



Citation: *SJ v Canada Employment Insurance Commission*, 2023 SST 1454

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

## Decision

**Appellant:** S. J.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (549302) dated November 24, 2022 (issued by Service Canada)

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**Tribunal member** Lilian Klein

**Type of hearing:** Teleconference

**Hearing date:** April 18, 2023

**Hearing participants:** Appellant

**Decision date:** May 30, 2023

**File number:** GE-23-258

## Decision

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

[2] The Claimant **hasn't shown that she was available for work** from October 5, 2020, to September 6, 2021. So, she can't keep the Employment Insurance (EI) benefits that she received during this period.

## Overview

[3] The Claimant in this appeal, S. J., left her job as a dietary aide due to childcare responsibilities during COVID-19. She received EI Emergency Response Benefits (EI ERB) until October 2020, when her claim changed automatically to EI regular benefits.

[4] On her biweekly claims, the Claimant declared that she was available for work. So, she was paid 50 weeks of **regular** benefits starting on October 4, 2020.

[5] The Canada Employment Insurance Commission (Commission) later decided that the Claimant hadn't been available for work from October 5, 2020, to September 6, 2021. It says her childcare responsibilities hadn't allowed her to accept work. It says she must repay over \$24,000 in regular benefits,

[6] To get EI **regular** benefits, you must be available for work. To show you're available, you must keep searching for work without personal conditions that unduly limit your chances of finding a job.

[7] The Claimant argues that she couldn't work during the COVID-19 lockdown because her daughter's school was closed. She says she also had to care for her husband after his brain surgery and when he got COVID-19. She says she can't afford to repay the overpayment of her EI regular benefits.

## The issue I must consider

[8] Was the Claimant available for work from October 5, 2020, to September 6, 2021?

## Analysis

[9] To qualify for benefits, the Claimant had to prove that she was capable of and available for work and unable to find a suitable job. To do this, she had to show that she

- i) wanted to return to work as soon as a **suitable** job was available;
- ii) tried to make that happen through **efforts** to find **suitable** work; *and*
- iii) had no **personal** conditions that might **unduly** limit her chances of finding a job.<sup>1</sup>

[10] I must look at each of these factors to decide the question of availability. I must also consider the Claimant's attitude and conduct.<sup>2</sup>

### The Claimant didn't show that she wanted to return to work

[11] The Claimant hasn't shown that she wanted to return to work during her EI claim. That's despite declaring on each of her biweekly claims that she'd been available for work. She says she made those declarations since she would have **liked** to go back to work. But liking the idea isn't the same as **showing by your actions** that you wanted to return.

[12] So, the Claimant hasn't shown that she wanted to return to work between October 5, 2020, and September 6, 2021. That's the first part of the availability test.

### The Claimant didn't try to find suitable work

[13] The Claimant didn't make any efforts to find suitable work. She says that's due to having to care for her child and for her husband after his surgery. They all got COVID too. She says she has no family in Canada to help and her husband couldn't help her either.

[14] The law says work is only **suitable** if the hours are compatible with one's family obligations.<sup>3</sup> But this doesn't mean that you can dismiss **all** work as unsuitable.

[15] To get regular benefits, you must show that you searched for work on **every working day for which you're claiming benefits**.

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<sup>1</sup> This is a plain language version of the three factors used to assess availability for work. It's known as the *Faucher* test. See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>2</sup> *Canada (Attorney General) v Whiffen*, A-1472-92; *Carpentier v Canada (Attorney General)*, A-474-97.

<sup>3</sup> See section 9.002(1)(b) of the *Employment Insurance Regulations* (EI Regulations). See also the decision of the Tribunal's Appeal Division (AD) in *SA v Canada Employment Insurance Commission*, 2022 SST 1490. I don't have to follow AD decisions, but their logic guides me.

[16] I acknowledge that it can be difficult to find suitable work. This was especially true in the Claimant's difficult circumstances, but you have to show that **you tried**.<sup>4</sup>

[17] But the Claimant didn't try. She says she wasn't available for **any** work at **any** hour, daytime or evenings, in the week or at weekends.

[18] So, the Claimant didn't make efforts to find work while receiving EI regular benefits. That's the second requirement in the availability test.

### **The Claimant had a personal condition that limited her availability**

[19] Having family obligations was a **personal** condition that **unduly** limited the Claimant's chances of finding suitable work.

[20] The Claimant says she wouldn't have been able to accept any work since she had to provide childcare and home schooling for her daughter until the schools reopened in September 2021.

[21] The Federal Court of Appeal (FCA) decision says having childcare obligations **is a personal condition** that limits your availability for work.<sup>5</sup>

[22] I considered a recent decision by the Tribunal's Appeal Division (AD) on this point. The AD decision says regulations enacted **after** the above FCA decision introduce some flexibility into the question of whether childcare obligations are **personal** conditions.<sup>6</sup> I considered whether this might apply in the Claimant's case.

[23] But I find that the AD decision doesn't apply. In the AD case, the claimant was mostly available, with just some limitations on the hours she could work. It wasn't that she had **no availability** at all, which is the case with the Claimant in the appeal before me.

[24] So, the Claimant had a **personal** condition that **unduly** limited her chances of finding work. Having no conditions is the third requirement in the availability test.

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<sup>4</sup> See *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

<sup>5</sup> See *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA). FCA decision are binding.

<sup>6</sup> See section 9.002(1)(b) of the EI Regulations and *SA v Canada Employment Insurance Commission*, 2022 SST 1490. Decisions of the Tribunal's Appeal Division aren't binding.

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

[25] Based on my findings on the above three factors, I find that the Claimant hasn't shown she was **capable of and available for work and unable to find a suitable job** from October 5, 2020, to September 6, 2021. So, **she's disentitled** for that period.

[26] The Claimant says she can't afford to repay her EI benefits. She's asking for leniency. I have no power to forgive or reduce the overpayment. But she has options.

[27] The Claimant can ask the Commission to consider writing off all or part of her debt because of undue hardship.<sup>7</sup> If the Commission's refuses, she can appeal to the Federal Court of Canada.

[28] The Claimant can also call the CRA's Debt Management Centre at 1-866-864-5823 to discuss her financial hardship and arrange a repayment plan that she can manage.

[29] The Claimant might want to ask the CRA if the **Canada Recovery Caregiving Benefit that she should have applied for** can still be set against the overpayment of her EI regular benefits.<sup>8</sup>

## **Conclusion**

[30] The Claimant **is disentitled** from receiving EI regular benefits from October 5, 2020, to September 6, 2021, since she wasn't available for work.

[31] This explains why I must dismiss the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

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<sup>7</sup> S 56(1)(f)(ii) of the EI Regulations refers to cases where repayment could cause undue financial hardship.

<sup>8</sup> The CRA had a benefit for parents who were unable to return to work due to childcare responsibilities when the schools closed during COVID-19: the Canada Recovery Caregiving Benefit. This is no longer available, but it might have been a better fit in the Claimant's circumstances than the EI regular benefits she was switched to after her EI ERB ended.