



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. B. v Canada Employment Insurance Commission*, 2019 SST 459

Tribunal File Number: GE-19-1142

BETWEEN:

L. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: April 1, 2019

DATE OF DECISION: April 4, 2019

DECISION

[1] The appeal is allowed in part. L. B. (the “Appellant”) is not entitled to benefits from September 17, 2018 to January 1, 2019. However, the disentitlement is removed as of January 2, 2019.

OVERVIEW

[2] The Appellant was laid off from his work at a construction company in September 2018 and anticipated being recalled to work in the spring of 2019. He applied for regular Employment Insurance (EI) benefits on November 21, 2018 and an initial claim was established effective September 16, 2018. The Canada Employment Insurance Commission (the “Respondent”) disentitled the Appellant from benefits from September 17, 2018 for reason that he had not returned an active job search form which had been sent to him on December 21, 2018 and therefore had not proven he was available for work or that he had made reasonable and customary efforts to obtain suitable employment.

[3] The Appellant lives in an isolated farming community and the main employers in the area are farms and construction companies. These employers lay off their employees in the winter. The Appellant has no computer, no car and there is no public transportation where he lives. There is also no public internet access in his community. He asserts he searched for work as best he could in person and by phone to employers within a radius of 50 miles. However, there were not a lot of employers to apply to and no one was hiring. His former employer eventually recalled him to work on March 11, 2019.

PRELIMINARY MATTERS

[4] The Appellant had a witness, X, testify at his hearing.

ISSUES

[5] Issue 1: Has the Appellant proven he was capable of and available for work and unable to obtain suitable employment from September 17, 2018?

[6] Issue 2: Has the Appellant proven that he has made reasonable and customary efforts to obtain suitable employment from September 17, 2018?

ANALYSIS

[7] To be entitled to receive regular Employment Insurance (EI) benefits, claimants have to prove that they are capable of and available for work and unable to obtain suitable employment (paragraph 18(1)(a) of the *Employment Insurance Act* (Act). The burden of proving availability is on the claimant (*Canada (Attorney General) v. Renaud*, 2007 FCA 328).

[8] While considering whether the Appellant was available for work and unable to find suitable employment, the Respondent also has the authority to ask the Appellant to prove that he was making reasonable and customary efforts to find suitable employment (subsection 50(8) of the Act). If Appellant fails to do so, he is also disentitled from receiving benefits under subsection 50(1) of the Act.

[9] The criteria for determining whether the Appellant is making reasonable and customary efforts for the purpose of subsection 50(8) of the Act are set out in section 9.001 of the *Employment Insurance Regulations* (EI Regulations). The EI Regulations also provide the criteria for determining what constitutes suitable employment, which applies to both subsections 50(8) and 18(1)(a) of the Act (section 9.002).

Issue 1: Has the Appellant proven he was capable of and available for work and unable to obtain suitable employment from September 17, 2018?

[10] The Appellant has proven he was capable of and available for work and unable to obtain suitable employment from January 2, 2019 but not from September 17, 2018 to January 1, 2019.

Capable of work

[11] I find the Appellant was capable of work from September 17, 2018 onward.

[12] Capability of work relates to a claimant's ability to perform the functions of the claimant's regular or usual employment or some other suitable employment (*Canada (AG) v. Cauglin*, A-1168-84). There is no dispute that the Appellant was capable of work.

Availability

[13] "Availability" is not defined in the EI legislation. However, the Federal Court of Appeal has held that the test to determine whether a claimant is available for work in accordance with paragraph 18(1)(a) of the Act 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 suitable employment;
3. Not setting personal conditions that might unduly limit the chances of returning to the labour market

1. Did the Appellant have a desire to return to the labour market as soon as a suitable job was offered?

[14] I find the Appellant did not have a desire to return to the labour market as soon as a suitable job was offered from September 17, 2018 to January 1, 2019. However, he did have a desire to return to the labour market from January 2, 2019 onward.

[15] The desire to return to work must be sincere, demonstrated by the attitude and the conduct of the Appellant (*Canada (Attorney General) v. Whiffen*, 1994 FCA 1472).

[16] The Appellant's testimony was that he was initially waiting to return to work in the spring with his former employer. He explained that he lives in a rural area and there is only seasonal work available. He testified that after speaking to the Respondent's agent on December 21, 2018, however, he began actively searching for other work.

[17] The Appellant advised the Respondent on December 21, 2018 that his job search efforts for the period from September 17, 2018 to December 21, 2018 were limited to two phone calls

made to two prior employers. He advised the Respondent that there was no work in his area and he did not have a phone, or a car or a licence.

[18] The Appellant's job search documentation does not show any employer contacts until January 2, 2019. After that, there are a number of contacts in January, February and March 2019.

[19] I find that from January 2, 2019 the Appellant's attitude and conduct did demonstrate a sincere desire to return to the labour market as soon as suitable work was available. He was aware from his conversation with the Respondent's agent on December 21, 2018 of the need to job search. Although he testified that he began job searching after that conversation, his job search records show he began to job search on January 2, 2019. I find that prior to January 2, 2019, the Appellant's intention was to wait until spring to possibly return to his former employer. He had only made two phone enquiries since his claim began on September 17, 2018 and January 2, 2019 as to possible work, which is not conduct demonstrating a desire to return to the labour market as soon as suitable work is available.

2. Did the Appellant demonstrate his desire to return to the labour market through efforts to find a suitable job?

[20] I find that the Appellant demonstrated his desire to return to the labour market through efforts to find a suitable job from January 2, 2019 onward but not for the period from September 17, 2018 to January 1, 2019.

[21] The Respondent's notes of a telephone conversation with the Appellant on December 21, 2018 provide that the Appellant advised that he does all kinds of work and considers himself a tradesman. He related that he lives 14 miles out of town and normally depends on other people to either pick him up to give him a ride to work. His main employer was X and would not have any work for him until the spring. He explained he had phoned a company in Calgary and one in Fort MacMurray to see if they had any work. He said there is no work in his area right now. He explained that he did not have a phone, a vehicle or a licence to drive. If he needs to use the phone, people come by his house and he uses their phone. If he needs to get a ride, people come by his house and he gets a ride. He advised the Respondent that he had not applied for any jobs, but only spoken to those two companies in Calgary and Fort MacMurray since his interruption of

earnings. He had not looked for work within his local area. The Appellant was asked by the Respondent to submit a job search within 10 days.

[22] The Appellant did not provide a job search until filing his reconsideration request on January 23, 2019. The job search shows that the Appellant did not begin job searching until January 2, 2019. His document shows had made four employer contacts between January 2 and January 3, 2019. The phone number of each of these places are noted.

[23] Upon speaking to the Respondent's reconsideration agent on February 16, 2019 the Appellant confirmed he did not have a computer. He also confirmed he did not have a resume and did not use job search tools to look for work. He related he had not attended any workshops, had any interviews or done any evaluation of his competencies. He had been networking by asking around for jobs in X, Manitoba, which was 8 miles away, and he explained that he could not go every day. He confirmed he had not contacted any other employers other than those listed on his job search list because he really did not think there were any jobs available right now. He advised that had obtained his own phone.

[24] In his Notice of Appeal, the Appellant reiterates that where he lives, employment opportunities lie mainly in farming and construction, which is seasonal work. He adds that the businesses that exist rely on seasonal business to keep them going and in the months of December to June, they also generally slow down and lay some people off. The Appellant states that he has travelled a radius of 50 miles to seek employment. He mentions that the town of X, X, X, X, X were all experiencing a slow down during this season and that "no matter how many trips I have taken they are getting annoyed with me because there are not jobs available." He points out, "I can hardly afford enough money to buy gas to travel while attempting to find employment. I am waiting to get a recall from my last employer, but that is determined by funding from government for construction of houses on Indigenous Land."

[25] The Appellant provided a job search with his Notice of Appeal. The job search lists one undated contact, four contacts made in January 2019 and four contacts made in March 2019. The Appellant has included contact names and phone numbers for each employer in his list.

[26] The Appellant included a further job search list with his Notice of Appeal noting contact with six employers. Phone numbers and contact names from the employers are provided. The Appellant testified that he made these contacts sometime in February 2019.

[27] The Appellant also provided a resume dated March 4, 2019 with his Notice of Appeal, which indicates that the Appellant's objective is to secure full time/part time employment in the housing construction industry, or mechanic assistant. The Appellant notes his experience as having worked in carpentry as a laborer for the past 10 years with various employers.

[28] The Appellant's testimony was consistent with the information he had provided to the Respondent and in his Notice of Appeal. He testified that he lives in X, Manitoba, which is a farming community of about 1781 people. He has lived there his whole life. The community is next to a X. The closest larger town is X, which is about 50 miles away with a population of 10,000. The Appellant explained he does not have a car and has to hire other people to drive him places. There is no public bus or transportation in his area. The closest large city to him is Winnipeg, which is 200 km away. To get there he would have to hire a ride.

[29] The Appellant testified that he was laid off from the construction company he usually works for in September 2018. He had worked there for 4 to 5 years. He explained that he did not know when he would be recalled to work as this company's has to bid for work and the work depends on whether the company has secured a contract. The Appellant confirmed there was no schedule or pattern to the time of recall. It depended on when the company had work. He was able to get to work because someone would drive him there. He testified he was recalled by this company and started work on March 11, 2019.

[30] The Appellant testified that he has a high school education. His prior work experience has been in construction and doing mechanic type work in garages. He has no computer and no access to internet. To complete his EI application, he went to the X, Manitoba outreach branch of Service Canada, which was about 19 miles away. He explained this is not a permanent Service Canada office. He did not ask them for help with job searching because an agent from Service Canada comes to this satellite location only once a month.

[31] The Appellant confirmed that prior to December 21, 2018 he had only phoned two past employers to see if they had work. He had not sought out work or made any applications for work other than that. The Appellant related that he did not submit a job search form to the Respondent as requested on December 21, 2018 as he did not receive the form he was supposed to submit back.

[32] The Appellant testified that he started looking for work after speaking to the Respondent's agent on December 21, 2018. He was phoning possible employers and also making enquiries in person. He testified that he tried to follow up with all the places near where he was living every week and a half to two weeks to see if things had changed.

[33] He testified that he would also ask friends and people who came to visit him if they knew of any jobs. The Appellant related that his witness had helped him prepare a resume on March 4, 2019. He did not have one prior to this. However, he explained that he was known in most of the places he was seeking work so a resume was not really necessary. He would look for work whenever he could get a ride, which was about three times a week and he would spend about 2 to 3 hours a day looking for work.

[34] The Appellant provided more information regarding the job search list he had provided with his Notice of Appeal that had no dates of contact on it. He testified that all of these contacts were made about the same time sometime in February 2019. Some of them he phoned and some he went to in person. The Appellant testified it was hard to get a ride to look for work but he tried his hardest. The problem was that most of the employers were seasonal.

[35] The Appellant's witness explained that she was a retired government employee so someone asked her to help the Appellant with his appeal. She confirmed that the area the Appellant lives in is a farming area and most of the jobs are seasonal. There is one Reserve beside his community and two Reserves to the north of it. The closest town in X which is also a farming community. She related that the availability of jobs from November to April is nil. The witness explained that the person from Service Canada comes to a satellite office once a month with a computer and leaves with the computer. They have no government services in their town and no internet availability for 2 miles out of town. There is not even a library. She explained the closest city is Winnipeg which is 200 km away. She related the Appellant has no money or

means to uproot and live there. She asserted that it is important to understand the profile of the community the Appellant lives in.

[36] In deciding whether the Appellant's efforts demonstrated his desire to return to the labour market, I have first considered whether the fact the Appellant anticipated returning from layoff in the spring relieved him of the obligation to search for alternative work during the period of layoff.

[37] Where a claimant who has been laid off with the promise of being recalled on a particular date, that claimant is entitled, for a reasonable period, to regard the promised recall, as the best or most probable avenue to employment and to act accordingly (*Canada (A.G.) v. MacDonald* (1994), A-672-93).

[38] I find the Appellant's possible recall to the construction company was not the best or most probable avenue to employment for him. In that regard, the Appellant had not been given a specific date of recall by his employer and there was no set pattern of recall from prior years with this employer. Further, the employment was not certain as it depended on the employer bidding and securing contracts. Given this was not the most probable avenue to employment for him, I find the Appellant did not demonstrate his desire to return to the labour market simply by waiting for the recall.

[39] I find the Appellant did not demonstrate a desire to return to the labour market until January 2, 2019 at which point he began actively job searching. He has not provided a record of any job search prior to that, other than his confirmation that he made two phone calls to two prior employers. While I acknowledge that the Appellant lives in a small farming community and that most of the work available was seasonal work, by making only two phone enquiries prior to January 2, 2019, the Appellant was turning what was a high risk of continued unemployment into an almost certainty. Such a passive effort to obtain employment does not demonstrate a desire to return to the labour market.

[40] I am satisfied, however, from the Appellant's job search lists and his testimony that he was actively job searching from January 2, 2019 and his efforts demonstrated his desire at that point to return to the labour market.

3. *Did the Appellant set personal conditions that might unduly limit the chances of returning to the labour market?*

[41] I find the Appellant set a personal condition of waiting to be recalled to his prior employer up until January 2, 2019 at which point he removed that condition and began actively job searching. I find this condition did unduly limit his chances of returning to the labour market prior to January 2, 2019.

[42] The question of availability is whether a claimant is sufficiently available for suitable employment and it cannot depend upon the particular reasons for the restrictions on availability (*Canada (Attorney General) v. Gagnon*, 2005 FCA 321 (CanLII)).

[43] The Respondent argues that the Appellant appears to be restricting himself to work with his former employer as he stated he was waiting to be recalled to his former employer, which was not to be until the spring of 2019. This employment was not certain as it was dependent on government funding.

[44] The Appellant's position is that there were no jobs available until the spring. The only work in the rural area where he lived was seasonal work.

[45] The Appellant had no certain date for recall. He testified there was no established pattern of recall. As well, there was no certainty the employer would even have work in the spring given the work depended on it bidding and securing contracts. I find by restricting himself to awaiting recall from his former employer, that the Appellant might have unduly limited his chances of returning to the labour market. However, based on the Appellant's job search information, I find that from January 2, 2019, the Appellant had removed this restriction.

Issue 2: Has the Appellant proven that he has made reasonable and customary efforts to obtain suitable employment from September 17, 2018?

[46] The Appellant has not proven that he made reasonable and customary efforts to obtain suitable employment from September 17, 2018 to January 1, 2019 but he has proven that he has done so from January 2, 2019.

[47] The Respondent has the authority to require a claimant to provide proof that she is making reasonable and customary efforts to obtain suitable employment (subsection 50(8) of the Act). Section 9.001 of the EI Regulations provides the criteria to determine if a claimant's efforts to obtain suitable employment are reasonable and customary.

[48] From September 17, 2018 to January 1, 2019, the Appellant's job search was limited to two phone calls. He did not engage in any of the activities listed in subsection 9.001(b) of the EI Regulations. Having only contacted two prospective employers over a period of approximately three and a half months, I find his efforts were not sustained as required by subsection 9.001(a) of the EI Regulations.

[49] However, I find that from January 2, 2019, the Appellant did make a sustained effort to find to work as required by subsection 9.001(a) of the EI Regulations. His job search information shows he contacted employers on 7 occasions in January, he made four employer contacts in February and he made 4 employer contacts in March along with preparing a resume. He testified that he also followed up with the employers he had contacted every one and half to two weeks to see if anything had changed. Although the overall number of employers contacted is not large, this number has to be considered in the context of the rural area in which the Appellant resides. I am satisfied the Appellant was making a sustained effort to find work from the potential pool of employers within a commutable distance from his home.

[50] I also find that the Appellant also engaged in some of the activities listed in subsection 9.001(b) of the EI Regulations. Although the Appellant did not engage in many of the specified activities, his activities need to be considered in light of the fact he had no computer, no internet access, no public access to internet and no car. There also was no permanent Service Canada site within commuting distance. The Appellant did engage in activities within his practical means. He networked by asking friends and people who visited him about job opportunities. He also assessed employment opportunities by phoning and visiting prospective employers. On March 4, 2019, he prepared a resume. There is no set number of activities that need to be performed. Overall, considering the Appellant's situation, I am satisfied that he was making sufficient efforts to engage in the activities required by subsection 9.001(b). I am also satisfied he was

searching for suitable work within the meaning of 9.001(c) of the Act. He was looking for jobs that were similar to for which he had prior experience.

CONCLUSION

[51] The appeal is allowed in part. The disentitlement from benefits for the period from September 17, 2017 to January 1, 2019 is maintained. The Appellant has not proven he was capable of and available for work and unable to obtain suitable employment or that he made reasonable and customary efforts to obtain suitable employment in that period.

[52] The disentitlement is removed effective January 2, 2019. The Appellant has proven he was capable of and available for work and unable to obtain suitable employment and also that he made reasonable and customary efforts to obtain suitable employment from that date.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	April 1, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. B., Appellant