



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *PD v Canada Employment Insurance Commission*, 2019 SST 1722

Tribunal File Number: GE-18-3261

BETWEEN:

**P. D.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

---

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

---

DECISION BY: Angela Ryan Bourgeois

HEARD ON: February 5, 2019

DATE OF DECISION: March 7, 2019

## **DECISION**

[1] I am allowing the Appellant's appeal because he has proven his availability for the period in question, between August 29, 2016, and December 30, 2016.

## **OVERVIEW**

[2] The Claimant in this file is the Appellant, P. D. The Claimant received regular employment insurance benefits under the *Employment Insurance Act* (Act) from September to December 2016.

[3] To receive benefits under the Act, claimants have to prove that they are available for work for each day that they claim regular benefits.<sup>1</sup>

[4] In February 2017, the Canada Employment Insurance Commission (Commission) determined that the Claimant had not been entitled to receive benefits between August 29, 2016, and December 30, 2016, because he was attending a training course on his own initiative and had failed to prove his availability for work.<sup>2</sup>

[5] The Claimant appealed the Commission's decision to the Tribunal. A member of the General Division of the Tribunal agreed with the Commission, and found that the Claimant had failed to prove his availability. The Claimant appealed that decision to the Appeal Division of the Tribunal. The Appeal Division allowed the Claimant's appeal, and returned the matter to the General Division for reconsideration.

[6] As such, the matter is now before me, and I must decide if the Claimant has proven his availability for work between August 29, 2016, and December 30, 2016.

## **PRELIMINARY MATTERS**

[7] I find that the intention of the Appeal Division in referring the matter back to the General Division for reconsideration was that I have a hearing *de novo*, or a new hearing. As such, I did

---

<sup>1</sup> Paragraph 18(1)(a) of the Act.

<sup>2</sup> See page GD4-2.

not consider any earlier oral testimony. At the hearing on February 5, 2019, I stated that I would not be considering earlier testimony.

[8] However, I considered all relevant documentary evidence filed with the Tribunal before the February 5, 2019 hearing, including the calendars<sup>3</sup> filed with the Appeal Division, and the job search report<sup>4</sup>, filed after the original hearing before the General Division.

[9] I have placed no weight on the training questionnaire completed by the Claimant on January 27, 2017, because it does not relate to the period in question. I find that it relates to the 2017 winter term because the Claimant completed it in late January 2017, and the courses listed are not the ones the Claimant took in the fall of 2016.

[10] I have placed no weight on the Claimant's statements to the Commission as set out in a Supplementary Record of Claim dated February 17, 2017<sup>5</sup>, because the statements are in relation to the period after December 2016. I find that these notes relate to the period after December 2016, because the agent wrote that he was "just reviewing his *current* situation," which I find means his situation in February 2017, when the Commission took the statements.

## **ISSUES**

[11] Did the Claimant have a desire to return to the labour market as soon as suitable employment was offered?

[12] Did the Claimant indicate a desire to return to the labour market through efforts to find suitable employment?

[13] Did the Claimant's attendance at university unduly limit chances of finding work?

[14] Considering these three factors, has the Claimant proven his availability for every working day between August 29, 2016, and December 30, 2016?

---

<sup>3</sup> Starting at page AD6-7.

<sup>4</sup> Starting at page GD6-1.

<sup>5</sup> See page GD3-23.

## ANALYSIS

[15] To receive benefits for a working day in a benefit period, claimants must prove, not simply allege, that they were capable of and available for work and unable to obtain suitable work on that day.<sup>6</sup> A working day is any day of the week, except for Saturday and Sunday.<sup>7</sup>

[16] There is no dispute that the Claimant was capable of working. The issue arises with his availability.

[17] To prove he was available for work, the Claimant must prove that it is more likely than not that he met the following three criteria:

- a) a desire to return to the labour market as soon as suitable work was offered;
- b) an indication of that desire through job search efforts; and
- c) an absence of personal conditions that unduly limited his chances of finding work.<sup>8 9</sup>

[18] The Appeal Division directed me to restrict my decision to the issue of “whether the Claimant was capable of and available for work from September to December 2016” and to revisit all three of the criteria set out above.<sup>10</sup>

[19] The Appeal Division did not specify the exact days for my reconsideration, and because claimants must prove their availability for *each* working day, I find that it was the intention of the Appeal Division for me to reconsider the period of disentitlement from August 29, 2016, to December 30, 2016<sup>11</sup>.

[20] There is a presumption of non-availability while attending full-time studies<sup>12</sup>, but the direction from the Appeal Division is that I *must* consider the three criteria set out above. Following the direction of the Appeal Division, I will address the three criteria, and will not

---

<sup>6</sup> Paragraph 18(1)(a) of the Act.

<sup>7</sup> Section 32 of the *Employment Insurance Regulations*

<sup>8</sup> *Faucher v. Canada Employment and Immigration Commission* A-56-96

<sup>9</sup> The burden of proof is on a balance of probabilities, and rests with the Claimant.

<sup>10</sup> *Demone v. Canada Employment Insurance Commission*, AD-18-322, paragraph 27

<sup>11</sup> See page GD4-2, last paragraph.

<sup>12</sup> *Landry v. Canada (Attorney General)*, A-719-91

address the presumption of non-availability. However, I would have found that the Claimant had rebutted the presumption by proving a history of working full-time while attending university full-time.

[21] Claimants must demonstrate a sincere desire to return to work. I must assess the Claimant's availability based on his attitude and conduct, taking into account all circumstances.<sup>13</sup>

**Did the Claimant have a desire to return to the labour market as soon as suitable employment was offered?**

[22] Yes. I find that the Claimant had a desire to return to the labour market as soon as suitable employment was offered.

[23] I find that the Claimant has proven that he had a desire to work despite his enrollment in four university classes for the following reasons:

- a) he indicated that he was looking for full-time work; and
- b) the previous year he worked full-time while attending university.

[24] I find that the Claimant worked full-time while attending university for the following reasons:

- a) he testified in detail as to the work he did from September to December 2015, tutoring, some weeks up to 50 hours a week.
- b) he testified that he worked for the university full-time from January 2016 to August 28, 2016, when he stopped working because the position ended; and
- c) he reported on his application for benefits that he worked for the university from January 13, 2016, to August 26, 2016.

[25] The Commission's notes at page GD3-25 state that the Claimant said he worked while attending classes but also admitted that it was summer work with the X and the university. I find

---

<sup>13</sup> *Canada (Attorney General) v. Whiffen* A-1472-92

that this statement is contradictory because it could not have been both summer work and while he was attending classes. I prefer the Claimant's oral testimony that he worked during the school year because it is consistent with his original statements on his application for benefits.

[26] The Claimant testified that he had a financial need for the money because his parents had advised him that there was a chance that he would not qualify for a student loan in January. Although financial need does not prove a desire to return to work, I find that his financial need lends credibility to his statements that he had a desire to return to work.

**Did he indicate his desire to find work through his job search efforts?**

[27] Yes. I find that the Claimant indicated his desire to find work through his job search efforts because his job search shows that he was making reasonable and customary efforts<sup>14</sup> to find work by preparing a resume, looking for work on-line and in person, networking, and applying for jobs.

[28] I accept the Claimant's testimony that he prepared his job search report<sup>15</sup> from a calendar<sup>16</sup> he kept as he looked for work. The Claimant testified that the calendar was in his handwriting, and that he tracked his efforts on the calendar as he did them because his mother told him he had to keep track. When asked by the Commission in February 2017, if he could provide a job search report, he immediately reported that he could provide one. I find that this further shows that he had been keeping track of his efforts.

[29] A letter from a potential employer written in February 2017, states that he had been seeking work *since* early fall 2016. I find that this letter proves that he had been regularly seeking work with that employer since the fall of 2016.

[30] I find that this letter, his job search report and the calendars, show regular and consistent efforts to find work from September through to December, which proves that he sustained his job search efforts throughout the period in question.

---

<sup>14</sup> To prove availability, the Commission may require that the Claimant prove that he is making "reasonable and customary efforts" to find suitable work. See subparagraph 50(1) of the Act.

<sup>15</sup> Starting at page GD6-1.

<sup>16</sup> Starting at page AD6-7.

[31] I find that his job search shows that he was looking for suitable work because he was looking for both unskilled work, such as McDonald's, as well as work in his desired profession, accounting.

**Did the Claimant's attendance at university unduly limit him from finding work?**

[32] No. I find that the Claimant's attendance at university was not a personal condition that unduly limited his chances of returning to the labour market.

[33] I find that the Claimant's attendance at university did not unduly limit his chances of finding work because he had worked full-time in the past while attending university, he had limited classroom time during regular business hours, and he could have reasonably missed some classes to go to work.

[34] I accept the Claimant's detailed testimony that he had worked significant or full-time hours during his previous university year. The Claimant testified that he tutored a number of students from September 2015, to December 2015, regularly working 25 to 30 hours a week, and before and during exams he worked 12 hours a day, or 50 hours a week. The Claimant testified that from January 2016 to August 28, 2016, he worked a minimum of 42.5 hours a week for the university.

[35] I accept the Claimant's testimony that he did not spend much time on his studies. He explained his class schedule and attendance requirements in detail at the hearing. The Claimant took three classes with classroom time, and one class that consisted of a self-directed research project. The Claimant was in class for a few hours on Monday and Wednesday, starting at 4:30 pm, and for about three hours on Tuesday and Thursday, from about 11 am to 2 pm. He explained that his classes were practical classes, which consisted mostly of in-class assignments, for example, in professional writing, his assignments would be to prepare emails or memorandums. He reported that he did his research project at the last minute, and on the weekends, because his project partner worked full-time and lived about an hour's drive away from the Claimant.

[36] The Commission's notes suggest that the Claimant provided a different class schedule to them over the telephone in February 2017. The notes state that the Claimant said he spent an

average of four to five hours a week on his studies.<sup>17</sup> I prefer the Claimant's testimony as to his class schedule and that he did not spend much time on his studies, to the Commission's notes. I find the Commission's notes are ambiguous because the paragraph says it speaks to his availability since August 2016, yet the Commission wrote the sentences about his schedule and time spent in the present tense. I find that the use of the present tense means that this information was in relation to what the Claimant was doing in February 2017, not what he had done in the fall of 2016.

[37] I find that the Claimant has proven that he would have been able to work around his class requirements. The Claimant testified that his professors encouraged students to find work in the accounting field, and supported their efforts to find work by allowing them to miss class, provided they completed their assignments. He stated that many students worked full-time in the accounting field while attending university. The Claimant told the Commission<sup>18</sup> that he would not have had to drop his classes because his scheduling could have accommodated any work schedule. Further, his job search shows that he applied for jobs in Nova Scotia. By applying for work in Nova Scotia, he has proven that he prioritized finding work over his attendance at his courses in Prince Edward Island.

**Has the Claimant proven his availability for every working day between August 29, 2016, and December 30, 2016?**

[38] I find that the Claimant has proven his availability between August 29, 2016, and December 30, 2016, because he had a desire to return to the labour market, his job search efforts show he had a desire to work, and he did not impose personal conditions that would have unduly limited his chances of returning to work. Further, the Claimant proved that he was making reasonable and customary efforts to find suitable work.

---

<sup>17</sup> See Investigation Information Sheet with respect to a telephone conversation on February 22, 2017, at page GD3-25.

<sup>18</sup> Page GD3-25



**CONCLUSION**

[39] The appeal is allowed. The Claimant has proven his availability between August 29, 2016, and December 30, 2016.

Angela Ryan Bourgeois  
Member, General Division - Employment Insurance Section

HEARD ON:	February 5, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	P. D., Appellant Tammy Wohler, Representative for the Appellant