



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. H. v Canada Employment Insurance Commission*, 2018 SST 1424

Tribunal File Number: GE-17-3004

BETWEEN:

**M. H.**

Appellant / Claimant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: John Noonan

HEARD ON: March 6, 2018

DATE OF DECISION: April 16, 2018

## REASONS AND DECISION

### OVERVIEW

[1] A claim for employment insurance benefits was established by the Appellant effective August 21, 2016. (GD3-3-12) The Canada Employment Insurance Commission (Commission) allowed this claim and benefits were paid. In a letter dated June 2, 2017, the Commission, finding that the Appellant was not available for work, informed him of same and information related to the overpayment that had accrued as a result.. The Appellant, on June 30, 2017, requested and was granted a reconsideration of this decision. This decision was not changed as per letter dated August 15, 2017 (GD3-86) and the Appellant appealed to the Social Security Tribunal on September 14, 2017.

[2] The Tribunal must decide whether the Appellant failed to prove his availability for work while attending a course of instruction pursuant to paragraph 18(1)(a) of the Employment Insurance Act (EI Act).

And

[3] Whether a penalty should be imposed pursuant to section 38 of the Act for making a misrepresentation by knowingly providing false or misleading information to the Commission.

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

- a) The complexity of the issues under appeal.
- b) The fact that the credibility may be a prevailing issue.
- c) The fact that the appellant will be the only party in attendance.
- d) The information in the file, including the need for additional information.
- e) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[5] The following people attended the hearing: M. H., the Appellant and R. V., the Appellant's witness / step father.

[6] The Tribunal finds the Appellant has failed to present evidence of "exceptional circumstances" that would rebut the presumption of non-availability while attending a full time course and that the Commission acted in a judicial manner when, at its discretion, it imposed a warning letter as a penalty. The reasons for this decision follow.

## **EVIDENCE**

[7] A claim for employment insurance benefits was established by the Appellant effective August 21, 2016. (GD3-3-12)

[8] The Appellant completed an interactive training course questionnaire while completing his claimant's report, in which he indicated that he was taking a full-time course of instruction of his own initiative from September 12, 2016 to December 20, 2016. He indicated he was not obligated to attend any scheduled classes or scheduled sessions; and that he worked at his own pace. He further indicated that he was available for work under the same or better conditions as he was before he started the course and that he would change his course schedule to accept a job; as well, that he made efforts to find work since starting his course (GD3-23-26).

[9] Resulting from a second training course questionnaire received for a subsequent training period, the Appellant was contacted by the Commission for fact-finding. The earlier period of training was reviewed where a discrepancy was detected when the two questionnaires were compared (GD3-63).

[10] Fact-finding revealed that the Appellant's program of studies was the same in the first and second semester (GD3-71-72).

[11] Fact-finding done with the student service coordinator at the university revealed that all courses of the faculty of science are classroom based on campus and that attendance is mandatory; that science students are expected to be in class as well as they are all made aware of the attendance expectations; that there is no ambiguity as to this requirement; and that schedules are fixed and can be changed only by dropping courses (GD3-64).

[12] Fact-finding done with the Appellant's last employer indicated that there was no flexibility with his work schedule from 7 am to 7 pm and that all employees were expected to work each day (GD3-65).

[13] Fact-finding done with the Appellant revealed that he was not available for work under the same or better conditions as he was before starting the course. When asked why he answered yes to the availability question, he said that he didn't know (GD3-71-72).

[14] The Commission notes that labour market information was not placed on the claimant's file. Where he was a full-time student during the normal hours of his occupation, he could not prove his availability for work in any event.

[15] The Commission notified the Appellant that benefits could not be paid from September 12, 2016 to indefinitely because he was taking a training course on his own initiative and had not proven his availability for work (GD3-73-74).

[16] The Appellant, when contacted by a representative of Service Canada, confirmed that he completed his own application and claimant's reports. The training questionnaire he completed on September 26, 2016 while doing his report was discussed as well as the most recent one he completed. The investigator inquired of the claimant as to why his answers on the critical question of attendance differed on the two questionnaires given that the program was the same. The claimant was informed of the information the investigator received from the university representative with regards to his attendance obligations and the claimant admitted that he was aware of the policy but chose to answer no because he figured that he could miss a class here or there if he had to work a shift. The investigator also asked the claimant why he answered yes to being available for work under the same or better conditions as he was before starting the course and the claimant answered that he didn't know (GD3-71-72).

[17] All claimants are required to make their claim for benefits by completing claimant reports in order to prove their entitlement to benefits for each and every week. In the case at hand, the claimant completed his claimant's report by internet for the period from 4 September, 2016 to 24 December, 2016 pursuant to section 91 of the Regulations.

[18] Prior to beginning the report, and each and every time a claimant completes a report, he is warned against providing false information.

[19] The facts on file show that the Appellant used the Internet reporting system to make his claim for benefits between 4 September, 2016 and 24 December, 2016 (GD3-18-57).

[20] Information on Electronic reporting can be found at pages (GD3-14-16).

[21] According to the records (GD3-17-57) the Appellant indicated that he was available for work.

[22] The Appellant made a request for reconsideration of the Commission's decisions on the questions of his availability and misrepresentation of facts. In support of his request for reconsideration, he argued that his answers were given honestly and from information he felt was accurate. He said he was willing to work and that he was looking for work to support himself through his semester. He added that many people do this and that he did not think that he was doing anything wrong. He joined a letter in which he asks for help in understanding how he should have gone about doing this correctly; in which he expresses the hope of correcting his file so he does not have to pay the debt imposed on his claim; in which he discusses his availability; in which he discusses his financial situation; in which he admits the information he gave could have been misleading but that, in no way, he was trying to fool or defraud the system (GD3-76-78).

[23] The Appellant, when contacted by a representative of Service Canada, with respect to his availability, the Appellant stated attendance was not 100% mandatory and that he could have worked between classes, during the evenings and weekends and a day shift if the job required it. He was willing to do part-time work around his class schedule. He later said he could work full time after school; school finishes at 3 pm and he could go to work from 3 pm to 10 pm. He stated that if he dropped classes, it would be a waste of his semester. He was informed the university said attendance was mandatory and he replied that while they may say this, attendance was not taken. However, he agreed that attending labs was 100% mandatory and that his program included labs. He was aware of the attendance policy but maintains one can miss a class to go to work. He indicated that he was doing a full-time course in a science program. He indicated that he looked for work starting in October or November and that he applied with 6 or 7 employers of which he identified five. He worked a 12-hour day in his previous employment and he normally worked day shifts (GD3-79-82).

[24] With respect to false statement, the Commission went over the circumstances that resulted in a finding of misrepresentation on the part of the Appellant (GD3-83).

[25] Following the request for reconsideration, the Commission maintained the earlier decisions (GD3-86-87).

[26] The Appellant (A) and his witness (W), at his hearing, testified that:

- a) (A) One can miss classes as no attendance record was taken.
- b) There are upwards of 200 students in each class.
- c) Labs were different, attendance was mandatory.
- d) (W) The Appellant may have had to forego a shift to accommodate school.
- e) Nobody pays \$8000 in tuition then quits to go to work.
- f) It is not practical to expect someone to do so.
- g) The Appellant was taking instruction in an effort to better himself.
- h) He was available after 4 PM daily and after 2 PM on two days.
- i) He was also available on weekends.
- j) His situation was no different than being sick one day then being available the next.
- k) The training questionnaire does not allow for explanations.

## SUBMISSIONS

[27] The Appellant submitted that he should be eligible for benefits because:

- a) Even though he is in school he is still available for work.
- b) He has been looking for work.
- c) His course completion and with it certification will make him much more employable.

[28] The Respondent submitted that the Appellant is not eligible for benefits because:

- a) The Appellant has not supported his claim of his availability for work while attending the UNB because he is attending a full-time program on his own initiative and his schedule is such that his availability is severely restricted.
- b) The Appellant's applications to 7 employers, as reported initially by the Appellant, does not constitute an active and comprehensive job search.
- c) The Commission understands that the Appellant has invested a lot of time and money into his course.
- d) The Appellant has failed to prove, as the onus is on him to do so, that he was available for work while attending the full time course at UNB.

## ANALYSIS

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

### **Re: Availability**

[30] There is a presumption that a person enrolled in a course of full-time study is not available for work. This presumption of fact is rebuttable by proof of exceptional circumstances **(Cyrenne 2010 FCA 349)**

[31] In order to be found available for work, a claimant must demonstrate 1. a desire to return to the labour market as soon as suitable employment is offered, 2. express that desire through efforts to find a suitable employment and 3. not set personal conditions that might unduly limit

their chances of returning to the labour market. All three factors shall be considered in making a decision. (**Faucher A-56-96 & A-57-96**) as well the factors listed in Section 90 and 0.1 of the Regulations must be taken into consideration.

[32] In this case the Appellant was not following a course of instruction approved by the Commission. He was taking the course as a result of his personal decision to attend this program and thus be more eligible for full time employment in his chosen field.

[33] The Appellant's initial statement to Service Canada that he was only available evenings and weekends must be seen as placing serious restrictions on his availability. (Duquet 2008 FCA 313) (Gauthier 2006 FCA 40).

[34] The Appellant's program of studies, contrary to what he stated, did require, according to UNB, attendance at class and in labs.

[35] The Appellant's job search, consisting of contact with 7 employers does not constitute reasonable and customary efforts to obtain employment as outlined in subsection 50(8) of the Act and the criteria outlined in section 900.1.

[36] The Appellant's step father / witness asserted, unchallenged by the Appellant, that "nobody pays \$8000 in tuition then quits to go to work and It is not practical to expect someone to do so" however this is exactly what the Act requires if someone wishes to be eligible for EI benefits.

[37] While this Member supports the Appellant's efforts to complete his education and find suitable employment as a result, I find that he has failed to present evidence of "exceptional circumstances" that would rebut the presumption of non-availability while attending a full time course. He is therefore not eligible to receive benefits.

### **Re: Penalty**

[38] Pursuant to section 38 of the Act, the Commission may impose a penalty for any misrepresentation which is knowingly made by the claimant. Knowingly means the Commission can reasonably conclude the claimant knew the information provided was untrue when he or she made it. There is no element of intent in this consideration.



[39] In a finding of misrepresentation, the onus of proof first rests with the Commission. Once the Commission can reasonably conclude benefits were paid as a result of misrepresentation, the burden then shifts to the claimant to prove that the events are open to innocent interpretation. The burden then shifts to the claimant to prove that the events are open to innocent interpretation. The standard of proof is the balance of probabilities. It is not sufficient to simply disbelieve a claimant's statement of innocence. To establish a false statement was knowingly made, the evidence must show: (1) an objectively false statement (2) that misleads the Commission (3) resulting in the real or possible payment of benefits to which the claimant was not entitled and (4) at the time of the statement, the claimant knew it did not accurately reflect the facts.

[40] In this case the Commission has shown that the Appellant was aware of the course attendance policies when he submitted contrary information on two occasions.

[41] As a result, the Commission acted in a judicial manner when, at its discretion, it imposed a warning letter as a penalty. The letter serves to warn the Appellant of the consequences of any future misrepresentations.

## **CONCLUSION**

[42] The appeal is dismissed on both issues.

John Noonan  
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.

**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.

**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).

## **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.