



Citation: *SM v Canada Employment Insurance Commission*, 2021 SST 733

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: S. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (432346) dated August 27, 2021
(issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference

Hearing date: November 1, 2021

Hearing participants: Appellant

Decision date: November 14, 2021

File number: GE-21-1905

Decision

[1] I am dismissing the appeal.

[2] The Claimant has not shown that she was available for work. This means that she is disentitled from being paid employment insurance (EI) regular benefits for her 2021 summer break.

Overview

[3] The Claimant was temporarily laid off from her job as an educational assistant when the school year ended in June 2021. Her qualification is in Early Childhood Education (ECE). She works for a school board helping children who have autism manage in the classroom.

[4] The Claimant used to be a casual employee, but three years ago, she was made permanent. As such, her employer gives her a guaranteed recall date each year for the following fall semester. The Claimant applied for EI regular benefits when the summer semester ended, as she has done for the previous five years.

[5] The Canada Employment Insurance Commission (Commission) decided that the Claimant could not get benefits since she did not show that she was available for work. To get regular benefits, you have to prove availability. This includes showing you looked for work and did not unduly limit your chances of finding a job by imposing personal conditions on the work you would accept.

[6] The Claimant disagrees with the Commission's decision. She says she was available for work because her guaranteed recall was her best chance of suitable employment. She says she did not know she had to look for work to cover her 2021 summer break since she never had to do this when claiming benefits in the past.

The issue I must consider

[7] Was the Claimant available for work while waiting to return to her job?

Post-hearing documents

[8] After the hearing, the Claimant submitted Records of Employment (ROEs) showing she had a history of guaranteed recall rights. I accepted these documents as relevant to her appeal. I shared this information with the Commission and offered it the opportunity to respond, but it did not reply.

Analysis

[9] In order to get EI regular benefits, claimants have to be capable of work, available for work and unable to find suitable employment.¹ Claimants have to prove three things to show they were available for work:

- a) that they wanted to return to work as soon as a suitable job was available;
- b) that they followed through on that wish by trying to find a suitable job; and
- c) that they had no personal conditions that might unduly limit their chances of returning to the labour market.²

[10] I have to consider each of these factors to decide the question of availability,³ looking at the Claimant's attitude and conduct.⁴

Did the Claimant want to return to work as soon as a suitable job was available?

[11] The Commission says the Claimant did not show she wanted to return to work as soon as a suitable job was available since she was just waiting to go back to her job in September 2021.

[12] The Claimant does not dispute this. She agrees that she was waiting to return to her existing position when the new school year began after the summer break ended.

[13] This means that she showed she was in no hurry to return to work.

¹ See s 18(1)(a) of the EI Act. I did not consider whether the Claimant was disentitled under s 50 of the EI Act for not performing a "reasonable and customary" job search since the Commission did not discuss this with her until the summer break was almost over.

² *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

³ *Faucher*, see above.

⁴ *Canada (Attorney General) v Whiffen*, A-1472-92; *Carpentier v Canada (Attorney General)*, A-474-97.

Did the Claimant make efforts to find a suitable job?

[14] The Commission says the Claimant did not look for any suitable jobs to cover her summer break. It argues that she should have considered other types of work if the education sector shuts down over the summer. The Commission says claimants have to continue looking for work while claiming benefits even if they think it is reasonable not to do so; they cannot just wait for a recall to their existing position.⁵

[15] The Claimant says she did not need to look for work because she had guaranteed recall rights to a suitable job.⁶ She says she checked alerts for other educational assistant jobs but they were for the school year starting in September 2021, just like her existing job. She reported three hours a week of self-employment in her husband's business over the summer break.

[16] The Claimant says any jobs she might be able to find would have been on less favourable terms than her existing position. In that job, she has guaranteed employment for ten months each year, with benefits and a pension. For the past three years, her seniority has guaranteed her recall at the beginning of each new school year.

[17] The Claimant says she was unlikely to find a job for the summer if a potential employer knew she was only looking for work until her recall date. But that would only apply if the positions were not specifically for the summer.

[18] I considered the Claimant's argument that any alternative jobs covering her summer break would have been on less favourable terms than her existing position. If so, they might not be considered suitable employment under the law.⁷

[19] However, I have insufficient information to make a finding that there were no suitable jobs available that summer. This is because the Claimant failed to test the job market by searching for any other positions. She did not report looking for work in such

⁵ *De Lamirande v. Canada (Attorney General)*, 2004 FCA 311.

⁶ The ROEs she submitted after the hearing support this argument.

⁷ S 6(4) of the EI Act. See also *MT v Canada Employment Insurance Commission*, 2020 SST 643.

settings as summer programs, autism centres or summer camps. The jobs she looked at in education only started in September 2021.

[20] The Claimant knew her contract was only for ten months each year, so her lay-off was no surprise. She had ample advance notice to search for suitable work to cover her upcoming weeks of unemployment.

[21] A Federal Court of Appeal decision said a claimant who is awaiting recall to work within a reasonable period should not be immediately disentitled to benefits on the grounds of not looking for other work.⁸ However, newer case law says you must still look for employment as a condition of getting regular benefits.

[22] In a recent decision of the Tribunal's Appeal Division, for example, the claimant was disentitled to benefits because he had not carried out a job search.⁹ He was waiting to return to his job.

[23] The Claimant says there was no point in her replacing her existing stable employment, where she had seniority, with a new job where she might not have guaranteed recall rights. I agree with that assessment for the months when she had guaranteed employment. I also accept that she might not have been able to find a suitable job to cover her summer break. But she was still required to try to find suitable work for the weeks when she knew she would be unemployed.

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

[24] The Commission says the Claimant set a personal condition because she was only prepared to consider work in the educational sector, which normally shuts down over the summer break. It says this restriction unduly limited her chances of returning to the labour market as soon as she could.

⁸ *Canada (Attorney General.) v MacDonald*, A-672-93.

⁹ *JP v Canada Employment Insurance Commission*, 2021 SST 319.

[25] The Claimant says it was not a personal condition. She says there were no suitable positions during the two-month summer break.

[26] I considered the length of the Claimant's unemployment to see if ten weeks was a "reasonable interval" to wait between jobs.¹⁰ Her recall did not have to be imminent but the delay could not be indefinite.¹¹ It could not be a long delay either.

[27] In the Claimant's case, the period of unemployment was ten weeks, from June 26, 2021, to September 3, 2021. She had a definite end date but ten weeks is not a reasonable period to claim EI benefits without any attempts to search for a job.

[28] Wanting to wait to resume her position in September 2021 was, therefore, a personal condition that unduly limited the Claimant's chances of returning to work.

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

[29] Based on my findings on the above three factors, I find that the Claimant has not shown that she was capable of and available for work during her 2021 summer break.

[30] The Claimant says she did not know that she had to look for a job since she was never asked to do this when claiming benefits for her summer break in the past. But claimants are told in their benefit application that they must keep looking for work.¹²

Conclusion

[31] The Claimant did not show that she was available for work because she did not look for any jobs for the ten weeks when she claimed benefits.

[32] This means that I am dismissing the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

¹⁰ See s 6(5) of the EI Act.

¹¹ See *MT v Canada Employment Insurance Commission*, 2020 SST 643.

¹² The Claimant says the Commission should have warned her but a warning is not required where claimants have not looked for any work at all. See *JP v Canada Employment Insurance Commission*, above, citing *Canada (Attorney General) v Stolniuk*, A-687-93.