Citation: *MS v Canada Employment Insurance Commission*, 2021 SST 488

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. S.
Representative:	W. K
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (379404) dated January 16, 2020 (issued by Service Canada)

Tribunal member:	Suzanne Graves
Type of hearing:	Teleconference
Hearing date:	August 12, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	August 26, 2021
File number:	GE-21-1040

Decision

[1] The Claimant hasn't shown that he was capable of and available for work from July 15, 2018, to February 2, 2019. This means that he cannot receive Employment Insurance (EI) benefits.

[2] The Canada Employment Insurance Commission (Commission) has not proved that the Claimant knowingly made false misrepresentations. So I find that the warning and notice of violation are removed.

[3] This means that the appeal is allowed in part.

Overview

[4] The Claimant lost his job on July 17, 2018. The Commission decided that the Claimant was disentitled from receiving EI regular benefits from July 15, 2018, to February 2, 2019, because he wasn't available for work. A claimant has to be capable of working 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.

[5] The Commission argues that the Claimant wasn't capable of working because of injuries he sustained due to an accident. The Claimant says he had a motor vehicle accident the day after leaving his job, but looked for employment as he believed he could still work with some physical restrictions.

[6] The Commission also decided that the Claimant made false and misleading statements. To be paid EI benefits, claimants complete online reports. The reports ask a series of questions. The Commission says it reviewed the Claimant's answers about whether he was available for work and decided that the Claimant knowingly provided false or misleading information when he said he was available to work. It imposed a warning and a notice of violation.

[7] The Claimant says he did not knowingly provide false and misleading information. He says he believed he could work at the time, and did not understand what was required of him, in part because he had a language barrier.

Issues

[8] I have to decide the following two issues:

a) Was the Claimant capable of and available for work?

b) Did the Commission prove that the Claimant knowingly made false or misleading statements on his claim reports? If he did, then I must also decide whether the Commission properly decided to impose a warning and notice of violation.

Analysis

Was the Claimant capable of and available for work?

[9] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[10] First, the *Employment Insurance Act* (EI Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[11] Second, the EI 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.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4]

[12] The Commission decided that the Claimant could not receive regular benefits because he wasn't capable of and available for work based on these two sections of the law. I will consider these two sections myself to determine if the Claimant was available for work.

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[1] See section 50(8) of the *Employment Insurance Act* (EI Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the EI Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

Reasonable and customary efforts to find a job

[13] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[5] 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.

[14] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I may consider. Some examples of those activities are preparing a résumé or cover letter, registering for job-search tools or with online job banks or employment agencies, and applying for jobs. [6]

[15] The Commission says that the Claimant didn't do enough to try to find a job. It asked the Claimant for a record of his job search efforts.[7] The Claimant's record only showed applications for jobs in Mississauga, and he said he could not commute that far.

[16] The Claimant argued that he had pain but tried to apply for jobs. He said that he did not understand what was required from him, in part because of a language barrier. He says that he did not realize his injuries were serious, and thought he could work, with some physical limitations. But he later found out that he had a muscle tear and could not work at all. He could not take warehouse jobs because he did not have the muscle strength. He testified that many transportation companies were not hiring, and he could not find any truck driving jobs within a reasonable commuting distance.

[17] After reviewing the Claimant's job search record, I find that the Claimant did not show that he made enough efforts to find a job. According to his search record he applied to five places of employment in one biweekly period, and reported that he rejected two job offers because they were too far away from his home.

[18] I find that the Claimant hasn't proved that his job search efforts were reasonable and customary.

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[5] See section 9.001 of the Regulations.
[6] See section 9.001 of the Regulations.
[7] The Claimant's job search record dated October 15, 2018, is at GD3-116.

Capable of and available for work

[19] The law also requires that a claimant prove that they are capable of and available for work. Case law sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:[8]

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

b) He has made efforts to find a suitable job.

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

[20] The key arguments in this case relate to whether the Claimant was capable of working so I will address that issue first.

[21] The Commission says that the Claimant was unable to work due to injuries he sustained in a motor vehicle accident that occurred in July 2018. Medical notes on file show that he was injured and unable to work as of July 20, 2018.[9] On March 6, 2019, he told the Commission that he was unable to work since July 20, 2018.[10]

[22] At the hearing, the Claimant testified that he had an accident the day after losing his job. He said that he thought he could work at the time, but acknowledged that his physical injuries have made him unable to work since then.

[23] I find that the Claimant was not capable of working from July 15, 2018,[11] to February 2, 2019. I make this finding based on the medical evidence in the Commission's file, the statements the Claimant made to the Commission, and his testimony to the Tribunal.

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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] The Claimant's medical notes are at GD3-133, and GD3-140
[10] A record of this discussion between the Claimant and a Commission agent is at GD3-136.
[11] July 15, 2018 was the effective date of the Claimant's benefits claim.

[24] Since I have decided that the Claimant was not capable of working due to his injuries, I do not need to consider whether he has shown that he was available for work according to the three factors set out above.

[25] I find that the Claimant has not proved that he was capable of and available for work.

Did the Claimant knowingly make false or misleading statements?

[26] To impose a penalty, the Commission has to prove that the Claimant knowingly provided false or misleading information.[12]

[27] It is not enough that the information is false or misleading. To be subject to a penalty, the Commission has to show that it is more likely than not that the Claimant knowingly provided it, knowing that it was false or misleading.[13]

[28] If it is clear from the evidence the questions were simple and the Claimant answered incorrectly, then I can infer that the Claimant knew the information was false or misleading. Then, the Claimant must explain why he gave incorrect answers and show that he did not do it knowingly.[14] The Commission may impose a penalty for each false or misleading statement knowingly made by the Claimant.

[29] I do not need to consider whether the Claimant intended to defraud or deceive the Commission when deciding whether he is subject to a penalty.[15]

[30] Each claim report asked the question: "Were you ready, willing and capable of working each day, Monday through Friday during each week of this report?" On 15 claim reports, the Claimant responded: "Yes" to that question.[16] The Commission says

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[12] Section 38 of the EI Act.
[13] *Bajwa v Canada*, 2003 FCA 341; the Commission has to prove this on a balance of probabilities, which means it is more likely than not.
[14] *Nangle v Canada (Attorney General)*, 2003 FCA 210.
[15] *Canada (Attorney General) v Miller*, 2002 FCA 24.
[16] The Claimant's claim reports are shown at GD3-34 to GD3-108.

that the Claimant knowingly made 15 false or misleading statements with that response on each report. It says that he knew that he was injured as a result of his accident, and unable to work, but falsely stated that he was available for work.

[31] The Commission initially imposed a monetary penalty. But on reconsideration, it reduced the monetary penalty to a warning. It also issued a notice of violation. A violation means that a claimant has to work more hours of insurable employment to qualify for EI benefits.

[32] The Claimant says that that he did not knowingly provide false or misleading information on his claim reports. He says that, when the accident happened, he did not realize that his injury was serious. He argued that if he had known that he was unable to work, he would have applied for a disability benefit instead of EI benefits.

[33] He says that he believed that he could work at that time, with physical restrictions. He continued to look for work because he needed to try to earn a living. He said that it was not until March 2019, that he realized that he had a serious physical injury, and that he was unable to return to work.

[34] The question on the Claimant's biweekly reports is simple and straightforward. But I find that the Claimant has provided a reasonable explanation for the answers he gave on his reports. His explanation is consistent with the fact that he made some applications for jobs during the period in question. As I result, I find that the Commission has not proved that it is more likely than not that the Claimant knowingly provided false or misleading information on his claim reports.

[35] As the Commission has not proved that the Claimant knowingly made false or misleading representations, a warning and violation may not be imposed.

[36] Since I have found that the Claimant did not knowingly make false or misleading statements, I don't need to address whether the Commission properly exercised its discretion when it imposed the warning and violation.

[37] The Claimant asked me to consider waiving or lowering the amount of his overpayment of the regular EI benefits he received. I have no discretion to reduce or write off an overpayment of benefits. The Commission has sole responsibility to write off an amount that is payable under section 43 of the EI Act.[17]

[38] I have sympathy for the Claimant's financial situation. However, I have to follow the rules set out in the EI Act and cannot make exceptions for special cases even in the interest of compassion.[18]

Conclusion

[39] The Claimant hasn't shown that he was capable of and available for work within the meaning of the law. Because of this, I find that the Claimant cannot receive regular EI benefits from July 15, 2018, to February 2, 2019. This means that the appeal on the issue of availability is dismissed.

[40] I find that the Claimant is not subject to a warning or a violation. This means that the appeal on the issue of the warning and violation is allowed.

[41] The appeal is allowed in part

Suzanne Graves
Member, General Division – Employment Insurance Section

[17] Section 56(1) of the Regulations.
[18] In *Canada (Attorney General) v Lévesque*, 2001 FCA 304, the Federal Court of Appeal held that the legislation has to be followed, regardless of the personal circumstances of the appellant (see also *Pannu v Canada (Attorney General)*, 2004 FCA 90).