



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. R. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 66

Tribunal File Number: GE-16-3831

BETWEEN:

E. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: March 10, 2017

DATE OF DECISION: May 8, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

L. R., the Appellant's mother and witness

INTRODUCTION

[1] The Appellant applied for regular employment insurance benefits (EI) under the *Employment Insurance Act* (EI Act) on March 7, 2016. A benefit period was established as of February 28, 2016. The Respondent determined that the Appellant failed to provide information necessary for the determination of his entitlement to EI by failing to report for an interview pursuant to subsection 50(6) of the EI Act. As a result, the Respondent imposed a disentitlement effective June 1, 2016, the date of the scheduled interview.

[2] The Appellant requested a reconsideration of the Respondent's decision and by letter dated September 8, 2016 the Respondent maintained its decision. The Appellant has appealed this decision to the Tribunal.

[3] The hearing was held by videoconference because the Appellant was represented and videoconferencing was available in the area where the Appellant resides.

ISSUE

[4] The issue is whether the Appellant is disentitled from receiving EI pursuant to section 50 of the EI Act for failing to comply with the Respondent's requirements imposed under subsection 50(6) of the EI Act and set out in a letter dated May 11, 2016 requiring the Appellant to attend a Claimant Information Session, at which time he was to provide a job search form.

EVIDENCE

[5] In a letter dated May 11, 2016 (the Letter) the Respondent advised the Appellant that he had been selected to attend a "Claimant Information Session". The Letter indicated that the Appellant was required to conduct sustained job search efforts. The details of his job search efforts were to be submitted at the session. The Letter continued:

It is very important that you attend this session. If you do not attend, or if you do not provide your completed job search form, your EI benefits could be stopped.

[6] The Appellant's mother confirmed that the Letter was addressed to her home address and that the Appellant received the Letter.

[7] The Appellant's mother stated that he had his job search form completed and because of the Appellant's anxiety, arrangements had been made for someone to take him to the session on June 1, 2016 because she had to work that day. She indicated that despite these efforts, it was impossible for him to go to the session because of his anxiety.

[8] By letter dated June 8, 2016 the Respondent advised the Appellant that they were unable to pay him EI from June 1, 2016 because he failed to attend a Claimant Information Session on June 1, 2016 as directed in the Letter. This letter indicated that the Respondent had been unable to contact the Appellant by telephone and asked him to contact them.

[9] The Appellant requested a reconsideration in early July 2016. He stated that he had been unable to attend the session because of his anxiety, his phone was broken so he was unable to be contacted and at the same time he was in contact with Home Depot.

[10] The Appellant's mother confirmed the Appellant's statement as to the difficulties he was having with his phone, his anxiety and his inquiries with Home Depot. The Appellant's mother indicated the Appellant's anxiety makes it difficult for him to go out anywhere.

[11] The Respondent's notes indicate that they were unable to get in touch with the Appellant, despite leaving a message on August 16, 2016, a message on August 17, 2016, sending a letter on August 17, 2016 and leaving a message on August 31, 2016 (after receiving a message from the Appellant). The Respondent's notes indicate that a decision was made on the reconsideration based on the information on file.

[12] The Appellant's mother indicated that the Appellant tried to contact the Respondent but sometimes he would not leave messages. She indicated that she tried to get him to go to the Service Canada Centre but she could not get him to attend because of his anxiety. She went herself but she was advised that they could not tell her anything.

[13] The Appellant's mother indicated that the Appellant was diagnosed as having ADHD at age 8 and when he was in school he saw someone for his anxiety. She indicated that he has been seeing a psychologist for his anxiety since around November 2016. A letter from the Appellant's psychologist dated March 9, 2017 indicates that the Appellant has been attending counselling for assistance with his anxiety.

[14] The Appellant's mother indicated that although the Appellant's job search form was completed before the scheduled session on June 1, 2016, the Appellant lost the form and had to redo it. He submitted the new job search form with his appeal to the Tribunal.

[15] The Appellant indicated in his Notice of Appeal that he was working casually in July and started a full time job in August 2016.

[16] The Appellant's mother indicated that the Appellant advised her that he was too anxious to attend the hearing.

SUBMISSIONS

[17] The Appellant submitted the following in his Notice of Appeal:

- a) he had no working phone at the time the Respondent was trying to get in touch with him;
- b) he worked on a casual basis in July 2016 and started full time work in August 2016; therefore he is only looking for benefits from his cut-off date of (June 1, 2016) to the date he obtained employment.

[18] The Appellant's mother, however, indicated that the work in August 2016 was short lived but he has been working since January 2017.

[19] The Respondent submitted that the Appellant is disentitled to receive EI for failure to contact the Commission and report to an interview pursuant to subsection 50(6) of the EI Act despite the Respondent's efforts to contact the Appellant. The disentitlement should last until he complies with the requirements of the EI Act. The Respondent noted that the job search efforts were not provided with his request for reconsideration.

[20] The Respondent submitted that considerable effort was made to contact the Appellant, and the Appellant has still not returned the Respondent's call from August 30, 2016. The Respondent concluded that the Appellant's explanation of a broken phone and anxiety did not absolve him of the responsibility to attend the interview or contact the Respondent to reschedule the interview or provide the job search information.

[21] The Respondent submitted that the Appellant has multiple resources to contact them other than by using his phone.

[22] Initially, the Respondent pointed out that the Appellant had not provided any medical documentation to support his condition. Following receipt of the psychologist's letter, the Respondent submitted that the evidence from the Appellant's psychologist only confirms that the Appellant is currently attending treatment but does not provide any detail as to how long the treatment has taken place or whether his medical condition has existed since June 1, 2016 when the disentitlement was first imposed.

[23] The Respondent relies upon *Canada (A.G.) v. Vilaca*, A-370-99, which is in relation to a claimant's obligation to attend an interview. The Tribunal notes that this case is in relation to paragraph 27(1)(d) of the EI Act, not subsection 50(6) upon which the Respondent relies in this matter.

[24] The Respondent also relies upon *Paxton v. Canada (A.G.)*, 2002 FCA 360, which the Respondent states affirms the principle that the Commission has the sole discretion to vary the administrative requirements under section 50 of the EI Act.

ANALYSIS

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

[26] Pursuant to subsection 50(6) of the EI Act the Respondent may require a claimant to be at a suitable place at a suitable time in order to make a claim for benefits in person or provide additional information about a claim. Pursuant to subsection 50(1) of the EI Act, a claimant who fails to fulfil or comply with a condition or requirement under section 50 is not entitled to receive benefits for as long as the condition or requirement is not fulfilled or complied with.

[27] The Federal Court of Appeal in *Canada (A.G.) v. Yeo*, 2011 FCA 26 confirmed that claimants for unemployment insurance benefits have the burden of proving their entitlement. Therefore, in order to be successful on appeal, the Appellant must prove that he has met the requirements under section 50 of the EI Act. The standard of proof is on a balance of probabilities.

[28] The Appellant has not alleged that he did not receive the Letter setting out the details of the session or the requirement for his attendance. The Appellant's mother confirms that he received the notice, was aware of its contents and was ready and willing to attend, but was unable to comply because of his anxiety. The Appellant stated that he was unable to subsequently contact the Respondent because of his phone problems and his anxiety.

[29] On the evidence before it, the Tribunal finds that the Appellant received the Letter and was therefore aware of the requirement for him to attend the session on June 1, 2016 and provide the completed job search form.

[30] The Appellant failed to attend the session on June 1, 2016 and provide the job search form and is therefore not entitled to receive benefits for as long as the condition or requirement is not fulfilled or complied with.

[31] The Appellant provided the job search form on October 13, 2016 when he filed his Notice of Appeal. Therefore, he met this requirement on that day.

[32] The Appellant has still not contacted the Respondent to reschedule and attend the session; pursuant to subsection 50(1) of the EI Act, the Appellant is therefore not entitled to receive benefits until he has complied with this requirement.

[33] That said, the Respondent may waive or vary any of the conditions and requirements of section 50 if it is of the opinion that the circumstances warrant the waiver or variation for the benefit of a claimant (subsection 50(10) of the EI Act). This is a discretionary power (*Paxton v. Canada (A.G.)*, 2002 FCA 360). Case law has consistently held that the Respondent's discretionary decisions can only be varied if the Respondent did not exercise its power judicially.

[34] The Federal Court in *Canada (A.G.) v. Purcell*, A-694-94, found that a discretionary power is not exercised judicially if it is established that the decision maker:

- a) acted in bad faith;
- b) acted for an improper purpose or motive;
- c) acted in a discriminatory manner
- d) took into account an irrelevant factor; or
- e) ignored a relevant factor.

Bad faith, improper purpose or motive and discriminatory manner

[35] The Appellant has not submitted that the Respondent acted in bad faith, for an improper purpose or motive or in a discriminatory manner. In reviewing the evidence on file, the Tribunal has not noted the appearance of any evidence that would suggest that the Respondent treated the file or rendered a decision in bad faith, for an improper purpose or motive or in a discriminatory manner.

[36] Therefore, the Tribunal finds, on the evidence before it, that the Appellant has not established on a balance of probabilities that the Respondent did not act judicially with respect to these three factors.

Relevant and irrelevant factors

[37] The Respondent considered the evidence before it that was relevant to its decision. It considered the available evidence with respect to the Appellant's anxiety and the issues he had with his phone. The Respondent considered that there were other avenues available to the Appellant to contact the Respondent if his phone was not working.

[38] The Tribunal finds that these factors considered by the Respondent were relevant factors.

[39] However, the Respondent was not able to consider all of the relevant factors in relation to the Appellant's anxiety because some of this evidence was presented at the hearing that was

not attended by the Respondent. The evidence the Tribunal finds to be relevant includes the Appellant's mother's evidence of:

- a) the severity of the Appellant's anxiety,
- b) its impact on the Appellant's daily life and the difficulty he has going out,
- c) the failed attempts to get him to attend the session on June 1, 2016, and
- d) the history of his anxiety .

[40] It was the Appellant's anxiety, the very thing that prevented him from attending the session, which prevented the Appellant from providing these relevant details to the Respondent.

[41] Where this evidence was not considered, the Tribunal finds that the Respondent did not act judicially in making its decision because it was unable to consider all relevant factors. A proper consideration of the reasons why the Appellant did not comply with the requirements under subsection 50(6) requires an examination of whether these reasons impact on the Appellant's ability to explain his non-compliance.

[42] Because the Respondent failed to exercise its discretion judicially in determining whether it should waive the conditions and requirements set out in section 50 of the EI Act, the Tribunal has the authority to make the decision that the Respondent should have rendered (subsection 54(1) of the *Department of Employment and Social Development Act*).

[43] The Tribunal has considered the serious impact that the Appellant's anxiety has on his daily life and his inability to go out as described by his mother at the hearing.

[44] The Tribunal finds that it more likely than not that the Appellant was not able to attend the session because of his anxiety.

[45] However, the Tribunal does not find that the evidence on file supports a finding that his anxiety and his telephone problems warrant a waiver or variation of the requirement to comply with subsection 50(6) of the EI Act to attend the information session and provide the job search form for the following reasons:

- a) The Appellant could have filed his job search sheet with a written explanation as to why he was unable to attend. The Appellant was able to request a reconsideration and therefore his anxiety was not so debilitating around that time that he was unable to communicate in writing.
- b) The Appellant may not have been able to speak with the Respondent directly on the telephone, but he did have the opportunity to leave messages, and could have left a detailed message explaining his condition and how it prevented him from complying with the Respondent's requests.
- c) The Appellant states that he was speaking to Home Depot at the same time and for some of the time he was working on a casual basis. The Tribunal finds that although the Appellant may not have been able to attend the session because of his anxiety, it is more likely than not that he did not follow up with the Respondent because he was working on a casual basis and had other irons in the fire.
- d) Lastly, the Tribunal finds that more medical evidence around the time of the Appellant's information session is required in order to justify waiving the requirement to attend the session pursuant to subsection 50(10) of the EI Act.

CONCLUSION

[46] The Appellant failed to fulfil all of the requirements set out in the Letter issued pursuant to subsection 50(6) and is therefore disentitled to benefits until all of the requirements are fulfilled.

[47] The Respondent had the discretion to waive or vary the requirements and decided that the circumstances did not warrant a waiver or variance. The Tribunal finds that this decision was not made judicially because the Respondent failed to consider all relevant factors in making its decision.

[48] The Tribunal has made the decision that the Respondent should have made, but the outcome did not change.

[49] On the totality of the evidence before it, the Tribunal is not satisfied that it is more likely than not that the circumstances warrant a waiver or variation of the conditions or requirements for the Appellant's benefit pursuant to subsection 50(10).

[50] The appeal is dismissed.

Angela Ryan Bourgeois
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

48 (1) No benefit period shall be established for a person unless the person makes an initial claim for benefits in accordance with section 50 and the regulations and proves that the person is qualified to receive benefits.

(2) No benefit period shall be established unless the claimant supplies information in the form and manner directed by the Commission, giving the claimant's employment circumstances and the circumstances pertaining to any interruption of earnings, and such other information as the Commission may require.

(3) On receiving an initial claim for benefits, the Commission shall decide whether the claimant is qualified to receive benefits and notify the claimant of its decision.

49 (1) A person is not entitled to receive benefits for a week of unemployment until the person makes a claim for benefits for that week in accordance with section 50 and the regulations and proves that

(a) the person meets the requirements for receiving benefits; and

(b) no circumstances or conditions exist that have the effect of disentitling or disqualifying the person from receiving benefits.

(2) The Commission shall give the benefit of the doubt to the claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the claimant under section 30 or disentitling the claimant under section 31, 32 or 33, if the evidence on each side of the issue is equally balanced.

(3) On receiving a claim for benefits, the Commission shall decide whether benefits are payable to the claimant for that week and notify the claimant of its decision.

50 (1) A claimant who fails to fulfil or comply with a condition or requirement under this section is not entitled to receive benefits for as long as the condition or requirement is not fulfilled or complied with.

(2) A claim for benefits shall be made in the manner directed at the office of the Commission that serves the area in which the claimant resides, or at such other place as is prescribed or directed by the Commission.

(3) A claim for benefits shall be made by completing a form supplied or approved by the Commission, in the manner set out in instructions of the Commission.

(4) A claim for benefits for a week of unemployment in a benefit period shall be made within the prescribed time.

(5) The Commission may at any time require a claimant to provide additional information about their claim for benefits.

(6) The Commission may require a claimant or group or class of claimants to be at a suitable place at a suitable time in order to make a claim for benefits in person or provide additional information about a claim.

(7) For the purpose of proving that a claimant is available for work, the Commission may require the claimant to register for employment at an agency administered by the Government of Canada or a provincial government and to report to the agency at such reasonable times as the Commission or agency directs.

(8) 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.

(8.1) For the purpose of proving that the conditions of subsection 23.1(2) or 152.06(1) are met, the Commission may require the claimant to provide it with an additional certificate issued by a medical doctor.

(9) A claimant shall provide the mailing address of their normal place of residence, unless otherwise permitted by the Commission.

(10) The Commission may waive or vary any of the conditions and requirements of this section or the regulations whenever in its opinion the circumstances warrant the waiver or variation for the benefit of a claimant or a class or group of claimants.