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

Citation: *S. R. v Canada Employment Insurance Commission*, 2019 SST 234

Tribunal File Number: GE-18-3182

BETWEEN:

S. R.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent/Commission

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: January 29, 2019

DATE OF DECISION: January 31, 2019

DECISION

[1] The appeal is dismissed. The Claimant failed to prove she was available for work as of June 17, 2018.

OVERVIEW

[2] The Claimant worked for a corporate travel company for approximately 30 years. After the company was sold to another organization, the Claimant found that the culture changed and she was pushed out, alongside other long term employees. The Claimant made a claim for employment insurance (EI) regular benefits, but the Canada Employment Insurance Commission (Commission) determined the Claimant was disentitled from receiving benefits because she did not prove she was available for work. The Commission upheld its decision on reconsideration. The Claimant appeals the decision to the Social Security Tribunal (Tribunal).

ISSUES

[3] **Issue #1** – Was the Claimant capable of and available for work and unable to obtain suitable employment from June 17, 2018, onward?

[4] **Issue #2** – Has the Claimant made reasonable and customary efforts to find work from June 17, 2018, onward?

ANALYSIS

[5] To be entitled to receive regular EI benefits, claimants have to prove that, for each working day, they are capable of and available for work and unable to obtain suitable employment (*Employment Insurance Act* (Act), paragraph 18(1)(a)). For the purposes of section 18 of the Act, a working day is any day of the week except Saturday and Sunday (Act, section 32).

[6] 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 he or she is making reasonable and customary efforts to obtain suitable employment (Act, subsection 50(8)).

[7] The criteria for determining whether the efforts that the Claimant is making constitute reasonable and customary efforts for the purpose of subsection 50(8) of the Act are set out in the Regulations (section 9.001). These criteria apply only to subsection 50(8) of the Act. The Regulations also provide the criteria for determining what constitutes suitable employment, which applies to both subsection 50(8) and paragraph 18(1)(a) of the Act (Regulations, section 9.002). While I may be guided by the factors set out in section 9.001 of the Regulations with respect to availability under paragraph 18(1)(a) of the Act, I note that I am not bound by them with respect to this section of the Act.

[8] The burden of proving availability is on the Claimant, who must not only allege availability, but prove it with all necessary documents (*Canada (Attorney General) v. Renaud*, 2007 FCA 328). The term "burden" is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means it is "more likely than not" the events occurred as described.

Issue 1: Was the Claimant capable of and available for work and unable to obtain suitable employment from June 17, 2018, onward?

[9] I find the Claimant has not proven she was capable of and available for work and unable to obtain suitable employment from June 17, 2018, onward, because she failed to prove that she expressed her desire to return to the labour market through efforts to find a suitable job, and she set personal conditions which could unduly limit her chances of returning to the labour market. I further find the Claimant is disentitled from EI benefits under paragraph 18(1)(a) of the Act.

[10] "Availability" is not defined in the legislation. However, the Federal Court of Appeal has held that the test to determine whether a claimant is available for work involves consideration of three factors (*Faucher v. Canada (Attorney General),* A-56-96):

1. The desire to return to the labour market as soon as a suitable job is offered;

2. The expression of that desire through efforts to find a suitable employment; and

3. Not setting personal conditions that might unduly limit the chances of returning to the labour market.

[11] The Claimant testified that she applied for two jobs since June 17, 2018, and was unsuccessful in both applications. The Claimant stated that she is 65 years old and that, in her opinion, no one will hire her because of her age. The Claimant testified that she sought assistance from a lawyer, who told her that she would not be able to find work due to her age.

[12] The Claimant testified that she used career websites to look for work, and while she received alerts for jobs for which she could apply, she often did not apply because she believed there was no point as she would not be considered based on her age.

[13] 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). The Claimant did not provide a job search history, but testified that she applied for only two jobs since June 17, 2018. Additionally, the Claimant did not provide the dates that she submitted these applications or a contact name and telephone number for the employers. From this, I find that the Claimant's efforts to find work were limited. I am not convinced that the Claimant's efforts expressed a sincere desire to find suitable employment.

[14] Further, The Claimant has not expressed a desire to return to the labour market by making efforts to find suitable employment. The Claimant has made only two job applications, and has decided that age discrimination renders her unable to get a job without actually having tried to get various other jobs of which she was made aware since June 17, 2018. No matter how little chance of success a Claimant may believe a job search would have, the 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)

[15] The Claimant has also set personal conditions that may unduly limit her chances of returning to the labour market, because she is of the opinion that she will not apply for any job which she expects will not hire her due to her age.

[16] Given that the Claimant has failed to prove any of the three necessary *Faucher* elements, I find the Claimant has not proven she was available for work.

Issue 2: Has the Claimant made reasonable and customary efforts to find work from June

17, 2018, onward?

[17] A Claimant's efforts to find a job can be considered reasonable and customary if they are sustained, directed toward obtaining suitable employment, and consist of certain activities such as submitting job applications. The onus is on the Claimant to prove that she made reasonable and customary efforts to obtain suitable employment.

[18] I find the Claimant has not proven she made reasonable and customary efforts to obtain suitable employment from June 17, 2018, onward, because she testified that she has only applied for two jobs since June 17, 2018. While the Claimant receives emails notifying her of job openings, I cannot find her efforts are sustained when she has applied to so few jobs. I find the Claimant has not proven her efforts to find employment were reasonable and customary.

[19] For the reasons above, I find the Claimant is disentitled from EI benefits under both paragraph 18(1)(a) and subsection 50(8) of the Act.

CONCLUSION

[20] The appeal is dismissed. I find the Claimant has failed to prove she was available for work and making reasonable and customary efforts to find suitable employment from June 17, 2018, onward.

Candace R. Salmon
Member, General Division - Employment Insurance Section

HEARD ON:	January 29, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	S. R., Appellant