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

Citation: *A. C. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 10

Tribunal File Number: GE-16-2539

BETWEEN:

A. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: January 17, 2017

DATE OF DECISION: January 20, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. C., the claimant, attended the hearing via teleconference.

INTRODUCTION

[1] The claimant became unemployed on October 1, 2015. She filed for Employment Insurance (EI) benefits on October 5, 2015. An initial benefit period for sickness EI benefits was established on October 4, 2015. The Canada Employment Insurance Commission (Commission) denied the claim because the claimant was on a non-approved training course and did not prove that she would be available for work if she was not sick. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated November 25, 2015. The claimant appealed to the Social Security Tribunal.

[2] The hearing was held by Teleconference for the following reasons:

a) The complexity of the issue under appeal.

b) The fact that the claimant will be the only party in attendance.

c) The information in the file, including the need for additional information.

ISSUE

[3] The issue under appeal is whether the claimant should have a disentitlement imposed pursuant to paragraph 18(1)(b) of the *Employment Insurance Act* for failing to prove that if it were not for her illness, she would have been available for work.

EVIDENCE

Information from the Docket

[4] The claimant applied for sickness EI benefits on October 5, 2015 stating that her last day worked was October 1, 2015 due to illness or injury and while she intended to return to work with this employer, her return to work date was unknown (Pages GD3-3 to GD3-15).

[5] The employer submitted a Record of Employment (ROE) dated October 27, 2015 indicating that the claimant began working as a disability support worker on June 16, 2013 and she was no longer working due to illness or injury on October 1, 2015 accumulating 1276 hours of insurable employment (Page GD3-16).

[6] The claimant completed a training questionnaire on October 17, 2015 indicating that she spends 15 to 24 hours per week on her studies. The claimant stated that she was not approved for this course or program under an Employment or Skills Development program and she decided on her own to take it. She explained that she is taking five courses at the University level with a start date of September 9, 2015 and an end date of December 11, 2015 with a total cost of $3,620. She stated that she is obligated to attend classes and her course obligations do not occur outside of her normal work hours. The claimant stated that her classes occur all day on Monday, the afternoon and evening on Tuesday, the morning and evenings on Wednesday and all day on Friday. She stated that if she was not ill or injured, she would be available for work and capable of working. She confirmed that her intentions once she has recovered from her illness or injury is to continue the courses and return to her employment activities to the same extent she worked prior to her illness or injury (Pages GD3-17 to GD3-21).

[7] The claimant was contacted by the Commission and she stated that she was not willing to drop her courses if she was offered full-time employment because she has to take them to complete her studies. The claimant stated that her semester ends in December 2015 but she is starting again in January 2016 and will be completed her studies in April 2016. The claimant explained that she previously worked full-time while going to school stating that she worked weekends so she could go to school full-time during the week. She stated that she could work after school and on weekends (Page GD3-22).

[8] The Commission sent a letter dated October 29, 2015 informing the claimant that she cannot be paid sickness EI benefits because she did not prove that she would be available for work if she were not sick because she is on a non-approved training course (Page GD3-23).

[9] Following the claimant's Request for Reconsideration, she was contacted by the Commission and confirmed that the information currently on file is correct and that there have been no changes made to her availability since the previous documentation. The claimant was asked to clarify why her ROE does not reflect that she worked full-time and she explained that she had taken some time off during the summer but she normally can work 48 hours in a weekend because she had to stay where she works (Page GD3-26).

[10] The claimant submitted her pay stubs for the period of September 1 to September 15, 2015 which indicates that she worked 173.25 hours. Her pay stub for the period of September 16 to September 30, 2015 indicates that she worked for 129.5 hours (Page GD2-5).

Testimony at the Hearing

[11] The claimant testified at the hearing that she believes that the Commission's reasoning is that they do not believe that she was available for work however, she provided evidence that she was able to attend her courses and still work a substantial amount of hours at the same time adding that the pay stubs she provided show she worked close to 80 hours per week in the month prior to her injury and surgery.

[12] The claimant stated that she tore her ACL and meniscus explaining that she was playing soccer when she was injured. She stated that she suffered her injury and while there was a bit of waiting she was able to get into surgery within three weeks.

[13] The claimant stated that her pay stubs clearly show that despite the fact that she was in courses, she was also available for work over and above what is required normally.

[14] The claimant was asked about her response "no" to the question "Do all of your course obligations occur outside of your normal work hours" and she stated that she wondered what "normal working hours" were. The claimant explained that she worked for this company for quite some time stating that her normal working hours have varied quite a bit over the years and

there was quite a bit of flexibility in that job. She stated that she typically worked a 48 shift on the weekends and she also worked overnight shifts allowing her the flexibility to work full-time and attend school full-time during the week. She stated that she began working for this employer in October of the year she started going to University and she did graduate in April 2016.

[15] The claimant stated she had complications from her surgery and it made it very difficult for her to go to classes even for just a couple of hours a day. The claimant explained that she had a spinal leak which made her light headed, gave her headaches and she had trouble getting out of bed and walking long distances. She stated that this is why she was solely capable of focusing on her studies and was not able to submit the appeal immediately because she was overwhelmed with recovering and getting caught up as she had fallen behind in everything. She explained that full-time studies for the University were between three and five courses adding that she had to drop a course following her surgery and was unable to complete a lab session.

[16] The claimant explained that she worked in disability services and when she was working she was required to be mobile and to attend to any of the needs of the individuals so if there are any bathing needs or if a client fell she would need to be able to help them. She stated that she was also required to do common household tasks and therefore was unable to continue working while she was recovering from her injury and surgery.

[17] The claimant stated that her ROE shows zero hours in four pay periods because she took some much needed time off in the summer. She stated that her ROE is tough to read and understand without seeing the hours explaining that her hours did fluctuate and sometimes she would take time off adding that she was paid a different rate of pay when she was sleeping but those were still considered hours worked that she was paid for.

SUBMISSIONS

[18] The claimant submitted that:

a) She does not understand how she is unavailable for work because if she was not injured or ill she would be working while going to school; she was on sickness EI benefits and she was willing to work on weekends (Page GD3-22).

b) Before her injury, she was working and attending University. Due to her injury, she is no longer able to work. Her attendance at school did not impede her ability to average 60 hours per week prior to her injury and would not currently do so at this time if it were not for her injury. She is available for work but not able to do so due to her injury therefore, her attendance in University should not affect her EI status (Page GD3-24).

c) In the past four years, she went to school full-time while at the same time worked full-time. Her school hours did not restrict her abilities to work. Additionally, even if she would have stopped going to school in order to remediate these provisions, she still would not have been able to work due to her knee surgery and subsequent restrictions (Page GD2-2).

d) Normal hours are different for her as her job allowed her to work a full 48 hours on weekends. The Commission is rigid in their requirement for "normal hours" which is what led to the denial of her EI benefits. She was able to work full-time hours and attend full-time studies for the duration of her University studies.

e) It is not too rare of a thing for people to work and go to school due to financial responsibilities; it was necessary for her to work while she was going to school.

[19] The Commission submitted that:

a) The claimant argued that she has in the past gone to school full-time and at the same time worked full-time. The Commission contends that the claimant's ROE does not show full- time hours as there are four pay periods with no earnings, her average hours worked per week is about 24. Where the claimant earned $951.39 and her pay period is semi- monthly, it works out that she averaged 26 hours per week. However, the pay stubs that the claimant provided are for those pay periods she did work full-time (Page GD4-2).

b) The claimant argued that her school hours did not restrict her ability to work. The Commission contends that the claimant has stated on her training questionnaire that not all her course obligations occur outside her normal work hours. This shows that the

claimant is in training when she would normally be working. As a result, she cannot prove that she would be otherwise available for work (Page GD4-2).

c) Furthermore, the claimant states that she delayed in filing her appeal because she needed to focus solely on her studies as they were quite intensive. The Commission submitted that this statement by the claimant shows that if she could not file an appeal due to her studies, she cannot prove that she would be otherwise available for full-time work (Page GD4-2).

d) While the Commission is sympathetic to the claimant's situation, the claimant cannot prove that if she was not sick she would be available for full-time work. The claimant is attending a full-time course to which she has not been referred. The claimant has stated that she is taking five courses at University level and would not be willing to drop the courses. This clearly shows that the claimant is not available for full-time work (Page GD4-2).

e) The evidence on file clearly shows that the claimant cannot demonstrate that, if her illness were not taken into account, she would be available for work as she is attending full-time training course (Page GD4-3).

ANALYSIS

[20] The relevant legislative provisions are reproduced in the Annex to this decision.

[21] In order to receive sickness EI benefits, the claimant must show that she is incapable of working due to illness. She must also demonstrate that if it were not for her illness, she would have been available for work.

[22] In *Faucher v. Canada (Attorney General)*, A-56-96, the Federal Court of Appeal (FCA) set out the three factors to be considered when determining whether a claimant is available for work:

1. the desire to return to the labour market as soon as a suitable job is offered;

2. the expression of that desire through efforts to find a suitable job; and

3. not setting personal conditions that might unduly limit the chances of returning to the labour market.

[23] The test of availability for work is a question of mixed fact and law. The failure to apply one of the factors is an error of law (*Canada (Attorney General) v. Rideout*, 2004 FCA 304).

[24] The claimant bears the burden of proving availability (*Canada (Attorney General) v. Renaud*, 2007 FCA 328).

[25] In this case, the Tribunal accepts that the claimant began working for this employer a month after she began studying at University and remained working and going to school for the duration of her University studies. The claimant became injured in October 2015 and was no longer able to work as her employment required her to be mobile and to be able to tend to the needs of the clients she worked with. The Tribunal further accepts the claimant's testimony that she suffered complications from her surgery and this caused her considerable difficulty with her recovery.

[26] The Tribunal recognizes that the claimant was applying for sickness EI benefits as she had become injured and therefore, she is not required to show her desire to return to work as soon as a suitable job is offered or demonstrate efforts to find suitable employment. The question before the Tribunal is whether the claimant has placed personal restrictions that might unduly limit her chances of returning to the labour force.

[27] There is a presumption that a person enrolled in a course of full-time study is generally not available for work within the meaning of the EI Act however, this presumption can be rebutted by proof of exceptional circumstances (*Landry v. Canada (Attorney General)*, A-719-91).

[28] The Tribunal is satisfied the claimant had a history of working while attending school as all of the insurable hours she accumulated in order to qualify for sickness EI benefits were accumulated while she was attending full-time studies. Furthermore, the claimant was able to find work that allowed for flexibility so she could maintain full-time studies while working and it was her intention to return to this employment as soon as she was cleared to do so by her doctor. From this, the Tribunal finds that the claimant has successfully rebutted the presumption

that a person enrolled in a course of full-time study is generally not available for work within the meaning of the EI Act and she has demonstrated a willingness to reintegrate into the labour force under normal working conditions for the employment where she normally worked.

[29] The Commission argued that the claimant's ROE does not show that she worked full-time. While the Tribunal recognizes that there are four pay periods with no earnings and some weeks where the claimant did not fulfill a full-time work schedule, the Tribunal finds that the claimant should not be penalized for having found an employer who provided flexibility which allowed the claimant to focus on her studies when necessary and to work full-time or more when able. The pay stubs that the claimant submitted show that she worked 173 hours in a two week period and this is more than double what a "normal" work week would be therefore, the Tribunal finds that the fact that the claimant's ROE does not show that in each and every week she worked full-time hours is not relevant as the claimant was not working a "normal" work routine.

[30] The Commission further argued that the claimant's school hours restricted her ability to work as she stated that not all of her course obligations occurred outside her normal work hours. The Tribunal accepts the claimant's testimony that her "normal" working hours varied throughout the duration of her employment explaining that there was quite a bit of flexibility with that employment. The Tribunal does not consider this fatal to the claimant's claim for EI benefits as the employer provided flexibility which then allowed the claimant to attend full-time studies. The Tribunal placed a lot of weight on the fact that the claimant worked all of her hours required to qualify for EI benefits while she attended full-time studies and had been following that routine for several years. While it would be preferred that a claimant for EI benefits work Monday to Friday, 9:00am to 5:00pm, that is simply not always realistic and claimants who work outside of "normal" working hours should not be penalized for finding work that allowed them to fulfil other responsibilities.

[31] The Commission stated that the claimant delayed filing her appeal because she needed to focus solely on her studies and this shows that if she could not file an appeal due to her studies then she cannot prove that she would be otherwise available for work. The Tribunal finds that the Commission's argument does not have merit as the claimant testified that she

suffered complications from her surgery and this prolonged and made for a difficult recovery period. The Tribunal is mindful that the claimant was not required to look for work as she was off work due to injury or illness and therefore, considers it reasonable that life was more difficult and complicated for the claimant following her injury and surgery.

[32] While the Tribunal respects the Commission's argument that the claimant was unwilling to drop the courses, the fact remains that when she was able to return to work, she would have return to her employer who provided flexible working conditions that allowed the claimant to work and attend University full-time.

[33] Additionally, the EI Act is designed to make benefits available quickly to those unemployed persons who qualify under it and so it should be liberally interpreted to achieve that end (*Abrahams v. Canada (Attorney General)*, A-872-80). The claimant worked while attending full-time studies because she needed to in order to meet her financial obligations. The claimant became unemployed through no fault of her own when she became injured and while she was no longer able to work, she was still able to attend her classes. The Tribunal considers it unreasonable that the claimant should then be denied EI benefits because she was not willing to give up her studies when she has shown that throughout her University education she has managed to work and study simultaneously.

[34] For these reasons, the Tribunal concludes that the claimant has proven that, if it were not for her injury, she would have been available for work pursuant to paragraph 18(1)(b) of the EI Act.

CONCLUSION

[35] The appeal is allowed.

K. Wallocha

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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.