Citation: *SC v Canada Employment Insurance Commission*, 2024 SST 845

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. C.
Representative:	R. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (599580) dated July 12, 2023 (issued by Service Canada)

Tribunal member:	Kristen Thompson
Type of hearing:	Teleconference
Hearing date:	July 10, 2024
Hearing participants:	Appellant Appellant's witness
Decision date:	July 16, 2024
File number:	GE-24-1685

Decision

[1] The appeal is allowed. The Tribunal's General Division agrees with the Appellant.

[2] The Appellant has shown that she was available for work. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Appellant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits as of November 30, 2022, 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 an 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 she restricted her job search to on-call nursing jobs with her employer. It says that she didn't expand her job searching efforts, although she was told to do so. It says that there could be other suitable jobs available.

[6] The Appellant disagrees. She says that she worked casually for her employer throughout her claim period, while searching for a full-time job. She says that she looked for jobs outside of nursing, but no other suitable job was available.

Issue

[7] Was the Appellant available for work?

Analysis

[8] I find that the Tribunal has jurisdiction to decide if the Appellant was available based on whether she has proven that she is "capable of and available for work" but wasn't able to find a suitable job. I don't have jurisdiction to decide if the Appellant was available based on her "reasonable and customary efforts" to find a suitable job.

[9] 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.

[10] First, the *Employment Insurance Act* (Act) says that an appellant has to prove that they were 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, including preparing a résumé, registering with online job banks, networking, applying for jobs, and attending interviews.[2]

[9] Second, the Act says that an appellant has to prove that they were "capable of and available for work" but weren'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, including that she wanted to go back to work as soon as a suitable job was available, she was making efforts to find a suitable job, and she wasn't setting personal conditions that might have unduly limited her chances of going back to work.[4]

[11] The Commission's initial decision says that the Appellant self-declared that she is retired.[5]

[12] The Commission spoke with the Appellant after she requested a reconsideration of its initial decision. The notes say that the Appellant isn't looking for jobs other than in

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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 GD3-19 and 22.

nursing. She was told to expand her job search.[6] There was no mention of other reasonable and customary efforts to find a job, including preparing a résumé, registering with online job banks, and networking.

[13] The Tribunal's Appeal Division (AD) said that, for the Commission to disentitle an appellant for not making "reasonable and customary" efforts, it would have had to first require the appellant to prove that she made these efforts, and then it would have to show that she failed to comply with the request. The AD said that it is outside the Tribunal's jurisdiction to look at an appellant's reasonable and customary efforts if the Commission didn't first make these inquiries of an appellant.[7]

[14] I don't find that the Tribunal has jurisdiction to decide whether the Appellant made "reasonable and customary" efforts. I'm persuaded by the decision of the AD and I'm following it. There is little indication that the Commission asked the Appellant about her reasonable and customary efforts to find a suitable job. Instead, the Commission told her to expand her job search to jobs outside nursing.

[15] This means that I will only look at whether the Appellant is available based on the second section of the law on availability.

Capable of and available for work

[16] 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:[8]

- she wanted to go back to work as soon as a suitable job was available
- she made efforts to find a suitable job

[6] See GD3-25.
[7] See *AS* v *Canada Employment Insurance Commission*, 2023 SST 402.
[8] 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.

- she didn't set personal conditions that might have unduly 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.[9]

– **Wanting to go back to work**

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

[19] The Appellant retired from nursing in December 2020, after 36 years of service. She says that she regretted retiring because her husband didn't also retire and she was isolated, especially during the COVID-19 pandemic.

[20] The Appellant says that the government asked retired nurses to return to work, so she did so in March 2021. She worked in the vaccine clinic and the chemotherapy department. Her plan is to work for a few more years.

[21] The Appellant says that she applied for EI benefits due to a shortage of work. But she continues to work casually in the chemotherapy department, throughout her claim period and currently, while looking for a full-time job. She says that there wasn't full-time work available to her in the chemotherapy department.

[22] I find the Appellant has shown that she wanted to go back to work as soon as a suitable job was available. I rely on her testimony that her plan was to work a few more years. I also rely on her conduct, as she continued to take nursing shifts offered to her.

[9] 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**

[23] The Appellant made enough effort to find a suitable job.

[24] The Appellant is 58 years old.

[25] The Appellant has a diploma in nursing from 1982. She says that most jobs in nursing now require a Bachelor of Nursing, at a minimum. She says that she is grandfathered in as a diploma nurse, so some nursing jobs are still available to her.

[26] The Appellant lives in a small community. There is one corner store. The Appellant's witness (her husband) says that the community is in an economically depressed area, with a high unemployment rate.

[27] In the neighbouring community, the witness says that employers include the hospital, Service Canada, a few restaurants, a school, a couple of garages, and a car dealership. There is also a large administrative office for a ferry service.

[28] The witness says that most people in the area work outside the community on rotation, within industries including offshore oil platforms, sailing, mining, and pipelines. He says that these jobs all require specialized schooling and training.

[29] The Appellant says that all the job postings for the hospital are on a casual basis. She says that there were no permanent full-time positions. She says that, since returning from retirement, she started with no seniority.

[30] The Appellant says that she previously worked in the emergency room. She says that this was a physically demanding job.

[31] The Appellant says that earlier in her career, in 2005, she suffered a back injury. She says that it would be difficult for her to go back to a physically demanding job. She says that she has difficulty lifting and sitting or standing for prolonged periods.

[32] The Appellant says that for the last 8 to 10 years she worked in chemotherapy, as it wasn't as physically demanding as the emergency room.

[33] The Appellant says that her work in the vaccine clinic was also less physically demanding, as most of the job was preparing and administering vaccines.

[34] The Appellant says that she updated her résumé.

[35] The Appellant says that she reviewed job postings on Facebook. She says that she is aware of all jobs that are available in the area, through networking and Facebook.

[36] The Appellant says that she looked for job opportunities at the hospital. She networked with managers at the hospital and public health.

[37] The Appellant says that she also searched for jobs outside of nursing. But she says that she didn't apply for any jobs outside nursing, as they weren't suitable. For example, the Appellant says:

- She looked for a job at a local personal care home, but this job was on a part-time call-in basis, paying minimum wage up to $17 per hour. She says that it wasn't better than the part-time call-in work she was doing in the chemotherapy department, where she made over $44 per hour.
- She reviewed office work, including jobs at the ferry service and schools, but these employers required applicants to have taken courses in office administration.
- She says that other jobs available, including work at restaurants, were too physically demanding.

[38] The Appellant says that her computer skills are basic. She says that the chemotherapy department still uses paper files, and the vaccine clinic used a very specific computer program she was trained on. She says that she is unable to use Excel and PowerPoint.

[39] The Appellant's efforts to find a job included preparing her résumé, searching for jobs on Facebook, networking, and reviewing jobs to determine if they are suitable.

Those efforts were enough to meet the requirements of this second factor because they were done on a consistent basis.

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

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

[41] The Commission says the Appellant restricted her job search to on-call nursing jobs with her employer. It says that she didn't expand her job searching efforts, although she was told to do so. It says that there could be other suitable jobs available.

[42] The Appellant says she hasn't done this because she looked for jobs outside of nursing, but no other suitable job was available. She says that she was looking for full-time work.

[43] I rely on a decision of the AD, where the Tribunal says that an appellant who is unwilling to work at any job that would exceed her health and physical capabilities is not setting personal conditions. The AD says that an appellant isn't required to be available for jobs unless they were suitable. Any jobs that would exceed her capabilities wouldn't be suitable jobs.[10]

[44] I find that the Appellant didn't set personal conditions that might have unduly limited her chances of going back to work. The Commission said that there could be other suitable jobs available to the Appellant, but it didn't give any examples. Whereas the Appellant has shown that the jobs available to her in her community, including work at restaurants, wasn't suitable to her health and physical capabilities, as she had difficulty lifting, and standing or sitting for prolonged periods.[11] I find the job at the personal care home to be unsuitable as it was at a lower rate of earnings, in the Appellant's usual occupation.[12]

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[10] See *SA v Canada Employment Insurance Commission*, 2020 SST 524.
[11] See section 9.002(1)(a) of the Regulations.
[12] See section 4(b) of the Act.

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

[45] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[46] The Appellant has shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant isn't disentitled from receiving EI benefits. So, the Appellant may be entitled to benefits.

[47] This means that the appeal is allowed.

Kristen Thompson
Member, General Division – Employment Insurance Section