Citation: *NA v Canada Employment Insurance Commission*, 2021 SST 747

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	N. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (425872) dated June 24, 2021 (issued by Service Canada)

Tribunal member:	Linda Bell
Type of hearing:	Teleconference
Hearing date:	October 19, 2021
Hearing participant:	None
Decision date:	October 20, 2021
File number:	GE-21-1626

Decision

[1] I am dismissing the appeal.

[2] The Claimant does not meet the availability requirements for sickness or regular Employment Insurance (EI) benefits. This means she is not entitled (disentitled) to the sickness or regular EI benefits she received since October 21, 2020.

Overview

[3] The Claimant stopped working on March 12, 2020, and submitted an application for sickness benefits. The Commission set up her claim for the EI Emergency Response Benefits (EI-ERB).[1] When the EI-ERB ended, the Claimant collected the maximum 15 weeks of EI sickness benefits from September 27, 2020, to January 9, 2021. She requested regular EI benefits as of January 10, 2021.

[4] The Commission conducted a review of the EI benefits paid to the Claimant. It determined that the Claimant failed to show she was otherwise available for work, if not for her illness. It also determined that the Claimant did not meet the availability requirements for regular EI benefits.

[5] On May 6, 2021, the Commission imposed two retroactive disentitlements (or stop payments). The first is a definite disentitlement imposed from October 21, 2020, to October 29, 2021. This is the period the Claimant is attending unapproved training on a full-time basis. The second is an indefinite disentitlement starting on January 10, 2021. The Commission imposed the indefinite disentitlement because the Claimant is restricting her availability to positions that would allow her to work virtually. These retroactive disentitlements result in a $4,300.00 overpayment of EI benefits.

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[1] The EI-ERB falls under the *Employment Insurance Act* (Act). The government created the EI-ERB as a temporary EI benefit, so that Canadians could receive EI benefits as quickly as possible during the global COVID-19 pandemic.

[6] The Claimant disagrees with the Commission. She appeals to the Social Security Tribunal saying she was available to work.

Matters I have to consider first

No one attended the hearing

[7] The Tribunal initially scheduled the hearing for September 28, 2021, at 12:00 p.m. (ET). The Claimant requested an adjournment stating she requires accommodations and is only available to attend a hearing after 3:20 p.m. (E.T.), with notice.

[8] The Claimant did not specify her required accommodations so I granted her adjournment request, without setting a hearing date. I also scheduled a prehearing teleconference to discuss her accommodation request and to provide her with information about the hearing process.

[9] I scheduled the prehearing teleconference for September 28, 2021, at 3:30 p.m. (ET).[2] On September 23, 2021, the Claimant emailed the Tribunal saying she was not prepared to attend a prehearing teleconference. I wrote to the Claimant the same day to clarify that the prehearing teleconference was not the hearing. I provided the Claimant with additional information about the prehearing teleconference.[3] The Claimant responded and now said that she has a disability and would not attend the prehearing teleconference.[4]

[10] On September 24, 2021, the Claimant sent an email to the Tribunal saying not to contact her, “to dictate anything.” She now states the Tribunal may only communicate with her via email.

[11] I wrote to the Claimant on September 27, 2021, and October 4, 2021, explaining that the appeal must proceed to a hearing as quickly as possible.[5] I also explained that

[2] See the notice of prehearing teleconference GD8 document.
[3] See the GD10 document.
[4] See the GD11 document.
[5] See documents GD10 and GD15.

if the Claimant is unable to proceed with the hearing due to an illness, she is required to submit a medical certificate signed by a physician, stating the Claimant's estimated recovery date and any accommodations required.

[12] The Claimant submitted an email to the Tribunal after regular business hours on October 15, 2021. Attached to this email was a typed letter listing a return address for a Dr. Gabriela Franklin at the Matlis Medical Clinic. Upon review of this letter, I note the following anomalies that call the validity of this letter into question.

- The letter is typed and not printed on an official letterhead.
- The letter does not have any official identifiers such as an office stamp listing the doctor's medical practitioner number.
- The signature is an initial. It appears this initial may have been traced because it doesn't flow smoothly.
- The doctor's name, as typed below the signature, does not list any initials behind the name to specify the doctor's medical certification or specialty.
- The first two paragraphs include emotional statements regarding the Claimant's former manager and a case manager at WSIB. These include non-factual statements such as "Since this whole debacle started"; "to add insult to injury"; and, "She is horrified that a manager..."
- The medical letter includes questionable language not normally used by medical professionals. These include, "All this discrimination" and "the manager succeeded in putting a black mark on her employment history."
- The emotional comments regarding the Claimant's former job and interactions with the WSIB case manager are not relevant to the issues under appeal.
- This medical letter does not list an estimated recovery date for the Claimant. Instead, it says, "we will have to see how long it will take her to heal."

- The letter does not state specific accommodations required by the Claimant.[6]

[13] After consideration of the foregoing, I found that this letter did not present exceptional circumstances that would prevent the Claimant from calling into a teleconference hearing. So, I denied her request for a another adjournment.

[14] The Tribunal notified both parties that the hearing would proceed as scheduled.[7] However, no one appeared. I am satisfied that both parties received the Notice of Hearing. The Tribunal sent the email to the email address provided by the Claimant. There is no indication that the email failed to send.

[15] The Notice of Hearing states that if a party does not attend the hearing, the Tribunal Member may proceed in the absence of the party if the Member is satisfied they received the Notice of Hearing. The Notice of Hearing also states, "**You must dial in to the teleconference using the numbers and information in the above box. The Tribunal will not call you."**

[16] As I am satisfied that the Tribunal notified the parties of the teleconference hearing, I proceeded to determine the merits of this appeal in the absence of both parties.[8]

Issues

[17] Does the Claimant meet the availability requirements for sickness EI benefits while in full-time attendance at unapproved training?

[18] Does the Claimant meet the availability requirements for regular EI benefits?

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[6] See the medical letter on pages GD18-2 and GD18-3.
[7] See the Notice of Hearing at page GD20 that was email to the parties on October 19, 2021, at 9:39 a.m. (ET).
[8] See section 12(1) of the *Social Security Tribunal Regulations*.

Analysis

Availability Requirements

[19] To be eligible for sickness EI benefits, a claimant must establish that they are unable to work and if it were not for their illness, they would be available for work.[9] To be eligible for regular EI benefits, a claimant must show that they are capable of and available for work and unable to obtain suitable employment.[10]

[20] Two different sections of the law require claimants to show that they are available for work.[11] The Commission says the Claimant was disentitled under both sections because she hasn't shown she was capable of and available for work and unable to find suitable employment while attending unapproved training full-time.[12]

[21] The Federal Court of Appeal (FCA) has said that claimants who are attending full-time training are presumed to be unavailable for work.[13] The presumption applies only to full-time students. The presumption can be rebutted. This means that it would not apply.

[22] I am going to start by looking at whether the presumption applies to the Claimant and if she has rebutted it. Then I will look at whether she was capable of and available for work and unable to find suitable employment.

Presumption that full-time students are not available for work

– Does the presumption apply to the Claimant?

[23] Yes. I find as fact that the presumption applies to the Claimant. This is because she told the Commission that she is attending full-time training from October 21, 2020,

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[9] See section 18(1) (b) of the *Employment Insurance Act* (Act).
[10] See section 18 of the Act.
[11] Paragraph 18(1)(a) of the 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. Subsection 50(8) of the Act provides that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment.
[12] See the Commission's submissions on page GD4-1.
[13] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

to October 31, 2021.[14] When completing her reports from January 10, 2021, to March 6, 2021, the Commission documented that the Claimant told them that she attends classes for 35 hours per week.[15] This means the presumption applies. So, I find the presumption of non-availability applies to the Claimant.

[24] I will now determine whether the Claimant has rebutted the presumption.

– **Has the Claimant rebutted the presumption?**

[25] No, I find the Claimant has not rebutted the presumption of non-availability while attending full-time training.

[26] The Federal Court of Appeal said that the Claimant could rebut the presumption of not being available for work by showing she has a history of working full-time while studying or by showing exceptional circumstances.[16]

[27] The Commission submits that the Claimant has failed to rebut the presumption of non-availability while attending a full-time course. This is because she admitted that if not for her illness, injury or quarantine, she would not be available or capable of the same type of work under the same conditions as she was before she started her training program. She told the Commission that she would refuse an offer of full-time employment if it conflicted with her training program. She also said she would not drop her training to accept employment if the work schedule conflicted with her training schedule.[17]

[28] I find the Claimant has not rebutted the presumption. Rebutting the presumption only means that the Claimant is not presumed to be unavailable. Even though she has failed to rebut the presumption, I must still look at the requirements of the Act and decide whether the Claimant is in fact available for work.

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[14] The law has consistently defined full-time training includes attending courses on mornings from Monday to Friday inclusive in CUBs 19512, 29264, 28251.
[15] See pages GD3-18 to GD3-19.
[16] See *Canada (Attorney General) v Rideout*, 2004 FCA 304 and *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[17] See pages GD3-13 to GD3-14 and GD3-18 to GD3-19.

Capable of and available for work and unable to find suitable employment

[29] I must consider whether the Claimant has shown she was capable of and available for work and unable to find suitable employment.[18] The Claimant has to prove three things to show she was available under this section:

a) A desire to return to the labour market as soon as a suitable job is available

b) That desire is expressed through efforts to find a suitable job

c) No personal conditions that might unduly limit their chances of returning to the labour market[19]

[30] I have to consider each of these factors to decide the question of availability,[20] looking at the attitude and conduct of the Claimant.[21]

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

[31] No. I see no evidence that the Claimant has had a desire to return to the labour market as soon as a suitable job is available. The Commission documented that she said she would only be available for virtual work because she has an ankle injury. But there is no evidence that she has made any effort to find such work. The Claimant told the Commission she was not available to work due to COVID. She also said she would not be willing to leave her full-time training to accept a job. So, I find that the Claimant has not shown she has had a desire to return to the labour market, if not for her injury.

– **Has the Claimant made efforts to find a suitable job?**

[32] No. I accept that the Claimant has not made any efforts to find a suitable job.

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[18] Paragraph 18(1)(a) of the Act.
[19] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[20] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[21] *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[33] The Commission submits that the Claimant failed to demonstrate her intention to return to the labour market since she started attending training on October 21, 2020.

[34] While they are not binding when deciding this particular requirement, I have considered the list of job-search activities, outlined below, as guidance when deciding this second factor.[22]

[35] The *Employment Insurance Regulations* (Regulations) lists nine job-search activities I have to consider. Some examples of those activities are[23]

- assessing employment opportunities
- developing a resume
- networking through on-line websites
- applying for jobs.

[36] The Claimant provided no evidence to support that she made attempts to look for work.

[37] The Commission's agent documented that on February 15, 2021, the Claimant told them that her injury would not allow her to do the type of job she had before but that she is capable of a sit-down/work at home job. She told the Commission that she is currently looking for work but then said she is not available for work because she is attending her training full-time.[24]

[38] I recognize that there is no formula to determine a reasonable period to allow a claimant to explore job opportunities. This means I must consider specific circumstances on a case-by-case basis.[25]

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[22] Section 6 of the EI Act defines what type of employment is not suitable. Section 9.002 of the Regulations lists the criteria for determining suitable employment.
[23] See section 9.001 of the Regulations.
[24] See pages GD3-15 and GD3-13.
[25] See section 10.4.1.4 of the Digest of Benefit Entitlement Principles.

[39] In this case, I found the Claimant's initial statements to the Commission to be credible. Specifically, that she was not looking for or available for work while attending full-time training.

[40] Based on the evidence as set out above, I find the Claimant hasn't proven she made any efforts to meet the requirements of this second factor.

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

[41] Yes. I find that the Claimant has set personal conditions that might unduly limit her chances of returning to the labour market, since starting her full-time training on October 21, 2020.

[42] I agree with the Commission when they state that the claimant failed to demonstrate her intention to return to the labour market while she is attending full-time training. She has also restricted her search by the type of employment she is capable of doing.[26] Specifically, the Claimant said she is only capable of doing a sit-down / at home job.[27]

[43] The evidence, as set out above, supports a finding that the Claimant has set personal conditions that unduly limited her chances of returning to the labour market.

Reasonable and Customary Efforts to find Suitable Employment

[44] In their submissions to the Tribunal, the Commission references a second disentitlement under subsection 50(8) of the *Act*. This provision requires the Claimant to prove that she is making reasonable and customary efforts to obtain suitable employment by providing details of her job search.

[45] I make no findings relating to subsection 50(8) of the Act because there is no evidence that the Commission made a decision on this issue.[28]

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[26] See page GD4-4.
[27] See GD3-15.
[28] Section 113 of the Act provides the Social Security Tribunal the authority to determine issues under appeal that the Commission determined and reconsidered.

[46] In their initial May 6, 2021, decision letter, the Commission states that the Claimant is not entitled to benefits because she was taking a training course on her own initiative and has not proven her availability for work if she were not sick.[29] In the second, May 6, 2021, decision letter the Commission states the Claimant has failed to prove her availability for work as of January 10, 2021, because she is restricting to work virtually.[30]

[47] There is no indication that the Commission made a decision relating to reasonable and customary efforts to obtain suitable employment.[31] Also, there is no evidence that the Commission asked the Claimant to submit evidence of her job search efforts. So I make no findings on subsection 50(8) of the Act.

Has the Claimant proven she is capable of and available for work and unable to find suitable employment?

[48] No. After considering my findings on each of the three factors together, I find that the Claimant has not shown that she was capable of and available for work and unable to find suitable employment if she were not sick from October 21, 2020, to October 31, 2021. I also find that she has not proven her availability for regular EI benefits as of January 10, 2021. This means she is subject to two retroactive disentitlements.

[29] See page GD3-21.
[30] See page GD3-22.
[31] See section 50(8) of the Act.

Conclusion

[49] I am dismissing the appeal.

[50] The Claimant has not met the availability requirements for sickness or regular EI benefits. This means she is disentitled from receiving sickness or regular EI benefits from October 21, 2020, to October 31, 2021.

[51] The Claimant is subject to an indefinite disentitlement as of January 10, 2021. This second disentitlement remains in effect until such time that the Claimant proves she meets the availability requirements.

Linda Bell
Member, General Division – Employment Insurance Section