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

[TRANSLATION]

Citation: *D. P. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 64

Tribunal File Number: GE-15-3332

BETWEEN:

D. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: May 5, 2016

DATE OF DECISION: May 6, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The initial hearing scheduled for April 5, 2016 was postponed. The new date for the hearing was established as May 5, 2016.

[2] The Appellant, D. P., was present at the telephone hearing (teleconference) on May 5, 2016.

INTRODUCTION

[3] On December 23, 2014, the Appellant made an initial claim for benefits that took effect on December 21, 2014. The Appellant stated that she had worked as a [Translation] "custom seamstress for women's clothing" for the Employer, Gestion Marie- Lou Inc., from January 21, 2014 to November 12, 2014. She stated that she would be returning to work for this employer but she did not know the date of her return to work (Exhibits GD3-3 to GD3-12).

[4] On June 16, 2015, the Respondent, the Canada Employment Insurance Commission (the "Commission"), notified the Appellant that it could not pay her employment insurance benefits as of May 25, 2015 because she was voluntarily limiting her availability for work. . The Commission explained that it considered that the Appellant was not available for work (Exhibit GD3-20).

[5] On September 3, 2015, the Appellant filed a Request for Reconsideration of an Employment Insurance Decision (Exhibits GD3-22 and GD3-23).

[6] On October 7, 2015, the Commission informed the Appellant that it was upholding the decision in her case dated June 16, 2015 regarding her availability for work (Exhibits GD3-30 and GD3-31).

[7] On October 19, 2015, the Appellant filed an "Application for leave to appeal before the Appeal Division" of the Social Security Tribunal of Canada (the "Tribunal") (Exhibits GD2-1 to GD2-3). The Tribunal stated that, although the Appellant used the form "Application for leave to appeal before the Appeal Division" to file her appeal instead of using the form

"Notice of Appeal – General Division – Employment Insurance Section" or another similar form, it had treated this application as though it was a regular appeal to this body.

[8] On November 5, 2015, in response to a request in this regard by the Tribunal on October 26, 2016, the Appellant sent this body a copy of the reconsideration decision that is the subject of the appeal in an effort to complete her notice of appeal (Exhibit GD2A- 1).

[9] This appeal was heard by teleconference for the following reasons:

a) The fact that the Appellant will be the only party in attendance;

b) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit. (Exhibits GD1-1 to GD1-4).

ISSUE

[10] The Tribunal must determine if the Appellant demonstrated her availability for work under paragraph 18(1)(*a*) of the *Employment Insurance Act* (the "Act").

THE LAW

[11] The provisions relating to availability for work are set out in section 18 of the Act.

[12] Paragraph 18(1)(*a*) of the Act provides as follows with respect to "disentitlement to benefits":

> . . . 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. . . .

[13] To determine what constitutes "suitable employment", section 9.002 of the *Employment Insurance Regulations* (the "Regulations") provides as follows:

> . . . 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.

[14] With respect to "type of employment", subsection 9.0003(1) provides as follows:

> . . . (1) 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.

EVIDENCE

[15] The evidence in the file is as follows:

a) A record of employment dated December 12, 2014 indicates that the Appellant worked as a "section 1 operator" for the Employer, Gestion Marie-Lou Inc., from January 21, 2014 to November 12, 2014 inclusive, and that she stopped working for that

employer because of a shortage of work (Code A – Shortage of work/End of season or contract) (Exhibit GD3-13).

b) On October 2, 2015, the Employer stated that during the period from May 25, 2015 to June 27, 2015, the Appellant had worked one day per week, i.e. Monday. It indicated that the Appellant had worked three days per week as of June 28, 2015. The Employer explained that the company was closed from July 19, 2015 to August 1, 2015 (two weeks). It stated that there was a shortage of work for the Appellant during the period from August 2, 2015 to August 22, 2015. The Employer explained that thereafter the Appellant had worked three days or more per week (Exhibit GD3-26).

c) On October 5, 2015, the Employer stated that the Appellant had asked on several occasions to return to her job at the plant in Saint-Marc-des-Carrières, Quebec, but that it was not possible to do so on a regular basis at that time. It indicated that the Appellant was available for full-time work and that she could be called if needed. The Employer explained that it was aware of the problem between the Appellant and another employee and that it had tried to find solutions. It indicated that the Appellant had decided to continue to work while trying to get along with the other employee in question. The Employer clarified that the Appellant worked on the basis of the availability she indicated which was three days per week. It specified that the work schedule is a four-day schedule between 32 and 35 hours per week (Exhibit GD3-27).

d) On October 7, 2015, the Employer stated that the Appellant was available for work on Monday, Tuesday and Wednesday at the plant in Saint-Ubald, Quebec. It indicated that the Appellant was not available to work Thursdays. The Employer explained that the Appellant was available for full-time work at the Saint-Marc-des- Carrières plant but that there was less work at that site because it required an employee able to carry out all of the tasks, which the Appellant could not do. It explained that the Appellant had worked at that site in the week of September 27, 2015 to October 2, 2015 and that she would work there again for a week or two. The Employer stated that the Appellant could work four days per week at the Saint-Ubald plant if she wanted to (Exhibit GD3-29).

[16] The evidence presented at the hearing is as follows:

a) The Appellant reviewed the main elements of her availability for work.

b) She explained that she had initially told her employer that she was available for work one day per week as of May 25, 2015 until June 27, 2015 inclusive (Exhibits GD3-14 to GD3-19, GD3-24 and GD3-25).

c) The Appellant then increase her availability for work to three days per week, specifically, Monday, Tuesday and Wednesday, as of June 28, 2015 (Exhibits GD3-21, GD3-24, GD3-25 and GD3-28).

d) She mentioned that she had not worked in the period from July 19, 2015 to August 1, 2015 (two weeks) because it was the vacation period (Exhibits GD2-1 to GD2-3 and GD3-21 to GD3-25).

e) The Appellant indicated that the plant was closed from August 2 to 22, 2015 (three weeks) and that there was no work for her there (Exhibits GD2-1 to GD2-3 and GD3-21 to GD3-25).

f) She explained that it was especially for the period of August 2 to 22, 2015 (three weeks) that she wanted to receive benefits. The Appellant specified that she had not claimed benefits for the periods in which she worked two or three days per week (Exhibits GD2-1 to GD2-3).

g) The Appellant stated that she did not search for work during the time that she had not worked, from July 19, 2015 to August 22, 2015, because she expected to return to her job after that period. She explained that there was no point in her working somewhere else for three weeks.

h) The Appellant indicated that she worked three days per week, on Mondays, Tuesdays and Wednesdays, at the Saint-Ubald plant where there was a four-day per week work schedule. She explained that it was she who had chosen not to work at the Saint- Ubald plant more than three days per week. The Appellant specified that she could have worked more than three days per week when there was too much work.

PARTIES' ARGUMENTS

[17] The Appellant presented the following observations and submissions:

a) The Appellant indicated that she had worked for the Employer for 21 years. She explained that she had been available to work at the Saint-Ubald plant one day per week from May 25, 2015 to June 27, 2015 inclusive. The Appellant explained that she was not available to work at that site on the other days of the week, during that period, in order to avoid an employee with whom there was a disagreement. According to the Appellant, that employee shouted at her and was not pleased that she continued to work. The Appellant stated that she had tried to resolve the problem but that the only solution she had found had been to reduce her availability for work. She indicated that she understood that she could not qualify for benefits while she was only available for work one day per week. The Appellant explained that as of June 28, 2015 she worked three days per week after partially resolving the problem with the other employee. She explained that she has given three days guaranteed and that she was also available on Thursday and Friday if she was needed (Exhibits GD3-14 to GD3-19, GD3-21 to GD3-25 and GD3-28).

b) The Appellant indicated that she believes she is entitled to receive benefits because she was unable to work because of a shortage of work. She indicated that she had received vacation pay for the period from July 19, 2015 to August 1, 2015 (two weeks) but that she had remained available for work during that time because she was not on vacation. The Appellant explained that during three weeks from August 2 to 22, 2015 there had not been any work for her because the company was closed, but that she had been available for work during that time. She underscored that she was also available for work on a full-time basis, at the Saint-Marc-des-Carrières plant but that she had not received hours at that site. The Appellant also mentioned that she had worked five days in the week of September 27, 2015 to October 2, 2015 (Exhibits GD3-21 to GD25 and GD3-28).

[18] The Commission made the following observations and submissions:

a) It indicated that to demonstrate availability for work, under paragraph 18(*a*) of the Act, it may require the Appellant to prove that she is making reasonable and customary efforts to obtain suitable employment (Exhibit GD4-5).

b) The Commission explained that availability for work is a question of fact and must be determined after considering the evidence and that the decision is based on an analysis of the following three factors: (1) the claimant wants to return to the labour market when suitable employment is offered; (2) she expresses that desire by making efforts to find suitable employment; and (3) she does not set personal conditions that might unduly limit her chances of returning to the labour market (Exhibit GD4-5).

c) It argued that the Appellant was limiting her availability for work. The Commission explained that, initially, as of May 25, 2015, the Appellant reported being available for work only one day per week and that, as of June 28, 2015, she extended her availability to three (3) days per week (Exhibit GD4-6).

d) The Commission argued that to be considered available for work by Employment Insurance, the Appellant must demonstrate full-time availability, which is not the case for the Appellant. According to the Commission, the Appellant was limiting her availability at one of the Employer's companies, namely, Saint-Ubald. The Commission pointed out that it was at that site that the Appellant could have worked full-time (Exhibit GD4-6).

e) It explained that the Appellant had claimed that as of May 25, 2015, she had had to reduce her availability to one day per week to avoid working with an employee who was causing her problems. The Commission pointed out that, despite this situation, the Appellant added two (2) days of availability as of June 28, 2015 and that she had continued to work with the same employee (Exhibit GD4-6).

f) The Commission determined that it had no choice but to consider the Appellant not available for work as of May 25, 2015 because she had set personal conditions that

unduly limited her chances of working full-time. It stated that the Appellant had the opportunity to work full-time in suitable employment at Saint-Ubald (Exhibit GD4-6);

g) It submitted that, while the Appellant had expressed the desire to work full-time, she knew that reducing her availability at the Saint-Ubald plant, as explained above, was incompatible with working full-time. It stated that it was that plant that had the work (Exhibit GD4-6).

h) The Commission explained that the Appellant had asked to be paid by Employment Insurance for the weeks of August 2, 9 and 16, 2015 because of a shortage of work at the plant. It determined that the Appellant could not be paid by Employment Insurance during that period because she was already disentitled for non-availability as of May 25, 2015 and that disentitlement was still in effect at the time of the company's plant closed for a three (3)-week period after the two (2) weeks of vacation (Exhibit GD4-6).

i) The Commission explained that the Appellant's disentitlement to receive benefits as of May 25, 2015 was because she was limiting her availability for work with her employer. It underscored that, even though there had been a shortage of work, it could not cancel the disentitlement for that reason. The Commission explained that the Appellant would have had to have shown that she was available for full-time work before and after the work shortage. It stated that the Employer confirmed that the Appellant could have worked four (4) days per week if she had wanted to (Exhibit GD3-29). The Commission concluded that the disentitlement for non-availability was upheld as of May 25, 2015 (Exhibits GD4-6 and GD4-7).

ANALYSIS

[19] In the absence of a definition of "availability" in the Act, the criteria developed in the case law serve to establish the availability of a person for work as well as their entitlement or not to receive employment insurance benefits. Availability is a question of fact that requires consideration of three general factors set out in the case law.

[20] In ***Faucher*** (**A-56-96**), the Federal Court of Appeal (the "Court") established three factors to be considered to determine whether a claimant has shown that he was available for work. In that case (***Faucher,*** **A-56-96**), the Court stated:

> There being no precise definition in the Act, this Court has held on many occasions that availability must be determined by analyzing three factors - 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 - and that the three factors must be considered in reaching a conclusion.

[21] These factors have been reiterated in other decisions by the Court (***Bois,*** **2001 FCA 175;** ***Wang,*** **2008 FCA 112**).

[22] The case law has clearly established that a person's availability is assessed per working day in a benefit period for which the person can prove that they were capable of and available for work, on that day, and unable to obtain suitable employment (***Cloutier,*** **2005 FCA 73;** ***Boland,*** **2004 FCA 251**).

[23] In ***Bertrand*** **(A-613-81**), the Court stated:

> The question of availability is an objective one –- whether a claimant is sufficiently available for suitable employment to be entitled to unemployment insurance benefits –- and it cannot depend upon the particular reasons for the restrictions on availability, however these may evoke sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it:

[24] In ***Cornelissen-O'Neill*** **(A-652-93)**, the Court recalled the words of the Chief Umpire in ***Godwin*** (**CUB 13957**) to the effect that: ". . . the Act is quite clear that to be eligible for benefits a claimant must establish his availability for work, and that requires a job search."

[25] In ***De Lamirande*** **(2004 FCA 311)**, the Court recalled as follows: "The case law holds that a claimant cannot merely wait to be called in to work but must seek employment in order to be entitled to benefits. . . ."

[26] In its assessment of the evidence, the Tribunal took into consideration the three factors set out above which serve to determine the availability of a person for work. These three factors are as follows: the desire to return to the labour market as soon as suitable employment is offered; the demonstration of that desire by efforts to find suitable employment; and the non-establishment or absence of personal conditions that might limit unduly the chances of returning to the labour market.

[27] The question of whether a person is available for work is a question of fact that must be resolved in light of the specific circumstances of each case but based on the factors set out in the case law.

[28] In this case, as of May 25, 2015, the Appellant did not meet any of the factors set out above, following the decision by the Commission in her case on June 16, 2015 notifying her that she was considered to be unavailable for work because she was voluntarily limiting her availability for work (Exhibit GD3-20).

Desire to return to the labour market as soon as suitable employment is offered

[29] The Appellant did not show her desire to return to the labour market as soon as a suitable job was offered to her (***Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112**).

[30] Based on the evidence in the file and the Appellant's testimony at the hearing, the Appellant always gave precedence to the employment she held with her regular employer, Gestion Marie-Lou Inc., even during the period that she was not working, that is, from July 19, 2015 to August 22, 2015 inclusive.

[31] The Tribunal is of the view that the Appellant was required to show her desire to return to the labour market as soon as suitable employment was offered to her. However, the Appellant chose not to do so.

[32] She informed her employer that she was only available one day per week from May 25, 2015 to June 27, 2015 to work at the Saint-Ubald plant, despite the fact that she could have worked full time at that location. The Appellant also indicated that she had then worked three days per week from June 28 to July 18, 2015.

[33] As for the period during which the Appellant did not work, from July 19, 2015 to August 22, 2015, she explained that there was no point in working elsewhere for a few weeks because she expected to return to her job after August 22, 2015.

[34] In this context, it is the Tribunal's opinion that the Appellant demonstrated that she did not desire to return to the labour market as soon as suitable work was offered to her. The Appellant's explanations indicate instead that she preferred to wait to return to her employment with her usual employer and to work according to the availability that she gave to it.

Demonstration of that desire by efforts to find suitable employment

[35] The Appellant also did not demonstrate her desire to return to the labour market by making significant efforts to find suitable employment for each working day of her benefit period from the date that her disentitlement to receive benefits was established by the Commission, that is, May 25, 2015 (Exhibits GD3-20, GD3-30 and GD3- 31).

[36] At the hearing, the Appellant clearly indicated that she not made searched for employment with potential employers because she knew that she would return to work with her usual employer after August 22, 2015. She explained that there was no point in working elsewhere for a few weeks and then returning to work for her usual employer.

[37] Furthermore, there is nothing to indicate that when the Appellant worked for her usual employer in the period from May 25, 2015 to August 18, 2015, she sought to fill the days when she could not be available for work by looking for employment with other employers.

[38] The Tribunal points out that a person's availability is assessed per working day in a benefit period for which the person can prove that they were capable of and available for work, on that day, and unable to obtain suitable employment (***Cloutier*, 2005 FCA 73; *Boland*, 2004 FCA 251**).

[39] Paragraph 18(12)(*a*) of the Act clearly states: "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."

[40] The Appellant had the responsibility to actively look for suitable employment in order to receive employment insurance benefits (***Cornelissen-O'Neill,* A-652- 93; *De Lamirande,* 2004 FCA 311**). The evidence shows that the Appellant did not discharge this responsibility from the time her disentitlement was established.

The non-establishment or absence of "personal conditions" that might unduly limit the chances of returning to the labour market

[41] The Tribunal considers that, in this case, the Appellant set "personal conditions" that unduly limited her chances of returning to the labour market (***Faucher,* A-56-96**).

[42] At the hearing, the Appellant explained that she had not looked for work with other potential employers in the period from July 19, 2015 to August 22, 2015 because she was supposed to return to her employment with her usual employer after August 22, 2015.

[43] The Appellant also clearly indicated that she had made the choice to work at the Saint-Ubald plant three days per week when she could have worked there full-time based on the four-days-per-week schedule established by the Employer.

[44] Moreover, the Employer indicated that the Appellant could have worked at the Saint-Ubald plant four days per week if she had wanted to (Exhibit GD3-29).

[45] The Tribunal is of the view that the Appellant's primary intent was to be employed with her usual employer, three days per week, despite the fact that she could have worked a full-time work schedule of four days per week.

[46] The evidence in the file indicates that the reasons given by the Appellant for not working full time are essentially related to the fact that she did not want to be in the presence of another worker with whom there was a disagreement or conflict.

[47] The Appellant initially indicated an availability of one day per week in the period from May 25, 2015 to June 27, 2015 inclusive. She then increased her availability for work to three days per week because the conflict with the employee in question had improved.

[48] By setting her own conditions under which she would agree to hold her employment, thus restricting her availability for work, the Appellant unduly limited her chances of returning to the labour market (***Faucher,* A-56-96**).

[49] The fact that the Appellant returned to work for the Employer, Gestion Marie-Lou Inc., after August 22, 2015 has no impact on this situation. The evidence shows that the Appellant was still limiting her availability for work with this employer.

[50] The Tribunal is of the view that the clear intent expressed by the Appellant was to remain in the employ of her usual employer, working three days per week, despite the fact that she could have worked a full-time work schedule of four days per week. In this context, the Tribunal finds that the Appellant unduly limited her availability for work (***Faucher*, A-56-96**).

[51] In short, the Tribunal finds that, as of May 25, 2015, the Appellant failed to demonstrate that, for each working day of her benefit period, she was capable of and available for work and unable to find suitable employment (***Cloutier*, 2005 FCA 73; *Boland*, 2004 FCA 251; *Bertrand,* A-613-81**).

[52] The Tribunal finds that the Appellant's entitlement to receive employment insurance benefits cannot be established because she failed to demonstrate her availability for work under paragraph 18(1)(*a*) of the Act as of May 25, 2015.

[53] The appeal is without merit on the issue in this case.

CONCLUSION

[54] The appeal is dismissed.

Normand Morin

Member, General Division – Employment Insurance Section