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

[TRANSLATION]

Citation: *PT v Canada Employment Insurance Commission*, 2019 SST 1743

Tribunal File Number: GE-19-1416

BETWEEN:

P. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: May 7, 2019

DATE OF DECISION: ~~May 9, 2018~~ **[May 9, 2019]**

DATE OF CORRIGENDUM: April 27, 2021

Canada

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] The Appellant stopped working on October 14, 2017, but did not apply for Employment Insurance benefits until December 21, 2017, since he was waiting for his Record of Employment. He requested an antedate to October 15, 2017, but the Commission denied his request, saying that he had not shown good cause for his delay in filing his claim, or exceptional circumstances to explain it. The Appellant explains that his employer issued the Record of Employment on December 8, 2017.

[3] The Commission also determined that the Appellant was not available for work from December 17, 2017, since he had failed to show that his intention was to find a job. The Appellant disputes this decision. He argues that he was available for work and that, in fact, he had an employer and continued to work for it.

PRELIMINARY MATTERS

[4] At the hearing, the Appellant indicated that he did not have a copy of his file. He said that he had probably received it but that he had not found it because of personal circumstances over the past year. The Tribunal gave the Appellant time to review the Commission's arguments before starting the hearing (GD4). The Tribunal also took the time to go over the Commission's file (GD3) to describe the documents in it to the Appellant. Finally, the Appellant indicated that he wanted to go ahead with the hearing, so it proceeded as planned.

ISSUES

[5] Can the Appellant's claim for benefits be antedated to October 15, 2017?

[6] Was the Appellant available for work from December 17, 2017?

ANALYSIS

Issue 1: Can the Appellant's claim for benefits be antedated to October 15, 2017?

[7] The Tribunal is of the view that the Appellant's claim cannot be antedated to October 15, 2017, because he has not shown good cause for the delay in filing his claim for benefits.

[8] When the Employment Insurance claim was made will affect the establishment of the benefit period. Section 10 of the *Employment Insurance Act* (EI Act) states that the beginning of the benefit period is determined by the date the claim was filed.

[9] To be entitled to Employment Insurance benefits, a claimant must meet qualification requirements. Section 48 of the Act states that no benefit period is to be established for a person unless the person makes an initial claim for benefits in accordance with section 50 and the regulations and proves that the person is qualified to receive benefits.

[10] An initial claim for benefits made after the day when the claimant was first qualified to make the claim is to be regarded as having been made on an earlier day if the claimant shows that they qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made (EI Act, section 10(4)). So, this involves an antedate request.

[11] When a claimant seeks an antedate, they have to show that they had good cause throughout the entire period of the delay. They have to show that they did what a reasonable and prudent person would have done in similar circumstances to satisfy themselves as to their rights and obligations under the Act (*Attorney General v Albrecht*, A-172-85; *Canada (AG) v Persiiantsev*, 2010 FCA 101; *Canada (AG) v Kokavec*, 2008 FCA 307). Lastly, the notion of antedate is a benefit of exceptional nature (*Attorney General of Canada v Scott*, 2008 FCA 145).

[12] Therefore, to decide whether the Appellant is entitled to an antedate, the Tribunal must consider whether he had good cause for not making his claim on time. This means that the

Appellant has to justify his delay for the entire period between October 15, 2017, and December 21, 2017.

[13] The Appellant explains that he waited until he received his Record of Employment before filing his claim. He says that he did not know what the record showed as his last day worked given that he had worked several days after going off work on October 14, 2017. He also says that he has always waited for his record before filing his claim. He adds that, this year, he filed his claim without his records and that, as a result, the Commission did not consider all his hours of work despite the fact that he had indicated all the employers.

[14] The Commission argues that the Claimant did not do what a "reasonable person" in his situation would have done to satisfy himself as to his rights and obligations under the Act. He should not have waited for his Record of Employment to see what it showed as his last day worked. The Claimant was without work several times and for several consecutive days after going off work on October 14, 2017—specifically, from October 15 to 23, 2017; from October 30, 2017, to November 9, 2017; from November 12 to 18, 2017; and from November 27 to December 6, 2017. The Commission accepts that the Claimant may have tried to reach its call centre many times but was unsuccessful. This shows that the Claimant wanted information. However, a reasonable person in a similar situation would have found a way to get that information, for example, by going to a nearby Service Canada Centre. The Claimant did not do so, claiming that it costs gas to go to such a centre.

[15] The Tribunal notes that, contrary to what the Appellant says, he has not always waited for his Record of Employment before filing a claim. The Commission confirms that the Appellant did not have his Record of Employment when he filed his last two claims (GD3-18). The Appellant indicates that the employer does not comply with the Act when it fails to issue his Record of Employment on time. He says that he took steps with his employer to get this Record of Employment but that the employer mentioned being busy because of the holidays. The Tribunal notes that the Appellant went off work in October.

[16] In addition, the Tribunal notes that, even though the employer is required to issue a Record of Employment on time, a claimant is also required to file their claim within the time set

out in the Act. An antedate can be allowed if a claimant files their claim late, but this is an exceptional circumstance. Lastly, the Tribunal notes that the Appellant indicated that he had made several attempts to reach the call centre, but they were unsuccessful.

[17] The Tribunal takes into consideration that the employer did not issue the Record of Employment until December 8, 2017, and that the Appellant filed his claim on December 21, 2017. The Appellant attributes the delay to the time it took for him to receive a copy of his record in the mail.

[18] The Tribunal takes into consideration that case law does not recognize good faith or ignorance of the Act as good cause for an antedate request. The Court has found that, barring exceptional circumstances, a reasonable person is expected to take reasonably prompt steps to determine their entitlement to benefits and to understand their obligations under the Act (*Canada (Attorney General) v Kaler*, 2011 FCA 266; *Canada (Attorney General) v Innes*, 2010 FCA 341; *Canada (Attorney General) v Somwaru*, 2010 FCA 336).

[19] The Tribunal is of the view that the Appellant did not do what a reasonable and prudent person in his situation would have done. The Appellant did not try to file his Employment Insurance claim until more than two months after his last day worked. In addition, even though the Appellant still worked for his employer on some days, nothing prevented him from going to a Service Canada Centre to get the information he needed because he was unable to reach the call centre and his employer had yet to issue his Record of Employment.

[20] Therefore, having regard to the evidence and the submissions presented by the parties, the Tribunal is of the view that the Appellant has not shown that he did what a reasonable and prudent person would have done. He has not shown that he had good cause for his delay throughout the entire period between October 15 and December 21, 2017. In addition, the Tribunal takes into consideration that ignorance of the Act is not enough to establish good cause (*Kaler*). Consequently, the claim for Employment Insurance benefits cannot be antedated.

[21] The appeal is dismissed on this issue.

Issue 2: Was the Appellant available for work from December 17, 2017?

[22] 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 (EI Act, section 18(1)(a)).

[23] Claimants must prove their availability, and an Employment Insurance claimant must ensure that they are available at all times. A claimant will be disentitled if their words and actions are not convincing enough to show genuine availability for work (*Canada (AG) v Cornelissen-O'Neill*, A-652-93).

[24] To do this, availability must be examined based on three factors: the claimant's desire to return to the labour market as soon as a suitable job is offered; making the necessary efforts to find a suitable job; and not setting personal conditions that could limit the chances of returning to work (*Faucher*, A-56-96, A-57-96).

[25] Therefore, the Tribunal must determine whether the Appellant was available for work. To do this, the Tribunal must answer the following questions:

- Did the Appellant show a desire to return to the labour market as soon as a suitable job was offered?
- Did the Appellant make the necessary efforts to find a suitable job?
- Did the Appellant set personal conditions that could limit the chances of returning to work?

<u>Did the Appellant show a desire to return to the labour market as soon as a suitable job was offered?</u>

[26] The Tribunal is satisfied that the Appellant showed a desire to return to the labour market as soon as a suitable job was offered.

[27] The Commission considers that the Claimant initially stated that he had not looked for work, saying that he already had a job (GD3-18). During the reconsideration in his file, the

Claimant mentioned that, although he consulted Job illico [*sic*], he had not applied anywhere, since his usual employer had him working three to four days a week after mid-October 2017 and that, in any case, his employment would resume in May 2018 (GD3-26). The Commission indicates that, by these words, the Claimant did not show a desire to return to the labour market as soon as a suitable job was available. On the contrary, according to his arguments, he was satisfied with his current condition and was waiting to return to work full-time in May 2018.

[28] The Tribunal notes that the Appellant's claim for benefits was established on December 17, 2017. At the time, the Appellant was off work from his employer for medical reasons (RGD5-9). This period off work ran from December 10, 2017, to March 1, 2018. Nevertheless, since the Appellant was seeking an antedate for regular benefits, he indicated that he had been unable to mention his situation in detail regarding his time off work.

[29] The Tribunal sees that the Commission did note that the Appellant was off work, but it did not try to get more details in that regard (GD3-25).

[30] Therefore, the Tribunal notes that, on January 18, 2018, and February 15, 2018, when the Commission contacted the Appellant and he confirmed that he already had a job and was not looking for work, the Appellant was off work from his employer (GD3-18 and GD3-26). In addition, the Appellant says that he was then doing what amounts to full-time work, from the week of December 3, 2017 (RGD5-8), until he was put on leave for health reasons.

[31] The Tribunal notes that the Appellant stated several times that he already had an employer and was therefore not looking for another job. As a result, although the Appellant is required to look for a full-time job when unemployed, the Tribunal cannot ignore that he made these statements while he was on medical leave.

[32] Consequently, the Tribunal is of the view that, if it had not been for his illness, the Appellant would have been available for work from December 17, 2017.

[33] The Tribunal is of the view that the Appellant showed a desire to return to the labour market as soon as a suitable job was offered (*Faucher*, A-56-96). In fact, he returned to work for

the same employer. The Tribunal must now determine whether the Appellant made concrete efforts to find a job (*Primard*, A-683-01).

Did the Appellant make the necessary efforts to find a suitable job?

[34] The Tribunal is of the view that the Appellant has not shown that he made the necessary efforts to find a suitable job from March 2, 2018.

[35] To be able to get Employment Insurance benefits, the Appellant is responsible for actively seeking suitable employment (*Cornelissen-O'Neill*, A-652-93; *De Lamirande*, 2004 FCA 311). It is not enough to intend to work. A claimant must show that they are making efforts to find employment.

[36] The Commission may require a claimant to prove that they are making reasonable and customary efforts to obtain suitable employment (EI Act, section 50(8)).

[37] To determine whether a claimant made reasonable and customary efforts to obtain suitable employment, the Tribunal must consider whether those efforts consist of the following: assessing employment opportunities; preparing a résumé 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 (*Employment Insurance Regulations* (EI Regulations), section 9.001).

[38] To determine what constitutes suitable employment, the Tribunal must consider the following factors: the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work; the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and the nature of the work is not contrary to the claimant's moral convictions or religious beliefs (EI Regulations, section 9.002).

[39] The Commission submits that the Claimant did not apply anywhere and simply looked at postings on a single website, Job illico [*sic*]. He mentioned no other job search efforts. The Commission indicates that, when it assesses availability, passively waiting for a job offer is not

considered enough. To prove their availability, a person is explicitly required to personally make reasonable and customary efforts to obtain suitable employment. It is therefore apparent that a dynamic desire to work needs to be considered, not just an expression of a passive state towards accepting work, which is not the case here.

[40] The Commission submits that the Claimant has always worked as a bus or truck driver. He does not want to do something else. And he does not want to drive a school bus, since it means that he would have to work five days a week and make three trips a day. In addition, he does not want a job that would require material handling, saying that, at 67, he is too old for that kind of thing. He said that he was limiting his job search to jobs as a charter bus driver. The Commission can only note from these arguments that the Claimant's real intention was not to return to the labour market as soon as possible, since he imposed several restrictions as to the type of suitable job he could work in.

[41] The Tribunal is of the view that, if it had not been for his illness, the Appellant would have been available for work for the period from December 17, 2017, to March 1, 2018. The Tribunal is of the view that it cannot assume that the Appellant would not have made an effort to find a job during that period if he had not been off work, or that he would not have worked full-time. The Appellant was off work for his employer, and he could not be expected to look for suitable employment for another job when he was unable to work.

[42] Nevertheless, the Tribunal is of the view that, from March 2, 2018, the Appellant had to make the necessary efforts to find another job. The Appellant could not limit his availability to his employer if his employer could not offer him full-time work. He needed to make job search efforts, but he confirms that he did not make any because his employer had him working a few days a week. In addition, he expected to return to a full-time job in May.

[43] A claimant can be declared unavailable for work because of an inadequate job search (*Cutts v Canada (Attorney General)*, A-239-90).

[44] Therefore, the Tribunal is of the view that, from March 2, 2018, the Appellant did not make the necessary efforts to find a suitable job. As a result, the Tribunal is of the view that the

Appellant has not shown that he made reasonable and customary efforts to find a suitable job from March 2, 2018.

Did the Appellant set personal conditions that could limit the chances of returning to work?

[45] The Tribunal is of the view that the Appellant imposed personal conditions that could limit his chances of returning to work, except for the period from December 17, 2017, to March 1, 2018.

[46] A claimant's availability cannot depend on particular personal conditions or overly restrictive constraints that would limit their chances of finding employment (*Canada (Attorney General) v Gagnon*, 2005 FCA 321).

[47] The Commission considers that the Claimant has always worked as a bus or truck driver. He does not want to do something else. And he does not want to drive a school bus, since it means that he would have to work five days a week and make three trips a day. In addition, he does not want a job that would require material handling, saying that, at 67, he is too old for that kind of thing. He said that he was limiting his job search to jobs as a charter bus driver. The Commission can only note from these arguments that the Claimant's real intention was not to return to the labour market as soon as possible, since he imposed several restrictions as to the type of suitable job he could work in.

[48] As mentioned earlier, the Tribunal is of the view that the Appellant's statements about not looking for [work] and not wanting to look for other types of jobs should be placed in the context of his being off work from his employer. The Tribunal is of the view that it is therefore consistent, that the Appellant considered that he already had an employer.

[49] Nevertheless, from March 2, 2018, since the Appellant was not returning to work full-time, he was required to look for a full-time job and not to impose personal conditions that could limit his chances of finding a job. The Appellant confirmed at the hearing that he had an employer and that he did not see why he would have been required to find another job, since he worked for his employer almost every week.

[50] The Tribunal takes into consideration the Appellant's arguments as to what constitutes full-time work for a bus driver. Nevertheless, as the Tribunal pointed out to the Appellant, since he wanted to receive Employment Insurance benefits for some of those weeks to supplement his income, he was not working full-time for the employer and could have worked more hours. The Appellant confirmed this.

[51] The Tribunal also takes into consideration that availability is assessed for each working day of each week in a benefit period. Therefore, even if a claimant works part-time while unemployed, they are required to show that they are capable of and available for work each working day in a week for which they are claiming benefits. Consequently, a claimant must show that they are making the necessary efforts to end their unemployment by looking for work.

[52] The Tribunal takes into consideration the many examples the Appellant gave regarding school transportation and other settings. Nevertheless, as mentioned, the Act applies to all claimants, and each has a responsibility to show that they are available for work.

[53] Therefore, the Tribunal is of the view that, from March 2, 2018, the Appellant imposed personal conditions that limited his chances of returning to the labour market, since the Appellant was not making any other job search efforts, limiting himself to the hours offered by his employer. A claimant cannot simply wait to be called back to work. They must look for a job to be entitled to benefits. (*Canada (AG) v De Lamirande*, 2004 FCA 311; *Cornelissen-O'Neill*, A-652-93)

[54] Having regard to the evidence and the submissions presented by the parties, the Tribunal is of the view that, on a balance of probabilities, the Appellant has shown that he was available for work within the meaning of section 18(1)(a) of the Act and that, [*sic*] 18(1)(b) of the Act, if it had not been for his illness, he would have been available for work for the period from December 17, 2017, to March 1, 2018. Nevertheless, the Tribunal is of the view that the Appellant did not meet the *Faucher* criteria from March 2, 2018, since the Appellant was not making any effort to find a suitable job and was limiting his chances of returning to the labour market by limiting his availability to his employer.

[55] The appeal is allowed in part on this issue. If it had not been for his illness, the Appellant would have been available for work for the period from December 17, 2017, to March 1, 2018. The Appellant was not available for work from March 2, 2018.

CONCLUSION

[56] The appeal is allowed in part.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	May 7, 2019
METHOD OF PROCEEDING:	In person
APPEARANCE:	P. T., Appellant