



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *F. M. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 74

Tribunal File Number: GE-16-922

BETWEEN:

**F. M.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Claude Durand

HEARING DATE: June 1, 2016

DATE OF DECISION: June 6, 2016

## **PERSON IN ATTENDANCE**

- [1] The Appellant, F. M., was present with his representative, G. T.
- [2] The other parties were not represented.
- [3] This appeal was heard by teleconference for the following reasons:
- a) The fact that the Appellant will be the only party in attendance at the hearing.
  - b) The information in the file, including the need to obtain additional information;
  - c) The fact that more than one participant, such as a witness, might be present.
  - d) This method of proceeding best meets the needs of the parties for accommodation.

## **INTRODUCTION**

[4] In this case, the *Employment Insurance Commission* (the Commission), disentitled the claimant to benefit starting January 4, 2016, because he failed to prove that he was available for work.

[5] The Appellant requested reconsideration and on February 18, 2016, the Commission upheld its initial decision.

[6] The Appellant appealed to the *Social Security Tribunal* on March 4, 2016.

## **ISSUE**

[7] The Tribunal must determine whether the Appellant was available for work and, at the same time, whether the disentitlement under subsection 18a) of the Act applies.

## **THE LAW**

[8] Section 18(a) of the Act states:

*18. (1) 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;*
- b) *unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or*
- c) *engaged in jury service.*

[9] Subsection 50(8) of the Act

*(8) Subsection 50(8) of the 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.*

[10] Section 9.001 of the Regulations:

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 résumé 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,*
  - (vii) *submitting job applications,*
  - (viii) *attending interviews, and*
  - (ix) *undergoing evaluations of competencies; and*
- c) *the claimant's efforts are directed toward obtaining suitable employment.*

[11] The notion of suitable employment has been set out in section 9.002 of the *Regulations* since January 6, 2013.

[12] For the purposes of subsections 18a) and 50(8) of the Act, the criteria for determining what constitutes suitable employment are provided in section 9.002 and 9.003 of the *Regulations*.

[13] Section 9.002 of the Regulations: Suitable Employment

- 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; and;*

- 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.*

[14] Section 9.003 of the Employment Insurance Regulations:

*(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)*
- (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.*

[15] (2) For the 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.*

*(3) 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.*

## **EVIDENCE**

### **Evidence in the file**

[16] A claim for benefits was established starting on November 15, 2015 (pages GD3-3 to 11). The layoff resulted from a company closure (page GD3-17)

[17] On November 20, 2014, the Appellant was asked to report to the Service Canada office. An officer wanted to check his availability because the Appellant had mentioned retirement. The conversation between the claimant and the officer generated very few clarifications. The officer informed him of his responsibilities in terms of availability and job searches (pages GD3-13 to 15).

[18] On January 6, 2016, the Commission contacted the Appellant. He said he was not interested in working for now. The Commission then informed him that he could not receive benefits if he was not available for work (page GD3-17).

[19] In February 2016, the Appellant informed the Commission that he had changed his mind. He was looking for work and wanted to receive benefits. He had started his job search and applied at various locations. He mentioned that he wanted to work as close to his home as possible.

[20] The Appellant sent the Commission a list of 4 companies where he had applied. He said he had searched for work elsewhere as well, but offered no further clarifications. (page GD3-22 and 23).

### **Evidence at the hearing**

[21] The appellant is 65 years old. He has limited education, having finished primary school, but did not attend high school.

[22] In the past few years, he worked as an assistant delivery person for Alimentation Marcotte. This company was sold to the Colabor group, which went out of business, and thus the Appellant lost his job.

[23] His work involved loading and unloading goods. He did not drive the delivery truck.

[24] The Appellant lives in X. When he worked for Alimentation Marcotte, the company was located in X, about 20 minutes from his place of residence.

[25] The company then moved to X, which required him to commute for 45 minutes to 1 hour.

[26] In the past two years, he has had three driving accidents (minor) while driving to work. He developed a fear of driving long distances on a daily basis. He suffers from anxiety.

[27] When he claimed benefits, he thought he would be entitled to benefits without looking for work. Once he understood the concept of availability, he began searching for another job.

[28] He does not own a personal computer and has no computer knowledge. He searches for work by looking through local newspapers, checking ads posted in grocery stores and public locations in X and surrounding areas, and has put his name in at grocery stores and garages, while also using his network of personal contacts.

[29] He is ready and available for work. He needs to work to make ends meet. However, he can no longer handle a two-hour commute back and forth to work every, although there are many small localities around X.

## **ARGUMENTS**

The Appellant's representative argued the following:

- a) He is a friend of the Appellant and is acting as his representative because the Appellant has difficulty in explaining his case;
- b) Initially, the Appellant made a mistake, thinking he was entitled to benefits without searching for work. Because he had applied for his pension, he thought he might possibly stop working altogether;
- c) The Appellant cannot afford to stop working, even if he obtains his pension. He therefore started looking for work in January 2016, as shown by the names of the potential employers that he approached, and which he submitted to the Commission.
- d) The Appellant never alleged that he was limiting his job search to an area within 2 minutes of his home. He simply said he was no longer able to commute from 45 minutes to an hour in order to get to work; he no longer has the necessary stamina.
- e) The Appellant is searching for work with the means at his disposal, and looking for types of jobs potentially accessible to him, at supermarkets, garages, convenience stores and in small shops. However, he is realizing that his age plays against him with employers, although this fact cannot be held against him.

[31] The respondent Commission made the following arguments:

- a) On January 6, 2016, the claimant clearly stated that he was not looking for work. After he received explanations about his obligation to search for work, he said he was not interested in looking for work and might do so later;
- b) When he filed his request for an administrative review, the claimant mentioned that he was now searching for work. He had submitted four job searches on January 20 and 26, 2016;

- c) The facts currently on file provide insufficient proof that the claimant is actively searching for work. He has not demonstrated that his efforts have been sustained.
- d) He said he changed his mind because he was not entitled to employment insurance. He said he has performed other searches since the first four, but cannot provide the names of the companies contacted;
- e) Subsequent conflicting statements made as the claimant began to realize the consequences of his remarks are of less value than the initial statements he made unwittingly;
- f) The claimant mentioned that he would like to find a job near his home because he was not interested in commuting to work as did before, for 45 minutes to an hour. He does not want a job that is more than 2 minutes from his home because there are a number of companies in his area, including two supermarkets and one engine repair shop.
- g) The fact that the claimant is restricting his availability by limiting his search to the vicinity of his home greatly reduces his chances of finding employment. The Commission therefore believes that the claimant is setting personal conditions that overly limit his chances of returning to the labour market..

[32] To support its contentions, the Commission cites the following case law: *Canada (AG) v. Bois*, 2001 FCA 175 *Canada (AG) v. Cornelissen-O'Neil*, A-652-93; *Lamirande v. Canada (AG)*, 2004 FCA 311

## **ANALYSIS**

[33] A claimant cannot simply wait to be called back to work; he or she must look for work in order to obtain entitlement to benefits (De Lamirande 2004 FCA 311; Cornelissen O'Neill [A-652-93]).

[34] Regardless of a claimant's chances of success in searching for work, the Act is designed to ensure that only persons who are truly unemployed and actively searching for work will receive benefits (*Cornelissen O'Neill* [A-652-93], citing *Godwin*, CUB 13957).



[35] The suitable nature of an employment is a concept that can vary as the claimant's personal circumstances change or the unemployment period persists. These factors can force claimants to change their attitude or efforts to prove their availability (*Stolniuk* [A-686-93] and [A-687-93]; *Whiffen* [A 1472 92]).

[36] To prove that he is available for work, the claimant must basically take the customary and reasonable steps through their attitude and behaviour to find a suitable employment (*Whiffen* [A-1472-92]).

[37] This case law on availability and suitable employment predates the coming into force of section 9.002 of the Regulations. Although it remains valid, it must be examined in light of new regulatory sections.

[38] In *Faucher v. Canada (Attorney General)* (A-56-96), the Federal Court of Appeal specified the requirements to consider in determining whether a claimant is available for work:

This availability is analysed on the basis of three factors:

1. the claimant wants to return to the labour market as soon as a suitable employment is offered;
2. the claimant expresses that desire by making efforts to find suitable employment; and
3. the claimant does not set personal conditions that might unduly limit his or her chances of returning to the labour market

[39] Today, the new regulatory provisions emphasize proactive effort by the claimant, who still bears the onus of proof. The claimant's interests and demonstration of such interest are detailed in behavioural criteria (s. 9.001 of the Regulations) that describe the sustained steps and concrete action involved in the effort.

[40] In this case, the Tribunal must determine whether the Appellant was truly available for work and whether he took reasonable steps to find suitable employment.

[41] These questions may seem redundant, but they pertain to two separate situations: interest in working, and the demonstration of such interest through the Appellant's positive actions.

### **Interest in returning to the labour market**

[42] The Appellant testified brilliantly and openly. He did not try to conceal facts. He admitted that in the beginning he had not searched for work. He supported his statements with concrete examples to explain how he had then searched for work in late January 2016. I consider his testimony credible.

[43] His testimony also sheds light on the type of work he can perform and the reasons underlying his decision not to commute back and forth for two hours to work, as he did in the past.

[44] Although I note that the Appellant did not complete the job search verification form, he assured me that he did inform the Commission of his job search efforts. This observation is also evident on reading the exhibits in the file (pages GD3-20 et 21).

[45] I also note that the Appellant must find work in order to survive. He has shown that his pension income provide him with an income of only \$198 a week, which is insufficient to live decently.

[46] I believe the Appellant demonstrated his interest in returning to the labour market.

### **Demonstration of such interest in working**

[47] The Appellant herein testified that he took steps to search for work during the disentitlement period imposed on him.

[48] The file proves that the Appellant contacted four (4) employers in late January 2016. The Appellant also states that he consults local newspapers, posters in public locations, visits businesses to solicit work and asks his personal contacts for leads on available jobs.

[49] I see that his statements at the hearing are consistent with the statements on file (pages GD2-4 and GD3-22).

[50] I note that the Appellant is 65-years old with limited education and no computer knowledge, and is therefore unable to use this method to search for work; he also lives in a small locality where everyone knows each other.

[51] Although at first glance the description of his job search may seem sparse, it does not necessarily prove that he failed to search for work. I note that the Appellant used the means available to him to the best of his knowledge to find work.

[52] I consider it plausible that in a small community and in neighbouring communities, people know each other. That the Appellant chose to make telephone calls or personal visits to businesses rather than drop off a résumé and a letter of application is not unusual..

[53] I also note from the Appellant's testimony that he regularly checks the job postings in local newspapers and on posters in public places.

[54] In my opinion, the Appellant is making a sustained effort. I see that he has explored his job options, use networking through his contacts, contacted prospective employers and applied for work by making telephone calls or visits in person.

[55] I note that his efforts meet several of the tests set out in section 9.001 of the Regulations for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts. In the Appellant's case, I believe they are.

[56] The Commission placed a great deal of importance on the fact that the Appellant was restricting his availability by limiting his job search to the vicinity of his home, thus reducing his chances of finding work.

[57] The Commission contends that the Appellant wants to work within a 2 minute radius of his home.. The Commission therefore believes that the claimant is setting personal conditions that overly limit his chances of returning to the labour market.

[58] I examined the Appellant's statements on this issue. I note that the Appellant said he no longer wanted to commute long distances as he had in the past. He also stated that if he could find a job near his home it would be *a good thing*. It was the Commission's officer who suggested a commute of 1 or 2 kilometers, and the Appellant answered yes (page GD3-22),

because there businesses near his home, including two supermarkets and one small engine repair shop.

[59] I am setting aside the Commission's allegations on this issue. The Appellant's initial statements do not necessarily establish that he is limiting the area of his job search to no more than 1 or 2 kilometers. The Appellant pointed out that he was searching for work in his locality and in neighbouring localities, and I accept this argument.

[60] I also note that under section 9.002 of the Regulations: Suitable Employment, the reasons given by the Appellant for limiting his commute time are acceptable, namely, in the past few years, he has had minor accidents on his way to work and is no longer able to commute long distances.

*a) the claimants' health and physical capabilities allow them to commute to the place of work and to perform the work;*

[61] The Appellant discharged his burden of proof by showing that he has been interested in returning to the labour market since January 20, 2016, that and has searched for work and did not unduly set personal conditions that would limit his chances of returning to the labour market.

[62] The Tribunal finds that the disentitlement imposed under paragraph 18a) of the Act was applicable from January 4, 2016, the date on which it was imposed by the Commission, to January 20, 2016, the date on which the Appellant proved that he had started his job search.

[63] The Tribunal finds the Appellant available for work following this disentitlement period. He is therefore entitled to benefits starting on January 20, 2016.

#### **COMING INTO FORCE**

[64] The appeal is allowed with amendments.



Claude Durand

Member, General Division - Employment Insurance Section