



Citation: *ZB v Canada Employment Insurance Commission*, 2023 SST 365

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

Decision

Appellant: Z. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (536717) dated August 10, 2022 (issued by Service Canada)

Tribunal member: Marc-André St-Jules

Type of hearing: Videoconference

Hearing date: December 6, 2022

Hearing participant: Appellant

Decision date: January 10, 2023

File number: GE-22-2840

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant(who is the Appellant).

[2] The Claimant hasn't shown that he was available for work. That changes as of October 14, 2022. From this point onward, he has proven that he was available for work. This means that he can only receive Employment Insurance (EI) regular benefits starting October 14, 2022. This is providing he has met all other entitlement conditions.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits as of January 24, 2022, onward 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 must 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 did not search for work for the first two months of his claim. He was hoping to return to his previous employer. When he did start looking for work, the most suitable employers had the similar vaccine policy requirements. Between January 18, 2022, and August 8, 2022, he applied to two jobs.¹

[6] The Claimant disagrees. He initially did not apply to any jobs as he was hoping he would get recalled to his old job. He was seeing restrictions being lifted and was hoping to be reinstated. He also did apply to jobs and has job alerts, a LinkedIn account

¹ See GD4 page 3.

and his résumé is always up to date. He networked with his colleagues in the forestry industry without any luck.

Matters I have to consider first

I have two appeals before me and they were kept separate

[7] I have two separate appeals before me with the same Claimant. I kept the appeals separate. This current decision deals with an availability issue. The other decision will be issued separately. To minimize the Claimant's time and avoid delays, I scheduled one hearing for both issues.

[8] I find the Claimant is not prejudiced by having two separate decisions. Each issue has its own decision thereby making each of them individually clearer and more concise

I will accept documents submitted after the hearing

[9] During the hearing, I agreed to accept documents to be submitted after the hearing as they supported part of his testimony. The documents were submitted as agreed.

[10] The documents were shared with the Commission. No reply from the Commission was received as of the date of this decision. The documents were considered as part of the decision.

Issue

[11] Was the Claimant available for work?

Analysis

[12] 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.

[13] 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.

[14] 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.

[15] 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.

[16] 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

[17] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.⁶ There is no evidence the Commission required the Claimant to prove reasonable and customary efforts to find a job as set out in section 50(8) of the Act. In looking through the evidence in the appeal file, I see only two statements from the Claimant to the Commission which may fall under section 50(8) of the EI Act.

[18] The first of which was the Claimant’s comment where he said he did not apply for any jobs while being suspended and prior to his dismissal.⁷ The second was the

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.

⁶ See section 9.001 of the Regulations.

⁷ See GD3 page 41.

Claimant's statement which says that he applied to two jobs between January 18, 2022, and August 18, 2022.⁸

[19] Both of these statements are valid answers regarding Section 50(8) as well as the second factor that need to be considered under the *Faucher* decision when looking at Section 18(1)(a) of the Act.

[20] Section 9.001 of the Regulations which gives the criteria to help define "reasonable and customary efforts" lists nine factors which should be considered when making a determination. The Commission did not ask the Claimant for any of the other factors which are relevant to the test. Five of the nine factors are included here for reference:

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- attending job-search workshops or job fairs
- networking.

[21] There are no discussions on résumés, job search tools, networking and the like between the Commission and the Claimant. The Commission has a statement on one of the nine criteria which are suggested in the Regulations.

[22] In addition, the Commission did not make any submissions on how the Claimant failed to prove how the Claimant was making reasonable and customary efforts to find a job. The Commission only summarized the legislation in regards to Section 50(8) of the EI Act and Section 9.001 of the EI Regulations.

[23] For these reasons, I find Claimant is not disentitled under section 50(8) of the EI Act. This is based on the lack of evidence and the lack of submissions.

⁸ See GD3 page 41.

Capable of and available for work

[24] 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:⁹

- a) He wants 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 hasn't set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

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

– Wanting to go back to work

[26] I find the Claimant has shown that he wants to go back to work as soon as a suitable job was available. My reasons are in the following paragraph.

[27] I accept that the only reason the Claimant did not work past January 18, 2022, is because he was forced to take an unpaid leave of absence. The Commission agreed to the Claimant's genuine desire to return to the workforce.¹¹

[28] In summary, I find the Claimant wanted to return to the workforce. This is sufficient to meet the first *Faucher* factor. The Commission does not dispute that.

– Making efforts to find a suitable job

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

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.

¹¹ See GD4 page 3.

[30] I have considered the job-search activities discussed above in deciding this second factor.

[31] During the hearing, the Claimant also provided information on his job search activities. This is in addition to the two jobs he applied to prior to August 18, 2022. The Claimant's efforts to find a new job included having an up-to-date résumé, a LinkedIn account and subscribes to job alerts. He also spoke to his contacts in the forestry industry, assessing job opportunities and networking.

[32] He testified that at the end of September 2022, he started doing casual work as a maintenance person with a local organization.

[33] I find those efforts are enough to meet the requirements of this second factor because in light of the vaccine requirements, very few jobs in his area were available to him. That is not the only factor. As the Commission stated the Claimant was in a high level, niche occupation which limits the number of jobs available even without vaccine mandates.¹² The Claimant's testified he was a project manager with a background in forestry. He managed complex files in consultation with many stakeholders.

[34] The Claimant says he looked at jobs in various cities and employers as his skills were transferrable.¹³ The problem is that he readily admitted that the jobs in his field often required vaccination. His stance on vaccination reduced the number of jobs he can actually apply to.

[35] I accept the Claimant applied to few jobs because there were few available to him. This is because of his higher education, background and specialized niche. This is further reduced because a number of jobs had their own vaccine policies. This last point, however, will be discussed in the next section under restrictions.

¹² See GD4 page 3.

¹³ He looked at the sale of his home to enable him to be mobile and accept jobs outside the area but he received no offers on his home.

[36] I find the Claimant did enough to find suitable employment under the second *Faucher* factor. The Commission did not provide any arguments or its position regarding the second *Faucher* factor.

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

[37] The Claimant has set personal conditions that might have unduly limited his chances of going back to work.

[38] The Claimant says he hasn't done this because mandates were being lifted or relaxed around the country. He remained available under the terms he was hired under and was ready, willing and capable to continue.

[39] He also argues he is allowed to apply to jobs that have policies on vaccine requirements. The job postings he provided also mention that "Accommodations will be made for those exempt from the COVID-19 vaccination, based on grounds protected by relevant human rights law."

[40] The Commission says the Claimant has placed restrictions on his availability for work outside his regular employer. He did not apply to any job while on leave of absence.¹⁴ The Claimant provided supporting information on his employer's leave policy.¹⁵ It states that unpaid leave "is not to be used to allow an employee/appointee to work for another employer or agency..."

[41] This is from the employer's leave policy last updated in 2016.¹⁶ I can consider the employer's policy but it is not binding on me. I need to apply the EI Act. Regardless what the policy says, when requesting benefits from the Commission, it is the EI Act which a person must follow. One of the fundamental part of EI regular benefits is the requirement to search for work. The employer's policy does not negate this requirement.

¹⁴ See GD4 page 2.

¹⁵ See GD2 page 28.

¹⁶ The section is titled Terms & Conditions for Excluded Employees & Appointees Part 09 – Leave and was last updated April 12, 2016.

[42] This is supported by the Federal Court of Appeal. In one case, the court has said that "... a claimant cannot merely wait to be called in to work but must seek employment in order to be entitled to benefits...".¹⁷ In another case the court has said that no matter how little chance of success, a Claimant may feel a job search would have, the EI Act is designed so only those who are actively seeking work will receive benefits.¹⁸

[43] I find that he did limit his chances of returning to work. There is no disputing that his vaccination status greatly reduced the number of jobs available to him. The Claimant agreed to this in his testimony. I find the Claimant's choice not be vaccinated unduly limited his chances of going back to work in his own field or in government occupations. However, once he started expanding his job search, his vaccination status was no longer unduly limiting.

[44] The Claimant testified that as of the end of September he started working casual work in maintenance. As indicated above, I agreed to accept his job search after the hearing and this included him reaching out to a local housing provider.¹⁹ This email dated October 14, 2022, is from the Claimant. He introduced himself and stated that he would like to work with the company and had assisted his friend the previous week to complete work for them.

[45] There is no mention if the work the previous week is paid or if he was just "assisting" without being paid. The email is written as an introductory email and not one where there was a pre-established working relationship. I find that had this been a paid position, the email would not be written as such by him introducing himself.

[46] The Claimant testified that this email did actually prove successful and he is doing maintenance work for them. He testified that he started at the end of September 2022. I find the October 14, 2022, date to be more accurate. It is the date he reached out to the employer. The work the previous week was assisting a friend and not paid work for the company.

¹⁷ *De Lamirande v Canada (Attorney General)*, 2004 FCA 311

¹⁸ See *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93

¹⁹ See GD6 page 5.

[47] I find that this shows the Claimant expanded his job search to a much broader area. Jobs in the private sector are much more likely not to have vaccine policies. Smaller private employers are also more likely not to have vaccine policies as well. For this reason, as of October 14, 2022, the Claimant was no longer unduly limiting his chances of returning to the workforce.

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

[48] Based on my findings on the three factors, I find that the Claimant has not shown that he was capable of and available for work prior to October 14, 2022. However, this changes as of October 14, 2022, where I find he satisfied all three of the *Faucher* factors and is capable of and available for work.

Conclusion

[49] The Claimant hasn't shown that he was available for work within the meaning of the law until October 14, 2022. Because of this, I find that the Claimant can't receive EI benefits prior to this day. He is entitled to receiving benefits as of October 14, 2022. This is providing he has met all other entitlement conditions.

[50] This means that the appeal is dismissed with modification.

Marc-André St-Jules
Member, General Division – Employment Insurance Section