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

Citation: *A. M. v Canada Employment Insurance Commission*, 2019 SST 1570

Tribunal File Number: GE-19-3203

BETWEEN:

**A. M.**

Appellant / Claimant

and

**Canada Employment Insurance Commission**

Respondent / Commission

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# SOCIAL SECURITY TRIBUNAL DECISION

## General Division – Employment Insurance Section

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DECISION BY: Raelene R. Thomas

HEARD ON: October 1, 2019

DATE OF DECISION: October 16, 2019

## DECISION

[1] The appeal is allowed. The Claimant has proven that she was available for work from July 1, 2019.

## OVERVIEW

[2] Claimants have to be available for work to be paid regular employment insurance (EI) benefits. To show that they are available, claimants have to be searching for a job all the time they are receiving EI benefits.

[3] The Claimant is employed by a school board in a full-time in a permanent seasonal job as a teaching assistant. She is also employed year-round part-time as an autism support assistant with an autism support service provider (the Service). When the Claimant was laid off from her teaching assistant position she applied for EI benefits and continued to work in her part-time job as an autism support assistant. The Commission decided the Claimant was disentitled from being paid EI benefits from July 1, 2019, because she was not available for work.

[4] I must decide whether the Claimant has proven that, it is more likely than not, she was available for work.

## PRELIMINARY MATTER

[5] The Commission submitted that it made an error when implementing the disentitlement. The letter it sent to the Claimant stated that the disentitlement was imposed effective June 29, 2019. The Commission submitted the disentitlement should have been imposed effective July 1, 2019, because disentitlements are imposed only from Monday to Friday.

[6] Where an error does not cause prejudice or harm, it is not fatal to the decision under appeal.[1] Because the Commission's error did not prevent the Claimant from seeking reconsideration of the Commission's initial decision and later to appeal the reconsideration decision, I find that this clerical error does not cause the Claimant any prejudice or harm

[1] *Desrosiers v. Canada (AG)*, A-128-89. This is how I refer to the court cases containing principles the law requires me to apply to the circumstances of this appeal.

**ISSUE**

[7] Was the Claimant available for work as of July 1, 2019?

**ANALYSIS**

[8] Two different sections of the law require claimants to show that they are available for work. One section requires that the Claimant make reasonable and customary efforts to find suitable work.[2] The other section requires that the Claimant must prove that she is capable of and available for work for each working day and unable to obtain suitable employment.[3] The Commission denied the Claimant her EI benefits because it determined she had not met any of these requirements.

[9] The law sets out the criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[4] I have to decide if her efforts were sustained and whether her efforts were directed towards 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.[5]

[10] The Commission submitted that it recognizes the Claimant's job search efforts by means of the employment positions she applied for and was in no manner attempting to minimize the actions presented. The Commission submitted that unfortunately what cannot be ignored is the intent behind the Claimant's search for employment with the repeated sentiment that these conditions have never been asked of her during prior claims. The Commission says when considering the obligations set forth in the *Employment Insurance Act* and *Regulations*, when one has confirmed job search activities, the intent behind such actions must be evaluated. The Claimant confirmed her focus was on her part-time employment for the summer, as well as with

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[2] *Employment Insurance Act*, subsection 50(8). This is how I refer to the legislation that applies to this appeal.
[3] *Employment Insurance Act*, paragraph 18(1)(a)
[4] *Employment Insurance Regulations*, section 9.001
[5] *Employment Insurance Regulations*, section 9.001

the expectation of a return to her full-time position with the school board, which fails to substantiate the conditions have been met.

[11] The Claimant testified that she applied for EI benefits after she was laid off from her school board job for the summer break. She had been working part-time, two to three shifts a week, at the Service during the school year and continued to do so during the summer break. The Claimant explained that she is guaranteed two shifts a week at the Service. She is a member of a union at the Service. Every day she receives a text that notifies her of available shifts. She can choose to accept the offered shifts. She is awarded the shift if she is the most senior of the employees accepting the offered shift. The Claimant testified that she creates her own schedule at the Service and if she got full-time work she would be able to fit her hours at the Service around the hours of a full-time job.

[12] The Claimant testified that when the Commission contacted her in July to discuss her claim for EI benefits the Service Canada agent asked her why she was applying for EI benefits if she was still working. The Claimant said she explained that she had been laid off from her full-time job but continued to work her part-time job and, in the past, a Record of Employment (ROE) was required from both employers. The Claimant testified that the Commission next contacted her in the first week of July to tell her that she had to look for a job. She conducted a job search, using the web-site Indeed, as suggested by a Service Canada agent.

[13] The Claimant's Representative submitted that the Commission failed to apply the case law that has established that a claimant who has a known date of recall need not demonstrate availability. The Representative said the Claimant is an Early Childhood Educator who has been employed as a full-time teaching assistant for a school board since December 2006. The Claimant is temporarily laid off during the summer months with the knowledge that she will be recalled to work in the same position in September. The Representative said that since September 2014 the Claimant has also been employed as part-time residential counsellor for the Service. She works at that job throughout the year and during the summer layoff. The Representative noted that the Claimant had applied for and received EI benefits during the summer months for 7 years. In three of those years she received EI benefits while she was on layoff from the school board and working part-time at the Service.

[14] The Representative submitted that the three *Faucher* factors were the starting point but the case law also interprets the *Employment Insurance Act* differently for those who find themselves in the Claimant's circumstances.[6] There is a different standard applied to claimants who are laid off with a reasonable expectation of recall. The case law has consistently held the Claimant may be excused from the obligation to show that she is actively looking for employment, at least for a reasonable period of time. A claimant is entitled to look upon the recall has her most probable source of suitable employment and to act accordingly. The Representative submitted that the Claimant's situation fits squarely within the case law and the Commission failed to consider that case law when it rendered its decisions. She said in the context of the Claimant's request for reconsideration the Service Canada agent specifically advised the Claimant she would need to quit her prospective full-time position with the school board in order to be considered "available for work" on the basis that the Claimant's imminent recall to that position was preventing her from being hired by potential employers. The Claimant refused. The Representative noted that in the Call on Decision contained in the appeal file, the Service Canada agent misapplied the legal test by failing to consider that the recall to the school board position was the most suitable job available to the Claimant in the circumstances. The Commission's focus on the Claimant's efforts to make herself available for work is an erroneous focus. The Representative noted that the basis for the Commission's decision on reconsideration was a little bit different from its initial decision in that, on reconsideration, the Commission said that because the Claimant would not leave the full-time work with the school board she had not proven her availability. The Representative submitted that the basis for the Commission's decision is contrary to the case law which provides that a Claimant who has a known recall date is available for work within the meaning of the *Employment Insurance Act*. The case law says that a recall should be understood as the Claimant's most probable source of suitable employment. The Representative referred to Canadian Umpire Benefits (CUB) 14685 and stated that it was not incumbent on the Claimant to go through a futile search for temporary employment in the two months prior to her recall. The Representative said the Claimant's case exemplifies the policy rationale that underlies the case law. The Representative noted that the

[6] A claimant proves her availability for work by proving her desire to return to the labour market as soon as a suitable job is offered, through demonstrated efforts to find a suitable job, and by not setting personal conditions that might limit her chances of returning to the labour market. (*Faucher v. Canada (Attorney General)*, A-56-96)

Claimant did conduct a job search, as directed, that ultimately proved futile given the small window of employment.

[15] The Representative argued that the interpretation of the case law makes good sense for three reasons. It protects employees whose short term availability for employment makes it extremely difficult to find work in the short period of layoff. It protects third party employers where employees may conceal the fact of their recall leaving an employer unhappy when the employee returns to their former position. It makes no good sense for an employee who is laid off annually to quit their full-time employment in order to meet the eligibility criteria of the *Employment Insurance Act*.

[16] I note the court has held that a claimant on temporary lay-off who is awaiting imminent recall should not be immediately disentitled for failing to seek other employment.[7] As well, a claimant will not be immediately disentitled if her best chances for employment are with the expected recall, but this principle does not relieve a claimant from undertaking efforts to find work.[8] However, a claimant "must be prepared to seek work" while awaiting their recall.[9]

[17] The ROE issued to the Claimant from the school board shows the expected date of recall is September 2, 2019. The last day for which she was paid was June 28, 2019. The Claimant's employment with the school board is unionized and she has been recalled to work after the summer break for the last 10 years. As such, I find that the Claimant has established that she was on temporary layoff awaiting an imminent recall. Nonetheless, the Claimant is still obliged to make some efforts to seek work while she is on layoff.

[18] The appeal file contains the job search the Claimant submitted to the Commission. She began the search once she was advised to do so by a Service Canada agent. The search is dated as received by the Commission on July 19, 2019. It shows that she applied for a number of jobs that were consistent with her education and her experience. She also testified that she would check for a text notice every day from her part-time employer for shifts that were available to be filled. These shifts were in addition to the regular weekend shifts that she continued to work

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[7] *Canada (A.G.) v MacDonald*, A-672-93
[8] See CUBs 14685, 14554, and 21160. Although I am not bound by CUBs, I am guided by the principles contained in these CUBs in reaching my decision.
[9] *The Attorney General of Canada v Cornelissen-O'Neill*, A-652-93

while on lay off from the school board. She would exercise her seniority rights to work additional shifts during the summer break.

[19] I find that the Claimant's best chance for suitable employment, for a reasonable period of approximately 8 weeks, was to continue to be available for additional shifts with her part-time employer during the summer months and later for full-time work in September when she would be recalled to her full-time employment. In my opinion, the Claimant's probability of seeking and securing any other temporary employment in the short period prior to her known date of recall was virtually none. Seeking other employment does not show that the Claimant was any more available to work than her focusing on getting as many shifts as possible from her part-time employer and waiting to resume her employment with the school board. I find that the Claimant's internet based job search taken in combination with her daily checking for available shifts with her part-time employer and being available for those shifts is sufficient evidence to show that the Claimant was making reasonable and customary efforts to find suitable employment by ensuring that she was available for shifts with her part-time employer.

[20] Availability is not defined in the *Employment Insurance Act*. As stated earlier a Claimant with an imminent recall is not relieved from undertaking efforts to find work. I must consider whether the Claimant has proven that she is capable of and available for work and unable to find suitable employment.[10] To do so I must apply all three of the *Faucher* factors[11] to the Claimant's circumstances.[12]

[21] In the Claimant's case I find that her desire to return to work is obvious in that she continued her part-time employment while employed full-time during the school year and also during the period of layoff from the school board. I find the Claimant has also expressed that desire while she was laid off from her full-time job through her efforts of making a daily check of the available shifts from her part-time employer, her willingness to pick up additional shifts when she is laid off from her full-time employment and, once she was informed of the requirement, the job search she conducted.

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[10] *Employment Insurance Act*, paragraph 18(1)(a)
[11] See footnote 6 for the three *Faucher* factors
[12] *Canada (Attorney General) v. Rideout*, 2004 FCA 304

[22] The Claimant told the Commission that if she were offered full-time employment she would not give up her part-time job with the Service. The Claimant testified that she needed the money she earned with the Service because of the seasonal layoff from her full-time work with the school board. She testified that because she could choose to accept shifts that were offered she could continue to work at the part-time job were she to get full-time employment elsewhere. Given the pattern of employment that the Claimant has demonstrated, combining full-time with part-time work, I do not find that the Claimant's unwillingness to give up her part-time job if she were offered a full-time job to be a personal restriction that would unduly limit her return to the labour market.

[23] The Claimant also told the Commission that she would not give up her full-time seasonal job with the school board if she were offered a non-seasonal job because the job with the school board had better pay and a pension. A Service Canada agent framed the Claimant's position as the Claimant was only seeking positions within her field, would only accept temporary work and had no intention of seeking out a new position that would interfere with the Claimant's seasonal one. The Claimant is recorded by the Service Canada agent as stating that was correct. She testified that her job at the school board was her dream job for which she was educated. In the Claimant's case she sought out work with other employers, albeit only permanent jobs. In the Claimant's case given the combination of the additional available part-time work, her willingness to accept that additional work, and the known date of recall to her full-time position, I do not find that that the Claimant's unwillingness to give up her seasonal full-time job was a personal restriction that might unduly limit her chances of returning to the labour market.

[24] The Claimant testified that she had access to transportation to get to work, that she was not restricted as to the distance that she could drive to get to work, that there were no times of the day, week, month or year that she could not work, that she would accept minimum wage and that she would take a job that required training if she had the qualifications. In light of this testimony and my earlier findings, I am satisfied that the Claimant has not set any personal conditions that might unduly limit her return to the labour market.

[25] Considering my findings on each of the three *Faucher* factors together, I find that the Claimant has proven that she was capable of and available for work and unable to find suitable employment.[13]

**CONCLUSION**

[26] The appeal is allowed. This means that the Claimant is not disentitled from receiving EI benefits.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

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| HEARD ON: | October 1, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | A. M., Appellant<br><br>Charlotté Calon Representative for the Appellant |

[13] *Employment Insurance Act*, paragraph 18(1)(a)