



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *PC v Canada Employment Insurance Commission*, 2021 SST 30

Tribunal File Number: GE-20-2375

BETWEEN:

P. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: January 5, 2021

DATE OF DECISION: January 8, 2021

DECISION

[1] The appeal is dismissed. I find that the Appellant has not shown that he was available for work.

OVERVIEW

[2] The Appellant worked as a delivery person for a pharmacy. He stopped working on March 27, 2020, because of his age and the risks related to the COVID-19 pandemic. He received the Canada Emergency Response Benefit until September 26, 2020, and applied for Employment Insurance regular benefits effective September 27, 2020.

[3] The Commission then determined that the Appellant was not entitled to Employment Insurance regular benefits from September 28, 2020, because the Appellant had failed to show that he was available and looking for work.

[4] The Appellant disagrees with that decision. He says that he is available for work but that he is unable to work because of his age and because of public health guidelines on the risks associated with the COVID-19 pandemic.

ISSUES

[5] Was the Appellant available for work from September 28, 2020?

ANALYSIS

Issue: Was the Appellant available for work from September 28, 2020?

[6] 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.¹

¹ See section 18(1)(a) of the *Employment Insurance Act* (Act).

[7] Claimants must prove their availability, and an Employment Insurance claimant must make sure that they are available at all times. A claimant will be disentitled if their behaviour and claims are not sufficiently compelling to prove genuine availability for work.²

[8] 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; making the necessary efforts to find a suitable job; and not setting personal conditions that might limit the chances of returning to work.³

[9] In addition, to prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to obtain suitable employment.⁴

[10] The *Employment Insurance Regulations* (Regulations) also list specific criteria for determining whether a claimant's efforts to find a suitable job constitute reasonable and customary efforts. According to these criteria, efforts must be 1) sustained, 2) directed at finding a suitable job, and 3) compatible with nine specific activities that can be used to help claimants obtain suitable employment.⁵

[11] Lastly, the Regulations set out the criteria to be used to determine what constitutes suitable employment. They are:

- a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;
- b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and
- c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.⁶

² See *Canada (AG) v Cornelissen-O'Neill*, A-652-93.

³ See *Faucher v Canada (AG)*, A-56-96.

⁴ See sections 18(1)(a) and 50(8) of the Act.

⁵ See section 9.001 of the Regulations.

⁶ See section 9.002 of the Regulations.

[12] According to the Appellant, he is available for work, but he cannot work at his job because of his medical condition and his age due to the risks related to the COVID-19 pandemic. He explains that he is 80 years old and that, according to public health guidelines, he had to stay home, since he was considered at risk. In addition, his job as a delivery person for the pharmacy required him to go into risky environments, such as retirement homes.

[13] Before deciding the issue of availability, I would like to mention that, despite the fact that the Employment Insurance Emergency Response Benefit was available to claimants, this stopped being the case on September 27, 2020.⁷ Therefore, in this case, the Appellant is asking for Employment Insurance regular benefits. As a result, he has to meet the criteria set out in the Act and its Regulations to be entitled to Employment Insurance regular benefits.

[14] Regarding the issue of availability, and in the absence of a definition of the notion of “availability” in the Act, the criteria developed in the case law can be used to establish a person’s availability for work and whether they are entitled to Employment Insurance benefits. Therefore, I have to consider the three criteria established in *Faucher* to determine whether the Appellant was available for work from September 28, 2020.

Did the Appellant express the desire to return to the labour market as soon as a suitable job was offered?

[15] The Appellant explains that his job will be available when he can return to it at the end of the pandemic. He says that it is not that he does not want to work; rather, he cannot work because of public health guidelines and his age. The Appellant is not looking for another job. He considers that he has one that suits him, and he wants to return to it once he is able to.

[16] The Appellant says that the employer does not want him to come back right away because of the risks to his health. He explains that it asked him to help it out in December but ended up calling him back to tell him not to come. He says that the pharmacist himself is advising him not to return to work because of the risks related to COVID-19.

⁷ See Part VIII.5 of the Act.

[17] However, the employer stated that the Appellant did not want to return to work until his Employment Insurance benefits ended. According to the employer, public health recommended that people over 70 not put themselves at risk, but it gave these people the green light to return to work beginning in June–July 2020.⁸ The employer also said that it had contacted the Appellant in late September to see whether he wanted to return to work before hiring the last employee, but the Appellant refused.⁹

[18] Even allowing for the fact that the job is not a suitable job for the Appellant because of his age and health, the Appellant has to show that he expresses his desire to return to work as soon as a suitable job is offered. But I cannot reach that conclusion.

[19] The Appellant considers that no job can suit him because of his age and the risks related to the pandemic. The Appellant is not looking for a job, since he considers that he has one and wants to return to it. Nevertheless, I am of the view that he cannot simply say that he cannot return to his old job because of COVID without having looked for something else. He has to prove that he was capable of and available for work and unable to obtain suitable employment. He cannot simply wait until the pandemic is over before looking for work.

[20] The Commission considers that the Appellant does not intend to look for another job. Although the Claimant asked his employer to return to work, the job he has is on-call and part-time. The Claimant has to look for a full-time job and be willing to work full-time at any time, day, evening, or night.

[21] I find that, even though the Appellant argues that he wants to work and that he is available for work, he did not express his desire to return to the labour market as soon as a suitable job was offered. I agree with the Commission that the Appellant has to look for a full-time job, but I have to qualify the Commission's statement by adding that this employment has to meet the definition of suitable employment for the Appellant.

⁸ See the supplementary information from the employer (GD3-17).

⁹ See the supplementary information from the employer (GD3-26).

Did the Appellant make the necessary efforts to find a suitable job?

[22] To be able to get Employment Insurance benefits, a claimant is responsible for actively seeking suitable employment.¹⁰ It is not enough to intend to work. A claimant must show that they are making efforts to find employment.

[23] The Commission may require a claimant to prove that they are making reasonable and customary efforts to obtain suitable employment.¹¹

[24] 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 résumé 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.¹²

[25] 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.¹³

[26] The Appellant confirms that he was not looking for work because he considers that he has a job.

[27] The Commission considers that the Appellant does not intend to find another job than the one he has and that he is simply waiting for the crisis caused by the COVID-19 pandemic to be over. The Commission maintains that there is no telling how long this crisis will last or when health measures will be lifted. Therefore, the Claimant needs to look for another suitable job with few or no coronavirus-related risks. The Claimant works in transport and delivery. Some

¹⁰ See *Cornelissen-O'Neill*, A-652-93; and *De Lamirande*, 2004 FCA 311.

¹¹ See section 50(8) of the Act.

¹² See section 9.001 of the Regulations.

¹³ See section 9.002 of the Regulations.

jobs in this field do not involve contact with other people. He has not shown that he is making a personal effort to find a job and that he is unable to obtain another suitable job.

[28] Consequently, I am of the view that the Appellant has not demonstrated reasonable and customary efforts to obtain suitable employment given that he is not looking for another job. In addition, the Appellant refused the employer's offer to return to work.¹⁴

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

[29] A claimant's availability cannot depend on particular personal conditions or overly restrictive constraints that would limit their chances of finding employment.¹⁵

[30] The Appellant considers that he has no restrictions that might limit his chances of returning to the labour market. In his opinion, the restrictions are imposed by public health, and he has to comply with them.

[31] The Commission, in turn, considers that the Claimant's intention, as mentioned by the employer, was to receive all his Canada Emergency Response Benefit and Employment Insurance payments before going back to work.

[32] In my view, a claimant must not limit their chances of finding employment on the labour market by personal conditions. Based on the Appellant's testimony, I am of the view that he imposed personal conditions that limit his chances of returning to the labour market. The Appellant is not looking for work and is waiting to return to work for his employer. However, he considers that he cannot work at that job, despite the changes in public health guidance.¹⁶

[33] In addition, I note that the Appellant was prepared to return to work after his discussion with the Commission about the reconsideration of its decision.¹⁷ Nevertheless, the Appellant was not looking for a full-time job and was not making any effort in that regard.

¹⁴ See the supplementary information from the employer (GD3-26).

¹⁵ See *Canada (Attorney General) v Gagnon*, 2005 FCA 321.

¹⁶ See the supplementary information from the employer (GD3-17).

¹⁷ See the supplementary information from the employer (GD3-26).

[34] I am of the view that Employment Insurance benefits are a temporary substitute for income as a result of involuntary unemployment, not a permanent substitute until a person feels safe to return to work. The Claimant has to meet the criteria established by the Act. I understand that the Appellant contributed to the Employment Insurance program and feels he is entitled to benefits. I also understand the risks associated with the COVID-19 pandemic, particularly because of the Appellant's age and health. Nevertheless, entitlement to Employment Insurance regular benefits depends on specific criteria that I cannot ignore.¹⁸

[35] In my view, on a balance of probabilities, the Appellant has failed to show that he was available for work within the meaning of section 18(1)(a) of the Act. I find that the Appellant does not meet the criteria in *Faucher* and that he is not entitled to receive Employment Insurance benefits.

CONCLUSION

[36] The appeal is dismissed.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	January 5, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	P. C., Appellant

¹⁸ See *Wegener v Canada (Attorney General)*, 2011 FC 137.