



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. H. v. Canada Employment Insurance Commission*, 2018 SST 1054

Tribunal File Number: GE-17-1725

BETWEEN:

C. H.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: John Noonan

HEARD ON: January 4, 2018

DATE OF DECISION: January 24, 2018

REASONS AND DECISION

OVERVIEW

[1] A claim for employment insurance sickness benefits was established by the Appellant effective July 17, 2016. (GD3-3- 10) The Canada Employment Insurance Commission (Commission) allowed this claim and 15 weeks of benefits were paid. There was a request to have this claim then become a claim for regular benefits. The Appellant was notified on January 13, 2017 of the Commission's decision finding that the Appellant voluntarily left his employment without just cause. The Appellant, on January 18, 2017, requested and was granted a reconsideration of this decision. This decision was not changed as per letter dated January 25, 2017 (GD3-22). The Appellant appealed to the Social Security Tribunal on May 23, 2017. This appeal was deemed complete on September 13, 2017, a decision was rendered regarding "late appeal" and the process continued with a hearing on January 4, 2018.

[2] The Tribunal must decide whether the Appellant voluntarily left his employment without just cause pursuant to sections 29 and 30 of the Employment Insurance Act (EI Act).

And

[3] Whether the Appellant failed to prove his availability pursuant to subsection 18(a) of the Employment Insurance Act (EI Act).

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

- a) The complexity of the issues under appeal.
- b) The fact that the credibility is not anticipated to be a prevailing issue.
- c) The fact that the appellant will be the only party 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.

[5] C. H., the Appellant, attended the hearing.

[6] The Tribunal finds the Appellant had reasonable alternatives available to him rather than leave his employment when he did and further finds the Appellant has not successfully rebutted the assertion that he was not available for work. The reasons for this decision follow.

EVIDENCE

[7] According to the evidence in the docket, the Appellant worked for Rona Inc. in NL until July 15, 2016 at which time he voluntarily left this employment (GD3-11).

[8] The Appellant subsequently submitted a medical note from his doctor advising that he would be off work until January 2, 2017 (GD3-12).

[9] When the sickness benefit period concluded, the Appellant requested regular benefits on November 25, 2016. GD3-13

[10] Medical note used to obtain sickness benefits stated the Appellant was to be off work through to January 2, 2017.

[11] When contacted by a representative of Service Canada, the Appellant explained he was off on sick leave and is ready to return to work if he can get work.

[12] He has been to see his former employer but has not asked for his job back.

[13] He told to him that he was considering retiring and had not yet applied for other work. (GD3-15).

[14] When contacted by a representative of Service Canada, the employer advised that he made a mistake when he completed the form and indicated retirement. The Appellant was off for some medical reason and at that time they did not know if he was coming back. He has not come back and he has been replaced but the employer would hire him back in a different position however they do not think that he is coming back and they have not spoken with him (GD3-16).

[15] When contacted by a representative of Service Canada on January 12, 2017, the Appellant advised that he left his job because of the stress of dealing with the public. The doctor was

concerned that he just needed time off. He never spoke with the doctor about why he was stressed. As far as he is concerned he is available for work. His employer would not hold his job for a period of a few months and he had not contacted the employer about returning to work (GD3-17).

[16] The Appellant was advised verbally of the denial of benefits.

[17] The Appellant immediately requested a reconsideration of the Commission's decision wherein he argued he had to leave his place of employment in July 2016. He has forwarded a copy of the letter from the doctor stating his medical condition and he then received 15 weeks of sick benefits. As of November 14, 2016 his medical condition had improved to the point that he was ready and available for work. His position with his previous employer was very stressful and was the cause of his medical problems, so he may not be able to work at that company, but that does not make him unavailable for work. There is no union at his place of employment so there is no such thing as four months of sick leave. He has paid Employment Insurance premiums for about 40 years (GD3-18-19).

[18] Based upon the facts on file, the Commission determined that the Appellant did not demonstrate just cause for voluntarily leaving his employment. The Commission, therefore, imposed an indefinite disqualification from receiving regular benefits pursuant to sections 29 and 30 of the Act, effective July 17, 2016 and imposed a disentitlement effective November 14, 2016 as he had not proven his availability for work (GD3-20-21)..

[19] As part of the reconsideration process the Appellant was contacted and he advised that there are no jobs in his area and he has not started a job search since January 13, 2017 and he has not contacted his former employer to return to work as there are no jobs for him there this time of year. He only ever worked in retail and he is not willing to leave or to accept a minimum wage job. He also advised that the change in his job was his age. He did have a conversation with his employer about retiring. There was no other job at his place of employment that he could move into (GD3-24-25).

[20] The employer then advised that the Appellant retired and there is no amendment to the previous statement. If the Appellant had gone on sick leave he would have been entitled to his banked time (GD3-26). A copy of the Appellant's retirement form was also submitted. GD3-41

[21] Following the request for reconsideration, the Commission maintained the original decisions (GD3-27 & GD3-39).

[22] The Appellant subsequently filed a renewal application for benefits effective March 19, 2016 (GD3-29-38).

[23] The Appellant advised on this application that he quit for health reasons. His doctor advised him to take time off. He has been cleared by his doctor to return to work and he is now seeking work. The job caused him stressed and he has forwarded a medical from his doctor advising of this (GD3-33-34).

[24] The Commission notified the Appellant that he was not entitled to Employment Insurance regular benefits because of his previous disqualification (GD3-39).

[25] The Appellant then filed another request for reconsideration and argued that he has been available for work since January 2017. The Commission has information from his doctor stating his present situation (GD3-40).

[26] The Commission notified the Appellant that it could not proceed with the reconsideration because an Administration Review Decision has already been completed and he has presented no new facts (GD3-42).

[27] The Appellant, at his hearing, testified that:

- a) The store where he worked was small.
- b) He did all jobs as required, shipping, receiving, etc.
- c) He had his own office where he dealt with contractors and others.
- d) His plan was to retire.

- e) His doctor gave him a note to be off work due to work related stress.
- f) There were no sick leave provisions at Rona.
- g) Rona hired a replacement for his position.
- h) He was advised to apply for sickness benefits and he would be eligible for 15 weeks of EI.
- i) He did so but it took two months before he got benefits.
- j) He was cleared to return to work in January 2017.
- k) He then checked with Rona but there were no jobs available.
- l) He looked elsewhere in the community but no jobs were available.
- m) He then requested regular benefits.
- n) Since June of 2017 he has no longer been seeking employment.
- o) He retired as of June 30, 2017.
- p) He believes he should be eligible to receive benefits from January through June of 2017.
- q) He has paid into the EI program for 40 years.
- r) It is, after all, an insurance program and he should be eligible.
- s) He is requesting 6 months of benefits only as he is presently retired.

SUBMISSIONS

[28] The Appellant submitted that he should be eligible for benefits because:

- a) He has been available for work since January..
- b) He had to quit his job due to medical problems. A letter from his doctor was forwarded to the Commission and he received 15 weeks of sickness benefits and in January 2017 he was cleared to return to meaningful employment.
- c) There were no job openings at his previous place of employment in January 2017 so he applied for regular benefits while he was looking for employment.
- d) He is still looking for employment and should be receiving benefits while looking for a job (GD2-1).

[29] The Respondent submitted that the Appellant is not eligible for benefits because:

- a) He left his job with Rona Inc. on July 15, 2016 without 'just cause' within the meaning of the Act.
- b) The Appellant chose to leave the employment by retiring.
- c) The evidence on file does not support that the Appellant was advised to leave his place of employment by his doctor.
- a) Neither has the Appellant presented proof that he had just cause for leaving his employment when he did as he had made a personal choice to retire.

[30] The Appellant was paid sickness benefits from July 31, 2016 to November 12, 2016 for a total of 15 weeks **in error**. Due to the date the doctor signed the medical certificate and the fact that the doctor did not indicate the date the illness began the Appellant should have been paid sickness benefits from October 2, 2016 to December 31, 2016 a period of 13 weeks. The Commission **will not** establish an overpayment for the Appellant on this issue as the Commission had the information and allowed the payment of benefits in error.

ANALYSIS

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

Re: Voluntary Leaving

[32] Section 30 of the Act states that “A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause...”

[33] For the leaving to be voluntary, it is the Appellant who must take the initiative in severing the employer-employee relationship.

[34] Both parties to this appeal agree that the Appellant voluntarily left his employment with Rona Inc. on July 15, 2016.

[35] The test for determining whether a claimant had "just cause" under section 29 of the EI Act is whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment (**White 2011 FCA 190; Macleod 2010 FCA 301; Imran 2008 FCA 17; Astronomo A-141-97**). The onus is upon the Appellant to show just cause for leaving his employment when he did.

[36] A claimant who leaves his/her employment must show that he/she had no other alternative but to do so. **Tanguay (A-1458-84)**

[37] In this case, the Appellant had other options open to him rather than quit his employment when he did.

[38] A reasonable alternative to leaving would have been for the Appellant to have spoken with his doctor prior to leaving his place of employment rather than three months later which could have led to his receiving sickness benefits immediately while he recovered from his illness.

[39] He could have also used the time that he had accumulated for a period of leave.

[40] Consequently, the Appellant failed to prove that he left his employment with just cause within the meaning of the Act.

[41] While the Appellant's reason for leaving his employment may constitute, for him, a good choice given his situation, I find that it is a personal choice and therefore it does not constitute "just cause" under the Act.

Re: Availability

[42] In order to be found available for work, a claimant shall: 1. Have a desire to return to the labour market as soon as 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. (**Faucher A-56-96 & Faucher A-57-96**)

Re: Having a desire to return to the labour market as soon as suitable employment is offered.

[43] In this case, by the Appellant's statements and submissions, he was not seeking employment immediately after his clearance to return to work on January 2, 2017 .

[44] As per testimony at the hearing, the Appellant had, later on contacted Rona seeking employment and had looked around his community but has not been successful in his efforts.

[45] I find that these actions on the part of the Appellant are not enough to show a sincere desire to return to the labour market as soon as suitable employment is offered.

Re: Express that desire through efforts to find a suitable employment.

[46] The Appellant does not have a listing of possible jobs that are not in his home community. This is where his job search efforts are centered.

[47] While alleging that there is no work in his area the Appellant still has not shown proof that he made any effort to seek employment in his area or outside his area.

[48] His former employer has made a clear statement indicating that he would re-hire the Appellant however the Appellant has not contacted the employer requesting employment.

[49] The Appellant has advised that the employer would have no work for him in the winter months however this should not prevent him from enquiring if he has a genuine desire to immediately return to the labour market.

[50] A vague statement advising that one is available for work does not satisfy the requirements of the Act and Regulations.

[51] I find that the Appellant has not, throughout the entire period of this process, shown that he was making reasonable and customary efforts to obtain suitable employment.

Re: Not set personal conditions that might unduly limit their chances of returning to the labour market.

[52] I find that the Appellant by limiting his employment search to a limited market constitutes setting personal conditions which unduly limited his chances of finding and accepting full time employment, a requirement of being eligible to receive benefits. If the claimant was not available for employment because of personal reasons, then it cannot be good cause to refuse suitable employment (**Bertrand A-613-81**).

[53] By itself, a mere statement of availability by the claimant is not enough to discharge the burden of proof. **CUBs 18828 and 33717**

[54] In regards to the Appellant's statements that he has been paying her Employment Insurance premiums and he should not be disqualified from receiving benefits which he believes he is entitled to, I submit the following from the **Federal Court Decision in A-541-85**:

“A person who has the right to receive unemployment insurance benefits under the Act, because all the substantive conditions required for the existence of that right are complied with or fulfilled, will not, of course, automatically be paid those benefits. The person has to come forward, make known his or her intention to exercise his or her right and show that he or she indeed **satisfies the conditions** established by the Act. Some of those conditions relate to the employment history and the present circumstances of the newly unemployed person and can be

verified once and for all at the beginning of the unemployment period **others relate to the situation or attitude of the person while unemployed** and, being essentially dependent on circumstances which may vary have to be verified regularly in the course of the whole unemployment period (mainly capability and availability to work, efforts to obtain new employment, no special disqualification resulting from an improper refusal or failure to apply for a situation in suitable employment). **It is therefore inevitable that a person who has the right to receive benefits will be called upon to come forward and prove that he or she satisfies the conditions of the Act”**

CONCLUSION

[55] The Member finds that, having given due consideration to all of the circumstances, the Appellant had reasonable alternatives available to him rather than leave his employment when he did I further find the Appellant has not successfully rebutted the assertion that he was not available for work and as such the appeal regarding both issues is dismissed.

John Noonan

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

- (vii) significant modification of terms and conditions respecting wages or salary,
- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (xi) practices of an employer that are contrary to law,
- (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
- (xiii) undue pressure by an employer on the claimant to leave their employment, and
- (xiv) any other reasonable circumstances that are prescribed.

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.

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.

(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.

Employment Insurance Regulations

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.