Citation: *BB v Canada Employment Insurance Commission*, 2021 SST 485

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (417158) dated March 19, 2021 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	Teleconference
Hearing date:	April 26, 2021
Hearing participants:	Appellant
Decision date:	May 5, 2021
File number:	GE-21-546

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, B. B., a worker in AB, was upon reconsideration by the Commission, notified that it was unable to pay him Employment Insurance Regular benefits from November 16, 2020 and Employment Insurance Sickness benefits from December 10, 2020 because he had not proven his availability for work. He is taking a training course on his own initiative and he did not prove that he would have been available for work if he were not sick. He had not proven that he was seeking and available for full time employment, which means he had not proven his availability for work, a condition of being eligible to receive benefits. The Appellant maintains he was available for work if not for his illness in that he has a proven history of full time work while attending full time studies at the undergraduate level. 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). (Appellant decided to continue with hearing without a representative.)

Issues

RE: Regular Benefits November 15, 2020 through to December 9, 2020

[3] Issue # 1: Was the Appellant available for work?

Issue #2: Was he making reasonable and customary efforts to obtain work?

Issue #3: Did he set personal conditions that might unduly limit his chances of returning to the labour market?

Analysis

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

[5] 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: Was the Appellant available for work?

[6] No.

[7] In this case, by the Appellant's statements and submissions, he was not seeking full time work due to already having employment. Due to weather conditions this employer had not needed him for snow clearing therefore there was no call to work.

[8] I find that the actions or lack thereof on the part of the Appellant do not show a sincere desire to return to the labour market as soon as suitable full time employment is offered.

Issue 2: Was he making reasonable and customary efforts to obtain work?

[9] No.

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

[11] The Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment.

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

[13] The Court held that the burden on the claimant to prove availability is a statutory requirement of the legislation that cannot be ignored. In order to obtain employment insurance benefits a claimant must be actively seeking suitable employment, even if it

appears reasonable for the claimant not to do so. **Canada (AG) v. Cornelissen-O'Neil, A-652-93; De Lamirande v. Canada (AG), 2004 FCA 311**

Issue 3: Did he set personal conditions that might unduly limit his chances of returning to the labour market?

[14] Yes.

[15] Again, the Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment.

[16] The Appellant has stated on several occasions that he did not look for alternate employment as he had employment with X that required him to be on call 24 hours a day, 7 days a week. The Appellant, by restricting himself to working only for this one employer, set a personal condition that severely limited his opportunity to return to the labour market. He was waiting for a call-in during the period in question, a personal choice on his part.

[17] The Appellant also noted that his educational pursuit, and not his employment, was his primary focus. I agree with the Commission's assertion that this is not indicative of a "desire to return to the labour market as soon as a suitable job" was offered.

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

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

[20] It is inevitable that a person who has the right to receive benefits will be called upon to come forward and prove that he or she satisfies the conditions of the Act.

[21] I find the Appellant, by his submissions and actions, has not met the burden of proof required to show he was in fact available for work and carrying out a reasonable and customary job search during the period in question.

RE: Sickness Benefits December 10, 2020 onwards

ISSUE

Issue #1: If not for the injury would the Appellant have been otherwise available?

[22] It is clear that, if you are sick or injured, you aren't available for work. The law for EI sickness benefits reflects this. However, the law says that, if you are asking for sickness benefits, you must otherwise be available for work. This means that the Appellant has to prove that his illness/injury is the only reason why he wasn't available for work.

[23] 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 would have been available for work if it weren't for his illness/injury.

[24] The same requirements are applicable here as outlined above but for clarity they must be repeated.

[25] 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: Was the Appellant available for work?

[26] No.

[27] In this case, by the Appellant's statements and submissions, he was not seeking full time work due to already having employment. Due to weather conditions this employer had not needed him for snow clearing therefore there was no call to work.

[28] I find that the actions or lack thereof on the part of the Appellant do not show a sincere desire to return to the labour market as soon as suitable full time employment is offered.

Issue 2: Was he making reasonable and customary efforts to obtain work?

[29] No.

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

[31] The Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment.

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

[33] The Court held that the burden on the claimant to prove availability is a statutory requirement of the legislation that cannot be ignored. In order to obtain employment insurance benefits a claimant must be actively seeking suitable employment, even if it appears reasonable for the claimant not to do so. **Canada (AG) v. Cornelissen-O'Neil, A-652-93; De Lamirande v. Canada (AG), 2004 FCA 311**

Issue 3: Did he set personal conditions that might unduly limit his chances of returning to the labour market?

[34] Yes.

[35] Again, the Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment.

[36] The Appellant has stated on several occasions that he did not look for alternate employment as he had employment with X that required him to be on call 24 hours a day, 7 days a week. The Appellant, by restricting himself to working only for this one employer, set a personal condition that severely limited his opportunity to return to the labour market. He was waiting for a call-in during the period in question, a personal choice on his part.

[37] The Appellant also noted that his educational pursuit, and not his employment, was his primary focus. I agree with the Commission's assertion that this is not indicative of a "desire to return to the labour market as soon as a suitable job" was offered.

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

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

[40] It is inevitable that a person who has the right to receive benefits will be called upon to come forward and prove that he or she satisfies the conditions of the Act.

[41] I find the Appellant, by his submissions and actions, has not met the burden of proof required to show he was in fact available for work and carrying out a reasonable and customary job search during the period in question.

[42] The Appellant doesn't have to show that he is actually available. He has to show that he would have been able to meet the requirements of all three factors if he hadn't been injured. In other words, he has to show that his injury was the only thing stopping him from meeting the requirements of each factor.

[43] The Appellant wasn't able to work because of his shoulder injury. To be able to receive EI sickness benefits, the Claimant must "otherwise be available for work."

[44] The Canada Employment Insurance Commission (Commission) says that the Appellant would not have been available for work anyway because he is a full-time student and his primary focus is his educational endeavor rather than working on a full-time basis and he is restricting himself to working solely for X, even if only limited part-time hours are available.

[45] The Appellant disagrees and states that he has worked this schedule for four years while maintaining a 4.0 GPA and achieving Honors status. He indicated that he worked full-time for this employer in the summer, but during the school year his focus is

to complete his schooling, while working whatever hours might be available at X (GD3-41).

[46] Other than the injury to his shoulder there is no change in the factors outlined above resulting again in the finding of non-availability.

[47] Had there not been an injury the Appellant would be working any hours available to him and he would not, as shown in his work history over the last four years, have applied for EI benefits, regular or sickness.

[48] The Appellant hasn’t shown that if not for his injury he would have been available for work within the meaning of the law. Because of this, I find that he can’t receive EI sickness benefits.

Re: section 32 Investigation and Report request

[49] I, on April 26, 2021, the date of the hearing, asked the Commission if there was a policy that would, in fact, result in the easing of restrictions as they relate to students in full time studies and availability.

[50] The response, GD7, confirmed that “Prior to 27 September 2020, a claimant’s availability for work would have been reviewed by a Commission representative when the claimant indicated he (or she) was involved in a non-referred course of training or instruction. As of 27 September 2020, availability is no longer automatically reviewed when a claimant submits an application for benefits, or a bi-weekly claimant report, and reports that he (or she) is attending non-referred training but is still available for work as required. Rather than being reviewed by an agent, the training is automatically allowed.”

[51] This is a policy used by the Commission. Any policy is superseded by the provisions of the **Act and the Regulations.** The Commission, while acknowledging the possibility that others in similar programs have been treated differently regarding the determination of availability, in this case opted to use these provisions given they have the authority under the **Act and the Regulations** to do so.

Conclusion

[52] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that he was not available for work from November 15, 2020 through to December 9, 2020 therefore is not eligible for regular benefits for that period. The Appellant was not otherwise available for work therefore not eligible for sickness benefits because he is a full-time student and his primary focus is his educational endeavor rather than working on a full-time basis and as such the appeal regarding availability is dismissed.

John Noonan

Member, General Division – Employment Insurance Section