



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. M. v. Canada Employment Insurance Commission*, 2018 SST 341

Tribunal File Number: GE-17-3862

BETWEEN:

L. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: February 19, 2018

DATE OF DECISION: April 13, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The Tribunal finds that the claimant no longer had restrictions to his employment; however, neither the claimant nor the Commission have provided evidence to show that the claimant was actually looking for work and applying for jobs. Since it is the claimant's responsibility to prove his availability for work, the Tribunal finds that the claimant has not proven that he was capable of and available for work and unable to obtain suitable employment.

OVERVIEW

[2] The claimant was working under a temporary work permit when his employer declared bankruptcy and his employment ended. The Canada Employment Insurance Commission (Commission) decided that the claimant had not proven he was available for work because his work permit restricted him to work for only one employer. The claimant provided information showing that he was allowed to remain in Canada as a temporary resident until May 2, 2019, and he agreed with the Commission that once he finds new employment, he can expect that this restriction will be removed from his work permit. The Commission changed their decision and found that he was available for work; however, the claimant appealed this decision to the Social Security Tribunal (Tribunal) because the Commission failed to remove the disentitlement and so benefits were not being paid. The claimant did not attend the hearing to explain if it was his intention to appeal a favourable decision; therefore, the Tribunal is left with no choice but to render a decision on the issue of availability based on the information in the appeal docket.

PRELIMINARY MATTERS

Failure to appear at the hearing

[3] If a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing according to subsection 12(1) of the *Social Security Tribunal Regulations*.

[4] Information retrieved from Canada Post shows the claimant signed for the Notice of

Hearing on January 27, 2018. Based on this evidence, the Tribunal is satisfied that the claimant received notice of the hearing and therefore proceeded with the hearing in the claimant's absence. The Tribunal also notes that the claimant did not make any contact with the Tribunal immediately following the hearing to request an adjournment or express any desire to participate in the hearing.

Commission's Concession

[5] Once a decision by the Commission is appealed, it is too late for the Commission to amend its decision (*Canada (Attorney General) v. Wakelin*, A-748-98).

[6] The Tribunal understands that on December 11, 2017, the Commission submitted representations stating that it consented to the appeal being allowed because the issue was allowed upon reconsideration, but it failed to remove the disentitlement, which is why benefits were not paid to the claimant. The Tribunal finds that it is unable to accept the Commission's concession without basing its decision on the totality of the evidence or lack of evidence in the appeal docket, and the law.

[7] Therefore, the Tribunal must proceed with its analysis on whether the claimant has proven that he was capable and available for work and unable to find suitable employment according to paragraph 18(1)(a) of the *Employment Insurance Act* (EI Act).

ISSUE

[8] Has the claimant demonstrated that he is capable and available for work?

ANALYSIS

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

[10] Availability is not defined in the legislation. The Tribunal considered the following three factors to decide whether a claimant is available for work (*Faucher v. Canada (Attorney General)*, A-56-96):

- a) the desire to return to the labour market as soon as a suitable job is offered;

- b) the expression of that desire through efforts to find a suitable job; and
- c) not setting personal conditions that might unduly limit the chances of returning to the labour market.

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

a) Does the claimant have a desire to return to the labour market as soon as a suitable job is offered?

[12] The desire to return to work must be sincere, demonstrated by the attitude and the conduct of the claimant (*Canada (Attorney General) v. Whiffen*, A-1472-92).

[13] The Tribunal finds that the claimant has demonstrated through his attitude and conduct that he has a desire to return to the labour market. He became unemployed on August 8, 2017. The claimant provided a letter dated May 4, 2017, from Citizenship and Immigration Canada (CIC) indicating that his application to remain in Canada as a temporary resident was approved and is valid until May 2, 2019. The claimant stated that once he finds employment, he can reasonably expect that CIC will remove the restriction from his work permit that limited him to working only for his former employer. The Tribunal accepts that this shows the claimant has a desire to return to the labour market.

b) Did the claimant demonstrate his desire to return to the labour market through efforts to find a suitable job?

[14] 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). The test of availability for work is a question of law. The application of the test is a question of mixed fact and law (*Canada (Attorney General) v. Rideout*, 2004 FCA 304).

[15] The Tribunal finds that the claimant has not proven that he was making efforts to find suitable employment. The Tribunal recognizes that the Commission was focused on the claimant's work permit, and once that issue was resolved, the issue of availability was allowed. However, the claimant appealed that decision requiring the Tribunal to interpret the law and

render a decision, making findings of fact based on the evidence before it. The Tribunal finds there is not enough evidence to show that the claimant was making efforts to find a suitable job.

c) Has the claimant set personal conditions that might unduly limit the chances of returning to the labour market?

[16] The only personal restriction that the claimant had was the restriction on his work permit, but he provided evidence that it could reasonably be expected that the CIC would remove the restriction from his work permit once he found other work. The Commission does not dispute this; therefore, the Tribunal accepts that the claimant has not set personal conditions that might unduly limit the chances of returning to the labour market.

CONCLUSION

[17] The Tribunal finds that the claimant has proven that he has a desire to return to the labour market and he has not set personal conditions that will limit his chances. However, the claimant has not provided evidence to prove that he was expressing his desire to return to the labour market through efforts to find a suitable job. Accordingly, he has not proven that he meets the test for availability set out in *Faucher*. Therefore, the Tribunal finds that the claimant has not proven that he was capable of and available for work and unable to find suitable employment, in accordance with paragraph 18(1)(a) of the EI Act.

[18] The appeal is dismissed.

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.

Social Security Tribunal Regulations

12 (1) If a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing.