



Citation: *AH v Canada Employment Insurance Commission*, 2023 SST 2037

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

Decision

Appellant: A. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (595926) dated June 23, 2023 (issued by Service Canada)

Tribunal member: Paula Turtle

Type of hearing: Teleconference

Hearing date: October 10, 2023

Hearing participant: Appellant

Decision date: November 27, 2023

File number: GE-23-2256

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 Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits from July 2, 2023, 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 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 she only applied for five positions between May 10, 2023, and August 24, 2023. She applied for three positions in May 2023, and two in August 2023. Applying for five jobs in three months does not show she was available for work. And the Commission says the Appellant was not looking for work that paid less than her teaching position.

[6] The Appellant disagrees and states that she actively looked for work in July and August 2023. And that she sent in documents that show this.

Matters I have to consider first

[7] There is a question of jurisdiction to be decided in this appeal. The Appellant filed an initial claim for benefits dated April 24, 2023. A benefit period was established effective April 9, 2023. I will call this the "April benefit period."

[8] The Commission told the Appellant she was not entitled to benefits from April 9, 2023, because she did not show she was available for work.

[9] The Appellant asked the Commission to reconsider its decision. She didn't know she had to apply for work with other employers to show she was available. But after the disentitlement decision was communicated to her, she applied for work with other employers.

[10] The Appellant spoke with a Service Canada agent on June 22, 2023. They talked about the Appellant cancelling her April benefit period.

[11] The Commission gave the Appellant its reconsideration decision on June 23, 2023. The Commission maintained its original decision that the Appellant did not show she was available for work. The Appellant appealed the reconsideration decision to the Tribunal.

[12] The Tribunal scheduled a hearing. The Appellant was present.

[13] Before the hearing, the Appellant filed a letter with the Tribunal. The letter was from the Commission. It was dated September 6, 2023. It disentitled the Appellant from being paid benefits from July 2, 2023, because she did not show she was available for work after that date. The Appellant could not tell me how the September 6, 2023, letter related to her April benefit period.

[14] After the hearing, I asked the Commission for information about the Appellant's April benefit period. And about the September 6, 2023, letter. And I asked the Commission to explain its position about my jurisdiction.

[15] The Commission said these things:

- On June 22, 2023, the Appellant asked to cancel her April benefit period. Service Canada told her that her benefit period could only be cancelled if she asked, and was able to establish, a new benefit period.

- On August 15, 2023, the Appellant asked to cancel her April benefit period. And she asked to start a new benefit period, effective July 2, 2023.
- The Commission established a new benefit period effective July 2, 2023. And the Commission told her she needed to show availability in order to be paid benefits during the new benefit period.
- The Appellant gave job search information for her new benefit period. That information began in May and continued to August 2023.
- The Commission told the Appellant on September 6, 2023, that her job search efforts did not show she was available for work. So, she was disentitled from receiving benefits effective July 2, 2023.

[16] The Act talks about two ways the Commission may cancel a benefit period that has been established. They are:

- The Commission may cancel a benefit period if it has ended and no benefits were paid or payable during the benefit period¹, or
- The Commission may cancel part of a benefit period if a claimant establishes a new benefit period.²

[17] In this case, it looks like the Commission cancelled part of the Appellant's benefit period – the April benefit period – because it required the Appellant to establish a new benefit period, starting on July 2, 2023.

[18] The Commission asks me to dismiss the Appellant's appeal of the reconsideration decision dated June 23, 2023. That reconsideration decision is about her April benefit period. They say I should do this even though the April benefit period was cancelled.

¹ See section 10(6)(a) of the Employment Insurance Act.

² See section 10(6)(b) of the Act.

[19] And the Commission says the Appellant did not request reconsideration of the September 6, 2023, decision that imposes a disentitlement effective July 2, 2023. So, because she did not request reconsideration of that decision, I do not have jurisdiction to deal with that period of time.

[20] I have to decide the following two issues before I can look at whether the Appellant has shown that she was available for work.

– **Mootness of the Appellant’s appeal about her disqualification in her April benefit period**

[21] The Appellant appealed the reconsideration decision dated June 23, 2023. That decision is about the April benefit period. And part of the benefit period, from April until her new benefit period started on July 2, 2023, is cancelled.

[22] The issue is moot. It relates to a cancelled portion of the benefit period.

[23] The Act says that a cancelled benefit period or portion of a benefit period is deemed never to have started.³

[24] If a benefit period never started, that means it never existed. The Appellant can’t get benefits if a benefit period does not exist.

[25] There is no benefit period from April 9 to July 2, 2023. So, neither party has any rights or obligations related to that period. This means the issue of the Appellant’s availability during that period is moot.⁴

[26] The Commission says I can deal with the Appellant’s appeal based on the facts that existed at the time.

[27] I can exercise my discretion and decide a moot issue. But there is no reason for me to do that in this case. This case does not raise issues that would have a broader impact beyond the parties.

³ See section 10(7) of the Act.

⁴ *Borowski v. Canada (AG)*, 1989 CanLII 123 (SCC).

[28] I find that the issue of the Appellant's availability in the cancelled portion of the benefit period is moot. I find there is no reason for me to exercise my discretion and consider the issue. Therefore, I will not consider it.

– **My jurisdiction to look at the Appellant's availability as of July 2, 2023**

[29] The Commission says I can't look at the Appellant's benefit period after July 2, 2023. The Commission decided on September 6, 2023, that she did not show she was available for work after July 2, 2023. So, the Commission denied benefits to the Appellant after that date.

[30] The Appellant did not request reconsideration of that decision.

[31] Having jurisdiction means that I am allowed to decide an issue. I have to first decide if I have jurisdiction to hear about the availability disentitlement as of the start of the July 2, 2023, benefit period before I can look at whether the Appellant met the availability requirements or not.

[32] I have jurisdiction to decide the Appellant's availability as of July 2, 2023. That is because the underlying issue of the Appellant's availability continued throughout her benefit period, starting from when her April 2023 benefit period was initially established, continuing through the discussions about cancelling part of her benefit period and her decision to cancel the first portion of her benefit period and start the benefit period on July 2, 2023, instead.

[33] The Act says that someone can appeal a reconsideration decision made by the Commission to the Tribunal.⁵ And my jurisdiction comes from that reconsideration decision.

[34] The Commission says the Appellant didn't ask the Commission to reconsider its September 6, 2023, decision that she was not available for work during the portion of her benefit period that began on July 2, 2023. And so, I can't look at that period of time.

⁵ See section 113 of the Act.

[35] The Commission and the Appellant have treated the issue of her availability for work as an ongoing and continuous one since the start of her April 2023, benefit period.

[36] Here are some examples of how the Commission and the Appellant have treated the issue of availability as ongoing and continuous:

- The Commission's May 5, 2023, decision and the reconsideration decision dated June 23, 2023, disentitled the Appellant from being paid benefits from April 9, 2023, (the start of her April benefit period) forward. There was no end date to the Appellant's disqualification. Rather, it would only end if the Appellant was able to demonstrate that she showed she met the availability requirements in the Act.
- The Commission spoke to the Appellant about her reconsideration request. The Commission's notes say that the agent talked to the Appellant about cancelling her benefit period and applying to start a new one so she could get benefits in the summer.⁶
- When the Commission was looking at whether the Appellant could be paid benefits as of the start of the July 2, 2023, benefit period they told the Appellant that availability "remained" an issue.⁷
- The Appellant sent job search information to the Tribunal for this appeal. That job search information was about the Appellant's job search before and after July 2, 2023.
- The Tribunal asked the Commission for submissions about the Tribunal's jurisdiction. In its submissions, the Commission talks about the Appellant's job search before and after July 2, 2023.⁸

[37] The Appellant's reconsideration request came before the Commission cancelled her April benefit period. The Commission said she was disqualified during her April

⁶ See Reconsideration File, GD3-28.

⁷ See Commission's submissions, GD20-6.

⁸ See Commission's submissions, GD20-2.

benefit period because she did not show she was available. The Appellant disagreed with the Commission's position.

[38] And the Commission said that she was disentitled after July 2, 2023, because her availability remained an issue. No new issues have been raised in connection with the second benefit period. And the Appellant continues to disagree with the Commission's position that she did not show she was available for work.

[39] Even though she didn't ask for reconsideration of the September 6, 2023, decision, it would be unreasonable for me not to look at the Appellant's availability after July 2, 2023. Both parties to his appeal have treated the issue of her availability as a continuous one and have given me information about her job search before and after July 2, 2023.

[40] I find I have jurisdiction to consider whether the Appellant was available for work from July 2, 2023.

Issue

[41] Was the Appellant available for work?

Analysis

[42] 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.

[43] First, the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.⁹ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.¹⁰ I will look at those criteria below.

⁹ See section 50(8) of the *Employment Insurance Act* (Act).

¹⁰ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

[44] 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.¹¹ Case law gives three things a claimant has to prove to show that they are “available” in this sense.¹² I will look at those factors below.

[45] 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.

[46] 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

[47] The law sets out criteria for me to consider when deciding whether the Appellant’s efforts were reasonable and customary.¹³ 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.

[48] 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:¹⁴

- registering for job-search tools or with online job banks or employment agencies
- attending job-search workshops or job fairs
- networking
- contacting employers who may be hiring

[49] The Commission says that the Appellant didn’t do enough to try to find a job. She only applied for five jobs. And she did not submit any applications between May 10,

¹¹ See section 18(1)(a) of the Act.

¹² See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹³ See section 9.001 of the Regulations.

¹⁴ See section 9.001 of the Regulations.

2023, and August 15, 2023. They say the Appellant did not apply for jobs that pay less than her teaching position.

[50] The Appellant says that her efforts were enough to prove that she was available for work.

[51] The Appellant sent all the information she had about her job searches to the Tribunal. I asked her about those documents at the hearing. She applied for the following jobs:

- Three positions with her school board, on May 8, 2023, and May 10, 2023.
- One position that was posted on August 29, 2023.
- One position with her school board in September 2023.

[52] At the hearing, I asked the Appellant if she applied for other positions. She said she wasn't sure, but maybe not.

[53] After the hearing, the Appellant sent in some other documents about her job search. She sent in some job postings that she applied for in October 2023. But then she wrote in and said she was looking for EI benefits only for July and August. And that the October job search had nothing to do with her claim.

[54] I find that the Appellant did not make reasonable and customary efforts to find work.

[55] In July and August (the months the Appellant has asked me to look at) she only applied for one job. And that job was posted on August 29, 2023. The Regulations say a claimant's efforts to find work have to be sustained in order to be reasonable and customary.

[56] Applying for one job in two months and at the very end of the second month does not show that the Appellant was making reasonable and customary efforts to look for work. It does not show that her job search efforts were sustained.

[57] The Appellant looked on the internet. But she did not tell me about anything else she did to find jobs she could apply for.

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

Capable of and available for work

[59] 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:¹⁵

- 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.

[60] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.¹⁶

– Wanting to go back to work

[61] The Tribunal considers whether a claimant has shown that she wanted to go back to work as soon as a suitable job was available.

[62] The fact that the Appellant only applied for one job in those two months does not show that she wanted to get back to work during those two months.

– Making efforts to find a suitable job

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

¹⁵ 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.

¹⁶ 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.

[64] 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.¹⁷

[65] The Appellant applied for one job at the very end of August. That is not enough effort to find a suitable job. I explained this above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[66] The Appellant's job search efforts weren't enough to meet the requirements of this second factor.

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

[67] I do not find that the Appellant set personal conditions that might have unduly limited her chances of going back to work.

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

[68] 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

[69] 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.

[70] This means the appeal is dismissed.

Paula Turtle

Member, General Division – Employment Insurance Section

¹⁷ 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.