Citation: *SJ v Canada Employment Insurance Commission*, 2021 SST 496

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. J.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (425980) dated June 16, 2021 (issued by Service Canada)

Tribunal member:	Mark Leonard
Type of hearing:	Teleconference
Hearing date:	August 11, 2021
Hearing participants:	Appellant
Decision date:	August 16, 2021
File number:	GE-21-1224

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Appellant has shown that she was available for work. This means that she is entitled to receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits from December 14, 2020, to February 16, 2021, because she wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. Ordinarily, this means that a claimant has to be searching for a job.

[4] The Commission says that the Appellant wasn't available because she was caring for her son. It says that she restricted her availability as a result of a family obligation. It had paid her eight weeks of benefits and as a result of the disentitlement, has established an overpayment of benefits subject to recovery.

[5] The Appellant disagrees and states that she was always available and willing to return to her job. She could not because she had to care for her son. Toronto Public Health closed his school for the period in question due to Covid-19. She says she had no choice but to care for him because she is a single parent without other available support and she could not obtain daycare for her son because none was available.

[6] I must decide whether the Appellant has proven that she was available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

Issue

[7] Was the Appellant 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 Appellant was disentitled under both of these sections. So, it claims that she must 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.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2]

[10] 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.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

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

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

Reasonable and customary efforts to find a job

[13] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[5] Ordinarily, I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. Usually it means that the Appellant has to have kept trying to find a suitable job.

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

[14] The Commission says that the Appellant didn't do enough to try to find a job. It says that she placed a restriction on her availability as a result of a family obligation or personal objection attributable to the Covid-19 pandemic.

[15] The Appellant disagrees. She says that she had no choice in the matter. Her son's school was shut down by Toronto Public Health. She testified that she is a single parent without support from another parent. She could not ask her mother to look after her son because her mother has health issues and the Appellant did not want to risk exposing her mother to Covid-19. She affirmed that she could not obtain child care because daycares were also closed during the period.

[16] The Appellant testified that the whole problem started with how the Commission handled her claim.

[17] The Appellant recounted that she made a claim for EI benefits in November 2020, when her six-year-old son was exposed to Covid-19 and was sent home to isolate for 14 days. Obviously, the Appellant was in contact with her son and was essentially, forced to care for him and to isolate for the same period. She informed she employer who allowed her to be away from work and assured her she could return to her job when she was able. When the Appellant made her initial claim, she was told that she did not qualify for EI benefits but because the new Covid-19 "Recovery" benefits were not yet set up, it would initiate an EI claim for her.

[18] The Commission representative suggested she claim sickness benefits. The Appellant told the agent that she was not sick and that the only reason she was off work was because her son could not attend school and she could not make other arrangements. The Appellant testified that the representative assured her that any issues would be fixed later. An agent assisted her by manually inputting her information to activate the claim. The Appellant confirmed in testimony that she was approved and received one week's worth of EI benefits.

[19] When her son's school was closed December 18, 2020, the Appellant again submitted weekly claims for benefits, but her claims would not go through. She

contacted the Commission and the agent told her that her claim had been changed to regular benefits and suggested that she note in her weekly claims that she was available and looking for work. She told the agent that she was not looking for work and did not want to do anything wrong. The Commission agent again informed her that any issue would be corrected later. So, she made her weekly claims noting she was available looking for work as she had been instructed and she received benefits.

[20] Fast forward to May 28, 2021. The Appellant received a letter informing her that she was not entitled to benefits because she has failed to make satisfactory childcare arrangements. When the Appellant called the Commission, it suggested she contact the Canada Revenue Agency (CRA) to seek benefits under the Canada Recover Childcare Benefit (CRCB). The agent told the Appellant that her information would be put into a joint database available to the CRA.

[21] The Appellant contacted the CRA who informed her that they could not process a claim because she had an open EI claim and further, that she was ineligible because her claim would be 90 days beyond the weeks in question.

[22] The Appellant requested reconsideration and on June 16, 2021, the Commission decided that the Appellant was deemed not available for work and in turn ineligible to receive benefits. Since she had already collected eight weeks of benefits, it established an overpayment subject to recovery. The Appellant believes she should be eligible for some benefit whether that is EI or CRCB.

[23] I find the Appellant entirely credible. Her explanation of the instructions she was given by the various Commission agents is entirely plausible given the expectations placed on the Commission to get benefits into the hands of those who needed it. I sense no deception whatsoever. Her assertion that she simply followed the instructions of the agents because she trusted them is what I would expect.

[24] I am satisfied that the agents were intent on assisting the Appellant and believed that any errors or inconsistent approval of benefits on their part would be corrected and that the Appellant would not find herself expected to return benefits at some later date.

What does this mean?

[25] It means that as a result of the Commission's efforts to positively respond to the Appellant's needs it established a claim for benefits under the EI program.

[26] Only much later did the Commission determined that the Appellant was not eligible to receive EI benefits. But the open EI claim and delay by the Commission in making this determination resulted in the Appellant being ineligible for the Canada Recovery Childcare Benefit.

[27] Now the Commission seeks to recover the benefits it paid the Appellant meaning she would be entitled to no benefits at all.

So is she is eligible for EI benefits?

[28] Yes.

[29] I find that the Appellant does not need to meet the standard of reasonable and customary efforts to find employment. I am satisfied that the Appellant had a suitable job. She was granted leave from her employment at a large retailer to care for her son. She had a perfectly suitable job that was available to return to whenever the closures and other restrictions ended.

[30] The length of her unemployment is also a factor here. It has been deemed reasonable that where a claimant is awaiting an imminent recall that they should not be immediately disentitled to benefits on the grounds of not seeking employment.[6] While the health department enforced school closure did not have a specific end date in mind when it was imposed, the expectation was clear that children would be returning to school as soon as safely possible. This return to school would enable the Appellant to return to her position.

[31] I am satisfied that the Appellant's circumstances are similar in nature to an imminent recall. Her employer had assured her that her job was available to her

[6] See (*Canada (A.G.) v. MacDonald*, A-672-93)

whenever she could return. It was not unreasonable for the Appellant to believe that the school closure would be for a short period and that she would be able to return to her job immediately after the closure ended. There is no rational reason for the Appellant to jeopardize an existing employment in the hope of finding other employment. In the midst of a global pandemic, with high unemployment across Canada and lockdown measures I place, it was in fact her best option and most probable avenue to employment.[7]

[32] Given the totality of the circumstances facing the Appellant and the nature of the Covid-19 restrictions, I find that the Appellant did not need to make reasonable and customary efforts to find other employment because she already had assured suitable employment to which she would be returning when Covid-19 restrictions lifted.

Capable of and available for work

[33] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[8]

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

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

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

[34] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[9]

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[7] See (*Canada (A.G.) v. MacDonald*, A-672-93)
[8] 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.
[9] 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.

– **Wanting to go back to work**

[35] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[36] She had a suitable job. One that was being held open by her. She was not laid off nor had her employment terminated because she had to care for her son. Her employer recognized her situation and granted her the time away and held her job for her to return to when she could.

[37] It is very clear that she only stopped working because she had no choice but to remain home caring for her son because of the health department imposed school closure. She stated that she wanted to return to work as soon as she could. In fact, that is exactly what she did. The very day that her son's school reopened, she went to work. I am satisfied that her actions support her desire to return to work as soon as was possible under the circumstances.

[38] I find that the Appellant had a suitable job and wanted to return to it as soon as possible.

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

[39] The Appellant has made enough effort to find a suitable job.

[40] I detailed my findings on this matter above. The Appellant had a perfectly suitable job that was available for her to return to whenever Covid-19 restrictions were lifted.

[41] When a claimant is awaiting an imminent recall, it is reasonable that that they should not be immediately disentitled to benefits on the grounds of not seeking employment. I am satisfied that the Appellant's circumstances are similar to an imminent recall.

[42] It was not unreasonable for the Appellant to believe that she would be able to return to her job immediately after the school closure ended. As I noted above, there is no rational reason for the Appellant to jeopardize an existing employment in the hope of

finding other employment. In the midst of a global pandemic, with high unemployment across Canada, it was in fact her best option and most probable avenue to employment.[10]

[43] I find that the Appellant did not need to make any additional efforts to find other suitable employment because she already had assured suitable employment.

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

[44] The Appellant didn't set personal conditions that might have unduly limited her chances of going back to work.

[45] The Commission says that that Appellant had a restriction on her availability as a result of a family obligation or personal objection attributable to Covid-19. It stated the following in its submissions:

> *"If clients state that they would have been available or otherwise available for work if not for Covid-19, and there are no other restrictions on their availability, agents can accept this statement at fact value. However, this does not apply to clients who are unavailable or not otherwise available to accept suitable employment due to restriction on their availability as result of a family obligation or personal objection attributable to the Covid-19 pandemic."*

[46] The Commission's statement clearly states that if the appellant had been otherwise available if not for Covid-19, she would be eligible for benefits. It adds that because she is unavailable as a result of a family obligation attributable to Covid-19, she is not entitled.

[47] The Commission did not submit any supporting reference in the *EI Act* or *Regulations* that supports the disentitlement based on this notion.

[48] My concern here is that the Commission is detailing elements regarding availability on circumstances (not otherwise available) more accurately described in

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[10] See (*Canada (A.G.) v. MacDonald*, A-672-93)

Section 18(1)(b) of the *EI Act*. But it quoted the section 18(1)(a) of the *Act* as the legislative reference for the disentitlement.

[49] The question to be answered is whether the Appellant placed personal restrictions that unduly limited her chances of going back to work.

[50] The Appellant says that **she** (my emphasis) did not place any restrictions that unduly limited her chances of returning to work. She says that she had no choice but to leave work to care for her six-year-old son who could not attend school because it had been closed due to Covid-19. She wanted to be at work. Toronto Public Health closed the schools in response to the Covid-19 pandemic. Likewise, the same health department closed the daycare facilities in order to further limit the spread of the virus.

[51] The restrictions and closures were to slow the spread. Sending children to other homes to be cared for is simply counter-intuitive to the rationale for the school and daycare closures. This left parents of affected children scrambling to find alternate arrangements, which were near non-existent, if they wished to continue working. If parents could not make alternate arrangements, they had no choice but to leave their work to care for their children.

[52] The Appellant is a single mom responsible for a six-year-old child. She did not have the benefit of another parent to assist her; daycares were closed or restricting admission to children of essential workers. She did not have a choice regarding leaving work to care for her child.

[53] Therefore, I can see no difference between being otherwise unavailable because of Covid-19, or otherwise unavailable because of a family obligation caused by the restrictions imposed in response to it.

[54] I find that the Appellant did not set personal conditions that limited her return to work. Those conditions were imposed upon her as a result of the restrictions implemented to control the spread of Covid-19.

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

[55] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work but could not attend her suitable job through no fault of her own.

[56] The Commission relies on the three "*Faucher*" factors in its submission to support its decision to deem the Appellant not available and therefore ineligible for benefits.

[57] I reviewed the "*Faucher"* decision. It does confirm that availability must be determined through the lens of the three factors. However, the learned judges were looking at the decision rendered by the Umpire and concluded that the finding that the claimants were not available was based on too narrow an application of the three factors. Essentially, the judges found that the Umpire had made the determination based solely on one factor. The judges found as follows:

> *"On reading the reasons for the decision of both the Board of Referees and the Umpire, it appears that the third factor was the only one really given any weight, eclipsing the other two, and that result was a conclusion that seems to have no real connection as it may be seen from* ***all*** *(my emphasis) the circumstances."*

[58] The Judges went on to conclude:

> *"We do not believe that a finding that the claimants were not available can be made on such a narrow basis, particularly if we consider that they were found not available scarcely one month after the beginning of the period of unemployment, right in the middle of February when it can only be inevitable that most roofers will be unemployed."*

[59] The judges were sending a message that availability is not decided on one factor alone to the exclusion of the others and without regards to all the circumstances. I see a distinct parallel between the judges' conclusions in "*Faucher"* and the Appellant's circumstances.

[60] I do not believe that the decision by the Commission to deem the Appellant unavailable can be made on such a narrow basis. Particularly, if we consider that she was found not available for only two months because she was caring for her son during a worldwide pandemic when it was inevitable that large numbers of workers would be unable to work because of restrictions imposed to limit the spread of the Covid-19 virus.

[61] My finding is based on the totality of ***all*** the circumstances facing the Appellant.

[62] On a final note, I am compelled to comment on the issue of coordination of benefits between the Canada Revenue Agency and the Canada Employment Insurance Commission.

[63] Through no fault of her own, the Appellant found herself stuck between two organizations responsible to coordinate response benefits but who are entrenched in their own stove piped administrative regimes. One says she is not entitled because she is unavailable for work. The other says it cannot entertain her claim because she has an open claim with the other organization.

[64] I am dismayed by the apparent lack of effort by these organizations to coordinate benefits to ensure that Canadians in need of assistance receive it. The legislators created a Covid-19 response framework that would ensure that Canadians in both need of, and eligible for assistance, would get it. While the administrators of the framework have an obligation to ensure eligibility, they also have an obligation to facilitate claims to ensure that eligible claimants receive those benefits.

[65] Even a cursory examination of the CRCB would lead anyone to conclude that the Appellant was eligible to receive it. Why did the Commission not flag her claim and coordinate with the CRA to determine the best available option for the Appellant?

[66] The Commission told the Appellant that they had put her information in a joint database available with the CRA to assist with her case. But she had already told them that the CRA had refused her claim. The Commission did nothing to try to liaise with the CRA to determine the best course of action to correct her claim and select the most

appropriate option. Not doing so, ultimately resulted in denying her any benefits even though it is abundantly clear she would be entitled to them.

[67] What value is there in a joint database that does not actually facilitate coordination of the various benefit programs? Computers don't fix problems, people do. So it is incumbent on those organizations to create the necessary liaison teams to fix problems, not just drop a claimant's information in a database and wash their hands of them.

[68] To suggest that a single mother forced to care for her six-year-old child at home as a result of Covid-19 restrictions is not entitled to some form of benefit is simply unconscionable. I call on both the Commission and the CRA to acknowledge their responsibilities to assist Canadians and coordinate efforts to facilitate legitimate claims and not complicate matters with bureaucratic practices that lead to astonishingly injudicious results.

Conclusion

[69] The Appellant has shown that she was available for work within the meaning of the law for the period from December 14, 2020, to February 16, 2021. Because of this, I find that the Appellant isn't disentitled from receiving EI benefits. So, the Appellant is entitled to benefits.

[70] This means that the appeal is allowed.

Mark Leonard
Member, General Division – Employment Insurance Section