Citation: ***N. H. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 159**

Date: September 22, 2015

File number: GE-15-995

GENERAL DIVISION - Employment Insurance Section

Between:

N. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Teresa M. Day, Member, General Division - Employment Insurance Section

Heard by Teleconference on July 15, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of his appeal via teleconference.

INTRODUCTION

[1] The Appellant established an initial claim for regular employment insurance benefits (EI benefits) effective November 9, 2014. On December 16, 2014, having identified the Appellant as an "occasional claimant", the Canada Employment Insurance Commission (Commission) asked the Appellant to attend an information session on January 8, 2015 and provide a detailed record of his efforts to find a job during the two-week period prior to the information session.

[2] The Commission reviewed the Appellant's efforts to find a job and determined the Appellant had not proven that he was available for work. On January 9, 2015, the Commission imposed an indefinite disentitlement as of November 9, 2014, which resulted in an overpayment of $2,570.00.

[3] On January 19, 2015, the Appellant requested the Commission reconsider its decision, citing the fact that he was laid off from his job "seasonally" with the assurance of rehire in "the New Year 2015", and had, in fact, already been recalled when he was asked to provide a record of his job search. On February 14, 2015, the Commission maintained its decisions regarding the Appellant's availability for work and the resulting overpayment. On March 12, 2015, the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal).

[4] The hearing was held by teleconference because of the complexity of the issue under appeal and because the form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] Whether the Appellant should be disentitled to benefits from November 9, 2014 for failing to prove his availability for work.

THE LAW

[6] Paragraph 18(1)(a) of the *Employment Insurance Act* (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."

[7] Section 50(8) of the EI Act 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 the claimant is making reasonable and customary efforts to obtain suitable employment.

[8] Sections 9.001 to 9.003 of the *Employment Insurance Regulations* (EI Regulations) define "suitable employment" and set out the criteria for determining whether or not employment is suitable and whether or not the claimant is making reasonable and customary efforts to obtain such employment.

[9] Section 9.001 of the EI Regulations addresses "reasonable and customary efforts" and provides:

For the purposes of subsection 50(8) of the Act, the criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts are the following:

(a) the claimant's efforts are sustained;

(b) the claimant's efforts consist of

(i) assessing employment opportunities,

(ii) preparing a resume or cover letter,

(iii) registering for job search tools or with electronic job banks or employment agencies,

(iv) attending job search workshops or job fairs,

(v) networking,

(vi) contacting prospective employers,

(viii) submitting job applications,

(ix) attending interviews, and

(x) undergoing evaluations of competencies; and

(c) the claimant's efforts are directed toward obtaining suitable employment.

[10] Section 9.002 of the EI Regulations addresses "suitable employment" and provides:

For the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8) of the Act, the criteria for determining what constitutes suitable employment are the following:

(a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;

(b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs;

(c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs;

(d) the daily commuting time to or from the place of work is not greater than one hour or, if it is greater than one hour, it does not exceed the claimant's daily commuting time to or from their place of work during the qualifying period or is not uncommon given the place where the claimant resides, and commuting time is assessed by reference to the modes of commute commonly used in the place where the claimant resides;

(e) the employment is of a type referred to in section 9.003; and

(f) the offered earnings correspond to the scale set out in section 9.004 and the claimant, by accepting the employment, will not be put in a less favourable financial situation than the less favourable of

(i) the financial situation that the claimant is in while receiving benefits, and

(ii) that which the claimant was in during their qualifying period.

[11] Section 9.003 of the EI Regulations defines employment "type" by length of unemployment and prior claims.

[12] Subsection 9.003(1) provides that a type of employment is

(a) in respect of a claimant who was paid less than 36 weeks of regular benefits in the 260 weeks before the beginning of their benefit period and who, according to their income tax returns for which notices of assessment have been sent by the Canada Revenue Agency, paid at least 30% of the maximum annual employee's premium in 7 of the 10 years before the beginning of their benefit period or, if their income tax return for the year before the beginning of their benefit period has not yet been filed or a notice of assessment for that year has not yet been sent by that Agency, in 7 of the 10 years before that year,

(i) during the first 18 weeks of the benefit period, the same occupation, and

(ii) after the 18th week of the benefit period, a similar occupation;

(b) in respect of a claimant who was paid more than 60 weeks of regular benefits in at least three benefit periods in the 260 weeks before the beginning of their benefit period,

(i) during the first six weeks of the benefit period, a similar occupation, and

(ii) after the sixth week of the benefit period, any occupation in which the claimant is qualified to work; and

(c) in respect of a claimant to whom neither paragraph (a) nor (b)applies,

(i) during the first six weeks of the benefit period, the same occupation,

(ii) after the sixth week and until the 18th week of the benefit period, a similar occupation, and

(iii) after the 18th week of the benefit period, any occupation in which the claimant is qualified to work.

[13] Subsection 9.003(2) provides that, for purposes of this section,

(a) "same occupation" means any occupation in which the claimant worked during their qualifying period;

(b) "similar occupation" means any occupation in which the claimant is qualified to work and which entails duties that are comparable to the ones that the claimant had during their qualifying period; and

(c) "occupation in which the claimant is qualified to work" includes an occupation in which the claimant could become qualified to work through on- the-job training.

[14] Subsection 9.003(3) stipulates that, in the counting of weeks referred to in subsection (1) and section 9.004, account shall be taken only of the waiting period, of any week in respect of which regular benefits are paid to the claimant and of any week of disqualification referred to in subsection 28(1) of the Act.

[15] Section 9.004 provides that offered earnings – evaluated by reference to earnings from the employment in which the claimant worked for the greatest number of hours during their qualifying period – are

(a) in respect of a claimant to whom paragraph 9.003(1)(a) applies,

(i) during the first 18 weeks of the benefit period, earnings equal to 90% or more of the reference earnings, and

(ii) after the 18th week of the benefit period, earnings equal to 80% or more of the reference earnings;

(b) in respect of a claimant to whom paragraph 9.003(1)(b) applies,

(i) during the first six weeks of the benefit period, earnings equal to 80% or more of the reference earnings, and

(ii) after the sixth week of the benefit period, earnings equal to 70% or more of the reference earnings; and

(c) in respect of a claimant to whom paragraph 9.003(1)(c) applies,

(i) during the first six weeks of the benefit period, earnings equal to 90% or more of the reference earnings,

(ii) after the sixth week and until the 18th week of the benefit period, earnings equal to 80% or more of the reference earnings, and

(iii) after the 18th week of the benefit period, earnings equal to 70% or more of the reference earnings.

EVIDENCE

[16] The Appellant applied for EI benefits on November 11, 2014. In his application, the Appellant stated that he had worked for The City of X from January 6, 2014 to November 7, 2014, when he was laid off due to shortage of work. The Appellant also indicated that he would be returning to work for this employer, but that his return date was unknown at the time of his application (GD3-3 to GD3-11). A Record of Employment from The City of X was provided (GD3-12), which listed the Appellant's occupation as "Labourer I" and confirmed the reason for separation as shortage or work/end of contract or season.

[17] On December 16, 2014, the Commission wrote to the Appellant about his claim and advised he was required to attend a Claimant Information Session on January 8, 2015, at which time he would need to submit details of his job search efforts for the two weeks prior to the date of the session on the attached form (GD3-13 to GD3-14).

[18] The Appellant attended the session on January 8, 2015 and submitted the job search form requested (GD3-15 to GD3-16), on which he listed 4 job searches between December 15, 2014 and January 4, 2015.

[19] On January 9, 2015, an agent of the Commission telephoned the Appellant regarding his job search and documented the call in an Investigation Information Sheet completed the same day (GD3-17 to GD3-19). In this call, the agent advised the Appellant that the form he had submitted was incomplete and was supposed to cover the specific two-week period of December 25, 2014 to January 7, 2015. According to the form he submitted, he looked for work on only two occasions during the specific period, namely on January 2nd and January 4th, when he checked online for electrician apprenticeships. The agent noted the Appellant's response was to advise that he had not done anything to look for work since he was laid off from The City of X and that he had not applied for any work at all while on claim. The Appellant advised that he had a seasonal job with the City of X and was waiting for his employer to recall him back to work. The Appellant confirmed that he had contacted the Commission on January 7, 2015 to ask if he had to attend the Claimant Information Session the next day because he knew he was going back to work on January 19, 2015.

[20] On the same day, January 9, 2015, the Commission wrote to the Appellant and advised that he was disentitled to EI benefits from November 9, 2014 because "you told us that you are prepared to work only for City of X" and therefore had not proven his availability for work (GD3-20 to GD3-21). A Notice of Debt was issued to the Appellant on January 17, 2015 regarding an overpayment of $2,570.00 as a result of the disentitlement (GD3-22).

[21] The Appellant made a Request for Reconsideration on January 20, 2015 (GD3-23 to GD3-25), and included a letter dated January 19, 2015 in which he explained the following:

(a) that he worked as a labourer on a paving crew and had received training on equipment specific to that job, and there was a seasonal cycle for his position;

(b) that he was laid off seasonally on November 7, 2014 with assurance of rehire in the New Year 2015, and that "this was a repeat of the previous November 2013 to January 6, 2014 when I was seasonally laid off due to conditions which are not optimal for laying asphalt."; and

(c) that he did network and looked into a few jobs, but that considering the holidays fell during the period in question, many businesses were closed from December 23, 2014 through January 2, 2015.

[22] In his January 19, 2015 letter, the Appellant also advised that he received a call back from his employer on January 5, 2015 that he was to start back to work on January 19, 2015. This was the reason why he contacted the Commission to see if he needed to attend the Claimant Information Session scheduled for January 8, 2015; and that this was also the reason why he did not put down all of his networking and other information on the job search form. The Appellant further advised that he was seriously ill and on a high dose of penicillin when he spoke with the Commission's agent on January 9, 2015. He recalled telling the agent that jobs in the paving field were very scarce in winter months, but stated "I never once denied looking for other work" and he further denied that he would have turned down any other job possibilities if they had transpired over the course of his layoff (GD3-25 to GD3-26).

[23] On February 14, 2015, a different agent of the Commission contacted the Appellant about his request for reconsideration and documented their telephone conversation in a Supplementary Record of Claim the same day (GD3-27). The agent advised the Appellant that he had not provided a verifiable, bona fide job search and that he had not indicated a willingness to modify his "job search/availability". The agent advised the Appellant that the Commission would be maintaining the disentitlement and a letter confirming the Commission's reconsideration decision went out the same day (GD3-28 to GD3-29).

[24] The Appellant filed an appeal with the Tribunal on March 12, 2015 (GD2) and included a copy of the penicillin prescription he had filled on January 9, 2015, a copy of his pay-stub from The City of X that showed he was back at work on January 19, 2015, and a letter dated January 15, 2015 which the Appellant identified as a "near replica" of the letter attached to his Request for Reconsideration. In this particular letter, the Appellant explained that when he called to confirm he had to attend the January 8, 2015 Claimant Information Session, "Whomever I spoke to, confirmed for me that I was to attend. At that time she told me that any inquiries to family or acquaintances qualified as job search. Rightly or not, and in my unwell state, I did not include those networking possibilities on my job search, and rightly or not,

knowing I was headed back to work on January 19, 2015, my job search form was admittedly haphazard and incomplete."

[25] In his Notice of Appeal, the Appellant referred to the telephone conversation with the Commission's agent that took place on January 9, 2015 and wrote the following:

"The issue, as stated on my reply for Request for Reconsideration is "availability to work". I believe the conversation with "Rav" that took place on January 9, 2015 is the basis for this decision. Even though I told her repeatedly that I had been called by the City of X on January 5, 2015 with my start date of January 19, 2015 and was in effect already employed, she did not accept my explanation and made a prejudiced decision, possibly because in my ill state, I did or did not state exactly what she prodded me to say. Therefore I was more than available to work. I was already rehired. That I did not hear back from any of the other jobs I resourced was out of my control."

<u>At the Hearing</u>

[26] At the hearing, the Appellant testified as follows:

(a) He is a labourer with the City of X's "paving department" and is part of a crew that works on concrete curbs and asphalt pavement projects around the city. His last day of work was November 7, 2014 because, by that time, the weather conditions in X were not suitable for paving or concrete work.

(b) He knew when he was laid off on November 7, 2014 that he would be called back to work in January 2015. His manager had confirmed this with him and it was consistent with the prior year (his first year working for The City of X), when he had been laid off for 8 weeks (between November 2013 and January 2014). He had been told to expect approximately the same thing every year he was in this position.

(c) His understanding of the EI program was that he was allowed to look for a similar job in a similar field, with similar pay, and he testified that is what he did. He applied to Alberta Asphalt and several other private paving companies, made

calls and networked, but there was simply no paving work in X at that time of year. He also looked for "inside jobs", exploring the possibility of working on the maintenance of paving equipment in mechanical shops, and even looked for snow removal work, but had no luck. All of this took place during the Christmas and New Year's holidays and, according to the Appellant, no one was even in their office during the particular two weeks the Commission had asked him about, let alone looking to hire someone.

(d) He was called back by The City of X to start work on January 5, 2015, exactly 8 weeks after he was laid off, but he was very sick at that time and arranged to be off for an additional 2 weeks to recover. The total period he was off the job was 10 weeks: 8 weeks of lay-off and 2 weeks because he was sick and unable to work.

(e) He strongly believes there was miscommunication between himself and the agents of the Commission that he spoke with regarding his job search efforts. At all material times, the Appellant felt he already had a job, namely his full- time position at The City of X, which the Appellant described as "a really good job", with a pension and benefits program. He had been seasonally laid off, the same way he had been the previous year, and the same way he could expect to be every year thereafter. He was looking for work that would run during the period of his lay-off, but he was only ever going to do short-term work until he was called back to his full-time job by the City of X. This is what he meant when he told the agent he was not looking for a job.

(f) He admits that he did not undertake an aggressive job search between November 8, 2014 and the Christmas/New Year's holidays, in part because he believed he was entitled to look for the same work and there really wasn't any such work, and in part because whenever he sent in a resume or called a private paving company (for inside or outside work), he was told they weren't hiring. However, the Appellant repeatedly stated that he did contact private paving companies to look for work he could do during the period of his lay- off and that he did

broaden his job search to equipment maintenance, without any success. The Appellant acknowledged that the report he did for the claimant information session on January 8, 2015 was "lackluster", but explained that was because he had "nothing to go on" during the time he was laid off.

(g) He knew, as of January 5, 2015, that he was returning to full-time work with The City of X and he knew his re-start date was going to be January 19, 2015. This was another reason for his "lackluster" effort to complete the form for the Claimant Information Session.

[27] Following the hearing, the Tribunal made a request to the Commission pursuant to section 32 of the *Social Security Tribunal Regulations* (SST Regulations) for confirmation of the Appellant's classification under EI Regulation 9.003(1) and an explanation as to which benefit weeks the overpayment related to. In its response (GD6), the Commission advised the Appellant was classified as an "occasional" claimant under EI Regulation 9.003(1)(c), and that the $2,570.00 overpayment "relates to the five week period November 23, 2014 to December 27, 2014" (see Pay History Details at GD6-4).

[28] The Tribunal notes that the Pay History Details report in fact indicates that the Appellant served his two-week waiting period during the weeks of November 10 and 17, 2014, and then received $432/week for the six week period – not five week period – commencing the week of November 24, 2014 and continuing to December 29, 2013, for a total of $2,592.00 in benefits. The History at GD6-4 therefore covers the entire 8 week period of the appellant's lay-off.

SUBMISSIONS

[29] The Appellant submitted that he met the availability requirements to receive EI benefits for the 10-week period he was unemployed.

[30] The Commission submitted that the Appellant has not demonstrated that he was available for work and actively seeking employment during his benefit period; that there is insufficient evidence of a bona fide job search and that the claimant's statements after he was made aware of the disentitlement should hold less weight than the initial spontaneous

statements made at the time he was first interviewed by an agent of the Commission, when he stated he was not making any efforts to find a job while on claim.

ANALYSIS

[31] In accordance with section 18 of the EI Act, in order for the Appellant to be entitled to benefits, he must demonstrate that he was capable of and available for work and unable to obtain suitable employment *(Attorney General of Canada v. Bois 2001 FCA 175; Attorney General of Canada v. Cornelissen-O'Neil A-652-93; Attorney General of Canada v. Bertrand A-631-81).*

[32] In the present case, the Commission found that the Appellant was subject to an indefinite disentitlement from November 9, 2014 because he did not prove his availability for work from the start of his benefit period. With respect to the last two weeks of his unemployment, the Appellant testified that he was very sick and admitted he was unable to work. The Tribunal finds that the Appellant has not proven his availability for the two-week period he was sick, namely for the weeks of January 5, 2015 and January 12, 2015. The Tribunal therefore must consider whether the Appellant has proven his availability during the 8-week period he was, in fact, laid off, namely between November 9, 2014 and January 5, 2015.

[33] In accordance with subsection 50(8) of the EI act, the onus is on the claimant to prove availability by demonstrating that he has made reasonable and customary efforts to obtain suitable employment in accordance with the provisions of sections 9.001 to 9.004 of the EI Regulations.

[34] The Tribunal first considered the Commission's submission that the Appellant did not demonstrate he was available for work and actively seeking employment while he was laid off from his employment with the City of X; and the lack of evidence to prove his efforts to secure employment for every working day during his lay off.

[35] The Commission determined that the Appellant was an occasional claimant in accordance with paragraph 9.003(1)(c) of the EI Regulations, and the Appellant agrees with this classification. As an occasional claimant, the Appellant was entitled to look for jobs in the same occupation for the first six weeks of his benefit period, which commenced on November 9,

2014. Therefore, from November 9, 2014 until December 20, 2014, the Appellant was entitled to look for work in the same occupation as his previous employment, namely as a labourer on an asphalt paving crew.

[36] According to the Appellant's testimony at the hearing, he had been looking for similar work during this period, but there simply was none. The Tribunal gives more weight to the Appellant's letters attached to his request for reconsideration and his appeal, as well as his testimony at the hearing, as he has now clarified that he was never looking for another full-time job because he, in fact, had a very good job at The City of X and didn't want to lose it. The Appellant was only ever looking for short-term work during the period of his lay-off, but there was no paving work of any kind at that time of year. He admittedly didn't keep track of his efforts with the level of detail Service Canada requested, but the Tribunal accepts his testimony that this was because his efforts had resulted in "nothing to go on".

[37] For weeks 7 to 18 of his benefit period, the Appellant was entitled to look for jobs in a similar occupation. The Appellant was called back to work at the City of X before week 18 of his benefit period, namely on January 5, 2015, but from December 21, 2014 to January 5, 2015, the Appellant was entitled to look for work in a similar construction role to that of his previous employment. The Tribunal accepts the Appellant's testimony that he had broadened his job search to include short-term inside work during the period of his lay-off, but that many of the businesses he contacted were closed for the holidays around Christmas and New Year's.

[38] Indeed, the Tribunal notes that the two-weeks referred to in the letter from Service Canada about the Claimant Information Session covered the period from December 25, 2014 to January 7, 2015. Given that this period included the Christmas Day, Boxing Day, and New Year's Day statutory holidays, and that many business are, in fact, closed between Christmas and New Year's, the Tribunal accepts the Appellant's argument that it is unrealistic to expect an aggressive job search during this period of time. This is especially the case when the Appellant had actually been called back to work on January 5, 2015 – which was within the reporting period for the information session.

[39] While section 18 of the EI Act requires a claimant to prove that he was capable of and available for work in order to be entitled to receive EI benefits, the EI Act does not provide a definition of "availability". Nonetheless, 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. *(Attorney General of Canada v. Faucher A56-96; Attorney General of Canada v. Poirier A 57- 96).*

[40] The Appellant's expressed willingness to return to the labour market during the intervening period of his seasonal lay-off "if there was a job" is credible and is noted. Based upon the Appellant's testimony at the hearing, the Tribunal is also satisfied that there is sufficient evidence of the Appellant's efforts to find a suitable job in the circumstances. While the Appellant did set the condition of only seeking short-term work that would cover the period of his seasonal lay-off, the Tribunal finds that this condition did not unduly limit his chances of returning to the labour market. This is especially the case given that the Appellant was recalled to his full-time job at The City of X on January 5, 2015.

[41] The Tribunal is supported in its analysis by the jurisprudence in connection with temporary lay-offs. The Federal Court of Appeal in *Canada (A.G.) v. MacDonald (1994) Doc. No. A-672-94* affirmed the principle that a claimant on temporary lay-off awaiting imminent recall should not be immediately disentitled on the grounds of not seeking other employment. Such a claimant is not necessarily disentitled for not proving an active job search where the best chances for employment are with that recall *(CUBs 14685, 14554 and 21160).* Additionally, a claimant who is "assured" of being recalled to full-time employment can "condition his or her availability by reference to the opportunity" *(CUBs 16773, 16171, 12750, 11603A and 67674);* and making the acceptance of other employment conditional upon the intention to return to the former employer upon being recalled would not be an unreasonable restriction *(CUBs 18717, 16171, 14797 and 14554).*

[42] The Tribunal finds that the Appellant's best chance for full-time employment was his assured recall by The City of X, that it was not unreasonable for the Appellant to seek short-term work for the 8-week period prior to his recall, and that his job search efforts conformed to the requirements of Sections 9.001 to 9.004 of the EI Regulations and were reasonable in the circumstances. The Tribunal further finds that the Appellant has met the three factors set out in the case law and has proven his availability during the first 8 weeks of his 10 weeks of unemployment.

CONCLUSION

[43] The Tribunal finds that the Appellant has proven his availability for the 8 weeks he was laid off from his job with The City of X and is, therefore, able to support a claim for EI benefits for 8 weeks commencing November 9, 2014 pursuant to paragraph 18(1)(a) of the EI Act.

[44] The Appellant is reinstated to EI benefits.

[45] The appeal is allowed.

Teresa M. Day
Member, General Division - Employment Insurance Section