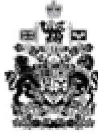

Citation: *MP v Canada Employment Insurance Commission*, 2021 SST 303

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. P.
Representative:	Rebecca Leclerc
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (420944) dated April 27, 2021 (issued by Service Canada)

Tribunal member:	Nathalie Léger
Type of hearing:	Videoconference
Hearing date:	May 31, 2021
Hearing participants:	Appellant Appellant’s representative
Decision date:	June 8th, 2021
File number:	GE-21-770

Canada

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Claimant hasn't shown that he was available for work. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits from November 2, 2018 to March 2, 2019 because he wasn't 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 searching for a job.

[4] The Commission has also claimed back money owed by the Claimant since he did not disclose in due time money owed during his benefits period. He says he was told and believed that he did not have to declare earnings if he worked less than 7 hours per weeks, but this was incorrect. This question is not at issue in this case since the Claimant agreed to pay back all the money owed.

[5] 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.

[6] The Commission says that the Claimant wasn't available because he restricted his availability with his employer to 7 hours per week during this period and did not look for other work during his lay-off period.

[7] The Claimant disagrees and states that there was no available employment in his very specialized type of work during the winter and that he did look for work by asking family and friends to keep him informed of all work opportunities. He also says he did not limit his availability to 7 hours per week. It must be noted that the Claimant does not

speak or understand either French or English very well[1], is first language being Portuguese. That is why he was represented at the hearing.

Issue

[8] Was the Claimant available for work?

Analysis

[9] 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.

[10] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[2] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[3] I will look at those criteria below.

[11] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[4] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[5] I will look at those factors below.

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

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

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[1] The Claimant also does not read either French or English. See GD04-2.
[2] See section 50(8) of the *Employment Insurance Act* (Act).
[3] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[4] See section 18(1)(a) of the Act.
[5] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

Reasonable and customary efforts to find a job

[14] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[6] I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[15] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those activities are the following:[7]

- networking
- contacting employers who may be hiring
- applying for jobs.

[16] The Commission says that the Claimant didn't do enough to try to find a job. First, the Claimant has said to the Commission that he did not want to work more than 7 hours per week[8]. This information was confirmed by his employer[9]. Furthermore, the Claimant was not able to explain what type of work he looked for or what steps he took to find work. Therefore, the Commission concluded he did not make any reasonable efforts to find suitable employment.

[17] The Claimant disagrees. First, he says he never told the Commission[10] that he did not want to work more than 7 hours and he does not understand why his employer is saying this. He repeated this claim at the hearing, saying he wanted to work to improve his living conditions. He also testified at the hearing that he looked for work, mainly by asking friends and family members to tell him if they became aware of some employment opportunity. The Claimant testified he did not send resumes or applied on job offers since very little was available in his line of work during the winter. The Claimant says that his efforts were enough to prove that he was available for work.

[6] See section 9.001 of the Regulations.
[7] See section 9.001 of the Regulations.
[8] See GD03-27
[9] See GD03-24
[10] See GD03-

[18] I find that the Claimant did not take reasonable steps to find suitable employment. First, I must note the discrepancy between the first testimony of the Claimant to the Commission and the subsequent ones about the number of hours he was willing to work during the winter. Considering his weak understanding of French and English, it is possible he did not understand properly the question the first time. But his employer was not called as a witness and I have no proof that what he told the Commission was not well noted by the agent. Since the Claimant's first declaration and the employer's declaration match, I find it is more probable than not that it reflects accurately what was actually said. I therefore find the Claimant limited his available hours to 7 hours per week.

[19] I also find that the Claimant's only steps to find work was to ask family and friends to keep him informed of work opportunities. He did not do any of the other actions that could be expected when doing a job search: contacting employers, applying on job offers or simply evaluating job offers found on specialized websites.

[20] The Federal Court of Appeal has decided in many instances that it is the claimant who has the burden of proving that he took reasonable and customary steps to find a suitable employment. It has also stated that this requirement is provided by law and cannot be ignored[11]. Since I have found that the Claimant limited his availability to 7 hours per week and did very little to find other employment, I find he does not meet the legal requirements on this question.

[21] The Claimant has/hasn't proven that his/her efforts to find a job are/were reasonable and customary.

[11] *De Lamirande v. Canada (AG),* 2004 FCA 311

Capable of and available for work

[22] 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:[12]

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

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

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

[23] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[13]

– **Wanting to go back to work**

[24] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available. As said before, he testified at hearing that he talked to family and friends so they could help him find a suitable Job.

– **Making efforts to find a suitable job**

[25] The Claimant hasn't made enough effort to find a suitable job. As said in the last section the problem is not necessarily his will to go back to work. It is rather that he did not understand that he had to look for work outside of his regular field of employment. This might be, at least to a certain extent, explained by his difficulty to understand French and English properly. And the fact that the Claimant has been receiving employment insurance benefits every winter for many years and presumably acted in the same way every year leads me to believe he was in good faith in his understanding of his obligations under the law.

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[12] 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.

[13] 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.

[26] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.[14]

[27] The Claimant's efforts to find a new job included talking to family and friends and asking around if anyone had work for him. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[28] Those efforts weren't enough to meet the requirements of this second factor because they were few and limited to his regular line of work. When receiving benefits, a claimant has to look at more than what he is used to. The efforts made to go back to work have to be sustained during the whole benefits period.

– **Unduly limiting chances of going back to work**

[29] The Claimant did set personal conditions that might have unduly limited his chances of going back to work. By telling his employer he only wanted to work 7 hours per week, the Claimant has imposed has limited his chances of going back to work.

[30] The Claimant says he hasn't done this because he claims he never limited his number of hours. As explained in paragraph 18 of this decision, I prefer his earlier declaration to the effect that he did, in fact, limit his availability. Therefore, I find he unduly limited his chances of going back to work.

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

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

[14] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

Conclusion

[32] The Claimant hasn't shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits.

[33] This means that the appeal is dismissed.

Nathalie Léger

Member, General Division – Employment Insurance Section