



Citation: *DC v Canada Employment Insurance Commission*, 2021 SST 817

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:

D. C.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (436349) dated October 12, 2021
(issued by Service Canada)

Tribunal member:

Linda Bell

Type of hearing:

Videoconference

Hearing date:

November 24, 2021

Hearing participant:

Appellant

Decision date:

December 1, 2021

File number:

GE-21-2074

Decision

[1] I am allowing the appeal, in part.

[2] The Claimant has shown that he meets the availability requirements for Employment Insurance (EI) benefits from November 2, 2020, to August 5, 2021. This means he is not subject to a disentitlement during this period.

[3] The Claimant has not proven his availability as of August 6, 2021. This means he is subject to a disentitlement as of August 6, 2021, indefinitely.

Overview

[4] The Claimant was working as a director for the provincial government. He started working from his home shortly after the onset of the global COVID-19 pandemic. In August 2020, the Claimant's employer told him that he had to start working in the office again.

[5] The Claimant asked for accommodations to continue working from home. He provided his employer with a medical assessment form signed by his doctor on August 21, 2020. This form states that the Claimant has a medical condition that requires working from home to avoid COVID.¹

[6] While waiting for his employer to respond to his accommodation request, the Claimant was off work on a scheduled two-week vacation. He returned to work on September 14, 2020. Three days later, on September 17, 2020, his employer dismissed him without cause.

[7] The Claimant applied for regular EI benefits. The Commission started his claim as of November 1, 2020.

[8] In August 2021, the Claimant reported self-employment earnings on his biweekly reports. The Commission conducted a review. It decided that the Claimant wasn't entitled (disentitled) to the EI benefits he had received since November 2, 2020. This is

¹ See pages GD5-2 to GD5-5.

because the Commission determined that he didn't meet the availability requirements for regular benefits. This decision results in a \$21,774.00 overpayment of benefits.

[9] The Claimant appeals to the Social Security Tribunal (Tribunal). He says he was actively looking for suitable work. When he couldn't find a job, he accepted an offer for contract work. This occurred approximately August 5, 2021. He then decided it would be best to continue doing contract work as a self-employed consultant. He also decided to apply for his CPP benefits. This is when he considered himself semi-retired.

Issue

[10] Has the Claimant shown he meets the availability requirements for regular EI benefits?

Analysis

[11] Two different sections of the law require claimants to show that they are available for work. One section requires that a claimant make reasonable and customary efforts to find suitable employment.² Another requires that a claimant must prove that they are capable of and available for work each working day.³

[12] The Commission decided that the Claimant had not met all of the availability requirements. It imposed two retroactive disentitlements, one under each section.

Reasonable and customary efforts to find suitable employment

[13] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.⁴ I have to look at whether his efforts are sustained and whether they are directed toward finding suitable employment (a suitable job).⁵ In other words, the Claimant has to have kept trying to find a suitable job.

² See section 50(8) of the *Employment Insurance Act* (Act).

³ See section 18(1)(a) of the Act.

⁴ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁵ Section 6 of the Act defines what type of employment is not suitable. Section 9.002 of the Regulations lists the criteria for determining what suitable employment is.

- **Suitable employment**

[14] To assess the Claimant's availability, I must first determine what suitable employment is for him. The Act does not define suitable employment. Instead, the law provides criteria I must consider when determining whether employment is not suitable or suitable for the Claimant.⁶

[15] I find that suitable employment for the Claimant is a job that can be done within his medical limitations at a remote location (from home) offering favourable pay or compensation that is usually agreed upon between good employers and their employees. This is what I considered.

- The Claimant has a medical condition that requires him to work from home during the global COVID-19 pandemic.⁷
- The Claimant turns 65 in the spring of 2022.
- The Claimant is well educated with a Master of Education. He completed his doctoral studies so is considered a PhD candidate. He also has ombudsman training.
- The Claimant's work experience includes executive level positions in research, policy, and regulation. He has experience working for private career colleges and as the director of planning, policy, and legislation priority unit with the provincial government.

⁶ Section 6 of the Act states that employment is not suitable for a claimant if: (a) it arises out of a work stoppage from a labour dispute; (b) it is in the claimant's usual occupation and is at a lower rate of earnings or on conditions less favourable than agreed upon between good employers and their employees; or (c) it's not in the claimant's usual occupation and is either at a lower rate of pay or on less favourable conditions than the claimant might reasonably expect to obtain, having regard to the conditions the claimant had in their usual occupation or would have had if they continued to be so employed. Section 9.002 of the Regulations states the criteria for determining suitable employment are: (a) the claimant's health and physical capabilities allow them to commute to the place of work and 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.

⁷ See the medical assessment form at pages GD5-2 to GD5-5.

- The Claimant was working for the provincial government when dismissed without cause. His annual salary was approximately \$127,344.00.⁸
- The Claimant received severance pay totalling \$96,071.00 with conditions. Those conditions stipulate that if he works for any provincial agency, ministry, or crown corporation he will have to repay the severance pay in an amount equal to what he earns during the 9-month period immediately following his last day paid. In this case, the repayment period is from November 2020, to July 2021.

[16] The Claimant says he lives in a city where most executive level jobs are with the provincial government, provincial agencies, or provincial crown corporations. So initially, he was searching for jobs with virtual organizations to work as an ESL tutor or research, or writing jobs that he could work at from home. I accept that these jobs are suitable for the Claimant.

- **Reasonable and customary efforts**

[17] 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:⁹

- assessing employment opportunities
- preparing a resume or cover letter
- contacting prospective employers
- networking

[18] I find that the Claimant has shown he made reasonable and customary efforts to find a suitable job from November 2, 2020, to August 5, 2021. This was before he decided to become semi-retired and collect his CPP.

⁸ This salary is an estimate based on the Claimant's earnings as listed on the Record of Employment (ROE) at page GD3-18.

⁹ See section 9.001 of the Regulations.

[19] The Commission submits that while there is no minimum number of job contacts one has to make while receiving benefits. But one does have to show a continuing attempt to find suitable employment.

[20] The Commission says that the Claimant continued to change his statements. At first, he said he wasn't available for full-time work. He admits that he only made 3 contacts over an 11-month period. Then after learning of the decision and overpayment, he said he has made hundreds, if not thousands, of contacts for suitable employment. He has not provided documentary evidence of any job contacts, even when asked to do so.

[21] I don't agree with the Commission's submission that this is a case where greater weight must be given to the initial spontaneous declarations made prior to the Commission's decision. This is because the Claimant provided a reasonable explanation why it appears that his statements about his job search efforts changed.

[22] The Claimant says that during his first few conversations with the Commission, they never told him they were discussing the entire period of his claim.¹⁰ He thought that they were only talking about his efforts to find work once he declared his self-employment earnings.

[23] When I read the Supplementary Records of Claim, I agree with the Claimant that those initial conversations with the Commission focused on his self-employment earnings and efforts. Those conversations started on August 23, 2021, which is after he started focusing his efforts on finding self-employment work as a consultant. This supports his evidence that he answered questions in the context of when he first became self-employed in early August 2021.

[24] The Claimant agrees that he read and agreed to the rights and responsibilities when completing his application for benefits.¹¹ He says that he did almost everything on the list of job search activities to try to find a job. He says he couldn't afford not to work.

¹⁰ See pages GD3-20 to GD3-21 and GD3-24.

¹¹ See page GD3-10.

He had always planned to keep working but was dismissed without cause. So after several months of not being able to find a job, he decided to become a consultant.

[25] The Claimant admits that he didn't keep detailed records of his job search. He was not able to submit documentary proof listing all of his contacts or job applications. The Claimant explained in detail how he searched for work daily by searching on-line postings. He continued his job search efforts by networking on LinkedIn and through telephone conversations. He also reached out to friends and former colleagues to try to find work. He says these types of activities can't be submitted to the Commission in a document format.

[26] The Claimant says that the Commission didn't ask him to submit a job search list until the October 7, 2021, telephone conversation. He says that he replied that he could submit a list but it would only have one company name on it because that is the only application that he could provide proof in writing. He says the agent told him not to bother submitting the list if it was only going to have one company name on it.

[27] The Claimant says that he was available for and looking for suitable work. He consistently said he could not afford not to work. He admits that it is true he didn't apply for many jobs between November 1, 2020, and August 5, 2021. This is because his medical circumstances made it extremely difficult to find suitable employment during the height of the COVID-19 pandemic.

[28] The Claimant says that while networking with a former colleague in August 2021, he learned of an opportunity to do some contract work. He secured the contract the end of the first week of August. He says shortly after getting this contract he decided to apply for his CPP. He started collecting his CPP in September or October 2021. Then he began to focus his efforts on securing contract work. This is when he considered himself semi-retired and self-employed as a consultant.

- **Reasonable period to find suitable employment**

[29] In cases where a claimant is limiting the type of jobs they are seeking, it is well established that they ought to be provided a reasonable period to explore those

opportunities. After a reasonable period has lapsed, then the claimant would be required to expand their job search criteria.¹²

[30] The Claimant says he did just that. Specifically, when he couldn't find a job, he decided to become self-employed as a consultant. He wasn't receiving a full-time income so he had to supplement his self-employment income. This is when he applied for his CPP and considered himself semi-retired.

[31] I acknowledge that there is no formula to determine a reasonable period to allow a claimant to explore job opportunities. This means that specific circumstances are to be considered on a case-by-case basis.¹³

[32] I recognize that the Claimant didn't submit a job search list to the Commission when it was discussed. However, I do not find that alone meets the requirements to impose a disentitlement because I believe the Claimant when he says the agent told him not to bother submitting it when he told her the list would only have one name on it.

[33] In this case, the economic effects caused by the global COVID-19 pandemic and public health orders in the Claimant's region are such circumstances that should be a consideration when determining the reasonable period to explore suitable job opportunities.

[34] After careful consideration of the evidence, as set out above, I find that the Claimant has proven that his efforts to find a suitable job are reasonable and customary for the period from November 2, 2020, to August 5, 2021. That is the period up until he decided to stop looking for employment and decided to be semi-retired and self-employed.

¹² See *Canada (Attorney General) v Le Duc*, A-134-95, and section 10.4 of the Digest of Benefit Entitlement Principles.

¹³ See section 10.4.1.4 of the Digest of Benefit Entitlement Principles.

Capable of and available for work

[35] Case law sets out three factors for me to consider when deciding whether the Claimant is capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:¹⁴

- a) He wants to go back to work as soon as a suitable job is available.
- b) He has made efforts to find a suitable job.
- c) He hasn't set personal conditions that might unduly (in other words, overly) limit 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] I find that the Claimant has shown that he wanted to go back to work as soon as a suitable job was available from November 2, 2020, to August 5, 2021.

[38] The Claimant has shown that he wanted to return to work. He didn't expect to lose his full-time job after asking for accommodations to work from home during the global COVID-19 pandemic. After several months of not being able to find suitable work as an employee, he decided to become self-employed. He secured his first self-employment contract around August 5, 2021, but that was not enough to sustain him financially. So he applied for his CPP and started receiving those benefits in either September or October 2021.

[39] I believe the Claimant when he says he would have accepted a suitable job prior to August 5, 2021. So, I find the Claimant has shown he wanted to go back to work as soon as a suitable job was available.

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.

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

[40] I find that the Claimant has made enough efforts to find a suitable job from November 2, 2020, to August 5, 2021. I have considered the list of job-search activities given above in deciding this second factor. That list is for guidance only when considering this factor.¹⁶

[41] The Claimant's efforts to find a new job included updating his resume, conducting on-line job searches, networking, and applying for suitable jobs. I set out these reasons above, when looking at whether the Claimant had made reasonable and customary efforts to find a job.

[42] The Claimant's efforts are enough to meet the requirements of this second factor from November 2, 2020, to August 5, 2021. This is because his efforts to find a suitable job were sustained and reasonable up until he decided to become semi-retired and self-employed.

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

[43] I find that the Claimant didn't set personal conditions that might unduly limit his chances of going back to work until August 6, 2021. I find that for the period from November 2, 2020, to August 5, 2021, the Claimant was seeking suitable employment given his age, experience, and medical condition, during the global COVID-19 pandemic.

[44] The Claimant says he didn't set personal conditions because he continued to look for suitable employment. A few months later, when he wasn't able to secure a suitable job, he decided to become self-employed as a consultant.

[45] The Commission submits that the Claimant's initial statements are more credible. This is when the Commission documented that he said he was retired and not willing to

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.

accept full-time work. The Commission doesn't say that the Claimant put any other restriction on his availability, other than restricting to his self-employment or retirement.

[46] I believe the Claimant when he says the Commission's agent erred when documenting their conversations. Upon review of the Supplementary Records of Claim, the Claimant disagrees with several statements as documented by the Commission's agent.¹⁷ He says that the agent never told him he was answering questions for the entire period of his claim. Instead, they spoke about his self-employment earnings so he answered the questions in the context of his self-employment.

[47] I found the Claimant's testimony to be consistent and plausible given the circumstances he presented during the hearing. I believe him when he says it was after several months of looking for work that he secured his first contract. This is when he decided to semi-retire and collect his CPP.

[48] The Claimant demonstrated that he was looking for work and available to do interviews over the telephone and by videoconference from his home, up until August 5, 2021. He continued to network by reaching out to several former colleagues and their contacts. He admits that he stopped looking for a job as an employee as of August 6, 2021, because that is when he got his first contract and decided to become self-employed and semi-retired.

[49] The evidence supports a finding that Claimant didn't set personal conditions that might unduly limit his chances of going back to work, until August 6, 2021.

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

[50] Based on my findings as set out above, I find that the Claimant has shown that he was capable of and available for work but unable to find a suitable job from November 2, 2020, to August 5, 2021.

¹⁷ The dates of these records are August 23, 2021, September 14, 2021, and September 2021. See pages GD3-20 to GD3-25.

Conclusion

[51] The Claimant has shown that he was available for work up until August 5, 2021, within the meaning of the law. This means the disentitlement commences on August 6, 2021, and continues indefinitely until he meets the availability requirements for EI benefits.

[52] This means that I am allowing the appeal in part.

Linda Bell

Member, General Division – Employment Insurance Section