



Citation: *JP v Canada Employment Insurance Commission*, 2022 SST 1113

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

Decision

Appellant: J. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (506436) dated June 20, 2022 (issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference

Hearing date: August 29, 2022

Hearing participant: Appellant

Decision date: September 7, 2022

File number: GE-22-2427

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 from December 20, 2021, to March 18, 2022.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant is disentitled from receiving EI regular benefits as of December 20, 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 was 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 was available to return to her job at any time.

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] Was 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 Claimant was employed as a teaching assistant. She was placed on an unpaid leave of absence as of November 30, 2021, due to the employer's mandatory vaccination policy.

[18] The Commission says that the Claimant didn't do enough to try to find a job. The Claimant told the Commission that she wasn't looking for other work while she was on unpaid leave from her job. She said that she was technically still employed and was guaranteed her job back when the vaccination requirement was lifted. So, she saw no reason to look for other work.

[19] The Claimant says that she remained available to return to her job at any time. It was only the temporary mandate that stopped her from working.

[20] In January 2022, the province announced that school would be returning as online learning for one week. The Claimant contacted her union to ask if she could return to her job, as her vaccination status would not affect her ability to perform her job duties from home. The union told her that she is on administrative leave due to the

⁶ See section 9.001 of the Regulations.

⁷ See section 9.001 of the Regulations.

vaccination mandate, so they do not expect the employer to recall her to work for the period of online learning.

[21] The Claimant returned to her job on March 21, 2022.

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

[23] The Claimant's testimony shows that she remained in touch with her union about the status of her unpaid leave from work, and was willing to return to work as soon as she was recalled. However, she didn't engage in any job-seeking activities. She acknowledged that she wasn't looking for another job because she was still employed and waiting to return to her position.

[24] 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 was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:⁸

- a) She wanted to go back to work as soon as a suitable job is available.
- b) She made efforts to find a suitable job.
- c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

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

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.

– **Wanting to go back to work**

[27] The Claimant hasn't shown that she wanted 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 November 30, 2021.

[29] The Claimant didn't look for other work while she was suspended. 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. But, by not applying for any other positions, 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.¹⁰

[34] The Claimant's efforts to find a new job included staying in contact with her union and remaining available to return to her position when the employer's vaccination requirement was lifted.

¹⁰ 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.

[35] These efforts are not enough to meet the requirements of this second factor because the lack of job search efforts do 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] The Claimant agreed that she was not looking for other work because she was still employed and waiting to return 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.¹¹ The Claimant statements that she wasn't looking for 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.

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

[40] 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.

¹¹ See *De Lamirande v Canada (Attorney General)*, A-598-03

Conclusion

[41] 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 from December 20, 2021, to March 18, 2022.

[42] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section