



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *D. L. v Canada Employment Insurance Commission*, 2019 SST 1549

Tribunal File Number: GE-19-3504

BETWEEN:

D. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: November 5, 2019

DATE OF DECISION: November 7, 2019

DECISION

[1] The appeal is dismissed with modifications.

OVERVIEW

[2] The Appellant applied for Employment Insurance benefits starting April 14, 2019. On June 5, 2019, he indicated on a job search form that he had not yet looked for work because of his family situation. On July 2, 2019, the Commission informed the Appellant that it found that he was not available for work as of April 15, 2019. As a result, an overpayment of \$5,620 was created.

[3] The Appellant disagrees with the Commission's decision as his benefits were cut without warning, which caused stress for his family and financial stress. He said that he had not yet looked for work because of a Court order. He submits that the Commission made a quick decision without regard to his good faith. Lastly, he says he agrees with the fact that his benefits were cut, but he disagrees with having to repay the five payments made, which is inhumane (GD2-2/3).

PRELIMINARY MATTERS

[4] If a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing.¹

[5] The Tribunal notes that an email containing the notice of hearing was sent to the Appellant on October 24, 2019, but it was returned. Therefore, the notice of hearing was sent by priority mail. The Appellant received the notice of hearing on October 29, 2019, because he signed for it himself.

[6] The Appellant did not attend the November 5, 2019, hearing and has not contacted the Tribunal since. Therefore, the Tribunal is of the view that it may proceed in the Appellant's absence since it is satisfied that the Appellant received notice of the hearing.

¹ *Social Security Tribunal Regulations*, s 12(1).

ISSUE

[7] Was the Appellant available for work as of April 15, 2019, within the meaning of the *Employment Insurance Act* (EI Act)?

ANALYSIS

Issue 1: Was the Appellant available for work as of April 15, 2019?

[8] 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 capable of and available for work and unable to obtain suitable employment.²

[9] Claimants must prove their availability, and an Employment Insurance claimant must ensure that they are available at all times. A claimant will be declared disentitled if their behaviour and claims are not sufficiently compelling to prove genuine availability.³

[10] To do this, availability must be examined based on three factors: the claimant's desire to return to the labour market as soon as a suitable job is offered; the efforts required to find a suitable job; and not setting personal conditions that could limit the chances of returning to work.⁴

[11] Therefore, the Tribunal must determine whether the Appellant was available for work. To do this, the Tribunal must answer the following questions:

- Did the Appellant have a desire to return to the labour market as soon as suitable employment was offered?
- Did the Appellant make the necessary efforts to find suitable employment?

² EI Act, s 18(1)(a).

³ *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93.

⁴ *Faucher*, A-56-96, A-57-96.

- Did the Appellant set personal conditions that could limit his chances of returning to work?

Did the Appellant have a desire to return to the labour market as soon as suitable employment was offered?

[12] The Tribunal is not satisfied that the Appellant showed his desire to return to the labour market as soon as suitable employment was offered.

[13] The Commission indicates that it is sure that the Claimant would like to work full-time and that his obstacles to finding employment are beyond his control, as he mentioned (GD3-27).

[14] The Appellant says that he has not yet looked for work because of his family situation. He explained that he has a Court order, requiring him to be home at 3:00 p.m. to look after his children, and he cannot leave his home before 8:00 a.m. (GD3-16 to GD3-21).

[15] The Tribunal is of the view that the Appellant did not show a desire to return to the labour market as soon as suitable employment was offered.⁵ The Tribunal must now assess whether the Appellant made concrete efforts to find employment.⁶

Did the Appellant make the necessary efforts to find suitable employment?

[16] The Tribunal is of the view that the Appellant did not show that he made the necessary efforts to find suitable employment.

[17] The Appellant is responsible for actively seeking suitable employment to obtain Employment Insurance benefits.⁷ That is, it is not enough to intend to work. A claimant must show that they made efforts to find employment.

[18] The Commission may require a claimant to show that they are making reasonable and customary efforts to obtain suitable employment.⁸

⁵ *Faucher*, A-56-96.

⁶ *Primard*, A-683-01.

⁷ *Cornelissen-O'Neill*, A-652-93; *De Lamirande*, 2004 FCA 311.

⁸ EI Act, s 50(8).

[19] To determine whether a claimant made reasonable and customary efforts to obtain suitable employment, the Tribunal must consider whether those efforts consist of the following: assessing employment opportunities; preparing a resume or cover letter; registering for job search tools or with electronic job banks or employment agencies; attending job search workshops or job fairs; networking; contacting prospective employers; submitting job applications; attending interviews; and undergoing evaluations of competencies.⁹

[20] To determine what constitutes suitable employment, the Tribunal must consider the following factors: the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work; the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.¹⁰

[21] The Commission indicates that the Claimant said that he could not work at all during the summer because he had to look after his children and that he could be available to work 25 hours per week when school started again. He also said that he could not leave the house before 8:00 a.m. and that he had to be home by 3:00 p.m. because he had to be there when his children got home from school (because a Court order prohibited the mother from being alone with the children). He added that he had to be home by 2:30 p.m. on Fridays because his child had medical treatments.

[22] On June 5, 2019, the Appellant confirmed that he had not yet made any efforts to find employment. He said he had updated his resume and attended a session by Emploi Québec [Québec employment services] (GD3-17).

[23] However, the Tribunal notes that the Commission did not contact the Appellant about his job search efforts until June 10. The Commission informed him of his responsibilities as an Employment Insurance claimant. The Appellant confirmed to the Commission that he could not look for work because of a Court order (GD3-20).

⁹ *Employment Insurance Regulations* (Regulations), s 9.001.

¹⁰ *Regulations*, s 9.002.

[24] Therefore, despite the fact that it contacted the Appellant on June 10, 2019, the Commission did not make its decision about his unavailability for work until July 2, 2019. The Commission established this unavailability as of April 15, 2019. Although the Commission did not grant the Appellant a reasonable amount of time to correct the situation, the Tribunal cannot deny that the Appellant's position was firm that he could not look for work because of the Court order.

[25] The Tribunal is of the view that the Commission must inform the Appellant of his obligations and give him a reasonable amount of time. The Tribunal is of the view that the Appellant did not show that he made reasonable and customary efforts to obtain suitable employment given that he has not looked for work. However, the Tribunal is of the view that the Commission should not make a retroactive decision to the start of the Appellant's claim as it did. The Tribunal is of the view that the Commission can confirm that the Appellant did not meet the availability requirements only once it has informed the Appellant. Therefore, the Tribunal is of the view that the Appellant did not show that he made reasonable and customary efforts to find suitable employment as of June 10, 2019.

Did the Appellant set personal conditions that could limit his chances of returning to work?

[26] The Tribunal is of the view that the Appellant imposed personal conditions that could limit his chances of returning to work.

[27] A claimant's availability cannot depend on particular personal conditions or unduly restrictive constraints that would limit their chances of finding employment.¹¹

[28] The Commission finds that the Claimant showed that there are personal conditions that unduly limit his chances of returning to the labour market because he says he is limited by the work schedule he can accept and the number of hours of work he can perform. He says he cannot work at all in the summer. The Commission therefore finds that he does not have the possibility of accepting and holding a full-time job from Monday to Friday. The Claimant also could not have a job that involves working evenings, weekends, or nights. In this context, the Claimant's

¹¹ *Canada (Attorney General) v Gagnon*, 2005 FCA 321.

chances of finding employment are significantly limited. The Claimant says he cannot work at all in the summer and can work only 25 hours per week while his children are in school.

[29] Furthermore, the Commission finds that the Claimant said that he had not looked for work and had not applied to job postings, except for one employer, X. But this employer said it did not know the Claimant.

[30] The Tribunal is of the view that a claimant must not limit their chances of finding employment on the labour market by personal conditions. The Appellant confirms that he is not available for work because of the Court order.

[31] The Tribunal is of the view, having regard to the evidence and the submissions presented by the parties and on a balance of probabilities, that the Appellant has failed to show that he was available for work within the meaning of section 18(1)(a) of the Act. The Tribunal is of the view that the Appellant does not meet the criteria in *Faucher*. However, due to the fact that the Commission did not inform the Appellant of his obligations until June 10, 2019, the Tribunal finds that the disentitlement should be imposed only as of that date.

[32] Finally, regarding the write-off of the overpayment, the Tribunal unfortunately does not have the jurisdiction to make a decision on that issue.¹²

¹² EI Act, s 112.1.

CONCLUSION

[33] The appeal is dismissed with modifications. The disentitlement must be imposed as of June 10, 2019.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	November 5, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	No party attended the hearing.