



Citation: *HH v Canada Employment Insurance Commission*, 2024 SST 1294

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

Decision

Appellant: H. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (666526) dated June 27, 2024 (issued by Service Canada)

Tribunal member: Paula Turtle

Type of hearing: Teleconference

Hearing date: October 1, 2024

Hearing participant: Appellant

Decision date: October 7, 2024

File number: GE-24-2674

Decision

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

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

Overview

[3] The Appellant was laid off from her job on December 17, 2021, for lack of work. In January 2022, she was diagnosed with a serious illness. She had surgery that month. Then she started treatments in April 2022. The treatments went on until May 2023.

[4] The Appellant applied for regular benefits on April 28, 2022. She received regular benefits from April 3, 2022, to August 20, 2022.

[5] In October 2022, the Appellant told the Commission she was sick from January 16, 2022, to August 20, 2022. She wanted to claim sickness benefits.

[6] The Commission paid the Appellant 15 weeks of sickness benefits from August 28, 2022, to December 10, 2022. This is the maximum sickness benefits she is entitled to.

[7] A claimant has to be capable of and 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.

[8] After the Appellant received regular benefits from April 3, 2022, to August 20, 2022, the Commission reconsidered the Appellant's entitlement to regular benefits for that period. The Commission looked at her medical evidence, and it decided that the Appellant wasn't capable of working during that time. So, she was disentitled from receiving regular benefits. The Commission's decision resulted in an overpayment of the benefits she received.

[9] The Appellant asked the Commission to reconsider its decision. The Commission maintained its decision because the Appellant didn't show she was available for work.

[10] The Commission's original decision denies the Appellant benefits because she wasn't capable of working. And the reconsideration decision says she wasn't available for work. Both the Appellant and the Commission talk about her capability and her availability to work in their submissions. So, I will look at both issues.

[11] I must decide whether the Appellant has proven that she was capable of and available for work between April 3, 2022, and August 20, 2022. I will sometimes call this period the summer of 2022. 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 capable of and available for work.

[12] The Commission says that the Appellant wasn't capable of working in the summer of 2022 because she first applied for sickness benefits for that time. And her medical evidence says she wasn't capable of working during that time. And the Commission says she wasn't available because she didn't do enough to find a job.

[13] The Appellant disagrees and states that she was capable of working. And she says she looked for work.

[14] At the hearing, the Appellant argued that she didn't understand all the rules about the benefits she was applying for. She gave her evidence through an interpreter.

Issues

[15] Was the Appellant capable of and available for work between April 4, 2022, and August 12, 2022?

Analysis

[16] To get EI regular benefits, you have to show that you are capable of and available for work, but unable to find a suitable job.¹

[17] For a claimant to be available for work, they must be capable of work. Capability refers to a claimant's ability to do the functions of their regular job or other suitable employment. A claimant who isn't capable of work can't be considered available for work.

[18] 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. So, she has to meet the criteria of both sections to get benefits.

[19] 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.² The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.³ I will look at those criteria below.

[20] Second, as discussed above, 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.⁴ Case law gives three things a Appellant has to prove to show that they are "available" in this sense.⁵ I will look at those factors below.

[21] I will now consider whether the Appellant was capable of and available for work.

Was the Appellant capable of work?

[22] The Appellant hasn't shown that she was capable of work in the summer of 2022.

¹ See section 18(1)(a) of the Act.

² See section 50(8) of the *Employment Insurance Act* (Act).

³ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁴ See section 18(1)(a) of the Act.

⁵ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[23] The Appellant told me she wasn't able to work after September 2022 until early 2023 because her arms were weak. But she says she was capable of working before then (in the summer of 2022), even though she was being treated for a serious illness.

[24] The Appellant submitted medical reports from her primary specialist to the Commission.⁶ The medical reports say:

- A medical report dated September 27, 2022, says she is incapable of working from February 14, 2022, to September 1, 2023.⁷
- A medical report dated November 23, 2022, says she is incapable of working from September 1, 2022, to September 1, 2022.⁸ The doctor corrected that report by changing the second date to September 1, 2023. The corrected report is also dated November 23, 2022.
- A medical report dated May 1, 2024, says she was incapable of working from January 14, 2022, to April 2, 2022.⁹ This medical report also says the Appellant was "eligible for EI after April 2, 2022". And it says she was able to return to work after April 3, 2022.

[25] The Commission started investigating the Appellant's entitlement to regular benefits in August 2023.¹⁰ The November 22, 2023, and the May 1, 2024, reports were written after the investigation started.

[26] The November 22, 2023, and May 1, 2024, medical reports contradict the earlier medical reports. I don't find those reports to be credible.

[27] The May 1, 2024, report says the Appellant was only incapable of working for a short period in early 2022. This is very different from the first three reports. The

⁶ The Appellant submitted other medical documents (see, for example, GD3-69). But I am not going to give weight to those documents because they weren't from her specialist. The specialist knows more about the Appellant's condition and treatments.

⁷ See GD3-30.

⁸ See GD3-51 and 54.

⁹ See GD3-77

¹⁰ See, for example, Commission's notes at pages GD3-63 to 66.

Appellant told her doctor she had to pay back EI a lot of money. And then her doctor wrote that report.

[28] The doctor wrote in the report that the Appellant was eligible for EI. The circumstances and timing and content of the report suggest that the doctor wanted to help the Appellant get benefits.

[29] The September 27, 2022, report was written only a month after August 2022, which is the end of the period in question. It was written closer in time to the period in question, so it is more reliable. And it was written before the Appellant's claim was being investigated.

[30] For the above reasons, I find the September 27, 2022, report to be the most reliable statement of the Appellant's ability to work in the summer of 2022.

[31] The Appellant said she could have worked in the summer of 2022. She wanted to go on working, even when she was having treatments for her illness. I understand the Appellant's willingness to continue to work. Sometimes, people who are treated for the Appellant's illness go on working while they are getting treatment.

[32] While I am sympathetic to the Appellant's willingness to continue working, I have to look at the medical evidence in the file. And the September 27, 2022, report says she wasn't capable of working in the summer of 2022.

[33] I find that the Appellant wasn't capable of working between April 2022, and August 2022.

[34] But even if the Appellant was capable of working in the summer of 2022, she hasn't shown she was available for work. And this means she isn't entitled to benefits for that reason, as discussed below.

Reasonable and customary efforts to find a job

[35] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.¹¹ 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.

[36] 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:¹²

- contacting employers who may be hiring
- applying for jobs
- attending interviews

[37] The Commission says that the Appellant didn't do enough to try to find a job in the summer of 2022. She contacted her last employer. But she didn't apply for any other jobs.

[38] The Appellant disagrees. She says she applied for jobs in December 2021 and January 2022, before she got sick. And she was waiting to hear from those employers. And she applied for one job with a new employer between April and August 2022. She says that her efforts are enough to prove that she was available for work.

[39] The Appellant told Service Canada that she didn't apply for any jobs between April and August 2022. That was because she was having treatments for her illness. And it would have been hard for a new employer to accommodate her treatment schedule.

[40] At the hearing, the Appellant said she had treatments in the afternoon. So, she could have worked in the mornings.

¹¹ See section 9.001 of the Regulations.

¹² See section 9.001 of the Regulations.

[41] I find that the Appellant didn't make reasonable and customary efforts to find a job in the summer of 2022.

[42] She only applied for one job because she had applied for jobs in December and January, and she was waiting to hear back. But a claimant has to make sustained efforts to find a job. That means they have to keep looking. Part of finding a job is contacting the places you have applied for work to follow-up on your application.

[43] And making sustained efforts to find a job means that you have to apply at new places. The Appellant only applied at one new place between April and August 2022.

[44] When I look at the list of job search activities, the Appellant didn't do many of the things that people normally do to find work.

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

Capable of and available for work

[46] 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:¹³

- 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.

[47] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.¹⁴

¹³ 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.

¹⁴ 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.

– **Wanting to go back to work**

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

[49] The Appellant told me that her husband was supporting the family. She says she wanted to work so she could contribute to the family's finances. And she told me that even though she was being treated for a serious illness, she wanted to work.

[50] I accept the Appellant's explanations. I find that she wanted to go back to work.

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

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

[52] 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.¹⁵

[53] The Appellant applied for one job in the summer of 2022.

[54] Those efforts weren't enough to meet the requirements of this second factor. Only applying for one job between April and August 2022, even if you applied for jobs before (in December and January) doesn't show that you did enough to find a suitable job.

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

[55] The Appellant didn't tell me about any personal conditions that might have unduly limited her chances of going back to work.

[56] And nothing in the file suggests the Appellant set personal conditions.

[57] I find that the Appellant didn't set personal conditions that unduly limited her chances of finding work.

¹⁵ 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.

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

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

Conclusion

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

[60] This means that the appeal is dismissed.

Paula Turtle

Member, General Division – Employment Insurance Section