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

Citation: *C. N. v Canada Employment Insurance Commission*, 2020 SST 493

Tribunal File Number: GE-19-4143

BETWEEN:

C. N.

Appellant / Commission

and

Canada Employment Insurance Commission

Respondent / Appellant

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: January 3, 2020

DATE OF DECISION: January 17, 2020

Canada

DECISION

[1] The appeal is dismissed. The Claimant has not shown that he was available for work. This means that he is disentitled from being paid employment insurance (EI) benefits from September 3, 2019.

OVERVIEW

[2] The Claimant was unemployed and receiving EI regular benefits from June 16, 2019. He then decided to go to college and started his program on September 4, 2019. The Commission disentitled the Claimant from receiving benefits from September 2, 2019, because he was taking a course on his own initiative and had not proven his availability. The Claimant disagrees with this decision. He says that now he understands the requirements for availability he is available for work. The Claimant appeals to the Social Security Tribunal.

PRELIMINARY MATTERS

[3] The Claimant requested an in person hearing. I determined that a videoconference hearing was the appropriate method of proceeding because of: the complexity of the issues under appeal; the fact that credibility may be a prevailing issue; the information in the file, including the need for additional information; the availability of videoconference in the area where the Claimant resides; the form of hearing respected the requirement under the *Social Security Tribunal Regulations*[1] to proceed as informally and quickly as circumstances, fairness and natural justice permit; and, it was the best method to clarify and receive evidence on the issues under appeal.

ISSUES

[4] I have to decide if the Claimant is available for work from September 3, 2019.

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[1] *Social Security Regulations*, section 3(1)(a). This is how I refer to the law that applies to the circumstances of this appeal.

ANALYSIS

[5] Claimants have to be available for work to be paid EI benefits. Availability is an ongoing requirement; claimants have to be searching for a job.

[6] Unless there are exceptional circumstances, a person who is studying full-time is presumed not to be available for work.[2] The Claimant can overcome this presumption if he has a history of full-time work while studying.[3] A claimant can also overcome the presumption by showing they are willing to leave their training if a suitable job is offered.[4]

[7] Under certain conditions, the *Employment Insurance Act* considers claimants referred to training by the Commission, or an authority designated by it, to be unemployed and capable of and available for work.[5] The Claimant testified that he was not referred to training because he missed the deadline for application so he cannot benefit from this provision.

The Claimant is enrolled in full-time study

[8] I find the Claimant was and is studying full-time. The appeal file shows that he reported to the Commission that he was studying full-time. The Claimant told the Commission that he is required to attend classes Monday to Friday, 8:30 a.m. to 3:30 p.m. His program began on September 4, 2019, and he is due to complete the program on May 22, 2020. As a result, I find the Claimant was, and is, studying full-time.

The Claimant has not rebutted the presumption he was not available due to full-time study

[9] The Commission submitted the Claimant has failed to rebut the presumption of non-availability while attending a full-time course. It says that he initially told the Commission that he was only available for part-time employment because he was attending school full-time. The Commission says that the Claimant did not actually apply for jobs, he just walked in to several employers to see if they were hiring.

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[2] *Landry v. Canada (Attorney General),* A-719-91; *Canada (Attorney General) v. Gagnon*, 2005 FCA 321; *Canada (Attorney General) v. Cyrene*, 2010 FCA 349).
[3] *Canada (Attorney General) v. Rideout*, 2004 FCA 304
[4] *Canada (Attorney General) v. Wang*, 2008 FCA 112
[5] *Employment Insurance Act*, section 25(1). This is how I refer to the legislation that applies to this appeal.

[10] The Commission notes that the Claimant says he now understands the requirements for availability. However, the Commission argues that the list of 11 employers the Claimant submitted with his appeal contains no evidence to outweigh the initial spontaneous statements he made regarding his intentions to look for part-time work while attending school.

[11] Since he notified the Commission that he was taking training the Claimant has provided different information regarding his efforts to find work and his willingness to work instead of attending training. Where there is contradictory evidence I must decide which contradictory evidence I prefer and I must provide reasons why I prefer certain evidence.[6]

[12] The Claimant completed a Training Course Information form on September 12, 2019. He indicated on the form that he would be available for work from "4:30 to 8" Monday to Friday and "8 to 8" on Saturday and Sunday. He wrote on the form that his intention was to "look for part time work as in school full time."

[13] The Claimant initially told the Commission in a telephone conversation on October 21, 2019, that he was attending school full-time and would be able to work in the evenings and on weekends. He also told the Commission that he would not quit his program. He was told that he would be disentitled to benefits during that telephone conversation.

[14] The Claimant requested reconsideration of the Commission's decision. In his request he wrote that he was "In school to advance myself in the workplace for suitable employment. I am able to work while in school including full time when available." On October 31, 2019, the Claimant told the Commission in a telephone call that he could work some shifts during the weeknights and on the weekends he could make up full-time hours. He said that he had not actually applied to work anywhere; he just walked in and asked if they were hiring. He also said that he would not drop his course, but later said that he "had to" he would, but it would have to be if he was offered something good, more than he was working before. On October 31, 2019, the Commission told the Claimant in a telephone conversation that it was confirming its original decision to disentitle the Claimant from receiving EI benefits.

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[6] *Bellefleur v. Canada (Attorney General)*, 2007 FCA 201

[15] The Claimant made a second request for reconsideration on November 1, 2019. That request was denied because he had not provided any new information. He was advised of his appeal rights to the Tribunal.

[16] The Claimant sent the letter dated November 1, 2019, with his appeal to the Tribunal on November 28, 2019. In that letter the Claimant says "as I am now aware of the concept of availability as it applies to me while attending this course, I now understand what my requirements are, and that is to seek employment and be available for work as my first priority." He wrote that he has been available for work since he filed his claim for benefits and attached a list of employers he has contacted since he filed his claim. He also wrote:

> I am seeking full time or any gainful employment while attending this course and if I find work I am willing to abandon my course. I had no understanding of what was required of me when I completed my bi-weekly declarations and I did not understand fully what my requirements were when I spoke to your representative. My main concern is to find employment and return to work and I believe this is evidenced in my job search (attached).

[17] The November 1, 2019, letter has two different lists of employers. When the letter was sent to the Commission it had a list of 6 employers. The letter was received by the Commission on November 7, 2019. When the letter was sent to the Tribunal it had a list of 11 employers. The letter was received by the Tribunal on December 6, 2019. The Claimant also referred to the Digest of Benefit Entitlements, two Canada Umpire Decisions and a Federal Court Decision.

[18] At the hearing, the Representative explained this was the Claimant's first application for EI benefits while he was attending training. The Representative felt the Claimant should have been made aware of the availability requirements and because he was not aware he could not satisfy those requirements. The Representative said that the Claimant's job search proves he is available for work and that he was a desire to return to the labour market rather than go to school. The Representative submitted that the Claimant's availability should be accepted as of the date that he started training. The Claimant should be given a reasonable period of time to search for work because the work he had been doing was on call shift work with irregular hours.

[19] The Claimant testified that before September 3, 2019, he made efforts to look for work. He handed out his resume to FTI, HH, QA, CBS in his home town and the town where he goes to school, NLCE, CT, and M.[7] He then clarified that statement by saying that he handed out resumes from the time he was laid off to "now really" meaning the date of the hearing. The Claimant explained that he had contacted three of the employers before and after September 3, 2019. In October he applied at ND. He explained that the lists attached to the November 1, 2019, letter were different because the added employers were ones that he applied to after November 7, 2019. The evidence shows that the added employers were ND, and in the town where he goes to school he applied for CBS, HHBS, M and the NLCE. He did not include F from the first list in his second list. The Claimant's Training Course Information form lists CBS in the town where lives, and HH and CBS in the town where he is going to school. He told the Commission he applied to HH, F, the SY, and CBS. He said this list was accurate as of October 21, 2019. Although he is recorded as later telling the Commission he had not actually applied for work anywhere, the Claimant testified that was not accurate. He testified that as part of dropping off his resume he would ask if the employer was hiring.

[20] The Claimant testified that he did not know what the question about his intention on the Training Course Information sheet meant. He had written "look for part-time work as in school full-time." He said that he thought he could go to school and be available for work full-time. He thought that full-time was 30 hours a week. The Claimant testified that he would be available anytime during his school hours if the work was there. I asked the Claimant what he meant when he wrote on his Reconsideration Request form "I am able to work while in school including full time when available." He explained that he meant when the work was available. He would not attend class and go to the job instead; his studies would "go on the backburner."

[21] The Claimant explained that the statement as recorded by the Commission on October 21, 2019, that "he would not quit his program" was taken out of context. He said the Service Canada Agent was talking to him about leaving school for a part-time job at [a fast food restaurant]. The Claimant testified that he can sustain himself with full-time employment. He would not leave school for part-time employment.

[7] I am referring to the employers by their initials.

[22] The Claimant testified that he had worked while taking training before. In 2014 for four months he was taking Occupational Health and Safety training, 8 am. To 4 p.m. on weekdays. He worked at a building supplies store in the evening and weekends.

[23] The Claimant testified that the November 1, 2019, letter was written by the Representative but he agreed with the contents of the letter. I asked him what he meant by the "concept of availability" as written in the letter. The Claimant said that is what got him to this appeal. He did not understand what availability meant. He thought that he could be available while he was in school. He said that "after further review I will abandon my studies for work." The Claimant said that he became aware of the concept of availability when he spoke to the Representative after he was first denied EI benefits. He could not recall the date of that conversation.

[24] I find the Claimant has not rebutted the presumption that he is available for full-time work while he is studying. The Claimant referred several times to his understanding of the "concept of availability." His Representative submitted that the Claimant could not be expected to comply with the availability requirements if he was unaware of those requirements. However, the Claimant testified that he received EI benefits three times before. There has been no change in availability requirements. The application for EI benefits clearly states that a claimant has certain rights and responsibilities. It states Claimant must "actively search for and accept offers of suitable employment" and "conduct search activities" with a list of nine activities provided. The Claimant accepted these rights and responsibilities. In light of this evidence I cannot accept that it is only after the Claimant was disentitled for benefits that he became aware of the availability requirements.

[25] As noted above, whether a claimant is in training or not in training the availability requirements remain the same. Being in full-time training has the further requirement that the Claimant have a willingness to leave the training for work. The Claimant's job search list initially had three employers listed with the caveat that he was only looking for part-time work. As he continued to talk to Service Canada agents and be disentitled to EI benefits the list of employers he provided grew and his method of looking for work went from asking if employers were hiring to dropping off resumes. He has also changed his statements regarding his

willingness to quit his training. The Training Information Form asked for his intentions. He was given 4 options: to find full-time work rather take the course; to find full-time work while taking the course; to devote his time to the course rather than find work; or other. He stating he was seeking only part-time work because he is in school full-time to stating. His intention changed since that time such that at the hearing he said "after further review, I will abandon my studies for work."

[26] I find that the Claimant has not rebutted the presumption that he was not available for work while attending full-time studies. I give greater weight to the Claimant's initial statements, written and oral, that he was looking only for work part-time and that he would not leave his studies. In my opinion, the Claimant's statements concerning his understanding of the "concept of availability" and his later statements that following his understanding of availability he would abandon his studies have been provided with the intent of overturning the Commission's unfavourable decision.[8] He testified that he would give up his studies for full-time work if that work was better than his prior jobs. He would not give up his studies for part-time work. Accordingly, I find the Claimant has not rebutted the presumption that he is not available for work because of his limited activity searching for full-time employment and his unwillingness to leave his studies for employment.

The Claimant was not available for work because he did not make reasonable and customary efforts to find a job

[27] Two different sections of the law require claimants to show that they are available for work. One section requires that the Claimant make reasonable and customary efforts to find work.[9] The other section requires that the Claimant must prove that they are capable of and available for work for each working day.[10] The Commission denied the Claimant his EI benefits because it determined he had not met all of these requirements.

[28] The law sets out criteria for me to consider when deciding whether the Claimant's efforts to find work were reasonable and customary.[11] I have to decide if his efforts were sustained and

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[8] *Canada (AG) v. Gagné*, FCA A-385-10
[9] *Employment Insurance Act,* subsection 50(8)
[10] *Employment Insurance Act,* Paragraph 18(1)(a)
[11] *Employment Insurance Regulations,* Section 9.001

whether his efforts were directed towards finding a suitable job. I also have to consider the Claimant's efforts in the following job-search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.[12]

[29] The Commission says the Claimant's job search shows that he is only looking for part-time work while attending school. He initially confirmed that he was not actually looking for work. The Commission says the list of 11 employers the Claimant submitted with his appeal contains no evidence to outweigh his intention to look for part-time work while attending school. The Commission says the Claimant's decision to look for work that starts after 4:30 p.m. in the town where he resides because he has no transportation supports that his focus is to complete his training. He has not demonstrated that obtaining immediate employment and returning to the workforce is his true intention. The Commission says the job search the Claimant conducted to September 3, 2019, and the Claimant's statements have not demonstrated that he was actively looking for employment. Consequently, the Commission says that the Claimant not proven his availability for work.

[30] The Representative said that the Claimant did not have any issues with transportation. The Claimant told the Commission that he uses his mother's car for the hour's drive to school because she works at night. He told the Commission that he can "sometimes" get transportation in the evening but has to ask to borrow a car. The Representative said that the town where the Claimant was attending college was a hub for the area. It is normal for people to commute and transportation would not be a problem.

[31] I find that the Claimant has not made reasonable and customary efforts to find a suitable job. His evidence is that as of September 12, 2019, he initially asked three employers if they were hiring. He then expanded that list to include two other employers as of October 21, 2019. As of October 31, 2019, the list of five employers remained the same. By the time of his appeal on November 28, 2019, he listed 11 employers with five being those he had previously

[12] *Employment Insurance Regulations*, section 9.001.

contacted. The Claimant has a resume. The Claimant began his studies on September 3, 2019. He applied for one advertised job in October. He has looked on-line for jobs. The evidence tells me that his job search amounted to contacting 11 employers and applying for one job over a period of three months. In my opinion, this is a limited job search. I find, that the Claimant has not provided sufficient evidence to show that he carried out any other activities related to a job search and that, due to his limited applications to employers, his efforts were not sustained. Accordingly, I find the Claimant has not proven that he was making reasonable and customary efforts to obtain suitable employment.

The Claimant was not capable of and available for work and unable to find suitable employment

[32] I must also consider whether the Claimant has proven that he is capable of and available for work and unable to find suitable employment.[13] A claimant proves his availability for work by proving his desire to return to the labour market as soon as a suitable job is offered, through demonstrated efforts to find a suitable job, and by not setting personal conditions that might limit his chances of returning to the labour market.[14] These three factors are known as the *Faucher* factors. I have to consider each of these factors to decide the question of availability, looking at the attitude and conduct of the Claimant.[15]

<u>Did the Claimant have a desire to return to the labour market as soon as a suitable job was available?</u>

[33] No, I find the Claimant has not shown a desire to return to the labour market as soon as a suitable job is offered.

[34] The Claimant is enrolled in full time studies. He told initially told the Commission that he would not give up his studies to go to work. He later told the Commission that he would give up his studies if he had to, but the job would have to more be more than what he was working before. He had been working call-in work at a fish plant and making $18 an hour at a shipyard.

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[13] *Employment Insurance Act,* paragraph 18(1)(a)
[14] *Faucher v. Canada (Attorney General)*, A-56-96
[15] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96; *Canada (Attorney General v Whiffen*, A-1472-92; and, *Carpentier v The Attorney General of Canada*, A-474-97

However, the Claimant also testified that he would only give up his studies if he found a job that was full time. He would be ale to sustain himself with full-time work. He would not give up his studies for part-time work. The Claimant has looked for employment with 11 employers and applied to one job since he started his studies on September 3, 2019. The Claimant testified that now that he understands the concept of availability he is willing to abandon his course. As a result of the Claimant's statements, I am satisfied the Claimant has not shown a desire to return to the labour market as soon as a suitable job is offered. Accordingly, I find the Claimant has failed to satisfy this *Faucher* factor.

Has the Claimant made efforts to find a suitable job?

[35] I find the Claimant has not made efforts to find a suitable job. While the job-search activities listed above are not binding when deciding this particular requirement, I have considered the list for guidance in deciding this second factor. The Claimant has a resume. The Claimant began his studies on September 3, 2019. He applied for one advertised job in October. He has looked on-line for jobs. The evidence tells me that his job search amounted to contacting 11 employers and applying for one job over a period of three months. As noted above, this is a limited job search. As a result, I find the Claimant's efforts are not enough to meet the requirements of this second factor because he has not proven, on a balance of probabilities, that his efforts were sufficient and directed towards finding suitable employment. Accordingly, I find the Claimant has failed to satisfy this *Faucher* factor.

Did the Claimant set personal conditions that might have unduly limited his chances of returning to the labour market?

[36] Yes, I find the Claimant did set personal conditions that might have unduly limited his chances of returning to the labour market. The Claimant initially indicated that he was looking for part-time work because he was in school full-time. He has been in the workforce over 10 years. His work experience is as a labourer and he has worked in retail. The Claimant told the Commission that he would give up his studies if he had to, but the job would have to more be more than what he was working before. He had been working call-in work at a fish plant and making $18 an hour at a shipyard. However, the Claimant also testified that he would only give up his studies if he found a job that was full time. Based on the foregoing evidence, I find the

Claimant has set personal conditions on the type of work that he would accept that might have unduly limited his chances of returning to the labour market. Accordingly, I find the Claimant has failed to satisfy this *Faucher* factor.

[37] The Representative submitted that jurisprudence supported the Claimant's case. He referred to the Federal Court of Appeal decision *Canada (Attorney General) v. Wang* (2008 FCA 112). He submitted that the Commission had appealed a decision of an umpire. In that case, the respondent (who was a claimant) was attending work full-time, she gave a list of her job search and was able show she was willing to leave her course for full-time work. On that basis the presumption of non-availability was rebutted. In *Wang* the court noted that the three factors contained in *Faucher* were the criteria to be applied to the claimant's circumstanced. It stated that the claimant "repeatedly stated that her first intention was to find and accept suitable employment. She presented evidence of numerous efforts to find employment." As noted above, I am required to consider and decide if the Claimant has met the three *Facuher* factors to determine whether the Claimant is available. I have done so and have decided that he has not met the *Faucher* factors.

[38] The Claimant quoted the first paragraph from section 10.4.2 of the Digest of Benefits Entitlements. The Digest of Benefit Entitlements is a publication of the Commission. I am not bound by the Digest. It does not have legislative authority and cannot qualify or disqualify the Claimant from benefits that are provided for by legislation. The section makes reference to the Commission advising a claimant of the requirements for availability when the Commission becomes aware of restrictions on a claimant's availability. I note, however, the notice is only to broaden a job search it is not a notice of the consequences of a claimant's unavailability once established. The Representative argue the Claimant should be given a reasonable period to search for work. In this case, the Claimant's availability was restricted by his full-time attendance at school. The application of a "reasonable period to search for work" is not applicable in these circumstances as it was the Claimant's initial unwillingness to give up his studies and his limited job search that were the cause of his unavailability not the length of time.

CONCLUSION

[39] The appeal is dismissed.

[40] The Claimant has not rebutted the presumption that he is not available for work due to his full-time studies. The Claimant was not capable of and available for work from September 3, 2019. The Claimant has not proven, on a balance of probabilities that he made reasonable and customary efforts to find suitable employment. As noted above, a Claimant must meet all three of the *Faucher* factors to demonstrate his availability. The Claimant did not prove, on a balance of probabilities that he met any of the three of the *Faucher* factors.

Raelene R.Thomas
Member, General Division - Employment Insurance Section

HEARD ON:	January 3, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	C. N., Appellant S. B., Representative for the Appellant