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

[TRANSLATION]

Citation: *S. P. v Canada Employment Insurance Commission*, 2019 SST 821

Tribunal File Number: GE-19-2540

BETWEEN:

S. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: July 31, 2019

DATE OF DECISION: August 7, 2019

Canada

DECISION

[1] The appeal is dismissed. I find that if the Appellant had not been sick, she would not have been available for work, starting on August 20, 2018, under section 18(1)(b) of the *Employment Insurance Act* (Act).

OVERVIEW

[2] On April 19, 2018, the Appellant filed a claim for Employment Insurance regular benefits, and she received benefits. On October 10, 2018, the Appellant asked the Respondent, the Canada Employment Insurance Commission (Commission), to convert her claim for regular benefits into sickness benefits (special benefits), starting on August 20, 2018.

[3] The Commission determined that the Appellant was not available for work as of August 20, 2018, and imposed a disentitlement from benefits on her as of that date, until the end of her benefit period—the week ending on September 29, 2018, which represents six weeks of benefits.

[4] The Appellant argues that she was available for work and that she had made efforts to find employment. She explained that her health condition had not prevented her from being available for work. The Appellant indicated that she had been able to work, depending on the conditions offered and taking into account her parental responsibilities, as well as the transportation available to her. On July 5, 2019, the Appellant disputed the Commission’s reconsideration decision. That decision is now being appealed to the Tribunal.

PRELIMINARY MATTERS

[5] The Appellant did not attend the teleconference hearing on July 31, 2019. A notice of hearing was emailed to the Appellant on July 17, 2019, to inform her of the July 31, 2019, hearing. On July 5, 2019, the Appellant authorized the Tribunal to communicate with her by email. On July 25, 2019, during a telephone conversation with a Tribunal representative, the Appellant confirmed that she had received the documents relating to her appeal file, including her notice of hearing, and confirmed that she would be attending the hearing.

[6] Satisfied that the Appellant had received notice of the July 31, 2019, hearing, I proceeded in her absence, as permitted in such situations under section 12 of the *Social Security Tribunal Regulations*. I waited for more than 45 minutes after the start of the hearing on July 31, 2019, to make sure that the Appellant would be present. Despite that waiting period, the Appellant did not show up. I had not received notice from the Appellant before the hearing that she would not be able to attend.

ISSUES

[7] I must determine whether, if it were not for her illness, the Appellant would have been available for work, as of August 20, 2018, under section 18(1)(b) of the Act.

[8] To make this determination, I must answer the following questions:

a) Did the Appellant express the desire to return to the labour market as soon as a suitable job was offered?

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

c) Did the Appellant establish personal conditions that might unduly limit the chances of returning to the labour market?

ANALYSIS

[9] Section 18(1)(b) of the Act stipulates that 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 unable to work because of a prescribed illness, injury, or quarantine, and that the claimant would otherwise be available for work.

[10] Section 9.001 of the *Employment Insurance Regulations* (Regulations) provides the specific criteria for determining whether the claimant's efforts to obtain suitable employment constitute reasonable and customary efforts. According to these criteria, the efforts must be: 1) sustained, 2) directed toward obtaining suitable employment, and 3) compatible with nine specific activities that can be used to help claimants obtain suitable employment.

[11] In the absence of a definition of the notion of “availability” in the Act, the criteria developed in the case law can be used to establish a person’s availability for work as well as their entitlement or disentitlement to receive Employment Insurance benefits.

[12] Availability is a factual issue that requires us to consider three general criteria provided in the case law.[1]

[13] These criteria are:

a) The desire to return to the labour market as soon as a suitable job is offered;

b) The expression of that desire through efforts to find suitable employment; and

c) Not setting personal conditions that might unduly limit the chances of returning to the labour market.[2]

[14] In this file, I find that, starting on August 20, 2018, the date on which the Commission imposed a disentitlement from benefits on the Appellant, she has not shown that, if it were not for her illness, she would have been available for work.[3]

[15] I note that in this case, a medical certificate was issued on October 12, 2018, indicating that the Appellant had been prescribed a medical leave for the period from October 8, 2018, to November 17, 2018, inclusive.[4] The Commission did not dispute this.

[16] However, the Appellant did not receive sickness benefits (special benefits) during this period because her benefit period had ended before the period for which she had been prescribed a medical leave. The Appellant received Employment Insurance regular benefits during the period covering the week starting on May 27, 2018, to the week ending on September 29, 2018.[5]

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[1] *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.
[2] *Ibid.*
[3] *Faucher*, A-56-96.
[4] GD3-29.
[5] GD3-25, GD3-26, GD3-32, and GD8-1.

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

[17] No. Even though the Appellant argued that she was available for work, she did not show her "desire to return to the labour market" as soon as suitable employment was offered, starting on August 20, 2018.[6]

[18] I find contradictory the Appellant's statements concerning her desire to return to the labour market as of that date.

[19] On this aspect, the evidence in the file and the Appellant's statements show the following:

a) In a statement made to the Commission on October 10, 2018, when the Appellant asked that her claim for Employment Insurance regular benefits be converted to sickness benefits, she explained that she had been unable to work since August 20, 2018, due to her health condition (illness) and that, if she had not been sick, she would have been available for work. In this statement, as well as in a statement made to the Commission on October 19, 2019, the Appellant explained that she had not found childcare for her children over the summer of 2018 and that in August 2018, her son was injured and her daughter was sick;[7]

b) On May 6, 2019, the Appellant stated to the Commission that she had not been able to work since the end of September 2018, and that she had been receiving mental health follow-up since August 2018. The Appellant's mother could have provided her with a vehicle for work for the months of August and October 2018, but that would not have been possible in September 2018, because the vehicle had broken down;[8]

[6] *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.
[7] GD3-21 to GD3-24.
[8] GD3-41 and GD3-42.

c) In a statement made to the Commission on May 7, 2019, the Appellant indicated that she had been available to work over the previous summer (summer 2018) as well as the month of September 2018;[9]

d) In her July 5, 2019, notice of appeal, the Appellant indicated that she had always been available for work and that she had filled out her reports to that effect. The only thing that had changed in this regard was that, near the end of August 2018, she had developed a mental incapacity, but despite this situation, she was nonetheless available for work. With suitable employment, she could have worked. If the wages had been more favourable, she could have paid for transportation. The Appellant could not afford to pay for childcare (for example, a babysitter), except in September 2018, when her parents could have cared for her children.[10]

[20] I place significant value on the Appellant's initial statement, on October 10, 2018, in which she indicated that she had not been available for work as of August 20, 2018.[11] It is a statement the Appellant made spontaneously when she asked that her Employment Insurance regular benefits be converted into sickness benefits (special benefits) and where she indicated the date from which she was not available for work, as well as the reasons why she was not available (for example, sickness, lack of childcare, lack of transportation).

[21] This statement precedes the Appellant's statements after she had learned in the Commission's January 4, 2019, decision, that she had not been available for work as of August 20, 2018.[12]

[22] Case law informs us that we must give more weight to initial spontaneous declarations than to statements made later in the face of an unfavourable decision from the Commission.[13]

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[9] GD3-44 and GD3-45.
[10] GD2-4 to GD2-7.
[11] GD3-21 and GD3-24.
[12] GD3-36 and GD3-37.
[13] *Clinique Dentaire O. Bellefleur*, 2008 FCA 13; *Thompson*, 2007 FCA 391; *Lévesque*, A-557-96.

[23] I find that, despite the fact that the Appellant expressed her availability for work, she did not show her desire to return to the labour market as soon as suitable employment was offered to her, starting on August 20, 2018.[14]

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

[24] No. The Appellant did not express her desire to return to the labour market through significant efforts to find suitable employment, starting on August 20, 2018.[15]

[25] On this point, the Appellant argues the following:

a) During her benefit period, the Appellant made several attempts to find suitable employment (for example, Employment Insurance website), but she was unsuccessful. She has the right to refuse employment that is unfavourable, without being considered not available for work. Part-time work, at minimum wage, is not suitable employment. The Appellant did not mention that she was not looking for work when she first contacted the Commission;[16]

b) The Appellant was available for work depending on the conditions offered. She would like to find a job paying a wage of $17.00–$18.00 an hour (for example, work in a hospital). The Appellant would have accepted a full-time day job at minimum wage or a bit more (for example, wage of $17.00–$18.00 an hour, work in a hospital);[17]

c) The Appellant could have had transportation to work with her parents' assistance, except for the month of September 2018, when their vehicle was broken down. There is no public transportation (for example, bus);[18]

d) The Appellant worked for X (X), for one day (three hours), on September 18, 2018. She left this employment because the work schedule (for example, evening and

[14] *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.
[15] *Ibid.*
[16] GD2-4 to GD2-7 and GD3-24.
[17] GD3-39 to GD3-42.
[18] GD3-41 and GD3-42.

> sometimes weekend afternoon work) was not flexible enough to allow her to care for her children. When the Appellant accepted this employment, she thought she would have childcare assistance (for example, her parents). The Appellant was unable to find someone suitable to care for her sick daughter, and she had to refuse the employment. If she had had a better salary, she would have been able to pay for transportation. She asked the employer about possible day jobs, but there were none. The Appellant's parents did not think this employment was acceptable (for example, unacceptable salary and work schedule), so she stopped working at it. At the time she was hired, the Appellant was unaware of the conditions in which she would be working as well as the issue of transportation.[19]

[26] I find that the Appellant's statements to the Commission regarding her efforts to find employment show that she did not make "reasonable and customary efforts" in her "efforts to find suitable employment," as indicated under section 9.001 of the Regulations, that is, sustained efforts, directed toward obtaining suitable employment, and compatible with nine specific activities that can be used to assist claimants in obtaining suitable employment.

[27] Aside from the employment that she held for one day with X (X), on September 18, 2018, and the job searches she said she conducted on the Commission's Employment Insurance website, the Appellant failed to show that she had directed her search toward obtaining suitable employment or that she had conducted specific activities to that effect, under section 9.001 of the Regulations (for example, contacting prospective employers, submitting job applications, attending interviews).

[28] I find that the Appellant's availability for work did not result in concrete and sustained job searches with the goal of finding employment.[20]

[19] GD2-4 to GD2-7, GD3-18 to GD3-20, GD3-24, GD3-30, GD3-31, GD3-35, GD3-41, and GD3-42.
[20] *Wang*, 2008 FCA 112.

[29] Case law informs us that a person's availability is assessed by working day in a benefit period for which they can show that, on that day, they were capable of and available for work and unable to obtain suitable employment.[21]

[30] Case law also indicates that, to be eligible for benefits, a claimant must be making efforts to find suitable employment even if it seems reasonable not to.[22]

[31] I find that, starting on August 20, 2018, the Appellant failed to meet her obligation to make efforts to find suitable employment.

Did the Appellant establish personal conditions that might unduly limit the chances of returning to the labour market?

[32] Yes. I find that the Appellant established "personal conditions" that unduly limited her chances of returning to the labour market starting on August 20, 2018. [23]

[33] The evidence shows that the personal conditions the Appellant imposed are related to the fact that she first indicated that she was not available for work starting on August 20, 2018, for health reasons (illness).

[34] On this point, I find that the Appellant established her own diagnosis concerning her health condition by determining that she was incapable of work as of that date, without providing medical evidence to that effect. I note that the medical evidence the Appellant presented indicates that a medical leave had been prescribed to her only for the period from October 8, 2018, to November 17, 2018, inclusive.[24] Moreover, the Appellant did not receive sickness benefits (special benefits) starting on August 20, 2018.

[35] I am of the view that the Appellant did not show that starting on August 20, 2018, and for every working day of her benefit period, she was unable to work because of an illness or injury

[21] *Cloutier*, 2005 FCA 73; *Boland*, 2004 FCA 251.
[22] *De Lamirande*, 2004 FCA 311; *Cornelissen-O'Neill*, A-652-93.
[23] *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.
[24] GD3-29.

and that she would otherwise have been available for work, as noted in section 18(1)(b) of the Act.

[36] The Appellant also established several other personal conditions had it not been for which she would have accepted employment.

[37] These conditions concern the fact that the Appellant was looking for work during the day, with specific hours, from Monday to Friday.

[38] These conditions are also related to the salary for which the Appellant would have accepted to work, specifying that she did not want to work for minimum wage, in a part-time job, because, according to her, it was not a suitable wage.

[39] The Appellant also indicated that her family responsibilities limited her availability for work (for example, difficulty finding childcare, financial difficulties paying for such a service).

[40] I find that starting on August 20, 2018, the Appellant established personal conditions that unduly limited her chances of returning to the labour market.

CONCLUSION

[41] In summary, I find that, if the Appellant had not been sick, she would not have been available for work, starting on August 20, 2018, under section 18(1)(b) of the Act.

[42] Therefore, the Commission’s decision to impose a disentitlement from benefits on the Appellant as of that date is justified in the circumstances.

[43] The appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	July 31, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. P., Appellant, not present at the hearing Canada Employment Insurance Commission, Respondent, not present at the hearing