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

Citation: *N. H. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 75

Tribunal File Number: GE-16-3984

BETWEEN:

N. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: March 28, 2017

DATE OF DECISION: June 1, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

N. H., Appellant

Robert Morrissey, Appellant's Representative

OVERVIEW

[1] When a claimant is engaged in full-time studies, there is a rebuttable presumption that the claimant is not available for work.

[2] The Appellant was enrolled in studies and completed a questionnaire (the first questionnaire) that indicating that he spent less than 25 hours a week in class and studying. He later completed a second questionnaire (the second questionnaire) indicating that he spent 25 or more hours a week in class and studying.

[3] The Appellant was paid regular employment insurance benefits under the *Employment Insurance Act* (EI Act) on the basis of the first questionnaire, but following the second questionnaire, the Commission determined that the Appellant was not available for work because he was attending a training course with mandatory attendance of 30 hours per week. Pursuant to paragraph 18(1)(a) of the EI Act a disentitlement was imposed.

[4] The Commission also issued a warning letter to the Appellant pursuant to subsections 38(1) and 41.1(1) of the EI Act for making a misrepresentation by knowingly providing false or misleading information to the Commission on the first questionnaire.

[5] The Appellant requested a reconsideration of these decisions and the Commission maintained its initial decisions. The Appellant has now appealed these decisions to the Tribunal.

[6] After considering the following, it was decided to hold the hearing by way of teleconference:

a) the need for additional information; and

b) the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as permitted by the circumstances and the considerations of fairness and natural justice.

[7] The Tribunal must decide whether the Appellant was available for work pursuant to paragraph 18(1)(a) of the EI Act. This requires the Tribunal to first determine whether the Appellant was engaged in full-time studies to determine if he has to rebut the presumption of non-availability.

[8] The Tribunal will then consider whether the Appellant misrepresented his course hours on the first questionnaire.

EVIDENCE

[9] The Appellant worked at a fish plant while attending his last year of high school. He worked 40 or more hours a week, working the 4 pm to 10 pm shift during the week and working from either 4 pm to 12 am or 2 am on Fridays and Saturdays.

[10] The summer after the Appellant graduated from high school he worked for the same fish plant as an engineer's helper, 40 hours a week (four 10-hour shifts).

[11] The Appellant started the power engineering course at Holland College on September 2, 2015. The course ended on May 13, 2016.

[12] The Appellant was laid off from the fish plant on September 4, 2015. The Appellant indicated that he was laid off because there is a slowdown during that time of year because of the fishing season cycles.

[13] The Appellant applied for EI on September 20, 2015 and a benefit period was established as of September 6, 2015.

[14] The Appellant completed a Training Questionnaire (first questionnaire) as part of his application for benefits in September 2015. He indicated that:

a) he was spending 15-24 hours a week on his studies, including study and class time;

b) all of his course obligations occurred outside of his normal work hours;

c) that he was available for work and capable of working under the same or better conditions as he was before he started the course;

d) he would drop the course to accept a job;

e) he had made efforts to find work since he became unemployed or started the course; and

f) he had not previously worked while taking a course.

[15] The Appellant's availability was accepted and he received EI benefits.

[16] In January 2016 the Appellant completed a second Training Questionnaire (second questionnaire) in which he indicated that:

a) he was spending 25 or more hours a week on his studies, including study and class time;

b) that not all of his course obligations occurred outside of his normal work hours;

c) that he attended classes or participates in sessions, Monday to Friday, morning and afternoon;

d) that he was available for work and capable of working under the same or better conditions as he was before he started the course;

e) he would drop the course to accept full-time work if the work conflicted with the course;

f) he had made efforts to find employment since starting the course;

g) he had not previously worked while taking a course.

[17] The Appellant's answers to the second questionnaire prompted the Commission to contact the Appellant (GD3-22) about his availability. The Commission's notes of the Appellant's statements are that he made a mistake on the second questionnaire, but he correctly completed the first questionnaire. He indicated that his class times were in the morning, not

usually in the afternoons, except maybe once a week, that there was very little homework (about 30 minutes a week).

[18] The Commission's notes indicate that the Appellant advised the Commission of the following:

a) when he answered that his course obligations occurred outside of his normal working hours he was thinking about when he was in school and working the evening shift;

b) when he stated that he was available for work under the same conditions as he was before he started the course he was thinking of when he was in high school;

c) that he did not know that if he dropped out or did not complete the program that he would have to repay bursary money he had received; and

d) when presented with the Commission's summary of evidence, the Appellant is noted to have replied: "in my mind I answered right".

[19] At GD3-38 the Appellant wrote that the hours of the course were Monday to Thursday, 9 am to 11 am, then 12 pm to 3 pm. Friday the course hours were 9 am to 12 pm. He indicated that because of the large class size, the class was divided into two groups with his class time being Monday to Thursday, 9 am to 11 am or 12 pm. He explained that this is why he felt he reported his class attendance and study time accurately. He indicated that he passed his tests and if he had found work he could have made arrangements to conclude his course at his schedule. He indicated that he was available for work and had been actively looking for work.

[20] During the hearing, the Appellant indicated that a typical day at school was:

> 9 -10 am – do homework, no instructors were in the class but help was available to the students if they had questions
>
> 10 am to 12 pm – instruction
>
> Afternoons – workshops.

[21] The Appellant indicated that there were only about 7 to 8 workshops throughout the entire program. Even if his group was scheduled to do a workshop it was only one afternoon a week, at most, and attendance was not mandatory or taken.

[22] The Appellant explained that his previous work at the fish plant was in this area of study so he already had exposure to the course material, including that topics covered in the afternoon workshops.

[23] The Appellant filed a letter from a fellow classmate. The letter indicated that he attended the Power Engineering Course with the Appellant during the 2015-2016 year. He indicated that their scheduled hours were from 9 am to 4 pm, Monday to Friday, with one hour off for lunch. He indicated that when he checked with former students he was told that the program always ended Friday at noon. He stated that when the program started in the fall of 2015 there were twice as many students as the class size would permit, so the college split the space between two classes, so they only spent half days in class, with the rest of the day to be spent in unsupervised study. He indicated that no one was disciplined or checked on if they left the program after half a day.

[24] The Commission contacted the college with respect to "general information" regarding the Appellant's course. The Learning Manager indicated that class time was from 9 am to 3:30 pm, 30 hours a week, that class attendance was mandatory and that there was some flexibility in doing some assignments online but classroom participation was still an integral part of the program. Evening programs were not offered or being considered.

[25] The Respondent's notes indicate that the Appellant confirmed that the Learning Manager advised him that there was no flexibility for the classroom or practical parts, except for a few on- line assignments.

[26] The Appellant indicated that the Learning Manager was not an instructor or in the classroom for his program. The Commission's notes indicate that the Learning Manager is involved in the programing but does not directly teach it (GD3-28).

[27] In a further conversation with the Learning Manager, the Learning Manager advised the Commission that, with respect to afternoon attendance, they do have students who do not do

what they are supposed to do. He indicated that he was very upset that a student would say they only do half-days for that course. He indicated that the afternoons are for practical skills and there are sessions in the lab, simulation programs and that they run different exercises. He indicated that afternoons are mandatory because they cannot make up the practical anywhere else. Further, it was indicated that in April there would be a one-month mandatory placement in the field.

[28] Further, the Learning Manager stated that he told the Appellant that there was no way a person could work full-time and still be successful in the course.

[29] At the hearing the Appellant confirmed that he passed the course and the two provincial examinations only attending the course until noon.

[30] When the Commission contacted the Appellant about the requirement to do full days at the college as per the terms of his Learning Contract with the college, the Appellant maintained that he did not make any false statements. He indicated that he answered what time he was spending at the college. He indicated that full days may be what is expected but he was only going for half days so he thought that was what he was supposed to put on the questionnaire.

[31] At the hearing the Appellant indicated that despite what the Learning Manager stated, he felt that the college would have adjusted his schedule around having a full-time job. He indicated that the Learning Manager could not say the hours they were actually attending because it would not look good for the college. He indicated that he was willing to leave the course in the sense of the hourly scheduled course because he knew he could complete the program through the flexible program.

[32] The Appellant submitted a December 2014 letter from the college to a previous student enrolled in the Power Engineering program. The letter indicates that although the student was enrolled as a full-time student, the College was in the process of adapting a new flexible delivery model to allow students to attend programming on a part-time basis. The college offered to design a part-time schedule to suit that student’s particular needs.

[33] The Commission had a further conversation with someone at the college about the bursaries. She indicated that if a student who receives bursaries exits or does not finish the program that the student is responsible to repay the bursary.

[34] During the hearing the Appellant indicated that he did not see how he would have to repay the bursaries because he would have been able to complete the course even if he had been working.

[35] The Appellant indicated that despite his efforts he was not able to find work while he was attending college. He indicated that he went through the list at Service Canada and looked on- line for opportunities. He also handed out resumes. He indicated that he was looking for work the whole time that he was in school, including calling the fish plant all winter to see if there was any work.

[36] The Appellant indicated that in mid-May 2016 he returned to work at the fish plant. His work and his school overlapped by a day or two.

[37] The Commission's notes state that the Appellant indicated that he had dropped off four resumes for jobs and that he would take whatever job he could get, including labour work, both full-time and part-time. He indicated that if push came to shove he would give up his course, further indicating that he could possibly complete the course in the evenings but that he did not care at that point because he already had the half-year certificate and could always complete the course later. The Commission's notes later indicate that the Appellant stated that whether he would drop out would have depended on the job and what it was paying; he would not have been prepared to drop out of the course for a general labourer wage job.

SUBMISSIONS

[38] The Appellant submitted the following:

a) He did not knowingly make any false misrepresentations. He answered honestly based on the actual times he attended school.

b) He finished the program and passed the provincial examinations despite the hours he attended the program, proving that full-time attendance was not necessary.

c) He was available for work because he had enough flexibility in the course program. The information given by the Program Manager was the standard program information, not the reality of what happened the year that he took the course.

[39] The Appellant submitted that the Commission did not notify him that he had to expand his job search and that he could be disentitled if he did not do it. The Appellant relies on CUB 72689 and CUB 12842 for the proposition that a claimant must be given notice that he must enlarge his job search and be given an opportunity to establish availability either by an adequate job search or by obtaining a Commission referral.

[40] The Commission submitted the following:

a) The Appellant must prove that he met the availability requirements of all claimants who are requesting regular employment insurance benefits under the EI Act, including continuing to seek employment and that the course requirements did not place restrictions on his availability that greatly reduced his chances of finding employment.

b) There is a presumption that a claimant attending full-time studies is not available for work. To rebut this presumption the Appellant must demonstrate that his main intention is to immediately accept suitable employment as evidenced by job search efforts, that he is prepared to make whatever arrangements may be required or that he is prepared to abandon the course. The claimant must demonstrate that the course is of secondary importance and is not an obstacle in finding and accepting suitable employment.

c) The Appellant failed to rebut the presumption of non-availability while attending a full-time course because:

    i) although he states that he only attended classes in the morning, the information from the college is that full-time attendance was mandatory;

    ii) he did not provide any information to confirm that he was only in attendance in the morning;

    iii) the representative from the college states that it would be impossible to work full-time while completing the course.

d) The Appellant failed to maintain an active job search which proves that finding work was not his priority. He only contacted four employers but the sample business directory for the city where he attended school indicated that there were numerous employers where he could have been making contact for work.

e) The Appellant's priority was to finish his training course.

[41] With respect to misrepresentations, the Commission states that it has met the onus of demonstrating that the Appellant knowingly made the following misrepresentations on his first questionnaire:

a) He was spending 15 to 24 hours per week on a training program when information from the college indicates that full-time class attendance from Monday to Friday, 9 am to 3:30 pm was mandatory, and was also contrary to his second questionnaire. The Appellant was unable to provide any information to confirm his statement that he only attended classes in the morning for a total of 15 hours per week. The Tribunal notes that the Appellant's classmate's letter was submitted after the Commission made this written submission.

b) All of his course obligations occurred outside of his normal working hours but his last employment was in a fish plant where employees work shift work, including days.

ANALYSIS

[42] The relevant legislative provisions are reproduced in the Annex to this decision.

Documents filed at the hearing

[43] At the hearing the Appellant referred to the December 2014 letter referred to at paragraph 32 hereof and the letter from the Appellant's classmate referred to at paragraph 23 hereof. The Appellant asked to be able to submit these documents to the Tribunal. The Appellant filed the documents on the day of the hearing. These documents were accepted into evidence and labelled GD5. GD5 was provided to the Commission on March 29, 2017. No opportunity to reply was provided because the Tribunal considers these to be documents filed at

the hearing which the Commission did not attend. It should be noted that as of the date of this decision, no submissions have been received by the Commission with respect to GD5.

Availability

[44] Pursuant to paragraph 18(1)(a) of the EI Act a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove he was capable of and available for work and unable to obtain suitable employment.

[45] There is a rebuttable presumption that when a claimant is enrolled in full-time studies they are not available for work. This presumption can be rebutted through proof of exceptional circumstances. (*Canada (Attorney General)* v. *Wang*, 2008 FCA 112; *Canada (Attorney General)* v. *Cyrenne*, 2010 FCA 349)

[46] To determine if this presumption applies, the Tribunal must decide if the Appellant was engaged in full-time studies.

Was the Appellant engaged in full-time studies?

[47] No. The Appellant was not engaged in full-time studies. Whether the Appellant was taking full-time studies is a factual determination to be made by the Tribunal based on the evidence.

[48] The Tribunal finds that the Appellant was engaged in part-time studies because he was only in school from 9 am to 12 pm Monday to Friday (15 hours a week) and only seven to eight afternoon workshops were held during the entire year. This finding is supported by the Appellant's first questionnaire, by his classmate's letter and the Appellant's oral testimony. The Tribunal also notes that the only time the Appellant provided any evidence to the contrary was in the second questionnaire, which he states did not represent the hours he actually attended college.

[49] The Tribunal recognizes that the second questionnaire indicated that he spent 25 or more hours a week in class and that he was in class both in the afternoon and in the morning. However, the Tribunal puts more weight on the Appellant's oral testimony which was

consistent with what he repeatedly told the Commission and is also consistent with his classmate's letter.

[50] The Tribunal acknowledges the information the Commission received from the College is that the course was a full-time course and that someone could not complete the course while working full-time. However, the Tribunal accepts and prefers the evidence of the Appellant and his classmate that although the course was intended to be a full-time course, during the year they attended, only half-days were spent in class, with the rest of the day in unsupervised study, without attendance being taken.

[51] The Tribunal accepts the Appellant's evidence that he only attended the course in the morning because it is supported by his classmate's evidence and it has been consistent throughout the file, save for the second questionnaire. Further, the Appellant was successful in the course despite the hours he attended, which is evidence that someone (at least someone with the Appellant's work experience) could attend the course on a part-time basis and be successful, proving the Learning Manager wrong when he stated that this was not possible.

[52] It is for these reasons that the Tribunal finds that the Appellant's studies, although intended to be full-time, were only on a part-time basis and therefore the rebuttable presumption of non-availability does not apply.

[53] The Tribunal must now consider the Appellant's availability.

Was the Appellant available for work pursuant to paragraph 18(1)(a) of the EI Act?

[54] Yes, the Appellant was available for work for the reasons set out below.

[55] While "available" is not defined in the EI Act, the Tribunal is guided by the Federal Court of Appeal (*Faucher v. Canada Employment and Immigration Commission* (1997), 215 N.R. 314, *Wang, supra*) which has consistently held that the criteria to be considered with respect to availability are:

a) a desire to return to the labour market as soon as suitable employment is offered;

b) an indication of this desire by efforts to find such suitable employment; and

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

Did the Appellant have a desire to return to the labour market as soon as suitable employment was offered and did the Appellant demonstrated his desire through efforts to find such suitable employment?

[56] Yes. The Appellant had a desire to return to the labour market as soon as suitable employment was offered which he demonstrated by calling the fish plant all winter when he was laid off and returning to work as early as possible in mid-May when lobster season started.

[57] Further, in addition to simply waiting for a call from the fish plant, the Appellant made efforts to find other work by dropping off resumes and looking on-line for positions.

Are there personal conditions that unduly limit the Appellant's chances of returning to the labour market?

[58] No. On the facts before it, the Tribunal finds that the Appellant's restriction of not being able to work between 9 am and 12 pm does not unduly limit the Appellant's ability to return to the workforce. In making this finding the Tribunal has considered the very short time the Appellant would spend studying outside of this time.

[59] The Tribunal took guidance from the Federal Court of Appeal in *Canada (Attorney General)* v. *Bertrand*, A-613-81. In that case the Board of Referees found that the Claimant was not available for the purposes of the EI Act where she was only available for work between the hours of 4 pm and 10 pm. The FCA did not question the Board's finding on this point.

[60] The facts in the case before the Tribunal are similar in that the Appellant has put restrictions on the hours he can work, however, the Appellant's hourly restrictions cannot reasonably be compared to those in the *Bertrand* case. The Appellant's restrictions equate to three to four hours a day which is starkly different from the mere six hours a day that the claimant in *Bertrand* was available to work.

[61] The Tribunal finds that the Appellant would have been able to engage in full-time employment had it been offered without leaving his course. The Tribunal bases this finding on the Appellant's history of working 40 hours a week while attending high school. He was able to and did work full-time hours while still in high school and managed to graduate and move on to further his education at college.

[62] The Tribunal acknowledges that the Appellant's questionnaires indicate that he stated that he had not previously worked while taking a course. The Tribunal does not find this to be contrary to the Appellant's evidence that he worked 40 or more hours a week during his last year of high school because applying the plain language test, high school would not be considered to be a "course".

[63] The Tribunal also considered the apparent inconsistencies in the evidence as to whether the Appellant was willing to leave his studies in order to obtain full-time employment and the Commission's submissions that the Appellant's studies were his priority. The Tribunal finds that any inconsistencies are not relevant to its decision because the Tribunal accepts the Appellant's evidence that he would have been able to work at a full-time job and still continue on in his studies, as he did in high school. Given this finding, whether he would have left his studies for full-time employment becomes a moot point because the limitations his course placed on his availability were not unduly limiting.

Did the Appellant knowingly misrepresent his availability in the first questionnaire?

[64] No. For the reasons set out above, the Tribunal finds that the Appellant's representations made on the first questionnaire as to his course hours accurately reflected the time he spent in the course and therefore were not misrepresentations. Further, the Tribunal finds that his representation that all of his course obligations occurred outside of his normal working hours were not misrepresentations because his high school hours had been accommodated by his previous employer and therefore it can easily be said that his much fewer college hours were outside of his normal working hours.

[65] The Commission may impose a penalty on a claimant where the Commission becomes aware of facts that in its opinion establish that the claimant has made a representation or provided information that the person knew was false or misleading (paragraphs 38 (1)(a) and (b) of the EI Act). A penalty may be imposed for each act or omission (subsection 38(1) of the EI Act). However, instead of imposing a penalty, the Commission may issue a warning instead (section 41.1 of the EI Act).

[66] With respect to the warning issued by the Commission, the Tribunal finds that where there has been no misrepresentation, the Commission may not issue a warning.

CONCLUSION

[67] The appeal is allowed.

Angela Ryan Bourgeois
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

18 (1) A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

(a) capable of and available for work and unable to obtain suitable employment;

(b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or

(c) engaged in jury service.

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

38 (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

(a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;

(b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;

(c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;

(d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

(e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

(f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;

(g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

(h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

(2) The Commission may set the amount of the penalty for each act or omission at not more than

(a) three times the claimant's rate of weekly benefits;

(b) if the penalty is imposed under paragraph (1)(c),

(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and

(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

(3) For greater certainty, weeks of regular benefits that are repaid as a result of an act or omission mentioned in subsection (1) are deemed to be weeks of regular benefits paid for the purposes of the application of subsection 145(2).

41.1 (1) The Commission may issue a warning instead of setting the amount of a penalty for an act or omission under subsection 38(2) or 39(2).

(2) Notwithstanding paragraph 40(b), a warning may be issued within 72 months after the day on which the act or omission occurred.