



Citation: *SJ v Canada Employment Insurance Commission*, 2021 SST 887

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: S. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (432108) dated September 17, 2021 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: December 2, 2021

Hearing participant: Appellant

Decision date: December 10, 2021

File number: GE-21-2001

Decision

[1] S. J. is the Claimant. The Canada Employment Insurance Commission (Commission) decided that she wasn't entitled to Employment Insurance (EI) benefits. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that she hasn't proven that she was available for work. This is because she wasn't trying to find a job or return to her old job. This means that the Claimant can't collect EI regular benefits.

Overview

[3] The Claimant worked at a restaurant. She stopped working in March 2020 when the restaurant closed. She didn't return to work when the restaurant reopened. Her daughter has medical conditions that put her at high risk during the pandemic. Her daughter needs daily care with feeding, bathing, and moving between her bed and her wheelchair. The Claimant stayed home to care for her daughter and reduce the risk of a Covid infection.

[4] At the same time, the Claimant was collecting EI benefits. After paying benefits for several months, the Commission reviewed her entitlement. The Commission decided that the Claimant wasn't available for work starting September 28, 2020. The Commission made this decision retroactively and asked the Claimant to repay all the EI benefits she received.

[5] You have to be available for work to get EI regular benefits. This is an ongoing requirement. This means you have to be trying to return to work.

[6] The Commission says the Claimant wasn't available for work. The Commission says she had to care for her daughter and she wasn't looking for a job.

[7] The Claimant disagrees with the Commission's decision. She says she had to stay home to protect her daughter's health. She says she can't repay benefits. She also says the Commission took too long to make a decision about her benefits, so she couldn't get information about other kinds of benefits.

Issue

[8] Was the Claimant available for work?

Analysis

[9] There are two different sections of the law that say you have to prove that you are available for work. The Commission says it used both sections of the law to refuse EI benefits. So, I will go through each section of the law as I make my decision.

[10] First, the *Employment Insurance Act* (Act) says that you have to prove that you are making “reasonable and customary efforts” to find a suitable job.¹

[11] Second, the Act says that you have to prove that you are “capable of and available for work” but aren’t able to find a suitable job.² Case law gives three you have to prove to show that you are “available” in this sense.³ I will look at those factors below.

[12] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

Reasonable and customary efforts to find a job

[13] There is a section of the law that says that you have to prove that your efforts to find a job were reasonable and customary.⁴

[14] The Commission says it used this section of the law to disentitle the Claimant from receiving benefits.

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

² See section 18(1)(a) of the Act.

³ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁴ Section 50(8) of the *Employment Insurance Act* and section 9.001 of the *Employment Insurance Regulations*.

[15] I disagree. I don't think the Commission has proven that it used this section of the law. I won't use this section of the law when I make my decision about the Claimant's availability for work.

[16] The Commission spoke to the Claimant several times. Each time, the Commission agents spoke to the Claimant about childcare, but they didn't ask the Claimant to describe her job search activities. The Commission agents didn't ask the Claimant for a job search record and they didn't warn her that they were looking at her entitlement to benefits under this section of the law. The decision letter says the Claimant isn't entitled to EI benefits because she didn't make childcare arrangements. The letter doesn't say that the Commission decided that the Claimant wasn't making reasonable and customary efforts to find a job.

[17] The Appeal Division has a decision that says I should be careful when I am looking at this section of the law. The Appeal Division says that I should look for evidence showing that the Commission asked the Claimant for proof of reasonable and customary job search efforts. Also, I should look for evidence explaining whether the Commission ever told the Claimant it was using this section of the law to make a decision about her availability.⁵

[18] I don't have to follow Appeal Division decisions. But in this case, I think the Appeal Division decision is helpful. I don't think there is enough evidence showing that the Commission used this part of the law to disentitle the Claimant.

[19] I am not going to look at whether the Claimant made reasonable and customary efforts to find a job. I don't think the Commission has proven that it used this section of the law to disentitle the Claimant.

[20] This doesn't mean that I am allowing the Claimant's appeal. I still have to look at the other part of the law that talks about availability for work.

⁵ *LD v Canada Employment Insurance Commission*, 2020 SST 688.

Capable of and available for work

[21] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.⁶

[22] I have to look at three factors when I make this decision:

1. You must show that you want to get back to work as soon as someone offers you a suitable job. Your attitude and actions should show that you want to get back to work as soon as you can;
2. You must make reasonable efforts to find a suitable job;
3. You should not set limits that might prevent you from finding a job. If you do set any limits on your job search, the limits should be reasonable.⁷

[23] So, I will go through each of these factors to decide if the Claimant has proven that she was available for work.

– Wanting to go back to work

[24] I find that the Claimant hasn't proven that she wanted to go back to work as soon as a suitable job was available.

[25] The Claimant gave conflicting information about whether she wanted to work. She originally told the Commission that she couldn't work because she had to take care of her daughter. During the reconsideration, she said she wanted to work, but her workplace was closed and she couldn't find other work. On her notice of appeal, she said she couldn't work because of her own health conditions and because of her

⁶ Paragraph 18(1)(a) of the *Employment Insurance Act*.

⁷ In *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

daughter's health. At the hearing, she said she wanted to work, but she also said she asked her employer for more time before returning to work.

[26] I think the Claimant's first statements to the Commission are most likely to be reliable. I also give weight to her statements at the hearing.

[27] I have to look at the Claimant's attitude and actions when I look at this factor. I have to consider the fact that she originally told the Commission that she couldn't work. I also have to consider the fact that, at the hearing, she said her employer invited her to come back to work but she asked for more time. She didn't return to work when her employer asked her to come back. I think this shows that she didn't have a desire to return to work as soon as suitable work was available.

[28] So, I find that the Claimant hasn't proven that she wanted to return to work as soon as a suitable job was available.

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

[29] At the hearing, the Claimant said she didn't look for work with another employer. She said she wanted to return to work with her regular employer and so she didn't look for a different job. She also said she didn't return to work with her usual employer the first time they asked her to come back to work. She said she asked for more time off.

[30] So, I find that the Claimant hasn't proven that she was making enough efforts to find a suitable job. This is because she agrees that she wasn't looking for work.

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

[31] I find that the Claimant set personal conditions that unduly limited her chances of returning to work.

[32] The Claimant told the Commission and the Tribunal that she couldn't work because she had to care for her daughter. At the hearing, she said her daughter needs daily care with feeding, moving, and bathing. She provided letters from her daughter's medical caregivers saying that her daughter is at high risk during the pandemic.

[33] The Claimant said her daughter had another caregiver before the pandemic, but the family decided not to have someone come into their home because of the risk of infection.

[34] So, I find that the Claimant had to care for her daughter. She needed to provide daily, complex care. Her daughter's medical team recommended that the Claimant stay home from work to care for her daughter and reduce the risk of a Covid infection. This was a restriction that unduly limited the Claimant's chances of returning to work.

[35] The Claimant also said that she was only willing to work for her regular employer. She said the restaurant was near her home. This allowed her to return home quickly if there was an emergency with her daughter. She said she wasn't looking for work with any other employers.

[36] I understand why the Claimant restricted herself to one employer. But this is a personal condition that also unduly limited the Claimant's chances of returning to work.

[37] So, I find that the Claimant set personal conditions that unduly limited her chances of returning to work.

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

[38] The Claimant hasn't shown that she had a desire to return to work. She didn't make reasonable efforts to find a job and she set personal conditions that unduly limited her chances of returning to work. I find that the Claimant hasn't proven that she was capable of and available for work but unable to find a suitable job.

[39] I understand why the Claimant wasn't available for work. I understand that she had to care for her daughter. But being available for work is an objective test. I can't look at the Claimant's reasons for unavailability. I can only look at the circumstances and decide if she is available for work or not.⁸ Nor can I make any changes to the law, even in sympathetic situations.⁹ You have to be available for work to get EI regular

⁸ *Canada (Attorney General) v Bertrand*, A-613-81.

⁹ *Canada (Attorney General) v Knee*, 2011 FCA 301.

benefits. The Claimant hasn't proven that she was available for work and so she isn't entitled to EI regular benefits.

[40] The Claimant and her family spoke about the financial difficulty they experienced during the pandemic. The Claimant has repeatedly said that she can't repay benefits. Her husband explained their current difficulty with paying rent. I understand that this overpayment would cause this family hardship. I ask that the Commission carefully review the file. Is the Claimant entitled to family caregiver benefits? Can the Commission use subparagraph 56(1)(f)(ii) of the *Employment Insurance Regulations* to write off the overpayment?

Conclusion

[41] I must dismiss the Claimant's appeal. She hasn't proven that she was available for work with in the meaning of the law. So, she isn't entitled to EI regular benefits.

Amanda Pezzutto
Member, General Division – Employment Insurance Section