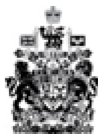

[TRANSLATION]

Citation : *BK v Canada Employment Insurance Commission*, 2021 SST 441

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	B. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (379937) dated February 4, 2020 (issued by Service Canada)

Tribunal member:	Charline Bourque
Type of hearing:	Teleconference
Hearing date:	July 7, 2021
Hearing participant:	Appellant
Decision date:	July 12, 2021
File number:	GE-21-842

Decision

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

[2] The Appellant hasn't shown that he was available for work. This means that he can't receive Employment Insurance (EI) benefits for the period from May 8 to August 3, 2019.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits as of May 12, 2019, because he wasn't available for work, since his work permit had expired.

[4] On October 9, 2020, the Tribunal's General Division decided that the Appellant was available for work for the period from December 20, 2018, to May 7, 2019, but that he wasn't available for work for the period from May 8 to August 3, 2019.

[5] The Appellant appealed this decision to the Tribunal's Appeal Division. The Appeal Division returned the file to the General Division for reconsideration of the issue of the Claimant's availability for work, only for the period from May 8 to August 3, 2019.[1] So, only that period is in dispute in this case.

[6] 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.

[7] I must decide whether the Appellant has proven that he was available for work for the period from May 8 to August 3, 2019. 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 was available for work.

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[1] See the Tribunal's Appeal Division decision from May 14, 2021.

[8] The Commission says that the Appellant wasn't available because his employer has proven that it contacted him several times and that he chose not to go back to work.

[9] The Appellant disagrees and says that he was available for work. He says that the Commission resolved the issue of his leave of absence and that this shows that his leave wasn't authorized and that he continued working. In addition, the Appellant explains that he was available for work and didn't refuse work, except for shifts of less than three hours if he had other priorities.

Matters I have to consider first

The Appellant asked me to adjourn (that is, pause) the hearing

[10] I agreed to adjourn the hearing because the Appellant thought that the issue of his availability had sorted itself out when the Commission reconsidered the decision on his leave of absence in his favour.

[11] I agreed to adjourn to allow the Appellant to review the documents, given that the issue of availability for the period from May 8 to August 3, 2019, was still in dispute. The Tribunal's Appeal Division sent this issue back for reconsideration, so I have to consider it to decide whether the Appellant has shown that he was available for work during that period.

Documents from the Commission

[12] The Appellant indicated several times that the Commission had contacted his employer and that the Commission had other documents that, among other things, allowed it to reconsider its decision on the leave of absence.

[13] I asked the Commission for copies of those documents, but the Commission sent copies of the documents already on file. The Appellant thinks there are other documents, but he isn't sure. I explained to him that the burden of proof was on him and that I could make another request to the Commission. After discussion, the Appellant

decided not to try to get other documents from the Commission, since he isn't sure there are any.

Issue

[14] Was the Appellant available for work for the period from May 8 to August 3, 2019?

Analysis

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

[16] 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.

[17] 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.[4] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[5] I will look at those factors below.

[18] The Commission decided that the Appellant was disentitled from receiving benefits because he wasn't available for work based on these two sections of the law.

[19] I will now consider these two sections myself to determine whether the Appellant was available for work.

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[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.

Reasonable and customary efforts to find a job

[20] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[6] I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[21] I also have to consider the Claimant'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:[7]

- assessing employment opportunities
- preparing a résumé or cover letter
- applying for jobs

[22] The Appellant says that his efforts were enough to prove that he was available for work. The Appellant sent a list of job search efforts he says he made between May and September 2019.

[23] The list doesn't seem very detailed to me. Still, I find that the list shows that the Appellant made several attempts to find a job during that period.

[24] The Appellant has proven that his efforts to find a job were reasonable and customary.

[6] See section 9.001 of the Regulations.
[7] See section 9.001 of the Regulations.

Capable of and available for work

[25] Case law sets out three factors for me to consider when deciding whether a claimant was capable of and available for work but unable to find a suitable job. A claimant has to prove the following three things:[8]

a) They wanted to go back to work as soon as a suitable job was available.

b) They made efforts to find a suitable job.

c) They didn't set personal conditions that might have unduly (in other words, overly) limited their chances of going back to work.

[26] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[9]

– Wanting to go back to work

[27] The Appellant hasn't shown that he wanted to go back to work as soon as a suitable job was available.

[28] To begin with, the Appellant explains that his employer didn't grant him a leave of absence and that he continued working during that period.

[29] I explained to the Appellant several times that the leave of absence issue wasn't in dispute in this case. The Tribunal doesn't need to question whether the Appellant had just cause for taking leave. Still, whether he was on leave is important when it comes to the issue of availability. But, that is a different issue under the Act.[10]

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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.
[10] The leave of absence issue is linked to the issue of voluntary leaving under section 29 of the Act, while the issue of availability has to be looked at under section 18 of the Act.

[30] I note that the Appellant asked [translation] “to take time off from tomorrow, Wednesday, May 8 to May 31, 2019.” He also told the employer to call him back if there were full-time hours.[11]

[31] The Appellant says that the employer didn’t grant him his leave and that his Record of Employment proves it, since he continued working until May 20, 2019.

[32] I note that the Appellant asked his employer to pay him his vacation pay and his time sheet, which included 30 hours of work for the period from May 1 to 15, 2019,[12] that is, the period corresponding to the pay period.

[33] The Appellant also says that he didn’t refuse work, except for periods of less than three hours when he had other “priorities.” The Appellant says that it isn’t a very busy time at work and that the employer had only few hours to offer him.

[34] I note that the employer indicated May 20, 2019, on the Record of Employment as the last day worked and that the Record of Employment was issued because the Appellant had to update his work permit.[13]

[35] I note that the employer asked the Appellant whether he was coming back to work on May 31, 2019, the last day of his vacation. The Appellant replied that he had to resolve his work permit situation.[14]

[36] The Appellant explained that he had an appointment with Citizenship and Immigration. But, the Appellant didn’t have an appointment. He had to call the call centre and preferred to do it at that particular time. I also note that the Appellant considered that he had implied worker status at the time.

[37] Then, the employer contacted the Appellant again on June 3, 2019, and June 18, 2019, to ask him whether he was coming back to work, since it was a busy time.[15] The

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[11] See the Appellant’s email to his employer (GD3-47).
[12] See the Appellant’s email (GD3-51).
[13] See the Record of Employment (RGD5-9).
[14] See the emails (RGD5-3 and RGD5-7).
[15] See the emails (RGD5-3 and RGD5-6).

Appellant explains that the employer was offering him shifts of only two hours, which isn’t permitted in Ontario.

[38] Still, I note that the Appellant turned down all the hours of work the employer offered, despite its repeated attempts. Relying on the fact that he has a work permit, the Appellant says that his employer was trying to exploit him by paying him for shorter periods.

[39] In my view, the Appellant’s actions don’t show that he wanted to go back to work. The Appellant turned down all hours of work with his employer whenever he felt he had other “priorities” or they were periods of less than three hours. Despite his indicating that there were conversations in addition to the emails, I am of the view that the Appellant didn’t act like someone who wanted to go back to work.

[40] The Appellant was capable of working the hours his employer offered. He turned them down to make a phone call when he didn’t have an appointment and could have contacted the call centre at another time. In addition, the Appellant had recourse if he felt that his employer wasn’t complying with labour standards. There is no indication that the employer wasn’t complying with labour standards when paying him, since the Appellant didn’t work for short periods.

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

[41] The Appellant made enough efforts to find a suitable job.

[42] 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.[16]

[43] The Appellant’s efforts to find a new job included looking for jobs with different employers. I explained these reasons above when looking at whether the Claimant made reasonable and customary efforts to find a job.

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[16] 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.

[44] These efforts were enough to meet the requirements of this second factor.

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

[45] The Appellant did set personal conditions that could unduly limit his chances of going back to work.

[46] The Appellant says he didn't do this because the employer didn't have any work to offer him, since it wasn't a busy time.

[47] As detailed above, I am of the view that the Appellant is contradictory. To begin with, the employer reportedly denied him time off and contacted him again more than three times to find out whether he was coming back to work, but it allegedly had only few hours to offer him, contrary to what the employer wrote in an email.

[48] The employer issued the Record of Employment because the Appellant had to update his work permit, but the Appellant indicated that he had an implied permit and could work. The Appellant indicated that he accepted all the shifts the employer offered, except for those of less than three hours when he had other priorities. In reality, during the second part of the hearing, he confirmed not having worked after May 20, 2019.

[49] In addition, the facts show that he refused to work for his employer at least twice. He mentioned having an appointment for his work permit in response to his employer's May 31 email, when that wasn't the case. He had to call the call centre. He didn't go back to work when the employer wrote him on June 18 to ask him to come back.

[50] I find that the Appellant limited his chances of returning to the labour market by personal conditions.

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

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

Conclusion

[52] The Appellant hasn’t shown that he was available for work within the meaning of the law. Because of this, I find that the Appellant can’t receive EI benefits for the period from May 8 to August 3, 2019.

[53] This means that the appeal is dismissed.

Charline Bourque

Member, General Division – Employment Insurance Section