



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. T. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 95

Tribunal File Number: GE-16-4527

BETWEEN:

G. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: June 14, 2017

DATE OF DECISION: June 23, 2017

REASONS AND DECISION

OVERVIEW

[1] The claimant made an initial claim for Employment Insurance (EI) benefits on May 2, 2016; his claim was made effective May 8, 2016. On September 12, 2016, the claimant was able to return to work on modified duties and requested regular EI benefits. On September 20, 2016, the Canada Employment Insurance Commission (Commission) disentitled the claimant from receiving benefits after finding that he would only accept part-time work and therefore he had not proven his availability for full-time work. The claimant requested a reconsideration of this decision, and on November 9, 2016 the Commission maintained its initial decision. The claimant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on November 30, 2016.

[2] The Tribunal must decide whether the claimant has proven that he was available for work in accordance with paragraph 18(1)(a) and section 50 of the *Employment Insurance Act* (EI Act) and section 9.001 of the *Employment Insurance Regulations* (Regulations).

[3] 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.

[4] G. T., the claimant attended the hearing via teleconference with his wife, M. T. who attended to provide support.

[5] The Tribunal finds that the claimant's disentanglement to EI benefits should be terminated as of November 4, 2016 as the claimant has proven his availability in accordance with paragraph 18(1)(a) and section 50 of the EI Act and section 9.001 of the Regulations.

[6] The reasons for this decision follow.

EVIDENCE

Information from the Docket

[7] The claimant's last day of work was January 13, 2016. He applied for sickness EI benefits on May 2, 2016 stating that he would be returning to this employer but his return to work date is unknown.

[8] The claimant indicated that he was unable to work for medical reasons and in receipt of group wage loss insurance benefits from January 13 to May 2, 2016.

[9] The claimant identified his job title as building operator – maintenance.

[10] The employer submitted a Record of Employment (ROE) dated May 2, 2016 indicating that the claimant began working on August 19, 2015 and he was no longer working due to illness or injury on January 13, 2016 accumulating 819 hours of insurable employment. The employer commented that the claimant was eligible for Short Term Disability (STD) from January 14 to May 18, 2016 but he was not eligible for the employer's Long Term Disability (LTD) group plan.

[11] The Commission sent a letter dated May 24, 2016 informing the claimant that he was approved 15 weeks of sickness EI benefits starting May 8, 2016.

[12] The claimant submitted a medical certificate dated August 30, 2016 which states that the claimant is fit to return to work on September 12, 2016 but only on modified duties.

[13] On August 31, 2016, the claimant spoke to the Commission and he stated that he is no longer able to do the requirements of his job, he requires modified duties but his employer was unable to accommodate this. The claimant was advised to provide an updated medical that specifically outlines his modified duties including any restrictions that he may have and whether he is cleared to work full-time or part-time.

[14] The claimant submitted a medical certificate dated September 9, 2016 which indicates that the claimant would only be able to return to work on restricted duties; limited to three or

four hours daily, sedentary, no lifting over 20 pounds and he needs to avoid sitting, standing or walking longer than two hours at a time.

[15] The claimant requested to have his claim converted from sickness EI benefits to regular EI benefits stating that he became available for and capable of working on September 12, 2016 but he is not capable of doing the same type of work under the same conditions as in his previous employment because he is required to be on modified duties as per doctor's advice.

[16] The claimant stated that he is unsure how long the gradual return to work is in place, he will be able to determine this when he is working. He stated that he can work varying days of the weeks and assumes that he will work five days per week. He stated that his previous employer could not accommodate this as it is a production line sitting job and they have a shortage of work at this time.

[17] The Commission sent a letter dated September 20, 2016 informing the claimant that he is unable to receive EI benefits from September 12, 2016 because he would only accept part-time work of gradual return to work of three to four hours per day and therefore he has not proven his availability to work.

[18] The claimant submitted his Request for Reconsideration stating that he was told that in order to receive regular EI benefits, he would have to be capable of working full-time. He does not dispute that he has physical limitations and his family doctor indicated that he had limitations and could only do modified duties however this was in relation to his past employment.

[19] The claimant stated that the operations manager with his former employer informed him that she could not offer him a job with any modified duties or a less physical position explaining that as the facilities maintenance technician, he has to be able to climb, walk from plant to plant and be able to go on the roof. This led him to resign from his position on September 10, 2016.

[20] The claimant stated that he is more than willing to seek full-time employment that would best suit his capabilities.

[21] The claimant submitted a medical note dated October 17, 2016 which indicates that the claimant is fit to return to light duties full-time; eight hours a day, five days a week.

[22] The claimant submitted a medical note dated October 21, 2016 which indicates that the claimant has been struggling with medical problems for some time. He has, however, reached a point where he would be able to return to work on light duties. This would mean largely activities such as sitting at a desk and doing phone calls. He would not be able to spend extensive time at a computer screen but could use one intermittently. He would be capable of light physical activity such as walking but no heavy lifting, no working at heights and no leg bending.

[23] The claimant was contacted by the Commission on October 24, 2016 and he stated that he was working on his resume and uploading it to Indeed.ca. He stated that he does not want to go back to the same trade as before and now wants to be a maintenance worker associate or helper instead of the lead hand as it is less physically demanding and a completely different workload.

[24] The claimant further stated that he is looking at branching out in his job search as he needs to get back to work as he has not been paid since he quit his job on September 10, 2016. He was asked to keep a job search and the Commission would call him back in two weeks.

[25] The claimant was contacted on November 8, 2016 and he stated that he is currently working on his job search getting it ready to be sent in.

[26] The claimant's job search history was received on November 9, 2016 showing that on October 25, 2016 he applied for a Maintenance Associate position and he received a call the next day for a telephone interview; he applied for a position as Building Maintenance Staging on November 6, 2016 with no response; on November 8, 2016 he applied for a Building Operator – Maintenance position and on the same day he applied for a Caretaker, Heavy Duty position.

[27] The claimant was contacted by the Commission again and he stated that he was looking for work but there was nothing to apply to. He confirmed that he had not attended a job fair, resume building workshop or networking events and he stated that he was sick with bronchitis for two or three days. He stated that because he was not finding anything, he broadened his search to building maintenance helpers and will now broaden his search more. The Commission stated that they looked on the job search website Indeed.ca and found a lot of jobs the claimant did not apply for; 314 jobs for “building maintenance” and 87 jobs for “building operator.”

[28] The Commission stated that the claimant told them the last time that he was looking for building maintenance or operator positions and that he was going to broaden his search more; he responded that he is broadening his search now. The Commission informed the claimant that the job search history looks like he forgot to look for work and then remembered that they were going to ask for it so he started up again; the claimant assured the Commission that he was looking for work. The Commission stated that four job applications in two weeks is not enough to convince them he has been looking for work.

[29] The claimant submitted a letter dated November 9, 2016 indicating that there was a gap in his job search history between October 25 to November 8, 2016 because he was sick for two weeks however he believes that he told the Commission this morning that he was sick for two to three days which was wrong. He stated that he had to take medication for one to two weeks while he had his cold and bronchitis. The claimant provided six pictures of the prescription medications he was required to take.

[30] The claimant submitted a medical certificate dated November 29, 2016 which states that the claimant was seen at the clinic on October 28 and was unable to search for work from October 23, 2016 to November 6, 2016 due to medical reasons.

Testimony from the Hearing

[31] The claimant testified at the hearing that he was on sickness EI benefits until September 4, 2016. He stated that he was given advice from his employer that he was to submit his letter of resignation with the company because they were unable to provide him with modified duties.

[32] The claimant confirmed he received 15 weeks of sickness benefits. The claimant stated that he felt he was able to return to work when he applied for regular EI benefits. He stated that he attempted to return to work with his previous employer; the employer needed a doctor's note stating that he was 100% able to return to work and his doctor would not provide him with a doctor's note without modified duties. The claimant stated that the employer wanted him to return to his old position but he was unable to do that and the employer was not able to offer him any light duties jobs.

[33] The claimant stated that if the employer did not have a shortage of work they might have been able to accommodate his modified duties. He explained that the employer had already laid off a number of employees and to bring him back and put him in another employee's position would have been wrong and the employer felt it would not have been fair to the other employee.

[34] The claimant confirmed that once his doctor allowed him to return to work, even with modified duties, he was looking for work.

[35] The claimant confirmed that he was unable to work from October 25 to November 6, 2016 due to bronchitis and he submitted his job search history to the Commission shortly after that on November 8, 2016; the reconsideration decision letter is dated November 9, 2016.

[36] The claimant stated that there were a lot of job postings on the website he was searching on but a lot of them had qualifications that he did not have or requirements that he was not able to do.

[37] The claimant stated that he continued to look for work following his episode with bronchitis stating that the last application he submitted was on February 17, 2017 when he became unable to work indefinitely due to illness; he kept a job search history and would submit it post-hearing.

Post-Hearing Documents

[38] The claimant submitted his job search history from October 2016 to February 2017. The Tribunal accepted the post-hearing documents as they directly speak to the issue under appeal of a disentitlement to EI benefits due not being able to prove his availability.

[39] The claimant's job search history shows that he applied for 10 jobs in November 2016, 11 jobs in December 2016, 9 in January 2017 and two in February with the last application made on February 7, 2017; all the applications made were in the building maintenance field.

SUBMISSIONS

[40] The claimant submitted the following:

- a) He was denied EI benefits based on a two week gap of time from October 23 to November 6, 2016 that he was not able to complete a job search because he was very ill with bronchitis. He has otherwise been very diligent with his job search and even though there are limitations with the job duties, he is aggressively looking for work.
- b) His intent was to go back to work because they needed to have an income in the family. Bills keep coming in and life keeps moving forward and it became extremely stressful.
- c) The downturn in the economy has not helped him either making find a job more difficult.
- d) He has no income at this time so it imperative that he receive EI benefits.
- e) He went eight months without an income putting them in desperate need to find financial help and this stressful situation worsened his health; they were forced to use the food bank because they had no other options.

[41] The Commission submitted the following:

- a) Availability as provided for in section 18(a) of the EI Act requires more than a simple wish to work, it required a demonstration to find work and unrestrained availability; subsection 18(a) of the EI Act requires that the claimant be available for work each day he is claiming benefits and should be looking for work at the same time.
- b) The claimant was asked on October 24, 2016, to provide proof of his job search activity for the upcoming two week period and that he would be contacted again in order to provide it. In his appeal submission, the claimant argued that he was denied regular benefits based on this gap in time where he was very ill with bronchitis. It is the Commission's submission that his report declaration at that time should have reflected his inability to work due to illness, however as he had already received the maximum 15 weeks of sickness entitlement available to him, if he did declare his non availability due to illness, the claimant would not have been paid benefits for that time period as he had exhausted all sickness benefits payable to him during this benefit period.
- c) The claimant indicated he would be interested in the lighter job of building maintenance helper. When he did provide his job search, he listed four jobs he had applied for via

email related to that type of work however a listing showed that within his geographic area there were 314 building maintenance jobs on the list. Quite obviously, there were many opportunities for that kind of work in the claimant's area of residence.

- d) At the time his availability was reconsidered, the claimant had failed to demonstrate that he met the requirements under the legislation for him to be considered available and willing to re-enter the workforce. If the claimant can prove he is making reasonable and customary efforts to find employment in accordance with the legislative provisions, his indefinite disqualification can be terminated based on that proof.
- e) Following a review of the post-hearing documents, the Commission submitted that the claimant's disqualification can be modified by retroactively terminating it as of Friday, November 4, 2016. The Commission has accepted that the claimant has been making reasonable and customary efforts to look for work from November 7, 2016; he is capable of working and has proven his availability from that date.

ANALYSIS

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

[43] The EI Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits (*Canada (Attorney General) v. Cornelissen O'Neill*, A-652-93).

[44] 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.

[45] 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).

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

[47] The Tribunal accepts that the claimant was authorized by his doctor to return to modified part-time work on September 12, 2016 and he was allowed to return to full-time duties effective October 17, 2016. The Tribunal finds that the claimant was not entitled to regular EI benefits from October 25 to November 6, 2016 because he was sick with bronchitis, he was unable to work or look for work and had exhausted his full entitlement to sickness EI benefits.

[48] However, the claimant continued to look for work following his illness and submitted a detailed job search history post-hearing. From this, the Tribunal finds that the claimant had a desire to return to the workforce, he expressed that desire through efforts to find suitable employment and he did not place any personal conditions that might unduly limit the chances of returning to the workforce.

[49] The Tribunal agrees with the Commission that the claimant's disentanglement to EI benefits should be terminated as of November 4, 2016 as the claimant has proven his availability under paragraph 18(1)(a) of the EI Act because he had been making reasonable and customary efforts to look for work from November 7, 2016.

CONCLUSION

[50] The appeal is allowed.

K. Wallocha

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

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.

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.

Employment Insurance Regulations

9.1 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.