



Citation: *NM v Canada Employment Insurance Commission*, 2023 SST 121

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

Decision

Appellant: N. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (539233) dated August 17, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Teleconference

Hearing date: December 5, 2022

Hearing participants:

Decision date: January 6, 2023

File number: GE-22-3023

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) is disentitled to regular employment insurance (EI) benefits starting from February 28, 2022 because he has not proven his availability for work.

Overview

[3] The Claimant applied for EI benefits on February 28, 2022. The Commission (who is the Respondent in this appeal) investigated whether the Claimant was available for work.

[4] A claimant must be available for work in order to receive regular EI benefits¹. Availability is an ongoing requirement and must be demonstrated for **each working day** during a claimant's benefit period².

[5] Only claimants who are actively seeking work can receive regular EI benefits. The availability requirement means claimants must be looking for employment for every working day of their benefit period in order to be entitled to EI benefits.

[6] The Commission decided the Claimant couldn't be paid benefits for 2 reasons related to his availability. Specifically, it said the Claimant was disentitled to EI benefits from February 28, 2022 because of personal conditions that restricted his job search efforts; and it said he was disentitled between May 23, 2022 and June 3, 2022 because he was incarcerated.

[7] The Claimant asked the Commission to reconsider. He explained that the conditions of his parole required him to live in a rural area and not travel more than 40kms from his residence. He argued that his transportation options in these circumstances were limited and so his job search efforts were also limited. He also said

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

² This rule was established by case law: see the decision in *Canada (Attorney General) v. Cloutier*, 2005 FCA 73.

he was employed by the prison while he was incarcerated, so he should be eligible for EI benefits during that period.

[8] The Commission maintained the disentitlements on his claim, and the Claimant appealed that decision to the Social Security Tribunal (Tribunal).

[9] I must decide if the Claimant has proven that he was available for work starting from February 28, 2022. This means the Claimant must prove he was capable of work and looking for work for every working day during his benefit period.

[10] I find that the Claimant has ***not*** proven his availability for work. This decision explains why.

Preliminary Matters

A) The Claimant did not attend the hearing of his appeal

[11] The Claimant did not attend his hearing. I waited 25 minutes beyond the scheduled time for the hearing via teleconference, but the Claimant never joined the call. I then proceeded with the hearing in his absence in accordance with the *Social Security Tribunal Regulations*.

[12] I am satisfied the Claimant received the Notice of Hearing. The Tribunal sent the Notice of Hearing by Purolator courier on November 8, 2022 and used the address the Claimant provided in his Notice of Appeal. The tracking information from Purolator indicates it was delivered on November 16, 2022, and there is a signature on file for the delivery³. I am therefore satisfied the Notice of Hearing was delivered to the Claimant on November 16, 2022.

[13] A Registry Officer from the Tribunal also made a reminder call to the Claimant on November 28, 2022 at the phone number he provided in his Notice of Appeal. The Registry Officer left a detailed voicemail message for the Claimant about his upcoming hearing on December 5, 2022 and asked him to call the SST back to confirm receipt of

³ The Tribunal's registry officer confirmed that the signature on file belonged to an individual at the Claimant's address (see the Claimant's related file, GE-22-3023).

the Notice of Hearing and his intention/readiness to attend the hearing. There was no response from the Claimant.

b) The Claimant has a related appeal in GE-22-3024

[14] The Commission yet had another reason why the Claimant could not be paid EI benefits on his claim. They said he was disqualified from EI benefits because he voluntarily left his job on November 1, 2021⁴. The Claimant appealed that decision to the Tribunal in file number GE-22-3024.

[15] I have dismissed the Claimant's appeal in GE-22-3024. I found that the Claimant lost his job due to his own misconduct and, therefore, could not be paid EI benefits.

[16] My decision in GE-22-3024 means the Claimant cannot be paid EI benefits – even if he is successful in his appeal on the availability issues (in GE-22-3023). However, for the sake of completeness, I issue this decision on the availability issues.

Issues

[17] Was the Claimant available for work from February 28, 2022?

[18] Can the Claimant be paid EI benefits for the period he was incarcerated⁵?

Analysis

[19] To be considered available for work for purposes of regular EI benefits, the law says the Claimant must show that he is capable of, and available for work and unable to obtain suitable employment⁶.

[20] The Federal Court of Appeal has said that availability must be determined by analyzing 3 factors:

⁴ Benefits were refused from February 28, 2022, the start of the Claimant's benefit period.

⁵ The Tribunal's jurisdiction extends only to decisions that have been reconsidered. The Appellant verbally asked the Commission to reconsider the issue of his availability while he was incarcerated and the outcome of that reconsideration was communicated to him verbally on August 15, 2022 (See GD3-61). I therefore consider this issue to be before me on this appeal.

⁶ Section 18(1)(a) of the *Employment Insurance Act* (EI Act).

- a) the desire to return to the labour market as soon as a suitable job is offered;
- b) the expression of that desire through efforts to find a suitable job; and
- c) not setting personal conditions that might unduly limit the chances of returning to the labour market⁷ .

[21] These 3 factors are commonly referred to as the “*Faucher* factors”, after the case in which they were first laid out by the court.

[22] I will start my analysis with the period of the Claimant’s incarceration. Then I will consider whether the Claimant has proven he was available for work according to the *Faucher* factors.

Issue 1: Can the Claimant be paid EI benefits for the period he was incarcerated?

[23] No, he cannot. The Claimant has not proven he was available for work while he was held in a detention centre.

[24] The Claimant told the Commission that he was incarcerated from May 22, 2022 to June 4, 2022⁸. He said he was ready and willing to work every day and worked in the kitchen while he was in prison⁹.

[25] But the law says a claimant is not entitled to receive EI benefits for any period in which they are an inmate of a prison or similar institution¹⁰.

[26] I agree with the Commission that the Claimant is disentitled to EI benefits while he was incarcerated, and that the period of the disentitlement due to incarceration should run from May 22, 2022 to June 3, 2022¹¹. While the Claimant may have been working in the prison kitchen during his incarceration, this is not sufficient to prove availability for work. By its very nature, being held in prison (incarceration) is a

⁷ See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.

⁸ See Supplementary Record of Claim at GD3-22.

⁹ See Supplementary Record of Claim at GD3-61.

¹⁰ See section 37(1) of the EI Act.

¹¹ See the Commission’s representations at GD4-4.

restriction that prevents a claimant from accepting and starting employment as soon as a suitable job is offered. This means the Claimant cannot satisfy the third *Faucher* factor and, therefore, cannot prove his availability for work while in prison.

[27] I therefore find that the Claimant is disentitled to EI benefits while he was incarcerated from May 22, 2022 to June 4, 2022.

Issue 2: Apart from the period of incarceration, was the Claimant available for work according to the *Faucher* factors?

[28] No, he was not. He has not satisfied any of the *Faucher* factors.

a) The first *Faucher* factor

[29] For purposes of the first *Faucher* factor, the Claimant must prove he was willing to accept suitable employment¹² as soon as it was offered.

[30] The Claimant told the Commission that¹³:

- One of his parole conditions is that he live at his rural property in X, Ontario.
- He had a job waiting for him in Mississauga and another potential opportunity in Toronto, but he is not allowed to travel more than 40km from X.
- His house is in urgent need of repair and he can't leave it until the repairs are made.
- As soon as he gets EI benefits, he will repair his house and then apply through his parole officer to be allowed to go to Mississauga to work.
- He does not currently have a driving license and has no money for transit.
- He is a mechanic, but all of his tools have been stolen.

¹² Suitable employment is generally considered to mean full-time employment that takes place within regular working hours.

¹³ See Report of Interview at GD3-16 to GD3-17, and the other Supplementary Records of Claim in the reconsideration file.

- As soon as he gets his EI money, he will return to work. He can work, but he needs money first so he can get the job he wants.

[31] I find that the Claimant was not willing to immediately accept suitable employment. He was only willing to work after he had repaired his house and had started receiving EI benefits. This is not sufficient to satisfy the first *Faucher* factor¹⁴.

b) The second *Faucher* factor

[32] On the second *Faucher* factor, I find that the Claimant's lack of job search efforts does not support a desire to return to the labour market.

[33] The Claimant told the Commission he wanted to return to his prior employment at A¹⁵. But the courts have said that waiting to be recalled to employment is not sufficient to prove availability¹⁶. Only claimants who are actively looking for employment can receive regular EI benefits. This is the case even if there is a possibility of recall or the period of unemployment is unknown or relatively short-term.

[34] The Claimant also told the Commission he had been making calls for work in X and had a potential job at a restaurant that was closed due to Covid but expected to reopen once the tourist season picked up¹⁷. He also applied to 3 grocery stores in the area.

[35] I accept that the Claimant's preference was to return to work at A (in Mississauga). But he was not doing enough to either get a travel permit allowing him to do so – or to find work within 40kms of his residence during the period of the disentitlement. He applied for EI benefits on February 28, 2022. He did not apply for a

¹⁴ The first *Faucher* factor requires the Appellant to prove he wanted to go back to work as soon as a suitable job was available. To do this, he must show that he had a desire to return to work for every working day of his benefit period.

¹⁵ See Supplementary Record of Claim at GD3-20. Note that "A" actually refers to "B". See also GD3-22.

¹⁶ *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *D. B. v Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *DeLamirande v Canada (Attorney General)*, 2004 FCA 311; *CUB 76450*; *CUB 69221*; *CUB 64656*; *CUB 52936*; *CUB 35563*.

¹⁷ See Supplementary Records of Claim at GD3-18, GD3-20, GD3-22 and GD3-23 to GD3-24.

travel permit, even with the employment opportunity in Mississauga. Then on June 15, 2022, the Commission asked him to list all of the jobs he had applied to since February 28, 2022 – and he could only list 5 places¹⁸. When interviewed again on August 15, 2022, the Claimant said he had made enquiries at 2 other restaurants and a hotel¹⁹.

[36] Only those who are actively seeking work can receive regular EI benefits. This means the Claimant needed to be looking for a work for every day of his benefit period in order to be entitled to the EI benefits he is asking for. The courts have said that a claimant's job search efforts must be sufficient to prove²⁰ an active, on-going²¹ and wide-ranging job search directed towards finding suitable employment²².

[37] The Claimant's job search efforts from February 28, 2022 fall short of this standard. This is especially the case given the given that the Claimant told the Commission he was looking for any minimum wage employment that was full-time and within 40 kms of his residence²³ – and the Labour Market information showed a significant number of employment opportunities available to the Claimant²⁴.

[38] This means he has not satisfied the second *Faucher* factor.

c) The third *Faucher* factor

[39] Finally, on the third *Faucher* factor, I find that the Claimant set personal conditions that unduly limited his chances of returning to work for every working day of his benefit period.

[40] The Claimant told the Commission that:

¹⁸ See GD3-23 to GD3-24.

¹⁹ See GD3-62.

²⁰ With verifiable evidence – including the names and contact information of the employers contacted and the dates he made enquiries and/or submitted an application.

²¹ A claimant must be searching for work for **every working day of their benefit period**.

²² Suitable employment is generally considered to be full-time employment.

²³ See GD3-23.

²⁴ See GD3-63 to GD3-78.

- He had a job waiting for him in Mississauga, but was unable to travel more than 40km from his residence in X as a condition of his parole.
- He lives 8 kms outside of the town of X.
- He is not able to work because he is too far out of town.
- He did not have a driver's license for medical reasons. But having to take an uber or taxi would make working pointless due to the costs. A taxi to town would cost him \$30.
- All the jobs he looked at are minimum wage jobs. He would be paying \$60 per day for taxis and only taking home \$40 after that expense.
- There is a Greyhound bus, but it only runs on certain days – Friday, Sunday, Monday and Wednesday.
- He offered to work at the local C on the days the bus ran, but they didn't hire him because they need people when stock comes in.
- Employers don't want him because even if he took a taxi, they're not reliable.
- He has interviewed and offered to work on days/hours when the bus runs, but the employers wanted someone who could work every day.
- He wanted to go back to being a mechanic, but his tools were stolen and he can't afford to buy new ones.

[41] The evidence shows the Claimant was restricting his employment to certain days a week and turned down at least one job offer due to transportation issues, even though he could have used a taxi to get to work on days the bus did not run²⁵. These

²⁵ I accept the Commission's submission that even at minimum wage, the Claimant could have covered the costs of the taxi.

restrictions unduly limited his chances of returning to the labour market, which means the Claimant has not satisfied the third *Faucher* factor.

[42] The Claimant must satisfy all 3 of the *Faucher* factors to prove availability pursuant to section 18 of the EI Act. Based on my findings, he has not satisfied any of them. I therefore find that the Claimant has not shown that he was capable of and available for work, but unable to find a suitable job from February 28, 2022.

[43] This means the Claimant is disentitled to EI benefits from that date because he has not proven his availability for work.

Conclusion

[44] The Claimant has not proven that he was available for work within the meaning of the law starting from February 28, 2022. I therefore find that he is disentitled to EI benefits from this date because he has not proven he was available for work.

[45] This means that the disentitlement imposed on his claim from February 28, 2022 must remain.

[46] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section