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

[TRANSLATION]

Citation: *GL v Canada Employment Insurance Commission*, 2021 SST 144

Tribunal File Numbers: GE-20-2322
GE-20-2323
GE-20-2325
GE-20-2326
GE-20-2327

BETWEEN:

G. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: January 25, 2021

DATE OF DECISION: January 27, 2021

Canada

DECISION

[1] The appeal is dismissed.

[2] I find that the Commission was justified in reconsidering the weeks of benefits included in the Appellant's claim for benefits established on December 21, 2014, as of May 1, 2015. It was also justified in reconsidering the Appellant's other four benefit periods.

[3] In addition, I find that the Appellant has not shown that he was available for work from May 1, 2015.

OVERVIEW

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant is disentitled from receiving Employment Insurance (EI) regular benefits for five benefit periods because he was not available for work. Essentially, it found that the Appellant was not entitled to receive benefits as of May 1, 2015, because he had an early retirement agreement that included one authorized day off per week. The Appellant has to be available for work each working day of his benefit period to get EI regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[5] I must decide whether the Appellant was available for work. The Appellant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

[6] The Appellant applied for EI benefits on December 21, 2014; December 20, 2015; December 25, 2016; December 24, 2017; and December 24, 2018.

[7] The Commission says that the Appellant was not available for work during each of those benefit periods because he started early retirement on May 1, 2015, he was limiting his hours to four workdays per week, and he was not available for work on Mondays.

[8] The Appellant argues that the Commission could not reconsider the claim for benefits effective December 21, 2014, because more than 72 months had passed. He also submits that, for

the benefit periods starting December 20, 2015, and December 25, 2016, the Commission could not reconsider those benefit periods either, since he had not made any false or misleading statements.

[9] The Appellant acknowledges that he entered into an early retirement agreement that came into effect on May 1, 2015. However, he says that he was available for work even on Mondays. He argues that, when off work from the employer, he made efforts to find a job and that he was available for work every day of the week.

ISSUES

[10] Was a false or misleading statement made in connection with the Appellant's claims for benefits?

[11] If so, did the Commission comply with the 72-month time frame when it reconsidered these claims?

[12] Was the Appellant available for work from May 1, 2015?

PRELIMINARY MATTER

[13] I joined the Appellant's five files—GE-20-2322, GE-20-2323, GE-20-2325, GE-20-2326, and GE-20-2327—because the appeals raise a common question of law or fact and because no injustice is likely to be caused to any party.

ANALYSIS

Was a false or misleading statement made in connection with the Appellant's claims for benefits?

[14] The Commission may reconsider a claim for benefits within 36 months after the benefits have been paid. If, in the opinion of the Commission, a false statement has been made, the time can be extended to 72 months.[1]

[1] Section 52(5) of the *Employment Insurance Act* (Act).

[15] To reconsider a claim for benefits within 72 months, the Commission does not have to show that the Appellant "knowingly" made false statements. But it has to do so when it imposes a penalty.[2]

[16] The Commission did not impose any penalties in the Appellant's files.

[17] The Commission may reconsider a claim for benefits within 72 months if, "in its opinion," a false or misleading statement has been made.[3]

[18] The Commission submits that it was justified in reconsidering the Appellant's claims for benefits. It says that false statements have been made in these files because the Appellant had an early retirement agreement as of May 1, 2015, and he failed to report this situation. For the Appellant, this agreement includes limiting his availability and not working one day per week, specifically Mondays.

[19] The Commission argues that the Appellant was not available for work each day of his benefit periods, as he alleges, because he was, in fact, not available to work for his employer one day per week. It explains that the Appellant stated that he was available for work on Mondays, when this was false.

[20] In the Appellant's view, he did not make any false or misleading statements or lie to the Commission because, while he admits to having an early retirement agreement and to reducing his availability by one day per week for his employer, he claims to be available for work every day of the week, even weekends.

[21] The Appellant's representative also argues that the Commission could not reconsider the claim effective December 21, 2014, because the 72-month time frame had passed. He says that the Commission could not reconsider the claims for benefits effective December 20, 2015, and December 25, 2016, because the Appellant had not made any false or misleading statements and because the Commission could not reconsider the claims beyond 36 months.

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[2] *Langelier*, 2002 FCA 157.
[3] This principle is applied in the following decisions: *Dussault*, 2003 FCA 372 (CanLII); and A*ttorney General of Canada v Pilote*, (1998) 243 NR 203 (FCA).

[22] Section 52(5) of the *Employment Insurance Act* (Act) refers to a false or misleading statement in connection with a claim. This provision indicates that, when a false or misleading statement or representation has been made, the Commission may reconsider the claim within 72 months.

[23] Therefore, I find that the Commission was dealing with a false representation in connection with the Appellant's five claims for benefits. Even if he did not mean to lie or intend to defraud, the Appellant failed to report that he was not available on Mondays. The Appellant failed to report this situation, which was due to the early retirement agreement that he had and that came into effect on May 1, 2015. This agreement includes one authorized day off per week between Monday and Wednesday. The Appellant chose to have Mondays off. Based on the facts, the Appellant is not available to work for his employer one day per week because he is on authorized leave.

[24] The Commission established a first disentitlement as of May 1, 2015, the date the agreement came into effect. And, even though this happened during the benefit period established on December 21, 2014, it was not imposed until May 1, 2015.

[25] The Appellant has to provide information relevant to his situation when completing his weekly claimant reports. The Commission was dealing with a false statement because the Appellant had failed to indicate that he was not available for work on Mondays or that he had one authorized day off per week.[4] The Commission could reconsider each of these claims within 72 months.

Did the Commission comply with the 72-month time frame when it reconsidered the Appellant's claims for benefits?

[26] The Appellant's representative argues that the Commission was not justified in reconsidering the Appellant's claim for benefits effective December 21, 2014. He explains that the Commission made its initial decision on January 7, 2020.

[4] GD3-27.

[27] However, each weekly claim for benefits can be considered a separate claim and can therefore be reconsidered under section 52 of the Act. Therefore, the Commission did not impose the disentitlement on December 21, 2014, but only as of May 1, 2015.

[28] The Act requires the Commission to notify the claimant of its decision within 72 months after a reconsideration.[5] Regarding the Appellant's claim for benefits effective December 21, 2014, the Commission made a decision on January 7, 2020, and the disentitlement was imposed for the weekly claims effective May 1, 2015.

[29] The Commission argues that it had 72 months within which to reconsider the Appellant's weekly [*sic*] weeks of benefits because the Appellant had failed to report the early retirement agreement that he had and that limited his availability for the employer X.

[30] The Commission can reconsider weeks of benefits included in a claim for benefits.

[31] The Commission may, **at any time in a specific period, reconsider its decision and, if it decides that a person has received money for which they were not qualified, it must calculate the amount due or payable and notify the claimant**.[6]

[32] The Appellant's disentitlement for the benefit period starting December 21, 2014, was established from May 1, 2015, to June 12, 2015. The Commission complied with the 72-month time frame when it notified the Appellant on January 7, 2020.

[33] The Commission was justified in reconsidering the weeks of benefits included in the Appellant's claim for benefits established on December 21, 2014, as of May 1, 2015, because it complied with the 72-month time frame.

[34] It was also justified in reconsidering the claims for benefits effective December 20, 2015, and December 25, 2016.

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[5] Section 52(2) of the Act.
[6] This principle is explained in the following decision: *Brière v Attorney General of Canada*, A-637-86.

Reasonable and customary efforts to find a job

[35] The law sets out criteria for me to consider when deciding whether the Appellant's efforts are reasonable and customary.[7] I have to look at whether his efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[36] I also have to consider the Appellant's efforts to find a job. The *Employment Insurance Regulations* (Regulations) list nine job search activities I have to consider. Some examples of those activities are the following:[8]

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job search tools or with online job banks or employment agencies
- contacting employers who may be hiring
- applying for jobs

[37] The Commission argues that, as of May 1, 2015, the Appellant was not willing to work more than four days per week. It says that he would not have left his job to find another full-time job because he was on early retirement with X and he intended to retire at 65.

[38] The Appellant explains that he has been working in concrete delivery for many years and that, every year, work at the employer slows down from January to May. He says that, during those periods, and each time he applied for EI benefits, he made efforts to find a job and showed that he was available for work five days per week.

[39] Even though he worked four days per week during the busy season because of his early retirement, the Appellant says that he remained available to work on Mondays as needed. He explains that he got his work schedule on call but that he worked full-time. He was not informed

[7] See section 9.001 of the *Employment Insurance Regulations* (Regulations) and section 50(8) of the Act.
[8] See section 9.001 of the Regulations.

of his delivery schedule until the day before or the morning of. He argues that he worked on a Monday at the employer's request twice in 2015, on May 25, 2015, and on October 19, 2015.

[40] This never happened again. The Appellant testified that he would look for another job when off work from X. However, he could not name an employer he had allegedly approached, or provide the date of an interview he had allegedly had. He says that, at the request of Emploi-Québec [Quebec employment services], he attended information sessions and updated his résumé.

[41] However, the Commission's file shows that the Appellant stated that the point of him taking an early retirement was to retire and that he was not looking for another job.

[42] The Appellant had the opportunity to get an early retirement agreement starting at age 60, and that is what he did. Even though the Appellant was available for work on May 25, 2015, and on October 19, 2015, under the agreement, the authorized day off has to be taken between Monday and Wednesday every week.[9]

[43] In other words, this agreement states that, beginning on May 1, 2015, the Appellant gets one authorized day off per week, taken between Monday and Wednesday, and that this day counts as an eight-hour workday (including for calculation purposes for the Appellant's retirement).

[44] Unfortunately, even though I understand that this situation created an overpayment of benefits to be repaid for the Appellant, listing efforts to find a job is not enough to be entitled to receive benefits. These efforts must be directed toward finding a job and working in that job.

[45] To get regular benefits, the Appellant has to show, on a balance of probabilities, that he made significant efforts to find a job each working day of his benefit period. Of course, he mentioned attending sessions offered by Emploi-Québec and updating his résumé, but he was unable to list the employers he had allegedly approached or to provide the date of an interview he had allegedly had, when these efforts need to be directed toward finding a suitable job.

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[9] Early retirement agreement, GD3-27.

Moreover, this explanation from the Appellant's testimony contradicts what he previously told the Commission.

[46] On December 6, 2019, the Appellant told the Commission that he would not leave his job at X to work for another employer and that he would no longer work five days per week for X because he had entered into an agreement that included a work schedule of four days per week.[10] The Appellant even stated that he was not making efforts to find a job because he had to be available for the employer X until 10 a.m. every morning. He indicated that he had not made any effort to find a job.

[47] In the face of conflicting statements, and without concrete evidence of the Appellant's alleged efforts to find another job, I am unable to find that he made reasonable and customary efforts to find a suitable job. I am of the view that it is more likely than not that the Appellant was not available for work each working day of his benefit period, since he was on early retirement and had one authorized day off per week.

[48] I find that the Appellant has not shown that he was available for work from May 1, 2015, within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

Capable of and available for work

[49] Case law sets out three factors for me to consider when deciding whether a claimant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[11]

- She [*sic*] wanted to go back to work as soon as a suitable job was available.
- He made efforts to find a suitable job.

[10] GD3-20.
[11] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

- He did not set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[50] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[12]

– Wanting to go back to work

[51] The Appellant showed a desire to go back to work as soon as a suitable job was available.

[52] Therefore, during each of his benefit periods, when he was off work because of a shortage of work, the Appellant did as Emploi-Québec requested.

[53] However, the Appellant intended to return to his job at X every year in the spring when the weather permitted it again.

[54] The Appellant showed a desire to go back to work as soon as a suitable job was available. But he preferred to do so with his employer X, with whom he was on early retirement.

– Making efforts to find a suitable job

[55] To be able to get EI benefits, the Appellant is responsible for actively looking for a suitable job.[13]

[56] The Appellant has not shown that he made efforts directed toward finding and working in another job. He has not provided the name or contact information of an employer he allegedly approached for a job.

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[12] Two decisions set out this requirement. Those decisions are *Attorney General of Canada v Whiffen*, A-1472-92; and *Carpentier v Attorney General of Canada*, A-474-97.
[13] This principle is explained in the following decisions: *Cornelissen-O'Neil*, A-652-93; and *De Lamirande*, 2004 FCA 311.

[57] A claimant's availability is essentially a question of facts, and the Appellant must prove that he was available for work each working day of his benefit period to be entitled to receive benefits.[14]

[58] I find that the Appellant did not express his desire to return to the labour market through significant efforts to find a suitable job each working day of his benefit period from May 1, 2015.

– Unduly limiting chances of going back to work

[59] An early retirement agreement between the Appellant and the employer shows that the Appellant had reduced his availability by one day per week, specifically Mondays.[15]

[60] Even though the Appellant testified looking for another full-time job without limiting his availability, this is inconsistent with his statements to the Commission agent.

[61] The pre-retirement agreement states that the Appellant gets one authorized day off per week between Monday and Wednesday. This authorized leave and having an early retirement agreement that limits his availability are personal conditions that unduly limit the Appellant's chances of working or going back to work.

– So, was the Appellant capable of and available for work?

[62] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether he can receive benefits from May 1, 2015.

[63] The Appellant's representative argues that the notion of availability, required Monday to Friday,[16] is inappropriate when the work schedule is different or takes place on weekends. However, the issue of availability refers not necessarily to days worked, but to a worker's availability on working days of their benefit period. Therefore, the early retirement agreement that was reached at the Appellant's request is a condition that unduly limits his chances of

[14] This principle is explained in the following decision: *Landry*, A-719-91.
[15] GD2-6.
[16] Section 32 of the Regulations.

finding a suitable job. The Appellant himself told the Commission that working more than four days per week for the employer X was not an option. The Appellant was not available for work one day per week, specifically Mondays, because he had authorized leave with X.

[64] Based on my findings on the three factors, I find that the Appellant has not shown that he was capable of and available for work but unable to find a suitable job for each of the following benefit periods: May 1, 2015, to June 12, 2015; December 26, 2016, to December 1, 2017; December 25, 2016, to January 14, 2017; December 25, 2017, to July 27, 2018; and December 24, 2018, onward.

CONCLUSION

[65] The Appellant has not shown that he was available for work within the meaning of the Act. Because of this, I find that the Appellant is not entitled to receive benefits.

[66] This means that the appeal is dismissed.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	January 25, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. L., Appellant Martin Savoie, Representative for the Appellant