



Citation: *HE v Canada Employment Insurance Commission*, 2022 SST 1287

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

Decision

Appellant: H. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (478412) dated April 27, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Videoconference

Hearing date: September 14, 2022

Hearing participant: Appellant

Decision date: October 7, 2022

File number: GE-22-1895

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) has not proven that she was available for work between November 8, 2021 and March 11, 2022. This means that the disentitlement imposed on her claim for employment insurance (EI) benefits cannot be changed.

Overview

[3] The Claimant worked as an Information Governance Officer and was employed by X. On November 8, 2021, she was placed on an unpaid leave of absence for failing to comply with the employer's mandatory Covid-19 vaccination policy¹ (the policy). She applied for EI benefits.

[4] The Respondent (Commission) investigated whether she was available for work.

[5] The law says a claimant must be available for work in order to receive regular EI benefits². Availability is an ongoing requirement³. 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 Claimant could not receive EI benefits between November 8, 2021 and March 11, 2022 because she was not vaccinated against Covid-19 and had not proven her availability for work⁴. The Commission said her decision to remain unvaccinated was a personal condition that unduly restricted her ability to return to work during this period⁵.

¹ The Claimant was subsequently dismissed from her employment on January 7, 2022 for the same reason.

² Section 18(1)(a) of the *Employment Insurance Act* (EI Act) says claimants can only get EI benefits for a working day if they prove they were capable of and available for work on that day, but could not find a suitable job.

³ A claimant has to show they were available on every working day during their benefit period.

⁴ See the March 16, 2022 decision letter at GD3-23.

⁵ The Claimant told the Commission she had been looking for work since becoming unemployed, but most or all of the employers she might work for required employees to be vaccinated – something she

[7] The Claimant asked the Commission to reconsider. She admitted she was suspended (and subsequently dismissed) for non-compliance with the policy, but stated she was opposed to being vaccinated for religious reasons. She said she was looking for work, but until March 11, 2022, many of the employers she applied to required their employees to be vaccinated. This was something she was not prepared to do, even though this restriction reduced her chances of finding employment.

[8] The Commission maintained the disentitlement on her claim, and she appealed that decision to the Social Security Tribunal (Tribunal).

[9] I have to decide if the Claimant has proven that she was available for work between November 8, 2021 and March 11, 2022. She must prove this on a balance of probabilities⁶.

[10] The Commission says the Claimant wasn't available because her restriction against being vaccinated severely restricted her chances of finding employment between November 8, 2021 and March 11, 2022. It prevented her from returning to work with her previous employer and substantially reduced the number of alternative jobs she was eligible for or could apply to.

[11] The Claimant disagrees. She says she was always available for work and was applying for jobs, but remained unvaccinated because of her religious beliefs. She denies that her religious beliefs were a personal condition that restricted her chances of finding employment. She argues the government set an unfavourable and discriminatory "environmental" condition (the vaccine mandates), and that is what restricted the jobs she could apply to.

[12] I agree with the Commission. These are my reasons.

was not prepared to do (see Supplementary Record of Claim at GD3-21). But on March 11, 2022, the Ontario government removed the vaccine requirements from many sectors, which she said greatly changed the number of opportunities available for her (see Supplementary Record of Claim at GD3-22). The Commission then imposed a disentitlement on her claim that was limited to the period between her suspension from employment and the lifting of the provincial vaccine mandates, namely from November 8, 2021 to March 11, 2022.

⁶ This means she has to show it is more likely than not that she was available for work during this period.

Preliminary Matter

[13] The Commission has made 2 decisions on the Claimant's claim. In addition to refusing to pay her EI benefits between November 8, 2021 and March 11, 2022 because she did not prove her availability for work, the Commission also decided that she was not entitled to EI benefits starting from November 8, 2021 because she lost her employment due to her own misconduct. The Claimant appealed both decisions to the Tribunal, and two appeal files were established: GE-22-1802 (misconduct) and GE-22-1895 (availability).

[14] The two appeals were heard together on September 14, 2022. A separate decision on the misconduct issue has been rendered in GE-22-1802.

[15] This is the availability decision.

Issue

[16] Was the Claimant available for work between November 8, 2021 and March 11, 2022?

Analysis

[17] To be considered available for work for purposes of regular EI benefits, the law says the Claimant must show that she is capable of, and available for work and unable to obtain suitable employment⁷.

[18] There is no question that the Claimant was **capable** of work during this time⁸. So I will proceed directly to the availability analysis to assess her entitlement to regular EI benefits between November 8, 2021 and March 11, 2022⁹.

⁷ Section 18(1)(a) of the *Employment Insurance Act* (EI Act).

⁸ There is no indication the Claimant was medically unable to work during this period, or otherwise incapable of work.

⁹ 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 shown 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 during this period. 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

[19] 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
- c) not setting personal conditions that might unduly limit the chances of returning to the labour market¹⁰.

[20] 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 Claimant’s attitude and conduct¹¹.

[21] The court has also said that availability is determined for each working day in a benefit period¹².

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

[22] No, she was not. The Claimant has not satisfied all of the *Faucher* factors for the period between November 8, 2021 and March 11, 2022.

[23] The Claimant has always said that she wanted to work. The Commission agrees that she wanted to work. Both parties agree on this point and nothing in the appeal file makes me doubt the Claimant’s desire to work. I therefore find the Claimant has proven that she wanted to return to work.

[24] The Claimant also said she was looking for work from the time she was separated from her employment with X. The Commission agrees that the Claimant was

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.

¹⁰ See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.

¹¹ 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.

¹² See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73.

trying to find a job, and hasn't made any arguments about the sufficiency of her job search efforts. I therefore find that the Claimant has proven that her job search efforts were reasonable.

[25] This means I accept the Commission's determination that the Claimant has satisfied the first 2 *Faucher* factors.

[26] It is the third factor that is problematic for her.

[27] To satisfy the third *Faucher* factor, the Claimant must prove that she did not set personal conditions that could have unduly limited her chances of returning to work for every working day of her benefit period.

[28] The Commission says that the Claimant's refusal to be vaccinated was a restriction on her chances of finding employment because most or all of her target employers required employees to be vaccinated. As a result, this restriction severely reduced her chances of finding employment until the provincial government started lifting the vaccine mandates on March 11, 2022.

[29] The Claimant told the Commission that¹³:

- She has not been vaccinated against Covid-19 due to her religious objections.
- This is not merely a personal belief – it is in accordance with her conscience, which follows Catholic doctrine.
- She has been looking for work in records management or information governance with the Ontario government and nearby municipal/regional governments. She has submitted over 15 applications so far.

¹³ See Supplementary Records of Claim at GD3-21, GD3-22 and . See also Request for Reconsideration at GD3-27 to GD3- 30.

- Only smaller employers do not require employees to be vaccinated, but the type of work she does would only be required by a large company or organization, and most or all of them require applicants to be fully vaccinated.
- She also applied to some banks, but they have all told her she would have to be fully vaccinated.
- Many employers added vaccination requirements to their job postings.
- This is not within her control, and the Commission should not consider that her religious beliefs were “voluntary restrictions” on her availability for work (GD3-30).
- On March 11, 2022, the Ontario government announced it was removing the vaccine requirements for employees in many sectors.
- This announcement greatly changed the number of job opportunities that are available to her.

[30] In her Notice of Appeal, the Claimant said she remains available for work. She also said that the Commission’s decision to deny her EI benefits was “complicit with the employer in religious discrimination”, and that the Commission “belittled” her religious belief by treating it as a personal objection (GD02A-6). She submitted that she has paid her “fair share” of EI premiums and expects to receive financial support for “rainy days” like this (GD02A-6).

[31] At the hearing, the Claimant stated that she was relying on the evidence and submissions in her Notice of Appeal (GD2A and GD2B) and the additional documents she filed at GD11. I had read this voluminous material in advance of the hearing, and I have considered it in making this decision.

[32] To avoid repetition, I will now set out the parts of the Claimant’s testimony that were not a reiteration of what she had already said in her appeal materials.

[33] The Claimant testified that:

- She has proved she wanted to work and that she was making efforts to find a job.
- The only reason the Commission said she was not available is because of a “personal condition”.
- But her religious beliefs are not a personal condition that she imposed. Her beliefs are her beliefs, and she applied them to the issue of the Covid-19 vaccines. She didn’t change anything about herself or impose a restriction because of the pandemic.
- The fact that the employers she was applying to required their employees to be vaccinated is “an environmental factor” that *they* imposed.
- It’s not right for employers to attach a vaccination requirement to the job they are looking to fill. By doing so, they made the nature of the work contrary to her religious beliefs. And she’s not required to take a job where the nature of the work is contrary to her religious beliefs.
- The Commission is perpetuating and endorsing discriminatory practices by treating her as not available for work because she’s unvaccinated.

[34] Availability for suitable employment is an objective question and cannot depend on a claimant’s particular reasons for restricting their availability, even if the reasons provided may evoke sympathetic concern or if the claimant believed in good faith that they were unable to work¹⁴.

[35] By choosing not to be vaccinated, the Claimant was restricting herself to jobs without a vaccination requirement – at a time when, by her own admission, most (if not all) of the employers she was targeting required candidates to be vaccinated.

¹⁴ See *Gagnon* 2005 FCA 321 and *Whiffen* A-1472-92.

[36] I find that this was a *personal* condition. The Claimant was not eligible for jobs she considered acceptable because of her personal choice not to be vaccinated. It doesn't matter that her personal choice was made for religious reasons. All that matters is that the personal choice she made limited the jobs she could apply for.

[37] And I find that this personal condition *unduly limited* her chances of returning to the labour market. It meant there was no reasonable prospect of the Claimant finding work in the existing labour market between November 8, 2021 and March 11, 2022 with that condition. This is readily demonstrated by the fact that the Claimant could have returned to work for her employer after being suspended on November 8, 2021 if she was willing to comply with the employer's mandatory Covid-19 vaccination policy.

[38] I therefore find that the Claimant's choice not to be vaccinated was a personal condition that restricted and unduly limited her chances of returning to the labour market. This means she has not satisfied the third *Faucher* factor for the period between November 8, 2021 and March 11, 2022.

[39] I agree with the Commission's decision to accept her availability after that. I accept the Claimant's evidence that job opportunities opened up for her significantly after the provincial government announced the lifting of the vaccine mandates in certain sectors. However, I reject her arguments about what the Commission's decision to change her availability represents. It does not show that she was disentitled on too narrow a basis. This is because the Commission didn't change the decision simply because the government announced it was lifting some of the vaccine mandates. The Commission changed the decision because the government's announcement meant that the Claimant's personal condition ***would no longer unduly limited her chances of returning to the labour market.***

[40] The Claimant must satisfy all 3 of the *Faucher* factors to prove availability pursuant to section 18 of the EI Act. Based on my findings, she has not satisfied all 3 factors for the period of the disentitlement.

[41] I therefore find the Claimant has not shown she was capable of and available for work, but unable to find a suitable job from November 8, 2021 to March 11, 2022. This means she is not entitled to EI benefits during this period.

[42] Finally, I acknowledge the Claimant's disappointment at not being able to receive EI benefits when she is in need of financial assistance. However, it is not enough to pay into the EI program. All claimants must meet the terms and conditions in the *Employment Insurance Act* in order to be paid benefits. And if a claimant cannot prove their availability for work, they will be disentitled to EI benefits regardless of how many years they have contributed to the program.

Conclusion

[43] The Claimant has not proven that she was available for work within the meaning of the law from November 8, 2021 to March 11, 2022. This means she is disentitled to EI benefits during this period.

[44] The disentitlement imposed on her claim between November 8, 2021 and March 11, 2022 must remain.

[45] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section