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

[TRANSLATION]

Citation: *M. S. v Canada Employment Insurance Commission*, 2019 SST 826

Tribunal File Number: GE-19-2145

BETWEEN:

M. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISTION BY: Yoan Marier

HEARD ON: August 1, 2019

DATE OF DECISION: August 27, 2019

DECISION

[1] The Appellant refused a suitable employment without good cause during his benefit period. The appeal is dismissed, and the Appellant is disqualified from receiving benefits, as determined by the Commission.

OVERVIEW

[2] The Appellant, M. S., filed a claim for Employment Insurance benefits. A benefit period was established starting December 2, 2018.

[3] During the first months of his benefit period, the Appellant was called to work on several occasions as a traffic control person for his employer X, but he did not show up.

[4] The Canada Employment Insurance Commission reviewed the claim for benefits and determined that the Appellant had refused a suitable employment offered by X on two occasions—January 12 and 23, 2019—without good cause. Therefore, the Appellant was disqualified from receiving benefits for seven weeks for each of these refusals.

[5] The Appellant now disputes the Commission's decision to the Tribunal. He submits that he had good cause for refusing the employment because his employer did not provide him with a safety helmet.

ISSUE

[6] Should the Appellant be disqualified from receiving benefits for refusing a suitable employment on two occasions during his benefit period without good cause?

ANALYSIS

Should the Appellant be disqualified from receiving benefits for refusing a suitable employment on two occasions during his benefit period without good cause?

[7] Yes, I find that a disqualification applies in this file for the reasons that follow.

[8] When unemployed, an Employment Insurance claimant is required to accept any offer of suitable employment, unless they have good cause for refusing this employment.[1]

[9] If a claimant refuses a suitable employment without good cause, they will be disqualified from receiving benefits for a period of 7 to 12 weeks.[2]

[10] The exact duration of the disqualification is at the Commission's discretion. I cannot change the duration of the disqualification, unless the Commission exercised its discretion in a non-judicial manner.[3]

[11] In order to come to a decision on this issue, I must ask four sub-questions:

1) Did the Appellant refuse an employment during his benefit period?

2) If so, was this employment suitable?

3) If so, did the Appellant have good cause for refusing this employment?

4) If not, what duration of disqualification should be imposed on the Appellant?

Did the Appellant refuse an employment during his benefit period?

[12] The employer X submits that, following a break during the holiday season, it needed employees again starting the second week of January. The employer states that the Appellant was called to work on at least two occasions, January 12 and 23, 2019, but that he refused to show up. The Appellant acknowledges that he refused to show up to work after his employer contacted him on those two days.

[13] I find that the Appellant did effectively refuse to work on two occasions during his benefit period.

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[1] *Employment Insurance Act* (Act), s 27(1)(a).
[2] Act, s 28(1)(a).
[3] The Commission is considered to have exercised its discretion in a non-judicial manner if it failed to consider relevant factors, placed too much importance on irrelevant factors, acted in bad faith, or showed discrimination (*Canada (Attorney General) v Owen*, A-465-94).

Was this employment suitable?

[14] A suitable employment is an employment that offers the claimant conditions and rate of earnings that are not less favourable than those in their usual occupation. Furthermore, an employment is considered suitable only if the claimant has the capacity to perform the work, the hours of work are compatible with their obligations and beliefs, and the nature of the work is not contrary to their moral convictions or religious beliefs.[4]

[15] I find that the employment offered to the Appellant was suitable for the following reasons.

[16] When he was first hired at X, the Appellant was assigned to a full-time position. In addition, between November 12, 2018, and December 1, 2018, the evidence shows that he worked a total of 144 hours.[5]

[17] The Appellant submits that he was reassigned on December 1. He went from working nearly 50 hours a week in a full-time position, to working only two days a week in an on-call position. The Appellant therefore asked the employer to prepare a Record of Employment so he could access benefits to make up for his loss of income.

[18] However, it appears the employer's activities resumed shortly thereafter. In a text message exchange with the Appellant, the employer mentioned that work resumed on January 7 and that it had to hire new traffic control people to fill all the available hours.[6] In its conversations with the Appellant over the winter, the employer repeatedly stated that it had plenty of work for him and that it had to hire new employees to address its staff shortage. Furthermore, the employer repeated this statement in its conversations with the Commission, submitting that the Appellant could have resumed full-time work starting the second week of January 2019 if he had wanted to.[7]

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[4] See the definition of not suitable employment in s 6 of the Act and the definition of suitable employment in s 9.002 of the *Employment Insurance Regulations*.
[5] GD3-18.
[6] GD3-28.
[7] GD3-43 and 54.

[19] In fact, the text message exchanges between the Appellant and the employer show that it was the Appellant who had asked to work only one or two days a week after filing his claim for benefits.[8] On December 16, 2018, he wrote the following: [translation] "...with unemployment, I am going to want to work one or two days until it starts again... certainly 'shortage of work' would be preferable."

[20] In my view, the evidence shows that the Appellant could have worked (almost) full-time in the same employment that he had until the month of December, as soon as the holidays were over. In January, the Appellant was called back to work sporadically (including on January 12 and 23) because he was limiting his availability for work and not because the employer did not have enough hours to offer him. In summary, everything indicates that the working conditions and rate of earnings offered to him by the employer at the time when he refused work were not less favourable than what he had before he filed his claim for benefits.[9]

[21] Furthermore, despite the conflicting information to that effect, I find that the Appellant had the capacity to perform the work asked of him by his employer.[10]

[22] Indeed, following the Commission's decision, the Appellant filed medical certificates indicating a work stoppage. The Appellant acknowledged at the hearing that he had used these certificates so that he could access benefits despite the Respondent's unfavourable decision. The first certificate, completed February 5, 2019, reports a work stoppage from December 7, 2018, to April 15, 2019. The second certificate, completed April 2, 2019, reports a work stoppage from December 7, 2018, to March 25, 2019. However, these medical certificates seem like favours to me, and I give them little weight for the following reasons:

a) When he filed his claim on December 14, 2018, the Appellant applied for regular benefits and not sickness benefits.

[8] GD3-24, 28, 44.
[9] See the definition of not suitable employment at s 6 of the Act.
[10] See the definition of suitable employment at s 9.002 of the *Employment Insurance Regulations*.

b) The Record of Employment the employer submitted made no mention of a work stoppage due to illness. According to the document, the record was issued at the Appellant's request because he wanted to voluntarily go on unemployment.

c) The employer was never made aware that the Appellant had a medical issue preventing him from working for extended periods of time. Furthermore, the multiple text message exchanges between the Appellant and the employer around the dates in question mention nothing to that effect.

d) In his conversations with the Commission, the Appellant never mentioned that the employment in question did not suit him for medical reasons. Moreover, in a conversation that occurred on January 25, 2019, when he was supposed to be on a leave from work, the Appellant clearly stated to the Commission that he was available for work any time and full-time. He never said that he was sick.

e) The certificates were issued retroactively, and the dates on the medical certificates seem to have been adjusted to allow the Appellant to access first sickness benefits, and then regular benefits. Indeed, the second certificate puts the end of the work stoppage at March 25, 2019—almost exactly 15 weeks after the beginning of the work stoppage. Curiously, 15 weeks corresponds to the maximum number of weeks of sickness benefits that claimants can receive.

[23] Finally, there is nothing in the evidence or in the Appellant's submissions to suggest that the proposed hours or nature of the work conflicted with the Appellant's schedule, beliefs, or convictions.[11]

[24] For these reasons, I find that the employment offered to the Appellant by X was a suitable employment.

[11] See the definition of suitable employment at s 9.002 of the *Employment Insurance Regulations*.

Did the Appellant have good cause for refusing this employment?

[25] A claimant is considered to have good cause for refusing an employment if they acted prudently, as a reasonable person would be expected to act in the same circumstances.[12]

[26] To justify his refusals of work, the Appellant relied mainly on two arguments.

[27] First, he mentioned that he had no safety helmet for working on the job site.

[28] In my view, refusing to work for this reason does not constitute good cause. The employer stated that its internal policy required employees to provide their own safety helmet and that the Appellant was able to work in November only because it had loaned him a helmet under exceptional circumstances.

[29] I find that it is reasonable for an employer to require its employees to provide their own safety equipment, especially when it is a personal item like a helmet. Furthermore, safety helmets seem to be available at reasonable prices at big box stores.[13] I find that a reasonable person who wanted to find work would have taken the necessary measures to obtain a helmet and go to work.

[30] Second, the Appellant submitted medical certificates indicating that he was on a leave from work over the winter of 2018/2019. However, for reasons that I outlined in detail above, I give little weight to these two certificates. In my view, the evidence shows that the Appellant was able to work during the period in question and that he refused work for a reason other than his alleged incapacity.

[31] I find that the Appellant did not have good cause for refusing work on January 12 and 23, 2019.

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[12] *Canada (Attorney General) v Moura*, A-800-80.
[13] GD3-61.

What duration of disqualification should be imposed on the Appellant?

[32] Based on the Act, the duration of disqualification in the case of a refusal to work must be between 7 and 12 weeks. The exact duration of the disqualification is at the Commission's discretion.

[33] In this file, the Commission imposed on the Appellant the minimum penalty provided under the Act, that is, a disqualification of seven weeks for each of the refusals to work.

[34] The Commission's submissions regarding the duration of the disqualification are brief, to say the least. However, the duration of the disqualification seems to be consistent with the Respondent's policy, which provides for the imposition of the minimum penalty of seven weeks of disqualification if the duration of the employment offered is seven weeks or less, for each refusal of work without good cause.[14]

[35] The employer submits that the Appellant could have worked full-time starting the second week of January if he had wanted to, but that he had limited his availability to one or two days a week. Therefore, it is likely that the Appellant could have continued to work after he was called to work on January 12 and 23, because the employer seemed to have plenty of work for him. However, the evidence is not sufficient to determine the duration of the employment offered with certainty.

[36] Therefore, I find that the Commission exercised its discretion judicially by imposing on the Appellant the minimum penalty under the Act for each of his two refusals of work. I therefore will not modify the duration of the disqualification imposed by the Commission.

[14] Section 9.7.1 of the *Digest of Benefit Entitlement Principles*.

CONCLUSION

[37] The appeal is dismissed.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	August 1, 2019.
METHOD OF PROCEEDING:	In person
APPEARANCES:	M. S., Appellant