



Citation: *PM v Canada Employment Insurance Commission*, 2022 SST 1778

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

Decision

Appellant: P. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (460751) dated March 24, 2022 (issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Videoconference

Hearing date: June 13, 2022

Hearing participants: Appellant

Decision date: July 13, 2022

File number: GE-22-1201

Decision

[1] I am dismissing the Claimant's appeal. This decision explains why.

[2] The Claimant did not prove that she was available for work after she was dismissed from her job for not complying with her hospital's COVID-19 vaccination policy.

[3] This means that she is not entitled to receive Employment Insurance (EI) benefits.

Overview

[4] The Claimant worked at the same hospital for twenty-one years. The hospital put her on unpaid leave on September 29, 2021, and dismissed her on October 15, 2021, because she did not comply with its COVID-19 vaccination policies.

[5] On November 1, 2021, the Claimant applied for EI regular benefits. The Commission decided that she could not get benefits since she did not show that she was available for work.

[6] I have to decide whether the Claimant has proved that she was available for work. She has to prove this on a balance of probabilities. This means that she has to show it is more likely than not that she was available for work.

[7] To prove this, the Claimant has to show that she wanted to return to work as soon as she could get a suitable job; that she made efforts to find a job; and that she did not set personal conditions that unduly limited her chances of getting a job.

[8] The Commission says the Claimant's decision not to get vaccinated means that she had a personal condition that limited her chances of returning to work in the health care field. The Commission says the Claimant has also not shown that she made any effort to find work.

[9] The Claimant disagrees. She argues that the employer wrongly dismissed her. She says she had health concerns about getting the vaccination as well as religious concerns. She says she plans to return to her old job so she did not look for any other work.

[10] My role is to decide if the Claimant was available for work while claiming benefits. Why she was dismissed or whether her dismissal was unfair are not questions before me.

Issue

[11] Was the Claimant available for work?

Analysis

[12] Not everyone who stops working can get EI regular benefits. To get benefits, you have to show that you are available for work. This includes searching for a job.

[13] The Commission says you must make “reasonable and customary” efforts to find work. But the Claimant did not do a job search so the Commission said nothing more.

[14] For this reason, I make no decision on a disentitlement under section 50 of the EI Act for failing to carry out a reasonable and customary job search. I will only consider the following test for availability in section 18(1)(a) of the EI Act.

Capable of and available for work

[15] I have to consider three factors when deciding whether the Claimant was capable of and available for work and unable to find a suitable job.¹ She has to prove that

- a) she wanted to get back to work as soon as a suitable job was available;
- b) she tried to do this by making efforts to find suitable work; *and that*
- c) she did not set personal conditions that might unduly (in other words, unreasonably) limit her chances of finding a job.²

[16] I have to consider each of the above three factors to decide the question of availability.³ As well, I must look at the Claimant’s attitude and conduct.⁴

The Claimant only wanted to return to her old job

[17] The Claimant says she wanted to return to work as soon as she could but was waiting to get her old job back. So, her wish to return to work only applied to that job.

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

² These three factors are set out in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases these factors in plain language.

³ *Faucher*, see above.

⁴ Two decisions from case law set out this requirement: *Canada (Attorney General) v Whiffen*, A-1472-92 and *Carpentier v Canada (Attorney General)*, A-474-97.

[18] The Claimant says she was willing to work every day. But being willing to work and having the time to work is not the same as being available for work.⁵ As noted above, the law says you must continue to look for a job; you cannot just collect benefits.

The Claimant did not try to get another suitable job

[19] There is no evidence that the Claimant made efforts to find another suitable job.

[20] The Claimant agrees that she did not search for work in the health care field or in any other sector. She says she was waiting for the hospital to reverse her dismissal since she wants her old job back.

[21] The Claimant says she did not know that she had to search for other work while claiming benefits. She argues that the Commission was negligent in failing to tell her this.

[22] But the requirement to keep looking for work is clearly set out in the Claimant's application for benefits. It applies to all claimants on every working day for which they want to claim benefits.

The Claimant set personal conditions

[23] The Claimant set personal conditions that unreasonably limited her chances of returning to work in suitable employment.

[24] The Commission says the Claimant set a personal condition by only being able to work in a job where her vaccination status would not matter. It says this condition limited her chances of finding a job in the health care field where she works.

[25] The Claimant confirmed that not being vaccinated prevented her from working at her old job and also at another hospital where she sometimes got shifts. This supports the Commission's argument that finding another job in health care would be especially difficult.

[26] I agree that the Claimant's vaccination status prevented her from complying with the COVID policies of her hospital. It meant that she could not comply with the policies of the

⁵ *Canada (Attorney General) v Leblanc*, 2010 FCA 60.

other hospital where she sometimes worked. This would, more likely than not, have been the same in most, if not all, health care facilities.

[27] The Claimant says she might have taken the vaccine if medical tests had cleared her to do this. But the tests were postponed due to COVID-19, so the delay was not her fault. She says the hospital would not extend the deadline to allow her to make an informed decision about the vaccination and her union refused to help her.

[28] But the Claimant, an ordained Minister, applied for a religious exemption too. In an affidavit, she refuses any form of vaccination.⁶ She argues that it is an experimental procedure that should not be performed on healthy men, women and children. She says Christians who are sick must go to the elders of her church, not doctors, and use only prayers and herbs. She states that using pharmaceuticals may amount to sorcery.⁷

[29] This sworn declaration shows that the Claimant would, more likely than not, have refused the COVID vaccine even if tests had shown no medical reason to refuse it. This is why I find that her decision to remain unvaccinated was a personal condition that unduly limited her chances of finding work, especially in her preferred area of employment.

[30] Wanting to wait to get her old job back rather than looking for other work was also a personal condition that unduly limited the Claimant's chances of finding a new job.⁸

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

[31] Based on my findings on the above three factors, I find that the Claimant has not shown that she was capable of and available for work and unable to find a suitable job.

[32] The Claimant says she did not know that she had to look for work while claiming benefits. She argues that the Commission failed in its responsibility to tell her what she had to do by never contacting her; she says this was disrespectful. She also argues that it is unfair for newcomers to Canada to get benefits without working for them when she has made EI contributions since she was 14 years old.

⁶ See the Claimant's Affidavit, dated October 17, 2021, at GD3-38 to GD3-44.

⁷ See the Claimant's Affidavit at GD3-43.

⁸ You cannot just wait to return to your job. See *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

[33] I sympathize with the Claimant's difficult circumstances without earnings or benefits but I cannot change the law even in cases of financial hardship.⁹ EI is an insurance plan. As with other plans, you not only pay into the plan, you must also meet its conditions.¹⁰ The Claimant did not meet these conditions because she did not show that she was available for work while claiming benefits.

Conclusion

[34] The Claimant has not shown that she was capable of and available for work starting on November 1, 2021. So, she is disentitled from receiving EI regular benefits as of that date.

[35] This means that I am dismissing the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

⁹ *Canada (Attorney General) v Knee*, 2011, FCA 301.

¹⁰ *Pannu v Canada (Attorney General)*, 2004 FCA 90.