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

Citation: *M. G. v Canada Employment Insurance Commission*, 2019 SST 565

Tribunal File Number: GE-19-1442

BETWEEN:

M. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Solange Losier

HEARD ON: April 25, 2019

DATE OF DECISION: May 7, 2019

Canada

DECISION

[1] The appeal is dismissed. The Appellant has not proven that he was capable of and available for work and unable to obtain suitable employment, or that he was making reasonable and customary efforts to find suitable employment.

OVERVIEW

[1] The Appellant applied for employment insurance regular benefits. The Respondent determined that the Appellant was not available for work because he did not have a valid work permit and was unable to work legally in Canada without a valid work permit. The Respondent submitted that this was a restriction to his availability for work and imposed a disentitlement from September 3, 2018 based on sections 18 and 50 of the *Employment Insurance Act* (Act) and sections 9.001 and 9.002 of the *Employment Insurance Regulations* (Regulations) for failing to prove his availability for work. The Appellant appealed to the Social Security Tribunal (Tribunal) submitting that he could not get a work permit because he needed a job offer first.

ISSUES

[2] Issue 1: Was the Appellant capable of and available for work and unable to obtain suitable employment?

[3] Issue 2: Has the Appellant made reasonable and customary efforts to find suitable employment?

ANALYSIS

Issue 1: Was the Appellant capable of and available for work and unable to obtain suitable employment?

[4] No, I find that the Appellant was not capable of and available for and unable to obtain suitable employment because his legal status as a visitor in Canada and corresponding visitor visa precluded him from working in Canada when the disentitlement was imposed.

[5] 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 (ss. 18(1)(a) of the Act).

[6] "Availability" is not defined in the Act; it is determined in accordance with the test that has been set out in the case law. The Federal Court of Appeal has determined the criteria to analyze to assess the evidence of a claimant's availability (*Faucher v. Attorney General of Canada*, A-56-96). In order to be found available for work, a claimant must:

- Have a desire to return to the labour market as soon as suitable employment is offered, and
- Express that desire through efforts to find a suitable employment, and
- Not set personal conditions that might unduly limit chances of returning to the labour market.

[7] The Appellant has the onus of proving that he was capable of, available for and unable to find suitable employment (*Canada (Attorney General*) v. *Renaud*, 2007 FCA 328).

[8] The Respondent imposed a disentitlement to employment insurance benefits based on subsection 18(1)(a) and subsection 50(8) of the Act for failing to prove his availability for work commencing from September 3, 2018 (GD3-30).

Does the Appellant have a desire to return to the labour market as soon as suitable employment is offered?

[9] Yes, I find that the Appellant has a desire to return to the labour market as soon as suitable employment is offered because he testified that he wanted to continue working, however his work contract ended on August 31, 2018. This was also consistent with his verbal statement to the Respondent and his written statement (GD3-39; GD2-16).

Has the Appellant expressed that desire through efforts to find a suitable employment?

[10] Yes, I find that the Appellant has expressed his desire to find suitable employment because his efforts included registering for various job search engines, sending emails to

prospective employers within his area of expertise and communicated with professionals in his field via “Linkedin”.

[11] The Appellant testified that he had a list of places he has applied to and evidence of the correspondence with his prospective employers during the disentitlement period. The Appellant submitted these documents to the Tribunal on May 1, 2019 and copy of them was forwarded to the Respondent on the same date (GD5-1 to GD5-20).

Are there any personal conditions that might unduly limit chances of returning to the labour market?

[12] Yes, I find that there are personal conditions that unduly limit the Appellant’s chances of returning to the labour market because his visitor visa precludes him from working in Canada.

[13] The Appellant worked for his employer from October 1, 2017 to August 31, 2018. He had a closed work permit which means that he was only permitted to work for this particular employer at that location for a specific period of time. A copy of this work permit was included in the file (GD2-19). His work contract was not extended beyond August 31, 2018, otherwise he states that he would have applied to extend his work permit. Since this was not an open work permit, he was not easily able to obtain immediate employment with any other employer.

[14] The Appellant did not have other employment secured after his employment ended on August 31, 2018. As a result, he states that he applied for a visitor visa on August 31, 2018 (GD3-14). The visitor visa was issued on December 4, 2018 and valid until February 28, 2019 (GD2-17). The Appellant testified that while his legal status in Canada was only visitor, he was actively looking for work and eventually secured a job offer on December 11, 2018.

[15] The Appeal Division of the Tribunal has considered the issue of availability and work permits on at least two occasions. Their decisions are not binding on me, however I find them persuasive. They determined that the claimant was responsible for extending his work permit and noted that it would be illogical to find a claimant available for work within the meaning of the Act and to collect employment insurance benefits when that individual is not legally permitted to work in Canada (*Canada Employment Insurance Commission v. A. R.*, 2016 SSTADEI 179; *Canada Employment Insurance Commission v. C. P.*, 2016 SSTADEI 277).

[16] I acknowledge that the facts in this case are slightly different as the Appellant did not fail to extend his work permit before it expired, but rather his work permit ended when his work contract ended. However, I find that it remains applicable as the end result is the same; he did not have a valid work permit to authorize him to work in Canada.

[17] I also agree and find it would be incompatible to find that a claimant is available for work within the meaning of the Act when their legal status as visitor includes a condition on the visitor visa stating that "unless authorized, prohibited from engaging in employment in Canada" (GD2-17).

[18] I am satisfied that the Appellant has expressed a sincere desire to return to the labour market as soon as suitable employment is offered and that he has expressed that desire through efforts to find suitable employment. However, I find that the visitor visa which does not permit him to work in Canada is a personal condition and restriction that unduly limits his chances of returning to the labour market.

[19] As a result, I find that the Appellant has not proven that he is available for work as required by subsection 18(1)(a) of the Act and he remains disentitled from receiving benefits from September 3, 2018.

Issue 2: Has the Appellant made reasonable and customary efforts to obtain suitable employment?

[20] No, I find that the Appellant has not made reasonable and customary efforts to obtain suitable employment because his efforts were not directed at obtaining suitable employment.

[21] The Respondent also disentitled the Appellant from receiving benefits pursuant to subsection 50(8) of the Act. This provision provides that, for the purposes of proving that a claimant is available for work and unable to find suitable employment, the Respondent may require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment.

[22] In accordance with subsection 50(8) of the Act, the onus is on the Appellant to prove availability by demonstrating that she has made reasonable and customary efforts to obtain suitable employment in accordance with the provisions of sections 9.001 and 9.002 of the Regulation during the period of disentitlement from September 3, 2018.

[23] The question of availability for a suitable employment is a separate and objective question. It is whether a claimant is sufficiently available for suitable employment to be entitled to employment insurance benefits and it cannot depend on a claimant's particular reasons for restricting their availability, even if the reasons provided may evoke sympathetic concern or if the claimant believed in good faith that they were unable to work (*Canada (Attorney General*) v. *Gagnon*, 2005 FCA 321).

[24] The Respondent submits that the Appellant is disentitled because he failed to meet the criteria of reasonable and customary efforts to obtain suitable employment under subsection 50(8) of the Act.

[25] Subsection 9.001(a) of the Regulation requires that the Appellant's efforts are sustained. I am satisfied that the Appellant's efforts to find employment were sustained because he has demonstrated that he was actively looking for employment based on his log of job search activities submitted during the disentitlement period (GD5-1 to GD5-20).

[26] Subsection 9.001(b) of the Regulation identifies various types of employment related activities for the purposes of demonstrating efforts to obtain suitable employment. I am satisfied that the Appellant has demonstrated that he made efforts to find suitable employment because he participated in networking, he was actively emailing prospective employers, he had one interview and was registered for various job search engines which provided him with daily job updates.

[27] Subsection 9.001(c) of the Regulation requires that the Appellant's efforts are directed towards finding suitable employment. I was not persuaded that his efforts were directed towards obtaining suitable employment because the Appellant was only looking for a specific type of work in an academic setting in a specialized field because he has a post doctorate degree specializing in chemical engineered research. This is not sufficient for establishing that his

efforts were directed at finding suitable employment because it was based on his preferences, versus a more expansive job search in areas that might render him more employable.

[28] Subsection 9.002(1) of the Regulation provides specific criteria for determining what constitutes suitable employment and circumstances that may render it unsuitable. The Appellant testified that that none of the listed criteria from a) to c) in the Regulation were applicable to his circumstances.

[29] I am satisfied that the Appellant's efforts to find employment were sustained and that he participated in various employment activities. However, I find that his efforts were only directed towards finding employment in his preferred specialty instead of a broader and more expansive job search to find suitable employment. Therefore, I find that the Appellant remains disentitled from benefits from September 3, 2018 pursuant to subsection 50(8) of the Act.

CONCLUSION

[30] The appeal is dismissed.

Solange Losier

Member, General Division - Employment Insurance Section

HEARD ON:	April 25, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	M. G., Appellant