Citation: *VD v Canada Employment Insurance Commission*, 2023 SST 1888

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	V. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (581640) dated June 5, 2023 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	September 28, 2023
Hearing participant:	Appellant
Decision date:	October 6, 2023
File number:	GE-23-1813

Decision

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

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

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from January 10, 2022, to June 24, 2022, because 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 has to be searching for a job.

[4] I have to 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 the Appellant wasn't available because she didn't make reasonable and customary efforts to find a suitable job.

[6] The Appellant disagrees and says there were no jobs available outside of delivery-service jobs during the pandemic.

Matter I have to consider first

The Appellant asked me to adjourn (that is, pause) the appeal

[7] The Appellant asked to reschedule the hearing since was going to be away for work. She asked again to reschedule the hearing so her union representative could prepare for the hearing. So, the hearing was rescheduled to another date for reasons of fairness.

Issue

[8] Was the Appellant available for work?

Analysis

[9] Two different sections of the law require claimants 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.

[10] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2]

[11] The Commission says it disentitled the Appellant under section 50 of the Act along with section 9.001 of the Regulations for failing to prove her availability for work. In its submissions, it says it may a claimant to prove that they are making reasonable and customary efforts to obtain suitable employment.

[12] The Commission's notes don't reflect that it asked the Appellant to prove her availability by sending a detailed job search record.

[13] I find a decision of the Appeal Division on disentitlements under section 50 of the Act persuasive. The decision says the Commission can ask a claimant to prove that they have made reasonable and customary efforts to find a job. It can disentitle a claimant for failing to comply with this request. But it has to ask the claimant to provide this proof and tell the claimant what kind of proof will satisfy their requirements.[3]

[14] I don't find that the Commission asked the Appellant to provide her job search record to prove her availability. So, I don't find that she is disentitled under this part of the law.

[15] Second, the Act says a claimant 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 a

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[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688
[4] See section 18(1)(a) of the Act.

claimant has to prove to show that they are "available" in this sense.[5] I will look at those factors below.

Available for work

[16] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[6]

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.

[17] 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**

[18] The Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available.

[19] The Appellant was placed on unpaid leave from her job. She testified that she realized that she needed some money. So, she got a job with a grocery delivery service. But for reasons I give below, I don't find that this job alone can be considered suitable employment.

[20] In a statement made when she appealed the Commission's reconsideration decision, the Appellant said there were no jobs outside of delivery service jobs that were hiring during the pandemic.

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[5] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[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.
[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.

[21] The Appellant said she had to look for work because the EI payments weren't enough. She added that she would have become homeless if she didn't get the grocery delivery job. Even though I accept the Appellant's statement that she needed money, I don't find from this that she has proven that she wanted to go back to work as soon as a suitable job was offered.

[22] I don't accept the Appellant's statement that there were no jobs outside of delivery service jobs due to the pandemic. Despite the pandemic-related closures throughout 2020 and 2021, I find the Appellant's statement about the types of jobs available is exaggerated. Even if she means that these were the only types of jobs that didn't require vaccination, I doubt this was likely the case in 2022.

[23] I don't find that the Appellant's conduct and attitude, namely relying on a grocery delivery job to supplement EI payments, is that of someone who wanted to return to work as a suitable job is offered. Rather, I find that this is the conduct of someone who was waiting to return to the job she had.

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

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

[25] As part of an investigation about how the Appellant had completed her bi-weekly reports, the Commission asked her if she had been actively looking for work. The Commission's file notes show that the Appellant said she didn't feel a need to look for work because she has a job to go back to.

[26] The Commission spoke to the Appellant's union representative. Its notes show that he said nobody actively looks for work especially when they have a return-to-work date after lay-off.

[27] The Commission sent a notice of decision to the Appellant to say that she failed to prove she was actively seeking work from January 10, 2022, to June 24, 2022.

[28] The Appellant asked the Commission to reconsider this decision. She said she completed her bi-weekly reports and always said she was ready and able to work. She

also said she didn't do anything differently than any other time she was on lay-off. The Appellant added that she didn't have anything from her employer saying she didn't have a job, which would have been the number one indication she would need to start looking for a job.

[29] The Appellant spoke to the Commission after she asked for a reconsideration of its initial decision. She then told the Commission that she had worked delivering groceries since January 2021. She attached a transaction history showing that she earned $4,366.76 in approximately five months. The Appellant also said she looked for a job at another delivery service. She said she was unable to look for any other work because she didn't have the COVID-19 vaccine and everywhere else required vaccination.

[30] The Appellant testified that she worked full-time at her usual job. She testified that at the grocery delivery job, she worked pretty much every day, as often as she could. She said it was time-consuming, to shop and choose the right groceries.

[31] I asked the Appellant what her rate of pay was at her grocery delivery job. She said she got paid based on the number of batches of deliveries she did and the distance she travelled. She added that there was nothing under $10. But the Appellant testified that there were some good weeks and some bad weeks.

[32] Considering that of the 22 payments the Appellant got from her grocery delivery job, 14 were less than $200, I don't find that this was the same as a full-time job. Since the Appellant worked full-time at her usual job, I don't find that in the circumstances, this job alone alone can be considered as a suitable job for the purposes of this factor.

[33] At the hearing, the Appellant testified that she realized soon after being let go from her job that she needed some money. She said she applied online for the grocery delivery service job and started the job on January 18, 2022.

[34] I asked the Appellant if she had kept a record of her job search activities as required by the application for benefits. The Appellant said she did not. She added that she had applied for a job at a food delivery service company, but she physically didn't

go anywhere because of COVID-19. I asked the Appellant if she had applied for jobs anywhere else, and she said she hadn't.

[35] The Commission submitted that the Appellant admitted that she wasn't looking or applying for any jobs since she had a job to go back to. I asked the Appellant about this. She said when she spoke to the Commission, she had already returned to work. She said she wasn't going to remember the details because it was six months ago. The Appellant also said she asked the Commission's officer she had spoken to why she hadn't called before she had returned to work, because she would have complied if she had known she had to.

[36] I accept the Appellant's evidence that she worked for a food delivery service. But I'm not satisfied that she did enough to look for work suitable to her circumstances as a full-time employee at her usual job.

[37] I give more weight to the Commission's notes about what the Appellant said about looking for work than the Appellant's testimony. I do so because it wasn't until after the Commission denied her application for benefits that she spoke about her job delivering groceries. And I don't find her explanation that she couldn't remember details about looking for work or applying for jobs is credible. This is especially so given the Appellant's comment about complying with the Commission's requirements if she had known she had to.

[38] I find it likely from the Appellant's request for reconsideration that she didn't look for work other than two delivery service jobs, one of which she got. I find that her statement that she hadn't done anything different than when laid off in the past supports a very limited job search. And in the absence of a record of job search activity, I don't find that the Appellant has done enough to find a suitable job.

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

[39] The Appellant set personal conditions that might have unduly limited her chances of going back to work.

[40] The Commission says the Appellant restricted her chances of getting a job because she refused to be vaccinated.

[41] The Appellant disagrees. She says vaccines aren't mandated in Canada and she has the right not to take the vaccine.

[42] While I accept as fact that the Appellant didn't take the COVID-19 vaccine, I'm not satisfied that this is what limited her chances of going back to work. Rather, I find that she limited her search for work based on her belief that the only jobs available were those involving food/grocery delivery.

[43] The Appellant applied for two jobs. She got one delivering groceries, but I have found that this job can't be considered suitable given the Appellant's circumstances. And the other job she applied for was a food delivery job. Without pursuing jobs, for example in the general labour, retail or hospitality industry, I find that by applying for food/grocery delivery jobs only, the Appellant limited her chances of returning to work as soon as a suitable job was offered.

– **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.

Conclusion

[45] 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 is disentitled from receiving benefits.

[46] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section