



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *C. T. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 20

Tribunal File Number: GE-16-2372

BETWEEN:

**C. T.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Bernadette Syverin

HEARD ON: January 27, 2017

DATE OF DECISION: February 17, 2017

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

The Appellant, Mrs. C. T., did not attend the scheduled hearing. The Respondent, the Canada Employment Insurance Commission (Commission), did not attend.

### **INTRODUCTION**

[1] The Appellant filed a claim for benefits on January 23, 2013, and a benefit period was established.

[2] An investigation undertaken by the Commission revealed that, in December 2012, the Appellant had applied for a business number with the Canada Revenue Agency. The investigation further revealed that between April 22 and June 21, 2013, the Appellant was launching this business while claiming Employment Insurance benefits.

[3] The Appellant was disentitled to benefits from April 22 to June 21, 2013, due to the fact that she was not available for work.

[4] The Appellant is appealing the Commission's decision to uphold her disentanglement from benefits from April 22 to June 21, 2013, due to the fact that she was unavailable for work.

[5] An initial hearing date was scheduled for December 20, 2016. However, the Tribunal granted a hearing adjournment after it received a letter from the Appellant explaining that serious personal circumstances prevented her from effectively defending her case. A new hearing date was set for January 27, 2017. The notice was sent via priority mail; the Appellant signed for the notice on December 29, 2014 (GD1 – GD7).

[6] In a letter addressed to the Tribunal and dated January 10, 2017, the Appellant wrote the following: [translation] "I wish to confirm to the Tribunal that I am unable to participate in the rescheduled hearing... I am therefore requesting that the Tribunal issue a decision by establishing each party's liability and thus reducing the amount owed, either wholly or in part. I

will comply with the Tribunal's decision and will request that the necessary measures be taken to facilitate the repayment...", as shown in Exhibit GD8-1.

[7] Given that the Tribunal was satisfied that the Appellant had indeed received the notice of hearing, the hearing proceeded in her absence, pursuant to subsection 12(2) of the *Social Security Tribunal Regulations*.

[8] Notwithstanding the foregoing, on the day of the hearing, the Tribunal waited 30 minutes on the line to allow the parties enough time to join the teleconference, but to no avail.

[9] This hearing proceeded via teleconference for the reasons set out in the notice of hearing.

## **ISSUE**

[10] Was the Appellant available for work between April 22 and June 21, 2013, as per section 18 of the *Employment Insurance Act* (Act)?

## **EVIDENCE**

[11] The Appellant filed a claim for benefits on January 23, 2013, and a regular benefit period was established (GD3-3-GD3-11).

[12] In 2015, an investigation revealed that the Appellant had requested a business number while in receipt of Employment Insurance benefits. Therefore, on August 13, 2015, the Commission asked the Appellant to complete a questionnaire about her self-employment during the period of April to July 2013. The Commission also asked her to provide a list detailing her job search (GD3-12-GD3-20).

[13] The Appellant did not complete the questionnaire. However, on August 19, 2015, in a letter addressed to the Commission, the Appellant explains that she had established her business in December 2012, but that it had become operational only on June 28, 2013. She further stated that she had participated in the Emploi Québec Support for Self-Employment program while she was receiving Employment Insurance benefits. She also provided to the Commission

contact details for more information. She also enclosed with the letter a newspaper article featuring her company (GD3-21 to GD3-25).

[14] On November 17, 2015, in an initial telephone conversation with the Commission, the Appellant explained that as of April 21, 2013, she began investing all her time to managing her business. She also stated that during the period of April 22 to June 21, 2013, she was not actively searching for employment and was not available for work. She did not go on job interviews and has no job search records (GD3-26).

[15] On November 17, 2015, Emploi Québec confirmed that the Appellant had indeed received assistance via the Support for Self-Employment program from June 23 to July 2013, and from August 2013 to June 2014 (GD3-27).

[16] Upon request from the Tribunal, following the hearing on January 27, 2017, the Commission provided documentation that clearly confirms that the agreement between the Appellant and Emploi Québec went into effect on June 23, 2013. The Commission also submitted screen shots of the Appellant's attestations, in which she declares her self-employment activities as of June 23, 2013 (GD12-1 to GD12-3).

[17] On March 31, 2016, during a second telephone conversation with the Commission, the Appellant once again confirmed that she was not available for work given that, as of April 21, 2013, she has been dedicating all her time to launching her company (GD3-28).

[18] On April 13, 2016, the Commission disentitled the Appellant from receiving benefits from April 22 to June 21, 2013, due to the fact that she was not available for work. Thus, in accordance with the Act, this resulted in an overpayment of \$3,095. A penalty pursuant to section 38 of the Act was also imposed for making false or misleading statements, and a notice of violation was issued in accordance with subsection 7.1(4) of the Act (GD3-35).

[19] On April 26, 2016, the Appellant filed a request for reconsideration as she declares that she had not made any false statements. The Appellant also states that she was available for work during the entire period at issue; she was working with her employment assistance agent

in returning to the labour force and her decision to start her company was made in concert with her employment assistance agent (GD3-31-GD3-33).

[20] On May 15, 2016, the Appellant further submitted that she had always been available for work as her employment is only seasonal, from July to September, and that she had never put her job search on hold. However, she was unable to provide a record of her job search for the period of April 22 to June 21, 2013. She reiterated that she dedicated over half of her time getting her business up and running and therefore spent little time looking for a job. She admitted that she mostly looked for jobs that would start in the fall, after her business shuts down for the year (GD3-36).

[21] In the reconsideration decision of May 17, 2016, the Commission decided in the Appellant's favour on the issues of the penalty and violation; however, the initial findings with regard to availability and the overpayment were upheld (GD3-37 to GD3-38).

[22] On June 6, 2016, the Appellant filed a notice of appeal with the Employment Insurance Section of the Tribunal's General Division, in which she states that she does not understand the basis for the Commission's decision (GD2-1 - GD2-3 and GD2A-1 - GDA-5).

## **SUBMISSIONS**

[23] The Appellant stated that she was not available for work during the period of April 22 to June 21, 2013. Nonetheless, her unavailability is justified by the fact that she was participating in the Emploi Québec Support for Self-Employment program, which is geared towards entrepreneurs starting their own business.

[24] The Commission states that Emploi Québec has confirmed that the Appellant had signed an agreement with them on June 23, 2013—after the period at issue. The Commission further states that the Appellant did not conduct a job search during this period. The Appellant decided to start her business and devoted all her time to this endeavour during the period of April 22 to June 21, 2013. The Commission maintains that its decision complies with the legislation and is supported by case law.

## ANALYSIS

[25] The relevant legislative provisions are included in an appendix to this decision.

[26] Paragraph 18(1)(a) of the Act stipulates 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.

[27] Section 32 of the *Employment Insurance Regulations* defines a working day as any day of the week except Saturday and Sunday.

[28] In order to be entitled to benefits, the claimant must demonstrate that they were capable of and available for work and unable to obtain suitable employment (*Bois* A- 31-00; *Cornelissen-O'Neil* A-652-93; *Bertrand* A-631-81).

[29] In *Faucher v. Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (A-56-96), the Federal Court of Appeal set out the three factors to be considered when determining whether a claimant is available for work:

- 1) the desire to return to the labour market as soon as a suitable job is offered;
- 2) the expression of that desire through efforts to find a suitable job; and
- 3) not setting personal conditions that might unduly limit the chances of returning to the labour market.

[30] With respect to the first factor, the evidence shows that the Appellant lacked the desire to return to the labour market as soon as a suitable job was offered.

[31] In fact, the Appellant had clearly and repeatedly confirmed—on November 17, 2015, and on March 31 and May 16, 2016—that during the period of April 22 to June 21, 2013, she had devoted all her time to starting her business and that she was not available for work. She further added that her unavailability was justified by the fact that she was starting her business under an agreement with Emploi Québec.

[32] The Commission contends that the agreement with Emploi Québec was entered into only after the period at issue. The Appellant did not submit any evidence to prove otherwise; this fact is therefore undisputed.

[33] Furthermore, in a conversation with the Commission on May 16, 2016, the Appellant said that she did not look for jobs during the period of April 22 to June 21, 2013. However, she was keeping a close eye on potential jobs for the fall of 2013, once her business would be closed for the year.

[34] As regards the Appellant's statements to the effect that she was unavailable for work, the Tribunal echoes the words of the umpire in CUB 25057: "It goes without saying that a person may not be regarded as available when that person admits to not being available or is in a situation that prevents him or her from being available. Payment of benefit is subject to the availability of a person, not to the justification of his or her unavailability..."

[35] The Tribunal is of the opinion that the Appellant did not demonstrate a desire to return to the labour market as soon as a suitable job was offered during the period at issue given that she was mainly preoccupied with launching her business.

[36] As for the second factor, the Appellant admitted having devoted all her time to her business, did not search for employment, and clearly stated that she was not available for work during the period at issue.

[37] Availability is a question of fact to be considered on the basis of all the circumstances of each individual case. Demonstrating availability requires the making of reasonable and customary efforts to obtain suitable employment (*Canada (Attorney General) v. Whiffen*, 1994 CanLII 10954 (A-1472-92)).

[38] The Tribunal finds that the Appellant failed to make efforts to find suitable employment during the period of April 22 to June 21, 2013.

[39] Finally, with respect to the third factor regarding the absence of personal conditions that unduly limit chances of returning to the labour market, the Commission contends that by devoting all her time to starting her business, the Appellant had unjustifiably limited her chances of re-entering the labour market.

[40] The submitted evidence shows that the Appellant had clearly intended above all to launch her business and that her main goal was not to return to the labour market. She had therefore set personal conditions that unduly limited her chances of returning to the labour market.

[41] The Tribunal finds there is no evidence to support that the Appellant would have accepted other employment instead of starting her own business during the period at issue. The Tribunal finds that the Appellant had set personal conditions that might unduly limit her chances of returning to the labour market when she made the decision to devote all of her time to starting her own business.

[42] The Tribunal is of the opinion that by focussing all her efforts on starting her business, the Appellant had failed to discharge the onus of proof that she was available for work. In this case, it is evident that the Appellant was not available for work during the period of April 22 to June 21, 2013.

[43] In light of the above, the Tribunal finds that the Appellant failed to meet the three factors set out by case law to establish her availability for work, as required by the Act. It is laudable that the Appellant was successful in creating employment for herself; however, in order for benefits to be payable, a claimant must prove that they were available and were actively searching for work for each day they were available, as stipulated by the Act and case law. The Tribunal does not find that the Appellant's case presents an exception to this rule.



## **CONCLUSION**

[44] The Tribunal finds that the Appellant failed to meet the onus on her to prove her availability for work for every working day during the period of April 22 to June 21, 2013. The Commission's reconsideration decision of May 17, 2016, is therefore upheld.

[45] The appeal is dismissed.

Bernadette Syverin  
Member, General Division - Employment Insurance Section

## APPENDIX

### THE LAW

#### *Employment Insurance Act*

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.

(2) A claimant to whom benefits are payable under any of sections 23 to 23.2 is not disentitled under paragraph (1)(b) for failing to prove that he or she would have been available for work were it not for the illness, injury or quarantine.

#### *Employment Insurance Regulations*

32 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.