer told the Commission that the Claimant did not provide much availability and that he was scheduled to work nights and weekends. In his Employment Insurance benefit claim, the Claimant stated that he worked full-time for UPS, Livingston and Purolator while studying part-time. He also stated that he worked for Extra Multi Ressources for 30 hours a week while studying 30 hours a week.

[29] At the hearing, the Claimant stated that he worked a few times for 36 hours a week and that he would have been available to do so regularly if offered the opportunity. Nevertheless, the Claimant confirmed that his work hours had to comply with his study schedule. He also stated that he did not apply for jobs with schedules that were unsuitable because of his training.

[30] On the basis of the evidence submitted, the Tribunal is satisfied that the Claimant showed that he had experience working part-time. Nevertheless, although the Tribunal notes that the Claimant was available for full-time work, the fact remains that his priority was to finish his studies. The Tribunal notes the Claimant's efforts to find a job, but cannot find that the Claimant showed that he had experience working full-time, even though he stated that he qualified three times to receive Employment Insurance benefits during his training.

[31] The presumption of non-availability during training can be rebutted only by exceptional circumstances when a person can show experience working full-time. The Tribunal finds that the

Claimant failed to rebut this presumption and that his availability was limited by personal conditions.

[32] The Tribunal notes that the Claimant stated that he qualified three times to receive Employment Insurance benefits. He stated that out of those three claims, he received Employment Insurance benefits for one of the claims while he was still taking training. The Tribunal is surprised at the difference between the Commission's decisions but cannot make a finding on the basis of this argument. The Tribunal does not have jurisdiction to do so because these were not the issues submitted to it. The Claimant stated that he followed up with the Commission after receiving the benefits to ensure that he was entitled to receive them.

[33] Therefore, the Tribunal finds that the Claimant did not meet the availability criteria since according to the Act, and despite his efforts, his availability was limited by personal conditions. In addition, there is no exceptional circumstance to rebut the presumption that he was not available for work in his training period.

CONCLUSION

[34] The appeal is dismissed.

Charline Bourque
Member, General Division

DATE OF REASONS: July 6, 2014