



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. D. v Canada Employment Insurance Commission*, 2019 SST 1678

Tribunal File Number: GE-19-2117

BETWEEN:

A. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: July 3, 2019

DATE OF DECISION: July 26, 2019

DECISION

[1] The appeal is dismissed. I find the Appellant has failed to prove his availability for work from December 31, 2018, onwards. The result is that he is disentitled from receiving employment insurance benefits in this period.

OVERVIEW

[2] The Appellant, who I will refer to as the Claimant, was terminated from his job after the job was moved to another country. The Claimant decided to continue taking his Ontario Real Estate Agent course, while looking for work. He made a claim for regular employment insurance (EI) benefits, but the Canada Employment Insurance Commission, which I will refer to as the Commission, determined he was disentitled from receiving EI benefits because he failed to prove he was available for work while taking a training program. The Commission upheld this decision after reconsideration. The Claimant appeals the decision to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

[3] At the hearing, the Claimant sought to enter further evidence of his job search. I allowed this request, and the Claimant submitted a post-hearing document on July 8, 2019, and followed up with a copy on July 9, 2019, because the original did not entirely transmit. These additional documents provide evidence of the Claimant's job search.

ISSUES

[4] **Issue #1** – Was the Claimant capable of and available for work and unable to obtain suitable employment as of December 31, 2018?

[5] **Issue #2** – Has the Claimant made reasonable and customary efforts to find work from December 31, 2018, onward?

ANALYSIS

[6] To be entitled to receive regular EI benefits claimants have to prove that, for each working day, they are capable of and available for work and unable to obtain suitable employment.¹ A working day is any day of the week except Saturday and Sunday.² Claimants also have to prove that it is more likely than not that they are making reasonable and customary efforts to obtain suitable employment.³ To determine whether a claimant's efforts are reasonable and customary, I must compare his activities to the criteria listed in the *Employment Insurance Regulations*.⁴ The *Employment Insurance Regulations* also provide criteria for determining whether an employment is suitable employment.⁵

Issue 1: Was the Claimant capable of and available for work and unable to obtain suitable employment as of December 31, 2018?

[7] The Claimant has failed to prove he was capable of and available for work as of December 31, 2018.

[8] The legislation does not define availability. The Claimant can establish his availability by proving his desire to return to the labour market as soon as a suitable job is offered, through demonstrating efforts to find a suitable job, and by not setting personal conditions that might limit his chances of returning to the labour market.⁶ These elements taken together are referred to as the *Faucher* test.

[9] The Claimant made an initial claim for regular EI benefits on January 16, 2019, effective December 30, 2018. On the claim form, he stated he was taking a part-time non-referred Ontario Real Estate Agent course and expected to spend 15-24 hours per week on his studies. The Claimant stated the course was scheduled to run from January 16, 2019, until June 30, 2019. The Claimant stated that he was sometimes obligated to attend classes in person, online, or by

¹ *Employment Insurance Act*, section 18(1)(a)

² *Employment Insurance Act*, section 32

³ *Employment Insurance Act*, section 50(8) sets the requirements; *Canada (Attorney General) v. Renaud*, 2007 FCA 328 established that claimants must prove they have made reasonable and customary efforts to find employment

⁴ *Employment Insurance Regulations*, section 9.001

⁵ *Employment Insurance Regulations*, section 9.002

⁶ *Faucher v. Canada (Attorney General)*, A-56-96 interprets the *Employment Insurance Act* to require this proof of availability

telephone, and said that he was not available to work under the same conditions as he was before he started the course but was looking for part-time work. He stated he was available to work Friday through Sunday, in the mornings and afternoons. He added that if a full-time job was offered to him, he would accept as long as he could delay the start date to allow him to finish his course.

[10] On January 24, 2019, the Claimant completed another initial claim form reflecting new training information. The Claimant stated he expected to spend 10 to 14 hours per week on studies, instead of 15-24 hours, and stated he was available for work and capable of working in the same or better conditions than he was before he started the course. He also stated that he would change his course schedule to accept a full-time job, if one was offered.

[11] The Commission issued a decision on March 7, 2019, finding the Claimant was disentitled from EI benefits from January 16, 2019, because he was taking a training program on his own initiative and failed to prove his availability for work. In its submissions to the Tribunal, the Commission stated that this notice contained an error, and should have disentitled the Claimant from EI benefits as of December 31, 2018, instead of January 16, 2019.

[12] The Claimant requested reconsideration, stating he started his real estate course on December 13, 2017, while still working with his previous employer. He stated he lost his job on December 28, 2018, and decided to continue his program while looking for a job. He stated he landed a contractual position with an advertising company on January 22, 2019, but this role pays only on a commission basis.

[13] The Commission spoke to the Claimant on April 25, 2019. The Claimant stated that he was taking one course, and had to complete five in 18 months. He stated that he completed two courses while working and started the third before his job ended. He stated the courses were originally correspondence, but because he failed a course he decided to attend an in-class version for three weeks from 8:30am until 4:10pm Monday through Thursday, but could not remember the dates when he attended. The Commission agent asked the Claimant what he would do if he found a full-time job, and he stated he would not abandon his course because he had spent a lot of money on it.

[14] The Commission issued a decision on April 25, 2019, upholding its previous decision to find the Claimant was disentitled from EI benefits from December 31, 2018, onwards.

[15] The Claimant filed a Notice of Appeal on May 24, 2019, reiterating much of what he said on the Request for Reconsideration. The Claimant added that he was still looking for a better job at the time he received the advertising position on January 22, 2019. The Claimant stated that it was after he obtained this new job on January 22, 2019, that he re-registered for the real estate program and was required to attend class for 12 days, at six hours per day. He submitted that he worked after class on his contractual job.

[16] At the hearing, the Claimant stated he was in class or studying for 15-24 hours per week. He stated that he was in class for only 12 days in the third course, and believed it was from March 18, 2019, until April 4, 2019. The Claimant stated the fourth class was from April 29, 2019, until May 3, 2019, and required him to be in class for those days.

[17] The Claimant testified that he initially stated he was not available for work because of the time he was obligated to attend classes. He also stated that he went to an employment agency and was told that his options were to change careers or do a job search, and he did not want to change careers because he would have to do more studying and training, without the promise of a job at the end. He stated he decided to apply for jobs, and was offered the contractual position on January 22, 2019. He stated that it was at this time that he decided to pursue the next course in the real estate program. The Claimant also testified that he was available Friday through Sunday from January until the end of June, 2019, because he was in class Monday through Thursday, and working on his contractual job in the evenings. He stated that while he was in class and working on the contractual job, he was only looking for part-time work.

[18] The Claimant made an initial claim for regular EI benefits on January 16, 2019, and followed-up with a second training information document on January 24, 2019. He stated to the Commission that this was done because he failed an exam, but it is not clear in the file why the Claimant followed up a week later to provide different information to the Commission. It is also unclear to me how the Claimant could have obtained a new job on January 22, 2019, and testified that it was at this time that he decided to pursue the rest of his Ontario Real Estate Agent course, when he stated on the January 16, 2019, initial claim form that he was taking the

program. The initial claim form predates the Claimant obtaining the advertising job on January 22, 2019, so he could not have decided to continue taking the course in response to obtaining a flexible, commission based job. I find the Claimant's main goal was to complete his real estate studies.

[19] The desire to return to work must be sincere, demonstrated by the attitude and the conduct of the Claimant.⁷ Further, a Claimant who restricts his availability and is only available for employment outside of his course schedule has not proven his availability for work.⁸

[20] I find the Claimant has failed to meet the requirements for availability as set out in *Faucher*, because while he did make efforts to find a job and has proven that with the submission of a job search list, the efforts he described do not demonstrate he wanted to return to the labour market as soon as a suitable job was offered. The Claimant has shown that he wanted to obtain further part-time employment that he would be able to do with his school schedule. Further, the Claimant has stated that he would only accept full-time employment if he was able to delay the start date so it would not conflict with his school schedule. I find the Claimant has set personal conditions that might limit his chances of returning to the labour market because he is focused on completing his educational program and is conducting a job search that works with his educational schedule, instead of a job search that is focused on obtaining immediate full-time suitable employment.

[21] Availability requires a willingness to re-enter the labour force under normal conditions without unduly limiting one's chances of obtaining employment.⁹ The Claimant has failed to prove that he had this willingness.

Issue 2: Has the Claimant made reasonable and customary efforts to find work from December 31, 2018, onwards?

[22] A Claimant's efforts to find a job are considered reasonable and customary if they are sustained, directed toward obtaining suitable employment, and consist of certain activities. Those activities may include assessing employment opportunities, preparing a resume or cover letter,

⁷ *Canada (Attorney General) v. Whiffen*, A-1472-92

⁸ *Canada (Attorney General) v. Gauthier*, 2008 FCA 313

⁹ *Canada (Attorney General) v. Primard*, 2003 FCA 349

registering for job search tools or with electronic job banks or employment agencies, attending job search workshops or job fairs, networking, contacting prospective employers, attending interviews, and undergoing evaluations of competencies.¹⁰ The burden is on the Claimant to prove on a balance of probabilities that he made reasonable and customary efforts to obtain suitable employment.

[23] I find the Claimant has established that he made reasonable and customary efforts to find work from December 31, 2018, onwards.

[24] The Claimant submitted that he applied for numerous jobs from December 2018 through March 2019. The list of jobs applied for, provided as a post-hearing document, includes over 25 positions where the Claimant has submitted an application. The Claimant has included a comments section, which tracks such things as the status of the application and states where there was no reply from the employer, where he attended a networking event, or where he was referred elsewhere. The Claimant stated he has a resume, and uses websites to find job opportunities. He has applied for a number of jobs from these sites, and testified that he obtained his contractual job from this job search.

[25] I find the Claimant has proven he made reasonable and customary efforts to find work from December 31, 2019, onwards because his efforts were sustained and directed towards finding suitable employment.

[26] For the reasons above, I find the Claimant is disentitled from EI benefits under section 18(1)(a) of the *Employment Insurance Act* from December 31, 2018, onwards. I further find he is not disentitled under section 50(8) of the *Employment Insurance Act* because he has proven he made reasonable and customary efforts to obtain suitable employment.

¹⁰ *Employment Insurance Regulations*, section 9.001(b)

CONCLUSION

[27] The appeal is dismissed. I find the Claimant has failed to prove his availability for work from December 31, 2018, onwards. The result is that he is disentitled from receiving employment insurance benefits in this period.

Candace R. Salmon
Member, General Division - Employment Insurance Section

HEARD ON:	July 3, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. D., Appellant