Citation: *BG v Canada Employment Insurance Commission*, 2022 SST 1611

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	B. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (455941) dated April 28, 2022 (issued by Service Canada)

Tribunal member:	Nathalie Léger
Type of hearing:	Videoconference
Hearing date:	September 9, 2022
Hearing participant:	Appellant
Decision date:	September 18, 2022
File number:	GE-22-1815

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Claimant has shown that he was available for work while doing his clinical training. This means that he isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from March 15, 2021, to April 30, 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 was 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 was available for work.

[5] The Commission says that the Claimant wasn't available because he was doing his clinical training, which was part of a non-referred course, and that he chose to work in a long-term care facility when he knew his job mobility would therefore be restricted.

[6] The Claimant disagrees and says that his 6 weeks clinical training was the last part of his training as a nurse. He studied full time and worked part-time, then full the whole time he was at school. He argues that during this clinical training, it was not his choices but the law that unduly limited his chance of finding another job while doing this training.

[7] On April 15, 2020, the Ontario government adopted an emergency order[1] that provided that workers could only work in a single long-term care home. This order was

[1] Ontario Regulations 146/20 "Limiting Work to a Single Long-Term Care Home." See GD2-13-14 for the text of the Regulations.

in place from April 22, 2020, to March 28, 2022. It was adopted at the height of the COVID-19 pandemic to protect elderly, highly vulnerable patients, from the virus.

Issue

[8] Was the Claimant available for work while doing his clinical training?

Analysis

[9] 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, he has to meet the criteria of both sections to get benefits.

[10] 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.

[11] In order to rely on this provision, the Commission must show it asked the Claimant to provide proof of the steps he took to find a suitable job. The Commission must ask for specific proof of those steps and explain what kind of proof will satisfy it.[4]

[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.[5] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[6] I will look at those factors below.

[13] The Commission decided that the Claimant was disentitled from receiving benefits because he wasn't available for work based on these two sections of the law.

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[2] See section 50(8) of the *Employment Insurance Act* (Act).
[3] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[4] *L.D.* v *Canada Employment Insurance Commission*, 2020 SST 688, paragraphs [11] and [12].
[5] See section 18(1)(a) of the Act.
[6] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[14] I will now consider these two sections myself to determine whether the Claimant was available for work.

Reasonable and customary efforts to find a job

[15] First, I have to decide if the Commission can rely on this section[7] of the Act to make its decision.

[16] I find the Commission cannot rely on this provision because there is absolutely no mention in the file it ever asked the Claimant to provide proof of the steps he took to find a suitable job during his clinical training. As explained before, this section of the Act only applies if the Commission can prove that it asked for, but did not obtain, proof of reasonable steps taken to find a suitable job.

Capable of and available for work

[17] I will therefore only consider whether the Claimant was capable of and available for work but unable to find a suitable job.[8] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[9]

a) He wanted to go back to work as soon as a suitable job was available.

b) He has made efforts to find a suitable job.

c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[18] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[10]

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[7] See section 50(8) of the Act.
[8] See section 18(1)(a) of the Act.
[9] 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.
[10] 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**

[19] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available.

[20] The Claimant testified that as soon as his clinical training was over, he went back to work for the nursing home where he worked before. He also testified that if the law had allowed him to, he would have kept working at his regular job while doing his training.

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

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

[22] I have considered the list of job-search activities included in s. 9.001 of the Employment Insurance Regulations in deciding this second factor. For this factor, that list is for guidance only.[11]

[23] The Claimant's efforts to find a job included asking the employer where he did his clinical training if he could work in any other capacity. He testified he also asked his regular employer if he could keep working during his 6-week training in any capacity but that this was refused because it was contrary to the emergency order. He testified that he did not look elsewhere as he did not want to endanger the elderly, vulnerable clientele he was working with.

[24] Those efforts are enough to meet the requirements of this second factor because it was all the Claimant could really do to find another employment during this critical period of the pandemic.

[25] Applying the Employment Insurance Act or its Regulations out of context can only lead to undesirable or illogical results. At the height of the pandemic, it is common knowledge that nurses and health care workers were in a dire position, fighting a virus that wrecked havoc in long-term facilities. Ontario residents needed, as citizens all over

[11] 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.

the world did, more nurses. In this context, saying to a Claimant that he should have postponed his training to a time where the flow between workplaces was more fluid is not only unreasonable, it goes against what was needed to end this pandemic for all.

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

[26] The Claimant didn't set personal conditions that might have unduly limited his chances of going back to work.

[27] The Claimant says he hasn't done this because it is not his choices but the law that limited his mobility and the type of work that employers were allowed to give him.

[28] The Commission says that by choosing to do his training, he set personal conditions as he knew he could only work in one long-term care facility.

[29] I find that the Claimant is correct in saying that it was the emergency order, and not his own choices that prevented him from working more. I note again that the Claimant has a history of working full-time while studying. I also not that he testified that he enquired to both his permanent and temporary employers about working in another capacity and that both employers said no because of the emergency order and the pandemic situation. I find that it was therefore not the Claimant who set personal conditions that limited his chances of finding another job, or working more hours. I find it was the combined effects of the pandemic and the emergency order that created the limitations, not his choices.

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

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

Conclusion

[31] The Claimant has shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving benefits. So, the Claimant may be entitled to benefits.

[32] This means that the appeal is allowed.

Nathalie Léger
Member, General Division – Employment Insurance Section