[TRANSLATION]

Citation: *PG v Canada Employment Insurance Commission*, 2021 SST 497

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	P. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (424965) dated June 8, 2021 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	July 28, 2021
Hearing participant:	Appellant
Decision date:	August 6, 2021
File number:	GE-21-1162

Decision

[1] The appeal is dismissed. I find that the Appellant has not shown his availability for work as of February 1, 2021.[1] His entitlement to Employment Insurance (EI) benefits cannot be established as of that date.

Overview

[2] From 1998—that is, a few years after he retired—until March 13, 2020, the Appellant completed several periods of employment as a driver for X (employer). He drove a van ("sedan") to transport children with disabilities.

[3] On March 13, 2020, he stopped working because of a shortage of work related to the COVID-19 pandemic.[2] He received the Employment Insurance Emergency Response Benefit (EI ERB)[3] until the end of September 2020—that is, for as long as this type of benefit was available.[4]

[4] On October 19, 2020, the Appellant applied for sickness benefits (special benefits). A benefit period was established effective October 18, 2020.[5] The Appellant received this type of benefit from October 18, 2020, to January 30, 2021—that is, for the 15 weeks that he was entitled to it.[6]

[5] On February 12, 2021, the Appellant contacted the Canada Employment Insurance Commission (Commission) to say that he was capable of and available for work as of January 31, 2021, but that he had health limitations, given that he could be exposed to COVID-19. He said he was unable to return to his usual job.[7]

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[1] See section 18(1)(a) of the *Employment Insurance Act* (Act).
[2] Coronavirus disease 2019.
[3] This type of benefit is also referred to as the Canada Emergency Response Benefit (CERB).
[4] In its arguments, the Commission indicates that this type of benefit was available until September 26, 2020—GD4-6.
[5] See GD3-3 to GD3-11.
[6] See GD4-6.
[7] See GD3-12 to GD3-14.

[6] On May 3, 2021, the Commission told him that it could not pay him EI benefits as of February 1, 2021, because he did not want to return to the labour market for health reasons. The Commission told him that it found that he was not available for work.[8]

[7] On June 8, 2021, after a request for reconsideration, the Commission told the Appellant that it was upholding the May 3, 2021, decision.[9]

[8] The Appellant argues that he was capable of and available for work as of February 1, 2021. He explains that he can work but that he is at risk of contracting COVID-19 because of his age and medical condition. The Appellant says he is unable to work in a job other than that of a driver. He explains that he is ready to go back to work with his usual employer, unless there is a new wave of COVID-19 in the meantime. The Appellant argues that, because of the COVID-19 pandemic, the government recommended that people aged 70 and older stay home and go out only for essentials, while according to the Commission, he has to look for work despite this situation, which he finds contradictory. He also argues that the provisions of the *Employment Insurance Act* (Act) about availability were not written based on a pandemic like COVID-19. On July 6, 2021, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

Issues

[9] I have to determine whether the Appellant was available for work as of February 1, 2021.[10]

[10] To do so, I have to answer the following questions:

- Has the Appellant shown the desire or willingness to return to the labour market as soon as a suitable job is offered?

[8] See GD2-13 and GD3-16
[9] See GD2-17, GD3-23, and GD3-24.
[10] See section 18(1)(a) of the Act.

- Has the Appellant expressed this desire through efforts to find a suitable job?
- Has the Appellant set personal conditions that might unduly limit his chances of returning to the labour market?

Analysis

[11] Two sections of the Act indicate that a claimant has to show that they are available for work.[11] These sections both deal with availability, but they are two different disentitlements.

[12] First, a claimant is not entitled to receive benefits for a working day in a benefit period for which the claimant fails to prove that, on that day, the claimant was capable of and available for work and unable to find a suitable job.[12]

[13] Second, to prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to find a suitable job.[13]

[14] In its arguments, the Commission indicates that, in this case, the decision is not based on section 50(8) of the Act because, by his own admission, the Appellant clearly indicated that he was not looking for another job and that he could not work.[14] The Commission specifies that it therefore did not ask him for proof of his job search efforts.[15]

[15] Therefore, I will not be looking at whether the Commission required the Claimant to prove reasonable and customary efforts to find a suitable job.[16]

[16] To determine whether a claimant is available for work, I have to consider the specific criteria set out in the Act to establish whether their efforts to find a suitable job

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[11] See sections 18(1)(a) and 50(8) of the Act.
[12] See section 18(1)(a) of the Act.
[13] See section 50(8) of the Act.
[14] See GD3-21 and GD4-5.
[15] See GD4-5.
[16] See section 50(8) of the Act.

are reasonable and customary efforts.[17] According to these criteria, the efforts must be: 1) sustained, 2) directed toward finding a suitable job, and 3) compatible with nine specific activities that can be used to help claimants get a suitable job.[18] These activities include the following: assessing employment opportunities; registering for job search tools, with electronic job banks, or with employment agencies; contacting prospective employers; and submitting job applications.[19]

[17] The criteria for determining what constitutes a suitable job are the following: 1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, 2) the hours of work are not incompatible with the claimant's family obligations or religious beliefs, and 3) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.[20]

[18] The notion of "availability" is not defined in the Act. Federal Court of Appeal (Court) decisions have set out criteria for determining a person's availability for work as well as their entitlement or not to EI benefits.[21] Those criteria are:

- the desire to return to the labour market as soon as a suitable job is offered
- the expression of that desire through efforts to find a suitable job
- not setting personal conditions that might unduly limit the chances of returning to the labour market[22]

[19] In assessing each of these factors, a claimant's attitude and conduct must be considered.[23]

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[17] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[18] See section 9.001 of the Regulations.
[19] See section 9.001 of the Regulations.
[20] See section 9.002(1) of the Regulations.
[21] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[22] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[23] The Court established this principle in the following decisions: *Whiffen*, A-1472-92; and *Carpentier*, A-474-97.

[20] In this case, the Appellant has not met the criteria set out above as of February 1, 2021. The Appellant has not shown that his efforts to find a job as of that time were reasonable and customary.

Issue 1: Has the Appellant shown the desire or willingness to return to the labour market as soon as a suitable job is offered?

[21] Even though the Appellant submits that he is available for work, he has not shown his desire or willingness to return to the labour market as soon as a suitable job is offered as of February 1, 2021.

[22] The Appellant explains that, on October 19, 2020, after he stopped receiving the EI ERB (CERB), he contacted EI—the Commission—to explain his situation and find out whether he could receive other benefits, such as sickness benefits (special benefits) or the Canada Recovery Benefit (CRB).[24] A Commission agent suggested that he apply for sickness benefits (special benefits). The Appellant relied on what the agent told him and applied for this type of benefit.[25]

[23] When he applied for benefits, the agent reviewed his medical certificate indicating that he was unable to work for a six-month period as of October 6, 2020.[26] According to the Appellant, the contents of this document are a bit [translation] "ambiguous." He argues that it is not a document indicating that he contracted COVID-19 or that he had to stop working because he had a health problem or was injured (for example, heart attack, fracture). According to him, it is a medical certificate indicating that he is at risk of contracting COVID-19, or at risk of complications if he contracts this disease, given his medical condition. The Appellant says he has heart and

[24] See GD3-17 to GD3-20.
[25] See GD3-6.
[26] See the medical certificate issued by Dr. Michel Lynch from the Argenteuil medical centre, on October 6, 2020, indicating that the Appellant was unable to work for six months for medical reasons. The document indicates in the [translation] "Notes" section: [translation] "at risk of COVID-19 complications"—GD2-18.

back problems. He says he had surgery for each of these problems and has to take several medications.[27]

[24] The Appellant explains that the medical certificate provided to the Commission was not meant to help him get sickness benefits (special benefits), but rather to justify to his employer why he was not working and to keep his seniority with the employer. He says that, even though he has stopped working for the employer, he is still employed by the employer but has not gone back to work for it.

[25] The Appellant explains that, before applying for benefits, on October 19, 2020, he indicated to the Commission agent that he was not sick. Despite his explanations about this, he received sickness benefits (special benefits).

[26] On February 12, 2021, after receiving this type of benefit, he contacted the Commission to explain his situation and ask it to pay him regular benefits.[28]

[27] The Appellant says that he has been available for work since February 1, 2021, but with [translation] “health limitations.”[29] He explains that he can work because he is not sick but that he is at risk of being exposed to COVID-19 or contracting this disease.[30] The Appellant says he cannot go back to his usual job for this reason or work in other settings.[31] According to him, the risk to his health is too high because of his medical condition.[32] He says that his employer cannot give him other tasks.[33] The Appellant explains that he likes his work as a driver and that, if he is not working, it is not because of a lack of willingness on his part. He notes that, if it were not for COVID-19, he would be working.[34]

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[27] See GD2-14, GD3-15, and GD3-17 to GD3-20.
[28] See GD2-15 and GD3-17 to GD3-20.
[29] See GD3-12 to GD3-14.
[30] See GD2-7, GD2-14, and GD3-12 to GD3-14.
[31] See GD3-12 to GD3-14.
[32] See GD3-17 to GD3-21.
[33] See GD3-12 to GD3-14.
[34] See GD3-21.

[28] The Appellant also says that, around April or May 2021, the employer contacted him to see whether he wanted to go back to work, given that educational institutions had reopened at that time. The Appellant told the employer that he would not return to work because he had not received both doses of the COVID-19 vaccine. The Appellant says he told the employer that he would revisit the possibility of going back to work for the next school year (2021–2022).

[29] In this case, I find that, even though the Appellant has expressed his availability for and willingness to work, he has not shown his desire to return to the labour market as soon as a suitable job is offered as of February 1, 2021.

[30] I find contradictory the Appellant's statements that he is available for and capable of work, when he has presented a medical certificate indicating that he was unable to work for health reasons for a six-month period—that is, from October 6, 2020, to April 6, 2021.[35] I find that this document does not contain ambiguities.

[31] In my view, a person does not show their willingness to work by presenting medical evidence indicating that they are unable to do so.

[32] I find that, by not complying with the employer's request that he go back to work around April or May 2021, the Appellant has not shown his desire to return to the labour market either.

[33] I find that the Appellant intends to go back to work with his usual employer, but only when he decides that he is able to do so, based on his own assessment of the risk of the COVID-19 pandemic to his health.

[34] This situation does not mean that the Appellant has shown the desire to return to the labour market as soon as a suitable job is offered.

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[35] See GD2-18.

Issue 2: Has the Appellant expressed this desire through efforts to find a suitable job?

[35] The Appellant has not expressed his desire to return to the labour market through significant efforts to find a suitable job since February 1, 2021.

[36] The Appellant explains that he has not looked for work since February 1, 2021.[36]

[37] He argues that, after that, there was an increase in COVID-19 cases and that a new wave of spread in the population was coming.[37]

[38] The Appellant argues that he was caught between two conflicting government directives about his job situation and the COVID-19 pandemic. He explains that, on the one hand, the Quebec government and Quebec's national director of public health recommended that people aged 70 and older, with specific health conditions, not leave their homes, except for essentials, and not have people over.[38] The Appellant says that, on the other hand, the Commission explained to him that he had to look for a job.[39] The Appellant says he followed the recommendations of his doctor, the government, and Quebec's national director of public health.[40]

[39] The Appellant explains that, in addition to the pandemic, potential employers in his area are, for example, pizzerias and companies like Walmart and Canadian Tire. He notes that, at his age, he will not go to work for this type of company.

[40] The Appellant says that he cannot have a job other than that of a driver, given his age.[41]

[41] The Appellant explains having indicated to his employer that he was not going back to work when he received an offer to do so in April or May 2021, but that he would

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[36] See GD3-21.
[37] See GD2-6.
[38] See GD2-6, GD2-7, GD2-15, and GD3-17 to GD3-20.
[39] See GD2-7, GD2-16, and GD3-17 to GD3-22.
[40] See GD2-6, GD2-7, GD2-16, and GD3-17 to GD3-20.
[41] See GD3-15.

be able to do so for the next school year (2021–2022)—that is, at the end of August 2021, unless there was another wave of COVID-19.

[42] The Appellant says he agrees with the provisions of the Act about availability for work. However, he wonders whether they are still valid in the context of a pandemic like COVID-19.[42]

[43] The Appellant also argues that it was reasonable for him to stay home, given that he was exposed to working conditions that were a danger to his health, as indicated in section 29(c)(iv) of the Act.[43]

[44] In this case, I find that the Appellant did not make "reasonable and customary efforts" in the "search for a suitable job"—that is, sustained efforts directed toward finding a suitable job and compatible with nine specific activities that can be used to help claimants obtain suitable employment.[44]

[45] The Appellant's testimony and statements show that he did not apply to any potential employers, even after the period during which he was unable to work for medical reasons—that is, from October 6, 2020, to April 6, 2021.[45]

[46] I find that the Appellant has shown that he chose to prioritize the employer that has been providing him with work for several years rather than looking, in a sustained way, for another job. Additionally, the Appellant turned down his employer's offer, in April or May 2021, to go back to work after educational institutions reopened.

[47] The Court tells us that a person's availability is assessed by working day in a benefit period in which they can prove that they were capable of and available for work on that day and unable to find a suitable job.[46]

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[42] See GD2-7.
[43] See GD2-7.
[44] See section 9.001 of the Regulations.
[45] See GD2-18.
[46] The Court established this principle in the following decisions: *Cloutier*, 2005 FCA 73; and *Boland*, 2004 FCA 251.

[48] I do not accept the Appellant's argument that he had just cause, according to the Act, to stay home to avoid being exposed to working conditions that were a danger to this health.

[49] The section of the Act[47] the Appellant is referring to is not relevant to assessing his availability for work. This section sets out the circumstances to determine whether a claimant has just cause for voluntarily leaving their job or taking leave.[48]

[50] I find that the Appellant's availability for work has not led to concrete and sustained searches with potential employers with the aim of finding a suitable job.

[51] The Court tells us that it is up to the claimant to prove their availability for work. To get EI benefits, a claimant must be actively looking for a suitable job, even if it appears reasonable for the claimant not to do so.[49]

[52] The Appellant was responsible for actively looking for a suitable job to be able to get EI benefits.

[53] I find that the Appellant has failed to meet this responsibility as of February 1, 2021.

Issue 3: Has the Appellant set personal conditions that might unduly limit his chances of returning to the labour market?

[54] I find that the Appellant has set personal conditions that might unduly limit his chances of returning to the labour market.

[55] I find that the personal conditions the Appellant set are related to the fact that, after his six-month period of incapacity for work due to health reasons—that is, from

[47] See section 29(c)(iv) of the Act.
[48] See section 29(c) of the Act.
[49] The Court established this principle in the following decisions: *De Lamirande*, 2004 FCA 311; and *Cornelissen-O'Neil*, A-652-93.

October 6, 2020, to April 6, 2021[50]—he himself determined under which conditions he would agree to work again.

[56] I find that the Appellant has made his own diagnosis and his own assessment of his risk of contracting COVID-19, or having complications if he contracted this disease, because of his medical condition.

[57] The Appellant has not shown that he has restrictions related to his health status and his physical capacity for work.[51]

[58] The medical evidence he presented indicates, above all, that he was unable to work for health reasons from October 6, 2020, to April 6, 2021.[52] It does not describe that he has specific functional limitations, whether for his job as a driver or another type of job, or that these limitations would prevent him from doing specific tasks after his period of incapacity for work.

[59] I find that, by determining himself the criteria establishing what constitutes a suitable job, including those criteria related to his health status and his capacity for work,[53] the Appellant has set personal conditions. In my view, these conditions unduly limited his chances of returning to the labour market to work at a suitable job.

[60] I find that the personal conditions the Appellant set are also related to the fact that he has chosen not to look for a job since February 1, 2021, and that he says he is interested in going back to work only for his employer of several years. Additionally, the Appellant himself has determined when he plans to go back to work for this employer by telling it that he would prefer to wait until the beginning of the 2021–2022 school year to do so, even though he had the opportunity to go back to work for it as early as April or May 2021.

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[50] See GD2-18.
[51] See section 9.002(1) of the Regulations.
[52] See GD2-18.
[53] See section 9.002(1) of the Regulations.

[61] I find that the Appellant set personal conditions that limited his chances of returning to the labour market.

Conclusion

[62] I find that the Appellant has not shown that he was available for work as of February 1, 2021. I find the disentitlement to benefits imposed on the Appellant justified as of that date.

[63] This means the appeal is dismissed.

Normand Morin

Member, General Division – Employment Insurance Section