Citation: *F. C. v. Canada Employment Insurance Commission,* 2015 SSTGDEI 11

Appeal #: GE-14-3124

BETWEEN:

F. C.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Alyssa Yufe
HEARING DATE:	January 21, 2015
TYPE OF HEARING:	Teleconference
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE

The Appellant attended the hearing by way of telephone conference on January 21, 2015. No one else was in attendance.

DECISION

[1] The Member of the Social Security Tribunal, General Division, Employment Insurance Section (the "Tribunal") finds that the Appellant has proven that he was entitled to sickness benefits because he was otherwise available as that term is understood in accordance with the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act")

INTRODUCTION

[2] The Appellant filed an initial claim for benefits on April 16, 2014 (Exhibit GD3- 12).

[3] On May 15, 2014, the Canada Employment Insurance Commission (the "Commission") decided that the Appellant was not entitled to sickness benefits and was not available as that term was understood in accordance with the Act (GD3-19).

[4] The Appellant filed a request for reconsideration of the Commission's decision. On July 9, 2014, the Commission decided in the Appellant's favour and granted him sickness benefits and then disentitled him on the grounds that he was not "available" (GD3- 26).

[5] The Appellant filed an appeal to the Tribunal on August 11, 2014 (GD-2) and a copy of the reconsideration decision on September 8, 2014 (GD2A).

[6] By informal interlocutory decision dated November 12, 2014, the Tribunal decided that the appeal should not have been characterized as late and it allowed the appeal to proceed (GD7).

[7] The Commission advised on September 18, 2014 at GD4-1 that it is conceding the file because the facts are not sufficient to show that the Appellant who applied for sickness benefits is not "otherwise available".

FORM OF HEARING

[8] The hearing was heard via teleconference for the reasons indicated in the Notice of Hearing dated November 27, 2014.

ISSUE

[9] Whether or not the Appellant would "otherwise be available" pursuant to paragraph 18(1)(b) of the Act.

THE LAW

Availability:

[10] Paragraph 18 (1) of the Act provides:

18. (1) 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.

Proof of Suitable Employment

[11] Subsection 50 (1) of the Act provides that a claimant who fails to fulfil or comply with a condition or requirement under section 50 of the Act, is not entitled to receive benefits for as long as the condition or requirement is not fulfilled or complied with.

[12] Subsection 50 (8) of the Act provides that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may

require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment.

[1]The new sections of the *Employment Insurance Regulations* SOR/2012-261, s.1., which became effective in January 2013 (the "New Regulations"), define in sections 9.01 to 9.004 what constitutes "reasonable and customary efforts" and "suitable employment" and demands that claimants broaden their searches within given timeframes to include employment in "similar occupations" as opposed to only seeking employment opportunities in the "same occupation" as those terms are defined in subsection 9.003(2) of the New Regulations.

Regulatory Requirements for Paragraph 18(1)(b):

[2]Subsection 40(1) of the *Employment Insurance Regulations,* SOR/96-332 provides as follows:

[3]**40.** (1) The information and evidence to be provided to the Commission by a claimant in order to prove inability to work because of illness, injury or quarantine under paragraph 18(1)(*b*) or subsection 152.03(1) of the Act, is a medical certificate completed by a medical doctor or other medical professional attesting to the claimant's inability to work and stating the probable duration of the illness, injury or quarantine.
[…]
(4) For the purposes of paragraphs 8(2)(*a*) and 18(1)(*b*) and subsections 28(7) and 152.03(1) of the Act, illness, injury or quarantine is any illness, injury or quarantine that renders a claimant incapable of performing the duties of their regular or usual employment or of other suitable employment.

EVIDENCE

[4] The Appellant applied for sickness benefits ("EI Benefits") on April 16, 2014. The Appellant had been working for "Rogers" (the "Employer") as a "business consultant". The last date worked was April 11, 2014 and the return date was set at January 5, 2015. The Appellant advised "no" to the question, asking whether he was "taking a course or other training program" (Application for benefits, GD3-2 to GD3-13).

[5] According to the record of employment ("ROE") dated May 7, 2014 , the Appellant worked at the Employer as a "Business Service Consultant" from April 1, 2012 to April 11, 2014. The reason for issuing the ROE was listed as Code "N" for "leave of absence" (GD3-14).

[6] The Appellant spent 25 hours a week on his studies. His course was not approved by the Commission. He was registered in a culinary course from April 29, 2014 to May 27, 2015 on Monday to Friday in the morning and afternoons. He could only drop classes and not make changes to his course or schedule. If he was not ill, he would be capable and available for work. His intentions once he has recovered, are to discontinue the course or program and to return to his employment activities. The total cost of his program is $450.00 (Commission Questionnaire, April 25, 2014, GD3-15 to 18)

[7] The Appellant is in class every day from 730 to 1430 to obtain a DEP diploma. It is not possible to modify his course schedule to work for his Employer. The Appellant was advised that he was not available for work (May 14, 2014, GD3-18).

[8] The Appellant was unable to provide a medical certificate because his doctor was out of town. He developed a medical condition in 2009 and had a relapse in 2012. Earlier in the year (March and April 2014), he started to suffer symptoms and feared another relapse. His current employment was contributing to his relapse. Both of his doctors advised him to keep busy with a hobby so he started a course on April 27, 2014. He has not claimed public assistance since the onset of his medical condition. The course would also ensure broader employment opportunities for when he recovered and that he would not relapse fully (Request for Reconsideration, June 3, 2014, GD3-2, Notice of Appeal, August 11, 2014, GD2).

[9] The medical certificate at GD3-24, which is signed by Dr. "TK VO", provides that the Appellant has "depression majeure" and that he had a relapse since February 2014 (May 28, 2014, Medical Certificate, GD3-24).

[10] On July 7, 2014, the Appellant submitted his job search. The Commission commented that it was all for part time jobs and in the same field/industry as his course (Commission notes, July 7, 2014, GD3-25).

Testimony at the hearing:

[11] The Appellant attended the hearing and gave testimony under solemn affirmation.

[12] The Appellant repeated that he took sick leave in April 2014 from work until January 5, 2015 and that his intention was to recover and return to work. The Appellant explained that he was only enrolled in a course or study because he thought it would assist him in his recovery by allowing him to keep busy while he was off of work. At the same time, he thought that it would facilitate in broadening his future job search and employment opportunities.

[13] The Appellant has not yet returned to work. He is waiting to meet with his doctor to discuss the situation with his doctor. His appointment is on February 11, 2015.

SUBMISSIONS

[14] The Appellant submitted that he should have been considered to have been otherwise available for the following reasons:

a) He was unable to provide a medical certificate because his doctor was out of town (GD3-21, GD2);

b) Both of his doctors advised him to keep busy with a hobby so he started a course on April 27, 2014 (GD3-21, GD2);

c) He has not claimed public assistance since the onset of his medical condition (GD3-21, GD2);

d) The course would also ensure broader employment opportunities for when he recovered and that he would not relapse fully (GD3-21, GD2);

e) He was available for part time employment (GD3-15 to 18);

f) But for his condition he would have been available to work (GD3-21, GD2);

[15] The Respondent submitted as follows:

a) Based on the information provided by the Appellant while he completed the training Questionnaire, combined with the information provided in his request for reconsideration along with his medical certificate, the facts are insufficient to support the decision rendered by the Commission (GD4-1);

b) An error was made in the notice sent to the Appellant at GD3-26. The notice should have stated that the Appellant was "not otherwise available" as per subsection 18(1)(b) of the Act (GD4-1);

c) According to the information in the file, the facts are not sufficient to show that the Appellant who has applied for sickness benefits, is not otherwise available (GD4-1); and,

d) Once the Commission's decision is appealed, the decision is out of the Commission's hands and any change to a decision after it is appealed is null and void (*Wakelin* A-748-98; *Poulin* A-516-91; *Von Findenigg* (A-737-82) (GD4-1).

ANALYSIS

Sickness Benefits/Benefits Pursuant to Paragraph 18(1)(b):

[16] The Tribunal finds that in order to qualify for benefits under paragraph 18(1)((b) of the Act, the Appellant has to demonstrate sufficiently that 1) he was unable to work because of his own prescribed illness, injury or quarantine; and, 2) that he would otherwise be available for work.

[17] The Commission decided in its reconsideration decision that the Appellant has proven on a balance of probabilities that he was unable to work because of his own prescribed illness, injury or quarantine. (The Tribunal notes that the medical note, which he provided at GD3-23, likely assisted him in meeting the regulatory and legislative requirements in this regard.)

“Otherwise be Available”

[18] The phrase, “would otherwise be available” is not defined in the Act.

[19] To understand what “would otherwise be available” means, resort must be had to the meaning of the word, “available”. The word “available” is also not defined in the Act.

[20] The legal notion of “availability” and the criteria, which a claimant must satisfy to prove that s/he is “available” pursuant to subsection 18(1) of the Act have, however, been delineated in the case/law jurisprudence.

[21] The case law/jurisprudence has held consistently that a claimant demonstrates his or her availability by: a) proving a desire to return to the labour market as soon as possible; b) by demonstrating this desire by making reasonable and customary efforts to find suitable employment; and, by remaining free of personal requirements which would unduly limit the opportunities for work (*Faucher* A-56-96, *Whiffen* 1472-92).

[22] The jurisprudence has also held that in order to demonstrate a desire to return to the labour market and that reasonable and customary efforts have been made, the claimant has to show that there have been serious efforts made to find employment through an active job search (*De Lamirande* 2004 FCA 311; *Cornelissen-O'Neill* A-652-93; *Cutts* A-239-90; CUBs 40597 (1998), 75821 (2010), 75947 (2010), 76719(2011)).

[23] “Availability” for work has also been held to imply, a willingness to reintegrate into the labour force under normal conditions without unduly limiting one’s chances of obtaining employment.

[24] Finally, the question of availability has been held to be a question of fact, which must be examined and assessed on a daily and continuous basis (*Chinook,* A-117-97; *Harbour,* A-541-85, *Faucher* A-56-96).

Is the Appellant "Otherwise Available" While he is Enrolled in a Course?

[25] The Appellant was enrolled in a full time course of study during his period of sick leave. The jurisprudence has held consistently, that there is a presumption of non-availability when a claimant is enrolled in a full time course of study, which has not been approved by the Commission. It has also been held in accordance with section 18 of the Act and section 32 of the Regulations that availability has to be shown during regular hours for the entire work day and cannot be limited to irregular working hours, such as evenings and weekends, which restrict availability significantly (*Bertrand A-613-81; Vezina A-736-01*); *Gauthier* 2006 FCA 40(A-552-03); *Gagnon* 2005 FCA 321; *Primard* 2003 FCA; CUB 80739 (2013), CUB 77241, (2011); CUB 25041, CUB 37951, CUB 38251).

[26] That being said, the presumption of non-availability on account of enrollment in a full time course of study has been held to be rebuttable upon proof of exceptional circumstances such as evidence of past history or pattern of concurrent work and study. In *Landry* A-719-91, the Federal Court of Appeal stated regarding the presumption as follows:

"This observation on the state of the law is too categorical. While it is true that there is a presumption that a person enrol[l]ed in a course of full-time study is generally not available for work within the meaning of the Act, at the same time it has to be admitted that this is a presumption of fact which certainly is not irrebuttable. It can be rebutted by proof of "exceptional circumstances". The work record mentioned by the umpire is only one example of such exceptional cases, although in fact it may be the one most frequently encountered. There may certainly be others."

[27] As such, where a claimant is enrolled in a course or program that is not approved by the Commission, an evaluation must be made to determine if the course or program unduly interferes or restricts the claimant's availability. The Appellant must provide sufficient evidence of his availability and the exceptional circumstances to rebut this presumption. (*Gagnon* 2005 FCA 321, *Sarto Landry* A-719-91, *Wang* 2008 FCA 112, *Lamonde* 2006 FCA 44, *Cyrenne* 2010 FCA 349, *Macdonald* A-672-93).

[28] The foregoing case law/jurisprudence applies to the Appellant's circumstances on an analogous basis. If enrollment in a full time course of study leads to a presumption that a claimant is not available pursuant to paragraph 18(1)(a), then enrollment in a full time

course of study by a claimant who applies for benefits pursuant to paragraph 18(1)(b) would create the analogous presumption that the claimant would be "otherwise unavailable."

[29] The Tribunal finds that the Appellant has demonstrated sufficiently on a balance of probabilities that he had a desire to return to the labour market as soon as possible and that he demonstrated this desire when he stated quite clearly at GD3-21, and GD2 that he was only enrolled in the course to keep busy while he was off of work and that he anticipated that this would also increase his chances for reemployment and assist him in avoiding a relapse. This was reiterated clearly at GD3-15 to 17 when the Appellant advised in the questionnaire that his intentions once he recovered from his illness/injury were to discontinue the course/program and return to his employment (*Macdonald* A-672-93; *Wang* 2008 FCA 112).

[30] The Tribunal also finds that the Appellant made efforts to find suitable future employment in the event that he was unable to go back to work with the Employer following his recovery (*Faucher* A-56-96, *Whiffen* 1472-92).

[31] On the basis of the Appellant's intentions and the facts as explained by him in the file and in his testimony, it is obvious that the Appellant did not take leave from work to pursue his courses and that he enrolled in the course of study after he had proven that he was unable to work because of his own prescribed illness, injury or quarantine. This is especially the case, because he advised that he would discontinue the course as soon as he recovered (GD3-15 to 17 and testimony). In this regard, the Tribunal also finds that the course was not a personal restriction, which unduly limited his opportunities for work.

[32] The Tribunal finds that the Appellant has proven the existence of exceptional circumstances and that he has rebutted successfully the presumption that his course of study made him otherwise unavailable for work (*Wang* FCA 112).

[33] As such, the Tribunal agrees with the Commission's representations at GD4-1, that the Appellant's submissions (GD3-21)(GD2), job search efforts in anticipation of his recovery, and his willingness and intentions to continue with his employment as soon as he has recovered (GD3-15 to 18) were sufficient demonstrations of his a desire to return to the

labour market as soon as possible, that he demonstrated this desire by making reasonable and customary efforts to find suitable employment, and that but for his illness and the course, which he registered for during his period of illness only, he remains free of personal requirements which would unduly limit the opportunities for work (*Faucher* A-56-96, *Whiffen* 1472-92).

CONCLUSION

[34] For the foregoing reasons, the Tribunal finds that the Appellant was unable to work because of his own prescribed illness, injury or quarantine and would otherwise of had been available as those terms are understood in accordance with paragraph 18(1)(b) of the Act and jurisprudence. The appeal is, accordingly, allowed.

Alyssa Yufe
Member, General Division

DATED: January 21, 2015