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

[TRANSLATION]

Citation: *DG v Canada Employment Insurance Commission*, 2021 SST 131

Tribunal File Number: GE-21-287

BETWEEN:

D. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Nathalie Léger

HEARD ON: March 10, 2021

DATE OF DECISION: March 20, 2021

Canada

Decision

[1] The appeal is dismissed.

[2] The Claimant has not shown that he was available for work. This means that he is disentitled from receiving benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits from March 1, 2019, to August 9, 2019, because he was not available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be able to (capable of) work and searching for a job throughout the period in which benefits are paid.

[4] I must decide whether the Claimant has proven that he was available for work. The Claimant 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.

[5] The Commission says that the Claimant was not available because he submitted a medical certificate indicating that he was unable to work from March 1, 2019, to November 1, 2019. Since this certificate shows that the Appellant could not have worked at a job even if he had found one during the period in question, he cannot be considered as having been available within the meaning of the Act.

[6] The Claimant disagrees and states that he was able to work. He says that the certificate was written by his family doctor, not the specialist. The specialist, however, allegedly stated that he could very well have worked during that period, since his dialysis treatments were done overnight at home. In addition, the Claimant says that he continued to look for work during that period and provided some evidence in this regard.

Issue

[7] Was the Claimant available for work?

Analysis

[8] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[9] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are "capable of and available for work" but are not able to find a suitable job.[1] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[2] I will look at those factors below.

[10] Second, the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[3] The *Employment Insurance Regulations* give criteria that help explain what "reasonable and customary efforts" mean.[4] Those criteria will need to be considered only if the Claimant has shown that he was available for work during the period in question.

[11] The Commission decided that the Claimant was disentitled from receiving benefits because he was not available for work based on these two sections of the law.

[12] I will now consider these two sections myself to determine whether the Claimant was available for work.

Capable of and available for work

[13] Case law sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:[5]

a) He wanted to go back to work as soon as a suitable job was available.

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[1] See section 18(1)(a) of the *Employment Insurance Act* (Act).
[2] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[3] See section 50(8) of the Act.
[4] See section 9.001 of the *Employment Insurance Regulations*.
[5] 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.

b) He has made efforts to find a suitable job.

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

[14] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[6]

– Wanting to go back to work

[15] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available. He has consistently testified to that effect, both to the Commission and at the hearing. He says that he made many efforts to find a job and that he was motivated to work. I accept his testimony in this regard, which, incidentally, the Commission has not contradicted, and I find that this factor is met.

– Making efforts to find a suitable job

[16] The Claimant has made enough effort to find a suitable job.

[17] In deciding this second factor, I have considered the job search activities mentioned by the Claimant. He says that he assessed employment opportunities, prepared a résumé, and registered for a job search website (Indeed) on which he regularly looked at job postings. He also filed into evidence several copies of responses related to job postings and invitations for interviews[7] that, unfortunately, did not lead to him getting a job. These documents date from March, April, and May 2019. The Commission has not made any submissions on this issue.

[18] Those efforts were enough to meet the requirements of this second factor because they show consistency in the assessment of, and in the prompt response to, job postings. This means that this second factor is also met.

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[6] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[7] See GD5-1 and GD7-2 to 5.

– Unduly limiting chances of going back to work

[19] To decide whether a claimant has shown their availability, it is necessary to determine whether the claimant is struggling with obstacles that are undermining their willingness to work. Obstacle signifies any constraint of a nature to deprive someone of their free choice, such as a lessening of the individual's physical strength[8] or another medical condition that is preventing the individual from working.

[20] The Commission argues that the Claimant had a medical condition that prevented him from working and that this is supported by a medical certificate from the family doctor indicating [*sic*] filed by the Claimant. This medical certificate, signed by the family doctor, indicates that he became unable to work on March 1, 2019.[9]

[21] The Claimant says that he was not unable to work and that his specialist disagrees with his family doctor. He indicates that, in March, he had minor surgery that prevented him from working only for a couple of days. He says that his specialist, who he has been seeing for several months, also confirmed that the surgery in March did not prevent him from working. In his view, the specialist's opinion should take precedence over that of the family doctor. To back up his claims, he provided a medical certificate that a resident had signed on behalf of his specialist.[10] Lastly, he says that his job search efforts throughout the period in question are proof of his ability.

[22] Unfortunately, I cannot accept this medical certificate as proof of his ability to work. First, this certificate is dated February 23, 2021, well after the period in question. While this fact alone is not determinative, it becomes determinative when considering that the medical certificate is written in the present tense.[11] This means that the only thing I can conclude from the certificate is that the Appellant is *currently* able to work. There is no mention of the period in question. Therefore, this certificate is of no use in challenging the opinion the family doctor expressed in the medical certificate mentioned earlier. Second, the fact that the Appellant

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[8] *Canada (Attorney General) v Leblanc*, 2010 FCA 60.
[9] See GD3-33.
[10] See GD5-2.
[11] The medical certificate reads as follows: "We assessed Mr. D. G. in the home dialysis unit today, and find he does not have restrictions which would prevent him from working."

continued his job search efforts, and the fact that he considered himself able to work, does not make it possible to disregard the medical opinion on file.

[23] I find that, during the period in question, the Appellant had an incapacity that unduly limited his chances of returning to the labour market.

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

[24] Based on my findings on the three factors, I find that the Claimant has not shown that he was capable of and available for work but unable to find a suitable job.

[25] The three factors must be met to show availability for work.[12] Since the third condition is not met, I find that the Appellant does not meet the applicable legal test.

Reasonable and customary efforts to find a job

[26] Because I have found that the Appellant was not available within the meaning of the Act during the period in question, I do not need to consider the issue of reasonable and customary efforts to find a job.

Conclusion

[27] The Claimant has not shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant is disentitled from receiving benefits.

[12] *Canada (Attorney General) v Bois*, 2001 FCA 175; *Canada (Attorney General) v Boland*, 2004 FCA 251.

[28] This means that the appeal is dismissed.

Nathalie Léger
Member, General Division – Employment Insurance Section

HEARD ON:	March 10, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	D. G., Appellant