Citation: *HL v Canada Employment Insurance Commission*, 2023 SST 1943

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	H. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (553470) dated October 31, 2022 (issued by Service Canada)

Tribunal member:	Jean Yves Bastien
Type of hearing:	Videoconference
Hearing date:	November 9, 2023
Hearing participants:	Appellant
Decision date:	November 27, 2023
File number:	GE-22-3973

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 can't receive Employment Insurance (EI) benefits.

Overview

[3] The Appellant was suspended from her job between April 5, 2022, and June 20, 2022, because she refused to be vaccinated against COVID-19. This suspension is the subject of a separate appeal (GE-22-3971)

[4] The Appellant established a claim for regular EI benefits, effective June 12, 2022.

[5] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits from June 13, 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 an Appellant has to be actively searching for a job even if they have only been suspended.

[6] 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.

[7] The Commission says that the Appellant wasn't available because she made no effort to look for another job. She waited two-and-a-half months until the COVID-19 vaccine mandate was lifted, and she could get her job back.

[8] The Appellant disagrees, and states that she had been fighting to get her job back since she was suspended. The Appellant argues that because she was called back to work, and got her job back as soon as the vaccine mandate was lifted, this proves that she was available for work.

Matters I have to consider first

The Hearing was rescheduled a number of times

[9] The Appellant was first contacted on March 7, 2023, by Tribunal Staff to ask if she was available for a Hearing on either March 10 or 16, 2023. The Appellant was taken aback and stated that she was surprised that a Hearing would happen so soon. The Appellant said that she didn't think that she would be available until August or September (of 2023).

[10] A Case Conference was held on March 17, 2023. One of the purposes of the conference was to discuss possible Hearing dates. The Appellant requested that her Hearing be delayed until "after the third week of September". I noted that this was an unusually lengthy delay, but since the Commission, who attended the conference, had no objection, the Hearing was rescheduled for September 26, 2023.

[11] The Hearing started as scheduled on September 26, 2023, however, the Appellant raised an allegation of bias. The Hearing was then paused to allow the Tribunal to consider and decide on this issue. An interlocutory decision was issued deciding that the Appellant had failed to prove that there was a reasonable apprehension of bias on October 31, 2023, and a date of November 9, was set for the Hearing to continue.

[12] The Hearing recommenced and was completed on November 9, 2023.

Issue

[13] Was the Appellant available for work as defined by the *Employment Insurance Act* (the *Act*)?

Analysis

[14] 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.

[15] First, the *Act* says that an Appellant 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] I will look at those criteria below.

[16] 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.[3] Case law gives three things an Appellant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[17] 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.

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

Reasonable and customary efforts to find a job

[19] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[5] 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.

[20] I also have to consider the Appellant's efforts to find a suitable job. The *Regulations* list nine job-search activities I have to consider. Some examples of those activities are the following:[6]

- assessing employment opportunities
- preparing a résumé or cover letter
- applying for jobs

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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] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96, and A-57-96.
[5] See section 9.001 of the Regulations.
[6] See section 9.001 of the Regulations.

[21] The Commission argues that the Appellant didn't do enough to try to find a job. "In this case, even though the claimant has shown a desire to return to the labour market, she restricted herself to only one employer, which is the one where she had been suspended. Consequently, we cannot say that she was ready and prepared to return to the labour market as soon as a suitable job was offered. Since the claimant restricted her availability to her employer, the only effort she has made to find a suitable job was the effort to get her job back with her employer. She did not make any effort to find a suitable job elsewhere."[7]

[22] The Appellant disagrees. She told the Commission that "after she was suspended, she did not look for further employment. She said this was because she was trying to get her job back with [her employer]". The Appellant said that "she was qualified for cashier and labour but that she would much rather prefer to work for [her employer]" in the job she had before she was suspended.[8]

[23] The Appellant argues that because she had signed a conflict-of-interest agreement with her employer, she was prevented from taking any similar job outside of the [federal] government.[9]

[24] The Appellant stated that she did not apply for any "labour job" because she couldn't find a stable one that did not require that she be vaccinated [against COVID-19].[10]

[25] The Appellant added:

> Therefore. Instead of spending time on cheap labour job which can not provides me job security and make ends meet, I did the following two things.
>
> I filed few grievances, communicated with PIPSC, collecting information to support my position and fight back for my job. The reality shows that the

[7] See pages GD4-2 and GD4-3 of the appeal record.
[8] See page GD3-11 of the appeal record.
[9] See page GD3-16 of the appeal record.
[10] See page GD3-16 of the appeal record.

> problem was not on me. **I was always available to work, and I want to get my job back**. The problem is that [employer] management who did not allow me to work due to their abuse of power and misconduct.
>
> At the same time, I was considering to have a secondary career, which I will not loose my job because of my vaccination status, and I will be interested and happy to work for a long time. Finally, I think nutritionist would be a good fit for me. I found the school and the program that fits me….[11]

[26] The Appellant says that her efforts were enough to prove that she was available for work. She told the Commission "Therefore, I was available to work. I was fighting back for my old job, and also pursuing a secondary career for long term. The decision that I have not proven my availability for work has no basis at all and has no consideration of the situation I was facing at that time neither."[12]

[27] I find that the Appellant has not made reasonable or customary efforts to find a job **as defined by the *Act* and the *Regulations***. Basically, she remained passive and waited until the employer's COVID-19 vaccination mandate was eventually rescinded and she was able to return to her former job. The Appellant made almost no efforts to find another job and therefore her job search was not "sustained".

[28] Other than possibly "assessing job opportunities" the Appellant did not do any of the other "reasonable and customary efforts" which are found in section 9.001 of the *Regulations*.

[29] Therefore, I find that the Appellant hasn't proven that her efforts to find a job were reasonable and customary.

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[11] See page GD3-16 of the appeal record.
[12] See page GD3-16 of the appeal record.

Capable of and available for work

[30] 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:[13]

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

[31] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[14]

– Wanting to go back to work

[32] I find that the Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available.

[33] The Appellant chose to remain mostly passive and wait until the vaccine mandate at her employer was rescinded and she could return to her former job. The Appellant's attitude was that there were no jobs available because the "good "ones that were advertised, all required applicants to be vaccinated against COVID-19. She stated that she wasn't interested in 'labour" jobs or working as a cashier.

[13] 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.
[14] 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.

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

[34] The Appellant didn't make enough effort to find a suitable job.

[35] 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.[15]

[36] The Appellant's efforts to find a new job were very limited, and essentially amounted to "assessing employment opportunities". I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[37] Those efforts weren't enough to meet the requirements of this second factor because the Appellant did nothing other than assessing job opportunities after which she decided that she didn't want to work in any "labour" jobs that might not require vaccination. She found that these jobs were low-paying, and her attitude was that she could not make ends meet by taking one of these jobs, so she didn't.

[38] The Appellant found that all the good jobs for which she was qualified required vaccination against COVID-19, so she discounted these.

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

[39] Did the Appellant set personal conditions that might have unduly limited her chances of going back to work?

[40] The Commission says that "by limiting herself to one employer, "X", where she could not return as long as she refused to receive the COVID-19 vaccine, or as long as the employer didn't the lift the vaccine mandate, the claimant was setting personal conditions that unduly limited her chances of returning to the labour market."[16]

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[15] 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.
[16] See page GD4-3 of the appeal file.

[41] The Commission also argues that "when the claimant says that she could not work for another employer than "X" because it would put herself in a situation of conflict of interest or that it would have been hard for her to find another job when vaccination against COVID-19 was a requirement of most employers and she refused to receive the vaccine (GD3-16), those are also personal conditions that unduly limit the chances of returning to the labour market.[17]

[42] The Appellant says she hasn't done this because she was fighting to get her job back the entire time. She testified that it was the "societal level of coercion" that limited her job search. The Appellant said that she didn't have equal rights with the vaccinated. She argued that "my skill set is doing the big accounting firm files. All the big companies had vaccine mandates. It's the same thing [as at my employer] so there is no point in going there. Working for small companies was not appropriate."

[43] I agree with the Commission's arguments that the Appellant limited her options by:

- not getting vaccinated
- considering only jobs which didn't require her to be vaccinated against COVID-19, and then discounting them because they didn't pay enough.
- waiting until her employer would lift their vaccination mandate, at some undetermined future time, and she could return to her job

[44] Therefore, I find that the Appellant did set personal conditions that unduly limited her chances of going back to work.

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

[45] 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.

[17] See page GD4-3 of the appeal file.

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 EI benefits from June 13, 2022, to June 24, 2022.

[47] This means that the appeal is dismissed.

Jean Yves Bastien
Member, General Division – Employment Insurance Section