[TRANSLATION]

Citation: *DQ v Canada Employment Insurance Commission*, 2023 SST 1837

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. Q.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (577819) dated April 4, 2023 (issued by Service Canada)

Tribunal member:	Guillaume Brien
Type of hearing:	Teleconference
Hearing date:	July 24, 2023
Hearing participants:	Appellant Witness
Decision date:	July 25, 2023
File number:	GE-23-1095

Decision

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

[2] The Appellant hasn't shown that he was available for full-time work. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from December 26, 2022, because he wasn't available for full-time work. The Appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[4] I have to 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.

[5] The Commission says that the Appellant wasn't available because he was available only to work part-time for his current employer. The Appellant is happy to work as a part-time school bus driver, and he doesn't want to change jobs for a full-time job. He didn't look for work during his layoff, since he had a known recall date. The Appellant was available only to work for his current employer.[1]

[6] The Appellant disagrees. He admits that he didn't fully comply with the law. First, he explained to me at the hearing that Quebec has more than 20,000 bus drivers and that no one is looking for a job on December 26 because it is the holiday season. He felt trapped by the EI agent, who only wanted to cut his EI. Second, he argues that he returned to a Service Canada office after the negative reconsideration decision of April 4, 2023, and was told by a Commission agent that they found the situation deplorable given his age and his contributions to society. Finally, the Appellant explains

[1] See GD4-1 to 8.

to me that there is a shortage of school bus drivers in Quebec. He says that, on the one hand, he receives provincial subsidies (under the Fidelibus school bus driver retention financial assistance program) but that, on the other hand, EI pushes him to look for another job to meet the "availability" criteria under the law.

Issue

[7] Was the Appellant available for work?

Analysis

[8] Two different sections of the law require claimants 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. Not qualifying under one of these two sections is enough to be disentitled from receiving the benefits claimed.

[9] 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.

[10] 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]

[11] The Commission decided that the Appellant was disentitled from receiving benefits because he wasn't available for work based on these two sections of the law.

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[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.

[12] I will now consider these two sections myself to determine whether the Appellant was available for work within the meaning of the law.

Reasonable and customary efforts to find a job

[13] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[6] 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.

[14] 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:[7]

- contacting employers who may be hiring
- applying for jobs
- attending interviews

[15] The Commission says that the Appellant wasn't doing enough to try to find a full-time job.

[16] The Appellant wrote that he understood he hadn't fully respected what the law says: search and evidence for a new job. But he says that he looked at EI offers. He says that he was available for travel if his employer called him. He says he is always open to better opportunities.[8]

[17] An analysis of the file shows the following:

- The Appellant works as a school bus driver, five days a week during the school year, with a schedule from 7:10 a.m. to 9:40 a.m. and from 2:20 p.m. to 5:40 p.m. He also makes himself available to provide transportation for

[6] See section 9.001 of the Regulations.
[7] See section 9.001 of the Regulations.
[8] See GD8-1 to GD8-3.

school outings.[9] The Appellant doesn't work in the summer unless his employer calls him for occasional transportation.

- The Appellant testified that his normal work week was 26 hours per week. So, he says that he isn't claiming benefits for the week from December 18, 2022, to December 24, 2022, since he worked 26 hours—a full work week.[10]

- The Appellant isn't looking for a job because he won't leave his job for another full-time job elsewhere, and because he enjoys his job.[11]

- The Appellant made the following statement during a phone call with the Commission on January 19, 2023: [translation] "I'm not looking for a job [and] I would not leave my job for a full-time job elsewhere. I'm good at my job."[12]

- On February 17, 2023, the Appellant told the Commission that he wasn't looking for a full-time job because he didn't want to leave his part-time job for a full-time one. He is good with this job, given that he is retired and given his age (corrected to 67 years).[13]

- On March 9, 2023, the Commission issued a first refusal letter, since the Appellant was available for only part-time work, having failed to prove that he was available for full-time work.[14]

- On April 4, 2023, during a conversation with the Commission about his reconsideration request, the Appellant confirmed that he hadn't looked for a job between December 24, 2022, and January 8, 2023. He explains his choice by the fact that he doesn't want to look for a job for only two weeks to then leave that job to go back as a driver. The Claimant adds that he

[9] See GD3-25.
[10] See GD3-17 to 20.
[11] See GD3-17.
[12] See GD3-19 and GD3-20.
[13] See GD3-21.
[14] See GD3-22.

sometimes looks at job postings to work as a truck driver but that he doesn't apply for any jobs. His goal is to keep the job he has now, since he is good where he is and enjoys his work.[15]

[18] So, the facts on file show the following:

- The Appellant works about 26 hours per week during school days. He also doesn't work during the summer, except occasionally. So, the Appellant doesn't work full-time.
- The Appellant confirmed several times to the Commission that he didn't look for a job during his layoff period from December 24, 2022, to January 8, 2023. He had a known return date after the holidays and he was satisfied with that.
- The Appellant enjoys his part-time work. He doesn't want to leave his part-time work for full-time work. So, he isn't making efforts to find a full-time job.

[19] Given the above, I find that the Appellant hasn't proven, on a balance of probabilities, that he made reasonable and customary efforts to find a job during his layoff period. The Appellant himself said several times that he didn't carry out any job search during that period. But a sustained job search is a requirement of the Act so that the Appellant can be entitled to the benefits claimed.

[20] As for the Appellant's arguments presented at the hearing, I don't accept any of them for the following reasons:

- Concerning the Appellant's first argument, that he **believes** that more than 80% of the school bus drivers who allegedly got the Commission's call on December 26, 2022, would have been in violation under the Act: I was assigned the Appellant's file. My task is to review the Appellant's file to make sure that the Commission's reconsideration decision was made in accordance

[15] See GD3-25 to 26.

with the Act and the particular facts of the case. I don't have to rule on other files.

- Concerning the Appellant's second argument, that he went to a Service Canada office in Longueuil after receiving the negative reconsideration decision, and that an agent told him that they found his situation deplorable: A Commission agent's opinion can't change the Act. I must apply the Act, not the personal opinions of an unnamed Service Canada employee who might have found the Appellant's situation deplorable.

- Concerning the Appellant's third argument, that the "availability" requirements in the Act are inconsistent with the provincial government of Quebec's Fidelibus program: My job is to apply the Act. I have no jurisdiction to rule on the Fidelibus program.

[21] The Appellant's arguments are therefore rejected. The Appellant hasn't shown that he made reasonable and customary efforts to find a job.

Capable of and available for work

[22] Given my previous finding, which confirms the Appellant's disentitlement under section 50(8) of the Act, I will only briefly analyze section 18(1) of the Act, which is a second additional legal test that the Appellant must meet to be entitled to the benefits claimed.

[23] Case law sets out three factors for me to consider when deciding whether the Appellant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[16]

a) He wanted to go back to work as soon as a suitable job was available.

[16] 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.

b) He made efforts to find a suitable job.

c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[24] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[17]

– **Wanting to go back to work**

[25] The Appellant hasn't shown that he wanted to go back to full-time work as soon as a suitable job was available.

[26] Instead, the file shows that the Appellant's part-time work is suitable for him. He enjoys his job and doesn't want to leave it.

[27] By wanting to keep his job as a part-time school bus driver, and not looking for a suitable full-time job, the Appellant has failed to show that he wanted to go back to work as soon as a suitable job was available.

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

[28] The Appellant hasn't made enough effort to find a suitable job.

[29] To help me make a finding on this second factor, I have considered the list of job-search activities given above. For this factor, these activities are for guidance only.[18]

[30] The Appellant said several times that he didn't look for any jobs during his layoff period over the holidays. He knew his return date and didn't want to change jobs. He would not have accepted a full-time job for only two weeks, before returning to the part-time job he enjoyed.

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[17] 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.
[18] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

[31] Although he says that he looked at job postings, the Claimant never applied for a job except for a bus driver position for the RTL [Longueuil transit network] in May 2023. So, it can't be said that the Appellant's job-search efforts were sustained.

[32] The Appellant's efforts weren't enough to meet the requirements of this second factor. The evidence shows that the Appellant enjoys his part-time job and that he doesn't intend to leave it.

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

[33] The Appellant said several times that he made himself available for his current employer.

[34] By only being available, passively, to work more hours for his current employer, the Appellant is setting a personal condition that unduly limits his chances of going back to work full-time for another employer.

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

[35] Based on my findings on the three factors, I find that the Appellant hasn't shown that he is capable of and available for work but unable to find a suitable job.

Conclusion

[36] The Appellant hasn't shown that he is available for work within the meaning of the law. Because of this, I find that he can't receive EI benefits.

[37] This means that the appeal is dismissed.

Guillaume Brien

Member, General Division – Employment Insurance Section