



Citation: *LN v Canada Employment Insurance Commission*, 2022 SST 1653

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

## **Decision**

**Appellant:** L. N.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (485039) dated May 18, 2022 (issued by Service Canada)

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**Tribunal member:** Mark Leonard

**Type of hearing:** Teleconference

**Hearing date:** November 8, 2022

**Hearing participants:** Appellant

**Decision date:** December 5, 2022

**File number:** GE-22-2205

## Decision

[1] The appeal is dismissed.

[2] The Claimant hasn't shown that she was available for work. This means that she cannot receive Employment Insurance (EI) benefits.

## Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits as of November 7, 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 was available for work.

[5] The Commission says that the Claimant was a nurse who lost her job because she chose not to be vaccinated. It says that in choosing to remain unvaccinated, she set a personal condition that highly limited her chances of being re-employed.

[6] The Claimant confirmed that she remains unvaccinated but needs to find a new job and has made efforts to do so. She says that either the employers she contacted required vaccination, or she received no response at all. She says that she has remained available for work throughout her period disentitlement

## Issue

[7] Was the Claimant available for work?

## Analysis

[8] 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.

[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.<sup>1</sup> The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.<sup>2</sup> I will look at those criteria below.

[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.<sup>3</sup> Case law gives three things a claimant has to prove to show that they are “available” in this sense.<sup>4</sup> I will look at those factors below.

[11] 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.

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

### Reasonable and customary efforts to find a job

[13] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.<sup>5</sup> 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.

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<sup>1</sup> See section 50(8) of the *Employment Insurance Act* (Act).

<sup>2</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

<sup>3</sup> See section 18(1)(a) of the Act.

<sup>4</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>5</sup> See section 9.001 of the Regulations.

[14] 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:<sup>6</sup>

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- contacting employers who may be hiring
- applying for jobs

[15] The Commission noted that it had disentitled the Claimant from receiving EI benefits pursuant to Section 50 on the Act and the Regulations. However, in its submissions, it focussed exclusively on the issue of the Claimant setting a personal condition that unduly limited her chances of finding employment.

[16] There is no evidence that the Commission asked the Claimant about her efforts to find employment.

[17] The Claimant told the Commission that she had been looking for work and it appears from the record that the Commission accepted this statement without question. Even in the Commission's representations, it admits that the Claimant had a desire to find work and acknowledged that she made efforts to find work.

[18] At no time did the Commission ask the Claimant to prove she had made these efforts to find work nor did it attempt to evaluate whether her attempts were adequate to demonstrate availability. It presented no evidence that supports the conclusion that the Claimant failed to make reasonable and customary efforts to find employment.

[19] In testimony, the Claimant says that she searched an online job bank and applied for as many as 20 jobs but had not been successful in obtaining one. She presumed

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<sup>6</sup> See section 9.001 of the Regulations.

that the fact she remained unvaccinated was the reason she had not received any calls or invitations to interview.

[20] I am satisfied that in the absence of evidence to the contrary, the Claimant has met the requirement to have made reasonable and customary efforts to find a job.

[21] Therefore, I find that the Claimant is not disentitled under Section 50 of the Act, pursuant to the *Regulations*.

### **Capable of and available for work**

[22] Case law sets out three factors for me to consider when deciding whether the Claimant is capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:<sup>7</sup>

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

[23] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>8</sup>

#### **– Wanting to go back to work**

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

[25] I find that the Claimant has shown a desire to return to the labour market as soon as she possibly could.

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<sup>7</sup> 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.

<sup>8</sup> 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.

[26] In testimony, the Claimant said that after she was dismissed from her job she applied for jobs both in the medical field and non-medical field. She says that she needs to find work to support herself.

[27] The Commission actually acknowledged that the Claimant had a desire to return to the labour market. It presents no evidence that would suggest otherwise. It made no representations that would lead to a different conclusion.

[28] Therefore, I am satisfied that the Claimant had a continuing desire to find new employment, which she demonstrated through her efforts to find work.

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

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

[30] 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.<sup>9</sup>

[31] The Claimant's efforts to find a new job included using an online job bank to find and assess posted jobs. She testified that she applied for many jobs but simply had not been successful in finding one. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[32] Again, the Commission acknowledged the Claimant's efforts to find new employment in its representations. It does not challenge that the Claimant's efforts were insufficient nor adequately focussed on finding suitable employment. As I noted above, the Commission never actually asked the Claimant to prove her job search efforts.

[33] I am satisfied based on the Claimant's testimony that those efforts were enough to meet the requirements of this second factor.

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<sup>9</sup> 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.

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

[34] I find that the Claimant did set personal conditions that unduly limited her chances of going back to work.

[35] The Commission says that the Claimant made a personal decision to not be vaccinated against Covid-19. It submits that because the Claimant worked in the health care field, not being vaccinated, would pose a significant barrier to her finding employment within her field. The Commission says that any employer in the health care industry would most likely require its employees both current and new to be vaccinated.

[36] It concluded that the Claimant's decision not to be vaccinated set a personal condition that unduly limited her chances of finding new employment.

[37] The Claimant was a nurse in a hospital setting. She was dismissed from her employment for not meeting her Employer's Covid-19 vaccination policy. The Claimant says that her decision not to be vaccinated is based on her health concerns. She says that she previously had a serious reaction to the flu vaccine and her doctor advised against taking the flu vaccine in the future. The Claimant says that she was very concerned with what might happen if she took the Covid-19 vaccine. In her submissions and in testimony, she confirmed that her doctor had not provided her with a Covid-19 vaccine exemption because she did not meet the established criteria to be eligible for one. She confirmed in testimony that she currently remains unvaccinated.

[38] In her testimony, the Claimant explained that she had applied for at least 20 jobs. She detailed that most of these jobs were in or related to the medical field such as Nurse, Medical Assistant, Receptionist in a Chiropractic Office, and medical-related jobs in clinics.

[39] The Claimant admitted that for the most part her search was limited to jobs with a medical connection and so it would be reasonable to expect that those employers would insist on vaccination. Given this knowledge, the Claimant did not show that she attempted to widen her search to jobs outside of those related to the medical field that might not have as stringent vaccination requirements.

[40] I am satisfied that the Claimant's choice not to be vaccinated set a personal condition that unduly limited her chances of finding suitable employment in her field. Additionally, I am satisfied that the Claimant focussed her search on medical-related jobs with the full knowledge that those jobs would likely require vaccination. This further limited her chances of finding employment.

[41] Given the high expectation for vaccination in the medial field, it would have been reasonable to seek employment in other employment fields that might have greater flexibility surrounding vaccination requirements.

[42] I empathize with the Claimant's concerns regarding her health. I accept that since the Covid-19 Vaccine is not a legislated requirement, the Claimant has the right to choose whether to take it.

[43] However, it is abundantly evident that during a worldwide pandemic (Covid-19) it was highly likely that many if not most employers sought to protect the health and safety of its employees by requiring vaccination or authorized exemption.

[44] So, when the Claimant made her decision to not get vaccinated with the knowledge it would likely severely limit her chances of finding future employment, she all but guaranteed that the burden (EI benefits payable) for her personal decision would be borne by the other contributors to the EI program.

[45] While the Claimant may have a very good personal reason for not taking the vaccine, it nevertheless established a restriction that unduly limited her availability for work given the Covid-19 circumstances and employer vaccination expectations. The Claimant cannot expect the other contributors to the EI program to bear the financial burden of her personal decision.

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

[46] Based on my findings on the three factors, I find that the Claimant hasn't shown that she was capable of and available for work but unable to find a suitable job.



## **Conclusion**

[47] The appeal is dismissed.

[48] The Claimant hasn't shown that she was available for work within the meaning of the law.

[49] However, the Claimant is only disentitled under Section 18(1)(a) of the Act from receiving EI benefits because she was not available. Based on my finding above, there is no disentitlement under Section 50(8) of the Act.

Mark Leonard  
Member, General Division – Employment Insurance Section