



Citation: *CO v Canada Employment Insurance Commission*, 2022 SST 622

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

Decision

Appellant: C. O.
Witness: A. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (441645) dated December 9,
2021 (issued by Service Canada)

Tribunal member: John Noonan

Type of hearing: Videoconference
Hearing date: February 28, 2022
Hearing participants: Appellant
Appellant's Witness

Decision date: March 7, 2022
File number: GE-22-269

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, C. O., a former worker in NL, was upon reconsideration by the Commission, notified that it was unable to pay her Employment Insurance benefits from August 15, 2021 as she had not proven her availability for work. because she had not proven that she was seeking and available for full time employment, which means she had not proven her availability for work, a condition of being eligible to receive benefits. The Appellant maintains she left work due to health reasons, and is unable to return due to a knee injury. She explained she is able to do any job which does not require her to be standing all day, or lifting heavy objects (GD3-24 to GD3-26). The Tribunal must decide if the Appellant has proven her availability pursuant to sections 6, 18 and 50 of the Employment Insurance Act (the Act) and sections 9.001 and 9.002 of the Employment Insurance Regulations (the Regulations).

Issues

[3] Issue # 1: Was the Appellant available for work?

Issue #2: Was she making reasonable and customary efforts to obtain work?

Issue #3: Did she set personal conditions that might unduly limit her chances of returning to the labour market?

Analysis

[4] The relevant legislative provisions are reproduced at GD-4.

[5] In order to be found available for work, a claimant shall: 1. Have a desire to return to the labour market as soon as suitable employment is offered, 2. Express that desire through efforts to find a suitable employment and 3. Not set personal conditions that might unduly limit their chances of returning to the labour market. All three factors shall be considered in making a decision. **(Faucher A-56-96 & Faucher A-57-96)**

Issue 1: Was the Appellant available for work?

[6] No.

[7] In this case, by the Appellant's statements and submissions, she was not seeking full time work except with the only proviso that she be physically able to perform the duties involved due to her ongoing medical issues, the inability to push, pull, stand for more than one hour per shift for a maximum of 15 – 20 hours per week. She added that she cannot perform "sitting down office work" as she has no training with computers, cash machines, etc.

[8] The Appellant, through her affirmed testimony at her hearing, testified she was not continually seeking full time employment. She was interviewed at Home Depot but was found to be unsuitable for the position due to her lack of computer skills. Tim Hortons was unable to accommodate her desire to sit while cleaning tables and A and W was also unable to accommodate the physical restrictions as well as the time restrictions.

[9] Later during the hearing, the Appellant testified that, other than Sobey's, she never informed other employers about her physical limitations. This statement is negated by her testimony that she sought accommodation at Tim Hortons and A and W.

[10] The Appellant is still on the call back list at Sobey's, pays her medical insurance premiums there and will be recalled once her knee replacement surgery is completed and she is medically cleared to return.

[11] I find that the actions, or lack of, on the part of the Appellant do not show a sincere desire to return to the labour market as soon as suitable full time or any employment is offered.

Issue 2: Was she making reasonable and customary efforts to obtain work?

[12] No.

[13] As per her submissions and testimony at the hearing, the Appellant has not been conducting a comprehensive job search.

[14] The Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment other the three employers noted above.

[15] I find that the Appellant has not shown that she was making reasonable and customary efforts to obtain suitable employment.

[16] The key term here is "suitable". Her lack of a continuous search has resulted in her not obtaining gainful employment in which she can fulfill the job requirements.

[17] The Court held that the burden on the claimant to prove availability is a statutory requirement of the legislation that cannot be ignored. In order to obtain employment insurance benefits a claimant must be actively seeking suitable employment, even if it appears reasonable for the claimant not to do so. **Canada (AG) v. Cornelissen-O'Neil, A-652-93; De Lamirande v. Canada (AG), 2004 FCA 311**

Issue 3: Did she set personal conditions that might unduly limit her chances of returning to the labour market?

[18] Yes.

[19] Again, the Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment.

[20] She was not actively searching for employment during the period in question, due to her physical limitations and her self described, inability to do "sitting down office work". This was a personal choice on her part.

[21] I find that the Appellant has set personal conditions which unduly limited her chances of finding and accepting full time employment, a requirement of being eligible to receive benefits.

[22] By itself, a mere statement of availability by the claimant is not enough to discharge the burden of proof. **CUBs 18828 and 33717**

[23] I find the Appellant, by her submissions and actions, has not met the burden of proof required to show she was in fact available for full time work.

[24] While I sympathize with the Appellant's situation I must consider the facts and apply the statutory requirements and cannot ignore, refashion, circumvent or rewrite the Act, even in the interest of compassion (**Canada Attorney General v. Knee, 2011 FCA 301**).

Conclusion

[25] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that she was not available for work and as such the appeal regarding availability is dismissed.

John Noonan
Member, General Division – Employment Insurance Section