



Citation: *LL v Canada Employment Insurance Commission*, 2021 SST 379

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

Decision

Appellant: L. L.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (421868) dated May 4, 2021 (issued by Service Canada)

Tribunal member: Amanda Pezzutto
Type of hearing: Teleconference
Hearing date: July 20, 2021
Hearing participant: Appellant
Decision date: July 22, 2021
File number: GE-21-1010

Decision

[1] L. L. is the Claimant. The Canada Employment Insurance Commission (Commission) made decisions about her Employment Insurance (EI) benefits. She is appealing these decisions to the Social Security Tribunal (Tribunal).

[2] I am allowing the Claimant's appeal. I agree with the Claimant. I think she has proven that she is available for work. This means that she should get EI benefits.

[3] These reasons explain my decision.

Overview

[4] The Claimant was collecting EI sickness benefits. Then, she asked for EI regular benefits starting February 23, 2020. The Commission paid her EI benefits. After a few months, the Commission reviewed its decisions. The Commission changed its decision a few times and then finally, the Commission decided that the Claimant wasn't available for work. The Commission made this decision retroactively. This means that the Commission backdated its decision. The Commission asked the Claimant to repay the benefits she had already collected.

[5] The Commission says that the Claimant wasn't available for work starting February 23, 2020. The Commission says the Claimant didn't accept work from her old employer and so she hasn't proven that she was available for work.

[6] The Claimant says the Commission is wrong. She says she was available for work. She says her old employer refused to give her any hours but she looked for work with different employers. She says she did everything she could to find a job but the pandemic made it hard to find work.

Issue

[7] Was the Claimant available for work?

Analysis

What are the issues in this appeal?

[8] I am going to write a summary of the Claimant's file. We talked about this at the hearing, but I want to be sure the Claimant understands what happened with her EI benefits. Many different things happened with her EI benefits and so I want her to understand what happened before her file came to the Tribunal.

[9] The Claimant was collecting EI sickness benefits. Her doctor said she was ready to return to work. The Claimant asked the Commission to start paying her EI regular benefits. The Commission switched her benefits to regular benefits starting February 23, 2020.

[10] Then, the Claimant's old employer made a Record of Employment (ROE) for her. On the ROE, the Claimant's old employer said she stopped working because she quit. The Commission believed the employer. The Commission decided to disqualify the Claimant from receiving EI benefits. This meant that the Commission asked the Claimant to repay all of the EI benefits she got after February 23, 2020.

[11] The Claimant asked the Commission to reconsider this decision. She said she didn't quit her job. The Commission investigated. The Commission agreed with the Claimant. The Commission agreed that she didn't quit. The Commission took away the disqualification.

[12] But, the Claimant's old employer told the Commission that they had work for her. They said she kept refusing to accept work. The Commission believed the employer. The Commission decided that the Claimant wasn't available for work because she wasn't accepting work from her old employer. The Commission disentitled the Claimant from receiving benefits starting September 30, 2019. This meant that the Commission asked the Claimant to repay all of the EI benefits she received after September 30, 2019.

[13] Then, the Claimant appealed to the Tribunal. The Commission reviewed the Claimant's file again. This time, the Commission decided that the Claimant was entitled to benefits from September 30, 2019 until February 22, 2020. But, the Commission still says the Claimant hasn't proven that she was available for work from February 23, 2020.

[14] This means that I have to decide whether the Claimant has proven that she was available for work. This is the only question I am going to look at in this decision.

[15] I am not going to make any decisions about whether the Claimant quit her job. Both the Claimant and the Commission agree that the Claimant didn't quit her job in 2019. The Commission reconsidered this decision and decided in the Claimant's favour. She isn't trying to appeal the Commission's reconsideration decision on this point.

Availability

[16] Now, I am going to explain why I have decided that the Claimant was available for work. I will explain what the law says about availability for work. I will explain how I have applied the law to the Claimant's situation.

[17] You have to prove that you are available for work if you want EI regular benefits.

[18] Two different sections of the law talk about availability for work. The Commission says it used both sections of the law and decided that the Claimant wasn't available for work under either section.

[19] The first section of the law says the Commission can ask you to prove that you are making "reasonable and customary efforts" to find a suitable job.¹

[20] Reasonable and customary efforts are the types of things that most people do when they are looking for a job. You have to make regular and ongoing job search efforts while you are looking for work. The law gives examples to help explain what kinds of things are reasonable and customary efforts.

¹ Subsection 50(8) of the *Employment Insurance Act*.

[21] The second part of the law says that you have to show that you are capable of working, but that you haven't been able to find a suitable job.² I have to look at three factors when I look at availability under the second part of the law.³ I will describe these three factors later in this decision.

[22] Now, I will look at each of the two sections of the law and decide whether the Claimant was available for work.

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

[23] The Commission says it used the section of the law that talks about “reasonable and customary efforts” when it decided that the Claimant wasn't available for work. The Commission says I should also use this section of the law when I make my decision.

[24] I disagree with the Commission. I don't think the Commission has proven that it used this section of the law. I am not going to use this section of the law when I make my decision about the Claimant's availability for work.

[25] The Commission talked to the Claimant after she asked for a reconsideration. The Commission included records of these conversations in the appeal file. When I read these records, I don't see where the Commission asked the Claimant about her job search. The Commission didn't ask the Claimant what she was doing to look for a job. The Commission didn't ask her for a record of her job search. The Commission didn't even tell the Claimant that they wanted to examine whether she was making reasonable and customary efforts to find a job.

[26] The Appeal Division has a decision that says the Commission should be careful when it uses the law to ask whether you are making reasonable and customary efforts to find a job. The Appeal Division says that the Commission should tell you if it is going to ask for this information. The Appeal Division says the Commission should tell you what it means by “reasonable and customary efforts.”⁴

² Paragraph 18(1)(a) of the *Employment Insurance Act*.

³ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁴ *LD v Canada Employment Insurance Commission*, 2020 SST 688.

[27] I represent the General Division of the Tribunal. The Appeal Division is next appeal step above me. They also make decisions about EI matters. Their decisions don't become part of the law, so this means that I don't have to follow their decisions if I don't think the decision is helpful. But usually, their decisions are helpful for me. Their decisions help me think about how I should apply the law to different cases. Their decisions help make sure that everyone at the Tribunal makes similar decisions about EI benefits.

[28] In this case, I think the Appeal Division's decision is helpful. I don't think the Commission ever told the Claimant that it was going to look at whether her job search efforts were reasonable and customary. The Commission didn't ask the Claimant for a job search record. The Commission's arguments only say it used the second section of the law to decide that the Claimant wasn't available for work.⁵

[29] I won't look at whether the Claimant was making reasonable and customary efforts to find a job. This is because I don't think the Commission has proven that it really used this part of the law to make its decision about the Claimant's availability for work.

– **Capable of and available for work**

[30] Earlier on, I said there was a second part of the law that talks about availability for work. This part of the law says that you have to show that you are capable of working, but that you haven't been able to find a suitable job.⁶

[31] I have to look at three factors when I decide whether you have proven your availability for work under this part of the law. You have to meet all three of these factors to prove that you are available for work:

⁵ At GD4-4, the Commission says it relied on paragraph 18(1)(a) of the *Employment Insurance Act* to disentitle the Claimant.

⁶ Paragraph 18(1)(a) of the *Employment Insurance Act*.

1. You must show that you want to get back to work as soon as someone offers you a suitable job. Your attitude and actions should show that you want to get back to work as soon as you can;
2. You must make reasonable efforts to find a suitable job;
3. You shouldn't set limits that might prevent you from finding a job. If you do set any limits on your job search, the limits should be reasonable.⁷

[32] I am going to look at each of the three factors. I will decide if the Claimant has met each factor. Then, I will decide whether the Claimant has proven her availability for work.

– **Wanting to go back to work**

[33] The Commission never asked the Claimant about her availability for work. The Commission only talked to the Claimant's old employer. The Commission relies on the employer's statements and says the Claimant didn't want to work.

[34] I don't think the Claimant's old employer is a reliable source when I am looking at the Claimant's availability for work. The Claimant gave me copies of the emails she sent to her old employer. The emails show that she kept asking her old employer for hours. I don't believe the employer when they say that the Claimant refused to accept work. I think the Claimant is a better source of information when I am looking at her attitude and actions. This is why I am going to rely on the things the Claimant said at the hearing. I don't give any weight to the employer's statements.

[35] At the hearing, the Claimant said she always wanted to work. She tried to talk to her old employer about returning to work. She says the Human Resources worker didn't

⁷ In *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

like her and didn't want to give her any hours. The Claimant said she started looking for work with other employers when she realized that her old employer wasn't going to give her any hours.

[36] I believe the Claimant. I believe that she wanted to go back to work.

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

[37] I find that the Claimant made enough efforts to find a suitable job.

[38] The Claimant has to prove that her job search efforts were reasonable for her circumstances. Her attitude and actions are important things I have to consider.⁸

[39] At the hearing, the Claimant described the things she did to look for work. She said she used the Indeed app to look for jobs. She called and emailed her old employer often. She used Facebook. She talked to friends about her job search. She printed and handed out business cards.

[40] The Claimant said she started trying to find work even before her sick leave ended. She said she started trying to find work in January 2020. She kept looking for work even after things closed down in March 2020 because of the pandemic. She said she kept looking for work all summer.

[41] The Commission hasn't given me any evidence that makes me doubt the Claimant's statements. The Commission talked to the Claimant's old employer, but I have already explained why I don't want to rely on the employer's statements. I think the Claimant's information is more reliable.

[42] I believe the Claimant. I think she has proven that she was making reasonable efforts to find a job. I think her attitude and actions show that she wanted to start working again.

⁸ *Canada (Attorney General v Whiffen*, A-1472-92

– **Not setting limits on the job search**

[43] At the hearing, the Claimant said she had experience in many different kinds of jobs. She said she could work as a security guard, a house cleaner, a support worker, delivery driver, or painter. She said she would do any kind of work. She said she would accept any wage because she knew she could work her way up to a higher wage. She said she applied for many different kinds of jobs.

[44] The Commission hasn't given me any information that contradicts the Claimant's statements. The Commission doesn't have any information about the Claimant's job search efforts.

[45] I believe the Claimant. I find that she didn't set any limits on her job search.

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

[46] The Claimant has to meet all three factors to prove her availability for work. I find that she has proven that she wanted to return to work. I find that she made reasonable efforts to find a job. She said she would accept any kind of work and I believe her. I find that she didn't put any limits on her job search.

[47] When I look at all three factors together, I find that the Claimant has proven that she was capable of and available for work but unable to find a suitable job.

Conclusion

[48] I am allowing the Claimant's appeal. I find that she has proven that she was available for work within the meaning of the law. This means that she should get EI benefits.

Amanda Pezzutto
Member, General Division – Employment Insurance Section