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

Citation: *S. A. v Canada Employment Insurance Commission*, 2018 SST 1353

Tribunal File Number: GE-18-1535

BETWEEN:

S. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: August 3, 2018

DATE OF DECISION: August 28, 2018

Canada

DECISION

[1] The appeal is allowed. The Appellant has proven his availability for work, despite being enrolled in a full-time course of instruction.

OVERVIEW

[2] The Appellant applied for employment insurance (EI) benefits on March 3, 2014. Later that month he contacted the Respondent to say he was taking a business management course. In response to a training questionnaire, he stated that the course required one to nine hours per week and that the course ran from March 31 to December 19, 2014. He received EI benefits until January 3, 2015. In January 2015, he reported to the Respondent that his studies were continuing until January 16, 2015. The Respondent determined that the course required 25 hours per week of time from its commencement. The Respondent notified the Appellant that benefits could not be paid from March 13, 2014, to January 16, 2015, because he failed to prove his availability for work during that period. An overpayment of $11,875.00 resulted.

ISSUES

[3] 1. What was the Appellant's time commitment to his course of studies? 2. Was the Appellant employed during the course of his studies? 3. Did the Appellant have a desire to return to the labour market as soon as a suitable employment was offered? 4. Did the Appellant express that desire through efforts to find a suitable employment? 5. Did the Appellant set personal conditions that might unduly limit his chances of returning to the labour market? 6. Did the expiry of a limitation period prevent the Respondent from reconsidering its initial decision to grant benefits?

ANALYSIS

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

[5] The Appellant is not entitled to receive benefits for a working day in a benefit period if he fails to prove that he was capable of and available for work and unable to obtain suitable employment (Act, paragraph 18(1)(a)).

[6] The Appellant has the onus of proving that he is making reasonable and customary efforts to obtain suitable employment (subsection 50(8) of the Act; *A.G. (Canada) v. Renaud*, 2007 FCA 328).

[7] A claimant's availability is a question of fact. To be found available for work, the Appellant must show all three of the following: 1) he has a desire to return to the labour market as soon as a suitable employment is offered; 2) he expresses that desire through efforts to find a suitable employment; and 3) he does not set personal conditions that might unduly limit his chances of returning to the labour market. (*Faucher v. Canada Employment Insurance Commission and Attorney General of Canada*, #A-56-96).

[8] Sections 9.001 to 9.002 of the *Employment Insurance Regulations* (Regulations) set out a number of factors to be considered in determining whether an appellant is making reasonable and customary efforts to obtain suitable employment, and what is suitable employment.

[9] There is a presumption that a person enrolled in a full-time course of study is not available for work, though the presumption can be rebutted by proof of exceptional circumstances (*Canada (A.G.) v. Cyrenne*, 2010 FCA 349). A claimant was not available where, owing to his course load, he would only be available at certain times on certain days, which restricted his availability and limited his chances of finding employment (*Duquet v. Canada Employment Insurance Commission et al.*, 2008 FCA 313).

Issue 1: What was the Appellant's time commitment to his course of studies?

[10] There is a presumption that a person in a full-time course of instruction is not available for work.

[11] The Appellant was in a full-time course of instruction, and presumed to be not available.

[12] In his first training questionnaire in April 2014, the Appellant stated that the course commitment was for one to nine hours per week. He testified that he assumed that the question was only asking about after-class work, and that he must have missed the second part of the question about the time spent in class. He had simply misunderstood the question. The answer "one to nine hours" was false. In his second training questionnaire in January 2015, he stated

that the time commitment was 25 hours or more per week. Documents from the college the Appellant attended, as well as his testimony, confirmed that the time commitment for the course was 25 hours per week for the entire duration of the course from March 31, 2014, to January 16, 2015. The course had been extended to accommodate a two-week vacation period in the summer of 2014.

[13] The classes for the entire course were held either in the morning from 8:30am to 12:30pm, or in the afternoon from 1:00pm to 5:00pm, from Monday to Friday. The Appellant attended the morning sessions throughout.

Issue 2: Was the Appellant employed during the course of his studies?

[14] The Appellant worked at a full-time night shift position for part of the time he was taking the course.

[15] The Appellant's employer had laid him off in early 2014. The Appellant established his claim effective March 9, 2014. The employer called the Appellant back to work, and laid him off, several times during the course he was taking. The Appellant worked from March 17 to 28, 2014, which was prior to starting the course; April 14 to June 27, 2014; July 21 to August 1, 2014; and August 18 to 28, 2014. He returned to work with this employer in early February 2015, after the course had ended. The Appellant worked the night shift, finished work at 6:30am, then attended his morning classes.

Issue 3: Did the Appellant have a desire to return to the labour market as soon as a suitable employment was offered?

[16] This issue deals with the first factor in the *Faucher* decision for assessing availability.

[17] The Appellant did have that desire to return to the labour market as soon as suitable employment was offered.

[18] The strongest piece of evidence in support of this conclusion is the fact that the Appellant did return to work during the course, working full-time and studying full-time during periods between lay-offs from his employer. He did work and study for approximately 14 weeks during the 42-week course, or one third of the time in the course.

[19] The strongest evidence against this conclusion comes from the Appellant's statements to the Respondent on April 5, 2018. The Appellant testified that the record of the conversation is accurate, though does not reflect the way he said it. It was a two-part conversation, the first while he was driving, the second once he got home and got access to some documents he still had. He was not expecting a call from the Respondent. He was driving with his wife and daughter, and had received several scam calls just before the Respondent called. He initially thought it was another scam call. He testified that while he was speaking to the Respondent while in the truck, he was being an asshole, giving smart ass answers to the questions. After he returned home, he was flustered and called the Respondent, to give information about his job search efforts, but had little information to provide, since the efforts were four years prior, and he had lost some documents in a move.

[20] The relevant statements made by the Appellant were three. First, when asked whether he looked for work while on claim, he responded, "Why would I look for other work when I had a job to go back to?" Second, when it was pointed out that this was his third EI claim so that he should have been aware of his obligation to keep a detailed job search record, he replied "I pay into EI, so I can collect EI", and that with a recall date in February 2015, "it did not make sense to look for other work". Third, the Appellant stated that he may have looked for some work, but it would be impossible to produce a job search record from 2014.

[21] The impact of these statements by the Appellant is weakened by the following considerations. The context in which he made the statements, being in his truck and irritated with scam calls so that he was being a smart ass, then being flustered at home when he had few documents for his job search, and the statements being made three years after the matters being discussed had occurred, all reduce the significance of the statements. The statements themselves show an emotional response, rather than a calm, reasoned answer to a question. That is particularly true of the first two statements. The first statement, "why would I look for work…?" is contradicted by evidence of job search efforts, discussed under the next Issue. The second statement, "I pay into EI, so I can collect EI" is not consistent with the fact that the Appellant did work full-time during the course. He was not sitting back and coasting on EI. The reference to being recalled in February 2015 limits the time frame of his answer to that immediate period.

The third statement expresses the Appellant's frustration at the time. He was able to provide evidence of job search activities, discussed below.

[22] The Respondent also relied on the $13,500.00 paid by the Appellant for tuition as a factor in support of the Appellant not being willing to give up the course, thereby showing that he was not available. This is contradicted by the fact that the Appellant did, during part of the course, simultaneously work full-time and continue with his full-time studies.

[23] Based on the above considerations, and particularly the Appellant's working full-time for periods while continuing the course, I find that he did have that desire to return to the labour market as soon as suitable employment was offered.

Issue 4: Did the Appellant express that desire through efforts to find a suitable employment?

[24] This issue deals with the second factor in the *Faucher* decision for assessing availability.

[25] The Appellant showed his desire to return to the labour force through his efforts to find suitable employment.

[26] One important part of the Appellant's efforts to find suitable employment was his remaining available for, and accepting, call-backs from his employer. He did not refuse a call-back because he was in school. He took the work and continued in school. This effort was more passive than the usual job search, so would not be sufficient by itself to show sustained efforts to find suitable employment. It does, however, qualify as assessing employment opportunities and networking under paragraph 9.001(b) of the Regulations.

[27] The other part of the Appellant's efforts to find suitable employment consists of his regular job search. The initial evidence of a job search is minimal. The Respondent, in its conversation with the Appellant on April 5, 2018, recorded the Appellant as saying that he may have looked for work, and that it would be impossible to produce any record of his job search. The Respondent does not record that it asked the Appellant if he had engaged in any of the activities listed in paragraph 9.001(b) of the Regulations. Such questions might have elicited more information from the Appellant about his job search.

[28] In his notice of appeal, the Appellant included four emails pursuing a job. As the Respondent correctly pointed out, only two of these emails are in the relevant period of March 31, 2014, to January 16, 2015. The two emails within the period are from July 4, 2014, for a production supervisor position, and from August 9, 2014, for a superintendent's position.

[29] In his testimony, the Appellant gave evidence of job search efforts beyond the information in the file. He was looking for full-time work, at his most recent wage of $17.00 per hour or more. He applied to X, but it only paid minimum wage. He had been trying to be hired by X in a production supervisor's job before and after the relevant period, and he would have taken a job there at any time. He had to apply through three agencies, rather than directly to X. One of those agencies was the X, which was the addressee in the July 4, 2014, email attached to his notice of appeal. Another of those agencies was the X, which was the addressee in the July 17, 2015, email attached to the notice of appeal. This latter email was outside the relevant period. The third agency was X. All three required several pre-screening interviews before submitting any application to X. Apart from emails, he had other contacts in the relevant period. He had applied for about 14 jobs during the relevant period, using emails and Kijiji, and contacting the X, X, and four others he found through LinkedIn. With respect to the nine activities listed in paragraph 9.001(b) of the Regulations, he testified that he had done all of them except attending job search workshops or job fairs.

[30] In a post-hearing submission, the Appellant provided further evidence of contacts, and a screen shot for each of Kijiji and LinkedIn. The Respondent made no submissions respecting this evidence. The July 4, 2014, email to X got him an interview on July 17, 2014, and a later interview, perhaps in August 2014, before it sent his application to X. He applied for five varied positions in August 2014, as shown on the Kijiji screenshot. He applied to X in November 2014. He applied for four jobs in the period from September to December 2014 through LinkedIn, as shown on the screenshot. That screenshot does not show the dates of the applications, just that they expired four years ago, which would have been in 2014. He applied to X in December 2014, and got interviews around the end of the relevant period, and later. He had also handed out resumés in the mall where the school was located. He did not recall all the shops he applied to, but definitely to X, X and X.

[31] The Respondent submitted "that jurisprudence has consistently upheld the principle that initial statements given by a claimant carry greater weight than subsequent statements, given in response to an unfavourable decision." The Federal Court of Appeal decisions cited in support of this proposition do not support it. They are: *Lévine v. Canada Employment and Immigration Commission,* A-78-89; *Boucher v. Canada (A.G.)*, A-272-96; *Rancourt v. Canada Employment and Immigration Commission,* A-355-96; *Al-Maki v. Canada Employment and Immigration Commission*, A-737-97; and *Bellefleur v. Canada (A.G.)*, A-139-07.

[32] In *Lévine*, the Court upheld an Umpire's decision to overturn the Board of Referees decision, as the Board had based its decision solely on the claimant's statement at the hearing that he never intended to run a commercial business, but was just sharing with friends the cost of fishing trips they took together. The Board ignored contradictory evidence in the written record, and ignored that the claimant had tried to hide that contradictory evidence. The claimant's statement was rejected by the Court not because it was later, but because it was contradicted by other evidence, and because the Board failed to explain why it accepted the later statement and rejected the earlier evidence.

[33] In *Boucher*, the Board of Referees ignored the claimant's earlier contradictory statements and decided based on his testimony. The Board erred in failing to consider whether the claimant's testimony was credible in light of the earlier contradictory statements.

[34] In *Rancourt*, "The board's decision, which was extremely brief, was based solely on the claimant's testimony at the hearing and completely ignored the rest of the evidence in the file. That evidence included statements by the claimant, his spouse, his son and independent witnesses to the effect that the claimant was working for his spouse's business when he said he was unemployed. The board could not reject that evidence for no reason and its failure to provide an explanation was an error that justified the Umpire in deciding the case himself, both on the facts and on the law."

[35] In *Maki*, another case in which the Board of Referees accepted the claimant's testimony in the face of earlier contradictory evidence, the Court stated the principle thus: "The Board of Referees was entitled to reject the evidence [in the Commission's documents] after weighing and assessing it, but could not ignore it", and cited *Lévine, Boucher* and *Rancourt* in support. That

statement of the principle from these cases is clearly a different principle from that put forward above by the Respondent.

[36] In *Bellefleur*, the Board of Referees had again not explained why it accepted some evidence but rejected contradictory evidence. The Court noted "When it [the Board of Referees] is faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious."

[37] The principle is not that a claimant's earlier statements are automatically to be given greater weight than his later statements. The principle is that if there is evidence, including the claimant's earlier statements, contradicting the claimant's later statements, then the appeal body must give reasons for accepting or rejecting that contradictory evidence. The principle does not give an automatic preference to the claimant's earlier statements.

[38] In this case, the contradictory evidence consists of, on the one side, the Appellant's statements in the conversation with the Respondent on April 5, 2018, and, on the other side, his earlier statements, his testimony and his documents. There are two reasons for preferring the Appellant's testimony and post-hearing documents about his job-seeking activities, to his April 5, 2018, statements. The first reason is that the Appellant's earliest statements in the Reconsideration File that are related to job seeking, favour the Appellant. In the second training questionnaire in January 2016, he answered "yes" to the question whether he had made efforts to find work since the start of his course or since becoming unemployed. In his request for reconsideration dated February 22, 2018, he stated that he worked during school and had made no false representations or misleading statements about his availability for work. The only statements from the Appellant supporting the Respondent's position come from its telephone conversation with him on April 5, 2018. As noted above, the answers to questions about looking for work were emotional reactions at a time of being flustered by an unexpected call from the Respondent. The Respondent accepted broad statements about not looking for work, rather than asking probing questions to elicit information about particular job seeking activities the Appellant may have done. The statements in that phone conversation have reduced weight based

on the circumstances in which they were given, their inconsistency with previous statements made by the Appellant, the lack of detailed questions or answers about job search activities, and their inconsistency with the Appellant's notice of appeal, testimony and post-hearing documents.

[39] The second reason for preferring the Appellant's testimony and post-hearing documents about his job-seeking activities is the detail of the efforts, even at this late time after the efforts in 2014, and the corroboration of some of that testimony by the emails with the notice of appeal, and by the screenshots in the post-hearing documents.

[40] Accepting the Appellant's evidence concerning both his work and his job search efforts during the course, I am satisfied that together they constitute sustained efforts to find suitable employment.

Issue 5: Did the Appellant set personal conditions that might unduly limit his chances of returning to the labour market?

[41] This issue deals with the third factor in the *Faucher* decision for assessing availability.

[42] The Appellant did not set personal conditions that unduly limited his chances of returning to the labour market.

[43] The major limiting personal condition would have been the Appellant's participation in a full-time course of education. The Appellant demonstrated that this was not a limiting condition by working full-time and continuing with the full-time course during approximately one third of the course. He has thus rebutted the presumption that he was unavailable because of his participation in that course.

[44] Another potentially limiting condition would be the Appellant preferring to complete the course, rather than taking a full-time job. The Respondent raised that issue in its April 5, 2018, conversation with the Appellant, and relied on it in its Representations. The problem for the Respondent is that the Appellant, in the second training questionnaire dated January 16, 2015, said that he would finish his course if he found full-time work that conflicted with the course. The course finished on January 16, 2015. As the Appellant testified, as January 16th was the last day of the course, and he completed the questionnaire on that day, he would finish the course

that day. He was not stating that he would not have taken a job prior to that. His previous action of working and attending the course at the same time is consistent with him taking a job and completing the course, rather than consistent with refusing a job. His notice of appeal stated that if he were offered a job he would have been able to switch classes to work around work, and that if he claimed he would not take a job due to school, he must have been confused by the wording of the question.

[45] Finally, the Appellant did not restrict his job search to only the kind of work he had done previously, in a factory. The broad range of jobs he applied for is evident in his job search, from production supervisor at X, to superintendent of a building, to X and X. These jobs often involved shift work, as did the work the Appellant did during the course. Shift work, combined with half-day class time, reduced the possibility of conflict between work and class time, thereby reducing attendance in the course as a limiting condition to returning to the labour market.

Issue 6: Did the expiry of a limitation period prevent the Respondent from reconsidering its initial decision to grant benefits?

[46] The Respondent can on its own initiative reconsider a decision within 36 months of the payment of benefits, or within 72 months of payment if the Respondent is of the opinion that a false or misleading statement or representation was made in connection with the claim (Act, subsections 52(1) and (5)).

[47] The Respondent was not prevented from reconsidering its initial decision to grant benefits, as it had the benefit of the longer 72-month period.

[48] Section 52 of the Act does not require that there be any dishonesty, deceit or fraud in the false statement or representation. The section just requires that the Respondent be of the opinion that the statement or representation is false. Implicitly, the section requires that the Respondent have proper grounds to support that opinion. In this case, the Respondent has not claimed any dishonesty, deceit or fraud on the part of the Appellant.

[49] The request for reconsideration states, “I did not falsely represent or put forth misleading statements about my availability to work.” That statement does not contradict the Respondent’s position. The Respondent did not claim the longer limitation period on the basis of the

Appellant's claims about availability. Rather, the Respondent claimed the longer period on the basis of the Appellant's statement in the first training questionnaire that the course work took one to nine hours per week. As the Appellant admitted in testimony, the "one to nine hours per week" answer was false. The falsity is confirmed by the college's documents showing 25 hours per week during the entire course. The Respondent's opinion that the statement was false was properly reached on the evidence.

[50] The Respondent therefore had 72 months from the payment of benefits to reconsider the initial decision to grant benefits. That decision was made in March 2014. The Respondent's decision on its own reconsideration was dated February 16, 2018. That date was 47 months after the initial decision to grant benefits, and therefore within the 72-month period.

CONCLUSION

[51] The appeal is allowed.

Paul Dusome

Member, General Division - Employment Insurance Section

HEARD ON:	August 3, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. A., Appellant

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.

52 (1) Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

(2) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

> **(a)** the amount calculated is repayable under section 43; and
>
> **(b)** the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

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.