



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *F. V. v Canada Employment Insurance Commission*, 2018 SST 1064

Tribunal File Number: GE-18-357

BETWEEN:

F. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: August 2, 2018

DATE OF DECISION: August 30, 2018

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] Following a career shift, the Appellant took a training course in X. After graduating on August 31, 2017, he applied to reactivate his Employment Insurance claim on September 3, 2017. On September 18, 2017, the Appellant started another training program that ran two days per week to develop his skills. The Employment Insurance Commission (Commission) decided that he had failed to show his availability for work given his training-related restrictions, and it imposed a disentitlement from receiving benefits effective September 3, 2017. The Appellant disputes this and submits that he made efforts to actively look for full-time employment while attending his training course, which he considers to be perfectly feasible in his situation.

ISSUES

[3] The Tribunal must decide whether the Appellant has proven his availability for work from September 3, 2017, onward even though he was taking a training course starting September 18, 2017.

ANALYSIS

[4] The relevant statutory provisions appear in the annex of this decision.

[5] Section 18(1)(a) of the *Employment Insurance Act* (Act) sets out that, to be entitled to Employment Insurance regular benefits, a person must show that they are capable of and available for work but unable to find suitable employment.

[6] The burden of proof is on the claimant (*Canada (Attorney General) v Renaud*, 2007 FCA 328).

Issue: Has the Appellant proven his availability for work from September 3, 2017, onward even though he was taking a training course starting September 18, 2017?

[7] In the absence of a definition of the notion of “availability” in the Act, the criteria developed in the case law can be used to establish a person’s availability for work. The Federal Court of Appeal has established that availability for work must be determined by analyzing three factors: 1) the desire to return to the labour market as soon as a suitable job is offered; 2) the expression of that desire through efforts to find a suitable job; and 3) not setting personal conditions that might unduly limit the chances of returning to the labour market. It has also established that the three factors must be considered in reaching a finding (*Faucher v Canada (Attorney General)*, A-56-96) (*Faucher*).

[8] In this case, the Tribunal finds that the Appellant has proven his availability for the following reasons.

[9] The Commission submits that the Appellant failed to rebut the presumption that he was not available while taking a full-time course because he prioritized his training. Case law has upheld the principle that a person enrolled in a full-time course is presumed to not be available for work (*Landry*, A-719-91; *Lamonde*, 2006 FCA 44). However, in certain cases, this presumption may be rebutted depending on the circumstances, including course attendance requirements and a claimant’s work-study history (*Gagnon*, 2005 FCA 321).

[10] In this case, the evidence shows that the Appellant was taking a course that took place on Mondays and Tuesdays. I find that courses that run two days per week do not amount to full-time studies. Therefore, I find that the presumption cannot be held against the Appellant.

[11] Therefore, just like all other claimants, the Appellant must meet the three *Faucher* factors to show his availability.

1) The desire to return to the labour market as soon as a suitable job is offered

[12] The Commission cites the decision CUB 79303, stating that there are similar facts in that case. Firstly, I am in no way bound by umpire decisions even though they may sometimes be convincing or inspiring. Secondly, after reading the ruling, I find that the facts are significantly

different. In CUB 79303, a claimant had a medical condition, spent 45 to 50 hours per week on his studies, and intended to focus solely on his training. In this case, the situation is entirely different. The evidence on file is clear that the Appellant spent only Mondays and Tuesdays on his skills development courses, which is significantly less burdensome. Furthermore, the Appellant testified that, even though he did not intend to drop out of his program, he ultimately intended to find a job in spite of the program. The Commission appears to have emphasized the fact that the Appellant indicated that he was not prepared to drop out of his training program while giving less weight to the fact that, from the start of its initial conversations with the Appellant, he had clearly shown his intention to return to the labour market.

[13] Considering the evidence on file and the Appellant's testimony, I personally have no doubt that the Appellant desired to rejoin the labour market. I give significant weight to the Appellant's testimony where he clearly and logically explained his personal situation, including the fact that he had to contribute to his family income as the father of three children. I also accept that the Appellant consistently had a real intention to work. His career change meant that he had to leave the market while he trained full-time, but, as soon as the Appellant had his diploma allowing him to exercise his new profession, he did not want to wait around before finding a new job. I also give weight to the Appellant's work history that was steady for several years, showing the willingness of someone wanting to be professionally active and not hiding behind unemployment.

[14] Therefore, I find on a balance of probabilities that the Appellant desired to return to the labour market as soon as a suitable job was offered from September 3, 2017, onward.

2) The expression of that desire through efforts to find a suitable job

[15] Regarding the Appellant's demonstration of the desire to return to the labour market, the Tribunal points out that he had the responsibility to actively look for suitable employment to be able to get Employment Insurance benefits (*Cornelissen-O'Neil*, A-652-93; *De Lamirande*, 2004 FCA 311). That is, it is not enough to intend to work. A claimant must show that they made efforts to find employment.

[16] The Commission did not make a submission about this factor.

[17] The Appellant testified that he started to look for work in September 2017 as soon as his first course had ended and he had graduated with his diploma in X on August 31, 2017. I note that, during his first discussion with the Commission on October 23, 2017, he stated that he was looking for employment and named three businesses in his efforts to find work. The following day, on October 24, 2017, during another interview with the Commission, the Appellant indicated that he was prepared to go all over X and through X to find employment and to work. I note from the Commission's record of conversations that it did not ask the Appellant to provide details of his efforts to find work. Instead, it appears that the Commission developed the issue of whether the Appellant would agree to drop out of his courses if a Monday-to-Friday job came up and then made its decision to disentitle him from receiving benefits. I find that the Appellant cannot be blamed for not proving his efforts to return to the labour market when he was not asked to do so.

[18] With his November 23, 2017, request for reconsideration, the Appellant provided a list of several places where he had applied between September 11, 2017, and November 9, 2017. I am of the view that the Appellant has shown the expression of his desire to work by submitting this list of job applications and by finding part-time employment at X in early December 2017. I note that the Appellant told the Commission during a conversation on December 22, 2017, that he continued to look for other employment so that he could work full-time. Furthermore, the Appellant stated in his testimony that, if the data the Commission received on December 22 about his employment seemed inadequate, it was because he had only just started and he needed to make himself known before getting more hours. Moreover, he stated that, even though he stayed at the X job for only two months, he was already working hours equal to those of a full-time position because of his determination to work.

[19] The Appellant has been able to convince me that he made significant efforts to find employment as soon as he got his licence as a X. I accept the Appellant's testimony that, being unemployed and without income since he stopped working months before and as a father of three children, he absolutely had to find a source of income. I find that the Appellant's conduct shows this when his career is looked at as a whole. The evidence shows that the Appellant restarted in another direction without any unnecessary delay after he decided to change careers. He then sent

his résumé to several places while taking a skills development course to get equipped with more qualifications and to give himself a greater chance of finding employment. A few weeks after graduating with his basic licence to practise in his new field, he found part-time employment at X that quickly became full-time. Barely two months later, on January 19, 2018, he got a new job as a full-time X at X, where he still works in fact.

[20] In light of all the evidence, including the Appellant's testimony, his attitude, and his behaviour since the end of his employment, I am satisfied that he has met the second *Faucher* factor of having to demonstrate his desire to join the labour market.

3) Not setting personal conditions that might unduly limit the chances of returning to the labour market

[21] A claimant's availability cannot be dependent on their particular personal conditions or on overly burdensome restrictions that limit their chances of finding employment (*Canada (Attorney General) v Gagnon*, 2005 FCA 321). In this case, what about the fact that the Appellant was not available to work on Mondays and Tuesdays because of his training course?

[22] I find that the evidence establishes that this restriction of two days per week did not unduly limit the chances of returning to the labour market in the Appellant's circumstances.

[23] The reasonableness of a claimant's restriction concerning their willingness to return to the labour market has to be assessed on the basis of the claimant's attitude and conduct and while taking into account all circumstances (*Whiffen*, A-1472-92). I accept the Appellant's testimony about why he is working in this field of employment. He mentioned that the field of X often offers jobs with hours outside the usual working day schedule of Monday to Friday from 9 a.m. to 5 p.m. Although the Federal Court of Appeal has indicated that a claimant's availability is assessed by working day in a benefit period (*Cloutier*, 2005 FCA 73), it has also held a number of times that the circumstances of each case must be considered (*Carpentier*, A-474-97; *Whiffen*, A-1472-92; *Rondeau*, A-133-76). I find that, in this case, the nature of the Appellant's field of employment is a circumstance and a context that must be considered. I accept that the training that took place on Mondays and Tuesdays had little impact on the Appellant's chances of finding employment in his field. I also accept that the field of X offers more job opportunities near the

end of the week, during evenings, and on weekends and that it is a field that is less busy on Mondays and Tuesdays. Furthermore, the benefit of time has shown that this reality is indeed true because the Appellant did manage to find full-time employment from the winter onward while continuing his training on Mondays and Tuesdays. As a result, I find that the restriction placed by the Appellant to be unavailable Mondays and Tuesdays because of his training is reasonable in his circumstances and did not unduly minimize his chances of rejoining the labour market.

[24] It is also important to note the Appellant's statement that it is also specific to the field of employment that employers are used to dealing with workers who attend training courses and that they are generally encouraging rather than reluctant about this because the service they offer benefits from their X training. I find that this reality of the employment sector has to be considered as well and that it supports the fact that the Appellant did not place conditions on himself that could unduly limit his chances of finding employment.

[25] In short, I find that, on analysis of the evidence, the Appellant has shown that he was available within the meaning of section 18(1)(a) of the Act because he met the three *Faucher* factors as of September 3, 2017. As a result, the Appellant's disentitlement should be lifted as of that date.

CONCLUSION

[26] The appeal is allowed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	August 2, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	F. V., 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.

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.