



Citation: *DH v Canada Employment Insurance Commission*, 2021 SST 641

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:

D. H.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (422132) dated April 30, 2021
(issued by Service Canada)

Tribunal member:

Raelene R. Thomas

Type of hearing:

Teleconference

Hearing date:

June 28, 2021

Hearing participant:

Appellant

Decision date:

July 6, 2021

File number:

GE-21-912

Decision

[1] The appeal is dismissed.

[2] D. H., the Claimant, has not shown that she was available for work from January 31, 2021 to April 1, 2021.

[3] This means she cannot be paid employment insurance (EI) benefits from January 31, 2021 to April 1, 2021.

Overview

[4] The Claimant is employed as a Registered Practical Nurse delivering health care to a client in the client's home. When the COVID-19 pandemic began, she stopped working in March 2020 because she has chronic health conditions and is immunocompromised. She resumed a current claim and then established a new claim for sickness EI benefits on July 18, 2020. On October 4, 2020, the Commission automatically enrolled the Claimant in a post Emergency Response benefit. The Claimant received 15 weeks of sickness EI to January 30, 2021.

[5] The Commission and the Claimant spoke after her sickness EI benefits ended. She told the Commission that she was not available for work due to her health issues. The Commission decided that the Claimant could not receive regular EI from the end of her sickness EI benefits to April 1, 2021, because she had not proven that she was available for work. The Claimant disagrees with this decision. She was not aware that she had to be looking for work outside of her profession or at a lower rate of pay. Once she was made aware she had to look for other work she did so. She says that she should be allowed a reasonable period of time before she has to look for work that is not in her profession or at a lower rate of pay.

Issue

[6] Was the Claimant available for work from January 31, 2021 to April 1, 2021?

Analysis

[7] The law requires claimants to show that they are available for work.¹

Suitable employment

[8] To decide the Claimant's availability, I must first define what is considered suitable employment for the Claimant. The law sets out the criteria I must consider when determining what constitutes suitable employment. Those criteria include whether:

- a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;
- b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and,
- c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.²

[9] The Claimant testified that she is a Registered Practical Nurse. She is employed by a home care agency. The supervisor is aware of her limitations. Prior to the COVID-19 pandemic the Claimant was working in an overnight position caring for a client in the client's home. She had very limited interaction with her co-workers because her reports would be done on the computer. The client has family members residing with her. This work suited the Claimant's medical issues.

[10] The Claimant testified that she has fibromyalgia and another chronic condition that requires her to take immune suppressing medications. The fibromyalgia makes it difficult for her to perform strenuous activity, she tires easily and requires frequent

¹ Paragraph 18(1)(a) of the *Employment Insurance Act* (EI Act) provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

² *Employment Insurance Regulations* (EI Regulations), subsection 9.002

resting periods. The medication that she takes for another chronic condition suppresses her immune system making her vulnerable to infection.

[11] The Claimant's doctor placed her off work in March 2020 due to the COVID-19 pandemic. The doctor agreed that she was at risk at the end of March 2020. The Claimant and her doctor discussed her conditions and her ability to work in May 2021. The Claimant's doctor has said the Claimant is not capable of full time work, but she can work part-time.

[12] The Claimant's doctor has told her that if she feels she can go to work she can go back to work. It is up to her to decide. In the meantime, she has her doctor's permission to remain off work. The Claimant testified her doctor is not able to judge the level of anxiety and the fear she has about going back to work. She has received counselling for her concerns.

[13] In light of the Claimant's medical issues, I find that suitable employment for this Claimant is employment that can be performed within the physical limits imposed by her fibromyalgia and the limits of her compromised immune system. Employment within these limits would not be physically demanding, would allow for rest periods, and would limit exposure to other people.

Reasonable and customary efforts to find a job

[14] The Commission referred to a disentitlement as having been imposed pursuant to sections 18 and 50 of the EI Act and sections 9.001 and 9.002 of the EI Regulations.

[15] Under section 50(8) of the EI Act, the Commission may require a claimant to prove that she has made reasonable and customary efforts to obtain suitable employment in accordance with the criteria in section 9.001 of the EI Regulations. Section 9.001 states that its criteria are for the purpose of section 50(8) of the EI Act. Section 9.001 does not say that its criteria apply to determine availability under section 18(1)(a) of the EI Act.

[16] If a claimant does not comply with a section 50(8) request to prove that she has made reasonable and customary efforts, then she may be disentitled under section 50(1) of the EI Act. Section 50(1) says that a claimant is disentitled to receive benefits until she complies with a request under section 50(8) and supplies the required information.

[17] The appeal file shows that the Claimant received EI sickness benefits from October 4, 2020 to January 30, 2021. The Commission contacted her on February 24, 2021, when a Service Canada agent noted that she said she was unavailable for work due to a compromised immune system.

[18] The Commission's next contact with the Claimant was on April 1, 2021, when a Service Canada agent spoke to her about her specific responsibilities under section 18 and told the Claimant that she was not fulfilling them. The agent asked the Claimant to make changes to her job search and said he would contact her in five business days. On April 9, 2021, the Claimant told the agent she had applied for jobs. He declared her available from April 1, 2021 onward.

[19] This evidence tells me that the Commission first required the Claimant to prove her job search activities under section 50 according to the "reasonable and customary" criteria described in section 9.001 on April 1, 2021, and gave her five business days to do so. She complied with that request on April 9, 2021. As a result, I find the Claimant's job search activities satisfy sections 50 and 9.001 and that a disentitlement was not imposed for her failure to prove her job search activities.³

[20] Accordingly, I only need to decide if the Claimant was available for work under paragraph 18(1)(a) of the EI Act.

Capable of and available for work and unable to find suitable employment

³ *L.D. v. Canada Employment Insurance Commission*, 2020 SST 688. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.

[21] To be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.⁴ The Claimant has to prove three things to show she was available:

1. A desire to return to the labour market as soon as a suitable job is available
2. Expressing that desire through efforts to find a suitable job
3. No personal conditions that might have unduly limited her chances of returning to the labour market⁵

[22] I have to consider each of these factors to decide the question of availability,⁶ looking at the attitude and conduct of the Claimant.⁷

Did the Claimant have a desire to return to the labour market as soon as a suitable job is available?

[23] Yes, I find the Claimant has shown a desire to return to the labour market as soon as a suitable job is available.

[24] The Claimant testified that she has been working for over forty years in various jobs. She has a small pension and needs the income. She said that it would not be good for her physically or mentally to be home all day. It is better for her to be working.

Has the Claimant made efforts to find a suitable job?

[25] No, I find the Claimant did not make efforts to find a suitable job.

[26] There is a list of job search activities to look at when deciding availability under a different section of the law.⁸ This other section does not apply in the Claimant's appeal.

⁴ Paragraph 18(1)(a) of the EI Act.

⁵ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁶ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁷ *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

⁸ Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.

But, I am choosing look at that list for guidance to help me decide whether the Claimant made efforts to find a suitable job.

[27] There are nine job search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.

[28] The Claimant testified that she did not look for work until the Service Canada agent told her on March 31, 2021, she had to look for work. She said that she attended an information session at Service Canada when she was receiving EI benefits several years ago. The Claimant said a participant asked if they had to look for work at a fast food restaurant. The answer was that claimants did not have to look outside their profession to take a lower paying job. The Claimant relied upon that information to not look for work.

[29] The Claimant submitted that she should have a reasonable interval before she had to look for work outside of her profession. The Claimant said that if she was told by the first agent she spoke to in February, after her sickness EI benefits ended, that she was required to look for work outside her profession she would have done so.

[30] In addition to section 9.002 in the EI Regulations, the EI Act also provides that some employments are not suitable in certain circumstances. This part of the EI Act says that for a reasonable interval after a claimant becomes unemployed, suitable work does not include work arising from a labour dispute, work that pays less or has conditions less favourable than a claimant's usual occupation, or work that is not in a claimant's usual occupation that pays less or has conditions less favourable than their usual occupation.⁹

[31] The EI Act also says that after a lapse of a reasonable interval from when a person becomes unemployed, that an employment is no longer considered to be

⁹ Sections 6(4)(a), 6(4)(b) and 6(4)(c) of the EI Act.

unsuitable if it is not in the Claimant's usual occupation and is at a lower rate of earnings or on conditions that are less favourable.¹⁰

[32] I consider a "reasonable interval" to be three months for this part of the EI Act.¹¹

[33] This part of the law does not mean that a claimant is not required to conduct a job search until after a reasonable interval of unemployment. Claimants are still required to look work while receiving regular EI benefits. They are allowed to limit their job search to certain types of employment for a reasonable period. But, they must be searching for work during that period. After a reasonable period has elapsed, the claimant is required to expand their job search criteria.¹²

[34] In this case, the Claimant made no effort to look for work either inside or outside her profession. As a result, I do not think that the Claimant can rely upon the reasonable period to establish an entitlement to benefits.

Did the Claimant set personal conditions that might have unduly limited her chances of returning to the labour market?

[35] No, I find the Claimant did not set personal conditions that might have unduly limited her chances of returning to the labour market.

[36] The Claimant testified that she has an undergraduate degree, she is a Registered Practical Nurse, has worked in nursing for most of her career and has some experience in retail. She has a driver's license and has access to transportation to allow her to commute to work. The Claimant said there are no times of the day, week or year that she cannot work.

[37] The Claimant's physical limitations are not personal conditions that unduly limit her return to the workplace. A claimant is not required to be available for jobs unless the jobs are suitable. Any jobs that exceed a claimant's capabilities would not be

¹⁰ Section 6(5) of the EI Act.

¹¹ This is consistent with the established jurisprudence.

¹² See *Canada (Attorney General) v. LeDuc*, A-134-95

suitable jobs.¹³ As stated above, the Claimant's physical limitations restricts what is suitable employment for her. However, there is no evidence that the Claimant has set personal conditions outside of the ones imposed by her physical conditions.

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¹³ I agree with the reasoning of the Tribunal's Appeal Division (AD) in *S.A. v Canada Employment Insurance Commission*, AD-20-390. The AD stated that a claimant who is unwilling to work at any job that would exceed his or her health and physical capabilities is not setting "personal conditions."

Was the Claimant capable of and available for work and unable to find suitable employment?

[38] No. A Claimant is required to satisfy all three of the *Faucher* factors to show she is capable of and available for work. Because she did not make any efforts to look for work from January 31, 2021 to April 1, 2021, she has not satisfied all three factors.

[39] Considering my findings on each of the three factors together, I find that the Claimant did not show that she was capable of and available for work and unable to find suitable employment from January 31, 2021 to April 1, 2021.¹⁴

Conclusion

[40] I find that the Claimant is disentitled from receiving benefits from January 31, 2021 to April 1, 2021.

[41] The appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section

¹⁴ Paragraph 18(1)(a) of the EI Act.