



Citation: *KJ v Canada Employment Insurance Commission*, 2021 SST 414

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

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (422743) dated May 10, 2021
(issued by Service Canada)

Tribunal member: Gary Conrad
Type of hearing: Videoconference
Hearing date: June 17, 2021
Hearing participant: Appellant
Decision date: June 24, 2021
File number: GE-21-874

Decision

[1] The Claimant has shown that he is available for work. This means that he is not disentitled from being paid benefits.

OVERVIEW

[2] Claimants have to be available for work in order to get regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job. The Commission decided that the Claimant was disentitled from being paid EI benefits as of December 21, 2020, because he is not available for work.

[3] The Commission says that while the Claimant appears to have a desire to return to the labour market and appears to have made efforts to find employment, due to the limitations of his study permit, the Claimant has personal conditions that limit his chances to return to the labour market, so he is not available¹.

[4] The Claimant says he lost his job due to COVID, and as an international student in Canada, he is only allowed to work 20 hours a week. The Claimant says it is not his choice to limit his hours and the law does not say he has to work full-time to be considered available.

[5] I must decide whether the Claimant has proven² that he is available for work.

ISSUE

[6] Is the Claimant available for work?

ANALYSIS

¹ GD04-3

² The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

[7] The law requires claimants to show that they are available for work.³ In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.⁴

[8] In considering whether a student is available pursuant to section 18 of the Act, the Federal Court of Appeal, in 2010, pronounced that there is a presumption that claimants who are attending school full-time are unavailable for work.

[9] The Act was recently changed and the new provisions apply to the Claimant⁵. As I read the new provisions the presumption of unavailability has been displaced. A full-time student is not presumed to be unavailable, but rather must prove their availability just like any other claimant.

[10] The Claimant has to prove three things to show he is available:

1. A desire to return to the labour market as soon as a suitable job is available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might unduly limit their chances of returning to the labour market⁶

[11] I have to consider each of these factors to decide the question of availability,⁷ looking at the attitude and conduct of the Claimant.⁸

Does the Claimant have a desire to return to the labour market as soon as a suitable job is available?

³ 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.

⁴ Paragraph 18(1)(a) of the *Employment Insurance Act*.

⁵ Subsection 153.161(1) of the *Employment Insurance Act*

⁶ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁷ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁸ *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

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

[13] The Commission submits the Claimant appears to have a desire to return to the labour market⁹.

[14] I accept the Claimant's testimony that he would be working if it were not for COVID and that he wants to return to work and is looking for work. I find the fact he was working previously, is unemployed solely due to COVID, and is making efforts to return to work demonstrates his desire to return to the labour market.

Has the Claimant made efforts to find a suitable job?

[15] I find the Claimant is making enough efforts to find a suitable job.

[16] The Commission submits the Claimant appears to have made efforts to find suitable employment¹⁰.

[17] The Claimant testified that after he lost his job due to COVID he starting looking for another job and sending out applications.

[18] The Claimant says due to the lockdown measures put in place as a result of the pandemic, very few places are hiring and it is very difficult to find a job. The Claimant says he applied for hundreds of jobs, with many different employers, but only got three interviews and was never hired for any position.

[19] I accept the Claimant's testimony he has been applying for a large amount of jobs with a variety of employers since he lost his job. I find his testimony is well supported by the documentation he sent in showing some of his job search efforts¹¹.

⁹ GD04-3

¹⁰ GD04-3

¹¹ GD06-3

[20] I find the Claimant's ongoing efforts to find employment, by signing up with online job banks, evaluating job postings, sending out a large amount of applications to various employers, and attending interviews, is sufficient efforts to find employment.

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

[21] I find the Claimant has not set personal conditions that might unduly limit his chances of returning to the labour market.

[22] The Commission submits the Claimant's availability for work is limited due to the terms and conditions of his study permit.

[23] The Commission submits the Claimant is limited to no more than 20 hours per week of work during a regular academic session.

[24] The Commission submits the decision *I.K. v Canada Employment Insurance Commission*, 2017 SSTADEI 337, although not binding on me, is a similar situation to the Claimant. The Commission submits that in *I.K.* the claimant was on a study permit and was limited to 20 hours of work per week and in that decision the claimant was found to be not available due to a legal barrier, that legal barrier being the study permit. The Commission submits the claimant in *I.K.* was found to have set personal conditions that unduly limited the chances of returning to the labour market as a result of the limits imposed by the study permit.

[25] The Claimant says his training is to be a commercial pilot and the training is very flexible as he can work at his own pace. He is required to schedule a minimum of 10 hours of flying each week but he can schedule that on day of the week from sunrise to sunset¹².

[26] The Claimant says that he is looking for work and he would be able to work around his training with full-time work but he is not able to work full-time due to the

¹² GD03-49

conditions of his study permit¹³. The Claimant testified he already had a job while attending his training so this shows he can easily accommodate work with his training.

[27] The Claimant also argues that nowhere on the Service Canada website does it say a person must be available for full-time work to be considered available.

[28] I find I accept the Claimant is in Canada under the terms of a study permit which limits him to 20 hours of work a week. I note neither party disputes this.

[29] I further find the Claimant is correct in that the law does not specify a person is only available if they are looking for full-time work.

[30] I accept the Claimant has the flexibility in his training, being able to book his flight time at any time, on any day of the week. I don't see any evidence to contradict this and I note the Commission has not disputed this statement.

[31] I find the Claimant's training would not unduly limit his chances of returning to the labour market as with the flexibility he has in scheduling his flight time he could make his training work around a job.

[32] I note the Commission is correct in that *I.K.* is a decision of the Appeal Division of the Social Security Tribunal, upholding a decision from the General Division regarding a finding that a claimant with a study permit limiting the amount of hours they could work had set personal conditions and was thus unavailable.

[33] However, I am not bound by the decision *I.K.* and further, I do not find it persuasive. I am not persuaded by *I.K.* for several reasons.

[34] The first reason is that, in a plain and obvious reading of the third factor to consider for availability set forth by the Court¹⁴ it speaks of the Claimant setting personal conditions. I find that the limitation on the Claimant's study permit of only working 20 hours a week was not set by the Claimant, it is a condition imposed by the

¹³ GD03-49

¹⁴ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96

Government of Canada. The Claimant had no choice in the limitation on the number of weekly working hours. I therefore find, as it was not the Claimant's choice to limit his working hours to 20 a week, it is not a personal condition he imposed.

[35] Second, I do not agree the limit of 20 hours of work a week imposed on the Claimant by the Government of Canada is a personal condition. It is the law created by the government, the Claimant did not create or come up with, the 20 hour limit.

[36] Third, I note that in *I.K.*, when referring to the third factor of availability, it is reworded in different ways to try and solve the apparent contradiction present in a plain reading of the third factor and a decision that something imposed on a person is a personal condition set by that person. In *I.K.* the restrictions imposed by the study permit are stated as a "...personal requirement that unduly limited his opportunities for returning to the labour market"¹⁵ and as the claimant "...struggling with an obstacle, more precisely, a legal barrier,..."¹⁶ Again, I would point out that a plain reading of the third factor does not refer to personal requirements or legal barriers, but personal conditions set by the Claimant.

[37] Finally, while *I.K.* mentions *Canada (Attorney General) v Leblanc*, 2010 FCA 60, in support of the conclusion that the limits imposed by the government on the claimant in that case are a personal condition, I disagree *Leblanc* supports that conclusion in the case of the Claimant before me as I find the Claimant's situation is materially different from the situation in *Leblanc*.

[38] In *Leblanc* the claimant was unable to work due to a fire that destroyed his ability to get to work and equipment he needed to do his work; he was unable to work. In the case before me, the Claimant has nothing preventing him from attending any job he would acquire; he is able to work. He is perfectly capable of working within the 20 hours per week limitation imposed by the Government, any day of the week, at any time, as his course schedule is extremely flexible. This is further demonstrated by the fact he

¹⁵ *I.K. v Canada Employment Insurance Commission*, 2017 SSTA DEI 337 at paragraph 27

¹⁶ *I.K. v Canada Employment Insurance Commission*, 2017 SSTA DEI 337 at paragraph 31

had a job, until he lost it due to COVID, which shows the study permit does not make the Claimant completely unable to work unlike the claimant in *Leblanc*.

[39] In summary, I find the Claimant has not set personal conditions that would unduly limit his chances of returning to the labour market.

[40] I find the limit of 20 hours of work per week imposed on the Claimant by his study permit, is not a personal condition he set. I find, he did not set this limit, it is the law, created by the Government of Canada, not a personal condition, which the Claimant must follow. He had no choice in this limitation.

[41] I further find his training does not present a personal condition that would unduly limit his chances of returning to the labour market as with the flexibility of the Claimant's course, being able to book his required flight time on any day at any time, his training would not impact his ability to work a job, as the job would not have to accommodate his training, he can make his training accommodate the job.

Is the Claimant capable of and available for work and unable to find suitable employment?

[42] Considering my findings on each of the three factors together, I find that the Claimant did show that he is capable of and available for work and unable to find suitable employment.¹⁷

CONCLUSION

[43] I find that the Claimant is not disentitled from receiving benefits. This means the appeal is allowed.

Gary Conrad
Member, General Division – Employment Insurance Section

¹⁷ Paragraph 18(1)(a) of the *Employment Insurance Act*.