Citation: *SV v Canada Employment Insurance Commission*, 2023 SST 1031

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. V.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (559230) dated December 16, 2022 (issued by Service Canada)

Tribunal member:	Katherine Parker
Type of hearing:	In person
Hearing date:	May 3, 2023
Hearing participant:	Appellant
Decision date:	June 6, 2023
File number:	GE-23-49

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant voluntarily left his job on August 29, 2022, without just cause. This means he is disqualified from receiving Employment Insurance (EI).

[3] The Appellant has shown that he was available for work between April 3, 2022, and July 23, 2022, because this is a grace period for union recall. This means that he isn't disentitled from receiving EI benefits for that period of time.

[4] The Appellant hasn't shown that he was available between July 24, 2022, and August 28, 2022. So the Appellant is disentitled to benefits for this period of time.

Overview

[5] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disqualified from receiving Employment Insurance (EI) regular benefits as of August 28, 2022, because he voluntarily left his employment without just cause.

[6] I must decide whether the Appellant voluntarily left his job, and if he did, whether the Appellant had no reasonable alternatives to leaving his job.

[7] The Commission also decided the Appellant was disentitled to benefits when he was laid off on April 3, 2022, because he didn't prove his availability 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.

[8] I must decide whether the Appellant has proven that he was available for work. The Appellant 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.

[9] The Commission says that the Appellant wasn't available because the evidence on file shows the claimant made no effort to seek work on his own, remained waiting for his union to find him work within an unreasonable restriction of a 30-minute commute

from his home. It said he continued to turn down the work that was being offered to him'[1]

[10] The Appellant disagrees with the Commission's decisions. He said he didn't voluntarily leave his job and that he was available for work. He said he turned down the recall from the company who laid him off because he didn`t want to work at the large plant. He explained to the Commission that he was having medical problems with his knees because the physical workplace required a lot of walking, and stairs. He said his knees failed on him at least three times and locked into hyperextension causing his knew to point backwards.[2]

[11] The Appellant says that the physical demands of his former job were caused by the workplace. He could still work in his trade and expected a recall because his union had amalgamated with Kingston which was closer to his home. He said he had less capacity for jobs that required physical labour, but he could still work in his field.[3]

[12] At the hearing, the Appellant provided new information and said he couldn't do the commute any longer for medical reasons and a position closer to home would be better. But he told the Commission that wasn't the reason for turning down the recall on August 29, 2022. He had been travelling for his work for many years and was used to staying in local accommodations during the week when he normally worked ten hours a day, four days a week. He said he turned it down because of his knees but his medical evidence said he could work in his trade with no restrictions.

Matter I considered first

I am not accepting documents sent in after the hearing

[13] At the hearing I asked the Appellant if he had evidence to support his claim that he had a medical condition that prevented him from driving to his former workplace. He

[1] See GD4-6.
[2] See GD3-19.
[3] See GD3-29.

said he hadn't discussed this medical information with the Commission because he was too embarrassed. The drive was approximately 1.5 hours in time.

[14] I suggested he could provide emails, medical notes, or any related correspondence that discussed the medical issue. It had to be relevant for the period of time in question, and I asked for it to be sent within five days from the date of the hearing.

[15] The Tribunal didn't receive any documents until almost 30 days later. The Appellant sent a note written by an individual saying the Appellant couldn't drive a distance of one hour. The person writing the note didn't indicate their profession, or title. The note wasn't written on letterhead and didn't have the stamp of a medical office or medical practitioner. Furthermore it was dated June 1, 2023, which is not relevant for the period in question.

[16] I didn't accept this late document as evidence because it wasn`t relevant to the time period in question, and its authenticity could not be verified.

Issues

[17] Did the Appellant voluntarily leave his job? If so, did he voluntarily leave without just cause?

[18] Was the Appellant available for work?

Analysis

Did the Appellant voluntarily leave job?

[19] I will first address the Appellant's voluntary leaving.

[20] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause for doing so.[4] Having a good reason for leaving a job isn't enough to prove just cause.

[4] Section 30 of the *Employment Insurance Act* (Act) explains this.

[21] The Appellant says that he didn't quit his job, he was laid off and waiting for recall.

[22] The Record of Employment states he was laid off and the reason for departure was "shortage of work". Expected date of recall was unknown.[5]

[23] The union representative for the employer told the Commission that the Appellant wanted to work closer to his home and that he didn't want to work at the larger plant. He said the Appellant no longer wanted to do the long drive. He said the Appellant knew there was no jobs coming up in the near future in the Kingston area where the Appellant lived.

[24] The Commission says that the Appellant voluntarily left his job when he turned down a recall offer from the union on August 29, 2022. It says that if the Appellant wanted to work, he could have taken that job at his former place of work. The Commission agreed with the Union.

[25] The Appellant said he didn't voluntarily leave his job when he turned down the recall on August 29, 2022. He said that the job he was offered was no longer suitable because of the physical workplace and the long commute. He said that the larger plant required a lot of walking, and he couldn't do it. He said he was waiting for MRI results on his knees and that he may have to wear a knee brace. He said he had been expecting to be recalled and could still work in his trade, but not at his former place of work.[6]

[26] I find that the Appellant did voluntarily leave when he turned down the recall on August 29, 2022. Both the Commission and the Appellant agree that he turned down a recall to his former employment. Section 29(b.1) (ii) of the Act says that the refusal to resume an employment is voluntary leaving. The Appellant had a choice to resume his employment but chose not to do so. The Appellant knew there was little to no work coming in the near future that would allow a 30-minute commute.

---

[5] See GD3-24.
[6] See GD3-28.

– The parties don’t agree that the Appellant had just cause

[27] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn’t have just cause.[7] Having a good reason for leaving a job isn’t enough to prove just cause.

[28] The law explains what it means by “just cause.” The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all the circumstances.[8]

[29] It is up to the Appellant to prove that he had just cause.[9] He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that his only reasonable option was to leave. When I decide whether the Appellant had just cause, I have to look at all of the circumstances that existed when the Appellant quit.

[30] The Commission says that the Appellant didn’t have just cause, because he had reasonable alternatives to leaving when he did. Specifically, it says that the Appellant didn’t want to make the long commute and that this wasn’t enough to turn down a recall. It said he had a job offer in his trade and he turned it down.

[31] I find that the Appellant turned down the recall without looking for reasonable alternatives. He didn’t ask his employer about accommodations so he could work in a capacity that didn’t require as much physical labour. He said he couldn’t do the walking and stairs at the larger plant. However, the Appellant didn’t ask for options or an alternate workplan, and he didn’t ask to be reassigned. At his hearing, he said that some employers would make informal accommodations of the older tradesperson and give them the less physical jobs such as transferring knowledge. But he didn`t ask his former employer for this consideration.

---

[7] Section 30 of the *Employment Insurance Act* (Act) explains this.
[8] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.
[9] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.

[32] At the hearing, the Appellant said the long commute was getting more difficult for medical reasons. He didn't provide any evidence to support a medical condition that limited his range of uninterrupted driving. The Appellant was accustomed to long commutes, he normally stayed locally during the week. He didn't tell the Commission about the medical issues causing the long drives to be difficult because he said he was embarrassed. So I have to give more weight to his original testimony to the Commission.

[33] For the reasons set out above, the Appellant didn't have just cause for leaving his job. This means that he is disqualified from receiving benefits from August 28, 2022.

Was the Appellant available for work?

[34] The Commission also decided that the Appellant was disentitled to benefits because he failed to prove his availability. The Commission says that he wasn't searching for a job. It also said he was physically able to work in his trade under the same conditions as before.[10]

[35] Two different sections of the law require Appellants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections, so he has to meet the criteria of both sections to get benefits.

[36] First, the Employment Insurance Act (Act) says that an Appellant has to prove that they are making "reasonable and customary efforts" to find a suitable job. The Employment Insurance Regulations (Regulations) give criteria that help explain what "reasonable and customary efforts" mean. I will look at those criteria below.

[37] Second, the Act says that an Appellant has to prove that they are "capable of and available for work" but aren't able to find a suitable job. [11] Case law gives three things an Appellant has to prove to show that they are "available" in this sense. I will look at those factors below.

---

[10] See GD3-22.
[11] See section 18(1)(a) of the Act.

[38] The Commission decided that the Appellant was disentitled from receiving benefits because he wasn't available for work. I will now consider these two sections to determine whether the Appellant was available for work.

Reasonable and customary efforts to find a job

[39] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[12] I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[40] Section 9.002 of the Employment Insurance Regulations (Regulations) provide the criteria for determining what is suitable employment. This includes physical and health problems that make commuting difficult.

[41] I find that a suitable job for the Appellant was his old job or a job similar to that one. He said at the hearing that he couldn't do the commute for medial reasons, but he didn't tell that to the Commission, and he didn't provide medical evidence to support his claim.

[42] I also have to consider the Appellant'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:[13]

- assessing employment opportunities
- networking
- registering with the union hiring hall

[43] The Commission says that the Appellant didn't do enough to try to find a job. It acknowledged there is a grace period for unionized tradespersons who are laid off.[14] It recognizes that the most likely source of employment will come from the union and

[12] See section 9.001 of the Regulations.
[13] See section 9.001 of the Regulations.
[14] See GD4-6.

allows for some restrictions. It noted that the Appellant would qualify for the maximum grace period of 16 weeks, which ended July 23, 2022.

[44] The Appellant disagrees. He said he had a reasonable expectation of recall even though he couldn't go back to the larger plant. He said the union had amalgamated with Kingston (the area he preferred to work) and that when normal construction season began, he would be called.

- The Appellant was laid off on March 31, 2022, due to a shortage of work.
- He expected a recall, and he was called on August 29, 2022, with an offer to return to the large plant he had been working at.
- He refused that call because he said it wasn't suitable as he didn't want the long commute.

[45] His capacity was reduced for working in areas that required high physical labour. However, he could still work in his trade with the right working conditions.

[46] He said he was continuously networking with former employers in his local area to find a job in his trade. He had worked in Kingston before. He kept on top of what construction was being approved and let them know he was available. He was always networking with other union members and tradespeople.

[47] I find that the Appellant wasn't making reasonable and customary efforts to find a job after July 24, 2022. The Appellant was waiting for a job to come up in his local area which was closer to home. Case law doesn't support not actively looking for other jobs while waiting for a recall as a reasonable or customary effort.

[48] The Appellant has not proven that his efforts to expect a recall were reasonable and customary. The union said there was work at the larger plant, but the Appellant limited his options by saying the drive was too long. For the reasons I stated above, commuting to the same job that he had done before is suitable.

Capable of and available for work

[49] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[15]

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) limit his chances of going back to work.

[50] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[16]

– **Wanting to go back to work**

[51] The Appellant has not shown that he wanted to go back to work as soon as a suitable job was available. He repeatedly said that he was waiting for a recall, but he was also planning to turn down the recall if it was with the former employer. He said he couldn't do the commute but didn't provide any medical evidence to support his situation.

[52] The desire to return to work must be sincere, demonstrated by the attitude and the conduct of the claimant. The Appellant said that he didn't want to go back to the plant. When he met with HR before his departure, he told them he hoped that he was never called back. HR took that to mean he was retiring, but he was laid off due to work shortage.

---

[15] 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.
[16] 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.

[53] The Appellant didn't accept the first job he was offered on August 29, 2022, because he said he didn't want to make the long commute any longer. He continued looking for work within his trade.

[54] I find that between April 3, 2022, and July 23, 2022, the Appellant was available. This was a usual grace period for union trades to expect a recall. I find that he wasn't available between July 23, 2022, and August 28, 2022, because he didn't demonstrate that he was looking for alternate employment, and when he did get a recall, he turned it down. After the grace period, the Appellant didn't demonstrate a sincere desire to return to work.

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

[55] The Appellant didn't demonstrate that he tried to find a suitable job between July 24, 2022, and August 28, 2022. He remained with the union and waited for their call.

[56] The Appellant said he looked at the job boards but didn't see anything in his trade. He said that he couldn't accept a job outside his trade because the wages were too low.

[57] The Appellant's efforts to find a new job included maintaining ties with his network for word about construction projects that were coming up. He wanted to work in the Kingston area and had worked there before.

[58] Those efforts were not enough to meet the requirements because after he turned down the first recall on August 29, 2022. He said he was hoping for a recall to a local job, but knew those jobs were not likely unless large construction projects were started in the area. He said he wasn't in a hurry to find a new job.

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

[59] The Commission said the claimant set a limitation that unduly limited his job options. The Appellant didn't want to make the long commute. He said he had a medical condition that made the drive difficult. But the drive was 1.5 hours one way. I agree that

the Appellant set this limitation on his job search and find that after July 23, 2022, this unduly limited his job options.

Conclusion

[60] The Appellant voluntarily left his job when he refused the recall on August 29, 2022. He did not have just cause for leaving because he had reasonable alternatives to leaving. This means he is disqualified from receiving benefits.

[61] The Appellant has shown that he was available for work between April 3, 2022, and July 23, 2022, while he was waiting for a recall. Because of this, I find that the Appellant isn't disentitled from receiving EI benefits for this period of time. So, the Appellant may be entitled to benefits.

[62] The Appellant wasn't available for work between July 24, 2022, and August 28, 2022. He didn't demonstrate that he wanted to return to work, he didn't look for suitable employment, and he limited his job options by saying he didn't want the long commute that he was normally accustomed to.

[63] This means that the appeal is dismissed.

Katherine Parker

Member, General Division – Employment Insurance Section