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

[TRANSLATION]

Citation: *S. M. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 87

Tribunal File Number: GE-15-2147

BETWEEN:

S. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: May 25, 2016

DATE OF DECISION: June 28, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The hearing initially scheduled for November 19, 2015 was adjourned as were those scheduled for December 2, 2015 and March 30, 2016. A new hearing date was set for May 25, 2016.

[2] The Appellant, S. M., was present at the telephone hearing (teleconference) on May 25, 2016.

[3] He was represented by Catherine Boutin of the Côte-des-Neiges Legal Aid Office (Centre communautaire juridique de Montréal).

INTRODUCTION

[4] On October 21, 2014, the Appellant made an initial claim for benefits that took effect on October 12, 2014. The Appellant declared that he had worked as a "cook" for the Employer, Restaurant Le Paris Beurre Enr., from July 23, 1997 to October 12, 2014. He indicated that he began receiving a pension from the Quebec Pension Plan (QPP – now Retraite Québec) on June 30, 2014 (Exhibits GD3-3 to GD3-13).

[5] On April 7, 2015, the Respondent, the Canada Employment Insurance Commission (the "Commission"), informed the Appellant that it was unable to pay him employment insurance benefits as of February 2, 2015 because he had not demonstrated that he was available for work (Exhibit GD3-24).

[6] On May 7, 2015, the Appellant filed a Request for Reconsideration of an Employment Insurance Decision (Exhibits GD3-26 to GD3-37).

[7] On June 12, 2015, the Commission informed the Appellant that it was upholding its decision of April 7, 2015 regarding his availability for work (Exhibits GD3-43 and GD3-44).

[8] On July 3, 2015, the Appellant filed a Notice of Appeal to the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (the "Tribunal") (Exhibits GD2-1 to GD2-5).

[9] On August 11, 2015, in response to a request by the Tribunal in this regard, dated July 27, 2015, the Appellant sent the Tribunal [translation] "a copy of the reconsideration decision that is the subject of the appeal" along with the date on which the reconsideration decision had been communicated to him (Exhibits GD2A-1 to GD2A-5).

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

a) 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

[11] The Tribunal must determine if the Appellant's disentitlement to receive employment insurance benefits because he did not prove his availability for work is justified under paragraph 18(1)(a) of the *Employment Insurance Act* (the "Act").

THE LAW

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

[13] 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 . . . .

[14] 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.

EVIDENCE

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

a) A record of employment, dated October 14, 2014, indicates that the Appellant worked for the Employer, Restaurant Le Paris Beurre Enr., from July 23, 1997 to October 10, 2014 inclusive, and that he stopped working for that employer because of a shortage of work (Code A – Shortage of work / End of contract or season) (Exhibit GD3-14).

b) On October 27, 2014, the Appellant reported having received $3,000.00 in 2009 as benefits from the Commission de la santé et de la sécurité du travail (CSST – now CNESST – Commission des normes, de l'équité, de la santé et de la sécurité du travail), (Exhibit GD3-15).

c) On February 5, 2015, the Appellant indicated that he had been assigned to light work since the start of his benefit claim and even before having made that claim (Exhibit GD3-16).

d) On February 5, 2015, the Appellant provided the Commission with a copy of the following documents:

   i. Commission de la santé et de la sécurité du travail (CSST) form, dated February 5, 2010, indicating that the Appellant could start light work (Exhibit GD3-17);

   ii. Results of a medical examination that the Appellant underwent at the Clarke Magnetic Resonance Imaging Center, a health institution, dated January 27, 2010 (Exhibit GD3-18);

   iii. Document from the CSST entitled "Temporary work assignment" as of February 8, 2010 (Exhibit GD3-19);

   iv. CSST medical report, dated February 5, 2010 (Exhibit GD3-20).

e) On March 26, 2015, the Commission indicated that it informed the Appellant that he needed to provide it with a recent medical certificate confirming or providing details of his reduced capacity to work (Exhibit GD3-21).

f) On April 7, 2015, the Appellant reported having had a work-related accident in 2010 [December 4, 2009] (fall outside) and having suffered a lumbar discal hernia. He stated that he has always experienced pain since his work-related accident. The Appellant mentioned having consolidated his file with the Commission de la santé et de la sécurité du travail (CSST) on April 7, 2015. He explained that despite the consolidation and the medical certificate, he was still unable to work, without restrictions, as had been the case since 2010. The Appellant stated that he was not able to work standing for long periods of time (maximum one hour) and that he had to alternate his position between sitting and standing. The Appellant stated that he was unable to lift heavy loads. He mentioned still having pain in his shoulders, back and neck (Exhibit GD3-22).

g) On April 7, 2015, the Appellant sent the Commission a copy of a medical certificate from the Centre d'urgence de Salaberry (Montréal), dated April 7, 2015. That document indicates that the Appellant is [translation] "able to work without functional limitation" (Exhibit GD3-23).

h) On April 14, 2015, Miriam Taylor, the assistant to the MP for the federal riding of Outremont, Thomas Mulcair, asked the Commission for explanations in order to understand why the Appellant was not entitled to employment insurance benefits. The Commission indicated that the Appellant was considered unavailable for work (Exhibit GD3-25).

i) In his request for reconsideration filed on May 7, 2015, the Appellant provided the Commission with a copy of the following documents:

    i. Decision rendered by CSST (Direction de la Révision administrative) [Administrative Review Branch], dated October 19, 2010. In that decision, CSST Administrative Review declared inadmissible the Appellant's request dated June 10, 2010 for reconsideration of the CSST's acceptance of a new diagnosis of discal hernia at the L5-S1 level and the medical assessment made by the Appellant's doctor. Administrative Review stated [translation] "in accordance with the report on after-effects made by the attending physician" and confirmed the decision rendered on June 18, 2010. Administrative Review also stated [translation] "the work-related injury of December 4, 2009 led to a permanent injury of 3.30% to the worker's physical or psychological integrity; and . . . the worker is entitled to an allowance for bodily injury of $1,759.66 plus interest" (Exhibits GD3-30 to GD3-32);

    ii. A form entitled "Authorization" indicating that the Appellant was represented by Catherine Boutin of the Côte-des-Neiges Legal Aid Office (Centre communautaire juridique de Montréal), duly completed and dated April 27, 2015 (Exhibit GD3-33);

iii. Letter requesting reconsideration, dated May 5, 2015, addressed to the Commission by the Appellant's representative (Exhibit GD3-34);

iv. Request for Reconsideration of an Employment Insurance Decision (Exhibits GD3-35 and GD3-36);

v Letter from the Commission addressed to the Appellant, dated April 7, 2015 (Exhibit GD3-38).

j) On May 25, 2015 and June 6, 2015, the Appellant's representative indicated that the latter was out of the country and she had no details regarding the job searches he had conducted (Exhibits GD3-39 and GD3-40).

k) On June 10, 2015, the Appellant stated that he was retired and had begun receiving an old age pension. He stated that he was unable to work full-time and did not want to because of his pain. The Appellant clarified that he could not work more than 20 hours per week. He explained that he had suffered a work-related accident (December 4, 2009) and was obliged by the CSST to return to work, full-time, despite his pain. The Appellant indicated that he believed that unemployment (employment insurance) could pay for his physiotherapy sessions (Exhibit GD3-41).

l) On June 10, 2015, the Commission indicated that it had informed the Appellant's representative that its decision would be upheld (Exhibit GD3-42).

m) In his Notice of Appeal filed on July 3, 2015, the Appellant sent a copy of the following documents:

i. Letter from the Employer (notice of termination of employment), dated August 6, 2014, informing the Appellant that his employment would end on October 1, 2014 (Exhibit GD2-3);

ii. Record of employment, dated October 14, 2014, indicating that the Appellant had worked for the Employer, Restaurant Le Paris Beurre Enr., from July 23, 1997 to October 10, 2014 inclusive (Exhibit GD2-4 or GD3-14).

n) On May 25, 2016, after the hearing, the Appellant's representative provided a document indicating that the Appellant would start new employment on May 30, 2016, working four days per week (Exhibits GD9-1 and GD9-2).

[16] The following evidence was presented at the hearing:

a) The Appellant reviewed the main elements in the file in order to show his availability for work.

b) He indicated that he had worked for the Employer, Restaurant Le Paris Beurre Enr., from July 23, 1997 to October 10, 2014 (last day paid), and had stopped working for that employer because of a shortage of work. The Appellant explained that he had had a work-related accident on December 4, 2009 (lumbar sprain) and had had to stop work for about four months. He explained that he received physiotherapy treatments during that period. He stated that he had returned to work in April 2010 and had held that employment, without interruption, until he was laid off in October 2014. He specified that, when he had returned to his position, he took up the same tasks he had performed before as a cook. The Appellant stated that he was working 35 hours or more per week even after he began receiving benefits under the Quebec Pension Plan (QPP – how Retraite Québec), that is, as of June 30, 2014. He stated that he had not voluntarily reduced his hours of work even though he was receiving QPP benefits (Exhibits GD3-3 to GD3- 14, GD3-22 and GD3-30 to GD3-32).

c) The Appellant stated that he had received employment insurance benefits from October 2014 to February 2, 2015 and had not received anything since February 2, 2015.

d) He explained that he does not have any other medical documents to provide other than those sent to the Commission on February 5, 2015 and April 7, 2015 and able to attest to the pain that he indicated that he felt (e.g., pain in his shoulders, back and neck) (Exhibits GD3-17 to GD3-20, GD3-22 and GD3-23).

PARTIES' ARGUMENTS

[17] The Appellant and his representative made the following submissions and arguments:

a) The Appellant stated that he visited five or six potential employers at the start of his benefit period in about November 2014. He stated that he had continued his job searches by meeting with restaurant owners in his area (i.e.: X Avenue, X Road in X) to give them his resumé and by talking with colleagues working in the food services sector. The Appellant explained that between February 2015 and June 2015, he visited establishments such as Le Piment bleu (X) and Restaurant Christophe (Avenue X, X). He specified that he had not limited his searches because of the pain he was feeling. The Appellant indicated having also searched for employment as a parking attendant and in a Jean Coutu pharmacy. He indicated that he had obtained only one interview with the Employer, La Croissanterie (La Croissanterie Figaro) (X Street) in about March 2016. He indicated that he was continuing his job search (Exhibit GD3-22).

b) He explained that when he had contacted a Commission officer in February 2015, it was to ask if the cost of his physiotherapy treatments could be covered by employment insurance. He explained that he was unable to pay for the physiotherapy treatments he needed because of his financial obligations and the fact that he was receiving $525.00 in benefits every two weeks. The Appellant explained that when he contacted the Commission, it was not to say that he was sick and that he was unable to work. He indicated that it was after this conversation that he sent the medical reports to the Commission. The Appellant indicated that he did not hear anything from the Commission for three months. He pointed out that if the Commission had only told him that it would not reimburse the cost of the physiotherapy treatments he was receiving, it would have been over. He explained that he had not been properly understood by the Commission (Exhibits GD3-16 to GD3-20).

c) The Appellant explained that the limitations he had described to a Commission officer during a conversation with the officer on April 7, 2015 were already present when he had returned to work in April 2010. He indicated that he had continued to suffer the pain that he had described but that the pain had not prevented him from working full-time. The Appellant mentioned that he was taking pills to combat the pain (e.g., Advil) and that he was able to continue to carry out his work. He explained that he received physiotherapy treatments and that these treatments were costly (Exhibit GD3-22).

d) He stated that he had not declared on June 10, 2015 that he was not prepared to work more than 20 hours per week because of the pain he was experiencing. He clarified that he explained at the time that if he was not receiving employment insurance benefits, he would have to continue to work, after his retirement, because his pension income would not be enough to meet his needs. He explained that he earned $19,000.00 in his last year of work with his employer. He stated that, since June 2015, he had received old age security benefits (old age pension) in addition to the benefits of about $250.00 per month that he had been receiving since June 2014 under the Quebec Pension Plan (QPP), for a total amount of about $1,200.00 per month. He stated that he had been eligible for pension benefits since April (month of his birth) and had begun receiving them in June 2015 (Exhibit GD3-41).

e) The Appellant also explained that, in June 2015, he had stated that he was able to work about 20 hours per week because he was experiencing more pain at that time but that his situation had improved eight or nine months ago (August-September 2015) and that he was able to work 40 hours or more per week.

f) He explained that even receiving a pension, he was going to have to work 20 hours per week. He explained that he had told the Commission officer that if his employment insurance benefits were cut, he would have to continue to work after his retirement. The Appellant pointed out that he was not of bad faith and that he did not want to defraud the system. He argued that he was not in a position to limit his job searches or to work only 20 hours per week (Exhibit GD3-22).

g) He pointed out that it was the second time that he had received benefits and that he knew that, while receiving benefits, he must demonstrate his availability for work.

h) The Appellant argued that the Commission made an incorrect decision because he wanted to know primarily whether employment insurance would pay for his physiotherapy treatments (Exhibits GD2-1 to GD2-5).

i) The Appellant's representative argued that there had been a misunderstanding by the Commission regarding the Appellant's request which was to find out if the cost of his physiotherapy treatments could be reimbursed by employment insurance.

j) She explained that the Commission's decision of April 7, 2015 was based on the medical certificates that the Appellant had provided in February and April 2015 (Exhibits GD3-17 to GD3-20 and GD3-23).

k) The representative argued that the only reason the Appellant provided a medical certificate stating that he needed physiotherapy treatments was to obtain information on the services offered by Service Canada. She explained that, despite his medical condition caused by a work-related accident in 2009 and which had resulted in a permanent impairment of his physical integrity of 3.30% (decision rendered by the CSST in October 19, 2010), the Appellant had returned to his employment until October 10, 2014, the date on which his employer terminated his employment because of a shortage of work (Exhibit GD3-29 or GD3-37).

l) She argued that the Appellant had had functional limitations since the work-related accident in December 2009 but that he had been able to work about 35 hours per week since he had returned to his position in April 2010. The representative explained that the pain experienced by the Appellant had not prevented him from working full-time or performing the tasks that he had performed for his employer. She stated that the Appellant had not required accommodations from the Employer. She argued that the Commission's finding that the Appellant was not considered available for work because he continued to experience pain as a result of the injury he had sustained, was incorrect.

She pointed out that the Appellant had been able to work for five years after his work-related accident. The representative stated that the medical certificates also indicated that he was able to work and that is what he had done. She explained that the reason for the Appellant's work stoppage was a shortage of work because the restaurant for which he was working had ceased operation and not because he was unable to hold the job that he had (Exhibit GD3-14).

m) The representative explained that the reference made to a period of availability of 20 hours per week in the Appellant's statement of June 10, 2015 had been one of the main factors the Commission considered in upholding its decision regarding the Appellant. She argued that that element or that statement did not appear in the statements that the Appellant had made previously to the Commission in February 2015 and April 2015. The representative explained that when the Commission officer had communicated with the Appellant on June 10, 2015, the Appellant had indicated that he could work 20 hours per week because he had just started to receive his old age security benefits. She pointed out that that statement could not apply retroactively to February 2015 and that the Commission's reconsideration decision could not apply based on that statement. She explained that that statement was made in a very specific context in which the Appellant had begun receiving his pension benefits and that he had realised that he would have to work about 20 hours per week. According to the representative, there was no basis for cancelling the Appellant's benefits as of February 2, 2015.

n) The representative argued that the Appellant had expressed his desire to return to the labour market as soon as a suitable job was offered to him. According to the representative, the Commission's analysis that the Appellant had not expressed his desire to return to the labour market when suitable employment was offered because he had indicated in his June 10, 2015 statement that he was retired, cannot be used to justify the decision it made in April 2015.

o) The representative argued that the Appellant has expressed his desire to return to the labour market by making efforts to find suitable employment. She pointed out that, in the food services field, finding employment works largely through contacts. The representative explained that the Appellant visited a number of restaurants to find employment, that he provided details to that effect, even though he did not provide material evidence (e.g., sending emails) of the searches he had carried out. She argued that, given the Appellant's age, despite the numerous efforts he had made to find employment, this situation might explain why he did not have many opportunities for employment. The representative indicated that, because of the Appellant's financial situation, he was very interested in finding employment. The representative stated that the Appellant had also expanded his job search by offering to work as a parking attendant or in a pharmacy. She argued that the Appellant had not set personal conditions that might unduly limit his chances of returning to the labour market. According to the representative, the Commission officer had drawn the conclusion that the Appellant had set personal conditions that unduly limited his chances of returning to the labour market, for medical reasons, without providing documentation of his functional limitations, but the evidence presented does not support such a conclusion. She stated that such a conclusion was based on the analysis made by a Commission officer in April 2015 based on the Appellant's statement that he was still experiencing pain. To conclude that the Appellant was limiting his job searches for that reason was not the case. She explained that, despite the Appellant's pain, he continued to work for his employer and there is nothing to indicate that he limited his job search subsequently for that reason.

p) The representative argued that there had been a misunderstanding of the Appellant's situation by the Commission when the Appellant contacted the Commission to find out if his physiotherapy treatments could be reimbursed by employment insurance. The representative argued that the Appellant's request had been interpreted as a lack of availability.

q) She explained that the Appellant's statement in June 2015, according to which he was available to work 20 hours per week, made no sense because that statement had been made in a specific content in which the Appellant had begun receiving pension benefits. She argued that the Appellant believed, at that time, that it would be enough for him to search for a job of 20 hours per week. The representative indicated that the Appellant's testimony showed that he had continued to make efforts to find employment, full-time, and that he was actively pursuing his search to that effect in order to improve his financial situation (Exhibit GD3-41).

r) The representative argued that the Commission's decision in the Appellant's case regarding his availability for work should be set aside.

s) She stated that the Appellant had always been available for work but that he had been unable to obtain suitable employment. She argued that the Appellant was entitled to receive employment insurance benefits retroactive to February 2, 2015 (Exhibit GD3-29 or GD3-37).

t) The representative explained that the Appellant wanted to indicate to the Tribunal that he would be starting new employment on May 30, 2016, four days per week and at the same time, show his availability for work and the efforts he had made to find work since he had lost his employment (Exhibits GD9-1 and GD9-2).

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

a) Availability is a question of fact. It should normally be established based on an assessment of the evidence. Availability is determined by analyzing these three factors: (1) the claimant wants to return to the labour market when suitable employment is offered; (2) he expresses that desire by making efforts to find suitable employment; and (3) he does not set personal conditions that might unduly limit his chances of returning to the labour market (Exhibit GD4-3).

b) The Commission argued that the Appellant did not express the desire to return to the labour market when suitable employment was offered because he stated that he was retired; he also did not express that desire by making efforts to find suitable employment because he did not provide any job search information. He also set personal conditions that unduly limited his chances of returning to the labour market full-time by stating he was available only 20 hours per week, which does not correspond to the normal range of expected availability and constitutes a restriction limiting the opportunities to obtain employment (Exhibit GD4-3).

c) It explained that the information provided by the Appellant and the medical documents in the file are contradictory to the extent that the Appellant should have been capable of working without restrictions according to his doctors. The Commission pointed out that the Appellant limited his availability for medical reasons without providing documentation attesting to limitations or disability. It stated that it had observed that the Appellant had been unable to find employment in the food services field in X since the start of the claim on October 12, 2014. The Commission determined that, in reality, the Appellant was limiting his availability such that it was difficult for him to find new employment. It stated that the Appellant had reported making only five or six job applications since the start of the benefit period in a field of employment in demand in X (Exhibit GD4-4).

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 his entitlement or not to receive employment insurance benefits. Availability is a question of fact that requires consideration of three general criteria 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 had shown that he was available for work. In that case (**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 ***Cornellisen-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."

[24] 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 . . . ."

[25] In ***Murray*** **(2013 FC 49)**, the matter involves an application to the Federal Court by the claimant, Norman Murray, for the following purpose:

> . . . to quash a decision of the Public Service Staffing Tribunal [PSST] dismissing his request to submit post-hearing evidence and dismissing his complaint of discrimination in a staffing process undertaken by the Immigration and Refugee Board [IRB] in 2006.

[26] In that decision (***Murray*, 2013 FC 49**), the Court set out, in the following terms, the components of the test to be applied to receive evidence adduced after the completion of the hearing:

> […]The parties agreed that the three-part test summarized in *Whyte v Canadian National Railway*, 2010 CHRT 6 [*Whyte*], which followed that used in *Vermette v Canadian Broadcasting Corporation*, [1994] CHRD 14, should be used. 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial; 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[27] On this element, the Tribunal does not accept, in its analysis, the evidence adduced by the Appellant on May 25, 2016, after the completion of the hearing on that same day (Exhibits GD9-1 and GD9-2), because the document is not a decisive factor in this case and it does not contain information likely to influence the Tribunal's decision (***Murray*, 2013 FC 49**).

[28] That document indicates that the Appellant would begin new employment as of May 30, 2016 on the basis of four days per week (Exhibits GD9-1 and GD9-2).

[29] In its assessment of the evidence, the Tribunal took into consideration the three factors set out above which make it possible 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 could limit unduly the chances of returning to the labour market.

[30] In this case, the Tribunal considers that, as of February 2, 2015, the date on which his disentitlement was established by the Commission in the decision it rendered on April 7, 2015, the Appellant continued to be available for work (Exhibit GD3-24).

[31] The Tribunal considers that the Appellant's disentitlement to benefits must be established instead as of June 10, 2015, the date on which the Appellant told the Commission that he was available to work 20 hours per week, that he was retired and that he had begun receiving old age security benefits (Exhibit GD3-41).

[32] Moreover, it was on June 10, 2015 that the Commission verbally informed the Appellant's representative that the April 7, 2015 decision regarding the Appellant would be upheld (Exhibits GD3-42 to GD3-44).

[33] The Tribunal considers, however, that there is nothing to indicate that the statements made by the Appellant on June 10, 2015 can be applied retroactively to February 2, 2015.

[34] The Tribunal is of the view that, as of June 10, 2015, the Appellant did not meet the factors set out above in regard to his availability for work.

Desire to return to the labour market when suitable employment is offered

[35] The Appellant demonstrated until June 10, 2015, his "desire to return to the labour market" when suitable employment was offered (***Faucher,* A-56-96**).

[36] The Tribunal considers that the Appellant very clearly demonstrated that when he communicated with the Commission in February 2015, it was primarily to determine if the cost of the physiotherapy treatments he was receiving could be reimbursed by employment insurance and not to state that he was unavailable for work because of his medical condition.

[37] At the hearing, the Appellant also pointed out that when he spoke with a Commission officer on April 7, 2015, he described the pain that he had continued to experience after his leave for medical reasons, but that that situation had not prevented him from returning to work full-time in April 2010 (Exhibit GD3-22).

[38] The medical certificate that the Appellant provided to the Commission on April 7, 2015 clearly indicates that the appellant is [translation] “able to work with no functional limitation” (Exhibit GD3-23).

[39] The Appellant’s representative argued that, despite the fact that the Appellant had had functional limitations since his work-related accident in December 2009, it had not prevented him from returning to his position in April 2010, carrying out the same tasks he had performed before and working 35 hours on a weekly basis. The representative pointed out that it was the Employer who had terminated the Appellant’s work on October 10, 2014 because of a shortage of work (Exhibit GD3-29 or GD3-37).

[40] The Tribunal accepts that it was not until June 10, 2015 that the Appellant failed to demonstrate his “desire to return to the labour market” when suitable employment was offered (***Faucher,* A-56-96**).

[41] In the statement he made to the Commission on June 10, 2015, the Appellant clearly indicated that, at that moment, he was unable or unwilling to work more than 20 hours per week. The Commission took care to report that, in his statement, the Appellant had reiterated [translation] “once again he cannot and does not wish to work full-time” (Exhibit GD3-41).

[42] Moreover, the Tribunal finds contradictory the statements made by the Appellant at the hearing that he had not said that he was not prepared to work more than 20 hours per week. During his testimony, the Appellant also indicated having said, on June 10, 2015, that he could work about 20 hours per week because he was experiencing more pain at that time, but that his situation had subsequently improved so that he was able to work 40 hours or more per week.

[43] The Tribunal also accepts that the indication given by the Appellant on June 10, 2015 that he did not want to work more than 20 hours per week coincides with the time when he began receiving old age security benefits (old age pension) (Exhibit GD3-41).

[44] At the hearing, the Appellant's representative did not challenge the statement that the Appellant had made on June 10, 2015 that he could work 20 hours per week because he had begun to receive his old age security benefits. According to the representative, that statement was made in a very specific context in which the Appellant had begun receiving his pension benefits and had thought that he would have to work about 20 hours per week.

[45] The Tribunal considers that the Appellant's indication about his willingness and his ability to work 20 hours or less per week does not reflect a desire on his part to return to the labour market, full-time, when suitable employment was offered.

[46] A person's availability is assessed by working day in a benefit period in 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**).

[47] 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 . . . ."

[48] The Tribunal is of the view that the statement made by the Appellant on June 10, 2015 demonstrates that, as of that date, the Appellant failed to demonstrate his desire to return to the labour market when suitable employment was offered.

[49] However, there is no evidence that before June 10, 2015, the Appellant did not desire to return to the labour market when suitable employment was offered.

Demonstration of that desire by efforts to find suitable employment

[50] The Appellant demonstrated his desire to return to the labour market by making significant efforts to find suitable employment on each working day in his benefit period until June 10, 2015.

[51] The Appellant indicated that he had met with several potential employers since the start of his benefit period, that is, as of November 2014 (Exhibits GD3-3 to GD3-13 and GD3-22).

[52] The Tribunal considers that, even after February 2, 2015, the date on which his disentitlement was established by the Commission following the reconsideration decision in his case (Exhibit GD3- 24), the Appellant continued his job search by meeting with several restaurant owners in the area where he lived and by speaking with colleagues working in the food services sector. The Appellant was able to name the establishments he visited to obtain employment (e.g., Le Piment bleu, Restaurant Christophe).

[53] The Tribunal considers that the Appellant also expanded his job search by searching in fields other than the one in which he had worked (e.g., parking attendant, work in a pharmacy).

[54] In light of the indication he gave on June 10, 2015 that he did not want and was unable to work more than 20 hours per week, and that he was retired, the Tribunal is of the view that the Appellant was not looking for full-time employment as of that date.

[55] The Appellant provided the Tribunal with evidence that he had found employment on May 25, 2016 and that that employment was four days a week beginning on May 30, 2016. However, this situation does not demonstrate that he had been actively looking for employment from June 10, 2015 until the moment that he found such employment almost one year later.

[56] The Appellant had the responsibility to actively look for suitable employment in order to be able to continue to receive employment insurance benefits (***Cornelissen-O'Neil,* A-652- 93; *De Lamirande,* 2004 FCA 311**).

[57] The evidence shows that the Appellant correctly discharged this responsibility from the start of his benefit period until June 10, 2015.

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

[58] By deciding on his own that he was unable and unwilling to work full-time, or more than 20 hours per week, and that he had retired, the Appellant set "personal conditions" that had the effect of unduly limiting his chances of returning to the labour market (***Faucher,* A-56-96**).

[59] The Tribunal considers that the Appellant did not set such conditions, based on his medical condition, for the period from the start of his benefit period until June 10, 2015. The medical certificate dated April 7, 2015 clearly indicates that the Appellant is able to perform his work "without functional limitation" (Exhibit GD3-23).

[60] The Tribunal concludes that the Appellant is entitled to receive benefits because he demonstrated his availability for work under paragraph 18(1)(a) of the Act, from the start of his benefit period until June 10, 2015.

[61] The appeal on the issue has merit in part.

CONCLUSION

[62] The appeal is allowed in part.

Normand Morin
Member, General Division – Employment Insurance Section