Citation: *VH v Canada Employment Insurance Commission*, 2023 SST 2024

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (611686) dated August 25, 2023 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Videoconference
Hearing date:	November 22, 2023
Hearing participant:	
Decision date:	November 27, 2023
File number:	GE-23-2753

Decision

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

[2] The Appellant hasn't shown she was available for work. This means she can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided the Appellant was disentitled from receiving 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 a claimant has to be searching for a job.

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

[5] The Commission says although the Appellant has a medical note, the note only says she cannot return to her previous employments. The Commission says the Appellant was not available because she did not do enough to look for a job. It says she was unable to provide a list of the jobs to which she had applied, had not updated her resume or enrolled with an employment agency.

[6] The Appellant disagrees with the Commission. She wrote in her appeal to the Tribunal that she is available for work and has applied to multiple places. The Appellant wrote she applied for jobs through the Job Bank and InDeed, has handed out resumes, she is willing to accept any job for which she is qualified, has a vehicle and has no restriction on traveling for work.

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[1] A person who applies for employment insurance (EI) benefits is called a "Claimant." A person who appeals a decision of the Canada Employment insurance Commission (Commission) is called an "Appellant."

Matter I considered first

The Appellant wasn't at the hearing

[7] The Appellant wasn't at the hearing. A hearing can go ahead without the Appellant if the Appellant got the notice of hearing.[2]

[8] I think that the Appellant got the notice of hearing. The Appellant gave her email address to the Tribunal as the way to communicate with her. The Appellant's appeal was acknowledged by email. The Tribunal sent her the reconsideration file, the Commission's submissions, and the notice of hearing by email. The Tribunal's staff also left a voice mail on the Appellant's phone and sent an email to her a few days before the hearing to remind her of the hearing and gave instructions on how to connect to the videoconference. All the emails were sent to the email address she provided and none of the emails were returned as undeliverable.

[9] On the day of the hearing, I started the videoconference at the scheduled time. At 30 minutes past the time set for the hearing, the Appellant had not appeared, and I disconnected from the videoconference. I note the notice of hearing gave the Appellant an opportunity to request a different hearing time and date. As of date of writing my decision, the Appellant has not contacted the Social Security Tribunal to request a different hearing time or to explain her absence. So, the hearing took place when it was scheduled, but without the Appellant.

Issue

[10] Was the Appellant available for work?

Analysis

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

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[2] Section 58 of the *Social Security Tribunal Rules of Procedures* sets out this rule.

[12] First, the *Employment Insurance Act* (EI Act) says that a claimant has to prove they are making "reasonable and customary efforts" to find a suitable job.[3] The *Employment Insurance Regulations* (EI Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[4] I will look at those criteria below.

[13] Second, the Act says that a claimant has to prove they are "capable of and available for work" but aren't able to find a suitable job.[5] Case law gives three things an Appellant has to prove to show they are "available" in this sense.[6] I will look at those factors below.

Reasonable and customary efforts to find a job

[14] In looking through the evidence in the appeal file, I did not see any requests from the Commission to the Appellant to prove she made reasonable and customary efforts to find a suitable job, or any claims from the Commission that if it did ask the Appellant, her proof was insufficient.

[15] I note the Commission did not make any submissions on how the Appellant failed to prove to it she was making reasonable and customary efforts. The Commission only summarized what the legislation says in section 50(8) of the EI Act and section 9.001 of the EI Regulations.

[16] Based on the lack of evidence the Commission asked the Appellant to prove reasonable and customary efforts under section 50(8) of the EI Act, I find the Commission did not disentitle the Appellant under section 50(8) of the EI Act. Therefore, I do not need to consider that part of the law when reaching my decision on this issue.

[17] I will only consider whether the Appellant was capable and available for work under the section 18 of the EI Act.

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[3] See section 50(8) of the EI Act.
[4] See section 9.001 of the EI Regulations.
[5] See section 18(1)(a) of the EI Act.
[6] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.

Suitable Employment

[18] To decide the Appellant's capability and availability, I must first define what is considered suitable employment for the Appellant. The law sets out the criteria I must consider when determining what constitutes suitable employment. Those criteria include whether:

a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;

b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and,

c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.[7]

[19] The Appellant started collecting EI sickness benefits on January 29, 2023. She received those benefits until June 24, 2023. The Appellant was "cleared to return to work – not a previous employment" by her Nurse Practitioner on June 29, 2023. The Appellant explained to a Service Canada officer on August 25, 2023, that she had trouble with her knees in her former job as a cleaner and she could not do home care due to its impact on her mental health. The Appellant said she could do light cleaning and had a hairstylist course so she could do that work. The Appellant also told the officer she could work in sales, retail and fast food.

[20] I find the evidence shows suitable employment for the Appellant is employment that would not require her to kneel for lengthy periods while working and work that did not involve providing home care to individual clients.

Capable of and available for work

[21] As noted above, I only need to consider whether the Appellant was capable of and available for work under paragraph 18(1)(a) of the EI Act.[8] Case law sets out three

[7] See subsection 9.002 of the EI Regulations.
[8] See section 18(1)(a) of the EI Act.

factors for me to consider when deciding this. 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 limited his chances of going back to work.

[22] 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**

[23] The Appellant told a Service Canada officer on August 25, 2023, that since July 2, 2023, she looked at the Job Bank for work, had applied for one job (but could not remember the details of the job), had not registered with any employment agencies and had not updated her resume or cover letter.

[24] The Appellant's appeal is dated October 2, 2023. In her appeal to the Tribunal the Appellant wrote she was available for work, and she had applied to multiple places and also through the Job Bank and Indeed. The Appellant also wrote she handed out resumes. But, the Appellant did not provide any list of the jobs she applied to or when she applied for those jobs. She also did not provide a list of the employers or businesses to whom she had given her resume.

[25] In my view, browsing the Job Bank and applying for one job over the course of two months from when she was cleared to return to work and spoke to the Service Canada officer, does not demonstrate a desire to return to work. With respect to the period after the Appellant spoke to the Service Canada officer and filed her appeal,

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[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.

there is insufficient evidence to show the Appellant had a desire to return to work. As a result, I find the Appellant has not met this factor.

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

[26] There is a list of job search activities to look at when deciding availability under a different section of the law.[11] This other section does not apply in the Appellant's appeal. But, I am choosing look at that list for guidance to help me decide whether the Appellant made efforts to find a suitable job.[12]

[27] There are nine job search activities in the list of job search activities: assessing employment opportunities, preparing a resume or cover letter, 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, submitting job applications, attending interviews and undergoing evaluations of competencies.[13]

[28] The Appellant spoke to a Service Canada officer on August 25, 2023, about two months after she was declared fit to return to work. She told the officer she looked at the Job Bank and had applied for one job but could not recall the details. She said she had not updated her resume or cover letter.

[29] The Appellant's appeal to the Tribunal is dated October 2, 2023. The Appellant stated in her appeal to the Tribunal she had applied for multiple jobs through the Job Bank and Indeed. She also said she handed out her resume. But, she did not provide a list of where she had applied and when. This evidence only tells me that in the five weeks since the Commission reconsidered her appeal the Appellant created a resume and applied for some jobs.[14] But I have no evidence of the types of jobs she applied for, when she applied for those jobs and to whom she gave her resume. As a result, there

[11] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[12] 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.
[13] Section 9.001 of the EI Regulations.
[14] The Commission issued it's reconsideration decision on August 25, 2023.

is insufficient evidence to show the Appellant's efforts satisfied this factor. Accordingly, I find the Appellant has not met this factor.

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

[30] The Appellant's medical limitations are not personal conditions that unduly limit her return to the workplace. A claimant is not required to be available for jobs unless the jobs are suitable. Any jobs that exceed a claimant's capabilities would not be suitable jobs.[15] As stated above, the Appellant's medical limitations restrict her from performing jobs that require her to kneel for extended periods or to work in home care.

[31] However, there is no evidence that the Appellant has set personal conditions outside of the ones imposed by her medical conditions.

[32] The Appellant has continued to live in the same town as when she was last employed. She has access to transportation to go to work and has a driver's license. She told the Service Canada office she could work in sales, retail, fast food, light cleaning or as a hair stylist. This evidence tells me the Appellant has not set any personal conditions that might limit her return to the labour market.

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

[33] Based on my findings on the three factors, I find the Appellant has not shown she was capable of and available for work.

[15] I agree with the reasoning of the Tribunal's Appeal Division (AD) in *S.A. v Canada Employment Insurance Commission*, AD-20-390. The AD stated that a claimant who is unwilling to work at any job that would exceed his or her health and physical capabilities is not setting "personal conditions."

Conclusion

[34] The Appellant hasn't shown that she is available for work within the meaning of the law. Because of this, I find that the Appellant can't receive EI benefits.

[35] This means that the appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section