



Citation: *IR v Canada Employment Insurance Commission*, 2023 SST 1911

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: I. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (542170) dated October 27, 2022 (issued by Service Canada)

Tribunal member: Paul Dusome

Type of shearing: Teleconference

Shearing date: November 6, 2023

Shearing participant: Appellant

Decision date: November 27, 2023

File number: GE-23-2420

Decision

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

[2] The Appellant hasn't shown that she was available for work from January 11, 2021, to September 11, 2021. This means that she can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits as of January 11, 2021, because she wasn't available for work. An 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 must decide whether the Appellant has proven that she was available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[5] The Commission says that the Appellant wasn't available because of a prescribed medical condition preventing her from working. She had also made no efforts to find work.

[6] The Appellant disagrees and states that she was willing to work from home, or where she would not have to wear a mask to protect herself from COVID-19. She could wear a mask for one to one-and-one-half hours, but after that she had trouble breathing due to her asthma condition.

Matter I have to consider first

I won't accept the documents sent in after the hearing

[7] The Appellant submitted by email two letters from Service Canada. One is dated April 6, 2020. It gives her access code to submit reports and to access information.

The related to EI Emergency Response Benefits she received prior to the time involved in this appeal.

[8] The second letter is dated August 4, 2022. It also gives her access code to submit reports and to access information. That letter relates to a period after the time frame involved in this appeal, which ended in September 2021.

[9] Both documents are not relevant to the issues in this appeal. That is why I am not accepting them as part of this appeal.

Issue

[10] Was the Appellant available for work from January 11, 2021, to September 11, 2021?

Background information

[11] The Appellant had been working in a Costco store handing out food samples to customers. This involved face-to-face contact with customers. When COVID-19 resulted in shutdowns, the employer laid her off. She applied for EI benefits on April 6, 2020. The Commission paid her the EI Emergency Response Benefit from March 15, 2020, until September 26, 2020.

[12] The Commission automatically changed the Appellant's Emergency Response Benefits to EI regular benefits effective September 27, 2020. The Commission paid her 50 weeks of regular benefits from September 27, 2020, until September 11, 2021. The Commission paid the regular benefits because the Appellant filed all her reports declaring that she was ready, willing and capable of working each day.

[13] On October 5, 2021, the Appellant contacted the Commission and reported that she had not been available for work since September 27, 2020. She had declared that she was available for work because of her financial situation. Her husband's income was not enough for them to live on. The Commission did not impose any punishments for making false declarations because the Appellant had voluntarily reported that she made false declarations.

[14] The Commission made its initial decision on August 4, 2022. It said that the Appellant was not available for work from September 28, 2020. As a result of that decision, she had to pay back the amount of benefits she had received since that date. That amount was \$24,450.00.

[15] The Appellant asked the Commission to reconsider that decision. In response, the Commission changed its initial decision on October 27, 2022. Based on medical evidence the Appellant had sent in, the Commission granted her the maximum 15 weeks of EI sickness benefits from September 27, 2020, to January 9, 2021. That meant that the amount she had to pay back was reduced. The Commission said that the Appellant was still not entitled to receive EI regular benefits starting from January 11, 2021. That was because she had not been available for work starting from January 11, 2021. That meant that she still had to pay back EI benefits paid to her from January 11, 2021, to September 11, 2021. The notice of debt dated March 6, 2023, says the amount owed is \$17,115.00.

[16] With that background information in place, I will proceed to deal with the issue in this appeal: was the Appellant available for work from January 11, 2021, to September 11, 2021?

Analysis

[17] Once sickness benefits end, the Appellant is not automatically entitled to regular benefits. She must prove her availability under the normal criteria. She will be entitled to regular benefits only if she proves her availability.¹ The time during which the Appellant must show she was available is from January 11, 2021, to September 21, 2021.

[18] Two different sections of the law require Appellants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits.

¹ *RZ v Canada Employment Insurance Commission*, 2017 SSTADEI 123, para. 16.

[19] First, the *Employment Insurance Act* (Act) says that an Appellant 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.

[20] Second, the Act says that an Appellant 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 an Appellant has to prove to show that they are “available” in this sense.⁵ I will look at those factors below.

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

[22] I will now consider these two sections to determine whether the Appellant was available for work.

Reasonable and customary efforts to find a job

[23] 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 her 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.

[24] 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

- assessing employment opportunities
- contacting employers who may be hiring
- applying for jobs.

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.

⁶ See section 9.001 of the Regulations.

⁷ See section 9.001 of the Regulations.

[25] The Commission says that the Appellant could not engage in any of the activities listed in section 9.001 of the Regulations. This was because she had a prescribed medical condition preventing her from working. This was confirmed by a doctor's note stating that the Appellant was unable to work from May 2020 to October 2021 due to the diagnosis of asthma. The Commission said that she also was not making any efforts to try to find a job.

[26] The Appellant disagrees. She was open to working from home or in any circumstance where she would not have to wear a mask for more than a short period. The Appellant says that her efforts were enough to prove that she was available for work.

[27] I find that the Appellant has not shown that she was engaged in reasonable, customary, and sustained efforts to find a suitable job.

[28] The Appellant's testimony about looking for a job was vague. She tried unsuccessfully for remote clerical work. She did not have the experience for those jobs. She could not work if she was required to wear a mask for more than one to one and one-half hours. She had no details of when or where she had applied for work. She considered cooking food to sell to others from her home. Her children persuaded her not to do that. The evidence does not support that any efforts she made were sustained over time. Nor does it show that her efforts were reasonable and customary.

[29] The Appellant's testimony at the hearing was given with the assistance of a translator in her language. The testimony is inconsistent with her recorded statements to the Commission when she reported that she was not available for the period of September 2020 to September 2021. These were in telephone conversations on February 2 and 16, 2022. The Appellant stated that she was afraid to work because of COVID-19 and could not wear a mask for eight hours a day. She was not available since September 27, 2020. In the second conversation, she answered "no" to the question, "Have you actively looked for work since then?" ["then" being April 2020].

[30] The Appellant attached a typed statement of reasons for her request for reconsideration. She referred to having limited English, and no translator on the calls with the Commission to assist her. So, she may not have understood the questions, or properly answered them. The typed statement is in good English. It was written with the help of the Appellant's daughter. The statement sets out that the Appellant, because of the COVID-19 pandemic and her asthma, "could not work and put my health at fatal risk. I was open to working from home, or in circumstances where I would not have to wear a mask." That statement is consistent with the Appellant's testimony about working from home and limiting the time at work for wearing a mask. But it still does not get around the vague evidence about her efforts to look for work in the first nine months of 2021.

[31] This conclusion that the Appellant has not shown that she was engaged in reasonable, customary, and sustained efforts to find a suitable job is supported by her family doctor's note dated August 15, 2022. The note states that the Appellant was unable to work from May 2020 to October 2021 due to the diagnosis of asthma. The doctor stated that it was the peak of the pandemic, and the Appellant was considered a high-risk patient due to the asthma. There is no indication in the note of any circumstances in which the Appellant might be able to work.

[32] The Appellant hasn't proven that her efforts to find a job were reasonable and customary.

[33] Based on the above reasons, the Appellant is disentitled from receiving EI benefits for the period January 11, 2021, to September 11, 2021.⁸

⁸ Section 50(8) of the *Employment Insurance Act*.

Capable of and available for work

[34] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:⁹

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

[35] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.¹⁰

– **Wanting to go back to work**

[36] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[37] This was because of her dire financial situation. Her husband did not have enough income to support the two of them. She had to apply for an early CPP retirement pension and OAS. They provide a small income. She has to pay for diabetes and asthma medication. Even with their combined income, the financial situation remains poor. So, she wanted to go back to work for financial reasons. But the desire was not supported by efforts to find work, as set out under the next heading.

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

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

⁹ 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.

¹⁰ 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.

[39] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.¹¹

[40] The Appellant's efforts to find a new job included some inquiries for remote clerical work. She said that she did not have the experience for those jobs. She could not wear a mask for more than one and one-half hours. That removed a large number of jobs that she could have applied for. Her testimony about her efforts to find a job was vague. I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[41] Those efforts weren't enough to meet the requirements of this second factor because they were few in number, and limited by her asthma and the duration of time she could wear a mask. The doctor's note, obtained in 2022, supports an inference that the Appellant was not looking for work at all, or only making minimal efforts to find work.

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

[42] The Appellant didn't set personal conditions that might have unduly limited her chances of going back to work.

[43] I find that the Appellant hasn't done this because her medical condition and the COVID-19 pandemic are matters outside her control. These are not limits that the Appellant chose to impose on herself.

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

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

Overpayment

[45] If a person has received a benefit to which she is not entitled, she is liable to repay that amount.¹² While the Appellant presents sympathetic circumstances, the

¹¹ 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.

¹² Sections 43 and 44 of the *Employment Insurance Act*.

Tribunal has no jurisdiction to reduce or cancel, on humanitarian and compassionate grounds, an overpayment that is owing to the Commission. Only the Commission can make such a decision¹³. The Appellant can ask the Commission for a write-off of the overpayment.

Conclusion

[46] The Appellant hasn't shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant can't receive regular EI benefits for the period from January 11, 2021, until September 11, 2021. Because of that, the overpayment of \$17,115.00 remains in place (less any payments the Appellant may have made toward the overpayment).

[47] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section

¹³ *ML v Canada Employment Insurance Commission*, 2016 SSTADEI 472.