

Citation: *A. R. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 221

Date: December 21, 2015

File number: GE-15-727

GENERAL DIVISION - Employment Insurance Section

Between:

A. R.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent

**Decision by: Eleni Palantzas, Member
General Division - Employment Insurance Section**

Heard by Videoconference on November 3, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Ms. A. R., attended the hearing by videoconference.

INTRODUCTION

[1] On November 13, 2014, the Claimant applied for, and was granted employment insurance sickness benefits from October 12, 2014 onward. On January 12, 2015 however, the Canada Employment Insurance Commission (Commission) advised the Claimant that she is not entitled to benefits from December 13, 2015 to January 4, 2015 because she would not have otherwise been available for work because she was visiting her family during this period.

[2] On January 22, 2015, the Claimant requested that the Commission reconsider its decision however; on February 14, 2015, the Commission maintained its decision.

[3] On February 24, 2015, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

[4] The hearing was initially scheduled to be conducted by teleconference given the complexity of the issue under appeal and since the Claimant was going to be the only party in attendance. Plus, 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.

[5] The first teleconference was scheduled for July 7, 2015 however; the Member and Claimant were unable to connect. The Claimant agreed to reschedule the teleconference hearing for July 10, 2015. The recording log indicated that the Claimant called in and was connected for 1 minute on July 10, 2015. The Tribunal attempted to call the Claimant both during the hearing, while the Member waited on the line for 45 minutes, and several times thereafter without success. On July 13, 2015, the Tribunal emailed the Claimant however; the Claimant did not respond. On July 20, 2015, the Member changed the form of hearing to that of a videoconference given the Claimant's difficulty connecting by teleconference. On November 3, 2015, the hearing was successfully conducted by videoconference.

ISSUE

[6] The Member must decide whether the Claimant is entitled to be paid sickness benefits from December 14, 2014 until January 2, 2015 because she was unable to work due to illness, when she would otherwise be available to work pursuant to paragraph 18(1)(b) of the *Employment Insurance Act* (EI Act).

THE LAW

[7] Paragraph 18(1)(b) 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 unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work.

EVIDENCE

[8] The Claimant was paid her regular salary by her employer from September 19, 2014 until October 10, 2014 while its insurance company reviewed her eligibility for short-term disability benefits. The insurance company deemed her fit to return to work and denied her claim. On November 13, 2014, the Claimant applied for employment insurance sickness benefits, provided medical documentation and was granted sickness benefits effective October 12, 2014 (GD3-3 to GD3-21).

[9] On January 12, 2015 the Commission advised the Claimant that she is not entitled to sickness benefits from December 13, 2014 to January 4, 2015 because she did not prove that she would not have otherwise been available for work because she had travelled to Northern Ontario to visit her family during this period. The Commission indicated that the Claimant stated that had she not been ill, she would not have travelled (GD3-22 and GD3-23).

[10] The medical certificate indicates that the Claimant's recovery date was expected to be February 23, 2015 (GD3-26 and GD3-27).

[11] On January 22, 2015, the Claimant requested that the Commission reconsider its decision noting that during the period in question she proved her illness/injury and that the Commission's decision is not validated anywhere in the EI Act or the *Employment Insurance Regulations* (Regulations) (GD3-28).

[12] On February 14, 2015, the Commission maintained its decision noting that although the Claimant had proven her illness, she must also prove that during her period of convalescence, she is not taking advantage of that time to go on a vacation. The Commission indicated in its decision that “It cannot be said that going on vacation, which would not have arisen had it not been for your inability for work, you have not proven that you were otherwise available for work.” (GD3- 30 to GD3-32).

[13] At the hearing, the Claimant testified that she feels that she was just as available for work while on sickness benefits as she was when she was working, even when she travelled to X during the period in question. She provided several reasons noting that (a) the bus leaves 2x/day and she could have been at work within 24 hours; she did this quite often while working including leaving and returning on weekends (b) normally, during the Christmas season, production levels slow down and if employees had vacation time, they took it during this time; because of her seniority, for the last 4 years, she used this time to travel to X to spend time with her family; she did nothing different than when she was working and would have travelled there regardless if she was off sick; it’s something she did every year during the holiday season and, (c) her employer had her cell phone number; she actually spoke with her Manager on one occasion while there. The Claimant stated that she did not realize that she could not leave her place of residence/home area and that this is not clear in the legislation.

[14] The Claimant referred to Exhibit GD3-22 stating that the Commission’s statement that “she stated that had she not been ill, she would not have travelled” is not correct. The Claimant testified that the Commission must have misunderstood.

SUBMISSIONS

[15] The Claimant submitted that she has proven her illness and she was just as available for work while on sickness benefits as she was when she was working. She visited her family during the Christmas holidays, as she has done for several years while working with the same employer and remained in contact with her Manager during the period in question.

[16] The Commission submitted that the Claimant was not able to demonstrate that if it were not for her illness, she would have been working or available for work from December 15, 2014, to January 2, 2015. The Commission submitted that the Claimant used her time of

inability, to visit family in Northern Ontario for the Christmas holidays, instead of remaining available for work in her home area. Her statement that she would immediately return to home area if her employer called her for work lacks credibility since she had already refused to return to work when her employer's insurance company had deemed her fit for work.

ANALYSIS

[17] According to subsection 18(1)(b) of the EI Act 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 unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work.

[18] In the case at hand, the Member finds that the Claimant met both requirements of subsection 18(1)(b) for the period in question from December 15, 2014, to January 2, 2015. It is undisputed evidence that the Claimant was unable to work because of a prescribed illness from October 12, 2014 until February 23, 2015. The Commission however, submitted that the Claimant was not otherwise available for work from December 14, 2015 to January 2, 2015 and imposed a disentitlement to sickness benefits during this period.

[19] The Member first considered that on November 13, 2014 the Claimant applied for employment insurance sickness benefits after the employer's insurance company denied her short-term disability claim. The Commission accepted the medical documentation submitted by the Claimant and granted sickness benefits effective October 12, 2014. The Commission accepted therefore, that the Claimant was unable to work due to illness from October 12, 2014. The Commission submitted however that the Claimant's statement that she would immediately return to her home area if her employer called her for work, lacked credibility because she had refused to return to work when she was deemed by her employer's insurance company fit to return to work on October 12, 2014. The Member disagrees with the Commission's position for two reasons (a) the Claimant has remained consistent that she was unable to work due to illness from her last day of work September 19, 2014 and that's why she refused to return to work at that time and applied for employment insurance sickness benefits and (b) the Commission, unlike the insurance company, accepted that the Claimant was unable to work at that time and granted sickness benefits effective the day that the employer stopped paying her regular salary on October 12, 2014. The Member finds therefore, that the Claimant's statement to the

Commission that she would immediately return to her home area if her employer called her for work, does not lack credibility.

[20] Secondly, the Member considered the Commission's submission that the Claimant used her time of inability to visit family in Northern Ontario during the Christmas holidays, instead of being available for work by remaining in her home area. The Member however, gave more weight to the Claimant's forthcoming, consistent and direct evidence than the indirect evidence of the Commission. On January 12, 2015, the Claimant was forthcoming to the Commission when she advised that she had been away during the holiday season to visit her family from December 15, 2014 to January 2, 2015 (GD3-22). The Claimant testified that she did not state to the Commission that "... had she not been ill, she would not have travelled" (GD3-22). The Claimant testified that, on the contrary, during the holiday period in question, she was just as available for work while on sickness benefits as she was when she was working because she visited her family during the Christmas holidays, just as she had done for the past 4 years (when production slowed down at her employer). Plus, she remained in contact with her Manager during the period in question. The Member agrees with the Commission that a period of claimed illness is not an opportunity to go on a vacation while convalescing, however; in this case, the Claimant did what she would normally do whether she was sick or working. This is not a case, where the Claimant took advantage of the time that she was sick to go on vacation when she normally would not. Going home to X, Ontario, for the holidays was a common practice for the Claimant while she was employed. Finally, the Member finds that although she left her 'home area' or 'area of residence', in this case, under these circumstances, the Claimant did not set any personal conditions that unduly limited her chances of returning to work.

[21] The Member therefore finds that the Claimant was able to demonstrate that had she not been ill, she would otherwise be available for work pursuant to paragraph 18(1)(b) of the EI Act. The Claimant is therefore entitled to be paid employment insurance sickness benefits from December 15, 2014 to January 2, 2015.

CONCLUSION

[22] The appeal is allowed.

Eleni Palantzas

Member, General Division - Employment Insurance Section