



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *F. C. v Canada Employment Insurance Commission*, 2019 SST 828

Tribunal File Number: GE-19-1934

BETWEEN:

F. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Christianna Scott

HEARD ON: June 6, 2019

DATE OF DECISION: June 30, 2019

DECISION

[1] The appeal is allowed. F. C. (Claimant) was available for work as of December 16, 2018 (with the exception of February 27, 2019, to April 3, 2019, when the Claimant was on vacation outside the country), because she showed that she would have been available for work if not for her illness.

OVERVIEW

[2] For five years, the Claimant worked part-time in the cosmetics department of a pharmacy. She was injured and stopped working. The Claimant made an initial claim for sickness benefits. A benefit period was established effective December 16, 2018. The Employment Insurance Commission (Commission) conducted an investigation about that claim and determined that the Appellant was not available for work as of December 16, 2018. The Claimant was therefore disentitled from receiving benefits as of that date.

[3] The Claimant is disputing the Commission's decision before the Social Security Tribunal. She argues that she was available for work during her period of absence from work. Furthermore, she submits that the Commission erred in its application of the availability test to the facts of her case.

ISSUE

[4] Did the Claimant show that she would have been available for work as of December 16, 2018, if not for her illness?

ANALYSIS

[5] To be entitled to sickness benefits, a claimant must prove that they were unable to work because of illness. They must also prove that, if they had not been ill, they would have been

available for work.¹ The Claimant has the burden of proving that she is entitled to receive benefits.²

[6] The Federal Court of Appeal set out the three factors to consider when determining whether a claimant is available for work:

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 a suitable job; and
3. not setting personal conditions that might unduly limit the chances of returning to the labour market.³

[7] I note that the Claimant applied for sickness benefits because she was injured when she had part-time employment. The issue is therefore the third factor, that of determining whether the Claimant set personal conditions that might unduly limit her chances of returning to the labour market.

[8] The Claimant worked part-time starting in September 2014 in the cosmetics department of a pharmacy. She worked about 12 hours a week. On December 14, 2018, she was injured and had to stop working. Her last day of work was December 12, 2018. She established a benefit period starting on December 16, 2018.

[9] The Commission claims that the Claimant's initial statements show that she was not available for work because the Claimant usually worked part-time and that that suited her. The Commission claims that the Claimant said, in that initial conversation with one of the Commission's agents, that she was not available full-time or looking for full-time employment.

[10] The Claimant states that she was available for work and that she did not place any limitations on her availability. She argues that the Commission incorrectly assumed that she was not available based simply on the fact that she worked part-time and was not looking for full-

¹ *Employment Insurance Act*, s 18(1)(b).

² *Canada (Attorney General) v Terrion*, 2013 FCA 97; *Canada (Attorney General) v Yeo*, 2011 FCA 26.

³ *Faucher v Canada (Attorney General)*, A-57-96.

time work. In the Claimant's view, the Commission did not correctly apply the legal test for availability.

[11] First, I accept the Claimant's argument that the Act does not require the Claimant to look for employment to be entitled to sickness benefits. The Claimant produced the Commission's February 6, 2019, decision report. In that report, the Commission said, [translation] "based on the evidence submitted, the Commission notes that the client's real intention is not to return to the workforce as soon as possible because she is not looking for employment in that sense... She has not looked for a second employment to make a full work schedule, or full-time employment."

[12] I note that the Commission made an error when it assessed the Claimant's availability based on her efforts to find employment when she applied for sickness benefits. The Act states only that a claimant must show that they were unable to work because of an injury and that they would have been available for work, if not for that injury.

[13] Furthermore, I accept the Claimant's argument that the Commission erred in determining that the Claimant was not available because she was working part-time. The Commission claimed that, in the initial conversation with the Commission's agent, the Claimant had proven that she intended to work only part-time. In the Commission's view, this intention to work part-time proves that the Claimant was not available full-time. The Commission indicates that the Claimant normally restricts her availability to part-time employment with her usual employer.

[14] I am of the view that the Claimant's initial statements must be taken in context. The Claimant testified with conviction that she had never said that she was not available to work more hours for her employer. She indicated that, during her initial conversation with the Commission, she reported the number of hours she worked for her current employer and explained her preferences regarding her schedule. She said she never spoke to the Commission about availability. Furthermore, I note that, when the Commission asked specific questions strictly concerning availability, the Claimant's explanations support her position that she was available. She indicated the following:

- she never refused overtime;

- her manager never offered her a full-time position; and
- she was always ready to replace her co-workers.

[15] Furthermore, during her testimony, the Claimant explained that she worked in a specialized department in the pharmacy and that all the members of her team worked part-time. Since she started working in the cosmetics department, there has never been a vacant full-time position. She states that she never refused to work additional hours. Moreover, she testified that she replaced her co-workers when they were absent and that she could work up to 30 hours a week, depending on her employer's needs.

[16] It is important to note that the employer did not contradict the information provided by the Claimant. The employer confirmed that it did not know whether the Claimant preferred to work part-time, and it confirms that it did not need another full-time employee.

[17] The Act does not require a claimant to work full-time to be eligible for benefits. The number of hours a claimant works does not automatically determine their availability for work. The Act states that a person must be available for each working day in a benefit period. This involves an availability for work during normal working hours. The fact that the Claimant worked part-time or that she appreciated a part-time work schedule does not mean that she limited her availability. I accept the Claimant's testimony in which she stated that she was available to work more than 12 to 15 hours a week. The Claimant's Record of Employment confirms her testimony. It shows that the insurable earnings paid every 15 days varies considerably from one pay period to another, which confirms that the Claimant worked more or fewer hours, depending on her employer's needs.

[18] I therefore find that, if not for the Claimant's injury, she would have been available for work as of December 16, 2018. The disqualification imposed by the Commission is therefore rescinded. Although this is not in dispute, it is useful to clarify that the Claimant still remains disentitled from receiving benefits for the period during which she was on vacation outside Canada from February 27, 2019, to April 3, 2019.

CONCLUSION

[19] The appeal is allowed.

Christianna Scott
Member, General Division – Employment Insurance Section

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| HEARD ON: | June 6, 2019 |
| METHOD OF PROCEEDING: | In person |
| APPEARANCES: | F. C., Appellant Kim Bouchard (counsel), Representative for the Appellant |