



Citation: *LD v Canada Employment Insurance Commission*, 2022 SST 989

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

Decision

Appellant: L. D.
Representative: J. D.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (440734) dated December 3,
2021 (issued by Service Canada)

Tribunal member: Catherine Shaw
Type of hearing: Teleconference
Hearing date: February 17, 2022
Hearing participant: Appellant
Appellant's representative
Decision date: February 18, 2022
File number: GE-21-2593

Decision

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

[2] The Claimant hasn't shown that he is available for work while taking training. This means that he 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 September 8, 2021, because he 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 have to decide whether the Claimant has proven that he is available for work. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he is available for work.

[5] The Commission says that the Claimant isn't available because he was taking training full-time.

[6] The Claimant disagrees and says that he was looking for a job in his industry and was willing to drop his training program if he found one.

Issue

[7] Is the Claimant available for work while taking training?

Analysis

[8] Two different sections of the law require claimants to show that they are available for work.

[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

[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

The Claimant is only disentitled under one section of the law

[11] The Commission submitted that the Claimant was disentitled from receiving benefits because he isn’t available for work based on these two sections of the law.

[12] But, the Commission didn’t ask the Claimant to prove that he made reasonable and customary efforts. When the Commission decided that the Claimant was disentitled, it didn’t discuss his job search efforts or ask him to prove that his efforts met certain criteria.⁵ Rather, its focus was on the Claimant’s restrictions on his work permit.

[13] The Commission must reconsider an issue before the Tribunal can make a decision about it.⁶ In this case, there’s no evidence that the Commission looked at whether the Claimant’s efforts to find work were reasonable and customary. So, I would

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 Some criteria help explain what “reasonable and customary efforts” means. These are set out in section 9.002 of the Regulations.

⁶ Section 113 of the Act says that I can’t decide a issue if it has never been reconsidered by the Commission under section 112 of the Act

be exceeding my jurisdiction if I considered whether the Claimant had made reasonable and customary efforts to find a suitable job.

[14] I will only look at whether the Claimant was capable of and available for work and unable to find suitable employment.

Capable of and available for work

[15] I have to consider whether the Claimant is capable of and available for work but unable to find a suitable job.⁷ Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:⁸

- a) He wants to go back to work as soon as a suitable job is available.
- b) He has made efforts to find a suitable job.
- c) He hasn't set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

[16] 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

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

[18] The Claimant started looking for work shortly after school started. He updated his resume. He signed up for several job search websites, including the Job Bank, Indeed, and a crew finder website for fishing positions.

[19] In September 2021, the Claimant applied for a job as a deckhand with Marine Atlantic. Later in September 2021, he was offered a job on a family member's boat to

⁷ See section 18(1)(a) of the Act.

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.

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.

scallop fish. He spent four weekends preparing the equipment, but the fishing efforts ended on October 14, 2021, when the boat had a serious equipment failure.

[20] In November and December 2021, he applied for three more jobs with shipping companies. He testified that these were full-time jobs with rotational schedules that would require him to be on the ship for several weeks at a time. He said that he would leave his training if he found a job that conflicted with his course schedule.

[21] The Claimant's attitude in being willing to leave his training to accept a full-time job shows that he has a desire to return to the labour market. His conduct in applying for jobs and accepting work for the scallop fishing season show that he wants to go back to work.

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

[22] The Claimant has made enough effort to find a suitable job.

[23] The Claimant's efforts to find a new job included having a resume prepared, reviewing job listings on websites, and submitting five job applications. He also accepted work in September 2021, and worked for four weekends preparing equipment for scallop fishing. I explained these reasons above when looking at whether the Claimant wants to go back to work.

[24] The Claimant added that he was staying in touch with his former employer, another family member, for the upcoming crab fishing season in the spring of 2022.

[25] I believe the Claimant was looking for work. He made reasonable efforts to find a job and accepted a position that was offered to him. I find that he has met this factor.

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

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

[27] The Commission says that the Claimant was restricting his job search because of his course schedule.

[28] The Claimant spends 30 hours per week on his studies. He told the Commission that he was focussing on finding work around his course schedule. When offered a position on his family member's boat for scallop fishing, the Claimant said that he "would be in school during the week," and on his request for reconsideration he stated that he was in school during the days, leaving his "evenings and weekends free to find employment."

[29] Availability must be demonstrated during regular hours for every working day and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability.¹⁰

[30] At the hearing, the Claimant said that his statements to the Commission misrepresented his true intentions while looking for work. He clarified that he was not limiting his job search to evenings and weekends. In fact, he willing to leave his training if he was offered a job that conflicted with his course schedule.

[31] I put more weight on the Claimant's statements at the hearing, because he gave his testimony in an open and straightforward manner. I think the Claimant's testimony was credible.

[32] I also put weight on the fact that the Claimant applied for several full-time jobs, which would require him to leave his course because of their rotational schedules. I think this supports that the Claimant was willing to leave his training to accept a full-time job.

[33] I think it's most likely that the Claimant wasn't restricting his availability based on his attendance in his training. So, this was not a personal condition that unduly limited his chances of going back to work.

[34] The Commission also said the Claimant was restricting his job search to seasonal jobs related to fishing. It argues that this unduly limits the Claimant's chances

¹⁰ *Attorney General of Canada v Bertrand*, A-613-81.

of going back to work because it's outside of the season for the types of fishing that the Claimant can perform.

[35] The Claimant agrees that he was only looking for jobs in the fishing industry. He says this didn't overly limit his chances of going back to work because there are different fishing seasons for different types of seafood, so it was possible to have work available in this industry year-round.

[36] The Claimant also says that work as a fisher was the only suitable type of employment for him. So, he was only searching for suitable employment by keeping his job search limited to work in the fishing industry.

[37] The law says that employment is not suitable for a claimant if it's not in your usual occupation and either has a lower rate of pay or has conditions that aren't as favourable as the ones you might reasonably expect to get.¹¹

[38] The Commission says there are other types of suitable employment for the Claimant. For example, he was previously employed as a sales associate.¹² So, it says this would be considered a suitable job for him.

[39] The Claimant responded that he didn't think sales associate would be suitable for him because he prefers physical work. His father also stated that the pay for his job as a sales associate was far less than the Claimant made as a fisher.

[40] I agree with the Commission's position. The Claimant was a sales associate at a retail store from October 2020 to April 2021, and again from June to July 2021. It is clear that this employment could be considered within the Claimant's "usual occupation."

¹¹ See section 6(4)(c) of the Act. This only applies for a reasonable interval from when you became unemployed.

¹² The Commission's submissions reference the Claimant's previous employment as "clerk" (see GD6-2). At the hearing, the Claimant said that he was employed as a sales associate at a retail store. For clarity, I have used this position title to refer to the Claimant's previous employment.

[41] I am not persuaded that the Claimant's usual occupation is limited to work as a fisher. He was employed as a fisher from April 12 to May 15, 2021. He has only worked for one season as a crab fisher, working around one month in this position. Even though his retail position was part-time, that position lasted far longer than his one season as a full-time fisher.

[42] I understand that the Claimant would prefer to work in the fishing industry. And that he is currently pursuing training and education to advance his career as a fisher. But limiting his job search to positions within the fishing industry is a personal condition that might unduly limit his chances of going back to work.

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

[43] Based on my findings on the three factors, I find that the Claimant has shown that he is capable of and available for work but unable to find a suitable job.

[44] I know that the Claimant said he was available for work. But this isn't enough to prove availability within the meaning of the law. By restricting his job search efforts to those in the fishing industry, the Claimant didn't show that he wanted to go back to work as soon as a suitable job was available.

Conclusion

[45] The Claimant hasn't shown that he 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