



Citation: *DM v Canada Employment Insurance Commission*, 2021 SST 557

## Social Security Tribunal of Canada General Division – Employment Insurance Section

# Decision

**Appellant:** D. M.  
**Representative:** P. M.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (415675) dated February 12, 2021  
(issued by Service Canada)

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**Tribunal member:** Paul Dusome  
**Type of hearing:** Teleconference  
**Hearing date:** April 16, 2021  
**Hearing participants:** Appellant  
Appellant's representative  
**Decision date:** April 22, 2021  
**File number:** GE-21-394

## Decision

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

## Overview

[2] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits as of November 23, 2020, for two reasons. First, his farming activities meant that he could not be considered unemployed. Second, he had not proven that he was available for work and unable to get work. His job search showed no efforts from November 23, 2020 to January 19, 2021, and insufficient efforts after that. 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.

[3] After reconsideration, the Commission changed its initial decision. It overturned the decision that the Claimant could not be considered unemployed due to farming activities. It changed its decision on availability and job search. The new decision ended the disentitlement for failure to seek employment, because he had provided a job search. The new decision replaced that disentitlement with another one, for not being available for full-time suitable work without undue restrictions.

[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 did not look for work in the first two months after applying for EI benefits, and only applied for six jobs after that. He imposed undue restrictions relating to pay, hours of work and which jobs he would apply for. The Commission concluded that the Claimant was not ready, willing and capable of working full-time suitable employment.

[6] The Claimant disagrees and states that he is willing and capable of returning to work. He has been looking for work. He has not set personal restrictions on his availability.

## 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 making “reasonable and customary efforts” to find a suitable job.<sup>1</sup> The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.<sup>2</sup> I will look at those criteria below.

[10] In order to rely on this provision, the Commission must first ask the claimant for proof of what reasonable and customary steps he is taking to find a suitable job. The Commission must also ask for specific proof of those steps he is taking, and what kind of proof will satisfy it.<sup>3</sup>

[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.<sup>4</sup> Case law gives three things a claimant has to prove to show that they are “available” in this sense.<sup>5</sup> I will look at those factors below.

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<sup>1</sup> See section 50(8) of the *Employment Insurance Act* (Act).

<sup>2</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

<sup>3</sup> *L.D. v Canada Employment Insurance Commission*, 2020 SST 688, paragraphs [11] and [12].

<sup>4</sup> See section 18(1)(a) of the Act.

<sup>5</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[12] 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.

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

### **Reasonable and customary efforts to find a job**

[14] First, I must determine if the Commission is entitled to rely on this part of the law.

[15] The Commission is not entitled to rely on subsection 50(8) of the Act, or section 9.001 of the Regulations, for the following reasons. Before making its initial decision, the Commission spoke with the Claimant. The bulk of the conversation focused on the Claimant's farming activities. One paragraph of the notes of this conversation deals with the Claimant's intention and willingness to seek and accept alternate employment. The Commission states that it expects persons requesting benefits to be actively searching for work. It refers to 53 job postings that meet the Claimant's educational level. The Claimant refers to past years he had been told to be looking for work, and to have the names of where he applied for jobs. No where does the Commission specify exactly what the Claimant must do, and what proof he has to give to the Commission. The same applies to the Commission's conversation with the Claimant respecting his request for reconsideration. The initial decision refers to the criteria in paragraph 18(1)(a) of the Act, "available for work and unable to get work". The decision mentions "Active Job Search". That refers to the second *Faucher* factor, efforts to find suitable employment. The *Faucher* factors deal with paragraph 18(1)(a) of the Act, not with section 50(8) of the Act or section 9.001 of the Regulations. The reconsideration decision refers to "disentitlement for being not available for full time suitable employment without any undo [sic] restrictions". That refers to the third of the *Faucher* factors related to paragraph 18(1)(a) of the Act. It is only in the Commission's Representations that the issue of section 50 of the Act and section 9.001 of the Regulations is brought up.

[16] The conclusion is that the Claimant was disentitled under paragraph 18(1)(a) of the Act. The Commission did not disentitle him under section 50 of the Act for failing to comply with a request from the Commission. The Commission did not make such a request. As a result, I do not need to assess the Claimant's activities under section 50 of the Act or section 9.001 of the Regulations.

### **Capable of and available for work**

[17] 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:<sup>6</sup>

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

[18] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>7</sup>

#### **– Wanting to go back to work**

[19] The Claimant has shown that wanted to go back to work as soon as a suitable job was available.

[20] The Claimant is 73 years old. He has a Grade 9 education. He does not have a trade, or any certifications. He has operated his cattle farm year-round for over 50 years. Fifty years ago, he started working outside the farm as well. He worked his farm before and after the day-time employment hours, and worked his full-time day job. During the last 31 years, he has worked during the spring to autumn season as a

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<sup>6</sup> 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.

<sup>7</sup> 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.

general labourer for the same employer. The seasonal work was mainly installation of water and sewer lines. During his layoff in the winter in past years, the Claimant tended to his farm and looked for work until recalled in the spring. The time commitment for the farm work is the same winter and summer. The Claimant has some medical issues. The issues do limit some activities, but do not prevent him from doing his farm work and outside job.

[21] I find that the Claimant does want to go back to work for the following reasons. In his request for reconsideration, he stated “I have been actively looking for work.” He listed four businesses to which he had applied for employment. In his conversation with the Commission about his reconsideration request, he mentioned other potential employers. In his notice of appeal, he listed seven other potential employers. He has reviewed the Job Bank postings in the Commission’s Reconsideration File. He is returning to work with his employer of 31 years, expected in early to mid-May. He would quit his job with that employer if he found a year-round full-time job. His farming activities do not prevent him from working full-time all year. He testified that the level of the farming activities is the same all year. The level does not increase during the winter lay-off period. The farming activities are not a factor preventing the Claimant from wanting to go back to work. While the Claimant does want to go back to work, the efforts he has taken to find work over the winter must be examined closely.

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

[22] The Claimant has not made enough efforts to find a suitable job.

[23] I have considered the list of job-search activities given in section 9.001 of the Regulations in deciding this second factor. For this factor, that list is for guidance only.<sup>8</sup> Activities from that list that are applicable in this case are: assessing employment opportunities; preparing a résumé; contacting employers who may be hiring; and applying for jobs.

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<sup>8</sup> 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.

[24] In favour of the Claimant, he has assessed employment opportunities from his own inquiries, and from reviewing the Job Bank using this son's computer, and the copy from the Commission. He has prepared a résumé. He has contacted employers who may be hiring, and applied for jobs with those who are hiring. He spoke to the four employers listed in his request for reconsideration. None of them were hiring. They were located within 20 miles of his home. He attached to his notice of appeal a list of six employers he had submitted resumes to. The list included the phone number and the name of the person he spoke to. None of them were hiring. He testified that he was willing to take a full-time, year round job and quit his current seasonal job.

[25] Against the Claimant, the following matters are relevant. In January 2021, the Claimant told the Commission that he had looked for work in the past, but not this year. He testified that he did not look for work from November 2020, until after he spoke with the Commission on January 19, 2021. He did not look for two reasons: there was no work; and COVID-19. In the conversation on January 19, 2021, the Commission told him that there were currently 53 jobs available with no education required. The Claimant replied that he knew he had to be looking, and had to have the names of where he applied for jobs. He stated that he had not done that this year. At the end of the hearing, I asked the Claimant about the Commission's claim that he did not apply to any of the available positions in his area even after he was told about them by the Commission. The Claimant responded "no comment".

[26] Those efforts were not enough to meet the requirements of this second factor for the following reasons. A claimant has an obligation to be taking steps to look for work, and to apply for jobs. He cannot rely on his opinion that there is no work to justify not looking for work. He has to actually contact employers to find out if there is work or not. He cannot rely on COVID-19 to justify not looking for work. COVID-19 might justify not accepting a job because of unsafe working conditions. But that does not justify not looking for work. A claimant must still make the effort to look for and find a job. The Claimant did not look for work from November 2020 until January 19, 2021. He then applied for ten jobs, the four listed in his request for reconsideration, and the six listed in his notice of appeal. He testified that he did not look for work after the list included with

his notice of appeal. That list was received by the Tribunal on March 11, 2021. So he had not looked for work from that date at the latest, and the hearing day of April 16, 2021. He testified that he will be returning to work with his long-time employer in early to mid-May 2021. Those two facts support an inference that the Claimant is not looking for work because he will be shortly returning to work with his long-time employer. Claimants have an obligation to be actively looking for work even if they will be recalled by an employer.

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

[27] The Claimant has not set personal conditions that might have unduly limited his chances of going back to work.

[28] The Claimant says he hasn't done this because he is willing to take full-time year round employment. He is not setting restrictions in regard to hours of work, salary or location.

[29] The Commission says that the Claimant has set some restrictions. He has not expanded his job search to include shift work and lower paying jobs. He has not applied for any of the available positions in his area shown on the Job Bank listing.

[30] I find that the Claimant has not imposed personal conditions that might unduly limit his chances of going back to work. He expressed a preference for day-time work at close to his above minimum wage with his regular employer. He did not impose these as definite requirements. He has applied for jobs within his geographic area. His long-time job is located a 10 to 15 minute drive from his home.

[31] His limitation based on one-hour or more one-way drives to work locations would not unduly limit him. Distance was a factor for 16 of the employers in the Commission's Job Bank list, as they were at least a one hour, one way, drive from his home. Five of the employers were located about one and one half hour drive one way. One was located a two and one half hour drive away, one way. He lived within a lesser driving distance from the urban area of the capital city of the province. His long time job was located a 15 to 20 minute drive from his home.



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

[32] 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. He had to prove all three factors to succeed. He only established two.

[33] The Claimant's circumstances arouse sympathy. He is 73, has some health problems, and has worked hard all his life. Working as a general labourer and working his farm at the same time for about half the year is beyond what many people could do, even short term. He has done it for 50 years. But the law is clear: however tempting it may be, I cannot re-write or bend the law. I must apply it as written.<sup>9</sup> I have done that, as set out above.

## **Conclusion**

[34] 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.

[35] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section

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<sup>9</sup> *Canada (Attorney General) v Knee*, 2011 FCA 301.