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

[TRANSLATION]

Citation: *J. K. v Canada Employment Insurance Commission*, 2019 SST 431

Tribunal File Number: GE-19-717

BETWEEN:

J. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: April 29, 2019

DATE OF DECISION: May 8, 2019

Canada

DECISION

[1] The appeal is allowed in part. The Tribunal finds that the Appellant did not take a leave voluntarily, but that he was not available for work during that period of leave.

OVERVIEW

[2] The Appellant is an ironworker for X and he works on the X job site. He went on leave from July 22, 2018, to August 4, 2018. The Canada Employment Insurance Commission (Commission) denied the Appellant's claim for benefits because it found that he had voluntarily taken a period of leave without good cause and that he was not available for work during that period. The Appellant submits that, in accordance with the ironworkers' collective agreement, the employer forces him to take a two-week leave between May 1 and October 31 of each year. The Tribunal must determine whether the Appellant took a leave voluntarily and whether he was available for work during that period.

ISSUES

[3] Did the Appellant voluntarily take a leave from July 22, 2018, to August 4, 2018?

[4] If so, was taking a leave the Appellant's only reasonable alternative?

[5] Was the Appellant available for work from July 22, 2018, to August 4, 2018? To determine this, the Tribunal must answer three questions:

- Did the Appellant have a desire to return to the labour market as soon as suitable employment was offered?
- If so, did the Appellant express this desire through efforts to find suitable employment?
- Were the Appellant's changes of finding suitable employment unduly limited by personal conditions?

[6] Has the Appellant proven that he made reasonable and customary efforts to find suitable employment from July 22, 2018, to August 4, 2018?

PRELIMINARY MATTER

[7] The Tribunal combined the files of appellants working for the employer X to facilitate the submission of evidence and the making of submissions for all of the files received.

[8] The following are the combined files: GE-19-700, GE-19-701, GE-19-703, GE-19-705, GE-19-707, GE-19-709, GE-19-711, GE-19-717, GE-19-721, GE-19-723, GE-19-725, GE-19-726, GE-19-728, GE-19-729, GE-19-730, GE-19-732, GE-19-733, GE-19-734, GE-19-735, GE-19-756, GE-19-757, GE-19-758, GE-19-759, GE-19-760, GE-19-765, and GE-19-767.

[9] The files were combined because the appeals raise similar questions of fact or law and because combining them was not likely to cause prejudice to the parties. This decision is unique to the Appellant.

ANALYSIS

Did the Appellant voluntarily take a leave?

[10] A claimant who voluntarily takes a period of leave from their employment without just cause is not entitled to receive benefits if the period of leave was authorized by the employer and if the employee and the employer agreed as to the day on which the employee would resume employment.[1]

[11] The Appellant does not dispute that the leave was authorized by the employer and that he and the employer agreed on the date he would resume employment, but he submits that the employer forced him to take a leave during the eight-week period between May 1 and October 31.

[12] The Appellant's representative argued at the hearing that the 2017–2021 collective agreement for the civil engineering and roadwork sector stipulates that a two-week period of leave

[1] *Employment Insurance Act* (Act), s 32.

is mandatory for ironworkers.[2] He explained that the employer has hired about 600 ironworkers who are all subject to the collective agreement. He submits that several employees took vacations during that period of leave and that they did not apply for Employment Insurance benefits, which is not the Appellant's case.

[13] The Appellant's representative argued that the Appellant needed to work during that period and that he would not have taken a leave if not for the application of the collective agreement.

[14] A human resources employee working for the employer declared that a Record of Employment with the letter "K" was issued to workers because of a leave authorized by the employer and because the job site was not closed during the summer of 2018. The job site was closed from December 24, 2017, to January 6, 2018. For this reason, the employer could not indicate [translation] "shortage of work" at the time of the Appellant's leave.

[15] Although an employee stated that employees are generally not obligated to take vacations other than when the job site is closed, when asked specifically about the ironworkers' working conditions, the employee finally indicated that she needed to check the information provided because it was the first year the new collective agreement was being applied.

[16] The Commission maintains that the Appellant could have continued to work for the employer during that period. It states that the Appellant was not forced to take a vacation that year and that taking a leave was the Appellant's personal choice.

[17] The question the Tribunal must answer in this case is whether the employee had the option of taking a leave.[3]

[18] The Appellant asked for a leave for the period from July 22, 2018, to August 4, 2018. The evidence shows that a two-week leave was mandatory and that it had to be taken between May 1 and October 31. The employer issued a memo on the topic in spring of 2018 that stated the following:[4]

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[2] GD3-59 and following.
[3] *Peace*, 2004 FCA 56.
[4] File GE-19-700, GD3-27.

> [Translation]
> Therefore, still under the collective agreement, in article 20.01 3), workers are entitled to two weeks of annual summer leave between May 1 and October 31 of each year with their supervisor's agreement, provided the company is not deprived of more than 25% of its workers in the same trade, specialty, or occupation.

[19] Based on this letter, it is clear that the workers can take a leave and that steps have been taken precisely so they can take vacations if they want to.

[20] However, the 2017–2021 collective agreement for workers in the civil engineering and roadwork sector states a different provision for ironworkers.

[21] In this regard, the memorandum specifies that the situation is different for ironworkers:[5]

> [Translation]
> Furthermore, under this same collective agreement, there is a special vacation condition for the type of construction work performed by the ironworker on the project.
>
> 3.1) Ironworker assigned to work on the bridge:
>
> Paragraph 3) of article 20.01 notwithstanding, salaried ironworkers assigned to work on the bridge are entitled to two compulsory consecutive weeks of leave during the eight-week period that includes the two weeks set out in paragraph 1) of article 20.01.
>
> To comply with the collective agreement, discuss your vacation with your foreman and/or superintendent, complete the attached leave form, and give it to them by June 15, 2018.

[22] A second memorandum with the subject [translation] "Summer Vacation 2018" also indicates the following:[6]

> [Translation]
> Please note that if we do not receive your completed form by the deadline, in accordance with the collective agreement, the Employer will determine the period of two consecutive weeks of leave for each employee who has not provided their leave form, and a written notice stated the applicable weeks will be sent.

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[5] *Ibid*.

[6] File GE-19-700, GD3-28.

[23] In light of this memorandum, it appears that the ironworkers had to complete the vacation form to have their two-week period of leave approved, or else the employer would set the mandatory period of leave.

[24] In this regard, the Tribunal is of the view that the situation was different for the ironworkers of X, who had to take a mandatory two-week leave that the employer pre-approved. Failing that, the employer would choose the two weeks of leave because, according to the collective agreement, ironworkers had to take that leave between May 1 and October 31.

[25] The Appellant did not have a choice in terms of taking the two-week leave. The only possibility that was available to him was to choose the timing of those two weeks between May 1 and October 31 and then to have his choice approved by the employer, failing which the employer would choose the dates of the leave for him. The Appellant therefore did not take that leave voluntarily.

[26] The Tribunal finds that the evidence is clear. The Appellant had to complete a vacation form that he had to give to his employer to have the dates of his leave approved, and, if he did not do so, the employer would have made him take a two-week leave in accordance with the collective agreement governing ironworkers.

[27] The Appellant's approved leave took place between July 22, 2018, and August 4, 2018, and the Tribunal is of the view that the Appellant did not take that leave voluntarily.

[28] Because the Appellant did not take a leave voluntarily, he does not have to show that he had just cause to take it or that taking that leave constituted the only reasonable alternative in this case.

Was the Appellant available for work from July 22, 2018, to August 4, 2018?

[29] 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.[7]

[30] To establish whether a person is available for work, the Tribunal considers the following three criteria:[8]

- 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 chances of returning to the labour market.

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

[31] The Appellant attended the hearing but chose not to testify. The Appellant's representative argued that the employment agency is responsible for finding employment for construction workers and that the Appellant correctly reported his work stoppage to the employment agency.

[32] However, the employment agency would not have contacted the Appellant since the time of year partly matched the construction holidays.

[33] The Appellant did not argue that he made any other efforts to find employment. The representative argued that the Appellant could not find employment in this field by looking in newspapers but by waiting for a call from the employment agency.

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[7] Act, s 18(1)(a).
[8] *Faucher,* A-56-96.

[34] The Tribunal is of the view that the Appellant showed a desire to return to the labour market as soon as suitable employment was offered.[9] The Tribunal must now assess whether the Appellant made concrete efforts to find employment.[10]

Did the Appellant express this desire through efforts to find suitable employment?

[35] The Appellant is responsible for actively seeking suitable employment to obtain Employment Insurance benefits.[11]

[36] The Commissions submits that, during the period from July 22, 2018, and August 4, 2018, the Appellant was on vacation. It states that the fact that his name was on the union's list does not prove his availability. It also argues that the Appellant failed to prove that he made any efforts to find employment and that he considered himself on [translation] "mandatory vacation."

[37] The *Employment Insurance Regulations* (Regulations) specifies various ways of conducting a job search, and the Appellant's search for employment must be sustained, that is reasonable and customary, **on every working day of his benefit period**[12] [emphasis mine].

[38] The Appellant did not argue that he made any efforts to find employment other than informing the employment agency that he was on a work stoppage. He stated that he had looked for employment in his field and that he had informed Québec's construction commission, Commission de la construction du Québec, of his work stoppage.

[39] The Tribunal heard the arguments of the Appellant's representative that, in construction, the employment agency can direct the Appellant in finding employment. However, under the Act, the Appellant must show that he made efforts to obtain employment to be entitled to benefits.

[40] In this regard, the Appellant could update his resumé, assess employment opportunities, contact prospective employers, and submit job applications.

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[9] *Ibid*.
[10] *Primard*, A-683-01.
[11] *Cornelissen-O'Neil*, A-652-93; and *De Lamirande*, 2004 FCA 311.
[12] Act, s 18.

[41] In the Appellant's particular case, he could have asked the employment agency about available jobs during his approved leave and/or assessed available jobs by looking for jobs online and/or by actually submitting an application for a job.

[42] However, the Tribunal is of the view that the Appellant's searches for employment were not sustained and concrete during each working day in his benefit period. The search must be active, and the Appellant is responsible for proving that he made efforts to obtain employment.

[43] A claimant's availability is essentially a question of facts, and the Appellant may choose to take a vacation during the approved leave, but he must prove that he was available for work to be entitled to benefits.[13]

[44] In terms of efforts to obtain employment, the Appellant indicated that he had informed his union hall and the Commission de la construction du Québec that he was available. Even if he submits that he [translation] "looked" for ironworker jobs, the Appellant made no concrete effort to obtain employment that he can assert. However, the Appellant is responsible for actively seeking suitable employment to obtain Employment Insurance benefits, and he has that responsibility for each working day of his benefit period.[14]

[45] The Tribunal finds that the Appellant has not expressed his desire to return to the labour market through significant efforts to find suitable employment during each working day of his benefit period from July 22, 2018, to August 4, 2018.[15]

Were the Appellant's chances of finding suitable employment unduly limited by personal conditions?

[46] The Appellant has not presented personal conditions that unduly limited his chances of finding suitable employment. However, the Appellant was not actively looking for employment during his leave, and he limited his chances of finding suitable employment by not making efforts to find employment.

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[13] *Landry*, A-719-91.
[14] *Op. cit. Cornelissen-O'Neil*, *De Lamirande*, and *Primard*, A-683-01.
[15] *Op. cit.* Primard.

Reasonable and customary efforts to obtain suitable employment

[47] The criteria for determining whether the efforts a claimant made to obtain suitable employment constitutes reasonable and customary efforts are the following:[16]

- assessing employment opportunities;
- preparing a resumé or cover letter;
- registering for job search tools or with electronic job banks or employment agencies;
- attending job search workshops or job fairs;
- networking;
- contacting prospective employers,
- submitting job applications,
- attending interviews, and
- undergoing evaluations of competencies.

[48] The Appellant has not shown any efforts to obtain suitable employment apart from reporting that he had stopped working for the employer X to the union employment agency and informing the Commission de la construction du Québec of his work stoppage. The Tribunal cannot find that the Appellant's efforts were sustained, reasonable, and customary each working day of his benefit period.

[49] Reporting his availability to the employment agency is not sufficient to show that he was actively seeking employment within the meaning of section 50(8) of the Act.

[50] The Tribunal states once again that the Appellant is responsible for making efforts to find employment each working day of his benefit period and that the Appellant's searches must be directed toward obtaining employment.

[16] Regulations, s 9.001.

[51] For these reasons, the Tribunal finds the imposition of a disentitlement from July 22, 2018, to August 4, 2018, to be warranted because the Appellant failed to show his availability for work as of that time.

[52] The Tribunal finds that the Appellant was not available for work from July 22, 2018, to August 4, 2018, because he failed to show he had made reasonably and customary efforts to find suitable employment within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations as of that time.

CONCLUSION

[53] The appeal is allowed in part.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	April 29, 2019
TYPE OF HEARING:	Teleconference
APPEARANCE:	Richard Benoît, Representative for the Appellant