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

[TRANSLATION]

Citation: *N. C. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 69

Tribunal File Number: GE-16-4112

BETWEEN:

N. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: May 4, 2017

DATE OF DECISION: May 12, 2017

Canada

REASONS AND DECISION

APPEARANCES

[1] The Appellant, N. C., was present at the telephone hearing (teleconference) held on May 4, 2017. S. B., a co-worker of the Appellant, was also present at the hearing, as a witness.

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

INTRODUCTION

[3] On September 30, 2015, the Appellant made an initial claim for benefits effective September 25, 2015. She stated that she had worked for the employer Résidence Chez S. (9049-4923 Québec inc.) from September 28, 2001, to September 12, 2015, inclusively. The Appellant indicated that she would return to work for that employer on October 3, 2015 (exhibits GD3-3 to GD3-11 and GD4-1).

[4] On September 15, 2016, the Commission informed the Appellant that it could not pay her employment insurance benefits starting on September 21, 2015. The Commission stated that it had been informed by the Appellant that she would agree to work only for the employer Résidence Chez S. (9049-4923 Québec inc.). The Commission indicated that it would consider the Appellant unavailable for work (exhibits GD3-47 and GD3-48).

[5] On October 3, 2016, the Appellant filed a Request for Reconsideration of an Employment Insurance Decision (exhibits GD3-50 and GD3-51).

[6] On October 26, 2016, the Commission informed the Appellant that it was upholding the decision made in her case, dated September 15, 2016, regarding her availability for work (Exhibits GD3-53 and GD3-54).

[7] On November 7, 2016, the Appellant filed a notice of appeal with the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (the Tribunal) (exhibits GD2-1 to GD2-5).

[8] On November 29, 2016, in response to a request made to that effect by the Tribunal, dated November 8, 2016, the Appellant sent the Tribunal "[translation] a copy of the reconsideration decision under appeal", dated October 26, 2016, to complete her appeal file (exhibits GD2A-1 and GD2A-4).

[9] This appeal was heard by teleconference for the following reasons:

a) The Appellant would be the only party in attendance;

b) This 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.

ISSUE

[10] The Tribunal must determine if the Appellant demonstrated her availability for work under paragraph 18(1)(a) of the *Employment Insurance Act* (the Act).

EVIDENCE

[11] The evidence in the file is as follows:

a) A record of employment dated October 14, 2015, indicates that the Appellant worked as a cook for the employer Résidence Chez S. (9049-4923 Québec inc.) from July 5, 2012, to September 19, 2015, inclusively, and that she stopped working for that employer because of a shortage of work (code A—shortage of work / end of season or contract). The statement indicates that the expected date of recall was "unknown" (Exhibit GD3-12);

b) On April 12, 2016, the Appellant sent a document to the Commission to make corrections to her statements in relation to the amounts she received for the weekly period beginning on October 4, 2015, to the one beginning on March 20, 2016 (Exhibit GD3-13);

c) On May 25, 2016, the Commission indicated that, after her waiting period had elapsed, from September 20, 2015, to October 3, 2015, the Appellant reported a full working week, representing 40 hours of work, followed by a week without work, starting on

October 4, 2015. The Commission stated that the "pay" column of the system "Full Text Screen" shows earnings under "Week 1 Earnings" and no earnings under "Week 2 Earnings." The Commission explained that the Appellant was working as a cook for the employer Résidence Chez S. (9049-4923 Québec inc.), a seniors' residence. The Commission asked how the Appellant could be without work every other week. She pointed out that, in her claim for benefits filed on September 30, 2015, she reported earning an annual wage of $19,000.00 for the work performed at that employer. The Commission explained that, when the Appellant went to a Service Canada Centre on April 4, 2016, she indicated that she had completed her returns without considering her wage increase, effective September 2015. The Commission asked how the gross wage reported by the Appellant, $420.00 per week, could have increased to more than $800.00 per week. The Commission asked whether the Appellant had worked every other week since October 4, 2015, or every week (Exhibit GD3-14);

d) On May 31, 2015, the employer stated that the Appellant worked every other week. He said that two cooks work at the residence. The employer explained that the Appellant had gone through tough times, that she was older and that the work was very demanding (Exhibit GD3-15).

e) In response to a request made by the Commission (Service Canada) dated July 8, 2016 ("Request for Information"—exhibits GD3-16 and GD3-17), the employer Résidence Chez S. (9049-4923 Québec inc.) provided a copy of the following documents:

    i. Table entitled "Résidence Chez S. – Revenus et détails des heures – Du : 01-01-2016 Au : 09-07-2016 " showing that the Appellant had worked 40 hours per week on different weeks during the period indicated in the table (weeks ending on January 16, 2016, January 30, 2016, February 13, 2016, February 27, 2016, March 12, 2016, April 9, 2016, May 7, 2016, May 21, 2016, June 4, 20916, June 18, 2016 and July 2, 2016) and that she had received a wage ranging from $19.50 to $21.00 per hour (Exhibit GD3-18);

    ii. Table entitled "Rémunération de l'employé – Employee's earnings" (record of wages) showing the hours worked by the Appellant for 2015 and for the

period from January 2016 to June 2016. The document indicates that the Appellant generally worked 25 to 35 hours each week for the period from January 4 to September 5, 2015, based on a gross wage of $420.00 (35 hours per week). The document also indicates that, starting on September 6, 2015, the Appellant began working in general every other week, 40 hours per week, based on a gross wage of $840.00 per week (exhibits GD3-19 and GD3-20).

f) On or around August 19, 2016, the Appellant sent the Commission a copy of the following documents:

   i. "bordereau des gains et déductions de l'employé(e) [statement of employee earnings and deductions]" issued to her by the employer Résidence Chez S. (9049-4923 Québec inc.) for the period from September 20 to 26, 2015, to January 2, 2016. These documents indicate that the Appellant worked the following hours: September 20 to 26, 2015 (40 hours—total earnings: $890.40), November 1 to 7, 2015 (40 hours—total earnings: $864.96), November 15 to 21, 2015 (40 hours— total earnings: $826.80), November 29 to December 5, 2015 (40 hours—total earnings: $890.40), December 13 to 19, 2015 (40 hours—total earnings: $890.40), and December 27, 2015, to January 2, 2016 (40 hours—total earnings $864.96) (exhibits GD3-23 and GD3-24);

   ii. Wage statements for the period from February 7, 2016, to July 16, 2016. These documents indicate that the Appellant worked 40 hours per week as a cook during the following weeks: February 7 to 13, 2016, February 21 to 27, 2016, March 6 to 12, 2016, March 20 to 26, 2016, April 3 to 9, 2016, May 1 to 7, 2016, May 15 to 21, 2016, May 29 to June 4, 2016, June 12 to 18, 2016, June 26 to July 2, 2016, and July 10 to 16, 2016 (exhibits GD3-25 to GD3-35);

   iii. "Journal des opérations – Pour la période du 1 septembre 2015 au 31 juillet 2016 [transaction record—for the period from September 1, 2015, to July 31, 2016]" for the Appellant's bank account (Caisse Desjardins de X, X) showing transactions during the period from September 1, 2015, to July 31, 2016 (exhibits GD3-36 to GD3-44).

g) In a document entitled “Détails sur l’avis de dette [details of notice of debt] (DH009)” dated September 24, 2016, and reproduced on December 2, 2016, the total amount of the Appellant’s debt was established at $6,812.00 (Exhibit GD3-49).

[12] The evidence presented at the hearing is as follows:

a) The Appellant recalled the main items in the file to show that she was available for work;

b) She stated that she had worked for the employer Résidence Chez S. (9049- 4923 Québec inc.) for 16 years. The Appellant indicated that she accepted the employer’s proposal to do work sharing and work one week every two weeks. She stated that she did work sharing during the period from September 2015 to October 2016. The Appellant stated that she went back to regular work, every week, without alternating and without breaks, for that employer in October 2016, after making a request to do so;

c) S. B., the appellant’s witness and co-worker, explained that she had assumed responsibilities with the employer, as part of the training program for private seniors’ residences (Formarez). She explained that the program, offered in partnership with school boards, is designed to provide training to employees working with seniors living in residences and to enable seniors’ residences to become accredited. S. B. indicated that the Appellant took this course so that she could assist seniors at the institution where she works. She stated that the Appellant worked not only as a cook but also as a personal support worker. S. B. also stated that the Appellant was available for work, but her regular employer did not need her during the week that she was not working. She noted that the Appellant could not work and that she had not found employment elsewhere. S. B. argued that the Appellant should be entitled to compensation for the weeks in which she was not working, since it was the employer who had asked her to do work sharing, and she still remained available for work.

PARTIES' ARGUMENTS

[13] The Appellant made the following submissions and arguments:

a) The Appellant explained that she had done work sharing (one week every two weeks), starting in September 2015, after accepting the work sharing offer from the employer, Résidence Chez S. (9049-4923 Québec inc.). The Appellant pointed out that it was the employer that wanted employees to do work sharing, and that she had not requested to do so. She argued that it was her first time doing work sharing. The Appellant stated that she could not work with this employer during the week when she was not scheduled to work (exhibits GD2-4, GD3-21, GD3- 22 and GD3-52).

b) The appellant explained that, although she was doing work sharing, she still remained available to work for her regular employer (Résidence Chez S. – 9049-4923 Québec inc.) during the weeks in which she was not working. She stated that the employer never called her to work during the weeks in which she was receiving benefits (exhibits GD3-45 and GD3-52);

c) In a written statement dated September 6, 2016, and in response to questions in that regard from the Commission, the Appellant stated that since September 2015, she kept herself available for her employer during the week in which she was not working. She stated that she did not look for work during the week in which she was not working because she was remaining available for her employer (exhibits GD3-45 and GD3-46).

d) She argued that she did not understand the question that she had been asked about her availability for work, because she is English-speaking. The Appellant said that she was challenging the decision made in her regard, since the Commission believed that she was available for work only for the employer, Résidence Chez S. (9049- 4923 Québec inc.) (exhibits GD2-4, GD3-50 and GD3-52);

e) In her request for reconsideration dated October 3, 2016, the Appellant stated that she was available for work and had looked for jobs on the Internet and with potential employers (Exhibit GD3-50);

f) In a statement made on October 26, 2016, the Appellant explained that she was available to work full time. She indicated that she often looked at job postings on the Internet. The Appellant indicated that she did not send any résumés to potential employers or apply to them. She indicated that she had given her name to the employer P. D., in X, Quebec, to do housekeeping. The Appellant said she could not remember when she had contacted this employer, but it was a few months ago (before October 26, 2016). She indicated that she knew she had to look for work when she was claiming benefits and that, to her, that is what she was doing when she was looking at job postings on the Internet and when she contacted an employer. The Appellant explained that she had seen job offers for a cook, but she already had a good job with her employer (Résidence Chez S. – 9049-4923 Québec inc.) (Exhibit GD3-52).

g) During the hearing, the Appellant indicated that she had looked for work, but no full-time jobs were available. She explained that she lived in a remote area, and there was not a great deal of work. The Appellant stated that she was looking for a job for the week during which she was not working for the employer, Résidence Chez S. (9049-4923 Québec inc.). She stated that she had done job searches for work in seniors' residences in X (Manoir X) and in X (Résidence X). She indicated that no full-time work was available at those locations;

h) She explained that the employer had increased her wage because, in addition to working as a cook, she could perform other duties with the residents, since she had taken a training course (Formarez) in 2015. The appellant stated that this training enabled her to assist and help seniors. She indicated that taking the training had resulted in the employer paying her for two jobs, because she would have the opportunity to do work not only as a cook, but also as a personal support worker. The Appellant stated that she had provided the Commission with information about the wage that she received from the employer (exhibits GD3-21 and GD3-22).

i) The Appellant indicated that she resumed working for her employer every week in early October 2016. She explained that, after agreeing to do work sharing in September 2015, she had problems with employment insurance and that she was tired of having to justify

herself to the Commission. The Appellant indicated that, since she had problems with her unemployment, she asked the employer if she could resume working full-time every week, and the employer accepted the request. She pointed out that all employees have been doing work sharing for the employer, in some cases for 15 years, and that she had been shafted (Exhibit GD3-52).

j) She argued that it was not her intention to defraud employment insurance. The appellant noted that she was not accustomed to employment insurance. She stated that she had used employment insurance only once, in the past, for three months, for medical reasons (Exhibit GD2-4).

k) She argued that she is entitled to receive benefits while she was not working. According to the Appellant, paying employment insurance premiums should entitle her to receive benefits (Exhibit GD3-52);

l) The appellant said that she found the amount requested ($6,812.00) high, that it was different if she had been asked to repay an amount of $1,000, for example. She explained that she did not have a high wage to repay the entire amount requested. The Appellant indicated that she had not started to repay the amount of the overpayment requested (Exhibit GD3-49).

[14] The Commission made the following observations and submissions:

a) The Commission explained that, to demonstrate availability for work under paragraph 18(1)(a) of the Act, subsection 50(8) of the Act provides that it may require the Appellant to prove that she is making reasonable and customary efforts to obtain suitable employment (Exhibit GD4-3);

b) The Commission explained that availability for work is a question of fact that must be determined after evaluating the evidence. It noted that the decision was made by analyzing the following three factors: (1) the claimant wants to return to the labour market when suitable employment is offered; (2) the claimant expresses that desire by making efforts to find suitable employment; and (3) the claimant does not set personal

conditions that might unduly limit their chances of returning to the labour market (Exhibit GD4-3);

c) The Commission explained that, during a telephone conversation, the Appellant said that she had no résumé, that she had consulted job postings on the Internet and that she contacted an employer. The Commission stated that it found that the Appellant was demonstrating a fairly passive availability, since her efforts to find suitable employment were very limited and it was impossible to obtain details about them (Exhibit GD4-3);

d) The Commission explained that the Appellant stated that she had returned to her regular full-time employer at her own request following the imposition of a disqualification from employment insurance benefits (Exhibit GD3-51). The Commission indicated that it found that the work, one week every two weeks, was a personal condition of the Appellant. The Commission believes that the condition greatly limits the Appellant's chances of returning to the labour market full time. It pointed out that, by maintaining her employment with the employer, one week every two weeks, and limiting her availability to that employer alone, the Appellant unduly limited her chances of returning to the labour market full time (Exhibit GD4-3).

e) The Commission explained that the Appellant alleged that she had misunderstood the question about availability because she was English-speaking (Exhibit GD3-50). The Commission stated that its decision was not based on an understanding of the question posed, but rather on the facts in the file. It explained that it was possible that the Appellant had misunderstood the meaning of the question, but that it had been clarified in subsequent telephone calls with her. The Commission pointed out that the absence of job search and elements for quickly returning to the labour market had enabled it to see that the Appellant did not meet the burden of proof on her with respect to availability (Exhibit GD4-4).

f) The Commission indicated that the Appellant also alleged that she was looking for employment on the Internet (Exhibit GD3-52). The Commission argued that simply viewing job offers on the Internet is not sufficient to demonstrate the inability to obtain suitable employment; it must be combined with concrete actions. The Commission

pointed out that the Appellant did not have anything else that could demonstrate that she was actively looking for work (Exhibit GD4-4);

g) The Commission explained that the Appellant stated that it was not her intention to defraud the Commission (Exhibit GD2-4). The Commission stated that the intent to commit fraud is not demonstrated in this case; no penalty is imposed on the Appellant, whether monetary or non-monetary. It stated that this element is not an element used to demonstrate the Appellant's availability for work; it is an element treated separately (Exhibit GD4-4);

h) The Commission explained that the Appellant indicated that she was not accustomed to employment insurance (Exhibit GD2-4). The Commission stated that the evidence requested of all claimants regarding availability is the same whether or not they are accustomed to benefits. It specified that this is not a factor in determining whether the Appellant was available for work and unable to obtain suitable employment (Exhibit GD4-4);

i) The Commission indicated that the Appellant also claimed that she was doing work sharing for the first time (Exhibit GD2-4). The Commission stated that the issue in this case was not whether the Appellant did work sharing, but rather to determine whether she was available for work and unable to obtain suitable employment. It noted that these were two separate concepts (Exhibit GD4-4).

j) The Commission argued that the Federal Court of Appeal (the Court) confirmed the principle that maintaining the employment relationship and remaining in the labour force does not necessarily make a person available, for every working day of a benefit period, as required by paragraph 18(1)(a) of the Act (*Gagnon,* 2005 FCA 321) (Exhibit GD4-4);

k) The Commission also argued that the Court has established that the claimant's burden of proving their availability is a requirement of the Act that cannot be ignored. A claimant cannot simply wait to be called back to work but must look for employment to qualify for benefits (*Cornelissen-O'Neil,* A-652-93, *Lamirande,* 2004 FCA 311) (Exhibit GD4-5).

ANALYSIS

[15] The relevant statutory provisions are appended to this decision.

[16] In the absence of a definition of "availability" in the Act, the criteria developed in the case law serve to establish the availability of a person for work as well as their entitlement or not to receive employment insurance benefits. Availability is a question of fact that requires consideration of three general factors set out in the case law.

[17] In *Faucher* (A-56-96), the Court established three elements to consider in determining whether a claimant has proven their availability for work. In that case (*Faucher*, A-56-96), the Court stated:

> 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.

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

[19] In *Gagnon* (2005 FCA 321), the Court stated:

> Failing to sever the employment tie and remaining part of the work force does not necessarily make a person available for work. The courts have consistently held that, in addition, the person must not impose such restrictions on his or her availability as to unduly limit his or her chances of holding employment: see *Canada (Attorney General) v. Loder*, 2004 FCA 18; *Canada (Attorney General) v. Rideout*, 2004 FCA 304; *Canada (Attorney General) v. Primard* (2003) 317 N.R. 359 (F.C.A.); *Canada (Attorney General) v. Bois*, 2001 FCA 175. . . . In *Vézina v. Canada (Attorney General)*, 2003 FCA 198, at paragraph 1, the Court repeated the comments it had made in 1982 in *Attorney General of Canada v. Bertrand*, [1982] F.C.A. No. 423 (QL): "The question of availability is an objective one - whether a claimant is sufficiently available for suitable employment to be entitled to unemployment insurance benefits—and it cannot depend upon the particular reasons for the restrictions on availability, however these may evoke sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it."

[20] In *Whiffen* (A-1472-92), the Court stated:

> . . . Availability is usually described, in the case law, either as a sincere desire to work demonstrated by attitude and conduct and accompanied by reasonable efforts to find a job, or as a willingness to reintegrate into the labour force under normal conditions without unduly limiting one's chances of obtaining employment. . . . It is to be noted that the notion of "suitable employment" in these provisions is defined in part with reference to the personal circumstances of the claimant and, more importantly still, that it is a notion that may vary as the period of unemployment is prolonged. . . . It is a well-established general rule, and one imposed by the legislation as well as the most common understanding of what a sincere desire to work may imply, that a claimant who imposes unreasonable restrictions regarding the type of work he or she is looking or the area in which he or she wishes to be employed fails to prove availability. Bearing in mind that availability is to be assessed on the basis of attitude and conduct and taking into account all circumstances, the reasonableness of a restriction placed by a claimant to his or her willingness to return to the labour market has to be assessed in like manner."

[21] The case law has clearly established that a person's availability is assessed per working day in a benefit period for which the person can prove that they were capable of and available for work, on that day, and unable to obtain suitable employment (*Cloutier*, 2005 FCA 73; *Boland*, 2004 FCA 251).

[22] In *Cornellisen-O'Neill* (A-652-93), the Court recalled the words of the Chief Umpire in CUB 13957 stating 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."

[23] 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."

[24] In *Pannu* (2004 FCA 90), the Court held as follows:

> [3] The applicant's complaint is really against the Employment Insurance Act. She says she has contributed during her entire period of employment and that it is unfair that she should be denied her sickness benefits now. However, the Employment Insurance Act is an insurance plan and like other insurance plans, claimants must meet the conditions of the plan to obtain benefits. In this case, the applicant does not meet those conditions and is therefore not entitled to benefits. [4] While the applicant's case is a sympathetic one, the Court cannot rewrite the Employment Insurance Act to accommodate her.

[25] In *Braga* (2009 FCA 167), the Court stated:

> . . . Notices of Debt are decisions of the Commission that fall within subsection 52(2) of the Act and are therefore appealable to the Board. Subsection 52(3) of the Act provides that the amount of an overpayment specified in a Notice of Debt becomes repayable, under section 43 of the Act, on the date of the notification of the amount of the overpayment. Under section 44 of the Act, a person who receives an overpayment of benefits is required to return the amount of the overpayment without delay. These provisions have the effect of creating an enforceable debt obligation in the amount specified in the Notice of Debt. That amount is a debt due to Her Majesty and is recoverable in accordance with the provisions of section 47, subject to the prescription period in subsection 47(3) of the Act.

[26] In weighing the evidence, the Tribunal considered the three criteria set out above, which serve to determine the availability of a person 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 through 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.

[27] In this case, as of September 21, 2015, the Appellant did not meet any of the criteria set out above, following the reconsideration decision by the Commission in her case on September 15, 2016, informing her that she was considered to be unavailable for work (exhibits GD3-47 and GD3-48).

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

[28] The appellant did not demonstrate her desire to return to the labour market as soon as a suitable job was offered to her (*Faucher,* A-56-96, *Bois*, 2001 FCA 175, *Wang*, 2008 FCA 112, *Gagnon*, 2005 FCA 321, *Whiffen*, A-1472-92).

[29] To determine what constitutes "suitable employment," section 9.002 of the Regulations provides as follows:

> . . . For the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8) of the Act, the criteria for determining what constitutes suitable employment are the following: (a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work; (b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; (c) the nature of the work is not contrary to the

> claimant's moral convictions or religious beliefs; (d) the daily commuting time to or from the place of work is not greater than one hour or, if it is greater than one hour, it does not exceed the claimant's daily commuting time to or from their place of work during the qualifying period or is not uncommon given the place where the claimant resides, and commuting time is assessed by reference to the modes of commute commonly used in the place where the claimant resides; (e) the employment is of a type referred to in section 9.003; and (f) the offered earnings correspond to the scale set out in section 9.004 and the claimant, by accepting the employment, will not be put in a less favourable financial situation than the less favourable of (i) the financial situation that the claimant is in while receiving benefits, and (ii) that which the claimant was in during their qualifying period.

[30] Although the Appellant indicated that she was available for work, it appears from the evidence in the record and from her testimony at the hearing that she accepted the offer of work sharing by the employer Résidence Chez S. (9049-4923 Québec inc.).

[31] This situation meant that, during the period from September 2015 to October 2016, the Appellant did work sharing, working one week every two weeks for that employer, and no longer every week, as was the case before.

[32] In this context, the Tribunal finds paradoxical the Appellant's indication that she remained available to work with her regular employer (Résidence Chez S. – 9049-4923 Québec inc.) during the weeks in which she was not working, since she agreed to do work sharing for that employer.

[33] The Tribunal also finds contradictory the Appellant's assertion that she was seeking employment for the weeks in which she was not working for her regular employer (Résidence Chez S. – 9049-4923 Québec inc.) after agreeing to do work sharing for that employer.

[34] The Tribunal considers that the Appellant must demonstrate her desire to return to the labour market as soon as suitable employment was offered to her, but she chose not to do so by accepting work sharing at her regular employer.

[35] The explanations provided by the Appellant indicate instead that she preferred to do work sharing for her regular employer, rather than look for full-time employment.

[36] In this context, the Tribunal is of the opinion that, as of September 21, 2015, the Appellant did not demonstrate that she wanted to return to the labour market as soon as suitable employment was offered to her.

Demonstration of that desire by making efforts to find suitable employment

[37] The Appellant also failed to express her desire to return to the labour market by making significant efforts to find suitable employment for each working day of her benefit period, starting on September 21, 2015 (*Cloutier*, 2005 FCA 73, *Boland*, 2004 FCA 251).

[38] The Tribunal finds that the Appellant did not make "reasonable and customary efforts" in the "search for suitable employment" as provided for in section 9.001 of the Regulations. That section states:

> 9.001 For the purposes of subsection 50(8) of the Act, the criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts are the following: (a) the claimant's efforts are sustained; (b) the claimant's efforts consist of (i) assessing employment opportunities, (ii) preparing a resumé or cover letter, (iii) registering for job search tools or with electronic job banks or employment agencies, (iv) attending job search workshops or job fairs, (v) networking, (vi) contacting prospective employers, (vii) submitting job applications, (viii) attending interviews, and (ix) undergoing evaluations of competencies; and (c) the claimant's efforts are directed toward obtaining suitable employment.

[39] The evidence on the record and the appellant's testimony show that, although she did work sharing with her regular employer, she chose to give priority to that employment rather than looking for other full-time employment in her field of expertise or in another field of employment.

[40] The Tribunal finds contradictory the Appellant's assertions about the job searches that she says she performed.

[41] At the hearing, the Appellant stated that she looked for work, but no full-time jobs were available. She then indicated that she had looked for work, without specifying the dates, with the following potential employers: Manoir X, in X, and Résidence X, in X. The Appellant also pointed out that no full-time work was available at those locations.

[42] In a statement dated October 26, 2016, the Appellant explained that she had looked at job offers on the Internet but had not sent any résumés or applied to potential employers (Exhibit GD3-52).

[43] The Appellant stated that she had contacted the employer P. D., in X, a few months before October 2016, to do housekeeping (Exhibit GD3-52).

[44] In a written statement dated September 6, 2016, the Appellant also indicated that she did not look for work during the week when she was not working because she was remaining available for her employer (exhibits GD3-45 and GD3-46).

[45] The Appellant explained that she already had a good job with the employer, Résidence Chez S. (9049-4923 Québec inc.) (Exhibit GD3-52).

[46] The Tribunal points out that a person's availability is assessed per working day in a benefit period for which the person can prove that they were capable of and available for work, on that day, and unable to obtain suitable employment (*Cloutier,* 2005 FCA 73; *Boland,* 2004 FCA 251).

[47] Paragraph 18(1)(a) of the Act clearly 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 that on that day the claimant was (a) capable of and available for work and unable to obtain suitable employment . . .

[48] The Appellant was responsible for actively seeking suitable employment in order to continue to obtain employment insurance benefits (*Cornelissen-O'Neil,* A-652-93, *De Lamirande,* 2004 FCA 311).

[49] The evidence shows that the Appellant did not discharge that responsibility as of September 21, 2015.

The non-establishment or absence of "personal conditions" that might unduly limit the chances of returning to the labour market.

[50] The Tribunal finds that the Appellant also established personal conditions that unduly limited her chances of returning to the labour market.

[51] The evidence shows that the personal conditions imposed by the Appellant are essentially related to the fact that she chose to do work sharing with her employer, Résidence Chez S. (9049-4923 Québec inc.) and that she gave priority to that employer. There is no indication that the Appellant wanted to offer full availability to another prospective employer.

[52] At the hearing, the Appellant stated that she was looking for work for the weeks in which she was not working for the employer, Résidence Chez S. (9049-4923 Québec inc.).

[53] The Appellant also indicated that she had seen job offers for a cook, but that she already had a good job with this employer (Exhibit GD3-52).

[54] The Tribunal is of the view that the Appellant cannot set her own conditions and determine on her own the conditions under which she would accept employment with another employer.

[55] Although the Appellant argued that she did not clearly understand the question asked about her availability for work because she is English-speaking, the evidence shows that, as of September 21, 2015, the Appellant's intention was not to return to the labour market to find other full-time employment, but to do work sharing with the employer Résidence Chez S. (9049-4923 Québec inc.), for which she had been working for 16 years, and to remain available for that employer.

[56] The continuation of the Appellant's employment relationship with the employer, Résidence Chez S. (9049-4923 Québec inc.), does not make her available for work, given her restrictions on her availability (*Gagnon*, 2005 FCA 321).

[57] The Appellant also explained that she resumed regular work with the employer in October 2016, after she had made a request to do so. The Appellant also explained that, after

making a request to her employer, she stopped doing work sharing, in early October 2016, and resumed regular work, that is, working every week. To that end, the Appellant explained that she was no longer doing work sharing because of the employment insurance problems she had encountered and because she no longer wanted to have to justify herself before the Commission.

[58] In determining the conditions under which she would have accepted alternate employment, the Appellant thus established, as of September 21, 2015, "personal conditions" that had the effect of unduly limiting her chances of returning to the labour market (*Faucher*, A- 56-96, *Bois*, 2001 FCA 175, *Wang*, 2008 FCA 112, *Gagnon*, 2005 FCA 321, *Whiffen*, A-1472- 92).

Payment of employment insurance contributions

[59] The Tribunal does not accept the Appellant's argument that she is entitled to benefits because she pays employment insurance premiums.

[60] Even if the Appellant makes contributions to the employment insurance program, this does not automatically entitle her to receive benefits during a period of unemployment. A claimant must meet all the requirements of the Act to qualify for those benefits (*Pannu*, 2004 FCA 90).

Obligation to repay

[61] The appellant also argued that the amount requested is high, that she did not have a large wage to repay the entire amount owed, namely, $6,812.00 (Exhibit GD3-49), and that the reimbursement of $1,000.00 seemed more acceptable.

[62] Despite the explanations given by the appellant on this point, she received an overpayment of benefits. The situation described by the Appellant cannot have the effect of exempting her from her obligation to repay the amount of the overpayment requested for benefits to which she is not entitled (*Braga*, 2009 FCA 167).

[63] Sections 43 and 44 of the Act set out provisions whereby the overpayment of employment insurance benefits must be reimbursed.

[64] The Tribunal notes that section 43 of the Act provides that the overpayment of employment insurance benefits must be repaid. That section clearly states:

> 43 A claimant is liable to repay an amount paid by the Commission to the claimant as benefits (a) for any period for which the claimant is disqualified; or (b) to which the claimant is not entitled.

[65] With respect to the obligation to "return the excess amount of the payment," section 44 of the Act states:

> 44 A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

[66] In short, the Tribunal finds that, as of September 21, 2015, the Appellant did not show that, for each working day of her benefit period, she was capable of and available for work and unable to obtain suitable employment (*Cloutier*, 2005 FCA 73, *Boland*, 2004 FCA 251, *Bertrand*, A-613-81).

[67] The Tribunal finds that the Appellant's eligibility for employment insurance benefits cannot be established because she did not show her availability for work under paragraph 18(1)(a) of the Act, as of September 21, 2015 (*Faucher*, A- 56-96, *Bois*, 2001 FCA 175, *Wang*, 2008 FCA 112, *Gagnon*, 2005 FCA 321).

[68] The appeal is without merit on the issue in this case.

CONCLUSION

[69] The appeal is dismissed.

Normand Morin
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 23.3 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.

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 or nurse practitioner.

(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.

Employment Insurance Regulations

9.001 For the purposes of subsection 50(8) of the Act, the criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts are the following:

(a) the claimant's efforts are sustained;

(b) the claimant's efforts consist of

(i) assessing employment opportunities,

(ii) preparing a resumé or cover letter,

(iii) registering for job search tools or with electronic job banks or employment agencies,

(iv) attending job search workshops or job fairs,

(v) networking,

(vi) contacting prospective employers,

(vii) submitting job applications,

(viii) attending interviews, and

(ix) undergoing evaluations of competencies; and

(c) the claimant's efforts are directed toward obtaining suitable employment.

9.002 (1) For the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8) of the Act, the criteria for determining what constitutes suitable employment are the following:

(a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;

(b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs;

(c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.

(d) to (f) [Repealed, SOR/2016-162, s. 1]

(2) However, employment is not suitable employment for the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8) of the Act if

(a) it is in the claimant's usual occupation either at a lower rate of earnings or on conditions less favourable than those observed by agreement between employers and employees, or in the absence of such agreement, than those recognized by good employers; or

(b) it is not in the claimant's usual occupation and it is either at a lower rate of earnings or on conditions less favourable than those that the claimant might reasonably expect to obtain, having regard to the conditions that the claimant usually obtained in the claimant's usual occupation, or would have obtained if the claimant had continued to be so employed.

(3) After a lapse of a reasonable interval from the date on which an insured person becomes unemployed, paragraph (2)(b) does not apply to the employment described in that paragraph if it is employment at a rate of earnings not lower and on conditions not less favourable than those observed by agreement between employers and employees or, in the absence of any such agreement, than those recognized by good employers.