



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. R. v Canada Employment Insurance Commission*, 2019 SST 1480

Tribunal File Number: GE-19-3508

BETWEEN:

L. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: October 30, 2019

DATE OF DECISION: October 31, 2019

DECISION

[1] The appeal is dismissed. The Claimant has not shown that she was available for work from December 23, 2015, to December 25, 2015. The Claimant was working a full working week during the week of December 27, 2015, to January 2, 2016. This means that benefits cannot be paid.

OVERVIEW

[2] Claimants have to be available for work to be paid regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job. I must decide whether the Claimant has proven¹ that she was available for work.

[3] The Claimant was in receipt of employment insurance benefits when she decided to start a daycare business. The Claimant applied for a Canada Revenue Agency business number that was effective on December 23, 2015, and she officially opened her daycare on January 4, 2016.

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not available for work from December 23, 2015, to December 25, 2015, and imposed a disentitlement. Subsequently, the Commission determined that for the week of December 28, 2015, to January 3, 2016, the Claimant was self-employed and, as a result, could not be paid employment insurance (EI) benefits and imposed a disentitlement.

[5] The Claimant disagrees. She says that she was available for work but she did not see any point in looking for work for a short period before she opened her daycare. She argues that she should be paid EI benefits, because she was still unemployed even while setting up the daycare because she did not officially open the daycare until January 4, 2016, and she had received no income during the period from December 23, 2015, to January 3, 2016.

¹ The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

ISSUES

[6] Was the Claimant available for work?

[7] Did the Claimant have a week of unemployment?

ANALYSIS

Availability

Reasonable and customary efforts to find a job

[8] 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 consider whether the Claimant has proven that her efforts to find a job were reasonable and customary.³

[9] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.⁴ I have to look at whether her efforts were sustained and whether they were 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.

² Subsection 50(8) of the *Employment Insurance Act* 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.

³ Subsection 50(8) of the *Employment Insurance Act*.

⁴ Section 9.001 of the *Employment Insurance Regulations*.

[10] The Commission says that the Claimant removed herself from the insurable workforce on December 23, 2015, when she applied for her Business Number through Revenue Canada, redirecting her focus to her self-employment venture exclusively. The Claimant stating that she was not seeking work with employers and was focused on her self-employment on December 23, 2015, supports she has not proven her availability for the period of December 23, 2015, to December 25, 2015.

[11] The Claimant says that she became unemployed after working for a company for 33 years. She says that she was not able to find work and decided that she would start a daycare. She says that she was still available for work, but says she did not see the point of looking for work when her daycare was going to be opening in a week or so. She says that she was not able to provide a job search list and that she likely looked on line. She says that, had she been offered a job that was more lucrative than her daycare business she would have accepted it.

[12] I find that the evidence is undisputed that the Claimant was capable of working but she did not make any reasonable and customary efforts to find work once she applied for her business number.

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

[13] I must also consider whether the Claimant has proven that he is capable of, available for work, and unable to find suitable employment.⁵ The Claimant has to prove three things to show he was available under this section:

1. A desire to return to the labour market as soon as a suitable job is available;
2. That desire expressed through efforts to find a suitable job; and
3. No personal conditions that might have unduly limited their chances of returning to the labour market.⁶

⁵ Paragraph 18(1)(a) of the *Employment Insurance Act*.

⁶ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96

Did the Claimant have a desire to return to the labour market as soon as a suitable job is available?

[14] No, the Claimant did not have a desire to return to the labour market as soon as a suitable job is available. The Claimant admitted she made the decision to start her daycare business and no longer was looking for work.

Has the Claimant made efforts to find a suitable job?

[15] No, the Claimant made no efforts to find a suitable job.

[16] The Claimant maintained that she was still available for work. However she admitted to the Commission and to me that she did not see any point in looking for work from December 23, 2015, because she had made the decision to open a daycare on January 4, 2016. She said that she did not see any point in continuing to look for work for such a short period.

[17] The Claimant says that she could not provide a list of any places she applied and as it was a while ago, she says she likely looked on line. The Claimant says that she would have accepted a job had one been offered and if had been more lucrative than starting her daycare business.

[18] I considered the Claimant's statements and I prefer her statements that she did not look for work from December 23, 2015, because she thought it futile to be more credible.

[19] I am not satisfied that the Claimant was still looking for work because she was not able to provide me with any type of job search and her only statement that she likely looked on line satisfies me that she was not making serious efforts to find employment.

Did the Claimant set personal conditions that might have unduly limited her chances of returning to the labour market?

[20] Yes, I find from the Claimant's statements to the Commission and to me that she felt it was futile to continue to look for work while she waited for her daycare to open. Thus, she set personal conditions that might have unduly limited his chances of returning to the labour market.

[21] I find that the Claimant made a personal choice to remove herself from seeking insurable employment and start her own daycare.

Was the Claimant capable of, available for work, and unable to find suitable employment?

[22] In these circumstances, the Claimant could not meet the Faucher criteria. She could not prove that she was available for work because she did not intend to look for other work, she made no efforts to obtain other work, and she waited until her daycare opened.

[23] I conclude that the Claimant did not meet the legal test to prove availability.⁷

[24] Because the Claimant was not available within the meaning of the *Employment Insurance Act* and *Employment Insurance Regulations*, she was not entitled to benefits in the relevant period. The Commission properly imposed a disentitlement.

Week of Unemployment

Issue 2: Did the Claimant have a week of unemployment between December 27, 2015, to January 2, 2016?

[25] I must decide whether the Claimant is disentitled from being paid benefits because she failed to prove she was unemployed. To do this, I must decide whether the Claimant's level of engagement in her business was minor in extent by analyzing the six factors in the context of the business activities.

⁷ Paragraph 18(1)(a) of the *Employment Insurance Act*

[26] The law says that a person can be paid EI benefits for each week of unemployment.⁸ A week of unemployment means any week in which a person does not work a full working week.⁹

[27] If a person is self-employed/engaged in the operation of a business, during any week in a benefit period¹⁰ the person is assumed to be working full working weeks. As a result, that week will not be considered a week of unemployment.¹¹ So, the person cannot be paid EI benefits.¹²

[28] There is an exception if the Claimant has a low level of engagement in the business. To decide the Claimant's level of engagement, I must look at the facts, and not the Claimant's personal thoughts and feelings, about her level of engagement. I am looking at whether the Claimant would not normally rely on the self-employment/business as a principal means of livelihood.

[29] The Claimant has to prove¹³ that her level of engagement in the business was low enough that the exception applies.

[30] I have to consider six factors to decide whether the Claimant's self-employment/engagement in the business is low enough to be covered by the exception¹⁴:

1. The time spent.
2. The nature and amount of money, property, goods¹⁵ and/or resources invested.
3. The financial success or failure of the business.
4. The ongoing, continuing and/or enduring nature¹⁶ of the business.

⁸ Section 9 of the *Employment Insurance Act*

⁹ Section 11(1) of the *Employment Insurance Act*

¹⁰ Subsection 30(1) of the *Employment Insurance Regulations*

¹¹ Section 9 of the *Employment Insurance Act*

¹² *Marlowe v Canada*, 2009 FCA 102.

¹³ *Canada (Attorney General) v Falardeau*, A-396-85; the Claimant has to prove this on a balance of probabilities which means it is more likely than not.

¹⁴ *Lemay v Canada Employment Insurance Commission*, A-662-97.

¹⁵ Subsection 30(3) of the *Employment Insurance Regulations* refers to the amount of "capital and resources" invested.

¹⁶ Subsection 30(3) of the *Employment Insurance Regulations* refers to the "continuity" of the business

5. The nature of the business.
6. The Claimant's intention and willingness to look for and immediately accept alternate employment.¹⁷

Time spent

[31] The Commission says that the Claimant's hours of operation will be from 7:15 AM to 5:15 PM once it is operational. And she has spent several hours in preparation, prior the opening.

[32] The Claimant says that she spent minimal time in preparation prior to her opening her daycare. She says she spent time having to submit a criminal record check and a child abuse check. In addition, she applied for a business number. She says her daughter helped her with her advertising on social media. She also put an advertisement in the schools and by word of mouth.

[33] I find that the Claimant's time spent in preparing for the opening of her home-based daycare would not be a low level of engagement because it would take a fair amount of time to get her daycare up and running. She admitted that she needed time to complete her criminal and child abuse registry checks and take them to the police station. She was required to obtain a city licence. In addition, she spent time on advertising her daycare spots and purchasing supplies.

Nature and amount of money, property, goods and/or resources invested.

[34] The Commission says that the Claimant purchased toys and craft supplies and that this was minimal in the nature and amount of money, property, goods and/or resources invested.

[35] I concur with the Commission in that operating a home-based daycare would involve a minimal, of the Nature and amount of money, property, goods and/or resources invested.

The financial success or failure of the employment/business

[36] The Commission says that the Claimant considers it to be her main source of income.

¹⁷ Subsection 30(3) of the *Employment Insurance Regulations*.

[37] The Claimant says that she started her daycare business when she was not able to find employment. She says that she decided to open the daycare in order to help her to be financially stable.

[38] The business's financial situation does not show a low level of engagement because this was the Claimant's main objective to have a successful home-based business in order to provide her with financial stability as her principal means of income.

The ongoing, continuing and/or enduring nature of the business.

[39] The Commission says that the business is continuing.

[40] The Claimant says that her daycare opened on January 4, 2016, and has continued to this point.

[41] The employment/business is ongoing, continuing and/or enduring nature of the business. This does not show a low level of engagement because the Claimant confirmed that her business is ongoing which would support that to be her focus to continue her daycare during the week of December 27, 2015, to January 2, 2016.

The nature of the business.

[42] It is undisputed; the nature of the employment or business is an in-home daycare.

The Claimant's intention and willingness to seek and immediately accept alternate employment.

[43] The Commission says that the Claimant stated she was seeking work up with employers until she applied for her Business Number and confirmed that she applied for the business number on December 23, 2015. The claimant advised that there was no point in looking for work between December 23 and January 3, 2016, as she could only accept work for a week or so.

[44] The Claimant is not disputing the fact that she did not look for work from December 23, 2015. She says she was available but saw no point in looking for work because she was opening a daycare on January 4, 2016. The Claimant says that if she had been offered a job after

December 23, 2015, and it would have been more lucrative than starting her daycare, she would have accepted it.

[45] I find that the Claimant's admission that she was no longer seeking employment does not show a low level of engagement because the Claimant had no intention to seek employment after she applied for her business number.

[46] I considered the Claimant's statement that had she been offered a job while she was waiting, for her daycare to open, she would have accepted it providing it was more lucrative than her daycare would be. However, I am giving little weight to the Claimant's statement because she admitted that she had not applied for any jobs, so there would be no job to be offered for her to immediately accept the offer.

The Claimant's level of engagement

[47] I have considered and weighed all six factors. Those factors looking at the Claimant's intention and willingness to immediately accept other employment is very important.¹⁸ Taking all of this together, the exception does not apply to the Claimant's self-employment.

[48] The Claimant was working full a working week. This means that benefits cannot be paid to the Claimant, because she did not have a week of unemployment.

[49] The Claimant says that she should not be penalized for finding employment by starting her own business and no longer be a burden on the EI system.

[50] As the Federal Court of Appeal has noted, claimants' efforts to create new employment for themselves or start their own businesses are highly commendable. But these efforts take the Claimant outside of the EI scheme, which is designed to provide temporary benefits to those who are unemployed and actively seeking other work.¹⁹

¹⁸ *Charbonneau v Canada (Attorney General)*, 2004 FCA 61

¹⁹ *Canada (Attorney General) v Jouan*, A-366-94.

CONCLUSION

[51] I find that the Claimant has not proven her availability from December 23, 2015, to December 25, 2015.

[52] I find that the Claimant was not unemployed because she was working a full working week from December 28, 2015, to January 2, 2016.

[53] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	October 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. R., Appellant