



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. A. v. Canada Employment Insurance Commission*, 2018 SST 338

Tribunal File Number: GE-17-1791

BETWEEN:

B. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

TELECONFERENCE ON: January 18, 2018

DATE OF DECISION: April 13, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The Tribunal finds that the claimant has not proven that he was available for work. Further, the Tribunal finds that the claimant has not proven that he was making reasonable and customary efforts to find suitable employment.

OVERVIEW

[2] The claimant was injured while at work and was under the support of the Worker's Compensation Board (WCB) when he was terminated from his employment. Once the claimant's entitlement to sickness Employment Insurance (EI) benefits was exhausted, he reactivated his benefit period effective February 1, 2017, claiming regular benefits. The Canada Employment Insurance Commission (Commission) decided that the claimant was capable of working but had not proven his availability for work nor had he proven that he was making reasonable and customary efforts to obtain suitable employment. It therefore disentitled him from being paid regular benefits. The claimant appealed to the Social Security Tribunal (Tribunal).

ISSUE

1. Was the claimant capable of working?
2. Was the claimant available for work?
3. Has the claimant proved that he is making reasonable and customary efforts to find work?

ANALYSIS

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

[4] To be entitled to receive regular EI benefits, claimants have to prove that they are capable of and available for work and unable to obtain suitable employment under paragraph 18(1)(a) of the *Employment Insurance Act* (EI Act). Section 9.002 of the *Employment Insurance Regulations* (Regulations) provides the criteria for determining what constitutes suitable employment.

[5] A claimant who fails to fulfil or comply with a requirement of section 50 of the EI Act is not entitled to receive benefits for as long as the requirement is not fulfilled, according to subsection 50(1) of the EI Act.

[6] The burden of proof is on the claimant (*Canada (Attorney General) v. Renaud*, 2007 FCA 328).

1. Was the claimant capable of working?

[7] To decide whether or not a claimant is available for work, it must be determined whether the claimant is capable of work. (*Canada (Attorney General) v. Leblanc*, 2010 FCA 60).

[8] The Tribunal finds that the claimant has proven that he is capable of working.

[9] The Commission agrees that the claimant provided WCB reports showing that he is not able to return to his previous employment, but he was able to return to work with limitations that would not cause further harm to his back injuries. The Tribunal is satisfied that the claimant is capable of working within his limitations.

2. Was the claimant available for work?

[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) no personal conditions that might unduly limit the chances of returning to the labour market.

[11] The failure to apply one of the factors is an error of law (*Canada (Attorney General) v. Rideout*, 2004 FCA 304).

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

[12] The Tribunal finds that the claimant has a desire to return to the labour market as soon as a suitable job is offered.

[13] The claimant stated that he is currently not receiving a livable level of WCB payments and his wife has been unable to work since 2013. There is no other income supporting his family.

[14] The Tribunal recognizes that a need for income is not the same as a desire to work; however, the Tribunal is satisfied that claimant has a desire to return to work as soon as a suitable job is offered based on his need to support his family and his statements that he was ready and capable of suitable work.

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

[15] No matter how little chance of success a claimant may feel a job search would have, 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).

[16] The Tribunal finds that the claimant has not demonstrated his desire to return to the labour market through sufficient efforts to find suitable employment. The claimant repeatedly indicated that he is ready and capable of suitable work; he was conducting a job search and keeping a detailed record as proof of his job search efforts. However, each job search record he provided showed only a few applications submitted.

[17] Following a conversation with the Commission, the claimant submitted a job search record on April 3, 2017, with only three entries on January 18, 19, and 20, 2017. He confirmed that of these three, he applied for only one position as a storage unit attendant. The Commission informed the claimant that he needed to be actively seeking employment in order to be entitled to receive regular EI benefits.

[18] On April 25, 2017, the claimant submitted another job search history with his Request for Reconsideration indicating the following job search efforts: January 23 (previous union); January

24 (some friends); January 25 (community members); January 26 (some friends); January 27 (storage unit); January 30 (some friends); January 31 (church groups); February 1 (church groups); and February 2, 2017 (community groups).

[19] The Commission contacted some of the people listed on the claimant's job search history: one person stated that he himself is looking for work and could not verify that he was able to assist the claimant in securing employment; another stated that the claimant called him and told him he was looking for a job but he confirmed that he did not have the ability to hire. The Commission noted that one person was listed twice and this person did not return the Commission's phone calls.

[20] The claimant submitted his Request for Reconsideration and Notice of Appeal and each time he included the list from subsection 9.001(b) of the Regulations. The Tribunal recognizes that this subsection of the Regulations refers only to subsection 50(8) of the EI Act, but the claimant submitted this list twice to show that he was available for work. He stated that he was preparing resumes and cover letters, assessing employment opportunities, registering for job search tools, submitting applications and keeping a detailed record as proof. However, he did not provide any evidence to support having done these things.

[21] The claimant testified he was talking to community groups trying to find work and this is why there are no names to put on the job search records. He stated that in his small city, and with his physical limitations, there were not a lot of opportunities. He stated that since June 2017, he has been applying for self-storage attendant, bank teller, and security jobs even though he does not have a licence to work security. Several times during the hearing the claimant stated that he was keeping a record of the jobs he applied for. The Tribunal asked the claimant to submit this job search record and the claimant stated that he was evicted from his apartment and a lot of his paperwork was lost, including his job search records.

[22] Following the hearing on January 18, 2018, the claimant submitted an updated job search history indicating that in July 2017 he applied as a parts person at a bike shop and as a receptionist with the union. He applied at Walmart in December 2017. On January 26, 2018, a week after the hearing, the claimant applied to four banks, a storage unit, and at Canadian Tire.

[23] The Tribunal is not convinced that the claimant was looking for work. The Tribunal agrees with the claimant's representative that the claimant did not understand the WCB Vocational Report dated April 14, 2016, or the Full Capacity Assessment that was completed in June 2017. The claimant mistakenly thought that he was only allowed to work as a storage unit attendant, and then as a bank teller as determined from the Full Capacity Assessment. However, it is the claimant who has the burden of showing that he is available for work and therefore, it is the claimant's responsibility to understand what that requires.

[24] It is not enough for the claimant to say he is looking for work, he must demonstrate his availability by actively looking for work. While the Tribunal is sympathetic that the claimant was evicted from his apartment and he lost his paperwork, the claimant submitted three job search records and they are all vague, incomplete and appear have been written quickly after he was asked to submit them. The claimant testified that he applied for a lot of jobs but then he provided a list of jobs following the hearing that did not include the banks or security jobs he said he was applying for since June 2017. Therefore, the Tribunal finds that the claimant has not demonstrated his desire to return to the labour market through 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?

[25] The question of availability is whether a claimant is sufficiently available for suitable employment and it cannot depend upon the particular reasons for the restrictions on availability (*Canada (Attorney General) v. Gagnon*, 2005 FCA 321).

[26] The Tribunal finds that the claimant had set personal conditions that unduly limited his chances of returning to the labour market. The claimant stated to the Commission that he is restricted to working at a storage unit according to a WCB report, and in his small community there are only three storage unit facilities, none of which were hiring. He agreed that he had limited his chances of finding a job by only applying at storage unit facilities but stated that it was not his fault. While the claimant did have restrictions on the work he could do, the Tribunal is not convinced that he was required to restrict his availability to working at only two types of employment.

[27] The claimant's representative argued that the claimant's best chance of finding employment is with the employer who dismissed him because the city has a population of approximately 15,000 and 1/5 of the population works for this employer. She added that the claimant's case has gone to arbitration but no decision has been rendered. Unfortunately, the payment of benefits is based on the claimant's availability and not on the justification of his unavailability. Therefore, the Tribunal finds that the claimant has set personal conditions that will unduly limit his chances of finding suitable employment.

3. Has the claimant proven that he was making reasonable and customary efforts to find suitable employment?

[28] The Commission has the authority to require the claimant provide proof that he is making reasonable and customary efforts to obtain suitable employment under subsection 50(8) of the EI Act. Section 9.001 of Regulations provides the criteria to determine if the claimant's efforts are reasonable and customary.

[29] The Tribunal finds that the claimant has not provided proof that he was making reasonable and customary efforts to obtain suitable employment. The claimant told the Commission that he was only looking for work at storage unit facilities and later as a bank teller. The claimant testified that he was applying for security jobs even though he was not licenced to work as a security guard. Each time the claimant provided a record of his job search efforts, they were limited in the number of jobs he applied for.

[30] The claimant submitted the list of criteria found in paragraph 9.001(b) of the Regulations twice. As found above when considering whether the claimant had expressed his desire to return to the labour market, the Tribunal accepts that the claimant did engage in some of the activities listed, including networking and contacting prospective employers, when he contacted community and church groups and friends, and submitting job applications as set out in the job search record he provided on April 3, 2017. However, under paragraph 9.001(a), the claimant's efforts must also be sustained, and the Tribunal finds that he has not provided sufficient evidence to show that he has carried out these activities in a sustained manner. Therefore, the Tribunal concludes that the claimant has not proven that he was making reasonable and customary efforts to obtain suitable employment.

CONCLUSION

[31] While the claimant demonstrated through his job search activity following the hearing that he is actively looking for work as of January 26, 2018, the Tribunal is unable to remove the disentitlements from receiving EI benefits because the job search activity occurred after the claimant's benefit period had ended, on September 10, 2016.

[32] The Tribunal finds that the claimant has proven that he is capable of working and has a desire to return to the labour market but he did not demonstrate his desire to return to the labour market through efforts to find suitable employment and he set personal conditions that unduly limited his chances of returning to the labour market. Accordingly, he has not met the test for availability set out in *Faucher* and is therefore disentitled from receiving benefits under paragraph 18(1)(a).

[33] Further, the Tribunal finds that the claimant did not prove that he was making reasonable and customary efforts to obtain suitable employment as required by subsection 50(8).

[34] Therefore, the Tribunal concludes that the claimant has not proven his availability for work under subsections 18(1)(a) and 50(8) of the EI Act.

[35] 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.

(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.

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

(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.

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.