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

[TRANSLATION]

Citation: *P. R. v Canada Employment Insurance Commission*, 2018 SST 1319

Tribunal File Number: GE-18-2902

BETWEEN:

P. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: October 31, 2018

DATE OF DECISION: November 30, 2018

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] A claimant is disqualified from receiving Employment Insurance benefits for a period of 7 to 12 weeks if they fail to accept a suitable employment without good cause. In this case, the Appellant received an offer of employment from X through the employment agency X. He refused the offer because he had to pay the liability insurance, which was usually paid by the employer, and because he was not entitled to benefits. Furthermore, he did not want to start the employment before the construction holidays. The Appellant argues that this is not an actual refusal of employment because he was still negotiating the terms and conditions of employment with the employer. The employer ended the negotiations, and the offer did not materialize.

[3] The Commission found that the Appellant refused an offer of employment with a salary in line with industry standards for X and for which he had the required qualifications. The Commission is of the view that the Appellant has not proven that the employment was not suitable or that he had good cause for failing to accept the employment. The Commission therefore exercised its discretion and disqualified the Appellant from receiving benefits for a period of 12 weeks.

ISSUES

[4] Was the employment considered suitable?

[5] Did the Appellant fail to accept a suitable employment?

[6] Did the Appellant have good cause for failing to accept a suitable employment?

[7] If so, did the Commission exercise its discretion judicially in disqualifying the Appellant from receiving benefits for a period of 12 weeks?

ANALYSIS

[8] Section 27(1)(b) of the Act states that a claimant is disqualified from receiving benefits if, without good cause since the interruption of earnings giving rise to the claim, the claimant has not taken advantage of an opportunity for suitable employment.

Issue 1: Was the employment considered suitable?

[9] Employment is not suitable employment for a claimant if it arises in consequence of a stoppage of work attributable to a labour dispute; 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 any such agreement, than those recognized by good employers; or it is not in the claimant's usual occupation and 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 their usual occupation, or would have obtained if they had continued to be so employed (section 6(4) of the EI Act).

[10] Furthermore, the criteria for determining what constitutes suitable employment are the following: the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work; the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and the nature of the work is not contrary to the claimant's moral convictions or religious beliefs (section 9.002 of the EI Regulations).

[11] Therefore, if the Tribunal is limited to these criteria, it seems, as the Commission argues, that the employment offered to the Appellant was suitable.

[12] However, the provisions of section 6(4)(c) of the Act must also be considered. These provisions state that employment is not suitable employment if it is not in the appellant's former occupation and has less favourable conditions or wages lower than what they might reasonably expect to obtain given the conditions and wages they would have received if they continued to work in their former employment. Finally, the Act specifies that after a lapse of a reasonable interval from the date on which an insured person becomes unemployed, section (4)(c) does not

apply to the employment described in that section 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 (section 6(4) and 6(5) of the EI Act).

[13] The Appellant argues that the X position that he was offered had conditions that were inferior to than those of the position he held before. He therefore tried to negotiate his conditions with the employment agency and indicates that the negotiations stalled. He argues that the employment agency did not submit his last offer to the employer and that this ended the negotiations and the offer of employment. The Appellant explains that two main points were being negotiated with the employer: the salary and insurance as well as the start date. He explains that the employer had agreed to increase the salary to cover the liability insurance. However, no agreement was reached for the start date. The Appellant believes that he asked for a reasonable interval of four weeks before starting the employment and that this was in line with the employer's standards.

[14] The Commission argues that the employment offered by the employment agency, X, was suitable because the Claimant had the qualifications needed for the position. The salary offered was within the standards for the field. Furthermore, the employment agency and the Claimant confirm that the salary of $85,000.00 was in line with salaries offered in the X field and that the supplement of $6,000.00 was enough to cover the insurance fees. The start date was within a reasonable time frame, and the Claimant did not show that he had valid reasons for not being able to start this new employment within this time frame.

[15] The Commission is of the view that the Claimant has not shown that he had good cause for refusing the offer of suitable employment on the basis that his salary with his former employer was higher. On the contrary, at X, the salary was $92,000.00 while the new salary offered was $91,000.00, which is the same. The Claimant emphasizes that he would have had to pay the monetary amounts for his insurance and that he did not wish to be stuck with the monthly payments if his contract ended after December 28, 2018.

[16] The Tribunal has considered the fact that the Appellant has confirmed that the negotiations with the employment agency stalled mostly on the issue of the employment start date. The Appellant wanted to start the employment after the two weeks of construction while the employer wanted him to start before. Although the Appellant finds that this is a reasonable time frame within the employer's expectations, the Tribunal does not agree with this position. Regarding Employment Insurance, a claimant must take advantage of an employment opportunity. The fact that he would not have been paid during the two weeks of construction is not a valid reason because the Appellant would probably have been able to benefit from Employment Insurance if it were a case of an employer business closure. The Tribunal is of the view that wanting to delay an employment start date is not good cause for determining that an employment is not suitable.

[17] Therefore, the Tribunal finds that the employment offered to the Appellant was suitable. The salary met the industry standards for the Appellant's type of employment. Furthermore, the employer had offered an additional amount to cover the Appellant's insurance. The fact that the Appellant was not able to start the employment on the day he wanted to start is not a reason for determining that the employment was not suitable. The Appellant has not provided good cause to explain why he had to start the employment later, other than the fact that the employer would not have paid him for the weeks of construction. Furthermore, being denied a later employment start date is not good cause for determining that the employment was not suitable. The Tribunal is of the view that, since the reason for the negotiations between the Appellant and the employer ending lies in the fact that the Appellant added a new request even though the employer had agreed to the salary increase, the Tribunal is of the view that this is treated as the Appellant refusing to start the employment on the day the employer wanted. It was the Appellant who imposed an extra condition on the employer.

Issue 2: Did the Appellant fail to accept a suitable employment?

[18] The Tribunal is of the view that the Appellant refused to take advantage of an offer of suitable employment.

[19] The employment agency, X, stated that it offered the Appellant work as an X. The agency stated that its client was in urgent need and was very interested in the Appellant's application. The employer had therefore increased its salary offer from $85,000 to $91,000 to cover the insurance fees and benefits, as the Appellant requested. However, the agency stated that the Appellant came back and raised the issue that he could not start the employment before August 6, 2018.

[20] The Appellant states that he did not refuse this offer of employment. He states that instead he was in a negotiation period with the employer and that, in the end, the employment agency simply did not provide the employer with his offer and that this ended the negotiations. He therefore did not refuse any employment. The Appellant explains that, despite the email indicating that he failed to accept the employment, the negotiations continued (GD3-45). He therefore made the employer a counter-offer. He states that they did not agree on the issue of insurance as well as the employment start date.

[21] The Commission, in turn, submits that the Claimant refused an offer of employment. The offer refused was for a salary in line with industry standards for X, and the Claimant had the qualifications to carry out this new employment. The Claimant has not shown that the employment was not suitable according to the criteria and definition of section 27 of the Act. In this case, a reasonable alternative would have been for the Claimant to accept the offer of employment. If the employment did not suit him, he could have worked while looking for new employment that suited him better.

[22] The Tribunal is of the view that, as the Appellant confirmed at the hearing, the start date was a problem for the Appellant. Although the Appellant finds that the time frame was reasonable and in accordance with the employer's rules, the Tribunal does not agree with this finding. The Tribunal is of the view that the Appellant did not have good cause for not starting his employment when the employer asked him to start. The Appellant was unemployed and looking for employment. The main reason for wanting to delay the start date had to do with the fact that he would have found himself without pay for two weeks during the weeks of construction. However, the Tribunal is of the view that the Appellant would have received a salary higher than the Employment Insurance benefits received during the three or four previous

weeks. Furthermore, nothing indicates that the Appellant would not have been able to receive Employment Insurance benefits during this period if he experienced a shortage of work.

[23] Moreover, while the Appellant believed that he was still negotiating with the employer through the employment agency and while he is of the view that the agency did not submit his last request to the employer, the Tribunal notes that, despite an initial refusal (GD3-45), the negotiations continued. The employer then agreed to review the salary it was offering the Appellant. Imposing a new start date and demanding new conditions are considered a refusal on the part of the Appellant to accept the employment.

[24] Therefore, based on the evidence and the parties' arguments, the Tribunal is satisfied that the Claimant refused to take advantage of an opportunity for employment.

Issue 3: Did the Appellant have good cause for failing to accept a suitable employment?

[25] The Tribunal must therefore examine the issue of whether the Claimant had good cause for refusing to take advantage of an opportunity for suitable employment.

[26] The Court states that good cause exists when the claimant acts prudently, that is, as a reasonable person would have acted in the same situation (*Canada (Attorney General) v Moura*, FCA A-800-80).

[27] The Appellant confirms that the start date was the problem because the insurance and salary issue had been resolved. Although arguments were presented in line with the insurance issue, the Appellant confirmed that the employer had increased its salary offer to resolve that issue. Therefore, the Tribunal considers that, as the Appellant has confirmed, the issue of the start date is what caused the Appellant to refuse the employment. Therefore, although the Appellant argues that he was still negotiating, the Tribunal is of the view that he did not have any valid reason to delay his start date, even if he considered his request to be reasonable.

[28] The Appellant was unemployed and was looking for employment. His last day of work with his former employer had been on February 16, 2018. The main reason for wanting to delay the start date had to do with the fact that he would have found himself without pay for two weeks

during the weeks of construction. However, the Tribunal is of the view that the Appellant would have received a salary higher than the Employment Insurance benefits received during the three or four previous weeks. Furthermore, nothing indicates that the Appellant would not have been able to receive Employment Insurance benefits during this period if he experienced a shortage of work.

[29] As mentioned earlier, the employment itself and the salary offered to the Appellant after negotiations corresponded to those of suitable employment. Moreover, the type of employment offered to the Appellant corresponded to that in which he worked during his qualifying period, as an X.

[30] Therefore, based on the evidence and the parties' arguments, the Tribunal is of the view that the Claimant failed to act as a reasonable person would have acted. The Tribunal is of the view that the Claimant failed to provide good cause for preventing him from taking advantage of an opportunity for suitable employment, under section 27(1)(b) of the Act.

[31] For this reason, under section 27(1)(b) of the Act, the Tribunal is of the view that the Claimant is disqualified from receiving benefits because, since the interruption of earnings giving rise to his claim, he failed to take advantage of an opportunity for suitable employment and did so without good cause.

Issue 4: Did the Commission exercise its discretion judicially in disqualifying the Appellant from receiving benefits for a period of 12 weeks?

[32] The Tribunal is of the view that the Commission exercised its discretion judicially and that, for this reason, the Tribunal may not intervene in the Commission's decision.

[33] A disqualification under section 27 is for the number of weeks that the Commission may determine, but the number of weeks of a disqualification arising under section 27(1)(a) or (b) must be not fewer than 7 or more than 12 (section 28(1)(a) of the EI Act).

[34] A higher court may not exercise the discretionary powers specifically conferred on the Commission under the *Employment Insurance Act*. The Commission's decision made in the exercise of such a discretion cannot be overturned unless it contains a fundamental error

demonstrating that it was not made judicially (*Canada (Attorney General) v Loken*, FCA A-464-94).

[35] The Commission determined that the duration of the disqualification was 12 weeks.

[36] Therefore, the question that the Tribunal must decide is whether the Commission exercised its discretion judicially in establishing the duration of disqualification at 12 weeks.

[37] The Commission indicates that it considered that the Appellant had the assurance of holding this employment until the end of December 2018 with a strong likelihood of continuing. This would have helped remedy the unemployment situation that had gone on since February 16, 2018. The Commission argues that, in this case, it exercised its discretion judicially in that it considered all of the relevant factors and did not consider irrelevant factors. Furthermore, the Commission indicates that it exercised its discretion in considering the length of employment, the terms of salary, the Claimant's qualifications, and the employer's interest in the candidate. After analyzing all the Claimant's arguments, the Tribunal finds that the Claimant did not present the Commission with extenuating circumstances that would have allowed it to reduce the disqualification.

[38] The Claimant argues mainly that the offer of employment did not materialize and that instead it was abandoned since the employment agency did not submit his counter-offer. However, the employer had increased the offered salary, and the Appellant wanted to delay the start date without good cause. The Appellant believed that he was still negotiating with the employer through the employment agency.

[39] Based on the evidence and the parties' arguments, the Tribunal is satisfied that the Commission considered the elements raised by the Claimant and that, as a result, it acted judicially in exercising its discretion.

[40] The Tribunal is of the view that it cannot therefore intervene in the Commission's decision regarding the number of weeks of disqualification.

CONCLUSION

[41] Based on the evidence and the parties' submissions, the Tribunal is of the view that the Claimant is disqualified from receiving benefits because, since the interruption of earnings giving rise to his claim, he failed to take advantage of an opportunity for suitable employment and did so without good cause, under section 27(1)(b) of the Act.

[42] The Tribunal is also of the view that the Commission acted judicially in exercising its discretion and that, as a result, the Tribunal may not intervene in the Commission's decision regarding the number of weeks of disqualification that was set at 12 weeks.

[43] The appeal is dismissed.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	October 31, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	P. R., Appellant