



Citation: *EP v Canada Employment Insurance Commission*, 2022 SST 614

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

Decision

Claimant: E. P.
Commission: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (457078) dated February 7, 2022
(issued by Service Canada)

Tribunal member: Audrey Mitchell
Type of hearing: Teleconference
Hearing date: April 20, 2022
Hearing participant: Claimant
Decision date: May 2, 2022
File number: GE-22-801

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant.

[2] The Claimant hasn't shown that she is 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 Claimant is disentitled from receiving Employment Insurance (EI) regular benefits as of October 25, 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 Claimant has proven that she is 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 is available for work.

[5] The Commission says that the Claimant isn't available because she isn't willing to leave her current job to accept a full-time job.

[6] The Claimant disagrees and states that she tried to look for other work, but hours of work at other jobs conflicted with her current job.

Issue

[7] Is the Claimant 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 Claimant 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 Claimant was disentitled from receiving benefits because she isn’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 Claimant is available for work.

Reasonable and customary efforts to find a job

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

[14] 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:⁶

- assessing employment opportunities
- networking
- contacting employers who may be hiring

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.

[15] The Commission says that the Claimant isn't doing enough to try to find a job.

[16] The Commission states that they disentitled the Claimant under section 50 of the Act along with sections 9.001 of the Regulations for failing to prove her availability for work. In their submissions, they say that they may require a claimant to prove that they are making reasonable and customary efforts to find suitable employment.

[17] The Commission's notes do not reflect that they asked the Claimant to prove her availability by sending them a detailed job search record.

[18] I find a decision of the Appeal Division on disentitlements under section 50 of the Act persuasive. The decision says the Commission can ask a claimant to prove that they have made reasonable and customary efforts to find a job. They can disentitle a claimant for failing to comply with this request. But they have to ask the claimant to provide this proof and tell the claimant what kind of proof will satisfy their requirements.⁷

[19] I do not find that the Commission asked the Claimant to give them her job search record to prove her availability. For this reason, I do not find that she is disentitled under this part of the law.

Capable of and available for work

[20] 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:⁸

- 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 hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

⁷ *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688

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.

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

– **Wanting to go back to work**

[22] The Claimant has shown that she wants to go back to work as soon as a suitable job is available.

[23] The Claimant works as a cash supervisor for a community gaming and entertainment company. She has worked there full-time for eight or nine years. The Claimant's place of work was closed temporarily more than once due to the pandemic. For this reason, she received the Canada Emergency Response Benefit, which turned into EI benefits.

[24] In her notice of appeal, the Claimant said that she receives pension benefits of \$1,000 a month, but can't afford to live on this amount of money. She says that for this reason she can't retire.

[25] The Claimant testified that whenever her place of work reopened during the pandemic, she was one of the first to be called back to work.

[26] I accept as fact that the Claimant wants to work because she has to. She has worked part-time recently, and testified that in the three weeks before the hearing, she had returned to working full-time at her job. Even though the Claimant didn't make much effort to find another job, which I'll address below, I find that she has shown that she wants to go back to work as soon as a suitable job is available.

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

[27] The Claimant hasn't made enough effort to find a suitable job.

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.

[28] 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.¹⁰

[29] When she spoke to the Commission in February 2022, the Claimant said she wasn't applying for jobs because she could only be available around her current job. She said that she is not interested in giving up her part-time job to accept full-time work, and was not applying for other part-time jobs.

[30] I asked the Claimant about what the Commission's notes from February 2022 say. She agreed that she didn't want to give up her job. She said that she went to clothing stores to look for work, but they interfered with the job she had. She added that she has a medical condition that makes it difficult for her to grip and lift. The Claimant said for example, that at Tim Hortons, employees have to be able to lift 20 to 40 pounds, which she can't do.

[31] I asked the Claimant what she did to find work, keeping in mind the list of job-search activities listed in the Regulations. The Claimant said that she sent résumés to two retail stores in September or October 2021, but didn't get an answer back. She said that she asked some of her co-workers, but they told her it's impossible to find a full-time job.

[32] The Claimant said she went to a gas station where she buys gas about two months before the hearing, and before that also. She said that the owner said that they were hiring for Friday and Saturday. But the Claimant said she wouldn't give up her job because she knew she would go back to full-time work there after COVID-19. The Claimant said she hadn't applied for any other jobs because there weren't jobs anywhere.

[33] I find that the Claimant did make efforts consistent with the activities listed in the Regulations to try and find work. These include talking to friends, talking to a potential

¹⁰ 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.

employer, and applying for two retail jobs. However, I don't find that this is enough in the six months since the Claimant applied for EI benefits.

[34] The Commission's notes reflect that when they spoke to the Claimant in February 2022, they found 639 jobs on Job Bank within an hour's commute from the Claimant's home. Yet the Claimant testified about speaking to only one potential employer around that time. I am not satisfied based on her evidence that she has made enough effort to find a suitable job.

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

[35] The Claimant has set personal conditions that might unduly limit her chances of going back to work.

[36] The Commission says the Claimant wasn't willing to leave her current job to accept a full-time job. They say she also didn't want to accept a second part-time job because it might conflict with her job.

[37] The Claimant says she didn't think it was realistic to quit her job to travel to work up to 200 kilometers for a minimum wage job, especially with the cost of gas.

[38] The Commission's notes show they told the Claimant that the jobs they found were within an hour's commute from her home. In spite of the Claimant's response above, I don't find it reasonable to conclude that all of the 639 jobs the Commission identified were 200 kilometers from her home and paid minimum wage. I don't find from the Claimant's evidence that she pursued any of those jobs. I find that by not doing so, she may have limited her chances of returning to full-time work.

[39] In addition, I find from the Claimant's testimony that she was waiting to return to full-time hours at her current job. She confirmed at the hearing that she wouldn't give up her job to accept a full-time job. I understand this since the reason for the temporary closure of her place of work is the unusual circumstance of the pandemic. However, I find that this means that the Claimant may have limited her chances of returning to full-time work.

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

[40] 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.

[41] The Claimant testified about the \$1,113 overpayment that resulted from the Commission's decision that she isn't entitled to EI benefits. She said that she is upset because the Commission wants her to repay these benefits, but it wasn't her fault.

[42] I sympathize with the Claimant. However, the law says that a claimant who has received benefits to which they are disentitled has to repay them.¹¹ While I sympathize with the Claimant's situation, I can't change the law.¹²

Conclusion

[43] The Claimant hasn't shown that she is available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits.

[44] This means that the appeal is dismissed with modification. For clarity, I don't find that the Claimant is disentitled under subsection section 50 of the Act. However, she is disentitled under section 18 of the Act.

Audrey Mitchell

Member, General Division – Employment Insurance Section

¹¹ See section 44 of the Act.

¹² See *Pannu v Canada (Attorney General)*, 2004 FCA 90.