



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *H. B. v Canada Employment Insurance Commission*, 2019 SST 43

Tribunal File Number: GE-18-2825

BETWEEN:

H. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: December 17, 2018

DATE OF DECISION: January 11, 2019

DECISION

[1] The appeal is allowed on the issue of the week of unemployment. The appeal is dismissed with modifications on the issues of availability and being outside Canada.

OVERVIEW

[2] The Appellant lost his employment in December 2017 and received Employment Insurance benefits as of April 23, 2018. He submits that he spoke to the Commission to ask how consulting work would affect his Employment Insurance benefits. The Appellant maintains that he was only seeking information about a hypothetical situation. However, the Commission informed him that he was not considered unemployed as of April 23, 2018, because he is self-employed.

[3] Furthermore, the Appellant informed the Commission that he was outside Canada in an effort to find employment from April 6, 2018, to April 30, 2018. The Commission imposed a disentitlement on the Appellant for that period because he was outside Canada, and it considered that he was not available for work during that period.

ISSUES

Week of unemployment

[4] Was the Appellant considered unemployed as of April 23, 2018?

Outside Canada

[5] Was the Appellant entitled to Employment Insurance benefits despite the fact he was outside Canada from April 6 to 30, 2018?

Availability

[6] Was the Appellant available for work from April 6 to 30, 2018?

ANALYSIS

Issue 1: Was the Appellant considered unemployed as of April 23, 2018?

[7] The Tribunal must determine whether the Appellant was considered unemployed. To do this, the Tribunal must answer the following questions:

- Was the Appellant self-employed?
- If so, he is presumed to have worked an entire week and cannot be unemployed. Did the Appellant disprove this presumption by showing that the work he performed was to such a minor extent that it could not be his principal means of livelihood?

Was the Appellant self-employed?

[8] The Tribunal is of the view that the Appellant is not considered self-employed because he is not engaged in the operation of a business.

[9] When an insured person who qualifies makes an initial claim for benefits, a benefit period will be established and benefits are payable to the person for each week of unemployment that falls in the benefit period (*Employment Insurance Act* (EI Act), section 9).

[10] A week of unemployment is a week in which a claimant does not work a full working week (EI Act, section 11).

[11] During any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week (*Employment Insurance Regulations* (EI Regulations), section 30(1)).

[12] Specifically, a self-employed person means an individual who is or was engaged in the operation of a business or is employed or any employee who does not have insurable employment, meaning a person employed by a corporation if the person controls more than 40%

of the voting shares of the corporation (EI Regulations, section 30(5), and EI Act, section 5(2)(b)).

[13] The Appellant made a claim for Employment Insurance benefits in which he indicated that he was not self-employed (GD3-32). He maintained that he had been actively seeking employment since December 4, 2017, and indicated that he had not done any work for compensation. He argued that he was not self-employed.

[14] The Tribunal faces a contradiction on which it must decide. On one hand, the Commission considers the Appellant to be self-employed. On the other, the Appellant indicates that he was never self-employed.

[15] First, the Tribunal notes that there are no business registrations in the Appellant's name in the file.

[16] The Commission submits that the evidence on file shows that the Claimant cannot be considered unemployed as of April 23, 2018. Even if the Claimant is not engaged in the operation of a registered business, he is waiting for the international employer to make an offer. The Claimant stated that he has invested a lot and that he does not want to give up; when he receives an offer, he will negotiate with the party making the offer. His goal is to become an independent consultant for an international company looking to open in Canada. He went to Morocco from April 6 to April 30, 2018, to meet with the president and chief executive officer. He attended two conferences there. He paid for his travel and to attend the conferences.

[17] The Appellant testified that he was soliciting an international company that wanted to open a subsidiary in Canada. As a result, the Appellant went through a long hiring process for the company. He explained that it was a salaried position with the company, but he thought that there could be a transition period during the company's establishment. During that time, he could have had the option of working as a freelancer. He maintains that, as a result, he contacted the Commission to get information about the support program for self-employment. He indicated that the information he gave the Commission was therefore hypothetical because he was never self-employed. He also cited \$9,000 as an example of the costs invested in the company, which the Commission says corresponds to the cost for him and his family to travel to Morocco.

[18] The Tribunal has also considered the Appellant's job searches (GD5). The Appellant confirmed that he found employment, which he began on November 26, 2018 (GD6).

[19] The Tribunal has considered the fact that the Appellant confirmed that he spent hours satisfying the international employer's requirements. He indicated that he believed that there would be an offer, but the employer put off opening a subsidiary in Canada.

[20] The Tribunal has considered that the Appellant gave detailed testimony about the situation. Furthermore, the Tribunal notes that, when put in perspective with the Appellant's testimony, the Commission's conversation log is consistent with the Appellant's testimony (GD3-56/57). In addition, there is no evidence supporting the fact that the Appellant was engaged in the operation of a business or self-employed during that period. Therefore, the Tribunal assigns more weight to the Appellant's testimony.

[21] Consequently, the Tribunal is of the view that the Appellant is not self-employed or engaged in the operation of a business on his own account or in a partnership or co-adventure. As a result, the Tribunal is of the view that the Appellant is not self-employed within the meaning of section 30 of the *Employment Insurance Regulations*.

[22] Therefore, since the Appellant is not considered a person who is self-employed or engaged in the operation of a business, according to section 30(5) of the Regulations, the presumption that the Appellant worked a full working week does not apply. The Appellant is therefore entitled to Employment Insurance benefits.

[23] The Tribunal has considered the Commission's arguments that the Claimant was not looking for work in other fields and did not apply if he did not have all the qualifications, that he did not apply if he was over-qualified because employers are afraid that he will leave later on, and that he did not apply to part-time positions because they did not include health or dental insurance. In addition, the Commission believes that the Claimant was also not applying for full-time positions that did not offer that coverage, saw no jobs for which he could apply in 2018, and was waiting for a response about his consulting work, and was giving himself time to find employment.

[24] However, the Tribunal is of the view that these facts concern a claimant's availability, not whether or not they are engaged in the operation of a business. Since the Commission did not give a decision on the Appellant's availability beyond the period during which he was outside Canada, the Tribunal is of the view that it therefore does not have to decide on the Appellant's availability outside the period in question.

Issue 2: Was the Appellant entitled to Employment Insurance benefits despite the fact he was outside Canada from April 6 to 30, 2018?

[25] Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada (EI Act, section 37(b)).

[26] One of the circumstances for which a claimant may be entitled to Employment Insurance benefits is going outside Canada for a period of not more than seven consecutive days to attend a *bona fide* job interview (EI Regulations, section 55(1)(e)).

[27] "The 'period' in paragraph 37(b) of the Act is the period, expressed in complete, whole days, during which the claimant was outside of Canada. For this purpose, a complete, whole day does not necessarily mean a calendar day. Rather, it can include a continuous 24-hour period that straddles two calendar days." (*Canada (Attorney General) v Picard*, 2014 FCA 46).

[28] The Appellant explained that he went to Morocco to meet with the president of a company with which he was seeking employment related to the opening of a subsidiary in Canada. He added that he also took advantage of the opportunity to visit family.

[29] The Commission argues that the Claimant could not receive benefits for the period from April 6 to 30, 2018.

[30] However, the Commission recommends that the Tribunal change the disentitlement period for the absence from the country. The Commission indicates that the disentitlement in this case should begin on April 9, not April 6, 2018. The Commission would like to clarify that this change has no effect on the payment of Employment Insurance benefits for that day because the Claimant's renewal request was established on April 22, 2018.

[31] The Tribunal has considered the fact that the Appellant indicated that he had to attend a job interview. As a result, he was invited to attend two meetings where he was able to speak with the company's president. The Tribunal notes that the Appellant did not provide documents related to a formal invitation to a meeting. The Tribunal is of the view that it was actually an informal meeting. While the Tribunal understands that this meeting could have led to an offer of employment, it is of the view that this does not satisfy the criteria for exceptions in the Regulations that allow a person to be entitled to benefits while outside Canada. The Regulations actually refer to "a *bona fide* job interview," and the Tribunal cannot make that determination in this case.

[32] However, the Tribunal has considered that the Appellant indicated that he left the country around 7:00 p.m. on April 6, 2018, and returned around 12:00 p.m. on April 30, 2018. Therefore, the Tribunal is of the view, as recommended by the Commission, that the Appellant was entitled to Employment Insurance benefits on April 6 and 30, 2018 (*Picard*).

[33] Consequently, the Tribunal is satisfied that the disentitlement for being outside Canada must be imposed from April 7 to 29, 2018, because the Appellant was outside Canada during that time.

[34] The appeal is dismissed with modifications in relation to this issue.

Issue 3: Was the Appellant available for work from April 6 to 30, 2018?

[35] 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 capable of and available for work and unable to obtain suitable employment (EI Act, section 18(1)(a)).

[36] Claimants must prove their availability, and an Employment Insurance claimant must ensure that they are available at all times. A claimant will be declared disentitled if their behaviour and claims are not sufficiently compelling to prove genuine availability for work (*Canada (Attorney General) v Cornelissen-O'Neil*, A-652-93).

[37] To do this, availability must be examined based on three factors: the claimant's desire to return to the labour market as soon as a suitable job is offered, the efforts required to find a suitable job, and not setting personal conditions that could limit the chances of returning to work (*Faucher*, A-56-96, A-57-96).

[38] The Commission decided that the Claimant was not available for work from April 6 to 30, 2018. He was outside the country meeting with an international employer to become an independent consultant in Canada. Furthermore, he was visiting his family.

[39] However, the Commission recommends that the Tribunal modify the disentitlement period. In terms of a departure date, the Claimant left on April 6, 2018, at 7:00 p.m. The Commission considers that he was available and ready to work. The disentitlement should begin on April 9, 2018, and not on April 6, 2018, as originally imposed. The Commission would like to clarify that this change has no effect on the payment of Employment Insurance benefits for that day because the Claimant's renewal request was established on April 22, 2018. For the return date, the Claimant returned on April 30, 2018, at noon. The Commission considers that he was not available on that day. The flight arrived at noon. He had to go through customs, pick up his luggage, and return to his home, so he could not have worked that day.

[40] The Appellant argues that he was outside Canada to meet with the president of an international company that hoped to open a subsidiary in Canada. The Appellant clarified that the employment was actually salaried employment and not self-employment. Furthermore, the Appellant indicated that he could have been contacted and could have returned to the country within 48 hours (page GD3-61).

[41] Therefore, the Tribunal must determine whether the Appellant was available for work. To do this, the Tribunal must address the three criteria established by the *Faucher* decision. In this case, the prevailing question is whether the Appellant imposed personal conditions that could limit his chances of returning to work.

Did the Appellant set personal conditions that could limit his chances of returning to work?

[42] The Tribunal is of the view that the Appellant imposed personal conditions that could limit his chances of returning to work.

[43] A claimant's availability cannot depend on particular personal conditions or on overly burdensome restrictions that limit their chances of finding employment (*Canada (Attorney General) v Gagnon*, 2005 FCA 321).

[44] The Appellant confirms that he was abroad for a job interview and to visit his family. As determined earlier, the Appellant has failed to prove that he had a "bona fide job interview." Furthermore, the Appellant confirmed that he took advantage of his stay abroad to visit his family.

[45] Although the Appellant maintains that he could have returned within 48 hours, the Tribunal recalls that the Act requires that an appellant prove their availability for every working day. Therefore, the Tribunal is of the view that the Appellant was not available for work during his stay abroad.

[46] However, the Tribunal is of the view that, on the departure date, the Appellant was available for work because he did not leave until around 7:00 p.m. Furthermore, the Tribunal agrees with the Commission's position that the Appellant was not available for work on the day he returned because he arrived at 12:00 p.m. and the delays caused by customs and his return home must be considered.

[47] Consequently, the Tribunal is of the view, having regard to the evidence and the submissions presented by the parties and on a balance of probabilities, that the Appellant has failed to show that he was available for work within the meaning of section 18(1)(a) of the Act for the period of April 7 to 30, 2018, because he imposed personal restrictions on his availability by leaving Canada.

[48] The appeal is dismissed with modifications in relation to this issue.

CONCLUSION

[49] The appeal is allowed in part.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	December 17, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	H. B., Appellant