Citation: *D. D. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 148

Appeal #: GE-14-3719

BETWEEN:

D. D.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Eleni Palantzas
HEARING DATE:	December 8, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal is dismissed

PERSONS IN ATTENDANCE

The Claimant, Mr. D D., participated in the teleconference hearing. He provided verbal approval for law student, Ms. Erin Epp, to represent him during the hearing. The Claimant's other representative, Mr. John No, participated as an observer.

DECISION

[1] The Member finds that the Claimant failed to prove his availability for work and is therefore, disentitled to regular benefits from April 28, 2014 pursuant to paragraph 18(a) of the *Employment Insurance Act* (EI Act).

INTRODUCTION

[2] The Claimant is a citizen of the United States working in Canada on a work permit. On February 10, 2014, the Claimant applied for employment insurance regular benefits after his employment contract ended on February 5, 2014.

[3] On June 11, 2014, the Canada Employment Insurance Commission (Commission) imposed a disentitlement to benefits from March 24, 2014 until April 25, 2014 because he was absent from Canada and because he failed to prove his availability. Further, the Commission imposed a disentitlement to benefits from April 28, 2014 onward because he did not have a valid work permit and was not considered available for work in Canada.

[4] On June 30, 2014, the Claimant requested that the Commission reconsider its decisions. On August 20, 2014, the Commission changed its decisions regarding his availability and his absence from Canada. The Commission allowed for a period of 14 days pursuant to section 55 of the *Employment Insurance Regulations* (Regulations) and imposed the disentitlement to regular benefits while he was outside Canada only from April 6, 2014 until April 25, 2014. The Commission maintained its decision regarding his availability from April 28, 2014 when he returned to Canada.

[5] On September 16, 2014, the Claimant appealed only the latter decision to the Social Security Tribunal.

FORM OF HEARING

[6] After reviewing the evidence and submissions of the parties to the appeal, the Member decided to hold the hearing by way of a telephone conference for the reasons provided in the Notice of Hearing dated October 15, 2014.

ISSUE

[7] Whether the Claimant should be disentitled to benefits for failing to prove his availability for work starting April 28, 2014.

THE LAW

[8] Paragraph 18(a) of the EI Act stipulates that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

EVIDENCE

[9] The Claimant is a citizen of the United States that has been working in Canada on a work permit for Cira Medical Services since July 6, 2011. On September 4, 2013 and September 23, 2014 respectively, the Claimant applied for both an extension of his work permit and permanent residency, prior to the expiry date of September 26, 2013. He remained employed with this employer on 'implied status' until his position became redundant on February 5, 2014. On February 10, 2014, the Claimant applied for employment insurance regular benefits (GD3-G to D3-15 and GD3-20).

[10] From March 23, 2014 until April 25, 2014, the Claimant went to the United States to visit his gravely ill mother who passed away while he was there. The Claimant advised the Commission that he was eligible to work in Canada on 'implied status' after his work permit had expired on September 26, 2013 because he had applied for a renewal prior to it expiring. The conditions of his immigration status however, state that although he is allowed to leave and re-enter Canada as he wishes, he is not eligible to work in Canada once he leaves

Canada. The Claimant stated that he was told by Citizenship and Immigration Canada (CIC) on several occasions prior to leaving, and upon his return, that he would no longer be eligible to work in Canada if he leaves the country (GD3-16 and GD3-21 to GD3-25). The Claimant testified at the hearing that upon entry to Canada on April 25, 2014, his 'implied status' was revoked at the border.

[11] On June 11, 2014, the Commission imposed a disentitlement to benefits from March 24, 2014 until April 25, 2014 because the Claimant was not in Canada and because he failed to prove his availability during the same period. In addition, the Commission imposed a disentitlement to benefits when the Claimant returned to Canada from April 28, 2014 onward because he no longer had 'implied status' and was therefore, not considered available for work (GD3-25 and GD3-26).

[12] On June 30, 2014, the Claimant requested that the Commission reconsider all three of its decisions noting that while absent from Canada he continued to job search (provided documented job search leads) and if offered a job while away, he could have returned on short notice. The Claimant's mother passed away while he was there on April 19, 2014 (GD3-27 to GD3- 35).

[13] On August 20, 2014, the Commission changed its decisions regarding the Claimant's availability and his absence from Canada allowing benefits for a period of 14 days from March 24, 2014 until April 5, 2014, pursuant to section 55 of the Regulations. The Commission imposed a disentitlement to regular benefits for the remaining period that he was outside Canada from April 6, 2014 until April 25, 2014. The Commission maintained its decision regarding his availability for work when he returned to Canada from April 28, 2014 onward (GD3-36 to GD3-39).

[14] On September 16, 2014, the Claimant appealed only the latter decision regarding his disentitlement to benefits from April 28, 2014 onward. The Claimant submitted examples of decisions from the Office of the Umpire where employment insurance benefits were allowed where claimants did not have valid work permits (GD2-7, GD2-8 and GD5-4 to GD5-22).

[15] The Claimant provided copies of his email inbox of job search leads sent to him by job banks for the period of February 6, 2014 until June 6, 2014 (GD5-29 to GD5-47, GD5-57 and GD5-58).

[16] At the hearing, the Claimant testified that he is still waiting for a decision regarding his application for a work permit and permanent residency. In the meanwhile, he confirmed that he cannot legally work in Canada because at the border, upon his return to Canada on April 25, 2014, his 'implied status' was revoked. The Claimant testified that if he were offered a job, would have to ask for the start date to be postponed.

[17] The Claimant testified that he has attempted to have the revocation of his work permit reversed and expedite his permanent residency application. He requested that an exception be made in his case given the reason that he had to leave Canada and the fact that he has a family to support and needs to be able to work. The Claimant stated that both he and his Member of Parliament were told by CIC that an exception cannot be made.

[18] The Claimant testified that upon his return to Canada on April 25, 2014, he has been available and looking for employment and volunteer opportunities, attending interviews, working with temporary agencies and conducting an extensive job search through the internet (referred to GD5-41 to GD5-47). He continues to job search hoping that his work permit and/or permanent residency approval is imminent so that he can accept a job offer as soon as possible.

SUBMISSIONS

[19] The Claimant submitted that:

a) he is ready, willing and able to return to work and meets all three criteria for demonstrating his availability as set out in case law;

b) the Commission is wrong to deny the Claimant benefits due to his work permit status;

c) the jurisprudence supports his position that the absence of a work permit does not preclude a claimant from proving his availability for employment; an invalid work permit is not an automatic bar to employment insurance benefits;

d) it is out of his control, and not his fault, that there is a delay in renewing his work permit; the delay is "more technical than real"

e) he has done everything in his power to have the revocation reversed and to be available for work.

[20] The Respondent submitted that:

a) it must imposed an indefinite disentitlement as of April 28 2014 pursuant to subsection 18(a) of the Act because the Claimant's implied status was revoked and is therefore, not legally allowed to work in Canada;

b) the Claimant is not legally entitled to work in Canada not because of the lack of a valid work permit, or because his work permit imposes restrictions on his employment, or because of the processing times of the CIC, but because he forfeited his 'implied status' (meant to cover the processing time of the CIC) by exiting and returning to Canada.

ANALYSIS

[21] In order for the Claimant to be entitled to benefits, he must demonstrate that he was capable of and available for work and unable to obtain suitable employment (Bois A- 31-00; Cornelissen-O'Neil A-652-93; Bertrand A-631-81).

[22] The Member considered that since there is no precise definition in the EI Act for availability, the Federal Court of Appeal has consistently held that availability must be determined by analyzing three factors – (1) the desire to return to the labour market as soon as a suitable job is offered, (2) the expression of that desire through efforts to find a suitable job, and (3) not setting personal conditions that might unduly limit the chances of returning

to the labour market - and that the three factors must be considered in reaching a conclusion (Faucher A-56-96 ; Poirier A-57-96).

[23] In this case, the Claimant submits that he is ready, willing and able to return to work and meets all three criteria for demonstrating his availability as set out in case law. The Member agrees with both parties that the Claimant meets the first criteria as he demonstrated a desire to return to the labour market by (a) applying to have his work permit extended prior to its expiry, (b) attempting to have the revocation of his work permit reversed, and (c) attempting to expedite his permanent residency application.

[24] Regarding the second criterion, the Commission submitted that, regardless of the Claimant's legal status to work in Canada, he did not make any application for employment since his return to Canada on April 25, 2014 (GD3-25 and GD4-3). The Claimant responded by providing documentary evidence to the Tribunal of his efforts noting that the Commission did not ask for his list at the time of its decision (GD5-41 to GD5-47). The Member finds that the Claimant met the requirement of the second criteria by providing satisfactory evidence of his job search efforts since April 28, 2014.

[25] This case therefore turns on the third criterion of whether the Claimant set personal condition that unduly limited his chances of returning to the labour market. The Claimant is appealing his entitlement to benefits after he returned to Canada on April 25, 2014. The Member finds that from the moment the Claimant consciously decided to leave the country knowing that his 'implied status' would be revoked upon re-entry into Canada, he has not met the third criterion for demonstrating his availability. Prior to April 25, 2014, the limiting condition (an expired work permit) was imposed upon the Claimant for reasons out of his control. From April 25, 2014 onward however, it is the Claimant who set the limiting condition (now a revoked work permit) that unduly limited his chances of reemployment, thus not meeting the third criterion for proving his availability.

[26] The Member considered the Claimant's submission that this third criterion does not apply to cases such as this one, where the Claimant had conditions imposed upon him that were out of his control. The Claimant's representative argued that case law has held that the lack of a work permit is a factor that is beyond a claimant's control and therefore, does not

preclude a claimant from proving his availability for employment. That is, an invalid work permit is not an automatic bar to employment insurance benefits (CUB 14357, CUB 20367A, CUB 22207, CUB 13136, CUB 63129, CUB 44956, CUB 52289, and CUB 63940). The Claimant has met the third criterion because he has not set conditions that limit his chances to enter the labour market. The Claimant submits that the only limiting factor to his reemployment is the lack of a valid work permit.

[27] The Member agrees with both parties that the lack of a valid work permit per se does not automatically preclude a claimant from proving his availability. The Member notes that Umpire Haddad indicated that a disentitlement under section 18 of the EI Act,

> "… applies to circumstance of unavailability created by a claimant by his absence or by engaging in an activity of his own choosing preventing him from satisfying the onus of proving availability. It is not intended to apply where unavailability is imposed upon a claimant in circumstances beyond his control when the claimant is ready, available and willing to accept employment. That claimant in this case finds himself having to pay insurance premiums pursuant to
> the provisions of one federal statute and then being informed that he is not entitled to benefits because of a restriction imposed pursuant to another federal statute. In my opinion, section 18 is not applicable in the circumstances under review. The Board of Referees erred in law in its reliance on that section. " (CUB 44596).

In this case however, the Claimant did engage in an activity of his own choosing that prevented him from satisfying the onus of proving his availability from April 25, 2014 onward. He left the country knowing that his work permit would be revoked upon re- entry into Canada and he would no longer have 'implied status'. From April 25, 2014 onward, this was no longer a case where his unavailability, or an invalid (expired) work permit, was imposed upon him due to circumstances beyond his control. This is a case where the Claimant's own actions resulted in the revocation of his work permit whereby he could no longer legally work in Canada.

[28] The Member further considered that the Commission actually allowed for benefits from February 5, 2014, when he was laid off, and while he was out of the country for 14 days from March 24, 2014 until April 5, 2014. It did so even though the Claimant had 'implied status' because his work permit had expired. The Commission did not impose a

disentitlement during these periods because it recognized that his unavailability was imposed upon him due to circumstances beyond his control and that he had applied for a work permit extension prior to it expiring. It did not automatically bar the Claimant from benefits in the absence of a valid work permit.

[29] Further, the Member considered the case law cited by the Claimant and notes that in each case; the circumstances were such where the claimants' unavailability was out of his/her control. The case law cited does not refer to a case such as this one, where the work permit was revoked (not simply expired) due to the Claimant's own actions. The Member agrees with the Commission, that from April 25, 2014 onward, the Claimant is not legally entitled to work in Canada not because of the lack of a valid (expired) work permit (as in CUB 14357, CUB 20367A, CUB 52289, CUB 63129), or because his work permit imposes restrictions on his employment (as in CUB 13136, CUB 44596), or because of a delay in the processing time of the CIC (as in CUB 63129), but because of his conscious decision to leave the country. The Claimant did so knowing that it will result in a complete revocation of his work permit upon re-entry into Canada.

[30] The Member sympathizes with the Claimant and his reason for having to leave the country and understands that he has attempted to appeal to his Member of Parliament and CIC on that premise. However, from the moment the Claimant decided to leave Canada knowing his 'implied status' would be revoked, the Claimant is responsible for setting a condition that unduly limited his chances of returning to the labour market. From April 25, 2014 onward, the Claimant is responsible for not being able to legally work in Canada and therefore, is responsible for his unavailability.

[31] The Member therefore finds that although the Claimant met the two first criteria set out in case law for determining a claimant's availability for employment, he did not meet the third criterion.

[32] The Member finds that the Claimant was unable to meet the onus placed upon him to demonstrate his availability from April 28, 2014 onward pursuant to paragraph 18(a) of the EI Act.

CONCLUSION

[33] The appeal is dismissed.

Eleni Palantzas
Member, General Division

DATED: December 30, 2014