Citation: *FG v Canada Employment Insurance Commission*, 2023 SST 1832

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	F. G.
Representative:	P. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decisions dated February 3, 2022, and February 4, 2022 (issued by Service Canada)

Tribunal member:	Suzanne Graves
Type of hearing:	In person
Hearing date:	November 9, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	December 5, 2023
File number:	GE-23-107

Decision

[1] The appeal is allowed in part.

[2] The Appellant's appeal on the issue of voluntary leave of absence is allowed. The Canada Employment Insurance Commission (Commission) didn't prove that the Appellant voluntarily took a leave from her job. This means she isn't disentitled from receiving Employment Insurance (EI) benefits for that reason.

[3] The Tribunal also has the authority to consider whether the Appellant was available for work.

[4] The Appellant's appeal on the issue of availability is dismissed. This means that she is disentitled from receiving EI benefits because she didn't prove that she was available for work.

Overview

[5] On May 27, 2022, the General Division of the Tribunal decided that the Appellant was disentitled from receiving benefits because she voluntarily took a leave of absence from her job without just cause.

[6] The Appellant appealed the General Division's decision to the Tribunal's Appeal Division (AD). The Appellant's appeal was allowed and on December 22, 2022, the AD returned the matter to the General Division for a redetermination on the issue of voluntary leave of absence.

[7] I held an in-person hearing on the appeal on November 9, 2023. At the hearing, the Appellant argued that she had appealed all of the reasons why she was refused benefits.

[8] So, I considered two reconsideration decisions of the Commission. First, the Commission decided that the Appellant took a leave of absence from her job without just cause. Second, it decided that she didn't prove she was available for work from October 11, 2021, to December 13, 2021.

Voluntary leave of absence

[9] The Appellant worked as a Personal Support Worker. She applied for EI benefits on October 4, 2021. The Commission looked why the Appellant took a leave of absence. It decided that she voluntarily took a leave from her job without just cause, so it wasn't able to pay her benefits. I have to decide whether the Appellant voluntarily took a leave of absence from her job. If so, I must consider whether she has proved that she had no reasonable alternative.

[10] The Appellant argues that she didn't voluntarily take a leave. She says that she asked her employer for a record of employment (ROE) and it placed her on leave without her knowledge. She says that she asked for the ROE because her hours had been reduced for several weeks and she was waiting for her employer to give her shifts.

[11] The Commission says the employer told an officer it had lots of work available and the Appellant could have accepted shifts at her discretion. So, it argues that the Appellant could have continued to work instead of taking a leave of absence.

Availability for work

[12] The Commission disentitled the Appellant from receiving regular EI benefits from October 11, 2021, to December 13, 2021, because it decided she wasn't available 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 must be actively searching for a job.

[13] I have to decide whether the Appellant has proved she was available for work. The Appellant has to prove this on a balance of probabilities. This means she has to show that it is more likely than not that she was available for work.

[14] The Commission says the Appellant wasn't available for work because she didn't do any job searches, restricted her availability to part-time, and to her current employer.

[15] The Appellant argues that she was always available for work and waiting for her employer to offer her shifts.

Matters I have to consider first

I will accept documents sent in after the hearing

[16] After the hearing, I asked the Commission for its arguments on whether the Tribunal has the authority to consider the issue of availability, and whether the Appellant has proved she was available for work. It sent in its representations and evidence on the issue of availability. I sent the new documents to the Appellant and allowed her until December 1, 2023, to respond. The Appellant made no arguments in reply.

An interpreter was present throughout the hearing

[17] An interpreter was present at the in-person hearing. The Appellant said there had been a misunderstanding about her need for an interpreter. She says that she doesn't need interpretation services, because she speaks enough English to understand the hearing and to respond to any questions.

[18] I asked the interpreter to remain at the hearing to ensure the Appellant had the opportunity to fully understand and participate in the proceedings and to give evidence in the language of her choice. The interpreter assisted the Appellant whenever requested to interpret the proceedings and to clarify any questions put to her.

Issues

[19] Is the Appellant disentitled from receiving benefits because she voluntarily took a leave of absence from her job without just cause? To answer this, I must first address the Appellant's voluntary leaving. If I find that she voluntarily took a leave, then I have to decide whether she had just cause to take a leave.

[20] Has the Appellant shown that she was available for work?

Analysis

Did the Appellant voluntarily take a leave of absence from her job?

[21] I find that the Appellant didn't voluntarily take a leave from her job.

[22] The law says that you are disentitled from receiving benefits if you take a leave from your job voluntarily and you didn't have just cause. The Commission has the onus to prove that the Appellant voluntarily requested a leave of absence.

[23] The Commission says that the Appellant voluntarily took a leave from her job. Her ROE states she took a leave of absence. The employer told the Commission that she took a leave from her job because she didn't want to accept the shifts it offered. It says there was work available, but the Appellant refused it.

[24] The Appellant testified that her hours were reduced to 2-3 hours per week. She asked her employer for a ROE, so that she could apply for EI benefits. Her employer issued the ROE but immediately placed her on a leave of absence. She didn't know she had been put on a leave and was waiting for her employer to assign her work.

[25] The Appellant testified in a straightforward manner with the assistance of an interpreter as needed. Her testimony is consistent with the reduced earnings shown on her ROE for several pay periods prior to October 4, 2021.[1] It is also consistent with the initial statements she made to the Commission.[2]

[26] She argues that the employer may have had work available but offered her very few hours of work each week. I have put more weight on the Appellant's testimony and find that that she asked her employer for a ROE because her work hours had been reduced. Her employer responded by issuing the ROE and placing her on a leave.

[27] The Commission hasn't provided enough evidence to prove, on the balance of probabilities, that the Appellant voluntarily took a leave of absence from her job.

[28] So, I find that the Appellant didn't voluntarily request a leave of absence. Since I have found that the Appellant didn't voluntarily take a leave from her job, I don't have to consider whether she had just cause for taking a leave.

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[1] The Commission filed a copy of the Appellant's ROE at GD3-20.
[2] The Appellant's initial statements are at GD3-8 and GD3-23.

Availability for work

[29] At the hearing, the Appellant argued she had appealed both reasons she was refused benefits, including whether she was available for work. The issue of availability was not addressed in the previous General Division or AD decisions.

[30] I first have to consider whether I have the authority to consider whether the Appellant was available for work.

[31] I asked the Commission for its arguments on whether the Tribunal has the jurisdiction to consider the issue of availability for work.[3] The Commission didn't dispute that the Tribunal has the authority to consider whether the Appellant was available. It sent in a copy of its reconsideration file, including its decision dated February 3, 2022, and its representations on the issue of availability for work.[4]

[32] In the Appellant's request for reconsideration, she argued she was searching for work. In her notice of appeal, she also states that she was looking for work.

[33] So, I find that I have the jurisdiction to consider whether the Appellant was available for work.

Has the Appellant proved that she was available for work?

[34] The law requires EI claimants to show they are available for work.[5] Availability is an ongoing requirement. This means that a claimant has to continue searching for a job.

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[3] The Tribunal's Investigation and Report dated November 14, 2023, is at RGD10.
[4] The Commission's reconsideration file on the issue of the Appellant's availability for work is at RGD11, and its representations on this issue are at RGD12.
[5] Section 18(1)(a) of the *Employment Insurance Act* (EI Act) says that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment. I agree with the reasoning in *LD v Canada Employment Insurance Commission,* 2020 SST 688. In that case, the Tribunal's Appeal Division decided that a claimant should first be required to provide proof of reasonable and customary efforts to find work before being disentitled to benefits under section 50(8) of the EI Act. There is no evidence that the Commission asked the Appellant for such proof. So, I will make no finding under section 50(8) and will only look at whether the Appellant was available for work under section 18(1)(a) of the EI Act.

[35] The Commission argues that the Appellant didn't prove she was available for work from October 11, 2021, until December 13, 2021. I have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[6] Case law sets out three factors for me to look at when deciding this.

[36] The Appellant has to prove the following three things:[7]

1. She wanted to go back to work as soon as a suitable job was available.
2. She made efforts to find a suitable job.
3. She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[37] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[8]

Wanting to work

[38] The Appellant testified that she loves her job and very much wanted to work. She testified in a direct manner and with the assistance of an interpreter. I find that she had a desire to return to work.

Job search efforts

[39] I considered the list of nine job-search activities set out in the *Employment Insurance Regulations* in deciding this second factor. Some examples of those activities are the following:[9]

- registering for job search tools or with electronic job banks or employment agencies

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[6] See section 18(1)(a) of the EI Act.
[7] 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.
[8] 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.
[9] See section 9.001 of the *Employment Insurance Regulations*.

- networking
- applying for jobs [10]

[40] The Commission argues that the Appellant only wanted to return to her existing job and wasn't making any efforts to search for new work.

[41] The Appellant argues she was always available for work. She testified that she followed the employer's procedures for notifying her of available shifts, and the onus was on the employer to notify her when work was available.

[42] She argues that she was available to take work from her employer every day but did have COVID symptoms at times and so could not accept certain shifts. She says that she phoned her employer several times to ask for work. She testified that she didn't look for other work since she didn't know she had been placed on a leave.

[43] I offered the Appellant an opportunity to send in any medical notes, or records of job search activities after the hearing. The Appellant stated that she didn't wish to send in any new documents to the Tribunal.

[44] I accept the Appellant's evidence that she didn't immediately know that her employer had put her on a leave of absence. But she testified that she didn't get notice of any available shifts during the period in question. I have already found that her hours had been significantly reduced in previous weeks. So, she was aware of the fact that her earnings had been interrupted.

[45] As stated above, to prove availability for work, a claimant must show they are actively looking for work on a continuing basis. The Appellant unfortunately gave no evidence that she carried out any job search activities between October 11, 2021, and December 13, 2021, other than waiting for her employer to offer her suitable shifts.

[10] I am not bound by the list of job-search activities in deciding this second factor. I have used the list for guidance only.

[46] So, I find that the Appellant has not met this second factor, as she didn't show that she made efforts to find new work.

Personal conditions

[47] The Commission argues that the Appellant put personal conditions on her job search as she was only looking for part-time work. The *Employment Insurance Act* does not require that a claimant must be looking for full-time work.

[48] The Appellant says she was available for any type of PSW work for her employer, subject to certain patient weight-lifting restrictions due to her age. She was also willing to take office work and had assisted her employer with office duties in the past. She testified that she was waiting for her employer to assign her work.

[49] I find that the Appellant set personal conditions on her job search because she limited her search to her current employer.

Was the Appellant capable of and available for work and unable to find suitable employment?

[50] Considering my findings on each of the three factors together, I find that the Appellant has not proved she was capable of and available for work and unable to find suitable employment. This is because she didn't show that she was actively looking for new work and limited her search to her current employer.

[51] So, she is disentitled from receiving benefits for this reason from October 11, 2021, until December 13, 2021.

Conclusion

[52] The Commission didn't prove that the Appellant voluntarily took a leave of absence. So, the Appellant isn't disentitled from receiving benefits for voluntarily taking a leave of absence from her job.

[53] The Appellant hasn't proved that she was available for work. So, she is disentitled from receiving benefits for that reason from October 11, 2021, until December 13, 2021.

[54] This means that the appeal is allowed in part.

Suzanne Graves
Member, General Division – Employment Insurance Section