



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. W. v Canada Employment Insurance Commission*, 2019 SST 893

Tribunal File Number: GE-18-3455

BETWEEN:

M. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: December 19, 2018

DATE OF DECISION: January 4, 2019

DECISION

[1] The appeal is dismissed. The Tribunal finds the Appellant did not have just cause to voluntarily leave his employment on September 25, 2017. The Tribunal finds the Appellant failed to prove his availability from September 26, 2017, to December 18, 2017.

OVERVIEW

[2] The Appellant established a renewal claim for employment insurance benefits on November 5, 2017. The Appellant was employed until September 25, 2017, when he voluntarily left his employment stating that he stopped working because of illness or injury. The Canada Employment Insurance Commission (Respondent) contacted the Appellant to clarify the type of benefits he was requesting and he advised the Respondent that he can still work and he has medical details from his doctor but he was not advised to quit. The Respondent disqualified the Appellant from regular benefits because it was determined he voluntarily left his employment without just cause. The Respondent also imposed a disentitlement because he failed to prove his availability from September 26, 2017, to December 18, 2017, because he would only accept work in God Lake Narrows. The Appellant appealed the decisions to the *Social Security Tribunal* (Tribunal).

PRELIMINARY ISSUES

[3] The Appellant confirmed he received his docket by email and he read it over but he never printed it out. He agreed to proceed with the hearing without the paper copy.

ISSUES

[4] Did the Appellant voluntarily leave his employment? If so,

[5] Did the Appellant have just cause to voluntarily leave his job?

- a) Because of health issues; and
- b) Obligation to care for his family.

[6] Should the Appellant be disentitled to benefits because he failed to prove his availability for work and has the Appellant demonstrated his availability for work by proving:

- 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.

ANALYSIS

Voluntary Leave

[7] Subsection 29(c) of the *Employment Insurance Act* provides that an employee will have just cause by leaving a job if this is no reasonable alternative to leaving taking into account a list of enumerated circumstances. The test to be applied, having regard to all the circumstances, is whether the Appellant had a reasonable alternative to leaving his employment when he did.

[8] Subsection 30(1) of the Act provides that a claimant is disqualified from receiving any employment insurance benefits if they voluntarily left any employment without just cause.

Issue 1: Did the Appellant voluntarily leave his employment?

[9] The question to ask, is did the Appellant have a choice to stay or to leave (*Canada (Attorney General) v. Peace*, 2004 FCA 56)?

[10] The Respondent has the burden of proof to show that the Appellant left voluntarily (*Canada (Attorney General) v. Peace*, 2004 FCA 56).

[11] Yes, the Tribunal finds the Appellant voluntarily left his job. The Appellant conceded that he left his job after he found out he had sleeping tuberculosis (TB) and he did not want to scare his colleagues. The Tribunal finds because the Appellant admits he voluntarily left, the Respondent's burden to prove is met.

Issue 2: Did the Appellant have just cause to voluntarily leave his job?

[12] No, the Tribunal finds the Appellant did not have just cause to voluntarily leave his employment because he made a personal choice to leave his employment when he did and he had reasonable alternatives available to him. Although a personal choice may constitute good cause, it is not just cause and by leaving, causes others to bear the burden of the Appellant's unemployment (*Canada (Attorney General v. White*, 2011 FCA 190; *Tanguay A-1458-84*).

[13] The onus is on the claimant who voluntarily left employment to prove that he had just cause for doing so because there was no other reasonable alternative for leaving the employment at that time. The test to be applied having regard to all the circumstances is whether, on the balance of probabilities, the claimant had no reasonable alternative to leaving his employment (*Rena-Astronomo (A-141-97)*).

a) Health Issues

[14] Where the detrimental effect on one's health is being proffered as just cause a claimant must (a) provide medical evidence (b) attempt to resolve the problem with the employer; and (c) attempt to find other work prior to leaving.

[15] The Appellant testified that while he was working he found out he had sleeping TB. He stated he called the nurse at the nursing station in his community and asked what it was all about. He stated she told him he wasn't contagious but when he returned home after his shift to come by the nurse's station and they would perform a test. He stated that he didn't know what to do and he didn't want to scare his co-workers. He testified that he never spoke to his employer or went back to the X. He testified that he decided to stay in his community and look for work there.

[16] The Appellant testified in November he had a telehealth conference with a doctor from Winnipeg and he told him he was not contagious and would prescribe him pills to take. He stated that he was required to go to the nurse's station for his medication but after a few weeks, he convinced them to let him take them at his home. He stated that he was not allowed to take the medication out of the community.

[17] The Appellant stated that he did call his employer after his November telehealth conference and told him about his health situation and the employer issued an amended record of employment stating he left for medical reasons.

[18] The Appellant testified that he didn't start taking his medication because it didn't arrive in the community until the end of December. He stated he doesn't know why the doctor's note (GD3-31) stated that his TB did not make him sick and he did not need to stay in the community to take his medication. He stated that he had been told, he did have stay in the, community to take his medication.

[19] The Appellant testified another reason he left his job was that he didn't want to be away from his grandchildren and his son. He explained that his daughter-in-law had been murdered 3 years prior and left a 5 and 3 year old. He stated that he did try to go back to his job in July 2018, but he just couldn't be away from his family and when he returned he promised his grandchildren their papa, would never go away again. He stated his employer knew his personal situation. He stated that his health and family were the two most important facts and he will do what he has to do.

[20] The Tribunal finds the Appellant was able to continue working and this is supported by the medical evidence (GD3-19) where Dr. Oliver stated in a letter dated November 7, 2017, that the Appellant was able to continue working.

[21] The Tribunal finds additional medical evidence on the file from Dr. Oliver (GD3-31 and GD3-32) supports that the Appellant was diagnosed with sleeping TB but it also states that the he was not sick or contagious and did not have to stay in the community to take his medications. The evidence also supports that the Appellant's medication did not arrive in the community until the end of December so even if he was required to stay in the community to take his medication he could have stayed working until that time. This Appellant also testified to the fact his medication did not arrive until the end of December.

[22] The Tribunal finds the medical evidence does not support that the Appellant was not able to remain in his employment or that he was advised to quit his job when he did, or that there was an immediate need to do so.

[23] The Tribunal considered the medical evidence provided by Michael Lang, Nurse-in Charge; however, the letter dated October 24, 2018, is over a year from when the Appellant left his employment. In addition, the Appellant submitted it after he made a subsequent application for employment insurance in 2018. The Tribunal finds the letter does not provide any dates and specifically the Appellant needed to leave his employment on September 25, 2017.

[24] The Tribunal finds from the Appellant's testimony that he was notified he had sleeping TB while he was at work and he was not contagious therefore he would not have posed a threat to his co-workers. The Appellant also testified that he never attempted to speak to his employer about his health situation or that he was leaving.

[25] The Tribunal finds from the employer's evidence on the file, the Appellant did not discuss his medical concerns or advised them he was leaving.

[26] The Tribunal considered the Appellant's testimony that after learning he had sleeping TB, he was confused and didn't know what to do and he didn't want to scare his co-workers or be treated differently, so he made the decision not to return to his employer following his break.

[27] The Tribunal acknowledges the Appellant's concerns but finds that the Appellant made a personal decision to leave without exhausting all reasonable alternatives. The Tribunal finds that the Appellant could have advised his employer of his health situation and discussed if there would be any issues with him remaining in the X. A reasonable alternative would have been to request a leave of absence or attempt to find other suitable employment before leaving.

b) Obligation to care for his family

[28] The Tribunal considered the Appellant's testimony that he also left his job because he wanted to be around to care for his grandchildren and son.

[29] A claimant will have just cause for quitting his employment if there is an "obligation to care for a child". A parent can leave employment to look after a child if no other reasonable arrangement can be made that would enable the parent to work and care for the child. Despite the fact that an obligation to take care of one's child can provide just cause, a claimant must still demonstrate that he or she had no reasonable alternative to leaving.

[30] The Tribunal finds the Appellant did not provide any evidence to support the children be in immediate need of his care. The Tribunal finds from the Appellant's testimony that he wanted to be closer to his family that was a deciding factor in his leaving his employment.

[31] The Tribunal considered the letter from Mike Edwards, the Appellant's therapist, however; the letter is dated November 14, 2018, and does provide any evidence to support this was the situation when the Appellant left his employment on September 25, 2017. The Tribunal finds from the Appellant's oral testimony that he had returned to work on July 17, 2018, until August 2, 2018, then again, voluntarily left his employment, promising his grandchildren he would never leave them again.

[32] The Tribunal finds on the balance of probabilities the letter from Mike Edwards, supports the Appellant's need to leave on August 2, 2018, and not on September 25, 2017.

[33] The Tribunal sympathies with the tragic situation but there it no evidence to support there was urgency to leave the employment on September 25, 2017, and the Tribunal finds the Appellant has failed to prove he exhausted all reasonable alternatives available to him. The Tribunal finds that a reasonable alternative would have been to remain employed until he was able to secure employment closer to home.

[34] The Tribunal must apply the test of whether the Appellant had a reasonable alternative to leaving his employment when he did. The Act imposes a duty on a claimant not to deliberately cause the risk of unemployment to occur. A claimant who has voluntarily left his employment and has not found other employment is only justified in acting in this way if, at the time he left, the circumstances existed which excused him from thus taking the risk of causing other to bear the burden of his unemployment. A claimant is responsible to exhaust all reasonable alternatives prior to placing himself or herself in a position of unemployment.

Availability

[35] To be entitled to receive regular employment insurance 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* (Act). Section 9.001 of the *Employment Insurance Regulations* (Regulations) provides the criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts and section 9.002 of the Regulations provides the criteria for determining what constitutes suitable employment.

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

[37] The burden of proof is on the claimant to prove his availability. The claimant must not only allege availability, they must prove it with all documents necessary (*Canada (AG) v. Renaud*, 2007 FCA 328, *Canada (AG) v. Floyd*, A-168-93).

Issue 3: Should the Appellant be disentitled to benefits because she failed to prove his availability for work and has the Appellant demonstrated his availability for work?

[38] 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) Has the Appellant demonstrated the desire to return to the labour market as soon as a suitable job is offered?

[39] No, the Tribunal finds the Appellant has not demonstrated a desire to return to the labour because the Appellant testified that he was available only for jobs within his community and he would not leave his grandchildren or son again. The Appellant has testified that living in a fly-in community and having to go back and forth was very hard on himself and his family. His stated he does not have the luxury, of hoping on a city bus, to look for work and he was willing to make the sacrifice to stay in his community. The Tribunal finds the Appellant's attitude and conduct do not support he was sincere in returning to the labour market.

[40] The Tribunal considered the Appellant's testimony that he was always available for work in his community. The Tribunal finds from the Appellant's testimony that when he left his job at X and made the decision to return to his community, he knew there were no jobs for X available. Therefore, on the balance of probabilities, the Appellant's desire to return to work as soon as a suitable job was offered was not likely, because when he left his job there would be no other jobs available for him, unless he was willing to travel outside his community, which is not disputed.

[41] 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).

b) the expression of that desire through efforts to find a suitable job; and

[42] No, the Tribunal finds that the Appellant has failed to demonstrate he has made serious efforts to find employment.

[43] The Appellant testified that when he left his job with X on September 25, 2015, he was looking for work in his community but all the X jobs were gone.

[44] The Appellant testified that he was always available for work in his community and he has found work a X and that the winter roads are about to open in January 2019, he will apply for work to build the new school. He testified that he is also working on starting his own business.

[45] The Tribunal finds from the Appellant's testimony that he looked for a job as a X but they were all taken. He did not provide any other evidence that he looked for other types of work during the period from September 26, 2017, to December 18, 2017. The Tribunal finds from the Appellant's testimony that he limited to his search to his community and that he did not want to leave the community and leave his grandchildren and son. The Tribunal finds the Appellant has not demonstrated he is making serious efforts to find employment.

[46] Availability is a question of fact that is based on the claimant's desire to return to the labour market as soon as he is offered suitable employment. This desire is shown through

reasonable ongoing efforts to find suitable employment as quickly as possible (*Bois A- 31-00; Cornelissen- O'Neil A-652-93; Bertrand A-631-81*).

[47] The Tribunal considered the Appellant's testimony that he recently found work as a X and was waiting to apply for employment when the winter roads open up. In addition, that he is in the process of starting his own business. However, the issue of availability if from September 26, 2017, to December 18, 2017, and the Appellant's job efforts he provided are recent and after the period in question and cannot support the Appellant's efforts from September 24, 2017, to December 18, 2017.

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

[48] Yes, the Tribunal finds the Appellant has set personal conditions that might unduly limit the chances of returning to the labour market because the Appellant's testified that he is only willing to work in his community and he is not willing to leave his grandchildren and son. The Appellant testified that he made a promise to his grandchildren that he would not leave them again and he would make whatever sacrifices he had to do so. He testified that his health and family were the most two important factors.

[49] The Appellant testified that he was not able to leave his community to the fact that he was required to take medication that needed to be administered by the nurse's station. However, he was able to convince them to take his medication at home, but the medication could not be taken out of the community.

[50] The Appellant questioned the Member if the letters from Mike the head nurse and Mike Edwards his therapists were being considered.

[51] The Tribunal considered the Appellant's medical evidence, however, the medical note (GD3-31) cannot support that during the period in question the Appellant was required to return or stay in his community from September 26, 2017, to December 18, 2017, to receive treatment.

The Tribunal finds the medical note (GD3-32) supports that the Appellant's medication did not arrive to the community until December 2017, and the medical note (GD3-40) indicates the Appellant started his treatment in January 2018.

[52] The Tribunal gives more weight to the medical documents that were issued that support the Appellant's health situation for the periods of September 26, 2017, to December 18, 2017, rather than the ones submitted over a year later.

[53] The Tribunal considered the medical evidence from Michael Lang, Nurse-in-Charge (GD3-68) but finds it is dated October 24, 2018, and although it states the Appellant must attend the nursing station to receive his medications, it does not provide evidence to support that this was for the period from September 26, 2017, to December 18, 2017. The Tribunal finds that this letter also contradicts the Appellant's testimony that he convinced the nurse to take his medication at home.

[54] The Tribunal considered the letter from Mike Edwards, the Appellant's therapist, and while it supports the Appellant's need to stay with his family, the letter is dated November 14, 2018, and after the Appellant had returned to his employer in July 2018. It does not support the dates for the issue of availability under appeal.

[55] The Tribunal notes, the Appellant testified that that after he left his employment on September 25, 2017, he returned to his employer in July 2018, he reapplied for benefits and it was after this leave he submitted the letters from Michael Lang and Mike Edwards.

[56] The Tribunal considered the Appellant's argument that he lives in a remote community and that he does not have the luxury to hop on a city bus to look for work. However, this does not change the fact, the Appellant made a personal decision to leave his employment to move to an isolated area, where by the Appellant's own admission there were no or little employment opportunities.

[57] The Tribunal sympathies with the Appellant's situation but the Tribunal does not have the authority to alter the requirements of the Act and must adhere to the legislation regardless of the personal circumstances of the Appellant (*Canada (AG) v. Levesque*, 2001 FCA 304).

CONCLUSION

[58] The appeal on all issues is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	December 19, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. W., Appellant