



Citation: *RB v Canada Employment Insurance Commission*, 2023 SST 1114

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

Decision

Appellant: R. B.
Representative: K. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (452400) dated February 4, 2022
(issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: In person
Hearing date: June 15, 2023
Hearing participant: Appellant
Decision date: July 11, 2023
File number: GE-22-3776

Decision

[1] R. B. is the Appellant. The Canada Employment Insurance Commission (Commission) is refusing to pay Employment Insurance (EI) benefits. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am allowing the Appellant's appeal in part. I find that she hasn't proven that she was available for work from October 4, 2020 until June 30, 2021. She isn't entitled to EI benefits for the time she can't prove that she was available for work.

[3] But I find that she has proven that she was available for work starting July 1, 2021. This means she is entitled to EI benefits from July 1, 2021 onwards, as long as she meets all the other conditions to get EI benefits.

Overview

[4] The Appellant was collecting EI Emergency Response Benefits (EI ERB). The Commission transitioned her to EI regular benefits starting October 4, 2020. But on each biweekly claimant report, the Appellant said she wasn't available for work. She told the Commission that she was worried about the risks of catching COVID-19 if she started working. So, the Commission decided that she wasn't entitled to EI benefits because she hadn't proven that she was available for work.

[5] The Commission says the Appellant hasn't proven that she was available for work and entitled to EI benefits. This is because the Commission says that the Appellant wasn't looking for work until after she was vaccinated against COVID-19. The Commission says the Appellant has to be looking for work to get EI benefits.

[6] The Appellant disagrees with the Commission's decision. She says that she wanted to work and was always ready to work. She says that she tried to find a job, but no one wanted to hire her.

Matter I have to consider first

The Appeal Division returned this file to the General Division

[7] Originally, the General Division allowed the Appellant's appeal. The Commission appealed this decision to the Appeal Division and the Appeal Division allowed the Commission's appeal.

[8] The Appeal Division says that the General Division has to reconsider the issue. This means that I have to make a new decision about whether the Appellant has proven that she was available for work.

Issue

[9] Was the Appellant available for work?

Analysis

[10] There are two different sections of the law that say you have to prove that you are available for work.

[11] First, the *Employment Insurance Act* (EI Act) says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.¹ The *Employment Insurance Regulations* (EI Regulations) give examples that help explain what "reasonable and customary efforts" means.²

[12] Second, the EI Act says that you have to prove that you are "capable of and available for work" but aren't able to find a suitable job.³ Case law gives three things you have to prove to show that you are "available" in this sense.⁴

¹ See section 50(8) of the *Employment Insurance Act*.

² See section 9.001 of the *Employment Insurance Regulations*.

³ See section 18(1)(a) of the *Employment Insurance Act*.

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

[13] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

[14] The Commission says it used both sections of the law to refuse EI benefits. So, I will look at both sections of the law when I decide if the Appellant has proven her availability for work

Reasonable and customary efforts to find a job

[15] The Commission says it used this part of the law to make its decision about the Appellant's entitlement to EI benefits. But I disagree. I don't think the Commission has shown that it really used this part of the law when it made its decision about the Appellant's entitlement to EI benefits.

[16] The Commission didn't ask the Appellant for a job search record. The Commission didn't warn the Appellant that she wasn't doing enough to find a job. The Commission didn't talk to her about reasonable and customary job search efforts. The original decision letter doesn't say anything about the Appellant's job search efforts. Instead, it says that the Appellant isn't entitled to EI benefits because she gave conflicting information about her availability for work.

[17] So, I won't use this part of the law when I make my decision. This doesn't mean that I am allowing the Appellant's appeal. I still have to look at the second part of the law that talks about being available for work.

Capable of and available for work

[18] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[19] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

1. You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;
2. You must show that you made reasonable efforts to find a suitable job;
3. You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.⁵

– **Wanting to go back to work**

[20] The Appellant has given conflicting information about whether she wanted to go back to work as soon as she could find a job.

[21] When she did her biweekly claimant reports, she said that she wasn't available for work. She told the Commission that she wasn't comfortable with working because she was worried about the risk of catching COVID-19.

[22] On her reconsideration request, she said she wanted to work. On her notice of appeal, she said she wanted to work, but she also said that she was available for work once she was fully vaccinated against COVID-19.

[23] And at the hearing, both the Appellant and her son (who was also her representative) gave contradictory statements about the Appellant's intentions. They said that the Appellant always wanted to work, but her son also said that she was able to work once she was vaccinated.

⁵ In *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

[24] When there are contradictory statements, I have to decide what is most likely to be true. I have to consider all of the evidence and make a decision on the balance of probabilities.⁶

[25] I think the Appellant's earliest statements are more likely to be true. This is because these are the statements she made during the actual time in question. I think the statements the Appellant made in 2020 and 2021 are more likely to reflect her state of mind at the time.

[26] The Commission's record of conversation shows that the Commission asked the Appellant a simple question about whether she was available for work, and the Appellant said she wasn't.

[27] So, I find that the Appellant hasn't proven that she wanted to return to work as soon as she found a suitable job. I find that she didn't want to return to work until she was vaccinated against COVID-19 because she was worried about the risk of catching COVID-19 if she returned to work.

[28] On her notice of appeal, the Appellant said she was fully vaccinated as of July 1, 2021. The Commission hasn't given me any reason to doubt her statement, and so I accept that the Appellant was vaccinated from July 1, 2021.

[29] The Appellant has consistently said that she wanted to work after she was vaccinated, and so I find that she has proven that she wanted to return to work starting July 1, 2021.

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

[30] The Commission says the Appellant doesn't have a job search record. The Commission also says that she wasn't actively looking for work until July 1, 2021.

[31] The Appellant has made conflicting statements about her job search efforts.

⁶ The Federal Court of Appeal says that the standard of proof is the balance of probabilities for employment insurance matters in its decision *Canada (Attorney General) v. Corner*, A-18-93.

[32] On her biweekly claimant reports, she said she wasn't available for work. She told the Commission that she wasn't comfortable with working because of the risk of COVID-19. On her notice of appeal, she said she was ready for work when she was fully vaccinated. At the hearing, she said she was ready to work starting from October 4, 2020, but her son also said she was able to work once she was fully vaccinated.

[33] So, because there are conflicting statements about whether the Appellant wanted to work and whether she was actively looking for work, it would be useful if the Appellant could provide detailed information about her job search efforts.

[34] But the Appellant doesn't have detailed information about her job search efforts. She didn't keep a written job search record for the time period I am looking at. At the hearing, I asked her for details about her job search efforts and she could only give me vague statements about where she looked for work and when she contacted these prospective employers. Often, she couldn't even provide the name of a prospective employer.

[35] It isn't enough for the Appellant to say that she went to "many places" to ask for work. It isn't enough for her to say she went to a pizza shop or a sweets shop. This isn't a detailed, reliable job search record. It isn't enough to outweigh the fact that the Appellant has made conflicting statements about her job search efforts.

[36] So, I find that the Appellant hasn't proven that she was making reasonable efforts to find a job.

[37] The Appellant has always said that she was looking for work and trying to find a job after she was fully vaccinated on July 1, 2021. I have no reason to doubt her statement, and the fact that she started working in October 2021 adds weight to this statement. I also note that the Commission says it accepts that she was looking for work starting July 1, 2021.

[38] So, I find that the Appellant has proven that she was making reasonable efforts to find a job starting July 1, 2021.

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

[39] The Appellant has made conflicting statements about whether she set any personal conditions on her job search.

[40] On her biweekly claimant reports, she said that she wasn't available for work. She told the Commission that she couldn't work because she was worried about the risk of COVID-19.

[41] At the hearing, the Appellant and her son made conflicting statements about whether the Appellant was willing to work before she was fully vaccinated. They said that the Appellant was always fit for work and willing to work, even before she was vaccinated. But her son also said that she was ready to work once she was fully vaccinated. When I asked him to explain the contradictory statements, he simply restated the same things.

[42] The Appellant hasn't given me a good explanation for why she has been making conflicting statements about her availability for work. So, I choose to rely on her earlier statements. I think they are more likely to reflect her real state of mind in 2020 and early 2021 because these are the statements she made to the Commission during the time in question.

[43] So, I find that the Appellant set personal conditions on her job search. I find that she didn't want to work until she was fully vaccinated. I find that this was a personal condition that made it hard for her to find a job until she was fully vaccinated.

[44] The Appellant says that she was fully vaccinated starting July 1, 2021. I believe her, and so I find that she didn't have any personal conditions that limited her chances of finding a job starting July 1, 2021.

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

[45] I find that the Appellant hasn't proven that she wanted to work until she was fully vaccinated. She hasn't proven that she was making reasonable efforts to find a job. And

I find that she set personal conditions that limited her chances of finding a job because she didn't want to work until she was fully vaccinated against COVID-19.

[46] So, I find that she hasn't proven that she was available for work from October 4, 2020 until June 30, 2021.

[47] But I find that the Appellant was vaccinated as of July 1, 2021. I find that she wanted to work and started making reasonable efforts to find a suitable job after she was vaccinated. I find that she didn't set personal conditions that limited her chances of finding a job after she was fully vaccinated.

[48] So, I find that she has proven that she was available for work starting July 1, 2021.

Conclusion

[49] I am allowing the Appellant's appeal in part. She hasn't proven that she was available for work from October 4, 2020 until June 30, 2021. This means she isn't entitled to EI benefits.

[50] But I find that she has proven that she was available for work starting July 1, 2021. This means that she is entitled to EI benefits from July 1, 2021, as long as she meets all the other conditions to receive EI benefits.

Amanda Pezzutto
Member, General Division – Employment Insurance Section