Citation: *MG v Canada Employment Insurance Commission*, 2024 SST 1276

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (648932) dated March 20, 2024 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	June 20, 2024
Hearing participant:	
Decision date:	July 5, 2024
File number:	GE-24-1408

Decision

[1] The appeal is dismissed. I disagree with the Appellant.

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

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant is disentitled from receiving EI regular benefits as of December 13, 2021, because he 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 he is available for work. The Appellant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he is available for work.

[5] The Commission says the Appellant isn't available because his refusal to get vaccinated meant he wasn't able to return to work for his employer even though there was work for him.

Matters I have to consider first

Issues under appeal

[6] The Commission decided that the Appellant lost his job due to his misconduct. It also decided that the Appellant hasn't proven his availability for work. In his notice of appeal, the Appellant attached a copy of the Commission's reconsideration decision on the issue of availability for work. But his submissions addressed only the misconduct issue.

[7] The Tribunal contacted the Appellant to clarify whether he wants to appeal both issues. The Appellant replied that he only wants to appeal the issue of his availability for work, since it is the reason for an overpayment that exists.

[8] I don't have a reconsideration decision on the issue of misconduct. Because of this, and based on the Appellant's clarification, I will consider only the issue of the Appellant's availability for work.

The Appellant wasn't at the hearing

[9] The Tribunal has to hold a hearing in the format the Appellant chooses.[1] In his notice of appeal, the Appellant chose to have his hearing in-person. But he later asked to have the hearing changed to a teleconference. The Tribunal sent him a new notice of hearing to make this change.

[10] The Appellant wasn't at the hearing. A hearing can go ahead without the Appellant if the Appellant got the notice of hearing.[2] I think that the Appellant got the notice of hearing because the Tribunal sent it to the email address he gave. In addition, the Tribunal left a voicemail message for the Appellant letting him know it sent a new notice of hearing for a teleconference hearing and to call if he had any questions.

[11] On the day of the hearing, when the Appellant didn't join the teleconference at the scheduled time, the Tribunal tried without success to reach him. So, the hearing took place when it was scheduled, but without the Appellant. The Appellant has not responded to the voicemail messages to date.

Issue

[12] Is the Appellant available for work?

Analysis

[13] 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 sections. So, he has to meet the criteria of both sections to get benefits.

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[1] See section 2(1) of the *Social Security Tribunal Regulations*.
[2] Section 58 of the *Social Security Tribunal Rules of Procedures* sets out this rule.

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

[15] The Commission says it disentitled the Appellant under section 50 of the Act along with section 9.001 of the Regulations for failing to prove his availability for work. In its submissions, it says showing availability requires a claimant to prove that they are making reasonable and customary efforts to find suitable employment.

[16] The Commission's notes don't reflect that it asked the Appellant to prove his availability by sending a detailed job search record.

[17] I find a decision of the Appeal Division on disentitlements under section 50 of the Act persuasive. The decision says the Commission can ask a claimant to prove that they have made reasonable and customary efforts to find a job. It can disentitle a claimant for failing to comply with this request. But it has to ask the claimant to provide this proof and tell the claimant what kind of proof will satisfy its requirements.[5]

[18] I don't find that the Commission asked the Appellant to provide his job search record to prove his availability. So, I don't find that he is disentitled under this part of the law.

[19] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[6] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[7] I will look at those factors below.

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[3] See section 50(8) of the *Employment Insurance Act* (Act).
[4] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[5] *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688
[6] See section 18(1)(a) of the Act.
[7] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[20] I will now consider this section myself to determine whether the Appellant is available for work.

Capable of and available for work

[21] 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:[8]

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

b) He has made efforts to find a suitable job.

c) He hasn't set personal conditions that might unduly (in other words, overly) limit 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.[9]

– **Wanting to go back to work**

[23] The Appellant hasn't shown that he wants to go back to work as soon as a suitable job is available.

[24] The Appellant told the Commission that he was off work from October 22, 2021, because he had COVID-19. But he applied for EI regular benefits on December 8, 2021. He told the Commission that he didn't know that there was a difference between regular benefits and sickness benefits. But he added that he applied for EI benefits because he wasn't allowed to work without getting the COVID-19 vaccine.

[25] Because the Appellant didn't attend the hearing, I could not ask him questions to determine if he wants to go back to work. But I find from his statement to the Commission that he could have gone back to his job if he was vaccinated. Even though

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[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.
[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.

the Appellant said he still had COVID-related symptoms, so he stayed home, I find that his actions show he didn't want to return to work.

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

[26] The Appellant hasn't made any effort to find a suitable job.

[27] Again, since the Appellant wasn't at the hearing, I could not ask him questions about what, if any efforts he made to find work. As noted above, he said that since he had COVID-related symptoms, he stayed home instead of returning to his job.

[28] The Appellant was in a car accident on January 21, 2022. He said that after this, he could not work and didn't do so until June or July 2022. But he didn't give any details of what he did to find work either before or after the accident So, I don't have enough evidence to find that the Appellant has made any efforts to find a suitable job.

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

[29] The Appellant has set personal conditions that might unduly limit his chances of going back to work.

[30] The Appellant didn't address this factor.

[31] The Commission says the Appellant's refusal to get the COVID-19 vaccine meant that he could not work for his employer. It said the Appellant also limited his ability to look for a job elsewhere at the time because he was unvaccinated.

[32] I agree with the Commission's submission, but only related to the job the Appellant had at the time. This is because there were non-specialized industries that didn't require employees to take the COVID-19 vaccine where the Appellant could have looked for work.

[33] The Commission asked the Appellant why he wasn't working since he reported that he was able to work. The Appellant replied that due to his accident, he was afraid to drive, so he can't work as a driver anymore. He said he doesn't even drive his own car.

[34] I acknowledge that there are jobs other than those that require driving, and the Appellant might be able to use public transportation to get to work. But without more details from the Appellant, I find that his decision not to drive anymore, while understandable, might unduly limit his chances of returning to work.

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

[35] Based on my findings on the three factors, I find that the Appellant hasn't shown that he is capable of and available for work but unable to find a suitable job.

Conclusion

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

[37] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section