



[TRANSLATION]

Citation: *JL v Canada Employment Insurance Commission*, 2023 SST 823

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

Decision

Appellant: J. L.
Representative: Louiselle Luneau

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (534471) dated October 4, 2022 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Teleconference
Hearing date: May 30, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: June 23, 2023
File number: GE-22-3528

Decision

[1] The appeal is allowed. I find that the Appellant has shown that she was available for work during the period from May 23, 2022, to August 12, 2022.¹ So, she is entitled to Employment Insurance (EI) benefits for that period.

Overview

[2] From September 2018 to October 1, 2021, inclusive, the Appellant had several periods of employment as a construction surveyor for the employer X.²

[3] On October 4, 2021, she made an initial claim for EI benefits (regular benefits).³ A benefit period was established effective October 3, 2021.⁴

[4] From January 30, 2022, to May 14, 2022, the Appellant was unable to work for medical reasons.⁵ She was paid 15 weeks of sickness benefits (special benefits) for this period.⁶

[5] Later, according to the medical certificate she sent the Commission, the Appellant was able to do [translation] “light work” from May 22, 2022, to July 22, 2022, for a maximum of 35 hours per week.⁷

[6] On July 20, 2022, the Canada Employment Insurance Commission (Commission) told her that it could not pay her EI benefits (regular benefits) from May 23, 2022, because she had restrictions that limited her chances of finding a suitable job, she didn't know what type of job she could do, and she wasn't actively

¹ See section 18(1)(a) of the *Employment Insurance Act* (Act) and sections 9.001 and 9.002(1) of the *Employment Insurance Regulations* (Regulations).

² See GD3-3 to 15, GD11-5, and GD11-6.

³ See GD3-3 to 15.

⁴ See GD3-1 and GD4-1.

⁵ See GD11-2.

⁶ See GD11-2.

⁷ See the medical certificate issued by the Abitibi-Témiscamingue Integrated Health and Social Services Centre, dated May 25, 2022—GD3-18.

looking for a suitable job. The Commission told her that, for these reasons, it had found that she wasn't available for work.⁸

[7] On October 4, 2022, after a reconsideration request, the Commission told her that the July 20, 2022, decision had been replaced by a new one. The Commission told her that, according to this new decision, she wasn't entitled to EI benefits from May 23, 2022, to August 12, 2022, because her capacity was reduced by illness, which limited her chances of working. The Commission told her that it had found that she wasn't available for work.⁹

[8] The Appellant says that she was available for and able to work during the period from May 23, 2022, to August 12, 2022. She argues that she needs to work. The Appellant says that she looked for work during the relevant period, and even before that, considering the tasks she could perform because of her medical restrictions. She explains that she focused her search in the field of surveying—her field of employment for more than 35 years—by contacting the various employers she had worked for, among other things. The Appellant says that she also looked in areas other than surveying (for example, cooking, delivery work). She went back to work in surveying on August 15, 2022. She says that she is entitled to EI regular benefits during the relevant period. On October 23, 2022, the Appellant challenged the Commission's reconsideration decision before the Social Security Tribunal of Canada (Tribunal). This decision is being appealed to the Tribunal.

⁸ See GD3-28 and 37.

⁹ See GD2-9, GD2-10, GD2A-7, GD3-41, and GD3-42.

Issues

[9] In this case, I have to decide whether the Appellant has shown that she was available for work during the period from May 23, 2022, to August 12, 2022.¹⁰ To do this, I must answer the following questions:

- Did the Appellant:
 - show a desire to go back to work as soon as a suitable job was available?
 - express this desire through efforts to find a suitable job?
 - set personal conditions that might have unduly limited her chances of going back to work?

Analysis

[10] Two different sections of the *Employment Insurance Act* (Act) require claimants to show that they are available for work.¹¹ Both sections deal with availability, but they involve two different disentitlements.¹²

[11] First, a claimant isn't entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that, on that day, they were capable of and available for work and unable to obtain a suitable job.¹³

[12] Second, to prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to obtain a suitable job.¹⁴

[13] To determine whether a claimant is available for work, I have to consider the specific criteria set out in the Act for determining whether their efforts to find a suitable

¹⁰ See section 18(1)(a) of the Act and sections 9.001 and 9.002(1) of the Regulations.

¹¹ See sections 18(1)(a) and 50(8) of the Act.

¹² See sections 18(1)(a) and 50(8) of the Act.

¹³ See section 18(1)(a) of the Act.

¹⁴ See section 50(8) of the Act.

job are reasonable and customary.¹⁵ According to these criteria, the efforts must be: 1) sustained, 2) directed toward finding a suitable job, and 3) compatible with nine specific activities that can be used to help claimants find a suitable job.¹⁶ These activities include assessing employment opportunities, registering for job search tools or with online job banks or employment agencies, contacting prospective employers, and applying for jobs.¹⁷

[14] The criteria for determining what a constitutes suitable job are the following: (1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, (2) the hours of work aren't incompatible with the claimant's family obligations or religious beliefs, and (3) the nature of the work isn't contrary to the claimant's moral convictions or religious beliefs.¹⁸

[15] The notion of "availability" isn't defined in the Act. Court decisions have set out criteria for determining a person's availability for work and entitlement to EI benefits.¹⁹ These three criteria are:

- the desire to go back to work as soon as a suitable job is available
- the expression of that desire through efforts to find a suitable job
- not setting personal conditions that might unduly limit the chances of going back to work²⁰

[16] In this case, the Appellant meets the above criteria to show that she was available for work during the period from May 23, 2022, to August 12, 2022. She has shown that her efforts to find a job during that period were reasonable and customary.

¹⁵ See section 9.001 of the Regulations.

¹⁶ See section 9.001 of the Regulations.

¹⁷ See section 9.001 of the Regulations.

¹⁸ See section 9.002(1) of the Regulations.

¹⁹ The Court established or reiterated this principle in *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

²⁰ The Court established or reiterated this principle in *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

Question 1: Did the Appellant show a desire to go back to work as soon as a suitable job was available?

[17] I find that the Appellant did show a desire to go back to work as soon as a suitable job was available during the period from May 23, 2022, to August 12, 2022.

[18] The Appellant explains that she has worked in construction surveying for more than 35 years.

[19] She argues that she needs to work. She says that she was never opposed to working in other fields of employment than surveying.

[20] The Appellant explains that, during the period when she was unable to work for medical reasons, from January 30, 2022, to May 14, 2022, and after that, she followed her doctor's recommendations after her March 11, 2022, surgery.

[21] She argues that she did everything possible to go back to work as quickly as possible based on her doctor's recommendations (for example, [translation] "light work"—lifting a load of 5 pounds or less with her right shoulder, lifting a load of 10 pounds or less with both hands, working a maximum of 35 hours per week, and doing physiotherapy).²¹

[22] The Appellant says that she went back to work in construction surveying on August 15, 2022.²² She had a contract in this field from November 1, 2022, to mid-May 2023.

[23] I find that the Appellant did show a desire to go back to work as soon as a suitable job was available during the relevant period.

[24] I have no reason to doubt that the Appellant wanted to work and continue to be in the labour market during the period from May 23, 2022, to August 12, 2022.

²¹ See the medical certificate issued by the Abitibi-Témiscamingue Integrated Health and Social Services Centre, dated May 25, 2022—GD3-18.

²² See GD3-39 and 40.

[25] She didn't stop showing her desire or willingness to go back to work as soon as a suitable job was available during the relevant period. She has shown that she was able to work during that period.

Question 2: Did the Appellant express this desire through efforts to find a suitable job?

[26] I find that the Appellant expressed her desire to go back to work through efforts to find a suitable job during the period from May 23, 2022, to August 12, 2022.

[27] The Appellant says that she looked for a job during the relevant period.²³

[28] She says that, even though she has worked for the same employer for several years—X—she also does contracts for several other employers.

[29] The Appellant says that she usually starts looking for work in March or April, given that her survey work is seasonal in nature and much rarer during winter.

[30] She explains that, as a construction surveyor, she may be called to work in several regions of Quebec. She says that it is rare for her to work in her own region, Abitibi.

[31] The Appellant says that, during the period from May 23, 2022, to August 12, 2022, and when she was unable to work for medical reasons, she made several efforts to find a suitable job.

[32] She says that her efforts to find work were directed toward surveying, based on the tasks she could perform as recommended by her doctor (for example, [translation] "light work"), as well as other areas of employment (for example, cooking, delivery).²⁴ She says that she has worked as a cook's assistant at a snack bar.

[33] The Appellant explains that, during the period from May 23, 2022, to August 12, 2022, she was unable to do her usual surveying tasks (for example, [translation]

²³ See GD2A-5, GD2A-6, GD3-19, GD3-27, GD3-29 to GD3-33, GD3-39, and GD3-40.

²⁴ See GD2A-5, GD2A-6, GD3-19, GD3-27, GD3-29 to GD3-33, GD3-39, and GD3-40.

“staking,” which means walking with a pocket of stakes on her shoulder, using a GPS, placing stakes every 20 metres, and working with a sledgehammer), given that her doctor had recommended she do [translation] “light work.” But she could do other types of construction surveying tasks that were less physically demanding than [translation] “staking” (for example, doing surveys, which means taking measurements or painting marks on the ground to guide excavation work when building a ditch or foundation for an electrical post, for example).

[34] The Appellant says that she made the following efforts to find a job:

- a) Updated her résumé at the end of each contract.
- b) Networking: Maintained a connection with the employers she worked for, through Facebook, to show her interest in working for them.²⁵
- c) Joined surveying Facebook groups (For example, [translation] “Surveying” and “Surveyor” groups). Reviewed positions posted through these groups.²⁶
- d) Mid-June 2022: Reached out to a potential employer, Galarneau Entrepreneur général inc.
- e) June 2022: Reached out to an acquaintance (D. H.), who owns a canteen and organizes events, to offer to work for him in cooking or food service at upcoming events (for example, [translation] “Truck rodeo” in early August 2022). There was no work for her.²⁷
- f) Reached out to an acquaintance who does delivery work, to find out whether she could do this type of work. The person told her that this wasn’t possible.²⁸

²⁵ See GD8-2, GD8-5, GD8-7, GD9-2, GD9-7, GD9-8, GD9-9, GD9-11, and GD9-12.

²⁶ See GD8-3, GD8-4, GD8-6, GD9-3 to GD9-6, GD9-10, and GD9-13.

²⁷ See GD3-39 and 40.

²⁸ See GD3-27, GD3-39, and GD3-40.

g) In the last week of July 2022: Reached out to the employer X. The employer told her that it would try to [translation] “find something.” It was then a question of a contract with Fermont starting around mid-August 2022.²⁹

[35] Concerning the summary of her October 4, 2022, statement to the Commission, in which she said that she didn’t think it was worth starting a job that she would have to leave quickly because she knew she would be able to go back to work in surveying in a matter of weeks,³⁰ the Appellant argues that these jobs were different from surveying (for example, delivery). She says that these jobs had working conditions and wages that were very different from those in surveying. For example, if she had taken a delivery job, this work would have been temporary until she went back to work in surveying. She also says that there are few restaurants and few jobs available in her community.³¹

[36] The Appellant explains that she indicated in her reconsideration request that, since the Commission had refused to pay her benefits, she wasn’t required to look for work every day.³² She says that she indicated this because, during a conversation with a Commission agent, the agent told her that she had to look for work [translation] “every day.” The Appellant says that she looked for work and that she didn’t have to report on her job search every day.

[37] The Appellant explains that, on August 15, 2022, she went back to work in construction surveying for the employer X.³³

[38] She says that she had a surveying contract from November 1, 2022, to mid-May 2023, to build an electrical substation.

²⁹ See GD3-33.

³⁰ See GD3-39.

³¹ See GD3-39.

³² See GD3-32.

³³ See GD3-39 and 40.

[39] The Appellant's representative argues as follows:

- a) The Appellant has shown that she was available for work during the relevant period.
- b) Contrary to what the Commission says, the Appellant was looking for a suitable job that respected her medical restrictions.³⁴
- c) The Appellant was looking for a job to continue working in construction surveying, both in and outside of her region.³⁵
- d) The Appellant wasn't opposed to other types of jobs than surveying (for example, cooking, delivery) and looked for other types of jobs.³⁶

[40] In this case, I find that the Appellant made "reasonable and customary efforts" to "find a suitable job"—that is, sustained efforts directed toward finding a suitable job that is compatible with nine specific activities that can be used to help claimants find a suitable job.³⁷

[41] The Appellant used appropriate means to be able to work (for example, assessing employment opportunities, networking, contacting her employer and other potential employers).³⁸

[42] In assessing the Appellant's availability for work, I also consider the criteria set out in the Regulations for determining what constitutes suitable employment, which includes the criterion that "the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work."³⁹

³⁴ See GD2A-5, GD2A-6, GD3-34, GD3-35, and GD3-38.

³⁵ See GD2A-5, GD2A-6, GD3-34, and GD3-35.

³⁶ See GD2A-5, GD2A-6, GD3-34, and GD3-35.

³⁷ See section 9.001 of the Regulations.

³⁸ See section 9.001 of the Regulations.

³⁹ See section 9.002 of the Regulations.

[43] The Commission says that it was “impossible” for the Appellant to work in her field of expertise because of her medical restrictions.⁴⁰ It argues that the Appellant should have recognized this and redirected her search to suitable jobs that took her medical restrictions into account.⁴¹

[44] I don’t accept the Commission’s arguments on these points.

[45] I find that the Appellant’s explanations show that she was able to work in surveying even though she had medical restrictions. The evidence on file doesn’t support the Commission’s finding that it was “impossible” for the Appellant to work in her field because of her medical restrictions. I find that, based on this finding, the Commission is making its own diagnosis aimed at limiting the Appellant’s actual ability to work in her field.

[46] I note that the Appellant’s medical evidence doesn’t indicate that she was unable to work in surveying, but that she had to do [translation] “light work” for a specific period, that is, from May 22, 2022, to July 22, 2022.⁴²

[47] In my view, the Appellant has shown that she could work at a suitable job based on her health and physical capabilities to commute to the workplace and to perform the work, as the Regulations set out.⁴³

[48] I note that the Appellant gives several details about the types of tasks she could perform in her field of expertise, while taking her medical restrictions into account.

[49] The Commission doesn’t explain how the types of tasks the Appellant could do, despite her medical restrictions, might not be suitable employment in her case.

[50] The Commission also says that the Appellant was limiting her job search efforts because she was waiting to go back to her field of employment and didn’t want to start a

⁴⁰ See GD4-5.

⁴¹ See GD4-5.

⁴² See the medical certificate issued by the Abitibi-Témiscamingue Integrated Health and Social Services Centre, dated May 25, 2022—GD3-18.

⁴³ See section 9.002 of the Regulations.

new job and then leave it, since she had almost recovered.⁴⁴ According to the Commission, these facts show that the Appellant wasn't willing to accept any suitable job, whether temporary or permanent, until she returned to her employer X.⁴⁵

[51] I don't accept the Commission's arguments on these points either.

[52] I find that the Appellant has shown that she wasn't just waiting to go back to work for the employer X. Her job search shows that she made ongoing efforts to work with several prospective employers in surveying.

[53] I note that, when the Appellant went back to work in surveying on August 15, 2022, it was for an employer other than X, for which she worked from September 2018 to October 2021.

[54] I also find that the Commission hasn't shown how the jobs that the Appellant could have done in food service or delivery, temporarily or permanently, could have been suitable jobs for her.

[55] I accept the Appellant's argument that working conditions (for example, wages) in food service or delivery are very different from those in surveying.

[56] In the circumstances, I find it reasonable that the Appellant first directed her search toward finding a suitable job—that is, a job that offered her earnings and conditions similar to those she received from her work in surveying. I find that the Appellant wasn't required from the outset to accept a job in a field other than surveying with less favourable conditions.

[57] The Commission argues that the Appellant's medical restrictions meant that she didn't have to lift more than 10 pounds and that these restrictions could have prevented her from working in food service or delivery jobs.⁴⁶

⁴⁴ See GD4-5.

⁴⁵ See GD4-5.

⁴⁶ See GD4-6.

[58] Given this finding, I find it ironic that the Commission mentions that the Appellant said she had only checked with two potential employers, one in food service and the other in delivery⁴⁷ if she felt that she was unable to do these types of work because of her medical restrictions.

[59] The Commission also says that the Appellant argued that she wasn't required to look for a job every day, since she wasn't receiving benefits during that time.⁴⁸ According to the Commission, this showed that the Appellant hadn't fulfilled her obligations and responsibilities regarding availability for work.⁴⁹

[60] On this point, I note that the Appellant's explanations indicate that she mentioned in her August 1, 2022, reconsideration request that she wasn't required to look for work every day⁵⁰ after a conversation with a Commission agent, who had initially told her that she had to do that.

[61] I also note that, based on the evidence on file, there is every reason to believe that it wasn't until a conversation with the Appellant, on July 20, 2022, that a Commission agent told her about her obligations regarding her availability for work.⁵¹

[62] In summary, I find that, from May 23, 2022, to August 12, 2022, the Appellant has shown her availability for work each working day of her benefit period.

[63] The Court tells us that availability is assessed by working day in a benefit period in which the claimant can prove that they were capable of and available for work on that day and unable to obtain suitable employment.⁵²

[64] The Appellant has shown that she directed her search toward finding a suitable job based on her health and physical capabilities, as the Regulations set out.⁵³

⁴⁷ See GD4-6.

⁴⁸ See GD4-6.

⁴⁹ See GD4-6.

⁵⁰ See GD3-32.

⁵¹ See GD3-27.

⁵² The Court established this principle in *Cloutier*, 2005 FCA 73; and *Boland*, 2004 FCA 251.

⁵³ See section 9.002 of the Regulations.

[65] It was the Appellant's responsibility to actively look for a suitable job so that she could get EI benefits.

[66] I find that the Appellant has shown that she fulfilled this responsibility during the relevant period.

Question 3: Did the Appellant set personal conditions that might have unduly limited her chances of going back to work?

[67] I find that the Appellant didn't set "personal conditions" that unduly limited her chances of going back to work in a suitable job during the period from May 23, 2022, to August 12, 2022.

[68] Although medical restrictions prevented the Appellant from performing all her tasks as a construction survey technician, this wasn't a personal condition that unduly limited her chances of going back to work.

[69] I don't accept the Commission's argument that the Appellant's availability for work was limited as much by her reduced ability to work as by her medical appointments.⁵⁴

[70] In my view, the Appellant's details about her ability to work and the surveying tasks she was able to perform, despite her medical restrictions, don't show that she set personal conditions that limited her chances of going back to work.

[71] The Commission also argues that, because of her medical restrictions, it was [translation] "unlikely" that the Appellant would find a suitable job in the region where she lives.⁵⁵ According to the Commission, the Appellant limited her efforts outside her region, even though she was aware of the limited job opportunities in her region.⁵⁶

[72] I don't accept the Commission's argument on these points.

⁵⁴ See GD4-6.

⁵⁵ See GD4-6.

⁵⁶ See GD4-6.

[73] I find that the Appellant's explanations indicate that she could work at a suitable job during the relevant period. Her testimony also indicates that she may be required to work in several regions of Quebec and that it is rare for her to work in the region where she lives.

[74] I find that, during the period from May 23, 2022, to August 12, 2022, the Appellant didn't set personal conditions that unduly limited her chances of going back to work in a suitable job.

Conclusion

[75] I find that the Appellant has proven her availability for work within the meaning of the Act during the period from May 23, 2022, to August 12, 2022. So, she is entitled to EI regular benefits for that period.

[76] This means that the appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section