Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *E. Z. v Canada Employment Insurance Commission*, 2018 SST 1380

Tribunal File Number: GE-18-2311

BETWEEN:

**E. Z.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Employment Insurance Section

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DECISION BY: Eleni Palantzas

HEARD ON: November 19, 2018

DATE OF DECISION: November 30, 2018

Canada

## DECISION

[1] The appeal is allowed in part. The Claimant showed that he had just cause for leaving his employment with X on February 6, 2018. The Claimant however, did not show that he was available for work from April 5, 2018 until May 3, 2018.

## OVERVIEW

[2] The Claimant was on a medical leave and in receipt of employment insurance sickness benefits until February 10, 2018. When he did not return to work with his employer on February 6, 2018, he was considered to have voluntarily left that employment. The Canada Employment Insurance Commission (Commission) disqualified the Claimant from receiving benefits effective February 11, 2018 because he left his employment with X without just cause. It determined that leaving was not his only reasonable alternative. Further, since leaving this employment, he had not shown that he was available for other employment from April 5, 2018 onward. The Claimant requested that the Commission reconsider its decisions. He argued that he could not return to his former employer because the work offered was not suitable i.e. not within his physical limitations. He had no choice but to leave. The Commission however, maintained that the Claimant did not provide medical documentation showing that he was advised by his doctor to quit his employment. Further, the employer was willing to accommodate him. Regarding his availability, the Commission changed its initial decision to that of a definite disentitlement from April 5, 2018 to May 3, 2018 because the Claimant secured part-time employment. The Claimant disagreed with both decisions and appealed to the Social Security Tribunal of Canada (Tribunal).

## ISSUES

[3] The Member must decide:

Did the Claimant voluntarily leave his employment for just cause?

Was the Claimant available for work from April 5, 2018 to May 2, 2018?

**ANALYSIS**

**Issue 1: Did the Claimant voluntarily leave his employment for just cause?**

[4] Yes, the Claimant showed that he had no reasonable alternative but to leave his employment with X and therefore, established that he had just cause for leaving.

[5] When a claimant leaves or takes a leave of absence from their employment, they are not automatically entitled to benefits. The claimant must show just cause for leaving that employment in order to receive benefits.

[6] To establish just cause for voluntarily leaving, or taking a leave of absence, a claimant must show that, given the circumstances, they had no reasonable alternative to leaving (Patel A-274-09, Astronomo A-141-97, Tanguay A-1458-84).

[7] Initially, the onus is on the Commission to show that the Claimant voluntarily left his employment. The Claimant had received employment insurance sickness benefits from November 3, 2017 until February 6, 2018 because he was unable to work during this period. The Claimant was subsequently cleared by his doctor to return to modified duties where he was not required to do repetitive back movements and lifting of more than 10 kilograms (GD3-26). Although the Claimant was capable of returning work with restrictions, he did not return to work with his employer on February 6, 2018. He argued that since his employer could not accommodate him he did not voluntarily quit his employment. The Member disagrees and finds that by not returning to work on February 6, 2018, the Claimant voluntarily left his employment.

[8] The onus of proof now shifts to the Claimant to show that he left his employment for just cause (White A-381-10, Patel A-274-09).

[9] Subsection 29(c) of the EI Act provides a non-exhaustive list of circumstances to be considered when determining whether a claimant had just cause for leaving their employment (White A-381-10). The Member considered the circumstances referred to subsection 29(c) and whether any existed at the time the Claimant left his employment. These circumstances must be assessed as of that time (Lamonde A-566-04).

[10] The Claimant testified that he did not return to work on February 6, 2018 because the employer was unable to provide him with work within his restrictions. Although this is not one

of the circumstances provided in paragraph 29(c) of the EI Act, the Claimant can still have just cause for leaving his employment if he shows that he had no reasonable alternative but to leave when he did. The Member finds that the Claimant met this onus for the following reasons.

[11] The Commission submitted that the Claimant did not provide medical documentation showing that he was advised by his doctor to quit his employment. Further, the Commission submitted that the employer had indicated that modified duties were offered to the Claimant prior to him leaving due to illness and that they would have been available to him had he returned. A reasonable alternative to leaving therefore would have been for the Claimant to return to work while he sought other suitable employment.

[12] The Member notes however, that the Claimant had advised the Commission that he disagreed with the employer's statements (GD3-25). The Commission did not indicate why it preferred the employer's statements to those of the Claimant.

[13] Unlike the Commission, the Member placed more weight on the Claimant's consistent statements both at the hearing and to the Commission, than on the indirect, unsupported statements of the employer. The Member finds the Claimant's testimony credible because it is both plausible and consistent with his statements and written submissions to the Commission. The Claimant testified that the employer lied to both the WSIB about his injury being work-related and then, to the Commission about accommodating his injury. His testimony is consistent with his statements and written submissions to the Commission (GD3-31 to GD3-36 and GD3B-35).

[14] At the hearing, the Claimant provided further details. He testified that the employer did offer him help from coworkers however, they were office staff (2 people + owner) or from the press department (1 person). They could only come to help him when he replaced the rolls that were 150 pounds or more, every 1 hour and 15 minutes. The Claimant testified that he was also not capable of performing the other physical requirements of his job including, bending, twisting and lifting of 45 to 75 pound paper tubes every 5-10 minutes. Even the press door was heavy and there was no assistive device. The employer was unable to accommodate his 10 kilogram lifting restriction. He testified that there were no other jobs available since there were only 5 employees in total. He was not qualified to work in the office or the press department so he had no other job options with the employer.

[15] Further, the Claimant testified that taking a medical leave until he can find other suitable work was not an option. He had reached the maximum allowable time off for sickness because he had already taken a medical leave on two other occasions. He explained that from July to the day he left, he had taken 3 weeks off, returned to work, injured his back again, then took 12 weeks off work and now, could only return to modified duties. The Claimant testified that his doctor told him that his back would not heal if he remained in this employment. He was advised to quit or keep going back to the doctor for (indefinite) time off with medication. The Claimant testified that further time off was not an option.

[16] The Member agrees with the Claimant that returning to work with his former employer was not a reasonable option. The modified duties offered by the employer were not within his medical restrictions and therefore, not suitable. Other employment with the employer and a medical leave were also not available. Remaining with the employer therefore, while he looked for other employment, was not a reasonable alternative to leaving because it was not possible.

[17] The Member finds that, given the circumstances at the time that the Claimant left his employment, he had no reasonable alternative but to leave (not return) on February 6, 2018. The Claimant therefore met the onus of showing that he had just cause for leaving his employment with X. Since the Claimant was receiving sickness benefits until February 10, 2018, he should not be disqualified from receiving benefits from February 11, 2018 onward.

**Issue 2: Was the Claimant available for work from April 5, 2018 to May 2, 2018?**

[18] No, the Claimant has not shown that he was available for work during this period because he did not prove that he was making reasonable and customary efforts to secure employment. The Commission has already allowed for benefits after May 3, 2018 because the Claimant had indicated that he had secured part-time employment as of that date.

[19] In order for a claimant to be entitled to benefits, they must demonstrate that they were capable of and available for work and unable to obtain suitable employment (Bois A-31-00; Cornelissen-O'Neil A-652-93; Bertrand A-631-81).

[20] The burden is on the claimant to prove their availability (Renaud A-369-06).

[21] Because there is no precise definition in the *Employment Insurance Act* (EI Act) for availability, the Federal Court of Appeal has consistently held that availability must be determined by analyzing three factors:

> (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 (Faucher A-56-96; Poirier A-57-96).

[22] Further, the *Employment Insurance Regulations* (Regulations) provide direction as to what is considered 'reasonable and customary efforts' under section 9.001 and what is, and isn't considered 'suitable employment' under section 9.002.

[23] Subsection 9.001(1) of the Regulations provides direction as to what is considered to be 'reasonable and customary efforts' when a claimant is seeking to obtain suitable employment. It specifically indicates that three criteria must be met when determining such efforts. The Claimant's efforts must (a) be sustained, (b) consist of specific activities listed in the subsection and (c) be directed toward obtaining suitable employment.

[24] The Commission submitted that from April 5, 2018 until he started to working part-time on May 3, 2018, the Claimant did not provide evidence of a job search. He indicated that although he was looking for work, none were within his medical restrictions. He had only contacted an employment councillor (GD3B-21 and GD3B-37). He later provided a job search list beginning January 23, 2018. However; from April 5, 2018 onward, he had only indicated that he was interviewed on April 13, 2018, by the employer with whom he secured part-time employment (GD3-39). The Commission submitted that these efforts do not demonstrate a desire to return to the workforce as soon as possible.

[25] At the hearing, the Claimant confirmed he was hired at the April 13, 2018 interview, and he started working on May 3, 2018. He testified that he did not job search from the day he was offered the job and when he started working. No further evidence was provided.

[26] The Member finds that the Claimant demonstrated a genuine desire to return to the labour market through his attitude, conduct and eventual attainment of a part-time job (Whiffen A-1472-92). Further, despite his physical limitations, the Claimant directed his job search efforts to

suitable employment, so he did not unduly limit his chances of returning to the labour market. He testified that he was looking for employment in his area of expertise i.e. the printing industry but in "small format" (not large format). Further, he was able to secure employment in printing where does not have to lift more than 10 kilograms or twist, he can sit or stand for prolonged periods, and he can take a break as needed.

[27] The Member finds however, that the Claimant did not provide any evidence that he was making reasonable and customary efforts to secure suitable employment from April 5, 2018 to May 2, 2018. The Member agrees with the Commission that one interview in a month, even if it did result in a job offer, is not sufficient evidence of a sustained effort that consisted of the activities listed in subsection 9.001(1) of the Regulations.

[28] The Member finds that the Claimant therefore did not meet the onus of proving that he was capable of and available for work and unable to obtain suitable employment for the period of April 5, 2018 to May 2, 2018.

**CONCLUSION**

[29] The appeal is allowed in part. The Claimant met the onus of showing the he left his employment for just cause and therefore, he should not be disqualified from receiving benefits from February 11, 2018 onward. However, for the period of April 5, 2018 to May 2, 2018, the Member finds that the Claimant did not prove his availability and therefore, he should be disentitled to benefits only during this latter period.

Eleni Palantzas

Member, General Division - Employment Insurance Section

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| HEARD ON: | November 19, 2018 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | E. Z. , Appellant |