Citation: *SG v Canada Employment Insurance Commission*, 2022 SST 697

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. G.
Representative:	J. V.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (388940) dated March 31, 2020 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Videoconference
Hearing date:	May 5, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	July 27, 2022
File number:	GE-20-1286

Decision

[1] The appeal is allowed.

[2] The Appellant has proven she was available for work from June 1, 2017 until the end of her claim. This means she is **not** disentitled to Employment Insurance (EI) benefits during this period.

Overview

[3] The Appellant was employed as an esthetician until the spa she worked at went bankrupt. She started a claim for regular EI benefits and received 30 weeks of benefits, from January 29, 2017 to September 2, 2017[1].

[4] In July 2017, the Appellant incorporated a business to provide esthetics services. The Respondent (Commission) investigated whether she was available for work when she was starting a business while on claim.

[5] A claimant must be available for work in order to receive regular EI benefits. Availability is an ongoing requirement. This means that a claimant must be searching for full-time employment and cannot impose personal conditions that could unduly restrict their ability to return to work.

[6] The Commission decided that the Appellant was not entitled to receive EI benefits as of June 1, 2017 because she was focusing on setting up and working at her business and did not prove her availability for work. The Commission imposed a retroactive disentitlement on her claim starting from June 1, 2017, which created an overpayment of EI benefits that she was asked to repay[2].

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[1] At GD3-17, the Commission's representative says that the Appellant was paid 30 weeks of EI benefits from January to September 2017. Since her claim was started as of January 29, 2017, and she had to serve a 2-week waiting period before the 30 weeks of payments could start, her claim would end 30 weeks after the waiting period. By my calculations, this means her claim ended on September 2, 2017. The Appellant also said that her claim ended on September 2, 2017 (see GD6-29).
[2] See the February 5, 2020 decision letter at GD3-22 to GD3-23. The Notice of Debt was not included in the reconsideration file.

[7] The Appellant asked the Commission to reconsider. She said she was looking for work, but most of the employers wanted sub-contractors - not employees. She also said that her business wasn't incorporated until July 27, 2017 and she didn't have any clients until October 2017 (after her claim ended), so she was always ready and able to work while on claim.

[8] The Commission was not persuaded and maintained the disentitlement on her claim. The Appellant appealed to the Social Security Tribunal (Tribunal).

[9] I have to decide if the Appellant has proven that she was available for work from June 1, 2017 until the end of her claim[3]. She must prove this on a balance of probabilities. This means she has to show it is more likely than not that she was available for work between June 1, 2017 and September 2, 2017.

[10] The Commission says the Appellant's main focus was setting up and working at her business, rather than being available for other work. The Commission says the Appellant was not available because she was not making efforts to find a suitable job and was restricting herself to working at her business.

[11] The Appellant says she was always looking for and willing to accept full-time employment. She says she actively looked for work and applied for jobs in her field (esthetics) and beyond (based on her other qualifications). She only incorporated because the spas she was applying to wanted sub-contractors – not employees. She needed to do something because she was still unemployed after nearly 6 months of searching for work. She hoped that incorporating would enable her to start working in her field again. And even after she did that, she continued applying for jobs.

[12] For the reasons set out below, I agree with the Appellant that she was available for work from June 1, 2017 until the end of her claim.

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[3] The disentitlement imposed in the decision letter (at GD3-22) has a start date (June 1, 2017), but no end date. This is an indefinite disentitlement, which means it runs continuously until the end of the Appellant's claim.

Preliminary Matters

a) Issue under Appeal

[13] From my review of the reconsideration file, there appears to have been an investigation by the Commission about the extent to which the Appellant was involved in her business while on claim[4].

[14] That is not the issue before me. As the Commission points out in its submissions, this is not why the Appellant was disentitled to EI benefits[5]. She was disentitled to EI benefits because the Commission determined she was not available for work while on claim, starting from June 1, 2017.

[15] I agree with the Commission that the issue on this appeal is whether the Appellant has proven her availability for work from June 1, 2017 until the end of her claim. That is the only question I will consider.

b) Post-hearing Documents

[16] At the hearing, the Appellant referred to a letter she sent to the Commission on November 20, 2019 setting out her job search efforts while on claim.

[17] This letter was not included in the reconsideration file provided by the Commission for this appeal. But it is relevant to the decision under appeal, so I agreed to accept a copy of this letter as a post-hearing document that would be considered when making my decision. I also agreed to accept summaries of parts of the testimony from the hearing that related to the start-up of the Appellant's business.

[18] The Appellant filed the agreed upon post-hearing documents immediately following the hearing on May 5, 2022 (GD6). The documents were shared with the

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[4] The law says you can receive EI benefits for each week you are unemployed. A week of unemployment means any week you don't work a full work week. But if you are self-employed **or involved in a business** that you own, **the law assumes that you work full work weeks in your business**. This means you are *not unemployed* and, therefore can't receive EI benefits. However, there is an exception to this presumption if your level of involvement in the business is limited. If a claimant proves that their level of involvement is so minor in extent that a person wouldn't normally rely on that self-employment as their main means of earning a living, than they may be entitled to receive EI benefits.
[5] At GD4-2.

Commission on May 9, 2022, and the Commission was given until May 17, 2022 to file any additional submissions it wished to make in response to them. On May 16, 2022, the Commission gave notice it had no additional representations.

[19] No other documents have been filed with the Tribunal by either party as of the date of the decision.

[20] As the Commission has had a fair opportunity and a reasonable amount of time to respond to the post-hearing documents, I am proceeding to issue this decision.

Issue

[21] Was the Appellant available for work from June 1, 2017 until the end of her claim for EI benefits?

Analysis

[22] To be considered available for work for purposes of regular EI benefits, the law says the Appellant must show that she is capable of, and available for work and unable to find suitable employment[6] .

[23] The Federal Court of Appeal has said that availability must be determined by analyzing 3 factors:

a) the desire to return to the labour market as soon as a suitable job is offered;

b) the expression of that desire through efforts to find a suitable job; and

[6] Section 18(1)(a) of the *Employment Insurance Act* (EI Act). The Commission says it used ***both*** sections 18 and 50 of the EI Act to disentitle the Appellant to EI benefits. But I do not think the Commission has proven that it used section 50. I see no evidence that the Commission asked the Claimant about her job search efforts or requested proof she was making reasonable and customary efforts to find a job **while she was on claim**. There is also no evidence that the Commission told the Claimant that she wasn't making reasonable and customary efforts to find a job or explained why her efforts were insufficient – **prior to imposing the disentitlement on her claim**. Therefore, I will not consider section 50 of the EI Act in my analysis, and will limit my consideration to whether the Claimant should be disentitled under section 18 of the EI Act.

c) not setting personal conditions that might unduly limit the chances of returning to the labour market[7] .

[24] These 3 factors are commonly referred to as the "*Faucher* factors", after the case in which they were first laid out by the court. When I consider each of these factors, I have to look at the Appellant's attitude and conduct[8].

Testimony at the Hearing

[25] The Appellant was represented at her hearing by her accountant. I will refer to her as accountant as "Joan". Since Joan was involved in the incorporation of the Appellant's business, she was also a witness for the Appellant. They testified jointly[9], so I will summarize their collective testimony below.

[26] The Appellant and Joan testified that:

- The Appellant was employed as an esthetician at a local spa when her employer "went bankrupt".
- She started applying for jobs in esthetics right away, both on-line and by going door-to-door to esthetician services, salons and spas.
- She tried very hard to find a job. She was looking for "anything" for work – it didn't have to be a spa.
- Her job search took advantage of her "many other qualifications". She has degrees in chemistry and a certification to work as an insurance agent. She also has experience "working in offices".
- She applied to Canada Post at the start of February 2017. Throughout February and March 2017, she was involved in an intensive candidate selection process

[7] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.
[8] See *Canada (Attorney General) v. Wiffen*, A-1472-92.
[9] By this I mean they did not testify in sequence, one after another. The Tribunal's informal process allows for a representative who is also a witness to assist and supplement an Appellant's testimony.

for a job with Canada Post. She spent 2 months doing on-line training modules and exams, and attending interviews with various Canada Post officials. But “in the end”, they did not offer her a position.

- During this same period, she also applied on-line to positions advertised by RBC and Scotiabank.

- And she was contacted by the owner of the spa she had been working at. This person was going to open a spa at a different location and wanted the Appellant to come to work there. But “in the end”, the owner had problems with their contractor and “it didn’t work out”.

- In May she also started going around in-person to various bank branches and other businesses in her area and dropped off resumes.

- And she continued to apply for esthetics positions at spas throughout April, May, June, July, August and September 2017.

- But a lot of esthetics services and spas don’t want to hire employees. They have moved to the “gig economy”. They all want to hire self-employed contractors so they don’t have to pay any benefits or liability insurance.

- She went to her friend, Joan, who was also an accountant, and asked Joan, ‘what am I supposed to do? And how can I help myself to find a job because I need to work?’

- Throughout her working life, she had always been an employee.

- But none of the spas she was applying to were willing to hire her as an employee. And she didn’t know anything about the rules or regulations for being self-employed or “opening a corporation”.

- Joan recommended that she incorporate a business – not so that she could work at home, but for “liability purposes”. A lot of the spas she was applying to told

her she would be required to “carry the burden” of her own limited liability insurance. This would help her to satisfy that condition.

- Joan explained what would be involved and the Appellant decided ‘OK, let’s do something because I need to work’.

- They started the incorporation process in July 2017[10].

- But she still kept applying for jobs. In July she dropped off resumes at a number of places, and applied to X in X and X in X.

- And with her background in chemistry, she also applied to “a couple of pharmaceutical jobs” in August 2017, including X, a pharmaceutical company in X.

- In September 2017 she applied to another spa, and to X, “which is our local hydro company”, as a customer service rep.

- She did not keep a contemporaneous record of her job search efforts. She did not know this was required[11].

- But she did respond to the Commission’s November 13, 2019 request for a record of her job search. On November 20, 2019, she sent the Commission a letter with a list of places she applied to while on claim[12].

- There were no restrictions on the days of the week or the hours she could work. Her 2 kids were in University, so she didn’t need childcare.

- She also had her own vehicle, so she could commute to work as needed.

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[10] The date of incorporation was July 27, 20217.
[11] I explained to the Appellant that this requirement is set out in the application for EI benefits as one of the responsibilities of claimants.
[12] There is no record of this in the reconsideration file (GD3) submitted by the Commission for this appeal. At the hearing, the Appellant confirmed she had a copy of the letter, and I agreed to accept it as a post-hearing document. It is at GD6-29. The Commission was given a copy of the November 20, 2019 letter (and the other post-hearing documents I agreed to accept) and made no representations in response.

- She continued to apply for jobs after she incorporated her business, and did not restrict her job search efforts to focus on her self-employment.

- She always wanted to work and never put any limits or conditions on that.

[27] I referred the Appellant to the Investigation Information Sheet at GD3-17, and asked her to explain the difference between what the Service Canada representative noted (namely, that the Appellant said she didn't look for work and had no job search record because she was focusing on building her business) – and her testimony today (namely, that she was actively seeking employment while on claim).

[28] The Appellant denied the statement at GD3-17. She doesn't know how the Service Canada representative "came up with that"[13]. She told the agent that she didn't have a record of her job search efforts, but she never said that she didn't look for work. She was always looking for work and always available to work.

[29] The Appellant and Joan also testified that:

- Opening a business was a "desperate" act for her.

- She never wanted to have a business.

- The spa she used to work at went out of business, but she had established "a clientele" there. These people were contacting her to find out where she was working so they could come to her, but she hadn't found a job.

- The spas she applied to were asking her to effectively work for herself.

[13] English is not the Appellant's first language. She requested a Romanian interpreter for the hearing and the Tribunal arranged for these interpretation services. Joan asked me if there were recordings of the telephone conversations documented by the various Investigation Information Sheets in the GD3 file. I said there were no recordings of these calls. Joan speculated that the Appellant's issues with English may have caused her to misinterpret what the Service Canada representative was asking and/or prevented her from providing complete answers. Although the Appellant did not rely extensively on the interpreter at the hearing, she was assisted by Joan – who clarified and explained questions for her. I can see how the Appellant could have benefited from similar assistance in dealing with the Commission.

- Every place she went to "wanted a sub-contractor" with independent "limited liability insurance"[14]. Some esthetics services are done with lasers and the esthetician is "almost like a practical nurse". Anyone doing this work needs "errors and omissions insurance" to cover themselves.

- She did the incorporation at the end of July 2017 so she could apply to spas as a sub-contractor.

- There was very little involved at the start of the business.

- She opened a corporate bank account on August 17, 2017.

- She didn't take any other steps in the business for over a month after that.

  The following additional information was provided in the post-hearing documents[15]:

  - On September 22, 2017 she arranged for Yellow Pages advertising.

  - On October 3, 2017, she ordered a sign for the front lawn of her house.

  - On November 1, 2017, she ordered business cards.

  - Her Yellow Pages advertising started on November 1, 2017.

- There were no supplies or equipment to purchase[16].

- She "bought a couple of bottles of nail polish and set up a table in her basement", and started doing manicures in her basement in October 2017.

- The first deposit to the corporate bank account was on October 6, 2017.

- She continued to apply for jobs and look for work the whole time.

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[14] See GD6-2 to GD6-3 for further details about how the sub-contractor arrangement would have worked.
[15] At GD6-3.
[16] See GD6-3 for additional details about the basement set-up.

At GD6-31, the Appellant provided a copy of an e-mail she received on September 15, 2017 from an employer she'd contacted, asking if she was available for an interview.

- She was not restricting herself to focusing on her business because there was very little involved in setting it up, and it wasn't even operating between June 1, 2017 and the end of her claim.

- Even with the incorporation, she still didn't get picked up as a sub-contractor by any of the spas she contacted because "no one was hiring".

- Her business was "closed" because "it never worked out" either way.

- She currently works as a retail sales clerk at Home Depot.

Issue 1: Was the Appellant available for work according to the *Faucher* factors?

[30] Yes, she was.

[31] The Appellant has satisfied all of the *Faucher* factors for the period between June 1, 2017 and the end of her claim.

a) Wanting to go back to work

[32] For purposes of the first *Faucher* factor, the Appellant must prove that she wanted to go back to work as soon as suitable employment was available. To do this, she must show that she had a desire to return to work for every working day of her benefit period and that her availability was not unduly limited.

[33] I find that the Appellant has shown she wanted to go back to work as soon as suitable employment was available between June 1, 2017 and the end of her claim.

[34] In coming to this conclusion, I accept the testimony at the hearing in its entirety. I found both the Appellant and Joan to be credible because of the forthright way they

answered my questions, and because the details in their answers made sense in the circumstances. Here's why:

- The Appellant lost her job back in January 2017 through no fault of her own (when her employer went bankrupt). She is an adult and needs to work to pay her expenses and survive.
- She was able to work during regular business hours for every working day.
- If she had wanted to start her own esthetics business, there was nothing preventing her from doing so.
- Instead, she expanded her job search efforts well beyond her chosen field of esthetics, albeit without success.
- By June 2017, she was understandably anxious about still being unemployed, so she was willing to go down the unknown road of incorporating a business to see if she could get taken on[17] in a sub-contractor position at a spa.
- In this way, she was still looking for an employment relationship – albeit as a sub-contractor.
- Between June 1, 2017 and the end of her claim, she explored the sub-contractor option as a way of returning to the labour market – and continued to apply to full-time positions.
- Aside from incorporating and opening a bank account, she didn't take any steps to advertise for clients (an essential element of any personal services business), or move towards operating her business in her home until 3 weeks after her claim had ended.

[17] She also referred to this process as being "hired" as a sub-contractor.

[35] All of this shows that, between June 1, 2017 and the end of her claim, the Appellant wanted to go back to work as soon as possible, and certainly as soon as suitable employment[18] was available.

[36] I find that the Appellant has satisfied the first *Faucher* factor.

a) Making efforts to find a suitable job

[37] For the second *Faucher* factor, the Appellant must prove that she was looking for suitable employment for every day of her benefit period.

[38] I find that the Appellant has shown she was doing enough to find suitable employment between June 1, 2017 and the end of her claim.

[39] The evidence shows that the Appellant made active, on-going efforts to find employment between June 1, 2017 and the end of her claim. Her efforts were not directed to part-time employment, but towards full-time positions, and she expanded her range of potential employers to draw on her prior education and work experience[19]. Even the incorporation of her business was directed towards entering into an employment relationship, albeit a new form of employment relationship for her (as a sub-contractor). In these ways, she was trying to find suitable employment for every working day during her benefit period.

[40] In coming to this conclusion, I give greatest weight to the testimony at the hearing. This is because the particulars about the Appellant's job search efforts, the other qualifications she had that allowed her to apply to non-esthetics positions, and the issues around sub-contractor work at salons and spas, were provided through active adjudication during the hearing. The Appellant expressed frustration about how the Commission documented her responses in the Investigation Information Sheets, and I can see from the Commission's notes that the Appellant was having difficulty answering

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[18] Given the Appellant and Joan's testimony about the nature of the esthetics services industry becoming part of the "gig economy", I find that suitable employment included a position as a sub-contractor with an esthetics services employer.

[19] The Appellant provided a copy of the resume she was presenting to potential employers at the time (at GD6-38 to GD6-39), and it lists her prior education and work experience as a chemical laboratory technician.

questions and communicating her information. It is possible, as Joan pointed out, that there may have been a language barrier[20].

[41] I also cannot ignore the fact that the Commission failed to provide relevant documents in the reconsideration file (GD3) it submitted to the Tribunal for this appeal. This shows a certain selectiveness with the evidence, and I find that troubling.

[42] For example, the November 1, 2019 Investigation Information Sheet at GD3-13 says the Service Canada representative was following up with the Appellant about a letter the representative had "sent her about her self-employment" – but that letter is not included in the reconsideration file. It's quite possibly the source of the Appellant's confusion around the issue on this appeal, especially given that the same notes indicate that the Appellant said she had responded to this letter. Then in the November 13, 2019 Investigation Information Sheet at GD3-16, the Commission's representative indicates that the Appellant's response had been received, but information was missing. And again – neither the Appellant's response, nor the follow-up letter the representative said would be sent – were included in the reconsideration file.

[43] Similarly, the November 13, 2019 Investigation Information Sheet at GD3-18 indicates the Service Canada representative reminded the Appellant "that we required any job search records and a full response and all of the documents requested *in the letter sent out this morning*" (emphasis added) – but that letter is not included in the reconsideration file. Even more troubling is the fact, on November 20, 2019, the Appellant **did** send in a record of her job search efforts – and this letter was also not included in the reconsideration file. Fortunately for the Appellant, she had it with her at the hearing and sent it in immediately afterward.

[44] Finally, I note from the November 29, 2019 Investigation Information Sheet at GD3-20 that the Service Canada representative was clearly considering whether the

[20] I was unable to access the video recording referred to at GD6-1 in the post-hearing documents. The accompanying submissions by Joan identify it as a video recording of the Appellant's attempt to reach out to the "EI officer assigned in march 2019" and say it shows the Appellant's English language issues as she tried to deal with this matter.

Appellant should have been disentitled to EI benefits because of her self-employment[21] – not her availability. Even more troubling is the fact that this Sheet acknowledges that the Appellant provided a record of her job search effort – but it was still not included in the reconsideration file for her appeal.

[45] These omissions raise questions for me about the accuracy of what the Commission wrote on the Investigation Information Sheets, especially concerning the Appellant's job search efforts.

[46] For all of these reasons, I accept the Appellant's explanation for why the testimony at the hearing differed from the statements the Commission says she made.

[47] I find that the Appellant has satisfied the second *Faucher* factor.

c) Unduly limiting chances of going back to work

[48] For the third *Faucher* factor, the Appellant must prove she did not set personal conditions that could have unduly limited her chances of returning to work. This generally means she must demonstrate that she capable of and available for work during regular working hours for every working day. Her availability cannot be restricted to irregular hours, such as evenings, nights, weekends and/or holidays, in order to accommodate another commitment or a family obligation or any other personal restriction that significantly limits when she could work[22].

[49] The Commission says the Appellant's business was a restriction because she restricted herself to focusing on it instead of looking for work outside of the business. For the reasons discussed in my analysis of the first and second *Faucher* factors above, I do not agree.

[50] The Appellant has shown that her involvement in her business between June 1, 2017 and the end of her claim, such as it was, was minimal. She didn't even consult

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[21] The work sheet shows the Service Canada representative reviewing the 6 factors to assess a claimant's involvement in a business or self-employment. These are different from the 3 factors used to assess a claimant's availability.
[22] *Bertrand (1982), 1982 Carswell Nat 466 (CA).*

with her accountant until July 2017 – and that was the first time she even considered starting a business. After incorporation at the end of July, she did nothing but utilize the business to apply for sub-contractor positions at spas. Anything else she did to get the business up and running occurred after her claim for EI benefits ended.

[51] For these reasons, I am satisfied that the business was not a personal condition that might have unduly limited her chances of going back to work. In fact, by incorporating her business, the Appellant enhanced her chances of obtaining work as a sub-contractor at an esthetics salon during the period of the disentitlement.

[52] I find that the Appellant has satisfied the third *Faucher* factor.

So was the Appellant available for work?

[53] Based on my findings on the three *Faucher* factors, the Appellant has shown that she was available for work but unable to find a suitable job between June 1, 2017 and the end of her claim.

Conclusion

[54] The Appellant has proven that she was available for work between June 1, 2017 and the end of her claim. This means she is **not** disentitled to EI benefits during this period.

[55] The Commission must rescind the disentitlement imposed on her claim.

[56] The appeal is allowed.

Teresa M. Day

Member, General Division – Employment Insurance Section