Citation: *AS v Canada Employment Insurance Commission*, 2024 SST 1023

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (664376) dated June 17, 2024 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	July 31, 2024
Hearing participant:	Appellant
Decision date:	August 14, 2024
File number:	GE-24-2293

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) can review the Appellant's claim. They also acted judicially when they decided to review the Appellant's claim for benefits, so I cannot interfere in their decision to do a review.

[3] The Appellant has failed to prove her availability for work because she was not making sufficient efforts to find work. This means the disentitlement from benefits issued by the Commission is upheld.

Overview

[4] The Commission became aware that the Appellant had worked for an employer she did not tell them about. The Record of Employment (ROE) issued by this employer said it had been issued due to a leave of absence.

[5] This information caused the Commission to investigate the Appellant's availability for work.

[6] After completing their investigation, they determined the Appellant is not available for work from July 3, 2023, onward. This decision resulted in a large overpayment.

[7] The Appellant says the ROE issued by her employer was issued in error, she was never on a leave of absence.

[8] The employer in question was a secondary job the Appellant did here and there. It is a popular job with educational assistants (what the Appellant works as) and teachers. The employer works on seniority and during the summer months there are so many other workers, and the Appellant has low seniority, that she cannot get any shifts.

[9] The Appellant says the only issue with her availability is that her daughter has a medical condition (severe anxiety) that prevents her working night shifts.

Matter I have to consider first

50(8) Disentitlement

[10] In their submissions the Commission states they disentitled the Appellant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

[11] In looking through the evidence, I do not see any requests from the Commission to the Appellant to prove her reasonable and customary efforts, or any explanations from the Commission to the Appellant about what kind of proof she would need to provide to prove her reasonable and customary efforts.

[12] While the Commission and Appellant did discuss her job search efforts, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11 persuasive, in that it is not enough for the Commission to discuss job search efforts with the Appellant, instead they must specifically ask for proof from the Appellant and explain to her what kind of proof would meet a "reasonable and customary" standard.

[13] I also do not see any discussion about reasonable and customary efforts during the reconsideration process or explicit mention of disentitling the Appellant under section 50(8) of the Act, or anything about the Appellant's lack of reasonable and customary efforts, in the reconsideration decision.

[14] Based on the lack of evidence the Commission asked the Appellant to prove her reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Appellant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Issues

[15] Can the Commission go back and review the Appellant's claim?

[16] Did they perform the review properly?

[17] Is the Appellant available for work?

Analysis

Reviewing the claim

[18] The Commission may review a claim for benefits, for any reason, within 36 months after benefits have been paid.[1]

[19] The period of benefits under review started on July 2, 2023.[2]

[20] The decision made by the Commission regarding their review of the Appellant's benefits is dated April 9, 2024.[3]

[21] The review, any recalculation on the claim, and notifying the Appellant with a decision, must be done within that 36-month window to allow for a review for any reason.[4] I find that the Commission is within this 36-month window, so they can go back and review the Appellant's claim.

Properness of the review

[22] Just because the Commission can go back and do a review, does not mean that is the end of the analysis. They must also do their review properly. In the case of EI, properly means "judicially".

[23] For their decision to have been made "judicially" the decision maker (here, the Commission) cannot have acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor, or acted in a discriminatory manner. Any discretionary decision that is not made "judicially" should be set aside.[5]

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[1] Section 52(1) of the *Employment Insurance Act*
[2] GD03-75
[3] GD03-75
[4] See *Canada (Attorney General) v LaForest*, A-607-87 and *Briere v Canada (Attorney General)*, A-637-86
[5] *Canada (Attorney General) v Purcell,* 1 FCR 644

Bad faith

[24] The Appellant says the Commission acted in bad faith. She says that ignored the fact her employer told them they issued the ROE saying “leave of absence” in error.

[25] Bad faith is a legal term which means an intentional dishonest act by not fulfilling some legal obligation or purposely misleading someone. I find the Commission did not do either of those things.

[26] I find that it was not bad faith for the Commission to decide to investigate the Appellant’s claim when there was an ROE saying “leave of absence” from an employer she had not reported to them since it could speak to the Appellant’s availability.

[27] I find it is a relevant part of their role in administering the EI program to ensure people who get paid benefits are actually entitled to receive them.

[28] Further, the Commission did not even have the information form the employer that the ROE was issued in error at the time they decided to do their review. The phone conversation in which the employer informed the Commission the ROE had been issued in error did not occur until June 6, 2024.[6] I find this was well after the Commission had decided to review the Appellant’s claim as they had already made a decision by April 2024.[7]

Improper purpose or motive

[29] The Appellant says the Commission acted for an improper purpose or motive. She says they became aware that the ROE was issued in error by her employer yet kept using it as a basis for their decision.

[30] I find the Commission did not act for an improper purpose or motive.

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[6] GD06-4
[7] GD03-75

[31] The Commission is in charge of administering the EI program. One of the things they need to do in their administrative capacity is determine if people can qualify to establish a benefit period and if they are entitled to be paid benefits.

[32] Qualifying to establish a benefit period and being able to be paid benefits are two different concepts. A claimant may meet the requirements to establish a benefit period, but there may be something preventing them from being paid benefits.

[33] An ROE saying the Appellant is on leave implies an inability to work. Seeing this ROE brings up a question of availability.

[34] Reviewing the Appellant’s claim to determine the Appellant’s availability is not the Commission acting for an improper purpose or motive. It is the Commission acting in their capacity of administrating the EI program to try and ensure that only the people who meet the requirements to get paid benefits receive EI, which is a proper purpose.

[35] As I have noted above, the Commission was not even aware of the ROE having been issued in error at the time they made their decision to review the Appellant’s claim. This means they did not act for an improper purpose or motive if they used the ROE as the trigger to review the Appellant’s claim, because at the time they made that decision, for all they knew, the ROE was correct.

[36] The fact they may have become aware at a later date the ROE was issued in error, does not mean they acted for an improper purpose at the time they made the decision to review the Appellant’s claim. Unknown future information cannot make their past action improper.

Ignore relevant factor

[37] The Appellant says the Commission ignored a relevant factor when they made their decision to review her claim, they ignored the fact the ROE saying “leave of absence” was issued in error.

[38] I find the Commission did not ignore a relevant factor.

[39] As noted above, the Commission was unaware the ROE was incorrect at the time they decided to review the Appellant's claim. This means the factor raised by the Appellant was completely unknown by the Commission at the time they decided to review the Appellant's claim, so they did not ignore a relevant factor.

Considered an irrelevant factor

[40] The Appellant says the Commission considered an irrelevant factor. She says that at the end of one of her calls with the Commission the agent asked her if she needed the EI money because she was addicted to drugs.

[41] She says such a question was not only totally inappropriate but completely irrelevant.

[42] I find the Commission did not consider an irrelevant factor.

[43] The factor raised by the Appellant would not be something that the Commission could have considered when making their decision to review her claim, since if they are calling her to discuss her claim, then the decision to review it had already been made.

[44] Further, while not necessary to decide on this factor, as the previous paragraph can stand alone, I don't find the Appellant's testimony the Commission asked her if she was addicted to drugs credible.

[45] I find such an outrageous action by the Commission is not in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."[8] To put the above into plain English, "there is no way anyone could reasonably believe the Commission agent actually did that."

Discriminated against

[46] The Appellant says that she feels she was discriminated against.

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[8] *Faryna v Chorny,* 1951 CanLII 252, [1952] 2 D.L.R. 354 (B.C.C.A.), at para. 10

[47] She says the Commission asking her whether she needs the EI because she is addicted to drugs is discriminatory.

[48] As I have already stated, I do not believe the Commission ever said that to her.

[49] I find the Appellant was not discriminated against. I find there is no evidence the Commission singled out the Appellant's claim for review due to any protected characteristic, such as her gender or age.

Did the Commission act judicially?

[50] I find the Commission did act judicially when they made their decision to go back and review the Appellant's claim as they did not act in bad faith, or for an improper purpose or motive; did not take into account an irrelevant factor or ignore a relevant factor; and did not act in a discriminatory manner.

[51] This means I cannot interfere in their decision to go back and review the Appellant's claim.

[52] In other words, I cannot change their decision to review the claim, but I can, and will, make a decision on whether the Appellant was available.

Capable of and available for work

[53] Case law sets out three factors for me to consider when deciding whether the Appellant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[9]

a) She wants to go back to work as soon as a suitable job is available.

b) She is making efforts to find a suitable job.

[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.

c) She has not set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

[54] When I consider each of these factors, I have to look at the Appellant's attitude and conduct for the entire period of the disentitlement,[10] (July 3, 2023 onward).[11]

– **Wanting to go back to work**

[55] The Appellant has shown that she wants to go back to work as soon as a suitable job is available.

[56] I accept that the Appellant wants to work. The fact she had a summer position when she was not working at the school, and says she put up fliers advertising childcare in her home over the summer, shows her desire to work. I would imagine that if a person had no desire to work, they would not get a summer position, nor look for work by advertising childcare opportunities in their home.

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

[57] The Appellant was not making enough efforts to find a suitable job.

[58] The Appellant is only required to look for suitable employment. Suitable employment is that which is not incompatible with the Appellant's family obligations.[12]

[59] I accept the Appellant's testimony that her daughter has extreme anxiety that would not allow the Appellant to leave her alone overnight, so she could not work a night shift.

[60] I accept as such because the Appellant has provided evidence that her daughter qualifies for the disability tax credit, prior to 2023, so the daughter clearly has a disability of some sort and I can readily accept it is severe anxiety.

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[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

[11] See GD03-75

[12] Section 9.002 of the *Employment Insurance Regulations*

[61] I note the Appellant has also been consistent in her statements to the Commission about her daughter's anxiety[13]

[62] I find, that based on her family obligations, any sort of night shift would not be suitable employment for the Appellant since the Appellant testified her daughter cannot be alone at night.

[63] I further accept the Appellant's testimony that it was not due to an inability to work that she got no shifts in the summer from her other job, it was just due to her seniority being so low there were only night shifts available, which she could not accept.

[64] I accept this because her employer corroborated her testimony.[14]

[65] However, despite accepting these things, I find the Appellant does not meet this factor of the test because she is not making sufficient efforts to try and find work.

[66] The Appellant says that she hung up a flier at her local coffee shop offering child/respite care in her home, and posted the same on Facebook, but did not get any clients.

[67] She says she also worked for the local coffee shop as a fill in if they were doing some large catering event. She said she worked very little, only a couple times around the Christmas season.

[68] The Appellant was hoping to get some shifts at her other job, but since she had low seniority the only shifts offered were nights shifts, which she could not take due to her daughter's condition.

[69] She did not look for any other work she could do since she says it was not worth it as it would be very hard to try and find a job for just two months before she returned to her position at the school.

[13] GD03-65
[14] GD06-4

[70] I find the Appellant just waiting for shifts from the coffee shop, is not sufficient efforts to find work. Especially since her work there was extremely sporadic and had only consisted of helping a little around Christmas.

[71] I find it was reasonable for the Appellant to wait some time to see if she would be able to get any shifts at her second job, but after a month had passed, with no shifts she could ever accept coming up, it was no longer reasonable to just wait.

[72] The Appellant hoping that she will get work is not sufficient effort. When no shifts are materializing, she needs to take active steps to try and find employment.

[73] I find that hanging a flier in the local coffeeshop and making a post on Facebook, are not sufficient efforts, since they are minimal efforts that are not ongoing.

[74] I understand the Appellant's feeling that it is not worth it to try and find other suitable employment, since it is hard to try and find a position for just two months, but availability is an ongoing requirement and the Courts have repeatedly confirmed the requirement to actively look for employment, even if it seems like a useless endeavour.

[75] "The Act is quite clear that to be eligible for benefits a claimant must establish…availability for work, and that requires a job search...No matter how little chance of success a claimant may feel a job search would have, the Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits."[15]

[76] Regular benefits are available to someone who is unable to find suitable employment and is actively seeking work. If the Appellant did not look, and was not actively seeking suitable work, she cannot say she was unable to find suitable employment.

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[15] See *Canada (Attorney General) v Cornelissen-O'Neil, A-652-93*

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

[77] The Appellant did not set any personal conditions that unduly (in other words overly) limits her chances of going back to work.

[78] As the Appellant is not required to accept work that is unsuitable, her decision to not take any shifts or jobs that would require her to be away from her daughter at night is an acceptable personal condition, since such work is unsuitable.

[79] I do not see any other personal conditions set by the Appellant, so I find she meets this factor of the test.

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

[80] Based on my findings on the three factors, I find that the Appellant has not shown that she is capable of and available for work but unable to find a suitable job.

Conclusion

[81] The appeal is dismissed.

[82] The Commission can review the Appellant's claim and they acted judicially when they decided to do so. This means I cannot interfere in their decision to do a review.

[83] Also, the Appellant has failed to prove her availability for work because she was not making sufficient efforts to find work. This means the disentitlement from benefits issued by the Commission for not being available is upheld.

Gary Conrad

Member, General Division – Employment Insurance Section