



Citation: *BW v Canada Employment Insurance Commission*, 2022 SST 1025

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

Decision

Appellant: B. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (457517) dated March 3, 2022 (issued by Service Canada)

Tribunal member: Gary Conrad

Type of hearing: Teleconference

Hearing date: August 24, 2022

Hearing participant: Appellant

Decision date: August 27, 2022

File number: GE-22-1500

Decision

[1] The appeal is dismissed.

[2] The Claimant has not proven her availability for work, so she should be disentitled from benefits.

Overview

[3] Claimants have to be available for work in order to get regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job.

[4] The Commission decided that the Claimant was disentitled from being paid EI benefits as she was not available for work since she needed to care for her son.

[5] The Claimant says she was capable of work, but was unable to leave her home due to her son needing 24/7 care. She was eventually able to go to work for a couple days a week as a neighbour was able to watch her son. She says she also had some live-in help for a while that allowed her to return to her full work schedule.

[6] I must decide whether the Claimant has proven¹ that she is available for work.

Matters I have to consider first

50(8) Disentitlement

[7] In their submissions the Commission states they disentitled the Claimant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

¹ The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

[8] In looking through the evidence, I did not see any requests from the Commission to the Claimant to prove her reasonable and customary efforts, or any claims from the Commission that if they did, her proof was insufficient.

[9] I further find the Commission did not make any detailed submissions on how the Claimant failed to prove to them that she was making reasonable and customary efforts; the Commission only summarized what the legislation says in regard to subsection 50(8) of the Act and what it says about reasonable and customary efforts.

[10] Based on the lack of evidence the Commission asked the Claimant to prove her reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Period of disentitlement

[11] Originally the Commission disentitled the Claimant from March 29, 2021, onward.²

[12] When they issued their reconsideration decision, they changed the period of disentitlement to start on September 28, 2020.³

[13] In their submissions the Commission says the reconsideration decision does not have the correct period of disentitlement, as the Claimant had requested her benefits be converted to Compassionate Care Benefits from September 27, 2020, so her availability only needs to be proven from March 29, 2021, onward.⁴

[14] I find I accept the Commission's submissions that the Claimant only needs to prove her availability from March 29, 2021, onward, as there is proof in the file the Claimant had her benefits converted to Compassionate Care Benefits.

² GD03-25

³ GD03-33

⁴ GD04-2

Issue

[15] Is the Claimant available for work?

Analysis

[16] In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.⁵ The Claimant has to prove three things to show she is available:

1. A desire to return to the labour market as soon as a suitable job is available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might unduly limit her chances of returning to the labour market⁶

[17] I have to consider each of these factors to decide the question of availability,⁷ looking at the attitude and conduct of the Claimant,⁸ over the period of the disentitlement from March 29, 2021, onward.

The Claimant's circumstances

[18] The Claimant's son had a massive stroke which left him completely debilitated and needing 24/7 care.

[19] The Claimant testified that from March 29, 2021, to October 8, 2021, she was technically capable of working, as she had a job she could return to and she was physically able to do it, but she could not leave her son alone because he required 24/7 care.

⁵ Paragraph 18(1)(a) of the *Employment Insurance Act*.

⁶ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁷ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁸ *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[20] The Claimant says her employer was very understanding, telling her to take all the time she needs to care for her son and that her job would be there for her when she could return.

[21] Starting October 9, 2021, the Claimant says she was able to return to work for two days a week Tuesday and Wednesday, for a few hours each day, as her neighbour would watch her son for the hours she was at work. The Claimant's employer confirmed the Claimant started working again on October 9, 2021, on Tuesday and Wednesday for 4.5 hours each day.⁹

[22] The Claimant says she kept this up until she got some live-in help. The Claimant says the live-in help left a month or so prior to the hearing date, and started either six or seven months before they left. She was unable to provide any more specifics about when the live-in help started.

[23] The Claimant says her position is permanent part-time, up to 24 hours a week and with the live-in help she was able to fully return to work, being able to accept any shift offered to her and even requested extra shifts.

Does the Claimant have a desire to return to the labour market as soon as a suitable job was available?

[24] I find the Claimant does have a desire to return to the labour market.

[25] The Claimant testified that she wants to work. It helps keep her feeling young, gets her out of the house, allows her to interact with new people, and she really needs the money. There was just a period of time where she could not go to her work due to needing to care for her son.

[26] I find that I accept the Claimant's testimony she wants to work. I have no doubt all the reasons she has offered for why she wants to work are true.

⁹ GD03-22

[27] I further find that while there was a period of time when the Claimant was unable to physically attend work due to having to care for her son, this does not mean her desire to work was extinguished. I find a person can still desire to work even if they are not able to work, just as a person confined to a bed can desire to be up and walking, even if they are unable to leave their bed for a time. A desire to do something does not simply disappear just because a person is prevented from fulfilling that desire for a period of time

Has the Claimant made efforts to find a suitable job?

[28] The Claimant did not make any efforts to find a job as she says she already had one to return to.

[29] While I fully understand the Claimant not looking for a job, since she did have one to return to, the Federal Court of Appeal has said the Claimant cannot simply wait to return to a job, she must be actively looking for work.¹⁰

[30] The reasons why the Claimant was not making any efforts to find work are very sympathetic, but the reasons are not relevant. I find that since she was making no efforts to find work, she does not meet this part of the test.

Has the Claimant set personal conditions that might unduly limit her chances of returning to the labour market?

[31] I find the Claimant did set personal conditions that might have unduly limited her chances of returning to the labour market.

[32] While I have immense sympathy for the Claimant's situation, for the period of March 29, 2021, to October 8, 2021, when she was unable to leave her son to attend her job, she had a personal condition that overly limited her from returning to work.

[33] Even though the Claimant's reasons for being unable to work for that period are completely understandable, and she really had no choice but to stay with her son, why

¹⁰ *De Lamirande v Canada (Attorney General)*, 2004 FCA 311

the Claimant is unable to work does not change the fact that if she cannot go to work at all she cannot be considered available.

[34] From October 9, 2021, onward, even though the Claimant started working again, she was still overly limited from working due to her personal condition of needing to care for her son, as she was limited to working two days a week for a few hours a day at specific times.¹¹

[35] I note that the Claimant testified she got a live-in caregiver that, based on the timelines she offered, would have started in either January or February 2022, and that having this caregiver allowed her to return to work full-time; however, I do not find this testimony credible.

[36] The Claimant was unable to say even the month when the live-in care for her son started. At best she was able to narrow the window down to either January or February 2022, based on the timelines she gave. I find this damages the credibility of her testimony. A live-in caregiver moving in and allowing her to fully return to work is significant, and something I would expect the Claimant would have more detail on had it happened, especially since the date the caregiver started would be tied to the date she was able to fully return to work.

[37] Also, she has never brought this up before the date of the hearing. I would expect, that since the Claimant was denied for not being available, something as significant as a live-in caregiver that allowed the Claimant to be able to fully return to work would have been mentioned prior to the hearing.

[38] However, even if the Claimant did actually have a live-in caregiver that allowed her to fully return to work, although I do not find this credible, it would not assist her in

¹¹ GD03-20, the Claimant said she could only work certain hours on Tuesday and Wednesday as she only ha care for her son during those hours.

collecting benefits as the Commission's submissions support the Claimant's benefit period would have ended well before January or February 2022.¹²

Is the Claimant capable of and available for work and unable to find suitable employment?

[39] Considering my findings on each of the three factors together, I find that the Claimant is not available for work.

Conclusion

[40] The appeal is dismissed. I find the Claimant has not proven her availability for work, so the disentitlement of the Commission is upheld.

Gary Conrad
Member, General Division – Employment Insurance Section

¹² GD04-3 the Commission says that October 2021 is outside the Claimant's benefit period, so that would mean January or February 2022 is as well.