



Citation: *TN v Canada Employment Insurance Commission*, 2021 SST 918

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:	T. N.
Respondent:	Canada Employment Insurance Commission
<hr/>	
Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (423879) dated May 21, 2021 (issued by Service Canada)
<hr/>	
Tribunal member:	Nathalie Léger
Type of hearing:	Teleconference
Hearing date:	July 8, 2021
Hearing participants:	Appellant
Decision date:	July 19, 2021
File number:	GE-21-952

Decision

[1] The appeal is partially allowed. The Tribunal agrees with the Claimant on part of her claim.

[2] The Claimant was working full work weeks from March 1st, 2021 to April 23, 2021. This means that she could not receive Employment Insurance (EI) benefits for that period. For the period that follows, starting on April 23, 2021, I find the Claimant was available and looking for work.

Overview

[3] For the first period in question, the Claimant was involved in a business with a friend selling hair pieces and hair products.

[4] The Canada Employment Insurance Commission (Commission) decided that the involvement of the Claimant in the business was substantial enough to conclude she was working full work weeks for the period in question. As a result, the Commission decided that the Claimant couldn't receive EI benefits. For the second period, the Commission decided that the Claimant has not proven she is available and looking for work as the law requires.

[5] The Claimant disagrees. She argues that she should receive EI benefits. She argues that she was still unemployed even while involved in a business because she was only helping a friend, essentially by doing some intermittent promotion. She also says she has been looking for work regularly and was therefore available for work.

Issues

[6] Was the Claimant's level of involvement so limited that she wasn't actually working full work weeks? Was the Claimant available for work?

Analysis

Issue 1 - Involved in a business

[7] If you are involved in a business, you may not be entitled to EI benefits.

[8] The law says that you can receive EI benefits for each week you are unemployed.¹ A week of unemployment means any week you don't work a full work week.²

[9] Also, if you are involved in a business, the law assumes that you work full work weeks.³ So, you can't receive EI benefits.⁴ It does not need to be officially your business.

Exception if your involvement is limited

[10] There is an exception if your level of involvement in the business is limited.⁵

[11] The exception applies if the Claimant's level of involvement is so limited that a person wouldn't normally rely on that business as their main means of earning a living.⁶

[12] The Claimant has to prove that her involvement was so limited that the exception applies.⁷ 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 her involvement is limited.

Six factors for deciding level of involvement

[13] To decide whether the exception applies, I have to consider the following six factors:⁸

- a) How much time did the Claimant spend on the business?
- b) How much has the Claimant invested in the business, and what are those investments (such as money, property, goods, and resources)?

¹ Section 9 of the *Employment Insurance Act* (Act) sets out this rule.

² See section 11 of the Act.

³ See section 30(1) of the *Employment Insurance Regulations* (Regulations).

⁴ See *Marlowe v Canada*, 2009 FCA 102.

⁵ See section 30(2) of the Regulations. It refers to a claimant being involved to "a minor extent" (in other words, their involvement is limited). Also see *Martens v Canada (Attorney General)*, 2008 FCA 240.

⁶ See section 30(2) of the Regulations and *Martens v Canada (Attorney General)*, 2008 FCA 240.

⁷ See *Canada (Attorney General) v Falardeau*, A-396-85, and *Lemay v Canada Employment Insurance Commission*, A-662-97.

⁸ Section 30(3) of the Regulations sets out these six factors. This decision paraphrases those six factors for plain language.

- c) Financially, has the business been a success or failure?
- d) Was the business meant to be ongoing?
- e) What was the nature of the business?
- f) Did the Claimant intend to and want to find another job quickly?

– **Time spent**

[14] The amount of time that the Claimant spent on the business doesn't show limited involvement. The Claimant has given contradictory evidence on the amount of time that she was spending each week for the business. On March 9th, 2021, the Claimant told the Commission she was spending less than 15 hours per week on the business, while a month later, on April 13, 2021, she stated that she was spending around 30 hours per week on the business.

[15] At the hearing, when asked again how much time she was spending on the business, the Claimant essentially avoided the question, saying she did not know because she was doing everything on her phone. She said it varied over time but that she was posting things on social media multiple times per day. She was not able or willing to estimate how much time that might have represented per week.

[16] I find the Claimant is not credible on this point. I am of the opinion that the Claimant is trying to downplay the importance of her involvement in the business. It has been consistently recognized by the jurisprudence that more weight has to be given to initial declarations that precedes the Commission's decision⁹. In this case, this means the declaration made by the Claimant that she was working a significant amount of time for the business. Therefore, I find her involvement was more than minor in extent.

– **Investments**

[17] The nature and amount of the Claimant's investments (such as money, property, goods, and resources) don't show limited involvement. The Claimant said at the hearing

⁹ *Lévesque c. Canada* (Procureur général) A-557-96

that she invested between 2 000\$ and 5 000\$ of her own money in the business, which is a substantial amount. She also brought expertise for social media and has spent considerable time working for the business. Those statements are consistent with what she had previously told the Commission. This level of investment shows more than minimal involvement in the business.

– **Financial success or failure**

[18] The financial situation of the Claimant's business is not particularly helpful in this case since the business is so young. The Claimant has stated that she made approximately 1000\$ profit but she also said to the Commission that profits were reinvested in the business¹⁰. It is worth noting that no element of proof were given as to the profitability of the business or its total income for the past months. I therefore find this element has no bearing on the conclusion to be reached.

– **Ongoing business**

[19] From the he Claimant's testimony, we can see that the business was meant to be ongoing. But since it was mainly her friend who ran the business, this point has no bearing on the determination of her involvement in the business.

– **Nature of the Claimant's business**

[20] The Claimant's business was selling hair and hair pieces online. The Claimant has testified at the hearing that she usually work in phone stores, but that nothing was opened during the Covid shut-down. This shows limited involvement because it is a completely different work from what she is used to do. Furthermore, the Claimant testified that when she ended her involvement in this business, she was hopping to start working again for a phone store. I find this element points to a limited involvement in the business.

¹⁰ See GD-03-15

– **Intention and willingness to find another job quickly**

[21] The Claimant said¹¹ to the Commission that she was not looking for work while she was involved in the business. She confirmed this at the hearing, but said it was because of the pandemic situation. This doesn't show limited involvement because it lends credibility to the Claimant's assertion that she was intending for this business to become her main source of income¹².

So, was the Claimant's level of involvement limited enough?

[22] The Claimant's level of involvement wasn't so limited that the exception applies. Her intention, at least for a time, was clearly for this business to become her means of earning a living.

[23] Two factors are especially important. Case law says that how much time you spend on the business and whether you intend to or want to find another job quickly are important factors to consider.¹³

[24] With all of this in mind, I find the exception doesn't apply to the Claimant's involvement in the business she was running with her friend.

[25] The Claimant was working full work weeks. This means that the Claimant may not receive benefits from March 1st 2021 to April 23 2021 because these were not weeks where she was unemployed according to the law.

Issue 2 - Available for work

[26] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits from April 23 2021 onwards 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.

¹¹ See GD03-15

¹² GD-03-13 et 15

¹³ See *Charbonneau v Canada (Attorney General)*, 2004 FCA 61.

[27] 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.

Analysis

[28] 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.

[29] 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.¹⁴ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.¹⁵ I will look at those criteria below.

[30] Second, the 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.¹⁶ Case law gives three things a claimant has to prove to show that they are “available” in this sense.¹⁷ I will look at those factors below.

[31] 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.

[32] 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

[33] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.¹⁸ I have to look at whether her efforts were

¹⁴ See section 50(8) of the *Employment Insurance Act* (Act).

¹⁵ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

¹⁶ See section 18(1)(a) of the Act.

¹⁷ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹⁸ 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.

[34] 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:¹⁹

- assessing employment opportunities;
- registering for job-search tools or with online job banks or employment agencies;
- applying for jobs.

[35] The Commission says that the Claimant isn't doing enough to try to find a job. The Commission's decision is only based on the fact that the Claimant has not provided proof of her job search with all the information that was requested by the agent. No analysis of the other factors seems to have been done.

[36] The Claimant was asked by the Commission to provide proof of her job search from April 1st until mid-May²⁰. She partially complied by providing a list of stores where she applied, the date she applied and the status of her application²¹. This list ended at the end of May and did not contain contact information, so the Commission decided it was incomplete²².

[37] The Claimant disagrees. She testified that she is available for work and that she has made continuous efforts to find employment. At the hearing, she testified that although she would prefer working in a phone store since this is where she has worked previously, she is also applying on other job offers. She agreed to send copies of all the job offers she applied for on LinkedIn. Those were received not long after the hearing²³.

¹⁹ See section 9.001 of the Regulations.

²⁰ GD03-20

²¹ GD03-23

²² Gd03-24

²³ See GD07 and GD08.

[38] Those copies show that she has applied consistently on numerous job offers from April 1st onwards²⁴. They also show that the contact information for the employer does not appear on the LinkedIn job offers since all you are required to do is press on “apply” to send your application. But the “screen shot” of the application clearly shows where and when the Claimant applied and also shows if the employer rejected, considered or replied to her application. I find that this information is sufficient to show that the Claimant has proven that her efforts to find a job are reasonable and customary.

Capable of and available for work

[39] 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:²⁵

- a) She wants to go back to work as soon as a suitable job is available.
- b) She has made efforts to find a suitable job.
- c) She didn't set personal conditions that might unduly (in other words, overly) limit chances of going back to work.

[40] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.²⁶

– Wanting to go back to work

[41] As decided above, I find the Claimant has shown that she wants to go back to work as soon as a suitable job is available.

²⁴ GD07 and GD-08 shows the Claimant has applied on more than 75 jobs in the past weeks, in very diverse type of work.

²⁵ 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.

²⁶ 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**

[42] The Claimant has made enough effort to find a suitable job.

[43] 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.²⁷

[44] The Claimant's efforts to find a new job included looking every day on job sites for work and applying on jobs for which she had the qualifications. I explained these reasons above²⁸ when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[45] Those efforts are enough to meet the requirements of this second factor because the Claimant looked everyday for employment opportunities and applied on numerous ones. Her effort were therefore continuous and sustained, which is sufficient to meet this criteria.

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

[46] The Commission has made no submission on that point and I see nothing in the file that could indicate that the Claimant unduly limited her chances of going back to work

[47] I find that the Claimant has not unduly limited her chances.

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

[48] Based on my findings on the three factors, I find that the Claimant has shown that she is capable of and available for work but unable to find a suitable job.

²⁷ 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.

²⁸ See paragraphs 37-38.

Conclusion

[49] I find that the Claimant, from March 1st 2021 to April 23 2021, was working full work weeks, so she wasn't unemployed.

[50] This means that the appeal on this issue is dismissed.

[51] The Claimant has shown that she is available for work within the meaning of the law from April 23 2021 onwards. Because of this, I find that the Claimant isn't disentitled from receiving benefits as of that date.

[52] This means that the appeal on this issue is allowed.

Nathalie Léger

Member, General Division – Employment Insurance Section