Citation: *DK v Canada Employment Insurance Commission*, 2021 SST 274

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision dated September 28, 2020 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	Teleconference
Hearing date:	April 27, 2021
Hearing participants:	Appellant
Decision date:	June 4, 2021
File number:	GE-21-580

Canada

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, D. K., was upon reconsideration by the Commission, notified that it was unable to pay him Employment Insurance regular benefits beyond March 23, 2020 because he was unable to work due to health reasons and he had not proven his availability for work, a condition of being eligible to receive benefits. The Appellant maintains his availability for work has been established and that he did not have access to his full entitlement of 15 weeks of sick benefits due to an assumption on the part of the Commission regarding the date he became unavailable due to an injury. The Tribunal must decide if the Appellant has proven his availability pursuant to sections 18 and 50 of the Employment Insurance Act (the Act) and sections 9.001 and 9.002 of the Employment Insurance Regulations (the Regulations).

Matter I have to consider first

[3] This case had been previously decided by the General Division and that decision was appealed by the Commission to the Appeal Division. The AD appeal was allowed and the case returned to the General Division to be heard by another Member de novo. This meant there was to be a new hearing and decision taking into account the reasons for the AD decision.

Issues

[4] Issue # 1: Did the Commission correctly determine the Appellant's entitlement to sickness benefits?

Issue # 2: Was the Appellant available for work?

Issue #3: Was he making reasonable and customary efforts to obtain work?

Issue #4: Were there personal conditions that might unduly limit his chances of returning to the labour market?

Analysis

[5] The relevant legislative provisions are reproduced at GD-4.

[6] 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.

[7] In order to be found available for work, a claimant shall: 1. Have a desire to return to the labour market as soon as suitable employment is offered, 2. Express that desire through efforts to find a suitable employment and 3. Not set personal conditions that might unduly limit their chances of returning to the labour market. All three factors shall be considered in making a decision. **(Faucher A-56-96 & Faucher A-57-96)**

Issue 1: Did the Commission correctly determine the Appellant's entitlement to sickness benefits?

[8] Yes.

[9] While the Appellant argues that he was available for work up to the point in February when his broken ankle was diagnosed as he continued to walk on it without any problems, it was he who informed the Commission that the injury occurred on January 4, 2020 as a result of an accident involving a piano pedal.

[10] The Appellant asserts that using the January 4th date to begin his sick benefits has no basis in medical fact. However this date was supplied by the Appellant not selected by the Commission.

[11] A close review of the file indicates that the Appellant applied for regular benefits on October 15, 2019. This application was approved and regular benefits were paid.

[12] Throughout the benefit period the Appellant, through his bi-weekly reports, advised the Commission of a total of 9 weeks where he was not available for work due to illness. These 9 weeks were correctly categorized as casual sickness. All other weeks during this period where benefits were paid, the Appellant indicated that he was ready, willing, capable, and actively seeking full time employment.

[13] However, on July 14, 2020 he contacted Service Canada to advise he had had an accident six months earlier which resulted in a broken ankle and to inquire as to his eligibility for sickness benefits due to his injury.

[14] The Appellant was informed that the EI Program allows up to 15 weeks of sick benefits to be paid during a benefit period if the requirements laid down by the Act are met. He stated at the time that this was new information for him even though he had reported periods on illness in the past.

[15] Given, again, the file information, the Appellant was indeed eligible to receive sick benefits and the Commission, retroactively, converted his claim for regular benefits to sick benefits effective January 4, 2020.

[16] The Appellant, at his hearing, testified that his injury took place on January 4, 2020. He stated that he was not aware of the extent of his injury until he visited his doctor and it was confirmed that his ankle was broken and required surgery. He was in a cast from February 15, 2020 through to April 15, 2020, two weeks less than reported by the Commission.

[17] Paragraph 12 (3)(c) of the Act, clearly indicates that the maximum number of weeks for which benefits may be paid in a benefit period because of a prescribed illness, injury or quarantine is 15.

[18] As noted above, the Appellant here had already received 9 weeks of sick benefits leaving a total of only 6 weeks which is what the Commission converted allowing for the total of 15 weeks of benefits being paid, the maximum allowed by law.

[19] A portion of the 9 weeks referred to occurred between January 4, 2020 and March 23, 2020. When the six weeks of additional sickness benefits were applied, the Appellant’s total allowable 15 weeks had been used by March 22, 2020.

[20] Medical information submitted by the Appellant indicates he was fit to return to work on June 15, 2020 but having received the maximum 15 weeks of sickness benefits no further sickness benefits could be paid on this claim.

[21] I find that the Commission correctly determined the Appellant's entitlement to sickness benefits and paid same at the correct times based on the Appellant's bi-weekly reports and his submissions and testimony.

Now I must address the issue of availability given that it has been determined that the Appellant's sickness benefits ended March 22, 2020.

Issue 2: Was the Appellant available for work?

[22] No.

[23] Subsection 18(1) of the Act states:

(1) A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

(a) capable of and available for work and unable to obtain suitable employment;

(b) incapable of work by reason of prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or

(c) engaged in jury service.

[24] In this case, by the Appellant's initial statements and submissions, he was not seeking full time work.

[25] However, when the Commission requested that he submit information relating to his job search efforts he submitted that he had made 4 applications for employment made with 4 different employers in positions of cleaning, sales, and safety, that he is a member of Local 92 – Job Board in Edmonton Alberta, that he had renewed 12 Health and Safety courses as soon as the covid shutdowns ended in order to improve his eligibility for available work, and that these efforts represent a small percentage of time spent investigating work possibilities (GD3-136).

[26] I accept these efforts as having taken place but I must balance these against the Appellant's submissions where he originally stated he was not seeking work and he was not available "for many weeks" beyond the removal of his cast. This Appellant has been consistently honest in reporting his casual sick periods while on claim therefore I have no reason to doubt him when he states he was injured on January 4, 2020 and was unavailable for work well beyond the removal of his cast. This falls in line with his surgeon's assessment that he was able to return to work as of June 15, 2020.

[27] "More credibility is given to the initial statements because the claimant provided information more candidly than the subsequent statements which were provided with the intent of overturning a previous unfavourable decision." as supported by **Canada (AG) v. Gagné, FCA A-385-10.**

[28] The disentitlement begins on March 23rd, 2020 because that is the date after the Appellant's entitlement to sickness benefits was exhausted.

[29] From that date foreword, the Appellant reported through his bi-weekly reports that he was capable of and actively seeking employment but it wasn't until the Commission requested an accounting of his job search efforts that he submitted the record of his four applications.

[30] I find the Appellant's job search activity, four applications over the period from March 23, 2020 onward to the date the decision was made regarding disentitlement, August 26, 2020, does not show a sincere desire to return to the labour market as soon as suitable full time employment is offered.

Issue 3: Was he making reasonable and customary efforts to obtain work?

[31] No.

[32] As per his submissions and testimony at the hearing, the Appellant has not been conducting a comprehensive job search.

[33] Again, when the Commission requested that he submit information relating to his job search efforts he submitted that he had made 4 applications for employment made with 4 different employers in positions of cleaning, sales, and safety, that he is a member of Local 92 – Job Board in Edmonton Alberta, that he had renewed 12 Health and Safety courses as soon as the covid shutdowns ended in order to improve his eligibility for available work, and that these efforts represent a small percentage of time spent investigating work possibilities (GD3-136).

[34] Four job applications beginning in August, 2020 having received regular benefits since October, 2019 thereby over a nine month period less the 15 weeks of sickness cannot and is not considered to be a reasonable job search.

[35] Again, I find the Appellant's job search activity, four applications over the period from March 23, 2020 onward to the date the decision was made regarding disentitlement, August 26, 2020, does not show that he was making reasonable and customary efforts to obtain suitable employment.

[36] I find that the Appellant has not, shown that he was making reasonable and customary efforts to obtain suitable employment.

Issue 4: Were there personal conditions that might unduly limit his chances of returning to the labour market?

[37] Yes.

[38] Again, the Appellant's submissions and testimony at the hearing indicate no on-going reasonable and customary efforts on the Appellant's part to obtain employment.

[39] He was dealing with a severe injury and resulting surgery and recuperation during the period in question.

[40] I find that the Appellant had personal conditions, injury related, which unduly limited his chances of finding and accepting full time employment, a requirement of being eligible to receive benefits.

[41] The Appellant asserts he was available for work up until February 15, 2020 and after his recuperation from his injury and related surgery however it has been shown that this is not the case.

[42] After his clearance to return to work as of June 15, 2020, the Appellant still failed to fulfill the requirements necessary to prove he was capable of and actively seeking full time employment as outlined in section 9.001 of the Regulations.

[43] By itself, a mere statement of availability by the claimant is not enough to discharge the burden of proof**. CUBs 18828 and 33717**

[44] I find the Appellant, by his submissions and actions or lack thereof, has not met the burden of proof required to show he was in fact available for work.

[45] Neither the Tribunal or the Commission have any discretion or authority to override clear statutory provisions and conditions imposed by the Act or the Regulations on the basis of fairness, compassion, financial or extenuating circumstances.

Conclusion

[46] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that he was not capable of or available for work and as such the appeal regarding availability is dismissed.

John Noonan

Member, General Division – Employment Insurance Section