

[TRANSLATION]

Citation: *D. B. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 65

Appeal No. GE-14-4320

BETWEEN:

**D. B.**

Appellant  
Claimant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance**

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SOCIAL SECURITY TRIBUNAL MEMBER: Charline Bourque

HEARING DATE: January 15, 2015

TYPE OF HEARING: Teleconference

DECISION: Appeal dismissed

## **PERSONS IN ATTENDANCE**

[1] D. B., the Claimant, participated in the hearing via teleconference. She was accompanied by D. L., her spouse, who acted as her representative and a witness.

## **DECISION**

[2] The Tribunal is of the opinion that the Claimant failed to show that she was available for work effective July 1, 2014, pursuant to section 18 of the *Employment Insurance Act* (the Act).

## **INTRODUCTION**

[3] The Claimant filed an Employment Insurance claim effective November 17, 2013. On August 11, 2014, the Canada Employment Insurance Commission (the Commission) informed the Claimant that it could not pay her Employment Insurance benefits effective July 1, 2014, given that she said she was looking for part-time employment only because she was giving priority to her employment as a mortgage broker. The Commission considered the Claimant not to be available for work. A notice of debt showing an overpayment of \$1,904 was sent to the Claimant. On October 21, 2014, following her Request for Reconsideration, the Commission informed the Claimant that the August 11, 2014, decision regarding her availability was being upheld. On November 17, 2014, the Claimant filed an appeal to the Social Security Tribunal (the Tribunal).

## **TYPE OF HEARING**

[4] This appeal was held by teleconference for the reasons given in the Notice of Hearing dated December 18, 2014. The teleconference hearing was held on January 15, 2015.

## **ISSUE**

[5] Was the Claimant available for work under paragraph 18(1)(a) of the Act?

## **APPLICABLE LAW**

[6] Section 18 of the Act states as follows:

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

(a) capable of and available for work and unable to obtain suitable employment;

[7] Section 32 of the *Employment Insurance Regulations* (the Regulations) defines a working day as follows:

For the purposes of sections 18 and 152.19 of the Act, a working day is any day of the week except Saturday and Sunday.

## **EVIDENCE**

[8] On August 11, 2014, the Claimant contacted the Commission and said that she had started working on commission on July 1, 2014. The Claimant indicated that she was spending more than 15 hours a week on her business and wanted to make it her principal means of livelihood. She stated that she wanted to find part-time employment while continuing her self-employment. She indicated that she was looking for 11 to 20 hours of work a week (GD3-15/16).

[9] On August 11, 2014, the Claimant told the Commission that her employment as a mortgage broker for Multi-Prêt started July 1, 2014. She was spending on average of 30 hours a week on her broker activities and was paid on commission. Her usual schedule was Monday to Friday, days and evenings, and occasionally weekends. She said she had a two-month probationary period after which the company would assess her work and determine whether she met the requirements. She also had to achieve some objectives and follow the regulations. The company was looking for full-time brokers and the Claimant could not hire someone to do her work. The Claimant indicated that she was looking for part-time work for just one or two days a week until her employment as a broker provided her with enough income. She pointed out that she could not work for another company as a broker but could work in another field, for example, as a secretary (GD3-17).

[10] On October 1, 2014, when contacted by the Commission about her Request for Reconsideration, the Claimant indicated that she was available for work as a representative in the banking field. She indicated that she used to earn \$120,000 a year and she was going to send proof that she had been looking for work. She indicated that she was free to determine her own schedule (GD3-27).

[11] Following the hearing, the Claimant sent T4s from her former employer, documents from Service Canada indicating that she is considered a long-tenured worker, an evaluation of her income potential, an email from her supervisor, a summary of job searches done since she was employed at Multi-Prêt, evidence of group insurance from her employer Multi-Prêt and a summary of the income she earned from Multi-Prêt. The Claimant also sent documents from Service Canada showing that she had received Employment Insurance benefits in 2008 when she was earning the same kind of income.

## **SUBMISSIONS OF THE PARTIES**

[12] The Claimant submitted the following:

- (a) The Claimant indicated that she had been without work since November 17, 2013. She indicated that she had received Employment Insurance benefits as of January 2014, which technically entitled her to receive benefits until February 2015. She pointed out that, as a result of her searches, she found a job in the same field in which she usually worked and which produced the income she was looking for, namely over \$108,000 a year, which is rare in her region.
- (b) She indicated that she signed an offer of employment on July 1, 2014, but received her first paycheque around November 20, 2014, because her earnings were in the form of commissions. She maintained that her next paycheques will fluctuate. She maintained that from July 1, 2014 to November 20, 2014, she had very little income. She also indicated that, in the past, in a similar situation from April 2008 to December 2008, Employment Insurance made up for the shortfall.
- (c) The Claimant indicated that she was not self-employed. She said that she had a supervisor, objectives to achieve and insurance to pay. She could lose her job if

Multi-Prêt so decided. She has worked full-time since July 1, but since her income is from commissions, there is a certain delay in being paid. Employment Insurance must fill in the weeks when she receives “partial” pay. She said that, in 2008, when she received a salary and was paid on commission by a car dealership, Employment Insurance made up the difference.

- (d) She indicated that she had worked full-time since July 1, and had been meeting with clients since the beginning. She had to take time to build a clientele. The Commission wanted her to look for another part-time job elsewhere but she could not do so out of loyalty to her employer and because she was working more than 35 hours a week from the time she started her employment. The Claimant did not work part-time after July 1.
- (e) On February 6, 2015, following the Commission’s submissions, the Claimant indicated that [translation] “given that there were a lot of assumptions and malice on the part of André Daigle (from the Commission), I would like to be able to respond to the arguments that he put forth” (GD11).

[13] The Respondent submitted the following:

- (a) Availability is a question of fact. It is normally established by assessing the evidence. Availability is determined by analyzing three factors: a desire to return to the labour market as soon as a suitable job is offered; the expression of that desire through efforts to find a suitable job; and not setting personal conditions that might unduly limit the chances of returning to the labour market.
- (b) When she spoke to the Commission, the Claimant stated that she wanted to find part-time employment for one or two days a week while continuing her self-employment until her work as a mortgage broker earned her a suitable income. The Claimant was not allowed to work for another company as a broker, but could work in another field such as, for example, as a secretary.
- (c) The Commission noted that the Claimant wanted to find part-time employment other than her self-employment. Therefore, she was limiting her availability to part-time

employment. Consequently, she was setting personal conditions that limited her chances of returning to the labour market full time. Consequently, the Claimant did not meet the requirements of paragraph 18(a) of the Act because she was unable to show her availability to work full-time outside her self-employment.

- (d) In this case, the Claimant did not file any evidence that she was looking for full-time work other than her self-employment after July 1, 2014. The similarity to the case referred to is the lack of evidence of an active job search for full-time employment other than the self-employment in order to prove her availability for full-time work. This is why the Commission maintains that the Claimant failed to prove her availability for full-time work outside her self-employment.
- (e) After the hearing, the Commission submitted additional arguments to the effect that the Claimant wanted to show that she was a long-tenured worker and that her potential salary with Multi-Prêt was \$130,000 a year, which suggests that she is in a special category of worker. She said that she was available for full-time employment that met her job profile and salary level if it were offered to her. The Commission maintains that the Claimant exceeded the first-18-weeks stage (long-tenured worker) since her claim started November 17, 2013. She would have had to expand her job search efforts and accept a lower salary after 18 weeks, namely, as of March 23, 2014 (the Claimant did not provide any proof of job searches in line with this). She said that she was always looking for opportunities, reading the newspapers, using her social network and personal contacts, but she did not demonstrate any concrete action that shows a real intent to find full-time work. She added that she had even looked at jobs for which she did not meet the requirements. So, why concentrate on jobs for which she did not meet the requirements instead of looking for a job for which she did meet them?
- (f) The Commission maintained that, based on the facts in the file (GD7), it is of the opinion that the Claimant devoted all of her time to her employment with Multi-Prêt as of July 1, 2014. The proof of job searches that she provided starts July 23, 2014. They consist of newspaper announcements and there is nothing to show that she took

any concrete action with businesses. Even if her intentions were good, the Claimant failed to demonstrate that she conducted any job searches before July 26, 2014 (GD9-1).

## **ANALYSIS**

[14] Paragraph 18(1)(a) of the Act states 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.

[15] Section 32 of the Regulations defines a working day as any day of the week except Saturday and Sunday.

[16] The Claimant has been working full-time for Multi-Prêt since July 1, 2014. She indicated that she received her first paycheque around November 20, 2014 because her remuneration was in the form of commissions. She maintained that from July 1, 2014 to November 20, 2014, she had no income. Finally, she indicated that in the past, from April 2008 to December 2008, when she was in a similar situation and being paid on commission, Employment Insurance made up the shortfall in her earnings.

[17] The Tribunal notes that the Claimant did not dispute the employer-employee relationship that she had with Multi-Prêt, indicating that she worked there full-time, she was paid on commission and did not receive a base salary, and that this started July 1, 2014. She did question the Commission's position that she should look for part-time work and that she was considered self-employed. She disagreed with the Commission's statement that she was not available for work, the proof being that she was working full-time.

[18] The Claimant indicated that she was open to any job possibilities that might be offered to her and would enable her to improve her working conditions. She sent a list of the job searches she had made since starting with Multi-Prêt.

[19] The Claimant also gave the example of a person who starts working part-time and whose salary is supplemented by Employment Insurance benefits. She indicated that she was

in the same situation except that it is her salary that is partial or non-existent, while she works full-time.

[20] The Tribunal pointed out that the issue of self-employment, although argued by the Commission, is not in question in this appeal because the Commission did not render a decision on the subject. The decision rendered by the Commission is based on the Claimant's availability.

[21] In accordance with section 113 of the Act, the Tribunal has the jurisdiction to hear an appeal of a reconsideration of a decision. Therefore, if a claimant is declared disentitled from receiving benefits because of non-availability, the Tribunal must look at and decide on this issue.

[22] Therefore, the Tribunal points out that it took into account the Claimant's request to be able to provide an explanation after the Commission submitted its additional arguments on January 27, 2015. The Tribunal did not grant this request since the Claimant had the opportunity to present her position regarding this issue at the hearing. Moreover, the Tribunal notes that the Commission submitted its additional arguments on the subject of the Claimant's job searches and her status as a long-tenured worker and that these issues were also discussed at the hearing.

[23] The Tribunal notes that paragraph 18(1)(a) of the Act specifies that to be eligible to receive benefits, a claimant must prove that the claimant was capable of and available for work and unable to obtain suitable employment [emphasis added].

[24] In this case, the Claimant indicated that she had found full-time employment. She specified that she had found a job that should give her the salary level she wanted. The Tribunal is of the opinion that the Claimant did not meet the definition of availability set out in the Act because she was not in a situation where she was unable to obtain suitable employment. In fact, the Claimant indicated that she was working Monday to Friday and sometimes on weekends. She was working weeks of more than 35 hours which is why she did not understand the Commission's requirement that she look for part-time work.



[25] Therefore, the Claimant was not in a situation where she was unable to find suitable employment.

[26] The Tribunal is also taking into consideration CUB 32717 which states [translation] “there is a consistent line of authority to the effect that employment, with or without pay, is employment and may prevent an individual from being available for a serious search. Moreover, the contract that the claimant signed seems to clearly bind him to an obligation to devote all his time to the employment.”

[27] The Tribunal understands that the Claimant received no pay for a certain period of time although she was working full-time. The Claimant was working full-time and was consequently not available within the meaning of the Act. Moreover, although she had no income during this period, her efforts at work were intended to provide her with income in the more or less short term.

[28] Finally, the Tribunal took into account the Claimant’s efforts to improve her situation or to find employment that offered her a better situation, such as not being paid on commission. There is a consistent line of authority to the effect that the Employment Insurance scheme is not intended as compensation for improving working conditions and availability must not be limited by personal conditions. The Claimant concentrated her efforts on making her full-time employment with Multi-Prêt a success and put considerable energy into building up her clientele and earning an income from this job that was similar to what she had earned earlier.

[29] In *Faucher*, the Federal Court of Appeal established three criteria that claimants must meet in order to demonstrate their availability for work. The criteria are the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market (*Faucher*, A-56-96, A-57-96).

[30] The Tribunal took into consideration the fact that the Claimant indicated that the Commission had made up the salary difference when she was in a similar situation in 2008 and being paid on commission. Nevertheless, each situation must be assessed on its own

merits and, although certain facts may look the same, the Tribunal cannot render an identical decision merely on that basis. The Tribunal must render a decision on an actual situation, taking into account the evidence and arguments made by the parties.

[31] Therefore, based on the evidence and the arguments made by the parties, the Tribunal is of the opinion that the Claimant failed to demonstrate that she was available for work. More specifically, the Tribunal is of the opinion that the Claimant was not available for work and unable to find suitable employment as required under paragraph 18(1)(a) of the Act since she was already working full-time. The Claimant was not available for work on any working day in her benefit period since she already had full-time employment.

## **CONCLUSION**

[32] The appeal is dismissed.

*Charline Bourque*

Member, General Division

DATE OF REASONS: April 14, 2015