



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. J. v Canada Employment Insurance Commission*, 2019 SST 278

Tribunal File Number: GE-18-3466

BETWEEN:

L. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: February 20, 2019

DATE OF DECISION: March 12, 2019

DECISION

[1] The appeal is dismissed. I find the Appellant (Claimant) is disentitled to EI benefits because she did not prove she had just cause to voluntarily take a leave of absence and she has failed to prove her availability for work.

OVERVIEW

[2] The Claimant applied for employment insurance benefits (EI) after voluntarily taking a leave of absence. The Canada Employment Insurance Commission (Commission) contacted the Claimant as she had indicated on her application a shortage of work but the record of employment indicated she had taken a leave of absence. The Claimant stated that she took a leave because she did not have transportation but she was looking for work. The Commission disentitled the Claimant benefits because they determined she had not proven her availability. The Claimant made a request for reconsideration on the issue of availability and during the reconsideration process; the Commission maintained the decision on availability and made a decision to disentitle her because she failed to prove she had just cause to voluntarily take a leave of absence. The Claimant filed an appeal with the *Social Security Tribunal* (Tribunal).

[3] A hearing was scheduled for January 8, 2019, but was adjourned because the Claimant did not believe she had received the docket in its entirety and she was not able to print it. The docket was resent by certified mail and by email. A second notice of hearing was sent on January 9, 2018, with a hearing scheduled for January 23, 2019. The Claimant did not attend the hearing and when contacted by the Tribunal her reason was she did not know about the hearing but did confirm she recently received the docket and would be available for a hearing any time in February or March. A hearing was scheduled for February 20, 2019, at 10:00 A.M. CST. On February 14, 2019, the Tribunal contacted her and she confirmed her attendance. The Claimant did not attend the hearing at the scheduled time. However, she called approximately an hour late and I was able to accommodate the Claimant.

PRELIMINARY MATTERS

[4] The Claimant confirmed she had received the docket; however, she had not received the GD8 or GD9 documents. I confirmed with her GD8 was the Commission's response to the section 32 and GD9 was the Notice of Hearing. The Claimant indicated she knew of the scheduled hearing as the Tribunal had advised her on February 14, 2018. She confirmed that she did not pick up her mail.

[5] In order to clarify the issues, I explained to the Claimant that during the reconsideration stage, the Commission had made a second decision to disentitle her to EI benefits because they had determined she did not prove just cause to voluntarily take a leave of absence. This had been communicated to her in a letter dated October 26, 2018; however, she did not request a formal reconsideration of that decision. I asked her if she wanted to appeal this issue along with reconsideration decision on availability. After a lengthy discussion, she confirmed she wanted to deal with both issues at this hearing.

[6] When I asked the Claimant if she had any new documents to provide that were not included in the docket. She stated that she was to send documents as it related to expenses to the Saskatchewan government. She stated she was not sure, what documents the Tribunal wanted her to send. I confirmed that the Tribunal had not requested any documents and asked if it was possible, it was provincial, agency was making the request and she agreed.

ISSUES

[7] Did the Claimant voluntarily take a leave of absence from her job?

[8] If so, did the Claimant have just cause to voluntarily take a leave of absence?

[9] Should the Claimant be disentitled to benefits for failing to prove her availability for work? Has the Claimant demonstrated her 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 of Absence

[10] In addressing section 32 of *the Employment Insurance Act* (EI Act) for voluntarily taking a leave of absence, a claimant must prove that they had no reasonable alternative to taking a leave of absence. They must also demonstrate they exhausted all reasonable alternatives available before leaving. The definitions of section 29 apply to sections 30 to 33 and sections 31 and 32 and may be included in either misconduct or voluntary leaving.¹

Issue 1: Did the Claimant voluntarily take a leave of absence?

[11] Yes, I find that the Claimant voluntarily took a leave of absence. The Claimant conceded that she voluntarily took a leave of absence because she was having trouble between her home and work life and her employer advised her to take a leave of absence. She also stated that she did not have transportation because did not have a driver's licence and that a driver's licence was required for her work.

[12] The Tribunal finds that section 32 applies in the Claimant's situation as she meets the criteria outlined as she did have her period of leave authorized by her employer, and there was an agreement upon a specific date, or even a general time, when the Appellant would resume her employment.²

[13] The employer confirmed that the Claimant was on a leave of absence due to personal issues. The record of employment indicates the Claimant has a return date of July 9, 2019. The employer also told the Commission, regarding a date for the Claimant to return, that they were

¹ *Canada (Attorney General) v Desson* (2004 FCA 303)

² In *(Canada (Attorney General) v. Lamonde* 2006 FCA 44 the Court indicated that a claimant who voluntarily takes a period of leave without just cause is not entitled to receive Employment Insurance benefits until one of the provisions of subsection 32(2) of the Act is met.

waiting for an email or letter from the Claimant showing she had a driver's licence and then they would discuss with the manager when the Claimant could resume work.

Issue 2: Did the Claimant have just cause to voluntary take a leave of absence?

[14] No, I find that the Claimant did not have just cause to voluntary take a leave of absence because she left for personal reasons and failed to prove she had no reasonable alternative to leaving.

[15] The Claimant now has the burden of proof to prove that there was no reasonable alternative to voluntary taking a leave of absence.³

[16] In her initial statement to the Commission, the Claimant said she could not work at that time because she had a lot going on and she was working on her issues. She stated she spoke to her employer about it but she did not feel comfortable talking to the Commission over the phone about her personal issues. She also stated that she had to take a leave of absence because she lost her drivers license and had no means of transportation to get to and from work. She stated she lived on a reservation and there was no public transportation. The Claimant told the Commission she has to take a temporary leave until she was capable of securing another mode of transportation.

[17] The Commission spoke the employer, on October 25, 2018, who confirmed the Claimant was on a leave of absence because she was having personal issues and it was affecting her job performance, so she needed time off. The employer stated that the Claimant was going to become an administrative assistant and she was required to have a driver's licence. She stated that the Claimant was to contact them and provide proof she had a driver's licence and at that time, it would be discussed with management when the Claimant could resume her employment.

[18] The Claimant testified that she took a leave of absence because she was having issues with her home life and it was causing issues with her work life. She was late coming to work because she had kids to take care of. She was not able to concentrate at work. She stated that she

³ The Federal Court of Appeal, (*Tanguay v Commission A-1458-84*), has confirmed the principal that where a claimant voluntarily leaves his/her employment, the burden is on that claimant to prove that there was no reasonable alternative to leaving when he/she did.

spoke to her employer about her situation and they suggested she take a leave of absence. She stated that Human Resources (HR) advised her to see her doctor and get approval for a stress leave but she did not want to go that route. She confirmed to me that she could have done that and maybe should have, but she did not seek any medical advice nor had she attempted to seek any alternative employment because she liked her job. She stated that she was to take the time off, deal with her issues and then she was to write a letter to her employer that would need to be approved by the board when she can go back.

[19] The Claimant, after being read the employer statement about needing a driver's licence remembered that she was going to get a promotion to an administrative assistant and she would need a driver's licence.

[20] I considered the Claimant's testimony that her home life was having an effect on her work life and that the employer confirmed this. However, I do not accept that the situation was of an urgent nature and she needed to leave when she did because she conceded that her employer advised her to go to her doctor and get documentation to support that she needed to take a stress leave. However, she did not want to go that route and agreed with her employer to take time off so that she could deal with her personal issues. She also conceded that she could have gone to see her doctor but she did not. The Claimant also conceded that she was able to work immediately in July when she went on her leave.

[21] I find that if the Claimant were experiencing health issues a reasonable alternative would have been for the Claimant to seek medical advice and request a leave of absence for those reasons. I am not convinced of the Claimant's statement that she did not want to go that route could support her situation of taking a leave was an urgent matter. I considered the Claimant's statements that she had to take a leave of absence because she did not have a driver's licence and am satisfied that this was more than likely not, the reason for her taking leave. However, I cannot accept this to be considered just cause because from her own statements she had to take a leave because she no longer had a licence to drive herself to work and a licence was required as part of her employment. I find the evidence of the certificate provided by the Claimant that she be required to take a Defensive Driving Course supports it was the Claimant's own personal actions, for not keeping her driver's licence in good standing caused her to lose her licence.

[22] I find that the Claimant has failed to prove she had just cause to voluntarily take a leave of absence and is disentitled to receiving EI benefits until she meets the criteria set out in section 32(2) of the EI Act.⁴

Availability

[23] 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 (EI 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.

[24] A claimant who fails to fulfill 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.

[25] The burden of proof is on the claimant to prove her availability. The claimant must not only allege availability, they must prove it with all documents necessary.⁵

Issue: 3 Should the Claimant be disentitled to benefits for failing to prove her availability for work?

[26] Yes, I find that the Claimant should be disentitled to benefits because she failed to prove her availability for work.

⁴ Section 32(2) states the reasons to end the disentitlement (a) resumes the employment; (b) loses or voluntarily leaves the employment; or (c) after the beginning of the period of leave, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits

⁵ *Canada (AG) v. Renaud*, 2007 FCA 328, *Canada (AG) v. Floyd*, A-168-93)

[27] The legal test to prove availability is determined by three factors; the desire to return to the labour market as soon as suitable employment is offered, the expression of that desire through efforts to find suitable employment; and not setting personal conditions that might unduly limit the changes of return to the labour market.⁶

a) Has the Claimant demonstrated the desire to return to the labour market as soon as a suitable job is offered?

[28] The desire to return to work must be sincere, demonstrated by the attitude and the conduct of the claimant.⁷

[29] I accept that the Claimant has demonstrated the desire to return to the labour market as soon as a suitable job because she demonstrated an attitude of her desire to work, providing she could find transportation.

[30] The Claimant testified that she was looking for work and tried to find transportation as soon as she was on her leave of absence from her regular job.

b) Has the Claimant demonstrated the expression of that desire through efforts to find a suitable job?

[31] I find that although the Claimant has expressed the desire to return to the labour market, she has failed to express that desire by proving that she has made serious efforts to find suitable employment.

[32] 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.⁸

[33] In her initial statement to the Commission, the Claimant said she could not work at that time because she had a lot going on and she was working on her issues. During the reconsideration process, the Claimant told the Commission that she was now available for work

⁶ *Faucher v. Canada (Attorney General)* A-56-96; *Canada (Attorney General) v Bois*, 2001 FCA 175

⁷ *Canada (Attorney General) v. Whiffen*, A-1472-92

⁸ *Bois* A- 31-00; *Cornelissen- O'Neil* A-652-93; *Bertrand* A-631-81

because she had gotten her driver's licence back and provided a Defensive Driving Course certificate dated September 20, 2018. She said she had talked to T. W. in Human Resources, about when she was able to come back to work, but she was told to wait for an email. The Claimant confirmed to the Commission that she was required to have a driver's licence because they have to use company vehicles. She stated she was looking for a job.

[34] The Claimant testified that she did look for work. She stated that she asked her relatives that live in the city, what she should do, and she asked around the reserve. She stated that she called J. M., X, who told her she might have something and to come to see her; but she was not able to get there and when she called about a month ago, J. M. said she did not have anything because she never came to see her. She stated she also called the City of Saskatoon to see if they had anything for her, but they did not.

[35] I considered the Claimant's testimony of her job search but I am not convinced that she meets the criteria of making serious efforts to find work following her leave of absence.⁹ The Claimant was not able to provide a bona fide job search but only that she called around to see what she should do. I also am of the view that she did have one potential job opportunity with J. M., but from her own admission, she did not follow up by going to see her at the time, and then called back approximately six months later.

[36] I am also of the view that the criteria set out in 9.002 of the Regulations (a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work; cannot be supported. Because in this case the Claimant has self-imposed restrictions of losing her driver's licence.

[37] I find, on the balance of probabilities, the Claimant could have contacted her employer after September 20, 2018, when she was eligible to get her driver's licence back. I accept the employer's statements to be credible and that the Claimant was to contact them and provide proof she had a driver's licence and at that time, it would be discussed with management when the Claimant could resume her employment.

⁹ 9.001 *Employment Insurance Regulations* set out the criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts.

[38] I considered the Claimant's testimony that she was able to get her driver's licence in September but never got it until December 18, 2018; because she did not have the money, can support a reason why she did not make an effort to contact the employer. I find it would have been reasonable to contact her employer and discuss her returning in September. It would be reasonable for her to ask if the employer if they could accommodate her with duties until such time, she could afford to pay for her driver's licence. Alternatively, she could have done so on December 18, 2018 and provided all the necessary documents. However, the Claimant testified she never did either.

[39] I prefer the Claimant's testimony that she did not contact the new director until last week, to be the most credible, and supports she was not making serious efforts to find work. I find that she still waited approximately two months after she got her driver's licence back and at that time they told her she needed to write a letter and the board will decide if she can return. However, she conceded that she never called before and she still has not sent the letter because she was waiting to see if she would receive EI and she still does not have transportation.

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

[40] I find the Claimant had set personal conditions on herself and the restrictions prevented her from returning to the labour market. The Claimant conceded that she had transportation issues after she lost her driver's licence.

[41] I am satisfied that the Claimant knew she was prevented from returning to the labour market because she had no transportation. She provided convincing testimony that she also had no driver's licence that prevented her from borrowing a vehicle. This restriction also prevented her from going to X to speak with J. M., who likely had a job for her. As well, I am satisfied that the Claimant's restriction continued even after she could have returned to her employer because she still had no transportation.

[42] The Claimant testified that she tried to get transportation. She stated that she lives on a reservation and she has no telephone and no driver's licence. She stated that because she has no driver's licence she was not able to borrow a vehicle but would need to depend on others to drive her.

[43] I am of the view that, on the balance of probabilities, the Claimant could have removed the restriction on December 18, 2018, when she held a valid drivers license, but she still not attempt to contact her employer to return to work until a week prior to the hearing date. I do not find her explanation that she was waiting to see if she got EI before she provided her employer with a letter and proof of a driver's license was reasonable and prevented her from returning to the labour market.

[44] I am also of the view that the Claimant had other options to remove her transportation restriction and return to the labour market as she testified that she maybe could have asked to car pool because there were others from the reserve who work there. I do not find her reasons for not doing so, that she did not ask because they work in different areas and she did not want to be a burden could support her wanting to remove the restriction.

[45] Because the Claimant was not available within the meaning of the EI Act and EI Regulations, she is not entitled to benefits. The Commission properly imposed a disentitlement.

CONCLUSION

[46] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	February 20, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. J., Appellant