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

Citation: *TB v Canada Employment Insurance Commission*, 2020 SST 1039

Tribunal File Number: GE-20-184

BETWEEN:

T. B.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent/Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Leanne Bourassa

HEARD ON: April 3, 2020

DATE OF DECISION: May 1, 2020

Canada

DECISION

[1] The Claimant has not shown that he was available for work. This means the appeal is dismissed and he is disentitled from being paid benefits.

OVERVIEW

[2] The Claimant began a pre-apprentice training program in industrial millwrighting. Shortly after the course began, he left his full-time job and applied for Employment Insurance (EI) Benefits. The Commission refused to grant him benefits, finding first that he had left his employment voluntarily without just cause and secondly, that he had failed to prove that he was available for work while in a full-time training course.

[3] The present appeal deals only with the issue of the Claimant's availability for work while in a full-time training course. This matter is the subject of a previous Social Security Tribunal (Tribunal) General Division decision and is being reconsidered further to an instruction of the Tribunal's Appeal Division.

PRELIMINARY MATTERS

[4] The General Division initially heard this matter on October 1, 2019 and dismissed the Claimant's appeal on October 11, 2019[1]. The Claimant was granted leave to appeal to the Appeal Division. The Appeal Division allowed the appeal on January 8, 2020[2]. The Appeal Division determined that the General Division made its decision without considering evidence that the Claimant had produced in a different appeal before the General Division in August 2019[3] (the August appeal), but that the Claimant had referred to and expected to be considered.

[5] The Appeal Division returned the matter to the General Division for a reconsideration. In returning the matter, the Appeal Division instructed that the General Division should reconsider the decision taking into consideration the information in August appeal.

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[1] *T.B. v. Canada Employment Insurance Commission*, 2019 SST 1482
[2] *T.B. v. Canada Employment Insurance Commission*, 2020 SST 8
[3] This was Tribunal file number GE-19-2434.

[6] I requested that the Claimant provide the information that he believes had not been taken into consideration in the original General Division decision. The Claimant resubmitted all documentation from all previous claims before all levels of the Tribunal as well as a letter including new argumentation. Because of these new arguments, I felt it was necessary to hold a new hearing on the matter and the Commission was offered a chance to provide comments regarding the new arguments raised. The Commission provided comments on March 26, 2020 and the Claimant responded to the comments in writing on March 29, 2020. All of these comments and submissions have been considered when reaching the decision that is explained below.

[7] As I am the same General Division member who heard the appeal at the General Division previously, I began the hearing on April 3, 2020 by inviting the Claimant's representative to consider whether she would prefer to have a new hearing before a different member. She said that she was prepared to proceed with me hearing the matter and did not expect that my hearing the matter again would subject the Claimant to any undue bias.

ISSUES

[8] Was the Claimant available for work?

ANALYSIS

[9] To be paid regular EI benefits, claimants have to be available for work. Availability is an ongoing requirement; claimants have to be searching for a job. The Claimant must prove that he was available for work[4].

[10] When a Claimant is participating in a course or program of training that he has been referred to by the Commission or an authority that the Commission delegates, he is considered to be capable of and available for work.[5] If he is on a course or training that he has not been referred to by the Commission, he does not benefit from this presumption and he must prove he is available for work. In my previous decision on this matter[6], I had already found that such a

[4] The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.
[5] Paragraph 25(1) of the Employment Insurance Act.
[6] *T.B. v. Canada Employment Insurance Commission*, 2019 SST 1482

presumption would only apply the Claimant for the period of April 30, 2019 to June 23, 2019 when the Commission led him to believe he was on an approved course of study. The Claimant therefore has to prove he was available for work from March 24, 2019 to April 30, 2019 and after June 24, 2019.

[11] Two different sections of the law require claimants to show that they are available for work;[7] 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.[8] Then, I must also consider whether the Claimant has proven that he is capable of and available for work and unable to find suitable employment.[9]

[12] Having reviewed my previous General Division decision in this appeal, there are certain elements of that decision that I find are not altered by a consideration of new materials and I will not discuss in detail in this decision. My reasons for making those findings are outlined in the decision issued on October 11, 2019. In particular :

- I still find that the Claimant was not enrolled in a training program that he had been referred to by the Commission or an authority delegated by them. [10]

- I still find that the presumption that the Claimant was not available for work because he was in fulltime studies of his own initiative does not apply to the period of May 1, 2019 to June 23, 2019, because the Claimant had been lead to believe he was on a referred course of studies. This was an extraordinary circumstance because the Claimant had been told by the Commission that he was on a referred course of study.

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[7] 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.
[8] Subsection 50(8) of the *Employment Insurance Act*.
[9] Paragraph 18(1)(a) of the *Employment Insurance Act*.
[10] GE-19-3149, paragraph 8

- I still find that although the Claimant's job preparation activities were part of his program of instruction, there were general activities that could help his overall job search.[11]

- I still find that the Claimant did not set a limit of 20 hours per week of availability while he was in his program of studies. This limit only applied to the employer he was working for at the time he began his studies and was set for reasons particular to that job.

[13] Considering that I do not feel that I need to revisit the above findings, the following issues still need to be reviewed in light of the additional information provided by the Claimant:

a) Was the Claimant making reasonable and customary efforts to find a job during the periods of March 24, 2019 to April 30, 2019 and after June 24, 2019 (going forward, this well be referred to as "the relevant period")?

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

New evidence and arguments brought by the Claimant

[14] In addition to the evidence considered in the original General Division decision on this matter, I reviewed and considered the following additional evidence when reconsidering the claim:

a) The evidence produced and the submissions made by the Claimant and the Commission to the General Division August appeal[12] which dealt with a disqualification for voluntarily leaving a job without just cause;

b) The evidence produced and the submissions made by the Claimant and the Commission to the Appeal Division in the present matter, dealing with the Claimant's availability for work while in a full-time course of studies;

[11] GE-19-3149, paragraph 19
[12] Tribunal file number GE-19-2434.

c) The Claimant's representative's letter to the Tribunal dated March 13, 2020 in response to my February 24, 2020 request for additional information. This letter accompanied the Claimant's submissions to the Tribunal for this reconsideration and three additional documents, being an undated job posting for a "Helper" position, an undated online job posting for an "Outdoor Labourer" position and a letter from a Journeyman Industrial Millwright to whom the Claimant is an apprentice, indicating that a pre-apprenticeship program is not a pre-requisite to becoming an apprentice;

d) The Commission's Supplementary Representations dated March 26, 2020 in response to the Claimant's representative's letter and submissions of March 13, 2020;

e) The Claimant's Representative's letter of March 29, 2020, responding to the Commission's Supplementary Representations and providing an extract of the Digest of Benefit Entitlements Principles Chapter 10, Section 3;

f) The testimony provided by the Claimant's Representative at the hearing on April 3, 2020.

Reasonable and customary efforts to find a job

[15] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[13] 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 hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.

[16] The Claimant argues that although he was in full-time studies, he was actively looking for work.

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[13] Section 9.001 of the *Employment Insurance Regulations*.

[17] As mentioned above and in the previous decision, I accept that the job search and preparation activities the Claimant did in the context of his program of studies and through the College's counselling service were activities that could be helpful for an overall job search.

[18] However, even taking into consideration the additional evidence that the Claimant has submitted, I find that the Claimant has not demonstrated that his job search was reasonable and customary. I do not see that he was searching and applying for a variety of jobs, in a sustained manner once he started his studies.

[19] The additional information that the Claimant has asked me to consider does not include any new examples of job search activity that the Claimant had engaged in during the relevant period or job applications that he had submitted.

[20] The Claimant testified, both at the original General Division hearing and through his representative at the most recent hearing, that during the relevant period he had gone out to several factories that he knew were hiring to inquire about general labour jobs. He argues that in my original decision I did not place much weight on his statements regarding his job searches that were conducted in person, primarily because he had only provided evidence of one of those visits.

[21] While I do not believe that the Claimant was being untruthful when he discussed visiting factories to ask about jobs, he has not provided the names and locations of factories he visited and the dates he had visited them. Without any information of this sort, I do not know how many factories the Claimant visited, how often he was doing these visits, if he spoke to anyone in a hiring capacity and if he did any follow up to those visits. I therefore cannot determine if there were enough of these visits to demonstrate that the Claimant's efforts were sustained throughout the period of his studies.

[22] The Claimant has argued that after April 30, 2019, he was unable to submit job search reports because the Commission had originally disqualified him from receiving benefits for having left his employment voluntarily. While it is true the Claimant could not report that he was looking for jobs on a weekly basis, nothing prevented him from keeping a list of the jobs he applied to and presenting it to the Commission or the Tribunal at a later date. On April 29, 2019,

he was advised by the Commission to keep a list of his job search activities. At this point, the Claimant has presented evidence to the Tribunal at least four times and has not provided a list tracking his job search activities. He has provided many pages of documentation and copies of email discussions, but there is only evidence of some interactions with a counsellor at the college and about 5 or 6 applications, some of which were done after he was refused benefits. This does not amount to a sustained search for suitable employment.

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

[23] I must also consider whether the Claimant has proven that he is capable of and available for work and unable to find suitable employment.[14] The Claimant has to prove three things to show he was available under this section:

a) A desire to return to the labour market as soon as a suitable job is available
b) That desire expressed through efforts to find a suitable job
c) No personal conditions that might have unduly limited their chances of returning to the labour market[15]

I have to consider each of these factors to decide the question of availability,[16] looking at the attitude and conduct of the Claimant.[17]

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

[24] The Commission has argued that the Claimant did not have a desire to return to the labour market because he was prioritizing his full-time studies over looking for a job. The Claimant has stated on several occasions that his priority was to get back to work a soon as possible and that he would leave his course if a full-time job presented itself.

[25] My view that the Claimant's intention and desire was originally to work while studying and that he would have preferred to be employed, has not changed. However, even with the

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

additional evidence considered, I do not find that the Claimant has succeeded in demonstrating his desire to work through efforts to find a suitable job.

Did the Claimant make efforts to find a suitable job?

[26] The Commission argues that the additional submissions by the Claimant do not undermine the General Division's previous decision that the Claimant did not make efforts to find a suitable job.

[27] The Claimant submits that there is quite a bit of evidence of his job searches but that the Commission, in its decision and submissions, focused heavily on the lack of evidence for job searches during the period between when the Claimant began his studies until June 24, 2019.

[28] It is appropriate to me that the Commission focused on the Claimant's job search activity during that time. As soon as he left his job and applied for benefits, the Claimant was required to prove his availability and to be searching for employment. It was only on April 30, 2019 that the Claimant was told that his training program was a referred program, so he does need to demonstrate he was looking for jobs before then. Although I accept that between May 1 and June 23, 2019 the Claimant thought he was in a referred program and did not think he had to prove he was looking for work, he has also argued that he was engaged in job search activities anyway.

[29] I have reviewed the evidence in the General Division August appeal, but see no new evidence of job search activity during the relevant period. The evidence from that appeal deals with a job search that took place before the Claimant began his studies and became unemployed. While it is relevant to explain the Claimant's later search activities, and I will discuss this job search later on in this decision, this evidence does not help to demonstrate that the Claimant was making efforts to find a job during the relevant period.

[30] As part of his school program, the Claimant participated in job search training that was offered through his college. While this training would naturally have been centered on employment in the millwrighting field, I still consider that this training could have been useful in a larger job search context. He worked to update his resume and cover letter. He took advantage of the career counselling services offered by the college.

[31] When looking at the evidence before me, including the evidence that had not been previously considered, I note the following:

- The first date for which there is evidence of job search activity in the relevant period, other than job search training in the context of his studies, is April 26, 2019 when the Claimant contacted a "job developer" at the college for help with his resume and cover letter. There were other exchanges with this counsellor on May 2, May 20, May 23 and June 11, 2019.
- On May 16, 2019, the Claimant applied for a job as a wholesale sales rep with a hardwood flooring company. He arranged an interview with that company but did not get the job.
- On June 22, 2019, the Claimant contacted a previous employer about doing some shifts on July 4th and 5th. Unfortunately, those shifts ended up being cancelled.
- On June 27, 2019, he applied for a job as a "Helper". In this application, he also said he would like to do his job placement for his pre-apprentice program with this company.
- On July 7, 2019, the Claimant applied for a job with one company as a "Mechanical Assembler" and another as a "Millwright Apprentice/entry level".
- On July 9, 2019, the Claimant sent an email message to his teacher telling him he would not be in class the next morning because a factory near where he lives is accepting resumes.

[32] From this information, I see that between the time the Claimant's benefit period began on March 24, 2019 and June 24, 2019, when he was advised that the Commission was unable to pay benefit because he had not proven his availability for work, the Claimant applied for 2 jobs. After he was advised that his benefits could no longer be paid, he applied for 3 more jobs.

[33] In addition to this evidence, I acknowledge that the Claimant has also testified that he went to factories along the GO Train line that he knew were hiring in order to inquire about jobs. His email to his teacher confirms that he intended to do that on July 10, 2019. The Claimant has not provided any more information about which factories he may have visited, when he visited them, what sort of jobs were available and if he actually applied for any jobs during those visits.

It is therefore difficult to give weight to that evidence without knowing how many visits took place and if they were during the relevant period.

[34] There is evidence before me showing the Claimant applied for 2 jobs between March 24, 2019 and June 24, 2019. While he did have training in job search skills through his college program, this is not enough to demonstrate that the Claimant had a desire to return to the job market as soon as a suitable job was available.

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

[35] The Claimant argues that he did not set personal conditions that might have unduly limited his chances of returning to the labour market because he was willing to leave his program of studies at any time for a full time job. The Commission argues that the Claimant had limited his job search to jobs that would fit with his program's work placement requirements. After taking into consideration the new evidence and arguments raised by the Claimant, I find that the Claimant did set personal conditions that limited his chances of returning to the labour market.

[36] As noted in the previous decision, after leaving his sales job with a painting company, the Claimant advised his previous actors union and production staffing agency that he was available if opportunities came up. He also applied for a sales job with a flooring company but did not get the job. There is no evidence that he applied for any other jobs until after he had been advised by the Commission on June 24, 2019, that he had not proven his availability.

[37] When reviewing the evidence submitted in the Claimant's August appeal before the General Division, I find several pages of correspondence between the Claimant and representatives of a sales talent agency. This information dates between January 2, 2019 and March 12, 2019, while the Claimant was trying to secure a new job in sales before leaving the job he was in at the time.

[38] Since these exchanges took place before the Claimant began his studies, I asked his representative why this was relevant to his job search while he was in school. She submitted that

this information is not evidence of his job search after he began his studies, but as an explanation for why he was not looking for jobs in the sales sector. She explained that the Claimant was told by the sales talent agency that the job he was in had not given him enough transferrable skills to secure a job in sales. For that reason, the Claimant felt it would not be worth his time to look for jobs in sales when he was again looking for work after he began his studies. I understand this reason for excluding sales jobs from his job search.

[39] In responding to my request for additional information, the Claimant also raised the argument that since he did not have access to a car, he had to rely on public transportation to do his job search. He explained that he primarily attempted to find employment by conducting in-person visits to companies along accessible transit routes. The Commission replied that if not having a car meant that the Claimant could not reach job off public transportation routes and he had set a personal condition of only seeking out work in professions were few jobs existed on public transportation routes, it follows that he was unable to seek out and immediately accept full-time work.

[40] The Claimant has also argued that he was not limiting his job search to only jobs that were related to his course of studies. He explains that his pre-apprenticeship program was not necessary to gain an apprenticeship as a millwright and he submitted a letter from his employer confirming this. He says he was looking for general labour positions.

[41] In reviewing the Claimant's job search evidence, including the new evidence brought to my attention, and taking into consideration the arguments he has raised, I must conclude that the Claimant's job search was still limited to general labourer type jobs accessible from public transport.

[42] The Claimant has explained why he did not apply for jobs in the sales field and that his job prospects were constrained by his lack of a car. What he has not done, however, is provide any evidence of additional jobs he applied for during the relevant period. There is no evidence that the Claimant broadened his job search to include jobs he may qualify for in other employment sectors such as construction, transportation, retail, hospitality or service industries. As previously decided, I find that the Claimant's job search was limited in scope. A broader search may also have increase the number of jobs available to him along public transit routes. As

the Federal Court of Appeal has set out, payment of benefits is subject to the Claimant demonstrating availability, not justifying their unavailability.[18]

[43] I find that by choosing to seek out and applying for only general labour jobs accessible by public transport, the Claimant has set personal conditions that limited his chances to return to the job market.

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

[44] Considering my findings on each of the three factors together, I find that the Claimant did not show that he was capable of an available for work and unable to find suitable employment.

[45] In conclusion, I feel it is important to clarify for the Claimant that to be successful in his appeal, he was required to demonstrate that he was available for work. To do this, he needed to show that he had been making a sustained search for suitable jobs and had not set conditions on his job search that might have unduly limited his chances of returning to the job market. On these key issues, I have found that the Claimant has not proven that his job search during the relevant period consisted of more than a few job applications. The additional evidence that I have taken into consideration does not include any new evidence of jobs applied for in the relevant period. I also find that in focusing on general labour jobs that were accessible by public transportation, the Claimant did limit his chances of returning to the labour market.

CONCLUSION

[46] The appeal is dismissed. The Claimant has not demonstrated that he was available for work while in a full-time course of studies on his own initiative. He is disentitled from receiving benefits.

Leanne Bourassa

[18] *Canada (Attorney General) v. Leblanc*, 2010 FCA 60

Member, General Division - Employment Insurance Section

HEARD ON:	April 3, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Suzanne Hansen, Representative for the Appellant/Claimant