



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *DK v Canada Employment Insurance Commission*, 2020 SST 1219

Tribunal File Number: GE-20-2239

BETWEEN:

**D. K.**

Appellant/Claimant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Catherine Shaw

HEARD ON: December 14, 2020

DATE OF DECISION: December 21, 2020

## **Decision**

[1] I am allowing the appeal in part.

[2] The Claimant has proven that he was capable of and available for work as of June 15, 2020. This means he can be paid regular EI benefits after that date.

[3] The Claimant has not proven that he was capable of and available for work from March 23 to June 14, 2020. This means he cannot be paid regular EI benefits during this period.

## **Overview**

[4] The Claimant was injured while on a claim for regular EI benefits. He underwent surgery and eventually recovered. He later advised the Canada Employment Insurance Commission (the Commission) that he had been injured. The Commission converted the regular benefits he had received since the injury to sickness benefits. Sickness benefits can only be paid for up to 15 weeks. The Commission decided the Claimant was not capable of working, so he could not be paid regular EI benefits once his sickness benefits ran out.

[5] The Claimant disagrees with the Commission's decision. He says that he was capable of working after he had his cast removed and had been making efforts to get a job. The Commission says the Claimant has contradicted himself and more weight should be given to his initial statements that he was not able to work.

## **Issues**

[6] Did the Commission correctly determine the Claimant's entitlement to sickness benefits?

[7] Was the Claimant was capable of and available for work from March 23, 2020.

## Analysis

### Did the Commission correctly determine the Claimant's entitlement to sickness benefits?

[8] Yes, I find the Commission correctly determined the Claimant's entitlement to sickness benefits.

[9] Sickness benefits are intended to support you when you are ill or injured. You can be paid up to 15 weeks of sickness benefits during your benefit period.<sup>1</sup>

[10] The Claimant applied for benefits on October 15, 2019. He was injured on January 4, 2020, when he broke his ankle. He had not realized he was injured until mid-February, when he went to the doctor. He had surgery on his ankle and was in a cast until April 16, 2020. On July 14, 2020, the Claimant contacted the Commission and advised that he had broken his ankle on January 4, 2020.

[11] The Claimant requested a conversion of his EI benefits from January 5, 2020, to change the regular benefits he received to sickness benefits.<sup>2</sup> The Claimant said that the Commission advised him to request that conversion, because he was injured during that time.

[12] The Claimant had claimed several weeks of sickness benefits before breaking his ankle. After he was injured, the Commission converted the Claimant's regular benefits to sickness benefits starting January 5, 2020. His remaining sickness benefits then ended on March 22, 2020, because he had received the maximum number of weeks of sickness benefits during his benefit period.<sup>3</sup>

[13] The Claimant argues that he should only be considered as injured from the point that he **knew** he had broken his foot. Even though he had broken his foot on January 4, 2020, he had not realized it was broken until he attended a doctor and received an x-ray on February 10, 2020.<sup>4</sup> He said that during this time he did not consider himself injured, so should not be considered as incapable of working. The Claimant said that if the Commission had not converted his regular

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<sup>1</sup> This is set out in section 12(3)(c) of the *Employment Insurance Act*.

<sup>2</sup> This request is found on GD3-110 of the appeal file.

<sup>3</sup> A breakdown of the Claimant's weeks of benefits is found on GD3-138 & GD3-139 of the appeal file.

<sup>4</sup> This is stated in the doctor's note dated August 11, 2020 seen on GD3-116.

benefits to sickness benefits starting in January, then he would have had enough sickness benefits to cover the period he was in a cast from February to April.

[14] I find this argument must fail. It is a fact that the Claimant broke his foot on January 4, 2020. I recognize that the Claimant did not understand that his foot was broken for nearly six weeks; however, the Claimant was injured during that time because he had, in fact, broken his foot.

[15] I find the Commission has correctly determined the Claimant's entitlement to sickness benefits. The Claimant was injured from January 4, 2020, so the only benefits that he was entitled to receive were EI sickness benefits until he had recovered. The Claimant was paid 15 weeks of sickness benefits as of March 22, 2020.

**Was the Claimant capable of and available for work as of March 23, 2020?**

[16] Claimants have to be capable of and available for work to be paid regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job.

[17] Two different sections of the law require claimants to show that they are available for work;<sup>5</sup> the Commission disentitled the Claimant from being paid benefits under both. I will first consider whether the Claimant has proven that he was capable of and available for work.

**Capable of and available for work**

[18] I find the Claimant has proven that he was capable of and available for work as of June 15, 2020. I find he has not proven that he was capable of working from March 23 to June 14, 2020. My reasons for this decision are set out below.

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<sup>5</sup> Subsection 50(8) provides that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment. Paragraph 18(1)(a) of the *Employment Insurance Act* provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

[19] In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.<sup>6</sup>

[20] To decide whether a claimant is available for work, it must be determined whether the claimant is capable for work.<sup>7</sup> Capability of work relates to a claimant's ability to perform the functions of their regular or usual employment or some other suitable employment.<sup>8</sup> Capability and availability are interconnected requirements because a claimant who is not capable of work cannot be considered available for work.

[21] The Commission submits the Claimant has not proven he was capable of working from March 23, 2020. It relies on the Claimant's statements to the Commission regarding his ability to work to support its position. It provided the notes of several conversations, as summarized here:

- On July 14, 2020, the notes state that the Claimant told the Commission that he was injured on January 4, 2020. He said he had the cast removed on April 30, 2020, but was most likely not able to work for many weeks beyond having the cast removed.
- On August 11, 2020, the notes state the Claimant said he had surgery in February 2020 and is still unable to work due to his ankle.<sup>9</sup>

[22] The Claimant disputes the Commission's notes of the conversations that occurred on August 11, 2020. He testified that he did not tell the agent he was unable to work due to his injury. Rather, he told the agent that his ankle had taken time to recover, so he would have claimed additional sickness benefits if he had them and taken more time to heal.

[23] I accept the Claimant's statements that the Commission's notes do not accurately reflect his words during the conversation. The notes were written by the Commission agent and are not an objective transcript of what the Claimant said. There is no recording of the conversation to provide an objective account. So, I find the Claimant's testimony regarding his statements hold more weight, as he was able to give them directly to me under sworn testimony. He was also able

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<sup>6</sup> Paragraph 18(1)(a) of the *Employment Insurance Act*.

<sup>7</sup> *Canada (Attorney General) v. Leblanc*, 2010 FCA 60

<sup>8</sup> *Canada (Attorney General) v. Caughlin*, A-1168-84

<sup>9</sup> GD3-113

to answer questions about his statements. I could not ask the Commission about the conflicting accounts of this conversation, as it did not have a representative present at the hearing.

[24] The Claimant said at the hearing that he had no choice but to claim sickness benefits until April 16, 2020, when his cast was removed. He said he was able to work almost immediately after the cast was removed. In support of this, the Claimant said that he had been working in his yard one week later. He said he was able to walk on uneven ground and use a chainsaw, which shows that he was capable of working at that time.

[25] The Claimant provided a medical note signed by his surgeon dated October 1, 2020. The note states that the Claimant is medically fit to return to work on June 15, 2020. The Claimant testified that he asked the surgeon to fill out the form to support his EI claim. He said the surgeon asked him if he thought the recovery date was acceptable. The Claimant did not think the date on the form was important, so he answered that it was fine.

[26] The Claimant attended in-person training sessions from June 25, to August 5, 2020, to renew his workplace safety certificates. The Claimant said he did this training to renew his expired certifications and be ready to return to work as soon as possible.

[27] There is conflicting information regarding when the Claimant was capable of working. I have placed weight on the following evidence, as I find these items to be the most reliable indicators of when the Claimant was capable of working.

- The medical note dated October 1, 2020, states the Claimant was capable of returning to work as of June 15, 2020. This is reliable evidence because the Claimant stated the doctor was familiar with the Claimant's condition throughout his recovery. The Claimant submitted the doctor was willing to change the date of the Claimant's recovery on the form, when he asked the Claimant if the date he could return to work "was okay." But, I do not think the doctor's question supports that he would have written any date the Claimant chose. I find it more likely that the doctor did not randomly choose the Claimant's recovery date as June 15, 2020. As this is an official document, I find it is most likely the doctor thought the Claimant had sufficiently recovered by that date to be capable of returning to work.

- The Claimant began attending in-person training sessions to replace his expired safety certifications around June 25, 2020. This indicates that the Claimant was sufficiently recovered to commute to the training centre and attend in-person training.

[28] I recognize the Claimant's argument that he was capable of working shortly after his cast was removed on April 16, 2020. However, he also stated that he would have taken more time off work to heal if he had additional sickness benefits. I find that this statement indicates that he was not sufficiently recovered to be capable of returning to work immediately after his cast was removed. If he was recovered, he would not need to use any additional sickness benefits.

[29] For the reasons explained above, I find the Claimant was capable of working as of June 15, 2020. I also find the evidence supports that the Claimant was not capable of working prior to June 15, 2020; therefore, the Claimant has not proven that he was capable of work from March 23 to June 14, 2020.

[30] Next, I turn to the question of whether the Claimant was available for work. The Claimant can establish his availability by proving his desire to return to the labour market as soon as a suitable job is offered, through demonstrating efforts to find a suitable job, and without setting personal conditions that might limit his chances of returning to the labour market.<sup>10</sup> I have to consider each of these factors to decide the question of availability,<sup>11</sup> looking at the attitude and conduct of the Claimant.<sup>12</sup>

### **Did the Claimant have a desire to return to the labour market?**

[31] I find the Claimant has shown a desire to return to the labour market as soon as a suitable job is available.

[32] The Claimant testified that he wanted to return to work as soon as possible for financial reasons. The Claimant usually had seasonal employment in the construction industry. Due to COVID-19, the construction industry experienced a significant slowdown and most employers were not hiring. The Claimant said that he belonged to a union in another province, where he

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<sup>10</sup> *Faucher v. Canada Employment and Immigration Commission*, A-56-96

<sup>11</sup> *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>12</sup> *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

could typically find work. But, after the industry was impacted by the COVID-19 public health emergency, there were no jobs posted to his union board that he could apply for.

[33] The Claimant said that he used several job sites to look for new job postings on a daily basis. He also contacted acquaintances to find prospective work. He had a strong indication that he would be hired for a job in another province in October 2020, through an acquaintance. Unfortunately, that job prospect fell through. The Claimant also applied at several local jobs, though he says many local businesses were shutdown due to COVID-19 restrictions.

[34] The Claimant's attitude and conduct in looking for job postings, submitting applications and networking with acquaintances to find prospective jobs show that he has a desire to return to the labour market as soon as a suitable job is available.

**Did the Claimant make efforts to find a suitable job?**

[35] I find the Claimant made enough efforts to find a suitable job.

[36] There is a list of job search activities to look at when deciding availability under a different section of the law.<sup>13</sup> This other section does not directly apply to this factor. But, I am choosing look at that list for guidance to help me decide whether the Claimant made efforts to find a suitable job.

[37] There are nine 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.

[38] The Claimant's efforts to find a new job included networking with acquaintances and other union members. He testified that he looked for new job postings on several websites on a daily basis. He provided a job search record to the Commission on October 14, 2020, which lists

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<sup>13</sup> Section 9.001 of the *Employment Insurance Regulations*, which is for the purposes of subsection 50(8) of the *Employment Insurance Act*.



four employers. He stated at the hearing that he applied for jobs with these employers starting in August 2020, but has also contacted other employers to inquire about jobs.

[39] The Claimant also kept paying his union dues, and renewed 12 health and safety certifications by attending in-person courses between June 25 and August 5, 2020. He needed these certifications so he could start work without delay.

[40] I find the Claimant's efforts are enough to meet the requirements of this second factor because they show he made reasonable ongoing efforts to find suitable employment as quickly as possible.

**Did the Claimant set any personal conditions that would unduly limit his chances of returning to the labour market?**

[41] The Claimant did not set personal conditions that might have unduly limited his chances of returning to the labour market.

[42] The Claimant stated at the hearing that he was looking for any type of job, though he was hesitant to accept local employment because his rate of pay is much higher when he works out of province. Despite these statements, I find the Claimant made efforts to find local work. His job search record indicates that he applied at three local businesses. He also testified that he has reached out to other local employers regarding job openings. So, I find the Claimant has not placed any restrictions that might have unduly limited his chances of finding work.

[43] Considering my findings on the Claimant's capability and each of the three factors taken together, I find that the Claimant has shown that he was capable of work and available for work as of June 15, 2020.

**Reasonable and customary efforts**

[44] The law sets out criteria for me to consider when deciding whether the Claimant's efforts are reasonable and customary.<sup>14</sup> I have to look at whether his efforts are sustained and whether

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<sup>14</sup> Section 9.001 of the *Employment Insurance Regulations*.

they are directed toward finding a suitable job. I also have to consider the Claimant's efforts in the nine job-search activities listed in paragraph 36 above.<sup>15</sup>

[45] As stated above, the Claimant was looking for job postings on several job search websites, including his union job board. He had a resume prepared and updated. He was speaking with other union members and acquaintances about jobs and had applied for several jobs, despite the scarcity of openings due to COVID-19 restrictions. He also renewed his health and safety certifications required to resume his usual employment in the construction industry.

[46] I find the Claimant has shown that he was making reasonable and customary efforts to find suitable employment. His efforts show that he was making a broad and sustained effort to ensure that he could resume work as soon as a suitable job was available by applying at local businesses and renewing his professional courses.

### **Conclusion**

[47] The appeal is allowed in part. The Claimant has shown that he was capable of and available for work as of June 15, 2020. He remains disentitled from receiving regular benefits from March 23 to June 14, 2020, because he has not shown that he was capable of and available for work during that time.

Catherine Shaw

Member, General Division - Employment Insurance Section

HEARD ON:	December 14, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. K., Appellant

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<sup>15</sup> The full list of criteria to be considered when determining whether a claimant made reasonable and customary efforts to find suitable employment are listed in the *Employment Insurance Regulations*, section 9.001