



Citation: *LM v Canada Employment Insurance Commission*, 2021 SST 591

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: L. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (427086) dated July 21, 2021
(issued by Service Canada)

Tribunal member: Candace R. Salmon

Type of hearing: Teleconference

Hearing date: August 24, 2021

Hearing participant: Appellant

Decision date: September 29, 2021

File number: GE-21-1361

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Claimant hasn't shown that she was available for work. This means that she can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits as of April 12, 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. This means that a claimant has to be searching for a job.

[4] I must decide whether the Claimant has proven that she was available for work. The Claimant 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.

[5] The Commission says that the Claimant wasn't available because she was not searching for work.

[6] The Claimant admits she is not available for work, because she will not wear a mask and there is a mandatory mask law in her province. She submits wearing a mask violates her human rights and religious freedoms, and that there is no suitable employment available for her because all employment she is qualified to do requires wearing a mask.

Matter I have to consider first

The Claimant doesn't want to pursue an appeal under the *Canadian Charter of Rights and Freedoms*

[7] In the Claimant's submission, she referred to human rights, discrimination, and religious freedoms. When I see those terms, I have a conversation with the claimant about an appeal under the *Canadian Charter of Rights and Freedoms* (Charter). Appeals under

the Charter proceed differently from the usual appeals under the *Employment Insurance Act*. Charter appeals are more complex, and have different notice requirements.

[8] Prior to the hearing, I discussed the option of a Charter appeal with the Claimant and explained the process. Specifically, I explained that I cannot consider any arguments relative to sections of the Charter if the Claimant did not proceed under the specific Charter process. The Claimant decided to rely on the contents of the *Employment Insurance Act* and its regulations, and opted not to pursue a constitutional appeal. For this reason, I have not considered the Claimant's argument from a Charter perspective.

Issue

[9] Was the Claimant available for work from April 12, 2021, onwards?

Analysis

[10] The Claimant applied for regular EI benefits on April 13, 2021. She worked for her healthcare employer from 1996 until 2021, and resigned from her job on February 19, 2021. She testified that she quit her job for moral and religious reasons. She submitted it is her moral, human, and "God given" right to breathe fresh air and the enforcement of a provincial mask mandate makes that impossible. She added that she also has moral concerns about the wearing of masks, because she believes they are unhealthy and she should be able to choose to keep her body healthy and safe from the risk of masks.

[11] The Claimant testified that she did not look for a new job before quitting her position because masks are mandatory everywhere. She also confirmed she did not speak to her employer about alternatives to quitting. She said that she initially wore a mask when requested, but found it difficult to breathe. Her manager tried to accommodate her with a different type of mask, but she found that they all made it difficult to breathe.

[12] 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, she has to meet the criteria of both sections to get benefits.

[13] First, the *Employment Insurance 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* give criteria that help explain what “reasonable and customary efforts” mean.² I will look at those criteria below.

[14] Second, the *Employment Insurance 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.

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

[16] 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

[17] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.⁵ I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[18] I also have to consider the Claimant’s efforts to find a job. The *Employment Insurance Regulations* list nine job-search activities I have to consider. Some examples of those activities are the following:⁶

- assessing employment opportunities
- applying for jobs
- attending interviews

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

² See section 9.001 of the *Employment Insurance Regulations*.

³ See section 18(1)(a) of the *Employment Insurance Act*.

⁴ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁵ See section 9.001 of the *Employment Insurance Regulations*.

⁶ See section 9.001 of the *Employment Insurance Regulations*.

[19] The Commission says that the Claimant didn't do enough to try to find a job because she admitted that she was not looking for a job.⁷

[20] The Claimant did not disagree with the statement that she was not looking for work. She told a Commission agent on June 15, 2021, that she was not looking for work.⁸ She reiterated on July 21, 2021, that she was not seeking employment because she "would have to wear a mask."⁹ In her Notice of Appeal, she stated that she does not wear masks, "and this makes me unable to be available for work, while this mandatory mask law is enforced."¹⁰ At the hearing, I asked the Claimant if she looked for another job before leaving her employment position, or if she has looked for work since leaving her job. She stated she did not and has not.

[21] I find the Claimant has not made sufficient reasonable and customary efforts to find employment because she has admitted on multiple occasions that she has not been looking for work. She does have a resume, but has not applied for work and has not made any other efforts to find a job as outlined in the *Employment Insurance Regulations*. Since she cannot prove that she was making reasonable and customary efforts to find a job, I find she is disentitled under section 50(8) of the *Employment Insurance Act*.

[22] The Claimant hasn't proven that she made reasonable and customary efforts to obtain suitable employment.

Suitable Employment

[23] What makes employment suitable? The Claimant submitted that her religious beliefs must be considered, which she believes yields a result that no employment can be suitable for her because she has a religious right not to wear a mask.

[24] The *Employment Insurance Regulations* include provisions that say I have to consider certain things when determining if an employment is suitable employment. I have to consider whether the Claimant's health and physical capabilities allow her to commute

⁷ See GD3-27

⁸ See GD3-28

⁹ See GD3-39

¹⁰ See G2-1

to the place of employment and perform the work, whether the hours of work are compatible with the Claimant's family obligations or religious beliefs, and whether the nature of the work is contrary to the Claimant's moral convictions or religious beliefs.¹¹

[25] The Claimant testified that she has no restrictions on commuting. She does have a neck injury that limits her ability to lift heavy items, which is outlined in a work capacity evaluation done by her provincial worker's compensation board. At the hearing she could not remember the exact weight restriction, but noted that she does have an accommodation relative to lifting. She also stated that she lives with fibromyalgia, which makes it difficult to sleep. For this reason, she prefers part-time employment because she is not able to work for five day in a row.

[26] The Claimant testified that she does not have any restrictions on her hours of employment, other than she is not available to work on Saturdays due to the Sabbath. With respect to work that is contrary to her moral convictions or religious beliefs, the Claimant testified she would not work with alcohol for religious reasons.

[27] The Claimant also submitted that wearing a mask violates her religious beliefs, and conflicts with her moral convictions, because you "cannot have fresh air, so the mask mandate infringes" on her Christian beliefs.

[28] I noted that the Commission asked the Claimant if she had any medical condition that would be aggravated by wearing a mask. She stated that she has asthma, but when asked for a medical note said she was "not going any further with that." She said that even if she had "perfectly healthy lungs," she would not wear a mask. She also confirmed that asthma is not the main reason she quit her job and isn't looking for work. She said she quit on principle, because of religious and human rights reasons. She also confirmed she did not want to claim sickness benefits, because she is not unable to work due to illness, and confirmed that she did not receive any direction from her doctor that she could not wear a mask.

¹¹ See section 9.002 (b) and (c) of the *Employment Insurance Regulations*.

[29] I find that suitable employment for the Claimant would require limited lifting, not to exceed the weight identified in her work capacity evaluation, employment that does not require her to attend on Saturdays, and that does not require her to work directly with alcohol or in a space where alcohol is served because it violates her religious beliefs.

[30] I do not agree with the Claimant's submission that employment that requires her to wear a mask is unsuitable because it violates her religious freedoms and moral convictions.

[31] The Claimant submits it is her religious and human right to refuse to harm her lungs by wearing a mask. She adds that the evidence shows that wearing a mask is dangerous, and says she wants to prevent health problems in the future. In her employment resignation letter, the Claimant cited "true health measures" taken from The Ministry of Healing.¹² She submitted that being forced to wear a mask violates her right to fresh air, which in turn violates one of God's health measures. In this letter, the Claimant did not refer to any medical journals to support her statements.

[32] Prior to the hearing the Claimant submitted additional documents, described as "credible medical reports concluding that mask wearing trial results do not support efficacy in mask wearing."¹³ She submits these reports support her health concerns relative to wearing masks. I disagree, but find the articles—which related to surgical and influenza infection rates as they relate to mask use—are not relevant to the question of suitable employment.

[33] I find the Claimant has not produced any credible medical evidence showing that masks cause harm, and did not argue that she cannot wear a mask for medical reasons.

[34] I find the wearing of masks is not related to religion, meaning it is not part of a belief system to which the Claimant subscribes. The Claimant has not proven that wearing a mask is objectively or subjectively prohibited by her religion. I find she made a personal choice and has a preference or singular belief that does not amount to a religious belief.

¹² See GD3-33

¹³ See GD10

Whether masks work to protect against COVID-19 is not the issue before me and does not relate to a religious belief or moral conviction.

Capable of and available for work

[35] 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:¹⁴

- 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.

[36] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁵

– Wanting to go back to work

[37] The Claimant hasn't shown that she wanted to go back to work as soon as a suitable job was available.

[38] The Claimant made no efforts to obtain a suitable job. She submits that anything she is qualified to do requires working with people, and she cannot do that without a mask. I have already found that a refusal to wear a mask is not an element of suitable employment, because the Claimant did not prove that it violated a religious or moral belief and did not argue that she had a medical condition that limited her ability to wear a mask.

[39] I find it is insufficient to simply say that there are no jobs in the marketplace that the Claimant could do, without even looking for jobs. Since the Claimant has not tried to

¹⁴ 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.

¹⁵ 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.

find a job, she has not proven that she wants to go back to work as soon as a suitable job is offered.

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

[40] The Claimant hasn't made efforts to find a suitable job.

[41] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.¹⁶

[42] The Claimant's efforts to find a new job included having a resume. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[43] Those efforts weren't enough to meet the requirements of this second factor because she made no efforts to look at available jobs, contact employers, or actually apply for any work. She is asking to receive EI benefits, noting she has not used the program before but has paid into it. However, it is not reasonable to expect the burden of the Claimant's choice to be unemployed to be shifted to the taxpayer.

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

[44] The Claimant has set personal conditions that might have unduly limited her chances of going back to work. She has refused to wear a mask during a global pandemic and mandatory masking order in her province. She recognizes that many jobs, certainly jobs where one would interact directly with other people, will not be available to her because she refuses to wear a mask. I find her decision to not wear a mask is a personal choice, and has likely unduly limited her chances of returning to work.

Was the Claimant capable of and available for work?

[45] Based on my findings on the three factors, I find that the Claimant hasn't shown that she was capable of and available for work but unable to find a suitable job.

¹⁶ 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.

Other evidence

[46] The Claimant submitted that denying her EI benefits is not reasonable, and basing the decision on the *Employment Insurance Act* is “obsolete” because it does not consider the varied complications due to the pandemic.

[47] I find the *Employment Insurance Act* is the basis of my jurisdiction. I must apply its provisions. While the government has implemented some temporary provisions related to the pandemic, it has not changed the basic requirements of availability.

Conclusion

[48] The Claimant hasn’t shown that she was available for work within the meaning of the law. Because of this, I find that she can’t receive EI benefits.

[49] This means that the appeal is dismissed.

Candace R. Salmon
Member, General Division – Employment Insurance Section