



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. C. v Canada Employment Insurance Commission*, 2020 SST 354

Tribunal File Number: GE-20-430

BETWEEN:

C. C.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Catherine Shaw

HEARD ON: March 4, 2020

DATE OF DECISION: March 18, 2020

Decision

[1] I am allowing the appeal. The Claimant has proven that he was available for work as of September 2, 2019.

Overview

[2] Claimants have to be available for work to be paid regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job. The Commission decided that the Claimant was unable to be paid benefits as of September 2, 2019, because he was not available for work while he was attending school.

[3] I must decide whether the Claimant has proven that he was available for work.¹ The Commission says that the Claimant set personal restrictions on his hours of work due to his full-time training schedule. The Claimant disagrees and provided a job search to support that he was actively seeking work.

Preliminary Matter - Reconsideration Decision

[4] The Commission's reconsideration decision dated January 7, 2020, states the issue of the Claimant's availability for work has been decided in his favour and the decision that was communicated to the Claimant on November 23, 2019, has been overturned. This refers to the decision letter dated November 23, 2019, which states the Claimant is not able to be paid EI benefits from September 2, 2019, because he has not proven his availability for work.

[5] The Commission submitted to the Tribunal that this was a clerical error and that the letter dated January 7, 2020, should have stated that the decision was maintained, not overturned.² At the hearing, the Claimant's representative argued that the reconsideration decision was made in the Claimant's favour, and therefore there is no cause to hear an appeal on the issue of the Claimant's availability.

¹ The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

² This submission is located on GD4-3 of the appeal file.

[6] The Commission argues that an error which does not cause prejudice is not fatal to the decision under appeal.³ I agree with this principle and find that the Commission's clerical error in the reconsideration decision does not cause prejudice because the Claimant exercised his right of appeal to the Tribunal.

What I must decide

[7] I must decide if the Claimant was available for work from September 2, 2019. To do this, I have to see if he was making reasonable and customary efforts to find suitable employment as of that date. Then I must address if he was capable of and available for work.

Reasons for my decision

Reasonable and customary efforts to find a job

[8] Two different sections of the law require claimants to show that they are available for work;⁴ the Commission disentitled the Claimant from being paid benefits under both. I will first consider whether the Claimant has proven that his efforts to find a job were reasonable and customary.⁵

[9] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.⁶ I have to look at whether his efforts were sustained and whether they were directed toward 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

³ This principle is stated in Canadian Umpire Benefits (CUB) decision 16233 and confirmed by the Federal Court of Appeal in *Desrosiers v. Canada (Attorney General)*, A-128-89.

⁴ Subsection 50(8) provides that, 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 he or she is making reasonable and customary efforts to obtain suitable employment. Paragraph 18(1)(a) of the *Employment Insurance Act* provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

⁵ Subsection 50(8) of the *Employment Insurance Act*.

⁶ Section 9.001 of the *Employment Insurance Regulations*.

hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.

[10] I find that the Claimant has proven he was making reasonable and customary efforts from September 2, 2019. The reasons for my decision are set out below.

[11] The Claimant was employed at a hardware store before he relocated to another province to attend university starting in September 2019.

[12] The Claimant said at the hearing that he is conducting an active job search to find employment. He updated his resume. He uses the mobile application LinkedIn to look for job postings. He networks with a group of friends who share job opportunities. He provided a job search record to the Commission that shows he contacted eighteen prospective employers to ask about potential job opportunities. He submitted job applications to five of these employers and attended one job interview. In November 2019, he worked at his former employer for a week during a break from school.

[13] The Claimant's testimony conflicted with information he had previously provided to the Commission. He spoke to the Commission on November 23, 2019. At that time, he said that he had dropped off a resume at a local hardware store and had not applied for work anywhere else. He submitted his request for reconsideration on December 4, 2019, and provided the job search record that shows he had contacted eighteen employers to ask for work and had sent a resume or job application to five of those employers. He spoke to the Commission again on January 3, 2019, and said that he had started looking for jobs in September 2019.

[14] The Claimant's job search record does not provide the dates that he contacted the listed employers. On December 4, 2019, he told the Commission that he could not recall the dates of the activities and would have to check his notes. At the hearing, the Claimant said that he did not keep notes on when he called the employers or applied for jobs, but that these activities took place over the fall.

[15] I asked the Claimant about his statement that he had only applied for one job at a local hardware store by November 23, 2019. The Claimant explained that he had not fully understood the Commission's questions during their telephone calls. The Commission did not provide a

transcript of the telephone conversation with the Claimant that occurred on November 23, 2019. It only provided the agent's notes of the Claimant's responses during the telephone call. As I have no evidence regarding what questions the Commission asked during the phone call on November 23, 2019, I prefer to rely on the Claimant's testimony and his later statements to the Commission that he had begun searching for work in September 2019.

[16] I find the evidence and testimony the Claimant has provided of his job search efforts show that he was making reasonable and customary efforts to find suitable employment. His efforts were sustained over a period of multiple months and he engaged in many of the job-seeking activities listed in paragraph 9 above. Therefore, I find the Claimant has shown that he made reasonable and customary efforts to find a suitable job from September 2, 2019.

Capable of and available for work and unable to find suitable employment

[17] To be entitled to receive regular employment insurance benefits, claimants must show they were capable of and available for work and unable to obtain suitable employment for every working day they are seeking benefits.⁷ A working day is any day of the week except Saturday and Sunday.⁸

Presumption of non-availability while attending a course of studies

[18] There is a presumption that a claimant enrolled in full-time studies is not available for work.⁹ A claimant attending a full-time course of instruction must demonstrate that they are available for work and unable to obtain suitable employment similar to the requirements of all claimants who are requesting regular EI benefits.

[19] This presumption of non-availability can be rebutted through proof of exceptional circumstances.¹⁰ Exceptional circumstances may be found when a claimant's first intention is to

⁷ This is set out in section 18(1)(a) of the *Employment Insurance Act*. The Federal Court of Appeal has stated that claimants have to prove they are entitled to EI benefits, including meeting the availability requirements in *Canada (Attorney General) v. Picard*, 2014 FCA 46 and *Canada (Attorney General) v. Peterson*, A-370-95. The law requires me to apply the principles set by courts. I refer to other cases that explain the *Employment Insurance Act* and the *Employment Insurance Regulations* in this decision.

⁸ This is stated at section 32 of the *Employment Insurance Regulations*

⁹ The rebuttable presumption of non-availability while attending full-time studies is set out in *Canada (Attorney General) v. Gagnon*, 2005 FCA 321

¹⁰ This is set out in *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349

find and accept suitable employment, when they have a history of working while attending a course of study, and they are willing to accept such employment even if it required changes to schooling.¹¹

[20] To determine if this presumption applies, I must decide if the Claimant was engaged in full-time studies.¹² At the hearing, the Claimant said that he attends class for approximately 17 hours per week. I find his hours of study do not support that he was attending a full-time course of study. Based on the Claimant's testimony regarding his course schedule, I find his studies were on a part-time basis and so the presumption of non-availability does not apply.

Availability for work

[21] Now I will consider whether the Claimant has proven that he is available for work and unable to find suitable employment.¹³ The Claimant has to prove three things to show he is available:

1. A desire to return to the labour market as soon as a suitable job is available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might unduly limit their chances of returning to the labour market¹⁴

[22] I have to consider each of these factors to decide the question of availability, looking at the attitude and conduct of the Claimant.¹⁵ All three factors must be met to prove availability.

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

¹¹ This principle is stated in *Canada (Attorney General) v. Wang*, 2008 FCA 112

¹² The rebuttable presumption of non-availability while attending full-time studies is stated in *Canada (Attorney General) v. Gagnon*, 2005 FCA 321

¹³ Section 18(1)(a) of the *Employment Insurance Act*.

¹⁴ The factors to consider when determining whether a claimant is available for work are set out in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹⁵ *Canada (Attorney General) v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[23] The Claimant gave credible testimony that finding work was his first priority and that he was willing to leave school or drop courses for suitable employment. He also gave a detailed account of his efforts to find a suitable job during the period in question. For these reasons, I am satisfied the Claimant's attitude and conduct support that he had a desire to return to the labour market as soon as a suitable job was offered.

Did the Claimant express that desire through efforts to obtain suitable employment?

[24] While they are not binding when deciding this particular requirement, I have considered the list of job-search activities outlined above in deciding this second factor for guidance. The Claimant's record of his job search showed that he contacted eighteen prospective employers and applied for five jobs since September 2, 2019. The Claimant testified as to his other job search efforts, which included searching for jobs online, networking with friends for job opportunities, and attending a job interview.

[25] Even though the Claimant's job applications are not extensive, I consider those applications in the context of his other job search efforts. I am satisfied that his efforts demonstrated a desire to return to the labour market from September 2, 2019.

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

[26] The Claimant's course schedule limited the hours of employment that he was able to work. However, the Claimant testified that he would be willing to alter his schedule or drop his courses if he found suitable employment. The Claimant's job search demonstrates that he was looking for jobs in both his university town and his hometown in another province. His testimony supports that he would have accepted suitable employment in either location. Therefore, I am satisfied the Claimant did not set any personal conditions that may have unduly limited his chances of returning to the labour market.

Was the Claimant capable of and available for work and unable to find suitable employment?

[27] The Claimant had a desire to return to the labour market as soon as a suitable job was offered and expressed that desire through efforts to obtain a suitable employment. He did not set any personal conditions that may have unduly limited his chance of returning to the labour market. Therefore, I find the Claimant has proven he was capable of and available for work from September 2, 2019.

Conclusion

[28] The Claimant has proven that he was available for work from September 2, 2019. This means the appeal is allowed.

Catherine Shaw
Member, General Division - Employment Insurance Section

HEARD ON:	March 4, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. C., Appellant Robert Morrissey, Representative for the Appellant