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

Citation: *J. L. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 189

Tribunal File Number: GE-16-4790

BETWEEN:

J. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Me Dominique Bellemare, Vice-Chairperson, General Division- Employment Insurance Section

HEARD ON: March 14, 2017

DATE OF DECISION: 12 April 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant was present by teleconference. Also present by teleconference, was Mr. Keavin Mathieu Gallant Finnerty of the University of Ottawa EI Litigation Clinic. The Respondent, the Canada Employment Insurance Commission of Canada (Commission) did not attend the hearing.

INTRODUCTION

[2] The Appellant is appealing a reconsideration decision issued by the Commission on November 25, 2016 disentitling him from receiving Employment Insurance benefits because he was not available for work as he was only capable to work-part time due to a medical restriction.

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

a) The complexity of the issue(s) under appeal.

b) The fact that the credibility may be a prevailing issue.

c) The fact that more than one party will be in attendance.

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

e) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[4] Was the Appellant available for work within the meaning of section 18 of the *Employment Insurance Act* (Act)?

[5] Did the decision of the Commission respect Charter values as per the principles established in ***Doré vs Barreau du Québec***, 2012 SCC 12?

EVIDENCE

Documentary evidence

[6] The file contains the usual documents, such as the initial application for benefits, the notes from the Commission, the record of employment, the initial decision, the request for reconsideration and the reconsideration decision. The Commission disentitled the Appellant from receiving regular Employment Insurance benefits from September 25, 2016.

[7] It also contains documents that are specific and relevant to this case, namely:

a) A note from Mr. Salerno, psychologist, dated September 30, 2016, stating that the Appellant is "generally" not able to return to work. Quoting a report from Dr Zacharia, psychiatrist, Mr Salerno mentioned that "it appears that the Appellant is suffering from extreme depression, extremely severe anxiety and extremely severe stress".

b) A note from Dr Martin, family doctor, dated October 26, 2016, stating that the Appellant cannot go back to work for X but that he can work part-time in a low-stress environment.

c) A psychological file review dated August 11, 2016 from Dr Monteiro, stating that the Appellant return to work be limited to part-time work, albeit fragile in his recovery.

d) A file note by the Commission dated November 17, 2016, which relates to a telephone conversation with the Appellant giving the reasons to dismiss his request for reconsideration. In this notes it explains that the family doctor and the psychologist do not recommend that the Appellant is able to go back to work, and to the Commission would need a note that he is capable to return to work on a part-time basis.

e) A note from Dr Martin, family doctor, dated November 21, 2016 that the Appellant is able to go back to work part-time.

f) A file note by the Commission dated November 25, 2016, stating that unless there is medical evidence of a prognosis showing improvement, he cannot prove his availability.

g) With his Notice of Appeal, the Appellant also filed evidence of his job that he has secured in December with X Employment Services, reports with META counselling services, his Service Canada Job Search from, various jobs he applied for and email exchanges with potential employers.

h) A note by Mr. Salerno, psychologist, dated January 30, 2017, stating that except for a recent setback, the psychological situation of the Appellant has improved in his new job, mostly that once he is in a predictable environment, he can perform some work.

Oral evidence

[8] The Appellant testified that after a work stoppage due to severe psychological problem resulting from a work injury, he has been actively looking for work since September 25, 2016. He has indeed secured a part-time cleaning position through a job agency on December 2, 2016. The job pays $12.50 per hour, which is below what he did before when he was paid $14.60 an hour, but that is fine with him. He worked 3 days per week at 8 hours per day.

[9] Prior to that, he had regular meetings with an employment counsellor, the evidence of which is in his file. He undertook training sessions, filed job application, did interviews, went to the Employment Centers and did some networking. He diligently looked for work, reviewed jobs posted, looked for entry positions at the CRA and Walmart and built up his résumé.

[10] He has no restrictions on his job search except for his medical requirements that he works only part-time. He has looked for work in his city of X, but also in X, which is not too far. He has a car and can drive to work. His field of part-time work included retail businesses and similar jobs, and there are plenty of jobs available. He also looked for minimum-wage jobs. His job search was on a full-time basis.

[11] His job lasted until February 19, 2017, as he suffered an anxiety setback. He is now looking at a job with the local library.

SUBMISSIONS

[12] The Appellant submitted that:

a) He has shown unequivocally that he desires to return to the job market as soon as a job was offered to him, and he indeed returned to the job market on December 2, 2016;

b) He expressed strongly his desire to return to the job market by his constant efforts, such as hiring a counsellor, attending interviews, fling job application, going to training, as per his testimony and documentary evidence shows.

c) He has not set upon himself personal conditions that might unduly limit his chances of returning to the labour market. His limitations were medical, as per his treating physicians and psychologists showed in their various reports, but he could work for three days per week, and he did work for three days per week. There were plenty of jobs available for him on part-time basis, and he did return to the job market on December 2, 2016, see ***Faucher*** A-56-96, ***Gulutzan CUB8465***, ***Whiffen***, A-1472-92, ***Bois***, supra, as cited by the Commission is not relevant as it was on an issue of voluntary leave and the Appellant has respected the principles enumerated on ***Cornelissen-O'Neil***, supra.

d) In ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2004 FCA 66, 2004, notice of a constitutional question under section 57 of the *Federal Courts Act* is not required in every case where a constitutional issue is raised or in every case where a party asserts a constitutional right. It is the nature of the remedy sought in a particular case that will determine whether a section 57 notice is required. The objective of section 57 is to preclude a Court from making a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds, unless the constitutional question underlying the judgment is the subject of prior notice to Canada and the provinces. A notice of constitutional question under section 57 is simply a means of ensuring that appropriate notice is given. It is axiomatic that there is no need for a section 57 notice in a case where the judicial remedy is something other than a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds. Of course, other remedies are possible. This is explained in the judgment of Justice Lamer, as he then was, in ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038 (S.C.C.). Although he was in dissent, all of the judges agreed with his analysis on this point. ***Slaight Communications*** establishes that, generally speaking, a discretionary decision

may be subject to two forms of constitutional challenge. One is a challenge to the legislation itself. Such a challenge is based on the premise that the legislation, properly interpreted, expressly or by necessary implication confers on the decision maker the authority to make a decision that infringes a constitutional right. In a challenge of that kind, the argument must be that the legislation is unconstitutional, and the remedy will be aimed at the legislation.

e) The other form of constitutional challenge to a discretionary decision is based on an argument that the legislation does not authorize the decision maker to make a decision that infringes a constitutional right. In a challenge of that kind, the remedy is not aimed at the legislation at all, but only at the decision. The constitutional challenge in this case is limited to the decision. It is common ground that the Minister has the discretionary authority to decide whether to approve the construction of the winter road through Wood Buffalo National Park, and that her decision is subject to challenge on constitutional grounds. However, ***Mikisew Cree First Nation***, supra, does not argue that the governing legislation expressly or by necessary implication authorizes the Minister to make a decision that infringes a constitutional right. Nor does Mikisew Cree First Nation argue that the legislation must be read down to conform to a constitutional principle, or to avoid the inevitable infringement of a constitutional right. The argument is that the manner in which the Minister exercised her discretion infringed the treaty rights of Mikisew Cree First Nation. That argument does not call for a decision as to the constitutional validity, applicability or operability of legislation. It follows that no notice of constitutional question was required under section 57 of the Federal Courts Act.

f) In ***Doré v. Barreau du Québec***, 2012 SCC 12, [28] The scope of the review of discretionary administrative decisions that provided the backdrop for the decision in ***Slaight,*** supra was altered by this Court's decision in ***Baker v. Canada*** (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 65. In that case, L'Heureux-Dubé J. concluded that administrative decision-makers were required to take into account fundamental Canadian values, including those in the Charter, when exercising their discretion (***Baker***, at paras. 53-56). How then does an administrative decision-maker apply Charter values in the exercise of statutory

discretion? He or she balances the Charter values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In Lake, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the prima facie infringement of mobility rights under s. 6(1) (para. 27). In ***Pinet***, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19). [56] Then the decision-maker should ask how the Charter value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the Oakes context. As this Court recognized in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the Charter balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of Dunsmuir, "falls within a range of possible, acceptable outcomes" (para. 47).

[13] The Respondent submitted that:

a) For the purpose of proving availability under paragraph 18(1)(a) of the Act, subsection 50(8) of the Act states that the Commission may require a claimant to prove that he is making reasonable and customary efforts to obtain suitable employment.

b) Availability is a question of fact, which should normally be disposed of on the basis of an assessment of the evidence. It is determined by analyzing three factors:

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.

c) Although the Appellant has demonstrated he sincerely wants to work part-time, the information presented does not demonstrate that he is fully capable of and available for work without restriction as required by the *Employment Insurance Act*. The arguments and the jurisprudence the Appellant has submitted outline the general factors to be considered when reviewing availability. As the Appellant concluded, the Commission is not questioning his desire to return to work or the actions he has taken to return to the labour market. The Commission has reviewed the question of whether or not the Appellant has proven he is capable of returning to the labour market without restrictions given the documentary evidence on file.

d) The Appellant was not disentitled from Employment Insurance benefits for the entire period requested. He initially made a claim for benefits stating he was ill and not capable of working; a medical note was provided stating his incapacity was for an indefinite period of time and he received 15 weeks of sickness benefits from May 29, 2016 to September 24, 2016 which is the maximum allowed under the paragraph 12(3)(c) of the Act for a prescribed illness. Once sickness benefits had reached the maximum entitlement he claims he is capable of working although it appears by the documentation on file the condition which rendered him incapable of working had not improved.

e) The initial medical documentation dated August 11, 2016 submitted from one of the specialists treating his condition, identifies the claimant as “likely being able to work part-time in a low stress environment” but more specifically the medical note dated September 30, 2016 submitted by another treating specialist identifies that although there may be some opportunity of Mr. J. L. working 1 hour per day, he is “disabled from work in general” and “an accurate return to work date is not possible” at this time.

f) Furthermore, the Commission has considered the subsequent medical note dated November 21, 2016 submitted from the Appellant’s family Doctor. The medical states Mr. J. L. was able to return to work as of September 26, 2016 for 3 days per week and that gradual return to work full time seems reasonable. This note does not align with the

September 30, 2016 note from the client's treating Psychologist. Given the inconsistent medical information it makes it difficult to conclude that the client has demonstrated his capacity to work or his ability to work even for the 3 days indicated.

g) The Commission has considered the statements of the Appellant and has reviewed the medical documentation presented and while it is commendable the Appellant has a desire to return to work on a part time basis and he has been actively seeking part time employment, there is still a question of his capabilities and his ability to return to work. The information presented does not demonstrate that he is fully capable of and available for work without restriction as required by the *Employment Insurance Act* in paragraph 18(1)(a) for the period of time he is requesting regular benefits. The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal enumerated the criteria to be analyzed in assessing the evidence of a claimant's availability, see ***Canada (AG) v. Bois***, 2001 FCA 175. Furthermore, the Court held that the burden on the claimant to prove availability is a statutory requirement of the legislation that cannot be ignored. In order to obtain employment insurance benefits a claimant must be actively seeking suitable employment, even if it appears reasonable for the claimant not to do so, see ***Canada (AG) v. Cornelissen-O'Neil***, A-652-93 and ***Lamirande v. Canada (AG)***, 2004 FCA 311.

ANALYSIS

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

Availability

[15] In order to be found available for work, a claimant shall:

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

2. express that desire through efforts to find a suitable employment; and

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

All three factors shall be considered in making a decision, see ***Faucher***, supra.

[16] Regarding the first factor, there is ample evidence in the file and in the Appellant's testimony that has always had a desire to return to the job market. Immediately following the end of his of his sickness benefits, his job search was on a full-time basis.

[17] Regarding the second factor, there is also ample evidence in the file and in the Appellant's testimony that he expressed the desire to return to the job market through very strong and sustained efforts to find a suitable employment. Also, the Commission agreed that regarding the first two factors, the Appellant met the requirements of the ***Faucher,* supra**.

[18] It is regarding the third factor that there is a difference of opinion between the parties. The Commission is of the opinion that the medical condition of the Appellant was still not good enough for him to return to the job market. They asked for medical evidence to support this. In a conversation with the Appellant on November 17, 2016, the Commission informed the Appellant that since his doctor and his psychologist did not support his return to work, he was not considered available for work. The exact quote from the file note of the Commission is "*I told him that if that's true I'll need a note stating that as of whatever date he was advised to return to work part time (gradual return) and is able to work (ex/ 3 days per week/ 20 hrs per week) from then until further advised*" (GD3-44). The Appellant secured the medical opinion of Dr Martin on November 21, 2016, stating that the Appellant could go back to work as of September 26, 2016, on a part-time basis for three days per week.

[19] On November 25, 2016, the Commission stated that despite the November 21 medical opinion of Dr Martin, the Appellant was still not available for work. The quote in the note is: "*Because the medical documentation provided does not provide a prognosis for continued improvement as is expected and required to receive partial weeks while on regular benefits. For such reasons the initial decision will be maintained as availability has not been proven*" (GD3-50). In the Tribunal's opinion, the Commission is basing itself on the note of Dr Martin (DG3-24) referring to a medical opinion that was not filed, of a unnamed psychiatrist that the Appellant was unfit to return to work at X, his former employment, but that he could work in a low-stressed environment. But that opinion never stated that the Appellant was unfit to return to any work (emphasis added).

[20] The Tribunal's opinion is that more recent medical opinion has more weight than older ones. Dr Martin's note is unequivocal: The Appellant was fit to return to work as of September 26, 2017. This was also very strongly supported by two important facts. The first one is that the Appellant did return to work on December 2, 2016, for a part-time position for three days per week at eight hours per day of work. He even accepted a job at a lower salary than he was receiving before. That in itself is evidence that he could return to work. The second important factor is the opinion of Me Salerno dated January 30, 2017, psychologist, that despite some setbacks, the Appellant could and should return to work.

[21] While the third factor is that the Appellant must not set personal conditions that might unduly limit their chances of returning to the labour market, paragraph 9.002(1)(a) of the Regulations, states that for the purposes of section 18 of the Act, when determining what is suitable employment one must have regard to "*the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work*". The Tribunal sees in this wording that the health condition is a factor to be considered. In this situation, the only limitation that the Appellant is one of mental health. He stated that he has a car and drives to work. While his medical condition is not perfect, he can still work and has indeed worked from December 2, 2016 to February 19, 2017.The Tribunal notes that there are no case law yet on how to reconcile 9.002 of the Regulations and the ***Faucher***, supra, factors.

[22] In the Tribunal's opinion, the Appellant did not set upon himself a personal condition but rather looked for suitable employment that would met his health condition. The evidence supports this, as the Appellant's efforts were directed to this type of job search, and he was successful. The Commission imposed a burden of medical evidence upon the Appellant that was too high. Every time that he fulfilled one of their requirements, they kept asking for more.

[23] The Tribunal therefore determines that the Appellant has met the condition of the third factor as per the law to be considered available to receive Employment Insurance benefits.

The Charter values argument

[24] While this argument is interesting, since the Tribunal has allowed the appeal on the question of availability, this argument becomes moot.

CONCLUSION

[25] The appeal is allowed as the Appellant has proven his availability for work as of September 26, 2016.

Me Dominique Bellemare
Vice-Chairperson, 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.

(2) A claimant to whom benefits are payable under any of sections 23 to 23.2 is not disentitled under paragraph (1)(b) for failing to prove that he or she would have been available for work were it not for the illness, injury or quarantine.

9.001 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 resumé 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.

9.002 (1) 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; and

(c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.

(d) to (f) [Repealed, SOR/2016-162, s. 1]

(2) However, employment is not suitable employment for the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8) of the Act if

(a) it is in the claimant's usual occupation either at a lower rate of earnings or on conditions less favourable than those observed by agreement between employers and employees, or in the absence of such agreement, than those recognized by good employers; or

(b) it is not in the claimant's usual occupation and it is either at a lower rate of earnings or on conditions less favourable than those that the claimant might reasonably expect to obtain, having regard to the conditions that the claimant usually obtained in the claimant's usual occupation, or would have obtained if the claimant had continued to be so employed.

(3) After a lapse of a reasonable interval from the date on which an insured person becomes unemployed, paragraph (2)(b) does not apply to the employment described in that paragraph if it is employment at a rate of earnings not lower and on conditions not less favourable than those observed by agreement between employers and employees or, in the absence of any such agreement, than those recognized by good employers.