



Citation: *LH v Canada Employment Insurance Commission*, 2022 SST 64

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: L. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (435884) dated October 1, 2021 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Videoconference

Hearing date: December 29, 2021

Hearing participant: Appellant

Decision date: January 13, 2022

File number: GE-21-2143

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant. The Claimant has not shown that she was available for work. This means that she cannot receive Employment Insurance (EI) benefits.

[2] The parties agree that the Claimant had good cause to file her late reports. The appeal is allowed on this issue.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided on reconsideration that the Claimant was disentitled from receiving EI regular benefits from January 18, 2021 to April 23, 2021 because she was not available for work.¹ The Commission also decided in favour of the Claimant on the issue of late reports. They decided that she had good cause.

[4] The Claimant says that she was capable and available for work, but has some medical restrictions. She did not look for work because she had a job and was not aware of her obligation to do so.

[5] 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.

[6] 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 available for work.

¹ See initial decision dated August 3, 2021 at GD3-48 and reconsideration decision dated October 1, 2021 at GD3-124.

Matters I have to consider first

Videoconference

[7] The Claimant initially asked for an in-person hearing.² Since in-person hearings were paused due to the pandemic, she agreed to a videoconference.

Adjournments

[8] This case was first scheduled to be heard on January 26, 2022.³ The Claimant asked to administratively reschedule her case within the 2-day grace period to an earlier date. She provided a list of available dates.⁴ It was rescheduled to December 10, 2021 based on her preferences and availability.⁵

[9] The Claimant then asked for an adjournment of the December 10, 2021 hearing date. She would not have her computer by that date and needed it to participate in the videoconference hearing.⁶

[10] I refused the Claimant's request to adjourn because the case had been prioritized and scheduled at an earlier date based on her specific availability.⁷ I noted that a teleconference hearing could be scheduled instead if her computer was not available.

[11] The Claimant later wrote in asking for another adjournment advising that her father was in hospice and passed away.⁸ She offered alternative available dates. I granted this particular adjournment because of exceptional circumstances. It was rescheduled to December 29, 2021 based on her preferences and availability.⁹

² See Claimant's appeal forms at GD2-5; see letter at GD6-1 to GD6-2; see Claimant's response at GD7-1 to GD7-2.

³ See notice of hearing at GD1-1 to GD1-4.

⁴ See Claimant's email at GD8-1.

⁵ See rescheduled notice of hearing at GD1A-1 to GD1A-3.

⁶ See Claimant's emails at GD8-1 and GD9-1.

⁷ See adjournment request denied at GD11-1 to GD11-3.

⁸ See Claimant's emails at GD14-1; GD16-1 to GD16-3;

⁹ See rescheduled notice of hearing at GD17-1 to GD17-3.

Overpayment chart

[12] I asked the Commission to submit a copy of the overpayment chart in advance of the hearing because it was missing from the file.¹⁰ A copy was sent to the Tribunal and sent to the Claimant.¹¹ Another copy was emailed to the Claimant after the hearing because she could not locate the original copy during the hearing.¹²

Commission concedes on issue of late reports

[13] On reconsideration, the Commission decided that the Claimant did not have good cause for failing to file her EI reports from May 2, 2021 to June 5, 2021. They denied her request to antedate the late EI reports.¹³

[14] However, after the Claimant appealed that decision, the Commission changed their position and conceded the antedate issue. They agree with the Claimant and have decided that she had good cause considering all of her circumstances and acted as a reasonable person.¹⁴

[15] Accordingly, I accept that the Claimant had good cause to file her reports to antedate. This means that the only issue under appeal remains is the Claimant's availability for work.¹⁵

Commission records

[16] At the hearing, the Claimant said she made an application for EI benefits and spoke to a Commission agent in either October 2020 or November 2020. She said there was no record of it in the file. She says this information is relevant to her case, even though the dates are outside of the relevant period she was disentitled to EI benefits.¹⁶

¹⁰ See section 32 of the *Social Security Tribunal Regulations* and GD10-1 to GD10-2.

¹¹ See Commission's response to my request and overpayment chart at GD12-1 to GD12-2.

¹² This was emailed to the Claimant's email address on January 5, 2022.

¹³ The decision was verbally communicated to the Claimant on September 28, 2021 at GD3-36.

¹⁴ See Commission's representations at GD4-15 to GD4-16.

¹⁵ See reconsideration decision dated October 1, 2021 at GD3-124.

¹⁶ The relevant period is period she was disentitled to EI benefits from January 18, 2021 to April 23, 2021.

[17] I wrote to the Commission to ask them to supply any records or recordings involving the Claimant from October or November 2020.¹⁷ The Commission wrote back confirming that they had no records of a discussion that took place with the Claimant in October 2020 or November 2020.¹⁸ A copy of the Commission's response was sent to the Claimant with an opportunity to reply by January 7, 2022.¹⁹

[18] The Claimant asked for an extension to reply.²⁰ On January 10, 2022, she provided a 15-page reply to the Tribunal.²¹ The Claimant's reply included the submission of documents that were already part of the file and discussed at the hearing.²² However, she did provide new comments about the overpayment chart because she could not locate the document during the hearing.²³ I acknowledged the Claimant's submission by sending her a letter to advise that I was accepting it and would now proceed to make my decision.²⁴

[19] The Claimant provided another lengthy submission after my letter was sent to her.²⁵ However, I am not accepting this post-hearing submission because she has submitted documents that are already part of the file. Her written comments are simply a restatement of her testimony, namely that she disagrees with the Commission's decision and resulting overpayment. I note that the Claimant was only asked to reply to the Commission's submission that they did not have any records for October 2020 or November 2020.²⁶

Issue

[20] Was the Claimant available for work from January 18, 2021 to April 23, 2021?

¹⁷ See section 32 of the *Social Security Tribunal Regulations* and GD19-1 to GD19-3.

¹⁸ See Commission's response at GD20-1 to GD2-20.

¹⁹ See letter to Claimant with an opportunity to reply at GD21-1 to GD21-2.

²⁰ See Claimant's request for an extension at GD3-22.

²¹ See Claimant's reply at GD23-1 to GD23-15.

²² See Claimant's reply dated January 10, 2022 at GD23-1 to GD23-15.

²³ See Claimant's comments about the overpayment chart at GD23-12.

²⁴ See letter dated January 11, 2022 at GD24-1 to GD24-2.

²⁵ See Claimant's reply dated January 11, 2022 at GD25-1 to GD25-29.

²⁶ See letter to Claimant with an opportunity to reply at GD21-1 to GD21-2.

Analysis

[21] 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.

[22] 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.²⁷ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.²⁸ I will look at those criteria below.

[23] Second, the Act says that a Claimant has to prove that they are “capable of and available for work” but are not able to find a suitable job.²⁹ Case law gives three things a Claimant has to prove to show that they are “available” in this sense.³⁰ I will look at those factors below.

[24] The Commission decided that the Claimant was disentitled from receiving benefits because she was not available for work from January 18, 2021 to April 23, 2021 based on these two sections of the law.

Background information

[25] The Claimant is 71 years old and works as a sales associate for a hardware store. She has worked there for around 14 years, earns \$20.70 per hour and has benefits, as well as profit sharing. She works mostly part-time hours, which she says is consistent with her written contract. For a few years she was working full-time hours, usually around or above 32 hours a week.

²⁷ See section 50(8) of the *Employment Insurance Act* (Act).

²⁸ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

²⁹ See section 18(1)(a) of the Act.

³⁰ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[26] The Claimant suffers from depression and has other physical medical issues. The employer has generally accommodated her at the workplace, whether it was through scheduling and/or modifying her duties.

[27] The Claimant first received Employment Insurance – Emergency Response Benefit (EI-ERB) for 15 weeks from June 21, 2020 to October 3, 2020. This followed by regular EI benefits for 30 weeks from October 4, 2020 to May 1, 2021.³¹ However, both parties agree that for part of this period, the Claimant was acutally unable to work for medical reasons.

[28] As the Claimant was unable to work for medical reasons, the Commission retroactively converted her regular EI benefits to sickness EI benefits for 15 weeks from October 4, 2020 to January 15, 2021.³² This resulted in reduced the Claimant`s overall overpayment. However, there remains an overpayment for the period from January 18, 2021 to April 23, 2021.³³

[29] At the hearing, the Claimant argued that she was capable and available for work from February 19, 2021. She asked me to modify the claim to show she was available from this date as it would reduce her overall overpayment.

Capability of working

[30] The parties agree that the Claimant was not capable of working for the period from October 4, 2020 to January 15, 2021. This is the period that her claim was converted from regular EI benefits to sickness EI benefits.

[31] However, the Commission and Claimant do not agree whether she was capable of working from January 18, 2021 to April 23, 2021. This is period the Claimant received regular EI benefits and has the burden of proving she was capable of working.

³¹ This is shown in payment chart at GD3-34 to GD3-37.

³² 15 weeks is maximum amount of weeks for sickness EI benefits.

³³ See overpayment chart GD12-2.

[32] I note that the Commission removed the disentitlement to regular EI benefits and decided that she was capable of working full days from April 24, 2021.³⁴

[33] As the relevant period is from January 18, 2021 to April 23, 2021, I have to decide if the Claimant was capable of working for this period.

[34] There are several medical notes in the file, some of which refer to periods outside of the relevant period in this case.³⁵ The medical notes identify the employer's letterhead and the forms are called "limitations/restrictions/return to work form".

[35] I was persuaded by the Claimant's testimony that she was capable of working her regular hours from February 19, 2021. I am relying on her work schedule and timesheet that shows she worked her first 7.45 hour shift on February 19, 2021 and by the medical note from her doctor.³⁶

[36] I find it was more likely than not, that the Claimant was capable of working from February 19, 2021 to April 23, 2021. She has shown that she capable of working and performing her normal duties at work.

[37] I acknowledge that the Claimant did work a few hours from January 18, 2021 to February 18, 2021. However, it was only a few hours a day a couple of times a week based on her medical restrictions at the time. However, I do not find that she was capable of working within the meaning of the law for every working day from January 18, 2021 to February 18, 2021.

[38] I still have to decide if she was available for work.

Reasonable and customary efforts to find a job

[39] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.³⁷ I have to look at whether her efforts were

³⁴ See reconsideration decision dated October 1, 2021 at GD3-124.

³⁵ See the Claimant's medical notes in the file at GD3-62 to GD3-74; GD13-4 to GD13-6; GD14-4.

³⁶ See medical note at GD13-4 and work calendar and timesheets at GD3-87; GD3-108.

³⁷ See section 9.001 of the Regulations.

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.

[40] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those activities are the following:³⁸

- assessing employment opportunities
- preparing a résumé 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
- applying for jobs
- attending interviews
- doing competency tests

[41] I find that the Claimant has not proven that her efforts to find a job were reasonable and customary for the following reasons.

[42] The Claimant testified that she did not look for other employment opportunities while she collected regular EI benefits. This is consistent with her previous statements to the Commission.³⁹ I note that even if a job search would not result in finding or securing any suitable employment opportunities, the Claimant must make some effort. If a Claimant admits that they did not look for work during the relevant benefit period, it is a fact that must be considered.⁴⁰

[43] The Claimant further explained that her employer was accommodating her return to work plan. She explained that she is 71 years old, had worked there for 14 years and was earning \$20.70 per hour. Because of this, she said that she was already employed

³⁸ See section 9.001 of the Regulations.

³⁹ See supplementary record of claim at GD3-39; GD3-46.

⁴⁰ See *Canada (Attorney General) v Renaud*, 2007 FCA 328.

and it was unlikely she would find other employment, particularly since she requires a medical accommodation for her physical restrictions. She cannot do heavy lifting or ladder climbing.

[44] The Claimant works in a retail environment at a hardware store. I do not accept the Claimant's argument that she could not have found alternate employment given her physical restrictions. While she has some physical limitations, there was no evidence that she could not have done or looked for sedentary jobs, office type work or remote work. The court has also said that no matter how little chance of success a Claimant may feel a job search would have, the EI Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.⁴¹

Availability for work

[45] 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:⁴²

- 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 did not set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[46] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.⁴³ I also note that Claimants are only required to be available for suitable jobs, which are jobs that are within their physical capability.

⁴¹ See *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93.

⁴² 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.

⁴³ 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**

[47] I find that the Claimant has shown that she wanted to go back to work as soon as a suitable job was available. She testified that she loves her job and wanted to work.

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

[48] 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.⁴⁴

[49] I find that the Claimant has not made any efforts to find a suitable job. She testified that she was not aware of the obligation to make efforts to find suitable employment. It is not necessary for me to define what kind of job search would have been adequate because she has already admitted to making no job seeking efforts at all. As noted above, the Claimant must make some efforts to find a suitable job. This is a requirement.

[50] The Claimant works in a retail environment at a hardware store. I do not accept the Claimant's argument that she could not have found alternate employment given her restrictions. While she has some physical limitations, there was no evidence that she could not have done or looked for sedentary jobs, office type work or remote work, even if she did not think would result in anything.

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

[51] I find that the Claimant has not set personal conditions that might have unduly limited her chances of going back to work.

[52] I do not find the Claimant's physical medical condition to be a personal condition that unduly limited her chances of returning to the labour market. Her physical limitations and restrictions are not personal conditions because she is still able to work full days, but has some physical restrictions around heavy lifting and ladder climbing. She has some difficulty around back-to-back scheduling of shifts for which her employer

⁴⁴ 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.

accommodates her. In my view, her physical restrictions this does not unduly limit her chances of going back to work.

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

[53] Based on my findings on the three factors, I find that the Claimant has not shown that she was capable of and available for work but unable to find a suitable job. Given that the Claimant made no effort to look for suitable work, I cannot accept that she was available for work as required by the law.

Conclusion

[54] The Claimant has not shown that she was available for work. Because of this, I find that the Claimant cannot receive regular EI benefits from January 18, 2021 to April 23, 2021. This means that the appeal is dismissed.

[55] The parties agree that the Claimant had good cause to file her late reports. The appeal is allowed on this issue only.

Solange Losier

Member, General Division – Employment Insurance Section