



Citation: *RH v Canada Employment Insurance Commission*, 2023 SST 1810

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

Decision

Appellant: R. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (574617) dated March 20, 2023 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: In person

Hearing date: July 19, 2023

Hearing participant: Appellant
Appellant's witness

Decision date: July 27, 2023

File number: GE-23-1048

Decision

[1] The appeal is dismissed. I disagree with the Appellant about his availability.

[2] The Appellant hasn't shown that he is available for work. This means he is disentitled from receiving Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided the Appellant is disentitled from receiving Employment Insurance (EI) regular benefits as of May 9, 2022 because he isn't available for work. An appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means an appellant has to be searching for a job.

[4] I must decide whether the Appellant has proven he is available for work. The Appellant has to prove this on a balance of probabilities. This means he has to show that it is more likely than not that he is available for work.

[5] The Commission says the Appellant isn't available because he hasn't shown he wanted to work as soon as possible and hasn't made much effort to find work.

[6] The Appellant disagrees and says he has wanted to return to work as soon as he could. He also says he has looked for whatever work he could find, but his options are limited because he doesn't speak English well and can only apply for jobs that allow him to speak his native tongue.

Matters I have to consider first

The Appellant asked for an interpreter

[7] The Appellant asked for an interpreter as English isn't his first language. At the hearing, the Appellant confirmed that he didn't understand English very well and needed the interpreter to translate everything. So, the hearing was fully conducted through an interpreter to ensure the Appellant had a meaningful opportunity to understand the proceedings.

50(8) Disentitlement

[8] The Commission says it disentitled the Appellant under subsection 50(8) of the *Employment Insurance Act* (Act).¹ Subsection 50(8) of the Act states the Commission may require an appellant to prove reasonable and customary efforts to find suitable employment.

[9] In other words, the Appellant only needs to prove reasonable and customary efforts under subsection 50(8) if the Commission exercises its discretion to require it.

[10] I've looked through the evidence and don't see any requests from the Commission to the Appellant to prove his reasonable and customary efforts, or any claims from the Commission that if he did, his proof was insufficient.

[11] I further find the Commission didn't make any detailed submissions on how the Appellant failed to prove to them that he was making reasonable and customary efforts. It only mentioned this briefly when discussing the Appellant's job search efforts.²

[12] Based on the lack of evidence that the Commission asked the Appellant to prove his reasonable and customary efforts to find suitable employment, I find the Appellant isn't disentitled under this part of the law.

The Appellant brought up an issue that isn't part of the Commission's reconsideration decision

[13] At the hearing, the Appellant testified that he applied for sickness benefits in October 2022, but the Commission denied his claim because of a mix-up with his medical certificate. His doctor initially filled out the certificate incorrectly due to a miscommunication, and although the doctor later corrected the mistake and the Appellant sent in the new medical certificate, the Commission still denied his claim.

¹ GD4-2.

² GD4-3.

[14] The Appellant testified that the Commission's decision to deny him sickness benefits was wrong because he has the documentation to show that he qualified for these benefits in October 2022.

[15] I told the Appellant I understood, but that I only have jurisdiction over a decision that the Commission has reconsidered.³ I told him the Commission's reconsideration decision is just about his availability for work⁴, so that is all that I can look at too.

[16] In other words, since the Commission didn't look at the Appellant's eligibility for sickness benefits in its reconsideration decision, this means I can't consider it here either.

[17] I understand the Appellant is frustrated and confused about why the Commission denied him sickness benefits in October 2022 and wants to appeal this decision to the Tribunal. But he needs to first ask the Commission to specifically reconsider its initial decision on his eligibility for sickness benefits. Once the Appellant gets a reconsideration decision from the Commission on that issue, he can then appeal it to the Tribunal if he wishes.

Issue

[18] Is the Appellant available for work?

Analysis

Capable of and available for work

[19] I have to consider whether the Appellant has been capable of and available for work but unable to find a suitable job.⁵ Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:⁶

³ Sections 112 and 113 of the *Employment Insurance Act* (Act) say that only decisions that have been reconsidered by the Commission can be appealed to the Tribunal.

⁴ GD3-60.

⁵ See section 18(1)(a) of the Act.

⁶ 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.

- a) He has wanted to go back to work as soon as a suitable job is available.
- b) He has made efforts to find a suitable job.
- c) He hasn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[20] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.⁷

– **Wanting to go back to work**

[21] The Appellant has shown that he has wanted to go back to work as soon as a suitable job is available, except for when he was injured.

[22] The Appellant testified that he was trying to find work from May 9, 2022 to October 24, 2022, but it was difficult because he doesn't speak English very well. I find the fact that he tried to find work during this period shows he had a desire to work.

[23] The Appellant also testified that he was injured and unable to work from October 25, 2022 to January 17, 2023. He provided evidence (a medical certificate) showing he was unable to work during this period.⁸ Based on his testimony and evidence, I find he didn't have a desire to work while he was injured since he couldn't physically work then.

[24] The Appellant testified that he was able to work again as of January 18, 2023 after his injury healed. He also testified that he started a new, full-time job on February 1, 2023. I find the fact the Appellant started working soon after he recovered shows he has had a desire to work since his injury healed.

[25] I therefore find the Appellant has shown that he wanted to go back to work as soon as a suitable job was available from May 9, 2022 to October 24, 2022 and from

⁷ 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.

⁸ GD3-42.

January 18, 2023 onwards. He tried to find work until his injury and has been working full-time since he recovered.

[26] But I also find the Appellant hasn't shown that he wanted to go back to work as soon as a suitable job was available from October 25, 2022 to January 17, 2023. He was injured and unable to work during this period.

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

[27] The Appellant didn't make enough effort to find a suitable job before he went back to work.

[28] The Appellant testified that he was looking for work until he got injured on October 25, 2022. But he also testified that he had trouble finding work because he doesn't speak English very well and wasn't looking for any jobs that required him to speak English. Because of this, he could only apply for a few jobs.

[29] The Appellant provided the Commission with a list of jobs he applied to. The list includes the name and phone number of each employer, and the date when the Appellant applied for each job.⁹

[30] I note the list has three jobs on it and indicates the Appellant applied for these jobs on March 14, 2022, June 9, 2022, and August 23, 2022. It also indicates that one of the employers on the list contacted the Appellant again in early 2023 and he started working for them on February 1, 2023.¹⁰

[31] Of the three jobs on the list, I note that the Appellant applied for one of them on March 14, 2022, which was **before** his disentitlement period started on May 9, 2022. This means I find the list shows the Appellant applied for only two jobs during his disentitlement period, on June 9, 2022 and August 23, 2022 specifically.

[32] The Appellant initially testified that he didn't look for any other jobs besides those on his list. His witness also testified that he applied to three or four jobs with employers

⁹ GD2-21.

¹⁰ GD2-21.

who spoke his native tongue, which I find generally aligns with the Appellant's initial testimony and the number of jobs on the list he sent to the Commission.

[33] But the Appellant then testified that he applied for a few other jobs by phone. He testified these other jobs were with small companies that he found from friends and relatives and his church.

[34] I asked the Appellant why he didn't include these other jobs on the list he sent to the Commission. He testified that they were just small companies, and it was one year ago when he sent the list. He also testified that he was sometimes confused when he spoke to the Commission because of the language barrier and he didn't always have a family member or friend with him to translate, so he may have said something he shouldn't have or not said something he should have during those conversations.

[35] I don't accept the Appellant's explanation, unfortunately. His later testimony about the number of jobs he applied to conflicts both with his initial testimony and his witness's testimony. In my view, it's reasonable to believe that if the Appellant had applied for more jobs than those on his list, he would have said that at the hearing when first asked about it. It's also reasonable to believe the Appellant's witness wouldn't have specifically said he applied for three or four jobs if he had applied for more than that. For these reasons, I give more weight to the Appellant's initial testimony and his witness's testimony about his job search than to the Appellant's later testimony about it.

[36] So, I find there's not enough evidence to show the Appellant applied for more jobs than those on the list he sent to the Commission. This means I find the Appellant applied for just two jobs during his disentitlement period.

[37] I also find there's no evidence to show the Appellant made any effort to expand his job search during his disentitlement period. He and his witness both testified that he didn't look for any jobs that required him to speak English. He also testified that he didn't contact any job search agencies with translation services to help him find work.

[38] Taken together, I find there isn't enough evidence to show the Appellant was actively looking for work from May 9, 2022 to October 24, 2022. He only applied for two

jobs, which I find isn't sufficient to show that his efforts to find work were ongoing during that period. His testimony also makes it clear that he limited his search to jobs that allowed him to speak his native tongue and didn't take any steps that might have allowed him to expand his job search.

[39] I also find the Appellant wasn't looking for any work while he was injured from October 25, 2022 to January 17, 2023. He and his witness both testified that he wasn't able to work and wasn't looking for work at all during this period.

[40] But I find the Appellant can be considered to be looking for work since January 18, 2023. This is because he started a full-time job shortly afterwards, on February 1, 2023, as discussed above.

[41] I therefore find the Appellant didn't make enough efforts to look for work during part of his disentitlement period, specifically from May 9, 2022 to January 17, 2023. He applied for very few jobs and didn't take other steps to look for work. Once he got injured, he didn't look for work at all.

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

[42] The Appellant has set personal conditions that have unduly limited his chances of going back to work.

[43] The Appellant and his witness testified that he hasn't applied for jobs that would require him to interact with people in English because he doesn't speak English well.

[44] The Appellant also testified that it has been hard for him to find jobs he can do because of his limited English skills.

[45] I find that another decision from the Tribunal's Appeal Division is relevant here. This decision says that some restrictions on a person's availability are caused by factors beyond their control and what I need to look at is whether the limits on a person's

availability are self-imposed.¹¹ While I'm not bound by this decision, I find its reasoning persuasive and give it significant weight here.

[46] In this case, I find the Appellant's limited understanding of English is self-imposed. While I acknowledge that it's not easy to learn a new language and that this process can take time, I see no evidence that the Appellant has taken any steps to try and improve his English skills to expand his job search. He didn't tell the Commission or testify that he has been trying to improve his English.¹² In my view, it's reasonable to believe if the Appellant has been doing that, he would have mentioned it at some point, either to the Commission or during the hearing.

[47] Instead, I find the evidence shows the Appellant has chosen to focus only on looking for and applying to jobs where he can speak his native tongue. His and his witness's testimony make this clear.

[48] So, I find the Appellant does have a personal condition that has overly limited his chances of returning to the labour market, which is his decision to avoid jobs that would require him to interact with people in English.

[49] I find the Appellant's decision to only look for jobs that don't require him to interact with people in English has severely reduced the jobs he can apply for. And I find having such a small pool of possible jobs would overly limit his chances of returning to the labour market.

[50] I acknowledge the Appellant has been working again since February 1, 2023. But he says that this job allows him to speak his native tongue, which I find doesn't change the fact that he has still made a choice to avoid jobs where he would need to speak English.

[51] In other words, I find the Appellant continues to have a personal condition that has overly limited his chances of returning to the labour market even though he has

¹¹ See *Canada Employment Insurance Commission v KJ*, 2022 SST 449.

¹² For the Commission's records of its conversations with the Appellant, see GD3-36, GD3-37, GD3-39, GD3-40, GD3-41, GD3-59.

returned to work. This is because in order to get that job he restricted his search to jobs that don't require him to interact with people in English, which means the pool of possible jobs available to him remains very small.

[52] I therefore find the Appellant has set personal conditions that have unduly limited his chances of going back to work throughout his entire disentitlement period, so from May 9, 2022 onwards.

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

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

[54] This is because the Appellant hasn't met all three factors for any part of his disentitlement period. He has had the desire to work from May 9, 2022 to October 24, 2022 and again since January 18, 2023, but not from October 25, 2022 to January 17, 2023. He has made enough efforts to find work since January 18, 2023, but not from May 9, 2022 to January 17, 2023. And he has set personal conditions that have overly limited his chances of going back to work from May 9, 2022 onwards.

[55] The Appellant testified that his appeal should be allowed for compassionate reasons because he now faces an overpayment and can't afford to pay it back.

[56] I understand the Appellant wants me to allow his appeal. But, unfortunately, I can't do that because he hasn't shown he is available for work during his disentitlement period. I have to follow the law the way it's written¹³ and can't make an exception for him, no matter how difficult or compelling his circumstances may be.¹⁴

[57] While I sympathize with the Appellant, who now faces a large overpayment, I don't have the power to erase it, unfortunately.¹⁵ The law doesn't allow me to do so,

¹³ See *Canada (Attorney General) v Knee*, 2011 FCA 301.

¹⁴ See *Pannu v Canada (Attorney General)*, 2004 FCA 90.

¹⁵ See *Canada (Attorney General) v Villeneuve*, 2005 FCA 440.

even if find the circumstances are unfair. The overpayment remains the Appellant's responsibility to repay.¹⁶

[58] These options are available to the Appellant:

- He can ask the Commission to consider writing off the debt because of undue hardship.¹⁷ Should the Commission deny this request, the Appellant can appeal to the Federal Court.
- He can contact the Debt Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or other debt relief measure.¹⁸

Conclusion

[59] The Appellant hasn't shown he is available for work within the meaning of the law. Because of this, I find the Appellant is disentitled from receiving benefits as of May 9, 2022.

[60] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section

¹⁶ Sections 43 and 44 of the *Employment Insurance Act* state that an appellant bears the responsibility for an overpayment.

¹⁷ Section 56 of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue hardship were an Appellant to repay it.

¹⁸ That's the phone number found on the Notice of Debt that was sent to the Appellant.