



Citation: *TR v Canada Employment Insurance Commission*, 2022 SST 825

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

Decision

Appellant: T. R.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (462615) dated April 22, 2022 (issued by Service Canada)

Tribunal member: Catherine Shaw
Type of hearing: Teleconference
Hearing date: June 14, 2022
Hearing participants: Appellant
Appellant's spouse
Decision date: June 21, 2022
File number: GE-22-1604

Decision

[1] The appeal is dismissed.

[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 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 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 the Claimant wasn't available because she was waiting to be recalled to her previous job and wasn't making enough efforts to show that she wanted to find suitable work as soon as she could.

[6] The Claimant disagrees with the Commission's decision. She was on a leave of absence due to her employer's vaccine mandate. She wanted to return to work but was also looking for other suitable jobs before she was recalled.

Matter I had to consider first

[7] The Claimant has two separate appeal files. I chose to hear both appeals in the same hearing in the interest of proceeding as informally and quickly as circumstances, natural justice, and fairness permit.

[8] However, I did not join the appeals. I am only able to join appeals if a common question of law or fact arises in the appeals and no injustice is likely to be caused to any

party.¹ In this case, the two appeals do not share a common question of law or fact. As such, I will issue two separate decisions.

Issue

[9] Is the Claimant available for work?

Analysis

[10] 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.

[11] 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.² The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.³ I will look at those criteria below.

[12] 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.⁴ Case law gives three things a claimant has to prove to show that they are “available” in this sense.⁵ I will look at those factors below.

[13] 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.

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

¹ See section 13 of the *Social Security Tribunal Regulations*.

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

³ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁴ See section 18(1)(a) of the Act.

⁵ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

Reasonable and customary efforts to find a job

[15] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.⁶ I have to look at whether her efforts were 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.

[16] 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:⁷

- assessing employment opportunities
- preparing a résumé or cover letter
- applying for jobs

[17] The Commission says that the Claimant didn't do enough to try to find a job. It provided notes of a conversation it had with the Claimant on April 6, 2022. These notes indicate that the Claimant had applied for a job as a caregiver and a couple of other odd jobs. She said that she wouldn't want to start a permanent job because she wants to return to her work.⁸

[18] The Claimant disagrees. She was available to return to work to her employer. She was also looking for other jobs that she could do while waiting to be recalled.

[19] The Claimant was employed as a customer service agent at an airline. She was placed on an unpaid leave of absence as of October 30, 2021, due to the employer's mandatory vaccination policy.

[20] The Claimant said that she put together a resume after she was placed on leave. She looked for work online by searching Kijiji and social media groups for unvaccinated people on Signal and Telegram. She also spoke with friends about jobs.

⁶ See section 9.001 of the Regulations.

⁷ See section 9.001 of the Regulations.

⁸ See GD3-32 to GD3-33.

[21] The Claimant applied for some odd jobs. In April 2022, one of her friends told her about a caregiving job in a private home. The client wanted someone who was unvaccinated to care for them. She accepted the job and worked for a couple of weeks before the client passed away.

[22] The Claimant said she remained available for her employer to call her back to work. She saw in the news that some employers had dropped their mandatory vaccination policies and recalled unvaccinated employees to work. She thought she might be recalled to her job at any time.

[23] The Claimant hasn't proven that her efforts to find a job were reasonable and customary.

[24] The Claimant's testimony shows that she engaged in several job-seeking activities. However, her job applications were very limited. She only applied for a couple of jobs since October 31, 2021. Such a limited search does not support that she made the broad and sustained search effort described in the *Employment Insurance Regulations*. Therefore, I find the Claimant has not shown that she made reasonable and customary efforts to find a suitable job.

Capable of and available for work

[25] 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:⁹

- 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.

⁹ 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] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁰

– **Wanting to go back to work**

[27] The Claimant hasn't shown that she wants to go back to work as soon as a suitable job is available.

[28] The Claimant was placed on an unpaid leave of absence from her job as of October 30, 2021.

[29] The Claimant looked for other work while she was suspended. But, she wasn't looking for a permanent job because she wanted to return to her job. Her employer had a mandatory vaccination policy that was preventing her from returning to work, but she hoped that would be lifted.

[30] A desire to go back to work has to be sincere and demonstrated by looking at the Claimant's conduct.

[31] The Claimant's job search efforts do not support that she was trying to find a job as soon as possible. I believe that the Claimant wanted to return to her job, and that she was willing to work in a temporary job until that happened. But, by only applying for a few odd jobs, I find that she hasn't shown that she wants to go back to work as soon as a suitable job is available.

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

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

[33] 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.¹¹

¹⁰ 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.

¹¹ 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.

[34] The Claimant's efforts to find a new job included looking for job postings on Kijiji and social media groups dedicated to unvaccinated workers. She spoke to her friends, had a resume prepared, and applied for a caregiver position and a couple other odd jobs.

[35] These efforts are not enough to meet the requirements of this second factor because the limited number of jobs applications does not show that she had a desire to return to the labour market as soon as a suitable job was available.

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

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

[37] The Commission said the Claimant was overly limiting her chances of going back to work by waiting to be recalled to her employment.

[38] At the hearing, the Claimant said that she wasn't making "major efforts" to find a job because she was on a leave of absence and was hoping to be recalled to her job.

[39] I understand that the Claimant wanted to return to her job. But, claimants can't wait to be called in to work; they must look for a job in order to be entitled to benefits.¹² The Claimant statements that she wasn't looking for a permanent job and wasn't making major efforts to find other work indicate that she was limiting her chances of going back to work because she was waiting to be recalled to her employment. So, I find this is a personal condition the Claimant had that might unduly limit her chances of returning to the labour market.

[40] The Claimant also said that she was only able to apply for jobs that didn't require employees to be vaccinated against COVID-19. The Claimant wasn't vaccinated and wasn't willing to be vaccinated for several reasons. She and her spouse testified that

¹² See *De Lamirande v Canada (Attorney General)*, A-598-03

this was a major barrier to finding work. She stated that the majority of job postings required employees to be vaccinated.

[41] I understand that the Claimant didn't want to be vaccinated. I recognize that the Claimant had good personal reasons for not wanting to get the COVID-19 vaccine. But, regardless of the Claimant's reasons, she admitted that the inability to accept a job that required the COVID-19 vaccination put serious limits on her chances of returning to work.

[42] The Federal Court of Appeal given guidance in cases where claimants have good reasons for being unable to accept some work:

The question of availability is an objective one—whether a claimant is sufficiently available for suitable employment to be entitled to [Employment Insurance] benefits—and it cannot depend on the particular reasons for the restrictions on availability, however, these may evoke a sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the lack of it.¹³

[43] The Claimant's choice not to get vaccinated was a barrier that didn't allow her to apply or accept the majority of job posting that she saw. This is a personal condition that she has which unduly limits her chances of going back to work.

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

[44] Based on my findings on the three factors, I find that the Claimant hasn't shown that she is capable of and available for work but unable to find a suitable job. This is because she wasn't make enough efforts to find work as of October 31, 2021.

¹³ See *Attorney General of Canada v Bertrand*, A-613-81

Conclusion

[45] 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.

[46] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section