Citation: *LG v Canada Employment Insurance Commission*, 2022 SST 455

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (454470) dated February 4, 2022 (issued by Service Canada)

Tribunal member:	Mark Leonard
Type of hearing:	Teleconference
Hearing date:	April 7, 2022
Hearing participants:	Appellant
Decision date:	April 12, 2022
File number:	GE-22-569

Decision

[1] The appeal is dismissed.

[2] The Appellant hasn't shown that she was available for work. This means that she can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits as of October 31, 2021, 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.

[4] I must decide whether the Appellant has proven that she was available for work. The Appellant 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.

[5] The Commission says that the Appellant wasn't available because she did not look for work while on a six-week forced administrative leave of absence from her employer.

[6] The Appellant does not dispute that she did not look for work but claims that she should not have to search for another job because she had a job to which she would be returning.

Issue

[7] Was the Appellant available for work?

Analysis

[8] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits.

[9] 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.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[10] 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.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[11] The Commission decided that the Appellant was disentitled from receiving benefits because he wasn't available for work based on these two sections of the law.

[12] I will now consider these two sections myself to determine whether the Appellant was available for work.

Reasonable and customary efforts to find a job (Section 50(8))

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

[14] I also have to consider the Appellant'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:[6]

- assessing employment opportunities
- registering for job-search tools or with online job banks or employment agencies

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[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See section 9.001 of the Regulations.
[6] See section 9.001 of the Regulations.

- applying for jobs

[15] The Appellant works from home conducting data entry and phone delivered customer service for a large health provider network. The Employer mandated that all employees be fully vaccinated against the Covid-19 virus no later than October 31, 2021.

[16] The Appellant has a neurological condition that limits her mobility. She testified that physicians have previously told her not to receive any vaccinations. She added that she was terrified to receive the vaccine out of concern as to what possible negative side effects it could have on her.

[17] However, faced with losing her job, she received her first dose of the vaccine prior to the October 2021, deadline. The Appellant then had to wait four weeks before she was eligible for her second dose of the vaccine and a further wait of two weeks for it to be deemed fully active.

[18] On October 31, 2021, the Appellant was not in compliance with the Employer's vaccine mandate because she was not fully vaccinated. The Employer placed the Appellant on an unpaid leave of absence pending being fully vaccinated. The Appellant says that she was eligible to return to work on December 8, 2021. I note, however, that she did not do so until December 13, 2021. Essentially, the Appellant was not at work from October 31, 2021, until December 12, 2021, a period of 6 weeks.

[19] The Appellant made an initial claim for benefits effective October 31, 2021. The Commission examined her case and in January 2022, determined that the Appellant had not made any form of job search during the six-week absence from her employer and disentitled her from receiving benefits because she "unavailable" under the Act.

[20] The Commission submits that the Appellant has not proven that she made reasonable and customary efforts to obtain suitable employment. It says that she did not conduct any job search consistent with the requirements of Section 50(8). It says that a job search is a requirement in order to be eligible to receive benefits.

[21] The Appellant confirmed that she did not seek any other employment. She says that it is unfair to a prospective employer to accept a job knowing that she would return to her previous employer.

[22] She added that because of her disability, she would have a difficult time finding employment. She says that she can only type with one hand and speculated that most employers would require her to perform at a higher proficiency.

[23] She offered that the Covid-19 pandemic is a unique circumstance. She says that there were no instructions to claimants informing them that they should conduct a job search during periods of unemployment during the pandemic. She asserted that she was not released from employment because of a shortage of work but simply on leave awaited her fully vaccinated status. She reiterated that she still had her job and a specific date when she would return to work.

[24] She asserts that she should not have to seek other employment given those circumstances.

[25] I disagree with the Appellant.

[26] I find that The Appellant hasn't proven that her efforts to find a job were reasonable and customary. By her own admission, the Appellant did not seek employment while she was unemployed.

[27] The Appellant contends that she should not have to make any efforts to find employment during her leave of absence because she had a specific return to work date.

[28] She elected to await recall by her Employer once she was able to prove her vaccination status. During the six-week period of her unemployment, she had a four-week period wherein she had not received her second shot. Until she had actually received that second dose, there was a period of four weeks wherein her return to work was not a certainty. By electing only to await a recall to work, she would forego making any reasonable and customary efforts to find other suitable employment.

[29] The law is clear. Claimants cannot await being recalled to work. They must seek employment in order to be entitled to benefits.[7]

[30] The Appellant testified that she was notified by email in September 2021 that she needed to be fully vaccinated no later than October 31, 2021, to remain working. I am satisfied that the employer provided sufficient advanced notice to her in order that she could be fully vaccinated before the deadline and avoid an interruption in her employment.

[31] Once notified, the Appellant had two choices. One was to immediately begin the vaccination process and meet the deadline or, the other, to seek an exemption from a health professional.

[32] The Appellant says that she contacted three physicians, her general practitioner, her surgeon, and her neurologist. She testified none provided her with an exemption. She speculated that the reason was that they were fearful of losing their jobs (licences) if they did so.

[33] I cannot accept the Appellant's speculation in this regard. I am not convinced that a health care professional would refuse an exemption if they were satisfied that the vaccination posed a health risk to the Appellant. I find it more likely that they simply could not conclude that the risk outweighed the benefit given her specific circumstances and declined to provide the exemption.

[34] Therefore, I find that the Appellant's decision to delay the start of her vaccination was a result of her own personal concerns over its safety. The Appellant became unemployment by her own actions and not because of the unique circumstances created by the Covid-19 pandemic.

[35] EI benefits are paid to those who find themselves unemployed through no fault of their own and not to provide benefits to those who create their own unemployment when they had other reasonable alternatives to doing so. In this case, the Appellant created

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[7] See (*De Lamirande v. Canada (Attorney General),* 2004 FCA 311)

her own unemployment when she failed to meet her employer's vaccination requirements by the deadline and had sufficient time to do so.

[36] The Appellant also offered that her disability would severely restrict any employment she might have found. She testified that she conducts data entry and telephone-related customer service from home. She says that her Employer accommodates her physical requirements but she suspects that other employers would not be willing to hire her given her condition. She explained that her disability restricts her capacity to input data to one hand only.

[37] I am not satisfied the disability of the Appellant amounts to a lack of capacity to work at her job or similar jobs. The Appellant was able to perform her duties consistent with her regular or usual employment. The reason she was on leave from her job was as a result of not meeting a condition of employment imposed by the employer, not a matter of being incapable of performing her usual duties.

[38] I therefore extend this capability to include jobs of a similar nature in data entry and telephone customer service. I find that the Appellant could have made reasonable and customary efforts to find similar employment to that of her current job and if offered a position, she could have then evaluated whether the job functions were within her scope of capability.

Capable of and available for work (Section 18(1))

[39] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[8]

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.

[8] 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.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[40] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[9]

Wanting to go back to work

[41] The Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available.

[42] The Commission says that during the period of her unemployment the Appellant did not have a desire to return to the labour market other than when she would return to work for her former employer.

[43] The Appellant confirmed she was not interested in finding other employment and did not think she should have given her anticipated return to her employer. She did not believe it was fair to a prospective new employer to accept a job then within a short period return to her previous employer.

[44] In examining the attitude and conduct of the Appellant, I am convinced that she was not interested in finding employment to mitigate her reliance on EI benefits. Her decision when to start the vaccination process placed her in a situation where she could not work. Then, when placed on leave, she was only willing to return to her employer once her vaccination status was achieved.

[45] This does not demonstrate a desire to work as soon as she might otherwise have done had she made efforts to find other suitable employment.

[9] 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

[46] By her own admission, the Appellant made no efforts to find employment. There is no point to looking at sufficiency of her efforts when no attempt was made to find other suitable employment.

[47] As I have noted above, the Appellant could not simply await a return to her old job once she met the employer's condition of vaccination. To be eligible for benefits, she was required to conduct a job search. The Appellant may have had a greater challenge obtaining a new job, but that did not exempt her from making the attempt.

[48] Clearly, no efforts at finding other employment are insufficient to meet the requirements of this second factor.

Unduly limiting chances of going back to work

[49] The Appellant did set personal conditions that unduly limited her chances of going back to work.

[50] When the Appellant decided that she would await a return to her old job once she met the employer's vaccine requirements, she established a personal condition. It eliminated the prospect of starting a required job search. She testified that returning to her employer was her best option because she could perform the work, they accommodated her disability and she would only be unemployed for a short period with a set return date. Nevertheless, it was not her only option.

[51] I find that the Appellant did set a personal condition when she concluded that a return to her old job was her best and only option. This unduly limited her chances of finding other suitable employment.

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

[52] Based on my findings on the three factors, I find that the Appellant hasn't shown that she was capable of and available for work but unable to find a suitable job.

[53] The Appellant alluded to the fact that she was unaware that she needed to be seeking employment in order to be eligible for benefits. She claims that information regarding the obligations surrounding availability is not clearly communicated by the Commission. There is a link that leads to a comprehensive list of rights and responsibilities included in the initial claim for benefits completed by all claimants. Being unaware of these responsibilities is not a sufficient reason to grant benefits.

[54] The Appellant also offered that she had paid into the EI program over her entire working life and that now that she was in need, she is being denied benefits. Having paid into the EI program does not confer an entitlement to benefits. Availability is one of the statutory eligibility requirements that must be met in order to receive them.

Conclusion

[55] The Appellant hasn’t shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant can’t receive EI benefits for the period from October 31, 221 to December 13, 2021.

[56] This means that the appeal is dismissed

Mark Leonard
Member, General Division – Employment Insurance Section