

Citation: *A. M. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 146

Date: September 2, 2015

File number: GE-15-1274

GENERAL DIVISION – Employment Insurance Section

Between:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Teresa Jaenen, Member, General Division - Employment Insurance Section

Heard In person on August 10, 2015, Regina, Saskatchewan

REASONS AND DECISION

PERSONS IN ATTENDANCE

Ms. A. M., the Appellant (Claimant) attended the hearing.

INTRODUCTION

[1] On August 10, 2014 the Claimant made an initial claim for employment insurance benefits. On November 20, 2014 the Canada Employment Insurance Commission (Commission) denied the Claimant benefits because she failed to prove she was unemployed and that she was available for work. On December 19, 2014 the Claimant made a request for reconsideration. On March 4, 2015 the Commission maintained its original decision and the Claimant appealed to the *Social Security Tribunal of Canada* (Tribunal).

[2] The hearing was held by In person for the following reasons:

- a) The complexity of the issue(s) under appeal;
- b) The information in the file, including the need for additional information; and
- c) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[3] The Tribunal must decide if a disentitlement should be imposed because the Claimant failed to prove she was unemployed as per section 9 and subsection 11(1) of the *Employment Insurance Act* (the Act) and subsection 30 of the *Employment Insurance Regulations* (Regulations).

[4] The Tribunal must decide whether a disentitlement should be imposed because the Claimant failed to prove her availability for work as per section 18(a) of the Act.

THE LAW

[5] Section 9 of the Act states when an insured person who qualifies under Section 7 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this part of each week of unemployment that falls within the period.

[6] Section 11(1) of the Act states that a week of unemployment for a claimant is a week in which the claimant does not work a full working week.

[7] Section 30 of the Regulations states subject to subsections (2), (3) 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. (1) Where a claimant is employed or engaged in the operation of a business as described in subsection (2) 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. (2) 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;(b) the nature and amount of the capital and resources invested; (c) the financial success or failure of the employment or business;(d) the continuity of the employment or business; (e) the nature of the employment or business; and (f) the claimant's intention and willingness to seek and immediately accept alternate employment. (3) 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 31st falls, if the claimant proves that during that period (a) the claimant did not work; or (b) the claimant was employed to such a minor extent that it would not have prevented the claimant from accepting full-time employment.

[8] Subsection 18 of the Act states a claimant is not entitled to be paid benefits for any working day in a benefit period for which the claimant fails to prove on the 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.

EVIDENCE

[9] On August 11, 2014 the Claimant made an application for regular employment insurance benefits (GD3-1 to GD3-9).

[10] On October 7, 2014 the Commission notified the Claimant she had been selected to attend a Claimant Information Session on October 28, 2014 which will explain her rights and responsibilities as well provide information on programs and services available to help her find work quickly (GD3-10 to GD3-13).

[11] On November 17, 2014 the Commission contacted the Claimant by telephone to follow up as to why the Claimant did not attend the information session on October 28, 2014. The Claimant stated to the Commission she didn't attend because she is starting her own business and has arranged a line of credit with her bank as well as office space. She stated she didn't call Service Canada to let advise them of her reason for not attending the session because she couldn't find the number and she was too busy setting up her business (GD3-14).

[12] On November 18, 2014 the Claimant stated to the Commission that she had started a sole proprietorship with hopes to make it a partnership. She stated the name of her business and location of the space she leased for the business. She stated she signed a lease on October 15, 2014 to start November 1, 2014. She stated her lease payment amount and that she had incorporated her business around the first part of October. She stated she started operating her business November 15, 2014. She stated she had obtained her licenses and she had to purchase a computer and office equipment, pay her first and last month rent. So far she had incurred \$6000.00 in expenses relating to the business as well had obtained a line of credit for \$20,000.00. She stated she controls her own hours and plans to work 36 hours per week during normal

business hours. Currently she is performing all business related task but will hire a bookkeeper. Her intentions are to make this business her principal means of livelihood.

[13] The Claimant stated she did not contact the Commission to find out how starting a business would affect her claim, she was just so busy renovating her family home and setting up her office and she was not sure what information to provide so she was glad the Commission called. She stated that she had only found one position for an immigration lawyer but that was not up her alley. She hadn't looked at other law firms because she wanted to go out on her own. She stated that when you have kids it's really hard to work for a firm. She needed some control and really needed to focus on her work life balance. She stated she made the decision to start her own business the later part of September, early October (GD3-15 to GD3-16).

[14] Copies of Articles of Incorporation for X Law Prof. Corp are dated September 25, 2014 (GD3-19 to GD3-21).

[15] A letter from Canada Revenue Agency dated September 29, 2014 issues a Business Number to X Law Prof. Corp (GD3-22 to GD3-24).

[16] A Permit for a Professional Corporation to practice law was effective November 6, 2014 (GD3-25).

[17] On November 20, 2014 the Commission notified the Claimant that action was taken on her Employment Insurance Claim and that she knowingly made 4 false representations (GD3-26 to GD3-28).

[18] A notice of debt was issued in the amount of \$4277.00 (GD3-29).

[19] On December 19, 2014 the Claimant made a request for reconsideration regarding the decisions and penalties (GD3-30 to GD3-36).

[20] On February 12, 2015 the Claimant stated to the Commission that she did not realize the significance of her statements to the agent about when she received her financing and completed her business applications. She stated that most of the information could be completed on-line within a half hours and in no way could affect her ability to look for and accept employment. She stated she was still looking for employment up until November when she occupied her office

space. She was willing to accept employment as long as it paid enough. She stated she would have cancelled everything if the job had a good salary. She stated she could supply a job search as she had called several lawyers in that period of time. The Claimant stated she did not purposely make a false statement. She did not consider herself involved in her self-employment business until she occupied her office space in November. She was going to inform the Commission once that had happened. She also had been forthcoming and did not lie to the Integrity officer at any time and answered their questions. The Claimant stated she would supply a job search (GD3-38).

[21] On February 20, 2015 the Commission contacted the Claimant regarding her job search. The Claimant stated she was delaying in getting the information as the people she was in contact with, 2 have relocated and one had retired. She is also busy establishing her law firm and trying to make a living and earn some income because she has no money coming in (GD3-39).

[22] On February 26, 2015 the Claimant provided a job search with two contacts (GD3-40).

[23] On March 4, 2015 the Commission notified the Claimant of their decision regarding the request for reconsideration (GD3-42 to GD3-43).

[24] In the Notice of Hearing the Claimant stated that she did not devote substantial time to the new business until she got her work space on November 15, 2014. She stated she spent a maximum of three hours on the new business from the end of September to the middle of November which works out to three to four minutes per day. She stated during the summer and fall months she continued to search for employment by checking the Law Society of Saskatchewan Careers section on its website and by making inquiries within the legal community. She stated had she found a job she would have taken it. In fact if a suitable position came up she would take it now because running one's own law firm is much more difficult than working for another firm with a good salary. She believes the EI system is fundamentally flawed in that it encourages people to work for an employer and discourages them from starting their own business. Benefits should be provided at least until the date on which a claimant is able to actually start working at their business, especially where the evidence indicates that that claimant's continued to search for and to be available for, available employment positions. In her case it appears the evidence is being ignored (GD2-1 to GD2-10).

SUBMISSIONS

[25] The Claimant submitted that:

- a) The letter in GD2-6 states her position;
- b) EI has been wanting to put her date of being unavailable when she first incorporated at the end of October;
- c) Her bank told her she had to incorporate in order to get financing. Prior to Nov 15th, she met with bank that took an hour, applied on line for ½ hour and moved boxes that took about 1 ½ hours that that worked out to 3 hours from the end of September till the end of November being 3 to 4 minute per day;
- d) Her landlord had leased her space around the September 15th but he didn't have everything moved out so he gave he gave her money back and then she could move in November. She received her first client the second week of November, officially opening as advertised in the Leader Post on November 1, 2014;
- e) She began bringing in money around the January and as of June she had brought in about \$60,000.00. She has hired an administrative assistant plus she now has an articling student for free;
- f) She indicated that if there was employment opportunities that arose now, that if that great job came up she would take it now. But personally for her that over the past 12 years she had worked for three law firms. The first she worked for 7.5 years, and then a firm for 2 years and then her last job 2 years;
- g) When she first started working she was single, but then she has children and this changed her work situation. When working for a firm you are expected to work 50 to 60 hours and when she had children this changed;
- h) Working in a private practice allows her to work more effectively, especially in family law, employment law and some personal injury. This is where she belongs, she is passionate about helping the people she helps;

- i) She was looking for a private practice but she couldn't find anything in family law. She looks on the law society web site as well as asked around. She has a lot of connections in the law community and she was contacting them;
- j) She applied for benefits and started to receive benefits at the end of August and then she received the letter (GD3-10) requesting her to attend an interview and on November 17, 2014 she told the Commission she was starting her own business;
- k) In (GD3-15) it's odd that she would have said it's a sole proprietorship when it's a corporation. She must not have worded it correctly. But she did want to start her own business. She believed it was the only way she was going to make it on her own. After losing three positions with three law firms you're not likely going to get another job with another law firm. She hadn't been approved from the bank, and it was when she was approved she signed her lease;
- l) In (GD3-20) if the document states she incorporated on September 25, 2014 it must be true, but she remembers there was some kind of delay;
- m) On September 28, 2014 she did request a business number from Canada Revenue Agency;
- n) On November 6, 2014 she received her permit form the Law Society;
- o) She remembers at the time she was trying to figure out how to let Service Canada know she was starting her own business, and by that she means going on the web site and looking for a phone number. She stated this to the Commission when they called her to find out why she did not attend the training session;
- p) She didn't know how to tell them what she was doing or what she was intending them to do. She was just looking for a place on the web site to say click here if you are starting your own business, she didn't think going to a training session on how to find a job would be helpful;

- q) She had just said to her Mom the day before that she needed to tell Service Canada what she was doing and she was going to, she just didn't know how and she had few things on her brain;
- r) There was nothing prevented her from attending the information session or going to a Service Canada office and advise them of her plans to start her own business;
- s) She thinks she may have forgotten about the session. It was a session of finding a job and she knows how to find a job, especially in the law community because she has found jobs three times before;
- t) How could she sustain a job, how could they find her a job, because she hasn't been able to keep a job, women with children don't have the same opportunities and it's all over the internet. Service Canada should have been more clear in what the information session would have included;
- u) She looked for work on the law society website, the career section of the Leaderpost and called a paralegal she knew from another firm in September who told her about a job at Saskpower but she didn't apply. Access Communication was another on chance they might be looking for in house legal counsel. She stated Service Canada never contacted them to verify she had; and
- v) She never sent out any resumes but recalls there was an ad for an immigration lawyer but she didn't have any experience so she didn't apply.

[26] The Respondent submitted that:

On the issue of Failing to Prove Unemployed

- a) The Commission analyzed the six factors found in subsection 30(3) of the Regulations and concluded that:
- b) Time spent – the Claimant's efforts in setting up and establishing her own law firm are not considered minor in extent. The Claimant made the decision to pursue this endeavor in late September/early October 2014. Since October 15th she has been busy moving the

previous tenant out and moving herself into the office space, advising that it was her intent to operate the business 36 hours per week, during regular business hours, Monday to Friday, 8am to 5 pm which supports the statements that she is trying to make this business full time and her main source of income;

- c) Nature and amount of capital and resources invested – The Claimant stated she is registered as the sole proprietor/owner and incorporated the business on September 25, 2014 in order to obtain financing. She obtained a business number effective September 25, 2014 and law society permits. She also spent \$1500.00 on computer and office equipment and signed a one year lease and has paid \$3000.00 for the first and last month rent. She has a total of \$6000.00 in business expenses and law society fees. She also confirmed she received a \$20,000.00 Line of Credit to establish a law firm;
- d) Financial success or failure of the employment or business - The Claimant advised that she had not had her first client yet so has not had any income, but is confident that her 12 years of experience in family law and the current need for family law services will lead to success. These activities demonstrate that the success of the business will depend on the client's involvement which is of a major extent;
- e) Continuity of the employment or business - The Claimant advised that it is her intent to make this her principal means of livelihood, and that it is her intent to grow the business, to add people and partners, to expand in family law and to add real estate law and wills and estate law. She stated that she plans on meeting with investors and is looking to undertake further marketing efforts to bring in clients as she is trying to make this business a success. This is confirmed by the Claimant as she stated in her appeal that her business is now picking up, she is earning an income and she is employing other people;
- f) Nature of the employment or business - The Claimant has opened a law firm providing legal services, specifically family law. The Claimant has worked in the legal business for the last 12 years and this business is similar to her previous occupations and her participation in this business is necessary;

- g) Claimant's intention and willingness to seek and immediately accept alternate employment -The Claimant advised that she did look for employment other than self-employment, the only position she found was for an immigration lawyer and she stated she did not have the experience required. Her job search is not reasonable for a person who is desirous of working in alternate employment. The Claimant stated that she made the decision to pursue self-employment in late September, 2014 and it is clear that it was her main goal to pursue this business opportunity;
- h) When viewed objectively, all six factors point to a finding that the Claimant's engagement in the operation of her business was that of a person who would normally rely on that level of self-employment as their principal livelihood; and
- i) The Claimant has argued that the amount of time she spent before November 15, 2014 setting up and establishing her business was only a few hours per week, however on many occasions the claimant has confirmed that her intentions are to make self-employment her main source of income and that she was devoting her time to making this business a viable option. It was not until after the decision to disentitle the claimant, resulting in an overpayment that she attempts to minimize the significance of her original statements.

On the issue of Availability

- a) The Commission submits that the Claimant was not looking for work other than her self-employment. She made the decision to pursue self-employment in late September and is completely committed to this by incorporating the business, signing a one year lease agreement on October 15, 2014, arranging financing through the bank, paying for her rent and various business expenses;
- b) Although the Claimant submitted a job search, it is not sufficient to show that she was dedicated to looking for other employment. The information shows that she contacted a paralegal and a technician to see if they knew about any jobs for lawyers, rather than contacting employers or making applications directly despite telling the Commission that she looked at the job search bank and newspapers. The Claimant would have been

aware her job search is unacceptable as she had been sent instructions to complete a job search form when she was asked to attend the Claimant Information Session;

- c) The Claimant had specifically stated during her initial interviews that she failed to attend her Claimant Information Session as she was involved in self-employment activities and that she hadn't looked for work as she was thinking about getting out on her own. She also tells the Commission the reason she had not yet contacted the Commission to discuss how her situation may affect her claim was because she had been so busy renovating her family home as it is up for sale and setting up her office;
- d) The Claimant stated that she did not realize the significance of her earlier statements. The Commission argues that the Claimant's subsequent statements about her availability contradict the prior statements about her self-employment activities and job search which lessens the credibility of her statement considering that she had since become aware of the disentitlement and resulting overpayment;
- e) In fact, it is well established in jurisprudence that a Claimant's initial statement holds more weight than a subsequent denial. Unless there are extraordinary circumstances, such as the initial statement being implausible or indications that it was obtained under duress, the first statement retains full value in spite of subsequent denials by the Claimant; and
- f) The Commission maintains that its decision for failing to prove she was unemployed and failing to prove her availability for work complies with the Employment Insurance legislation and is supported by case law.

ANALYSIS

[27] Section 9 of Act states when an insured person who qualifies under Section 7 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this part of each week of unemployment that falls within the period. Subsection 11(1) of the Act states a week of employment for a claimant is a week in which the claimant does not work a full working week.

[28] If a claimant is self-employed or engaged in the operation of a business on his or her own account (“self-employment”) during any week in a benefit period, subsection 30(1) of the Regulations deems that claimant to have worked a full working week during that week. As a result, that week will not be considered to be a week of unemployment for the purposes of section 9 of the Act. Subsection 30(2) of the Regulations provides an exception to the deeming rule in subsection 30(1) of the Regulations where the self-employment is minor in extent. The issue in this application is whether that exception applies to Claimant.

[29] The Tribunal must determine whether the Claimant’s involvement in her law firm operation is minor in extent and whether the level of engagement can be determined as a principal means of livelihood. In this case, the Tribunal addressed the six factors of subsection 30(3) of the Regulations.

[30] The Claimant presents the argument on time spent that prior to November 15th, she met with bank that took an hour, applied on line for ½ hour and moved boxes that took about 1 ½ hours and that worked out to 3 hours from the end of September till November being 3 to 4 minute per day.

[31] The evidence on the file support that the time spent was not minor in extent as the Claimant made the decision to pursue this endeavor in late September/early October 2014. Since October 15th she has been busy moving the previous tenant out and moving herself into the office space, advising that it was her intent to operate the business 36 hours per week, during regular business hours, Monday to Friday, 8am to 5 pm which supports the statements that she is trying to make this business full time and her main source of income.

[32] The Tribunal finds the Claimant’s initial statements she made to the Commission to be a more accurate account of the events and that her testimony at the hearing that she only spent 3 hours from the end of September to November is not a credible statement. The Tribunal finds that the Claimant also had been preparing for starting her own business prior to the end of September as she provided oral evidence that originally her landlord had leased her space around the September 15th but he didn’t have everything moved out so he gave he gave her money back and then she could move in November. She received her first client the second week of November, officially opening as advertised in the Leader Post on November 1, 2014. The

Tribunal finds the Claimant would have spent additional time in preparation to the opening and her first client. There is evidence to support she spent time on getting telephone lines, putting ads in the paper and other crucial elements that are necessary in starting a new business.

[33] The Tribunal finds from the Claimant's oral evidence also support that she had made arrangements to lease her office space prior to September 15, 2014 to which she testified that she was not able to move in so the landlord refunded her the money. The documentary evidence supports that the Claimant's intentions were to start a business in September as the Article of Incorporation was electronically filed on September 25, 2014. As well her request for a Business Number from the Canada Revenue Agency was acknowledged on September 29, 2014.

[34] The Tribunal finds that the Claimant had business cards printed at the time she submitted her request for a Business Number from Canada Revenue Agency which also substantiates she was working on setting up her business prior to the end of September (GD3-24).

[35] The Tribunal finds the evidence supports that the Claimant's time spent in setting up her law firm was not minor in extent. *Charbonneau v. Canada (A.G.)* A-699-02

[36] On the factor of the capital and resources invested. The evidence on the file by the Claimant's statements that she spent \$1500.00 on computer and office equipment and signed a one year lease and has paid \$3000.00 for the first and last month rent. She has a total of \$6000.00 in business expenses and law society fees. She also confirmed she received a \$20,000.00 Line of Credit to establish a law firm.

[37] The Tribunal finds that the amount of capital and resources were of significant nature. The Tribunal finds from the evidence on the file the Claimant was required to invest in computer and office equipment as well as establish a \$20,000.00 line of credit, which the Tribunal finds is a substantial amount. The Tribunal finds the amount of capital and resources was not minor in extent.

[38] On the factor of financial success or failure the Claimant provided contradictory evidence in that she stated she would cease her business operations if an employment opportunity arose that paid enough money. However the Claimant provided oral evidence that

having her own law firm was her only option because personally for her that over the past 12 years she had worked for three law firms. The first she worked for 7.5 years, and then a firm for 2 years and then her last job 2 years. When she first started working she was single, but then she has children and this changed her work situation. When working for a firm you are expected to work 50 to 60 hours and when she had children this changed. She provided oral testimony that starting her own business was her only option. She stated how could she sustain a job, how could they find her a job, because she hasn't been able to keep a job, women with children don't have the same opportunities and it's all over the internet.

[39] The Tribunal finds from the Claimant's oral evidence that her intent was to start her own business so she could better balance her personal and work life and that she her goal was to make it successful.

[40] On the factor of the continuity of the employment or business the evidence on the file state The Claimant advised that it is her intent to make this her principal means of livelihood, and that it is her intent to grow the business, to add people and partners, to expand in family law and to add real estate law and wills and estate law. She stated that she plans on meeting with investors and is looking to undertake further marketing efforts to bring in clients as she is trying to make this business a success. This is confirmed by the Claimant as she stated in her appeal that her business is now picking up, she is earning an income and she is employing other people.

[41] The Tribunal finds from the Claimant's oral evidence that this is still the case and that she has been successful. She testified that when she started the business her plans were to hire a bookkeeper and since her initial plans she has been successful at growing her business. She now employs an administrative assistant, plus has an articling student. She also provided oral evidence that she has generated \$60,000.00 of income.

[42] On the factor of nature of the employment or business the evidence on the file show the Claimant has opened a law firm providing legal services, specifically family law. The Claimant has worked in the legal business for the last 12 years and this business is similar to her previous occupations and her participation in this business is necessary.

[43] The Tribunal finds from the Claimant's oral evidence that working in a private practice allows her to work more effectively, especially in family law, employment law and some personal injury. This is where she belongs; she is passionate about helping the people she helps.

[44] The Tribunal finds that the nature of employment or business is one that the Claimant is experienced and passionate in and one that her intent is to be successful in.

[45] On the factor of the Claimant's intention and willingness to seek and immediately accept alternate employment.

[46] The Tribunal finds the evidence on the file state the Claimant advised that she did look for employment other than self-employment, the only position she found was for an immigration lawyer and she stated she did not have the experience required. Her job search is not reasonable for a person who is desirous of working in alternate employment. The Claimant stated that she made the decision to pursue self-employment in late September, 2014 and it is clear that it was her main goal to pursue this business opportunity.

[47] The Tribunal finds the Claimant's evidence is contradictory as she provided subsequent statements to the Commission and oral evidence that she was willing to accept employment providing the pay was adequate, and then subsequently provided oral evidence that having her own business was the only way for her. She testified that she hasn't been able to keep a job, women with children don't have the same opportunities and it's all over the internet.

[48] The Tribunal finds that Claimant's initial statements are significant and that she was spending significant time starting own business and that her desire was to become self-employed. Although the Claimant stated she was willing to seek and accept employment she was only able to provide two contacts to whom she spoke to in the summer or early fall, which indicates was a time before she began the task of starting her own business. The Tribunal finds that the Claimant may have searched on law society web site and the local paper however she testified that she never sent out any resumes or made any applications for employment to any of her contacts, even on the event there may be potential employment.

[49] The Tribunal finds that Claimant's initial statements she stated to the Commission that she did not attend the information session on October 28, 2014 because she is starting her own

business and has arranged a line of credit with her bank as well as office space. She stated she didn't call Service Canada to let advise them of her reason for not attending the session because she couldn't find the number and she was too busy setting up her business. The Tribunal notes the letter requesting the Claimant to attend the information session was sent to her on October 7, 2014 which substantiates the Claimant was working on setting up her own business earlier than November 15, 2014.

[50] The Tribunal relies on *Marlowe v. Canada (A.G.)* 2009 FCA which states:

The Claimant was not entitled to benefits of the exception in subsection 30(2) of the Regulations because his self-employment in the new business during the benefit period was full-time and therefore not minor in extent.

[51] The Tribunal finds the Claimant has failed to show she falls within the exception of subsection 30(2) of the Regulations. The test is objective and not determined simply by ascertaining the Claimant's intentions. Thus, an expressed intention that the business should not become the Claimant's principal means of livelihood is a factor to be considered but is not in itself conclusive.

[52] In the Notice of Appeal the Claimant argues that she believes the EI system is fundamentally flawed in that it encourages people to work for an employer and discourages them from starting their own business. Benefits should be provided at least until the date on which a claimant is able to actually starting working at their business, especially where the evidence indicates that the claimant continued to search for and to be available for, available employment positions. In her case it appears the evidence is being ignored.

[53] The Tribunal finds that although the Claimant believed she should be entitled to benefits while she was starting her business, there is not sufficient evidence to support that she was actively seeking employment at the same time. Unemployment insurance benefits "are not intended to be used to subsidize a claimant who carries on a business for himself or is endeavoring to start a business of his own.

On the issue of Availability

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

[55] In order to qualify for employment insurance benefits, the Claimant must also be able to prove that she was capable of work and unable to find suitable employment. Therefore, the burden of proof is on the Claimant. Availability is a question of fact that is based on the Claimant's desire to return to the labour market as soon as she is offered suitable employment. This desire is shown through reasonable ongoing efforts to find suitable employment as quickly as possible (*Bois* A-31-00, *Cornelissen -O'Neil* A-652-93 and *Bertrand* A-631-81).

[56] The question of whether the claimant was available for work is a question of fact that is based on an assessment of the evidence as interpreted by the case law (*Faucher v. Canada (Attorney General)* (A-56-96), *Canada (Attorney General) v. Bois* (2001 FCA 175 (CanLII)).

[57] In order to be found available for work, a claimant shall (1) have a desire to return to the labour market as soon as a suitable employment is offered; (2) express that desire to return to work through efforts to find suitable employment; and (3) not set personal conditions that might unduly limit their chances of returning to the labour market.

[58] The Claimant presents the argument that she would have accepted employment as long as it paid enough and that she would cease her business should an employment opportunity arise.

[59] The Tribunal finds that the Claimant may have accepted employment however the evidence on the file and her oral testimony contradicts the argument, in the fact that her intention was to start her own business and that she felt that was her only option in order for her to balance her personal and work life. The Tribunal finds the evidence does not support that the Claimant had a desire to return to the labour market to work for someone else, but rather to start her own business.

[60] The Claimant presents the argument that she was making efforts to seek employment right up until she received her first client in November. She provided contacts to substantiate her job search.

[61] The Tribunal finds the evidence does not support that the efforts the Claimant was making expressed the desire to return to the labour market. The Tribunal finds the Claimant was provided with an opportunity to attend an information seminar to which she did not do and then when contacted by the Commission informed them she was not looking for work because she was starting her own business. The Tribunal finds from the Claimant's own admission to the Commission she had not been looking for work.

[62] The Claimant provided oral testimony that she looked for work on the law society website, the career section of the Leaderpost and called a paralegal she knew from another firm in September who told her about a job at Saskpower but she didn't apply. Access Communication was another on chance they might be looking for in house legal counsel. She stated Service Canada never contacted them to verify she had and she never sent out any resumes but recalls there was an ad for an immigration lawyer but she didn't have any experience so she didn't apply.

[63] The Tribunal is not satisfied from Claimant's oral evidence that she was actively seeking employment and the oral evidence contradicts her original statements to the Commission when she said she had not been looking for work but busy starting her own business.

[64] The Tribunal finds the evidence supports that the Claimant set personal conditions that might unduly limit her chances of returning to the labour market when she made the decision to devote her time to starting her own business. The Tribunal finds there is no evidence to support that the Claimant would have accepted other employment instead of starting her own business.

[65] The Tribunal finds the Claimant's oral evidence further supports its findings as the Claimant testified that she remembers at the time she was trying to figure out how to let Service Canada know she was starting her own business, and by that she means going on the web site and looking for a phone number. She stated this to the Commission when they called her to find out why she did not attend the training session.

[66] The Tribunal finds that a disentitlement should be imposed because the Claimant has failed to prove she was unemployed as per the Regulations.

[67] The Tribunal finds a disentitlement should be imposed because the Claimant has failed to prove she was available for work as per the Act.

CONCLUSION

[68] The appeal on both issues is dismissed.

Teresa Jaenen
Member, General Division – Employment Insurance Section