Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *L. J. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 54

Tribunal File Number: GE-16-1834

BETWEEN:

L. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: January 12, 2017

DATE OF DECISION: April 21, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, Mr. L. J., attended the videoconference hearing on January 12, 2017. He was represented by Counsel Jean-Guy Ouellet from the firm Ouellet, Nadon and Associates. Mr. Richard-Alexandre Laniel, an intern at Ouellet, Nadon and Associates, also attended the hearing.

[2] The Respondent, the Employment Insurance Commission of Canada (Commission), was absent during the hearing.

INTRODUCTION

[3] On January 17, 2016, the Appellant filed an initial claim for benefits effective January 17, 2016. He reported having worked for the employer Second Dimension International Ltd. (SDI Marketing) from March 23, 2014, to November 15, 2015, inclusively, and that he had stopped working for this employer due to dismissal. The Appellant also reported that he had worked for the employer T. T. from February 1, 2014, to March 20, 2014, inclusively, and that he had stopped working for this employer due to a shortage of work (Exhibits GD3-3 to GD3-14).

[4] On March 1, 2016, the Commission informed the Appellant that it could not pay him Employment Insurance benefits as of January 17, 2016, because he was taking a training course on his own initiative and because he had not shown that he was available for work (Exhibit GD3-16).

[5] On March 10, 2016, the Appellant submitted a request for reconsideration of an Employment Insurance decision (Exhibits GD3-17 to GD3-30).

[6] On April 8, 2016, the Commission advised the Appellant that it was upholding its decision of February 17, 2016 [*sic*] [March 1, 2016], concerning his availability for work (Exhibits GD3-54 and GD3-55).

[7] On May 8, 2016, the Appellant filed a notice of appeal with the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (Tribunal).

[8] On May 19, 2016, in response to a request by the Tribunal in this regard, dated May 11, 2016, the Appellant sent the Tribunal a [translation] "copy of the reconsideration decision that is the subject of the appeal" in an effort to complete his appeal file (Exhibits GD2A-1 to GD2A-14).

[9] On July 13, 2016, the Tribunal informed the Appellant that following the prehearing conference held on July 5, 2016, and during which the issue of a constitutional challenge was raised (*Canadian Charter of Rights and Freedoms*), under paragraph 20(1)(*a*) of the *Social Security Tribunal Regulations*, the Appellant had to file a notice to that effect by September 13, 2016, at the latest (Exhibits GD6-1 and GD6-2).

[10] On August 22, 2016, the Appellant said he was being represented by Counsel Jean-Guy Ouellet from the firm Ouellet, Nadon and Associates (Exhibit GD7-4).

[11] On August 22, 2016, the representative informed the Tribunal that the Appellant would not be presenting arguments based on the rights provided under the *Canadian Charter of Rights and Freedoms* and that he would not be filing a notice to that effect, under paragraph 20(1)(*a*) of the *Social Security Tribunal Regulations* (Exhibits GD7-1 to GD7-4).

[12] The appeal was heard by videoconference hearing for the following reasons:

a) The fact that the Appellant will be the only party present at the hearing; and

b) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[13] The Tribunal must determine whether the Appellant was available for work while he was attending a training course, within the meaning of paragraph 18(1)(*a*) of the *Employment Insurance Act* (Act).

EVIDENCE

[14] The evidence in the docket is as follows:

a) On March 10, 2016 (reconsideration request), and on April 6, 2016, the Appellant sent the Commission a copy of the following documents:

i. "Record 8—Amount for postsecondary studies—2014" indicating that the Appellant paid the University of Montreal $1,142.60 for tuition or examination fees, for the 2014 tax year (Exhibits GD3-18 to GD3-20);

ii. "Record 8—Amount for postsecondary studies—2015" indicating that the Appellant paid the University of Montreal $4,126.08 for tuition or examination fees for the 2015 tax year (Exhibits GD3-21 to GD3-23);

iii. Certificate in Philanthropic Management from the Faculty of Continuing Education at the University of Montreal, dated October 28, 2015 (Exhibit GD3-24);

iv. Lease agreement indicating that the Appellant is a tenant and that rent must be paid as of June 15, 2014 (Exhibits GD3-25 and GD3-26);

v. Appellant's McGill University transcript dated February 15, 2016, for courses taken during the summer 2014, fall 2014, winter 2015, fall 2015 and winter 2016 sessions (Exhibits GD3-27 to GD3-30, GD3-40 and GD3-41);

vi. Appellant's cover letter addressed to Équiterre on November 30, 2015, for a position supervising an on-the-ground solicitation team and confirmation of receipt of the application by the potential employer (Exhibits GD3-34 and GD3-35);

vii. Employment opportunity posted by the University of Montreal on November 27, 2015 (deadline to apply: December 9, 2015) for a "Coordinator, Community Action" position for the employer L’Oeuvre Léger and a letter from the Appellant to that employer, dated November 30, 2015, for the position in question (Exhibits GD3-36 to GD3-39);

viii. Employment opportunity posted by the University of Montreal on January 18, 2016 (deadline to apply: January 25, 2016), for a "Funding Coordinator" position for the employer International Festival of Lanaudière and an application letter from the Appellant to that employer, dated January 17, 2016, for the position in question (Exhibits GD3-42 to GD3-44);

ix. Employment opportunity posted by the University of Montreal on February 10, 2016 (deadline to apply: February 28, 2016) for a "Donor Relations Officer" position for the Dr. Julien Foundation and an application letter from the Appellant to that employer, dated February 7, 2016, for the position in question (Exhibits GD3-45 to GD3-49);

x. Business cards from Ranstad recruitment agency (sales & marketing) as well as from the employers Pro-vision X and Carrefour X (Exhibit GD3-50).

b) On April 6, 2016, the Appellant explained that he attended training at the University of Montreal and McGill University from January 6, 2016, to April 26, 2016, and that he was actively seeking employment. The Commission said it had explained to the Appellant that it did not doubt his efforts to seek employment. It explained that when asked whether he would be willing to give up his training course if an employment offer were to conflict with it, the Appellant responded that he was available for work 40 hours per week. The Commission said that it urged the Appellant to provide a specific response, either "yes" or "no," because he could have been available for work 40 hours per week, but not according to a normal working schedule. The Commission noted that the Appellant then responded to that question by saying that he would forward to the Commission all documents relevant to his job search (Exhibit GD3-31);

c) On April 7, 2016, the Commission said that it did not doubt the Appellant's efforts to seek employment, but that it was his availability for work that was being verified, which included his willingness to give up his training should he receive an offer of employment. The Commission said it had advised the Appellant that he had mentioned two different times, when he filed his benefit claim on January 17, 2016, and when he was contacted by an agent on February 2, 2016, that he would not give up his training if it conflicted

with an offer of employment. The Commission indicated that the Appellant had not wanted to answer "yes" or "no" to the question of whether he would be willing to give up his training course if an employment offer conflicted with it, and that he simply answered that he was available for work 40 hours per week (Exhibit GD3-51);

d) On April 8, 2016, the Commission said it had explained to the Appellant that work-study history is not a criterion for determining availability for work. The Commission specified that work-study history had been a criterion in that regard in the past, but that in January 2013, following a legislative change and the implementation of the "Connecting Canadians with Available Jobs" initiative, this criterion was no longer valid or taken into consideration (Exhibits GD3-52 and GD3-53);

e) In his notice of appeal filed on May 8, 2016, the Appellant sent a copy of the following documents:

i. Letter from the employer SDI Marketing (proof of employment) dated May 20, 2014, indicating that the Appellant had been working there since March 23, 2014, as a regular full-time employee, as well as pay stubs from that employer for the period from September 30, 2014, to November 13, 2015 (Exhibits GD2-5 to GD2-11);

ii. Appellant's banking statements from the Royal Bank of Canada indicating that deposits were made by the employer SDI Marketing for the period from May 15, 2014, to August 31, 2015 (Exhibits GD2-12 to GD2-21);

iii. "Payment history" indicating that the Appellant had made payments during the period from September 22, 2014, to November 15, 2015, to attend training courses (ex.: registrar's office, application for admission) (Exhibits GD2-22 and GD2-23);

iv. "Record 8—Amount for postsecondary studies—2015" indicating that the Appellant had paid the University of Montreal $4,126.08 (Exhibit GD2-24 or Exhibits GD3-21 to GD3-23);

v. "Record 8—Amount for postsecondary studies—2014" indicating that the Appellant paid the University of Montreal $1,142.60 (Exhibits GD2-25 to GD2-29 or exhibits GD3-18 to GD3-20);

vi. Certificate in Philanthropic Management from the Faculty of Continuing Education at the University of Montreal, dated October 28, 2015, and confirmation letter from the University to that effect (Exhibits GD2-30 and GD2-31 or exhibits GD3-24);

vii. Employment opportunity posted by the University of Montreal on February 10, 2016, for a “Donor Relations Officer” position at the Dr. Julien Foundation and the Applicant’s application letter addressed to that employer, dated February 7, 2016, for the position in question (Exhibits GD2-33 to GD2-37 or exhibits GD3-45 to GD3-49);

viii. Employment opportunity posted by the University of Montreal on January 18, 2016, for a “Funding Coordinator” position for the employer International Festival of Lanaudière and the Appellant’s application letter addressed to that employer, dated January 17, 2016, for the position in question (Exhibits GD2-38 to GD2-41 or exhibits GD3-42 to GD3-44);

ix. Employment opportunity posted by the University of Montreal on November 27, 2015 (deadline to apply: December 9, 2015) for a "Coordinator, Community Action" position for the employer L’Oeuvre Léger and a letter from the Appellant to that employer, dated November 30, 2015, for the position in question (Exhibits GD2-42 to GD2-45 or exhibits GD3-36 to GD3-39);

x. Appellant's cover letter addressed to Équiterre on November 30, 2015, for a position supervising an on-the-ground solicitation team and confirmation of receipt of the application by the potential employer (Exhibits GD2-46 and GD2-47 or exhibits GD3-34 and GD3-35);

xi. Business cards from Ranstad recruitment agency as well as from the employers Pro-vision X and Carrefour X (Exhibits 2-48 or GD3-50);

xii. Documents "2014 Reassessment" and "Notice of Assessments" indicating the Appellant's income for the 2014 tax year (Exhibits GD2-50 to GD2-56);

xiii. A letter from the Appellant addressed to Service Canada, dated April 6, 2016, requesting reconsideration (Exhibit GD2-58);

xiv. Request for Reconsideration of an Employment Insurance decision (Exhibit GD2-59);

xv. A letter from the Appellant addressed to a Service Canada representative (Commission), dated April 7, 2016, indicating that the approach used on the telephone was based on discrimination, unfounded accusations and psychological harassment, rather than on the evidence he had provided, the Act and the regulations—a situation that prejudiced him. He submitted that representing such an institution (the government) does not give someone the right to act according to their own will or according to a personal feeling. The Appellant indicated that he was thus obliged to refer the matter to the competent court because the work had not been done correctly (Exhibit GD2-61).

f) On May 19, 2016, the Appellant forwarded to the Tribunal a copy of the Commission's questionnaire regarding his course or his training program to which he had already responded (Exhibits GD2A-5 to GD2A-14);

g) On January 16, 2017, the Appellant’s representative sent the Tribunal the following documents:

i. A list of decisions cited by the representative during the hearing (Exhibits GD8-4 or GD8-226);

ii. Federal Court of Appeal (Court) decisions for the following cases: ***Gagnon* (2005 FCA 321)**, (Exhibits GD8-5 to GD8-7 or GD8-228 to GD8-231), ***Bois* (A-31-00)**, (Exhibits GD8-8 and GD8-9 or GD8-232 and GD8-233), ***Faucher* (A- 56-96)**, (Exhibits GD8-10 to GD8-12 or GD8-234 to GD8-237), ***Romero* (A-442-96)**, (Exhibit GD8-13 or exhibits GD8-238 and GD8-239), ***Whiffen* (A-1472-92)**,

(Exhibits GD8-22 to GD8-29 or GD8-248 to GD8-255), ***Gibbs* (2004 FCA 400)**, (Exhibits GD8-36 to GD8-39 or exhibits GD8-262 to GD8-265), ***Wang* (2008 FCA 112)**, (Exhibits GD8-42 to GD8-47 or GD8-268 to GD8-272) and ***Dupont* (A-442-91)**, (Exhibits GD8-48 and GD8-49 or GD8-273 to GD8-275);

iii. CUB 75144 (Exhibits GD8-2 and GD8-3 or exhibits GD8-224 and GD8-225), CUB 33603 (Exhibits GD8-14 and GD8-15 or exhibits GD8-240 and GD8-241), CUB 22889 (Exhibits GD8-30 to GD8-35 or GD8-256 to GD8-261), CUB 59406 (Exhibits GD8-40 and GD8-41 or exhibits GD8-266 and GD8-267) and CUB 19462 (Exhibits GD8-50 and GD8-51 or GD8-276 and GD8-277);

iv. Tribunal decision in the following case: ***Employment Insurance Commission v. K. S.* (2016 SSTADEI 178**), (Exhibits GD8-16 to GD8-21 or exhibits GD8-242 to GD8-247);

v. Appellant's unofficial transcripts and list of studies, issued by the University of Montreal, dated January 9, 2017, indicating which courses he took (Certificate in Philanthropic Management from the Faculty of Continuing Education and customized Master's degree in applied sciences) for the following sessions: summer 2014, fall 2014, summer 2015, fall 2015, winter 2016, summer 2016 and fall 2016 (Exhibits GD8-52 to GD8-55 or exhibits GD8-277 to GD8-281);

vi. Descriptions of various courses offered at the Faculty of Continuing Education at the University of Montreal and schedules for the classes the Appellant was registered for, for the following sessions: winter 2015, summer 2015, fall 2015, winter 2016, summer 2016 and fall 2016 (Exhibits GD8-56 à GD8-79 or exhibits GD8- 282 to GD8-305);

vii. Appellant’s *McGill University Transcript of Student Record*, dated February 15, 2016, indicating which courses he had taken for the following sessions: summer 2014, fall 2014, winter 2015, fall 2015, winter 2016 (Exhibits GD8-80 and GD8-81 or exhibits GD8-306 and GD8-307);

viii. Schedules for courses the Appellant was registered for at McGill University for the following sessions: summer 2014, fall 2014, winter 2015, fall 2015 and winter 2016 (Exhibits GD8-82 to GD8-86 or exhibits GD8-308 to GD8-312);

ix. A table entitled [translation] "M. L. J. Job Search History" showing his efforts to find work during the period from November 2015 or January 5, 2017 (Exhibits GD8-87 and GD8-88 or exhibits GD8-313 and GD8-314);

x. Emails from the Appellant addressed to potential employers applying for jobs, during the period from December 2, 2015, to August 3, 2016, inclusively, emails that he received from the employers he had contacted or from a recruitment agency he had contacted (Randstad) during the period in question, various documents indicating that the Appellant had consulted University of Montreal job search sites, as well as various addresses of potential employers (Exhibits GD8-89 to GD8-205 and GD8-213 to GD8-222 or exhibits GD8-315 to GD8-431 and GD8-439 à GD8-448);

xi. A "Consent to Disclosure of Personal Information" form completed by the Appellant with the company Groupecho Canada, dated August 2, 2016 (Exhibit GD8-206 or GD8-432);

xii. Documents from the employer World Animal Protection (ex. results from self-assessment and quality control questionnaires, Appellant's ID) (Exhibits GD8-207 to GD8-210 or GD8-433 to GD8-436);

xiii. Receipt from Urgences-santé Québec, dated August 25, 2016, indicating that the Appellant had been transported by ambulance on August 5, 2016 (Exhibit GD8-211 or exhibit GD8-437);

xiv. Medical certificate issued by the Clinique médicale de l’Avenir (X), dated September 2, 2016, indicating that the Appellant was off work from August 30, 2016, to September 11, 2016, inclusively (Exhibit GD8-212 or GD8-438).

[15] The evidence at the hearing is as follows:

a) The Appellant recalled the main items in the docket regarding the training courses he had taken and the program of study he had been registered for, in an effort to show his availability for work;

b) He explained that he had taken training courses in urban design at the University of Montreal (courses taken: Workshop in Urban Design 2; Seminar in Urban Design 2 and Landscape Theories—12 credits) as well as English courses at McGill University (courses taken: English Grammar and Writing Techniques and English Oral Communication Techniques—6 credits). The Appellant specified that at both universities, the courses had begun on January 6, 2016, and ended on April 26, 2016. He said that he then took courses at the University of Montreal during the summer 2016 session and that he completed these courses toward the end of June 2016, around June 22 or 23, 2016 (Exhibits GD3-3 to GD3-15, GD3-31, GD3-32, GD8-56 to GD8- 79, GD8-82 to GD8-86, GD8-282 to GD8-305 and GD8-308 to GD8-312);

c) The Appellant's representative stated that he would send the new documents to the Tribunal following the hearing (ex. : Federal Court of Appeal (Court) decisions, CUB decisions, Tribunal decision, course schedules showing the Appellant's past work and education experience, Appellant's transcripts and course schedules, his job search history (Exhibits GD8-1 to GD8-448).

PARTIES' ARGUMENTS

[16] The Appellant and his representative made the following observations and submissions:

a) The Appellant submitted that he had shown the Commission that he was available to work full time while pursuing his education. He noted that he was used to working while studying (Exhibits GD2-2, GD2-5 to GD2-21, GD3-52 and GD3-53);

b) He stated that he had begun working full time in March 2014 and had lost that employment in November 2015. The Appellant explained that as of the summer 2014, he had been taking courses while working full time (Exhibit GD2-5). He specified that the

courses he was taking at McGill University during the summer 2014 session to the winter 2016 session were on Saturday, as well as Tuesday and Friday evenings (ex. : winter 2015 session). The Appellant explained that for a time, he had dropped the courses at McGill University in order to focus on his Master's program (*Maîtrise individualisée en design urbain* [customized Master's in urban design]) at the University of Montreal. He noted that he had provided his year-to-date transcript from McGill University (Exhibits GD2-5, GD3-40, GD3-41, GD8-80 to GD8-86 and GD8-306 to GD8-312);

c) Regarding the winter 2016 session, the Appellant specified that he had spent 28 hours per week in training (ex. studies, courses and homework), including 18 hours of in-class training each week (12 credits at the University of Montreal and 6 credits at McGill University). He stated that he was required to follow a specific schedule or take part in sessions (in class, online or by telephone), and specified that all of his course obligations took place outside of his normal working hours. The Appellant specified that the rules of the educational institutions allowed him to change his course or program schedule, but that after a certain date, he would have had to drop the courses. He noted that when he said he was taking courses during the day (Exhibit GD3-15), he was talking about courses during the weekend. The Appellant mentioned that his training courses were not approved under an employment or skills development program (Emploi-Quebec) and that he had decided to take them for personal reasons. He noted that he had invested around $2,800.00 in these courses (Exhibits GD3-3 to GD3-15, GD3-52 and GD3-53);

d) He stated that he had taken four courses during the fall 2014 session and six courses during the winter 2015 session, all at the University of Montreal, while taking two other courses at another institution, also during the winter 2015 session. The Appellant said that he had also taken four courses at the University of Montreal during the summer 2015 session. He specified that all these courses were given either in the evenings, late afternoon after 5:00 pm, or on weekends (Exhibits GD8-56 to GD8-79, GD8-82 to GD8-86, GD8-282 to GD8-305 et GD8- 308 to GD8-312);

e) The Appellant explained that he had completed his Certificate in Philanthropic Management at the University of Montreal in the summer 2015 (Exhibits GD2-30, GD2-

31 and GD3- 24). He said that he then registered for a customized Master's program in urban design at the University of Montreal in the fall of 2015. The Appellant specified that this program was intended for people who work and that the program's courses were held mainly in the late afternoon. He said that he registered for three courses, including one nine-credit courses, in the fall 2016 session at the University of Montreal and it was considered full-time studies. The Appellant specified that with his Master's program, he had greater independence and that it was up to him to do the research required as part of the program. He specified that the professors were there to give direction regarding the work assigned. The Appellant explained that the majority of the work consisted of submitting the work required (Exhibits GD2-30, GD2-31, GD3-24, GD8-52 to GD8-79 and GD8-277 to GD8-305);

f) The Appellant explained that he had completed training in architecture outside of Quebec. He noted that in Quebec, in the field of architecture, the profession is regulated and that there is a set of procedures to be followed before becoming a member of the Order of Architects of Quebec or being able to work in another Canadian province. The Appellant specified that he was unable to work as an architect in Quebec without first obtaining the required certification from the Canadian Architectural Certification Board (CACB) and then a professional membership (ex. Order of Architects of Quebec). He said that he had, however, worked in this field as a designer, without being a professional member. The Appellant explained that he had taken courses in the Certificate of Philanthropic Management program because he also had a career in this field in Haiti. He mentioned that before coming to Quebec, he had already worked in a construction company in Haiti while studying. The Appellant noted that his first priority was to work and then to study in order to build his knowledge;

g) He explained that he had to take financial responsibility for his family because his wife was sick. The Appellant said that he was the only one working in order to provide for his family. He said that for this reason, he continued to work because he had to. The Appellant explained that he had obligations related to work. He had to may $1,100.00 per month in rent (Exhibit GD3-26). He said he was providing for his family with the help of

loans and bursaries that he had obtained and with the help of lines of credit that he had at various financial institutions (Exhibits GD3-26, GD3-52 and GD3-53);

h) He argued that even though he had university degrees (Ex. certificate, bachelor's degree), he was willing to do any type of work (ex.: development research officer, manufacturing job) in order to provide for himself and his family. He explained that he did not want to receive social assistance because he is young and because he could work (Exhibits GD3-52, GD3-53, GD8-89 to GD8-205, GD8-213 to GD8-222, GD8-315 to GD8-431 and GD8-439 to GD8-448);

i) The Appellant stated that he was available to work during his training period. He specified that he could work 40 hours per week, and that he was available to do so, days, evenings and weekends. The Appellant indicated in his claim for benefits that he was available for and capable of work in the same type of employment and with the same conditions that he had before his course or program. He also mentioned that he was looking for full-time employment with a flexible work schedule, consistent with his training courses. The Appellant explained that a week contains 168 hours (7 X 24 = 168), that he used 40 hours to work, 30 hours to study, 49 hours to sleep and 49 hours to eat, travel, etc. (Exhibits GD3-7, GD3-15, GD3-17, GD3-31 and GD3-51);

j) He argued that he had already studied full time while working 40 hours per week. The Appellant explained that while he was working for the employer Second Dimension International Ltd. (SDI) as a sales representative, he was working 40 hours per week on a flexible schedule, which allowed him to work full time, while taking a training program from September 15, 2015, until his dismissal on November 15, 2015 (Exhibits GD2-5 to GD2-21, GD3-15, GD3-17 and GD3-31);

k) The Appellant indicated that he had been trying to find employment since the beginning of his course or program, or since he had been on unemployment. He argued that he had proven that he was looking for work and that the Commission agent dealing with his case agreed with this. The Appellant submitted that he had been discriminated against because he could not receive benefits despite the fact that he was available for

work and that he had provided evidence in that regard, which prejudiced him (Exhibits GD2-2, GD3-8, GD3-31 and GD3-51 to GD3-53);

l) He explained that he had participated in several job interviews with potential employers, in addition to those he had mentioned before (ex.: World Vision, Pro-vision X). The Appellant specified that he had participated in a dozen interviews with potential employers or recruitment agencies between January 2016 and April 2016. He indicated that he had also contacted Emploi-Quebec and was registered with several recruitment agencies (ex.: Randstad, T. T. Inc.), (Exhibits GD8-89 to GD8-205, GD8-213 to GD8-222, GD8-315 to GD8-431 and GD8-439 to GD8-448);

m) The Appellant specified that he had also provided the Commission with announcements and emails relevant to his job search during the period between November 2015 and January 2016 (Exhibits GD2-33 to GD2-48, GD3-34 to GD3-39, GD3-42 to GD3-50);

n) He said that he did not mentioned to potential employers that he was in school (ex. winter 2016 session), because his objective was to find a job. The Appellant noted that he tried to downplay or to not talk too much about his skills or university degrees in order to increase his chances of getting a job. He explained that his discussions with potential employers centred mainly on the job descriptions and duties. The Appellant specified that if a degree was required for a certain position then, in that case, he would present the necessary documentation. He said that when he applied for jobs with charitable organizations, he mentioned that he had a Certificate in Philanthropic Management, because these organizations required the certificate for their positions;

o) The Appellant argued that he had continued to look for work (Exhibits GD3-31, GD3-52 and GD3-53);

p) He said he was available for work and that if he was offered employment, he would have accepted it given the financial obligations he faced (ex. paying his bills). The Appellant noted that he wanted to work and study at the same time and that he had no problem doing this;

q) The Appellant explained that if he had gotten a job outside of Montreal (ex.: position at the Conseil acadien de Rustico [Rustico Acadian Council], Prince Edward Island), he would have accepted the offer. He said that in that situation, he would have made arrangements with his professors to continue his courses online, depending on the rules of the teaching institution;

r) He mentioned that he had worked for the employer World Animal Protection, in August 2016, but that he had worked only one day for that employer (August 4, 2016) because on that day he had a medical problem, which turned out to be appendicitis. The Appellant then obtained a medical certificate certifying that he was unfit to work. He explained that when he returned to work, the employer told him they no longer needed him and that his employment had therefore ended (Exhibits GD8-207 to GD8-212 et GD8-433 to GD8-438);

s) The Appellant explained that he told the Commission (Exhibit GD3-15) that he would finish his course or training program if a he was offered a job and the employment conflicted with his course or program, because it was a question of language. He explained that in his country, grammar was taken very seriously and the questioned was formulated in the conditional tense. The Appellant said he had considered the question as an assumption or a probability. He said he had assumed that he would finish his courses, but that in fact he was used to working while he studied. He noted that he was a working man and that he was also able to study. He expressed the opinion that there were language issues with the Employment Insurance form (claim for benefits) because the questions were asked in the conditional, which meant that the focus was on assumptions instead of facts. According to the Appellant, evidence is more convincing that assumptions, but the agent did not want to use the evidence he had presented (Exhibits GD2-2, GD3-15, GD3-52 and GD3-53);

t) He indicated that he never said he would prioritize his training over work, in a conversation with a Commission agent on February 2, 2016 (Exhibit GD3-15) and that the information he had provided in that regard in his benefit claim (Exhibit GD3-7) was probably a mistake (Exhibit GD3-51). The Appellant explained that he had problems on

the telephone with the agent who communicated with him on February 2, 2016, regarding the way in which the questions were formulated. He submitted that he had been subject to unfounded accusations and had been forced to say things that he did not mean. The Appellant argued that the agent did not make assumptions, that there was no probability or random approach at the time when the questions were asked. He explained that he had said, affirmatively, that he would give up his courses for employment. The Appellant submitted that he could work and study at the same time, and that he had proved that through his past experience. He specified that he did not want to respond to the question of whether he would give up his training if a job offer were to conflict with it by "yes" or "no" because he is available to work 40 hours per week (Exhibits GD2-61, GD3-7, GD3-15 and GD3-51);51);

u) The Appellant explained that he had been sincere in his statements and that if he had not been honest, he would have been entitled to benefits. He finds that the decision rendered in his case was unfair because it was based on a personal feeling of the agent that dealt with his case and on assumptions, when in cases of law, decisions must be supported by facts and evidence. The Appellant stated that he had been subject to psychological harassment by the agent who had dealt with his case (Exhibits GD2-2, GD2-61, GD3-52 and GD3-53);

v) He submitted that in the case law, availability is also the desire to work, demonstrated by a person's attitude and behaviour, in addition to efforts a sincere desire to work demonstrated by attitude and conduct and accompanied by reasonable efforts to find a job (***Whiffen, A-1472-92***), which he says he objectively demonstrated (Exhibit GD2- 2);

w) The Appellant stated that he had friends in the same situation as him who were not called [by the Commission] (Exhibits GD3-52 and GD3-53);

x) He argued that he as a student and employee, he had also made contributions to Employment Insurance (Exhibit GD2-2);

y) He asked that justice be done because he considers himself entitled to benefits (Exhibits GD2-2, GD3-52 and GD3-53);

z) The representative argued that since September 2014, until the end of his employment (November 2015), the Appellant had always had a full-time job while attending full-time studies, except during the summer sessions. He indicated that the Appellant had taken a course at McGill University during the summer 2014, two courses at the University of Montreal during the summer of 2014, and courses during the fall 2014, including two courses at McGill University and four courses at the University of Montreal. The representative argued that the Appellant had therefore been a full-time student while working full-time. He indicated that the Appellant had also taken courses at the University of Montreal during the fall 2016 session. The representative specified that the Appellant's courses began in September 2016 and ended in December 2016 (Exhibits GD8-56 to GD8-79, GD8-82 to GD8-86, GD8-282 to GD8-305 and GD8-308 to GD8-312);

aa) He noted that the Commission had not questioned the Appellant's job searches (Exhibits GD3-31 and GD3-51);

bb) The representative submitted that the decisions ***Gagnon* (2005 FCA 321)** and ***Bois* (2001 FCA 175)**, mentioned by the Commission in its arguments, were not relevant to this case. The representative argued that in ***Gagnon* (2005 FCA 321)**, it was a matter of a claimant who had voluntarily left his employment to attend a course, which does not resemble the Appellant's situation. He specified that in this decision (***Gagnon*, 2005 FCA 321**), the claimant said he wanted part-time employment and mentioned that he had not conducted a job search (paragraphs 3, 4 and 14) (Exhibits GD8-5 to GD8-7 or exhibits GD8-228 to GD8-231). The representative indicated that ***Bois* (2001 FCA 175)** refers first to a question of exclusion and second to a question of availability. He explained that in ***Bois* (2001 FCA 175)**, a disqualification was imposed on the claimant because she had voluntarily left her employment to attend a course and had provided no evidence of her availability for work (paragraph 3) (Exhibits GD8-8 and GD8-9 or exhibits GD8-232 and

GD8-233). The representative submitted that the two decisions cited in support of the Commission's arguments both seemed erroneous;

cc) He argued that the three criteria for determining whether a person is available for work are the following: the desire to work, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the changes of returning to the labour market (***Faucher*, A-56-96**) (Exhibits GD8-10 to GD8-12 or exhibits GD8-234 to GD8-237). The representative submitted that the Appellant's desire to return to the labour market as well as his efforts in that regard were clear and that these elements were recognized by the Commission when it said about the Appellant that it had [translation] "no doubt about his efforts to seek employment" (Exhibit GD3-31). He argued that the analysis of a person's availability for work is factual and contextual. The representative noted that in ***Faucher* (A-56-96)**, the Court stressed the need to stick to the facts. He explained that in the Appellant's case, the evidence showed someone who had been capable of full-time work since the summer 2014 (GD8-10 to GD8-12 or exhibits GD8-234 to GD8-237);

dd) The representative argued that in ***Romero* (A-442-96)**, the Court affirmed the umpire's decision in CUB 33603, that past work and education must be taken into consideration when a person wants to show that they did not unduly limit their chances of obtaining employment, according to the criteria established in ***Faucher* (A-56-96)** (Exhibits GD8-13 to GD8-15 or exhibits GD8-238 to GD8-241);

ee) He indicated that the Commission explained that work-study history was no longer a relevant factor in rendering a decision in the Appellant's file (Exhibits GD3-52 and GD3-53). The representative noted that several of the Tribunal's decisions indicate that the work-study history was still a relevant factor. According to him, the Commission made an error in law with regard to the application of the relevant factor of a claimant's work-study history (Exhibit GD4-5). The representative argued that the decision rendered by the Tribunal's Appeal Division in K.S. (2016 SSTADEI 178) (Exhibits GD8-16 to GD8-21 or exhibits GD8-242 to GD8-247), in which the application for leave to appeal filed by the Commission was refused, the Appeal Division concluded that the presumption of

non-availability for work may be reversed by evidence showing that a person gave priority to finding employment rather than to their studies, or by evidence of a work-study history. He noted that in that decision, the Tribunal's Appeal Division concluded that the Commission did not have a reasonable chance of success on appeal (Exhibits GD8-16 to GD8-21 or exhibits GD8-242 to GD8-247);

ff) The representative argued that in ***Whiffen*** **(A-1472-92)**, it was a matter of a claimant who had moved to a region in which the unemployment rate was higher than it was in her former place of residence and who was accused of not adequately searching for suitable employment or suitable types of employment, because he imposed his own restriction on his chances of being rehired. He noted that in that decision (***Whiffen,*** **A-1472-92**), the Court made the following clarification: "To simply apply the policy, the fact that the new location was significantly less advantageous for eventual re-employment will have to be established and the burden of establishing that fact will lie on the Commission since it will be advanced to counter the evidence of the claimant [...]" (Exhibits GD8-22 to GD8-29 or GD8-248 to GD8-255). The representative explained that in such a case, we are in prior opinion. He specified that in the Appellant's case, the Commission indicated that it had no doubts as to the fact that he was looking for work (Exhibit GD3-31). The representative affirmed that the Commission indicated that the Appellant was not finding work because he was limiting his job search due to his courses. He asked for the evidence showing that the night courses in which the Appellant was enrolled were preventing him from finding a day job. According to the representative, the evidence shows rather that the Appellant was able to work full time during the day and to combine work and study at night (Exhibits GD8-22 to GD8-29 or GD8-248 to GD8-255);

gg) He issued the notice that when the Commission alleges that a person's job searches are adequate and that this person then has to modify them, they should be given notice to that effect. The representative argued that in CUB 22889, it is a matter of a claimant who was enrolled in training courses for three consecutive sessions and who benefitted from a reasonable period of time to find employment. He explained that in that decision (CUB 22889), the jurisprudence presented shows that a notice must be given before a claimant

is disqualified from receiving benefits when there is a work-study history (Exhibits GD8-30 to GD8-35 or GD8-256 to GD8-261);

hh) The representative indicated that in ***Gibbs*** **(2004 FCA 400)**, it was a matter of a claimant who had lost his employment and who had a work-study history. He argued that in that decision (***Gibbs,*** **2004 FCA400**), the Court found that the Board of Referees had not committed an error in its decision establishing the claimant's availability for work and that the umpire had not committed an error in dismissing the Commission's appeal (CUB 59406). The representative explained that in that case (***Gibbs,*** **2004 FCA 400**), the Court found that the claimant demonstrated his availability for work and that he had thus discharged his onus of proof, due to exceptional circumstances (Exhibits GD8-36 to GD8-41 or exhibits GD8-262 to GD8-267);

ii) He submitted that the Appellant's situation is similar to ***Wang*** **(2008 FCA 112)**. The representative explained that in that decision (***Wang,*** **2008 FCA 112**), it is a matter of a claimant who is studying and receiving Employment Insurance benefits, while looking for employment anywhere in North America (Exhibits GD8-42 to GD8-47 or GD8-268 to GD8-272). He argued that the Appellant is looking for employment, even if that employment is located outside his area of residence. The representative noted that during the period in question, the Appellant was doing his Master's and had more flexibility than had he been doing his Bachelor's degree, in terms of attendance requirements of the courses;

jj) The representative argued that in ***Dupont*** **(A-442-91)**, the Court affirmed CUB 19462, in which the umpire determined that the claimant was available for work despite the Commission's position that a student without a work-study history cannot demonstrate their availability for work. The representative summarized that in CUB 19462, the umpire found that the claimant demonstrated that he had looked for work and that he was making his job search a priority (Exhibits GD8-48 to GD8-51 or GD8-273 to GD8-277);

kk) He submitted that the evidence presented validated the Appellant's statements according to which he was looking for work (CUB 75144) (Exhibits GD8-2 and GD8-3 or exhibits GD8-224 and GD8-225);

ll) The representative expressed the opinion that in its arguments, the Commission did not question the Appellant's willingness to look for work. He said that all the Commission said to disentitle the Appellant to benefits was that the work-study history was not a relevant factor, which he says constitutes an error in law (Exhibit GD4-5);

mm) He argued that on the question of the Appellant's willingness to give priority to his job search over his courses, he explained that he would finish his courses anyway because they were not incompatible with employment;

nn) The representative asked the Tribunal to allow the appeal. He specified that because the disentitlement imposed on the Appellant began in January 2016, this application concerns the entire 2016 benefit period.

[17] The Commission made the following submissions and arguments:

a) It argued that to demonstrate availability for work, under paragraph 18(*a*) of the Act, subsection 50(8) of the Act stipulates that it can require a claimant to prove that they are making reasonable and customary efforts to obtain employment (Exhibit GD4-4);

b) The Commission explained that a claimant who is attending a training course without having been referred by the authority designated by the Commission must prove that they are capable and available for work and unable to find suitable employment. It noted that they must meet the requirements relating to availability the same as any other claimant who wishes to obtain regular benefits. The Commission specified that the claimant must continue seeking employment and show that his training requirements do not affect his availability and do not reduce his chances of finding employment (Exhibit GD4-4);

c) It argued that there is a presumption that a claimant is not available for work while attending a full-time course on their own initiative. The Commission explained that to rebut that presumption, the claimant must show that their primary intention is to obtain suitable employment, as evidenced by efforts to find employment, and that he is ready to take all actions required to hold a job and even withdraw from his courses if necessary. It indicated that the claimant must show, through his actions, that the course is of secondary

importance and does not constitute a barrier to seeking and accepting suitable employment (Exhibit GD4-4);

d) The Commission submitted that the following factors should be assessed in determining a claimant's availability for work: a) the attendance requirements of the course; b) the claimant's willingness to give up his studies to accept employment; c) whether the claimant has a history of being employed at irregular hours; and d) the existence of "exceptional circumstances" that would enable the claimant to work while taking courses (Exhibit GD4-4);

e) It submitted that, in this case, the Appellant had failed to rebut the presumption of non-availability while he was attending a full-time course because he had not demonstrated his willingness to give up his studies to accept employment (Exhibit GD4-4);

f) The Commission explained that the Appellant dedicated around 28 hours per week to his training, including courses, studies and homework. It noted that the Appellant attending his courses during the days and evenings and that he invested nearly $2,800.00 for one session (Exhibit GD4-4).

g) It found that the Appellant's intention was to find a job with a flexible schedule so that it would not conflict with his training courses. According to the Commission, this situation shows that the Appellant's priority was his training. It noted that the Appellant must prove that his primary intention was to return to the labour market without creating obstacles to obtaining employment (Exhibit GD4-4);

h) The Commission explained that the Appellant was not ready to give up his courses if offered employment. It specified that the rules of the teaching institution would not allow him to change his course schedule after a certain point and that the Appellant would have had to withdraw from the program (Exhibit GD4-5);

i) It explained that effective January 2013, there had been a legislative change and that work-study history was no longer considered in assessing availability for work (Exhibit GD4-5);

j) The Commission submitted that paying Employment Insurance premiums while working does not automatically give someone the right to receive Employment Insurance benefits and that the eligibility criteria must be met (Exhibit GD4-5);

k) It issued the notice that the fact that the Appellant was attending training led the Appellant to impose certain restrictions on his availability for work, which seriously reduced his chances of finding a new job (Exhibit GD4-5).

ANALYSIS

[18] The relevant legislative provisions are reproduced in an appendix to this decision.

[19] In the absence of a definition of the notion of "availability" in the Act, the criteria developed in the case law can be used to establish a person's availability for work as well as their entitlement to receiving Employment Insurance benefits. Availability is a question of fact which comprises three necessary criteria established in the case law.

[20] In ***Faucher* (A-56-96)**, the Federal Court of Appeal (Court) sets out three factors to be considered in determining whether a claimant has proved their availability for work:

> There being no precise definition in the Act, this Court has held on many occasions that availability must be determined by analyzing three factors - 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, and 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.

[21] These factors have been reiterated in other decisions by the Court (***Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112**).

[22] In ***Wang* (2008 FCA 112)**, the Court held as follows:

> The evidence was that the respondent repeatedly stated that her first intention was to find and accept suitable full-time employment. She had presented evidence of numerous efforts to find employment. She also indicated that she was willing to relocate to accept such employment. The case rests on the credibility of the respondent and the Board of Referees obviously found the respond to be credible. Thus the presumption of non-availability for work was successfully rebutted by the respondent.

[23] In ***Cornellisen-O'Neill* (A-652-93)**, the Court cited the Chief Umpire's decision in ***Godwin*** (**CUB 13957)**, that "[...] The Act is quite clear that to be eligible for benefits a claimant must establish his availability for work, and that requires a job search."

[24] In ***De Lamirande* (2004 FCA 311)**, the Court recalled as follows: "The case law holds that a claimant cannot merely wait to be called in to work but must seek employment in order to be entitled to benefits [...]."

[25] A person enrolled in a full-time training course is presumed not to be available for work. This presumption of fact is rebuttable by proof of exceptional circumstances (***Cyrenne* 2010 FCA 349; *Wang* 2008 FCA 112; *Gagnon* 2005 FCA 321; *Rideout* 2004 FCA 304; *Boland* 2004 FCA 251; *Primard* 2003 FCA 349; *Landry* A-719-91**).

[26] This presumption may be rebutted if the person demonstrates that they had previous experience working full time while attending school (***Rideout* 2004 FCA 304; *Boland* 2004 FCA 251; *Loder* 2004 FCA 18; *Primard* 2003 FCA 349; *Landry* A-719-91**).

[27] In ***Romero* (A-442-96)**, the Court confirmed the conclusion reached by the umpire in CUB 33603 that the claimant had demonstrated that she had experience working while studying and that she had looked for work, thus convincingly rebutting the presumption that she was not available for work.

[28] A student taking a course approved by the Commission is considered to be available for work (***Lamonde*, 2006 FCA 44, *Gauthier*, 2006 FCA 40**).

[29] According to consistent case law, the Employment Insurance system is not meant to pay benefits to people who take courses on their own initiative, but to those who are actively seeking employment.

[30] In its assessment of the evidence, the Tribunal considered the three criteria mentioned above that are used to establish a person's availability for work. These three factors are as follows: the desire to return to the labour market as soon as suitable employment is offered; the demonstration of that desire by efforts to find suitable employment; and the non-establishment or

absence of personal conditions that might limit unduly the chances of returning to the labour market.

[31] The question as to whether a person enrolled in a full-time course of instruction is available for work is a question of fact that must be determined in light of the specific circumstances of each case but based on the criteria set out in the case law.

[32] In this case, the Tribunal finds that the Appellant met the above criteria, at the time he applied for benefits, on January 17, 2016, after he began his training on January 6, 2016, at the University of Montreal (*Maîtrise individualisée en design urbain* [customized Master's in urban design]—applied sciences), as well as at McGill University (English courses).

Desire to return to the labour market as soon as suitable employment is offered

[33] The Appellant demonstrated his desire to return to the labour market as soon as he was offered a suitable job (***Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112**).

[34] Even if he began attending training courses on January 6, 2016, the Appellant demonstrated that his intention had always been to be in the labour market and to work full time.

[35] The Tribunal finds credible the Appellant's explanations according to which he wants to work, because he needs to support his family and he has financial obligations to meet.

[36] The Tribunal finds that the Appellant did not choose to leave his employment to return to his studies. He had worked full time since March 23, 2014, and his employment ended mid-November 2015 (November 13 or 15, 2015) (Exhibits GD2-5 to GD2-11 and GD3-3 to GD3-15). The Appellant had already been a student for the majority of his employment period.

[37] The Tribunal finds that while attending his training program, the Appellant showed his desire to return to the labour market as soon as he was offered suitable employment (***Faucher*, A-56-96, *Bois*, 2001 FCA 175, *Wang*, 2008 FCA 112**).

Demonstration of that desire by efforts to find suitable employment

[38] The Appellant demonstrated his desire to return to the labour market by making significant efforts to find suitable employment on each working day in his benefit period (***Faucher*, A-56-96, *Bois*, 2001 FCA 175, *Wang*, 2008 FCA 112**).

[39] The Tribunal finds that since he began his training, the Appellant's availability for work has consisted of concrete and sustained searches for employment, with the goal of finding full-time work.

[40] The Appellant provided ample supporting documentation relating to his job searches (Exhibits GD8-89 to GD8-205, GD8-213 to GD8-222, GD8-315 to GD8- 431 and GD8-439 to GD8-448).

[41] The Appellant explained that he participated in a dozen job interviews with potential employers, between January 2016 and April 2016.

[42] He said he had worked with recruitment agencies (ex.: Randstad, T. T. Inc.) and had contacted Emploi-Québec (Exhibits GD8-89 to GD8-205, GD8-213 to GD8-222, GD8-315 to GD8-431 and GD8-439 to GD8-448).

[43] The Tribunal notes that the Commission twice indicated that it had "no doubt" as to the Appellant's efforts to seek employment (GD3-31 and GD3- 51). The Appellant’s representative effectively highlighted this element during the hearing.

[44] The Tribunal finds that the Appellant's credible testimony shows that he was available for full-time work, even if he was attending training.

[45] The Tribunal is of the opinion that from the time he began his training, the Appellant was continuously looking for full-time work.

[46] The Appellant was responsible for actively seeking a suitable job in order to be able to continue to obtain Employment Insurance benefits (***Cornelissen O’Neil*, A 652 93; *De Lamirande*, 2004 FCA 311**).

[47] The evidence shows that the Appellant did not discharge of that responsibility when he started his training program.

Not setting “personal conditions” that might unduly limit the chances of returning to the labour market

[48] By starting training on January 6, 2016, the Appellant did not set "personal conditions" that might have unduly limited his chances of returning to the labour market (***Faucher*, A-56-96, *Bois*, 2001 FCA 175, *Wang*, 2008 FCA 112**).

[49] Even if the Appellant said that he dedicated around 28 hours a week to his courses (winter 2016 session), he remained available for work. He specified that he was available for work during the days, evenings and weekends (Exhibits GD3-15).

[50] The Appellant's testimony indicates that the courses in which he was enrolled, both at the University of Montreal and McGill University, as of the summer 2014 session, were offered either on weekends or during the late afternoons or evenings during the week. The Appellant presented several documents relating to the courses in which he was enrolled (Exhibits GD8-52 to GD8-79, GD8-82 to GD8-86, GD8-277 to GD8-305 and GD8-308 to GD8-312).

[51] The Tribunal is of the view that his course requirements and the time he dedicated to them did not compromise his availability for work or his search for suitable employment.

[52] The Tribunal finds that the Appellant's work experience shows his willingness to prioritize his employment while attending training.

[53] The Appellant specified that when he worked for the employer Second Dimension International Ltd. (SDI), he worked 40 hours per week and was still able to focus on school. Nothing indicates that the Appellant would not have been able to work full-time while attending training, as of January 2016.

[54] The Appellant also specified that the *Maîtrise individualisée en design urbain* [customized Master's in urban design] at the University of Montreal in which he was enrolled was intended for people already in the workforce.

[55] The Tribunal finds that the Appellant also demonstrated that he was ready to expand his job search efforts by indicating that he was willing to accept a job that does not correspond to his field of training or to his education (ex. Certificate in Philanthropic Management).

[56] The Appellant also specified that he would accept work outside of the region where he lives to improve his chances of obtaining employment. He explained that if he found employment outside of the region where he lives, he would be able to make arrangements with his professors to continue his courses online, depending on the rules of the institution where he studies.

[57] At the hearing, the Appellant explained that, above all, he wanted to ensure he obtained suitable employment that would allow him to provide for himself and his family.

[58] The Tribunal finds that the Appellant has remained open to and interested in finding suitable employment with potential employers and that he has made efforts in that regard, without setting personal conditions that might undermine his availability for work.

[59] The Tribunal does not consider the fact that the Appellant's training was not referred or recommended by Emploi-Québec, the appropriate designated authority, as a "personal condition" demonstrating that he was not available for work.

[60] Despite the situation, the Tribunal is of the opinion that the Appellant was able to rebut the presumption that a person enrolled in a full-time training course on their own initiative is not available for work (***Cyrenne*, 2010 FCA 349, *Wang*, 2008 FCA 112, *Lamonde*, 2006 FCA 44, *Gauthier*, 2006 FCA 40, *Gagnon*, 2005 FCA 321, *Rideout*, 2004 FCA 304, *Boland*, 2004 FCA 251, *Primard*, 2003 FCA 349, *Landry*, A-719-91**).

[61] In this context, the Appellant's training program does not represent a personal condition that might unduly limit his chances of returning to the labour market, under the Act.

Application of principles related to returning-to-studies cases

[62] Availability for work is also measured by four principles related to returning-to-studies cases that can rebut the presumption of non-availability (***Cyrenne*, 2010 FCA 349, *Wang* 2008**

FCA 112, *Gagnon* 2005 FCA 321, *Rideout* 2004 FCA 304, *Boland* 2004 FCA 251, *Loder*, 2004 FCA 18, *Primard* 2003 FCA 349, *Landry*, A-719-91).

[63] These principles are as follows: the requirement to attend courses; the claimant's willingness to withdraw from his studies to accept employment; the claimant's history of working irregular hours; and the existence of "exceptional circumstances" making it possible for the claimant to work while taking courses.

[64] With respect to the "attendance requirements of the course," the Appellant stated in his application for benefits that he had to take his courses according to a specific schedule or attend sessions, but that the rules of the teaching institution that he attended allowed him to change his course or program schedule (Exhibits GD3-5 to GD3-7). The Appellant noted that all his course obligations occurred outside normal working hours (Exhibits GD3-7).

[65] At the hearing, the Appellant also specified that as part of his Master's program, he had more independence when it came to meeting his course obligations. He stated that the bulk of these obligations consisted of research and submitting the required course work.

[66] The Tribunal is of the opinion that this situation is entirely compatible with establishing the Appellant's availability for full-time work.

[67] The Tribunal finds that the Appellant had flexibility in attending his training courses.

[68] The Tribunal is of the opinion that the requirement for the Appellant to attend his training courses and the time he dedicated to them did not compromise his availability for work or his efforts to find suitable employment.

[69] With respect to the question relating to the Appellant's willingness to give up his studies to accept employment, the Tribunal finds that the Appellant demonstrated that he was ready to give up his training to return to the labour market.

[70] On this point, the Tribunal finds that the Appellant showed that there was no clear incompatibility between his availability for work, on each working day in his benefit period, and his training courses.

[71] The Tribunal takes into consideration the fact that the Appellant's courses were not held during working days or during normal working hours, but rather at the end of the day, during the week, or on the weekend (Exhibits GD8-56 to GD8-79, GD8-82 to GD8-86, GD8-282 to GD8-305 and GD8-308 to GD8-312).

[72] In this context, the Tribunal finds that the times the courses were held would not have prevented the Appellant from accepting employment.

[73] The evidence on file shows that the Appellant stated that if he was offered full-time employment that conflicted with his courses or program, he would have chosen to finish his courses or program (questionnaire: training program—Exhibit GD3-7). In a statement made on February 2, 2016, he explained that he would have chosen his training if it were to conflict with an employment offer (Exhibit GD3-15).

[74] On this aspect, the Tribunal finds that the Appellant's explanations and clarifications during the hearing show that he would not have refused employment in order to continue his courses, despite seeming inconsistencies in his statements to that effect.

[75] At the hearing, the Appellant explained, just like in the statement he made to the Commission on April 7, 2016 (GD3-51), that he had not said he would give priority to his studies over full-time employment.

[76] The Appellant specified that if he had been offered employment, he would have accepted it given the financial obligations he faced (ex. paying his bills). He noted that he wanted to work and study at the same time and that he had no problem doing so.

[77] The Appellant also argued that the questions he was asked were formulated in the conditional tense and that he had only speculated that he would finish his courses if offered a job that conflicted with his courses or program (Exhibits GD3-7).

[78] The Tribunal finds that without getting into a debate over semantics, there may have been a misunderstanding or misinterpretation, on the part of both the Commission and the Appellant, both on the part of the Commission and the Appellant, as to his answer to the question

of whether he would give up the courses in which he was enrolled in order to accept suitable employment.

[79] The Tribunal finds that despite his seemingly contradictory answers to questions regarding the importance of his studies, the Appellant showed that he would have given them up for suitable employment.

[80] Regarding the fact that the claimant has a history of working irregular hours, the Tribunal finds that the Appellant showed that he had a history of working while attending school (work-study history), since 2014 (summer 2014 session), that proved his availability for full-time work while attending a training course or program.

[81] The Appellant demonstrated that he could reconcile his full-time work with his studies and that he had a significant work-study history in that regard (***Rideout*, 2004 FCA 304, *Boland*, 2004 FCA 251, *Loder* 2004 FCA 18, *Primard*, 2003 FCA 349, *Landry*, A-719-91**).

[82] When the Appellant worked for the employer Second Dimension International Ltd. (SDI) from March 23, 2014, to November 15, 2015, he worked 40 hours per week on a flexible schedule, while attending training. When he began his training during the summer 2014 session, the Appellant already had a job. He did not leave that job to go back to school.

[83] The Tribunal rejects the Commission's argument that a legislative change in January 2013 meant that the work-study history was no longer considered with the government's implementation of the "Connecting Canadians with Available Jobs" initiative (CCAJ) (Exhibits GD3-52 and GD4-5).

[84] The Commission did not provide any explanation as to what extent the work-study history should no longer be considered when assessing a claimant's availability for work.

[85] The Tribunal notes that the "Connecting Canadians with Available Jobs" (CCAJ) initiative, effective January 6, 2013, is a set of measures to help better connect unemployed Canadians with available jobs in their local area that match their skills. The Tribunal is of the opinion that the measures introduced under this initiative do not render a claimant's work-study history irrelevant in assessing their availability for work.

[86] The Tribunal finds that, in this case, the Appellant clearly proved there were "exceptional circumstances" indicating that he was able to work while attending his courses and enabling him to rebut the presumption that a person enrolled in a full-time training course is not available for work (***Cyrenne*, 2010 FCA 349, *Wang*, 2008 FCA 112, *Gagnon*, 2005 FCA 321, *Rideout*, 2004 FCA 304, *Boland*, 2004 FCA 251, *Primard*, 2003 FCA 349, *Landry*, A-719-91**).

[87] In summary, since he filed his application for benefits on January 17, 2016, and since starting his training program on January 6, 2016, the Appellant has met all the above-mentioned criteria related to availability for work (***Faucher*, A-56-96, *Bois*, 2001 FCA 175, *Wang*, 2008 FCA 112**).

[88] The Appellant also showed that he was able to apply the principles that pertain specifically to students enrolled in a training program in a way that rebutted the presumption of non-availability (***Lamonde*, 2006 FCA 44, *Cyrenne*, 2010 FCA 349, *Wang* 2008 FCA 112, *Gagnon* 2005 FCA 321, *Rideout* 2004 FCA 304, *Boland* 2004 FCA 251, *Loder*, 2004 FCA 18, *Primard* 2003 FCA 349, *Landry*, A-719-91, *Floyd*, A-168-93**).

[89] The Tribunal concludes that the Appellant is available for work under paragraph 18(1)(*a*) of the Act.

[90] Therefore, the Tribunal finds that imposing a disentitlement on the Appellant under paragraph 18(1)(*a*) of the Act is not justified.

[91] The appeal on the issue has merit.

CONCLUSION

[92] The appeal is allowed.

Normand Morin

Member, General Division—Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

Availability for work, etc.

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.

Exception

(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.

25 (1) For the purposes of this Part, a claimant is unemployed and capable of and available for work during a period when the claimant is

> **(a)** attending a course or program of instruction or training at the claimant's own expense, or under employment benefits or similar benefits that are the subject of an agreement under section 63, to which the Commission, or an authority that the Commission designates, has referred the claimant; or
>
> **(b)** participating in any other employment activity
>
> **(i)** for which assistance has been provided for the claimant under prescribed employment benefits or benefits that are the subject of an agreement under section 63 and are similar to the prescribed employment benefits, and
>
> **(ii)** to which the Commission, or an authority that the Commission designates, has referred the claimant.

(2) A decision of the Commission about the referral of a claimant to a course, program or other employment activity mentioned in subsection (1) is not subject to review under section 112. -

50 (1) A claimant who fails to fulfil or comply with a condition or requirement under this section is not entitled to receive benefits for as long as the condition or requirement is not fulfilled or complied with.

(2) A claim for benefits shall be made in the manner directed at the office of the Commission that serves the area in which the claimant resides, or at such other place as is prescribed or directed by the Commission.

(3) A claim for benefits shall be made by completing a form supplied or approved by the Commission, in the manner set out in instructions of the Commission.

(4) A claim for benefits for a week of unemployment in a benefit period shall be made within the prescribed time.

(5) The Commission may at any time require a claimant to provide additional information about their claim for benefits.

(6) The Commission may require a claimant or group or class of claimants to be at a suitable place at a suitable time in order to make a claim for benefits in person or provide additional information about a claim.

(7) For the purpose of proving that a claimant is available for work, the Commission may require the claimant to register for employment at an agency administered by the Government of Canada or a provincial government and to report to the agency at such reasonable times as the Commission or agency directs.

(8) 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.

(8.1) For the purpose of proving that the conditions of subsection 23.1(2) or 152.06(1) are met, the Commission may require the claimant to provide it with an additional certificate issued by a medical doctor.

(9) A claimant shall provide the mailing address of their normal place of residence, unless otherwise permitted by the Commission.

(10) The Commission may waive or vary any of the conditions and requirements of this section or the regulations whenever in its opinion the circumstances warrant the waiver or variation for the benefit of a claimant or a class or group of claimants.