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

Citation: *M. R. v Canada Employment Insurance Commission*, 2019 SST 962

Tribunal File Number: GE-19-2852

BETWEEN:

M. R.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Catherine Shaw

HEARD ON: August 20, 2019

DATE OF DECISION: August 30, 2019

Canada

DECISION

[1] I am dismissing the appeal. The Claimant has not shown that he was available for work as of February 20, 2017. This means that he is disentitled from being paid regular employment insurance (EI) benefits.

OVERVIEW

[2] Claimants have to be capable of and available for work to be paid regular EI benefits. Availability is an ongoing requirement; claimants have to be searching for a job. The Commission decided that the Claimant was disentitled from being paid EI benefits as of February 20, 2017, because he was not capable of and available for work.

[3] I must decide whether the Claimant has proven that he was capable of and available for work.[1] The Commission says that the Claimant does not meet the availability requirements because he was too unwell to work. The Claimant disagrees and states that he recovered from his illness within two weeks and was capable of working after that. I find that the Claimant was capable of working but has not proven he was available for work and making reasonable and customary efforts to find suitable employment.

ISSUE

[4] Was the Claimant capable of and available for work as of February 20, 2017?

ANALYSIS

Reasonable and customary efforts to find a job

[5] Two different sections of the law require claimants to show that they are available for work;[2] the Commission disentitled the Claimant from being paid benefits under both. I will first

[1] The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.
[2] Subsection 50(8) provides that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment. Paragraph 18(1)(a) of the *Employment Insurance Act* provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

consider whether the Claimant has proven that his efforts to find a job were reasonable and customary.

[6] The law sets out criteria for me to consider when deciding whether the Claimant's efforts are reasonable and customary.[3] I have to look at whether his efforts are sustained and whether they are directed toward finding a suitable job. I also have to consider the Claimant's efforts in the following job-search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.

[7] The Claimant told the Commission and the Tribunal that he began working for his former employer again in March 2017, for a period of six days. He resumed his employment there again in August 2017, and is still working for that employer. He said that he contacted the employer both times to inquire about work and was offered employment as a result of those calls.

[8] The Claimant said at the hearing that he did not apply for any other jobs during his period of unemployment between March and August, because he preferred to return to his employer due to the high quality and cleanliness of their equipment. He said that he did not know where else he could work at that time. He said that he researched the potential employers in the area and tried to figure out who he was able to work for. He gave a detailed account of four employers that he researched for their location and area of travel, including X, X, X, and X. He said that he researched possibly seven companies in to total. Some of the companies did not use the correct equipment for his experience as a X. He said that he did not contact any of these companies after performing this research. He stated that the only company he contacted was his former employer, who he contacted near the end of February 2017, which resulted in a brief period of employment.

[9] The Claimant also stated that he checked the local paper for job postings, but did not see anything. He said there are no X positions available near him. Every company that he researched

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[3] Section 9.001 of the *Employment Insurance Regulations*.

was located more than an hour away from his home address. His current employer is also located approximately one hour's drive away and he has been commuting.

[10] Following the hearing on August 20, 2019, the Claimant submitted an e-mail that he said provides more information about his job search. In this e-mail he states that he traveled to Moncton on three different days to seek employment with the company X. He said he was offered a full-time job with that company. He also said that he spoke with a company in Quebec regarding a X position, researched another company in X, NB, and prepared to test with another company in X. He said that he researched his current employer from January 25, 2015, and they also offered him a job so he informed X that he will stay with them.

[11] I find this additional information difficult to rely on because there are no dates attached to the Claimant's job search efforts with X and the three other companies. The Claimant was disentitled from receiving regular EI benefits as of February 20, 2016. He started working again in August 5, 2017. As such, the relevant period for the issue at appeal is between February 20, 2016 to August 5, 2017. The Claimant's statement that he researched his employer as of January 25, 2015, and then informed X that he would not accept their job offer indicates to me the Claimant is discussing a period prior to February 20, 2016. If that is the case, this evidence is not relevant to the issue under appeal.

[12] The information the Claimant provided in this e-mail also directly contradicts his testimony at the hearing. He stated at the hearing that he had not contacted any employers and did not apply for jobs with any companies except his former employer. Because the Claimant's additional job search information conflicts with his affirmed testimony given earlier that day, and because of the undefined time period of the job search efforts, I choose to rely on the Claimant's testimony. The Claimant had the opportunity to explain his job search efforts in depth at the hearing and I was able to question him about those efforts. As such, I find the information he provided at the hearing is more reliable than the information he provided by e-mail after the hearing.

[13] However, even if I considered the Claimant's job search efforts as provided in the e-mail, it would not change my conclusion that he has not proven that his efforts to find a job were reasonable and customary. The Claimant's testimony indicated that his efforts did not move

beyond researching potential employers. He concluded that most employers were not suitable for him due to the type of X or quality and cleanliness of their equipment, so he did not contact any of them. He said that one employer, X, was a possibility but admitted that he did not contact that employer, either.

[14] I recognize that the Claimant directed his efforts at finding suitable employment by assessing employment opportunities and contacting his former employer in March and August 2017, but I find his efforts were not sufficient when compared with the job-seeking activities required by the *Employment Insurance Regulations*. I also find the Claimant's evidence does not support that his efforts were sustained throughout the period of his unemployment. As such, the Claimant has not met his burden of proving that he was making reasonable and customary efforts to find suitable employment.

Capable of and available for work and unable to find suitable employment

[15] To decide whether a claimant is available for work, it must be determined whether the claimant is capable for work.[4] Capability of work relates to a claimant's ability to perform the functions of their regular or usual employment or some other suitable employment.[5] Capability and availability are interconnected requirements under section 18 of the *Employment Insurance Act* because a claimant's availability can be limited if they are incapable of work.

[16] The Claimant made an initial claim for sickness benefits on October 31, 2016. He stated on his initial application that he stopped work on October 6, 2016, due to illness and was not returning to work for health reasons. He provided a medical note to the Commission that states he needed to be off work for 1-2 weeks.

[17] The Commission initially disqualified the Claimant from receiving EI benefits for voluntarily leaving his job without just cause. The Claimant requested a reconsideration of this decision and told the Commission that he had left work as a result of an injury at work and the effects of the injuries were severe and had lingered for quite some time. The Commission changed its decision on the voluntary leaving issue but then decided the Claimant could not be

[4] *Canada (Attorney General) v. Leblanc*, 2010 FCA 60
[5] *Canada (Attorney General) v. Cauglin,* A-1168-84

paid regular benefits from February 20, 2016 because he had not proven he was capable of and available for work. Specifically, the Commission said the Claimant's statements on reconsideration supported that he was too unwell to work or look for suitable employment.

[18] The Claimant disputed the Commission's decision at the hearing. He said the Commission misconstrued his statements and characterized his condition as more severe than it was. He acknowledged that he told the Commission that he had set up his trailer like an intensive care unit in a hospital, but denied that he said he had hunkered down "in a bunker." He clarified that he meant that he did not receive cell phone reception inside the trailer, in a similar way that it would not be available in an intensive care unit. The Claimant testified that he was recovered from his injuries within two weeks.

[19] It is worth noting the Commission's decision is based on statements the Claimant made during a conversation on July 25, 2019. The record of this conversation is prefaced by a note from the Commission agent which states "the client talked continuously and jumped from subject to subject incoherently… statements provided by the client were documented in a point format to the best of the agent's ability."

[20] I find the evidence supports the Claimant was recovered from his injury by February 20, 2016, and was capable of work as of that date. It is undisputed that the Claimant left work for health reasons on October 6, 2016. He stated at the hearing that he was recovered from his injury within two weeks and able to return to work. This is supported by the medical note provided to the Commission states the Claimant is to be off work for up to two weeks to allow his recovery. I also find the Commission's evidence of the Claimant's statements on July 25, 2019, to be less reliable than his testimony as the Commission agent's notes indicate that she had difficulty understanding and documenting the Claimant's statements thoroughly.

[21] Next, I turn to the question of whether the Claimant was available for work. The Claimant can establish his availability by proving his desire to return to the labour market as soon as a suitable job is offered, through demonstrating efforts to find a suitable job, and without setting personal conditions that might limit his chances of returning to the labour market.[6] I have

[6] *Faucher v. Canada Employment and Immigration Commission,* A-56-96

to consider each of these factors to decide the question of availability,[7] looking at the attitude and conduct of the Claimant.[8]

[22] The Claimant has shown a desire to return to the labour market as soon as a suitable job was offered. I accept the Claimant's testimony that he wanted to return to work immediately because he supports himself and was having financial difficulty due to the decrease in his income after he stopped working in October 2016. The Claimant also wanted his current employment to be considered as evidence of his desire to work. He testified that he has been employed with the same company since August 5, 2017.

[23] I find the Claimant did not make enough efforts to find a suitable job. While they are not binding when deciding this particular requirement, I have considered the list of job-search activities outlined above in deciding this second factor for guidance. For the reasons explained above, the Claimant's efforts to find a new job included researching potential employers and contacting his former employer in March and August 2017. These efforts were not enough to meet the requirements of this second factor because

[24] Additionally, I find the Claimant did set personal conditions that might have unduly limited his chances of returning to the labour market. The Claimant says he eliminated several potential employers because he thought the equipment they used was not the same quality as the equipment used by his former employer. Additionally, he said the former employer maintained the equipment exceptionally well and kept it cleaner than most companies. He said this is why he preferred to return to his former employer, rather than take a chance with another company, where he may have to use unclean or unsafe equipment. I find the Claimant's preference for his former employer was a personal condition that he set that might have unduly limited his chances of returning to the labour market, all the more so because he chose to apply for work only with the former employer rather than explore other opportunities.

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[7] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[8] *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[25] Considering my findings on each of the three factors together, I find that while the Claimant did show that he was capable of work he has not demonstrated that he was available for work and unable to find suitable employment as of February 20, 2016.[9]

CONCLUSION

[26] I find that the Claimant is disentitled from receiving benefits. This means that the appeal is dismissed.

Catherine Shaw
Member, General Division - Employment Insurance Section

HEARD ON:	August 20, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. R., Appellant/Claimant

[9] Paragraph 18(1)(a) of the *Employment Insurance Act*.