



Citation: *RK v Canada Employment Insurance Commission*, 2021 SST 760

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: R. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (427129) dated September 1, 2021 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: October 26, 2021

Hearing participant: Appellant

Decision date: October 29, 2021

File number: GE-21-1798

Decision

[1] R. K. is the Claimant. The Canada Employment Insurance Commission (Commission) decided that she wasn't available for work. The Commission refused to pay Employment Insurance (EI) benefits. She is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal, but I am changing some parts of the Commission's decision. I find that the Claimant hasn't proven that she was available for work from December 20, 2020 until January 13, 2021; from March 1 to April 24, 2021; and from July 1, 2021 onwards. This is because she didn't want to return to the labour market and she set conditions that made it too hard to find a job.

Overview

[3] The Claimant is working towards becoming a pharmacist. She takes preparation courses that finish with an exam. She stopped working because of her studies and applied for EI benefits. She gave the Commission information about her studies and the Commission decided to pay EI benefits. After some months, the Commission reviewed the Claimant's entitlement. The Commission decided that the Claimant wasn't available for work starting December 21, 2020 and asked her to repay benefits.

[4] You have to be available for work to get EI regular benefits. This is an ongoing requirement. You have to prove your availability for work for each day you want EI regular benefits. This means that you have to be searching for a job.

[5] The Commission says the Claimant isn't available for work because she is studying full-time. The Commission says she hasn't overcome the presumption that full-time students aren't available for work.

[6] The Claimant disagrees with the Commission's decision. She says the Commission gave her misleading information and paid benefits, even though she was honest about her studies.

Issue

[7] Is the Claimant available for work?

Analysis

[8] There are two different sections of the law that say you have to prove that you are available for work. The Commission says it used both sections of the law to refuse EI benefits. So, I will look at both sections of the law when I decide if the Claimant has proven her availability for work.

[9] First, the *Employment Insurance Act* (Act) says that you have to prove that you 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

[10] Second, the Act says that you have to prove that you are “capable of and available for work” but aren’t able to find a suitable job.³ Case law gives three things you have to prove to show that you are “available” in this sense.⁴ I will look at those factors below.

[11] You have to prove that you are available for work on a balance of probabilities. In other words, you have to prove that it is more likely than not that you are available for work.

Reasonable and customary efforts to find a job

[12] One section of the law that says that you have to prove that your efforts to find a job are reasonable and customary.⁵

¹ See section 50(8) of the *Employment Insurance Act* (Act).

² See section 9.001 of the *Employment Insurance Regulations* (Regulations).

³ See section 18(1)(a) of the Act.

⁴ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁵ Section 50(8) of the *Employment Insurance Act* and section 9.001 of the *Employment Insurance Regulations*.

[13] The Commission says it used this section of the law to disentitle the Claimant from receiving benefits.

[14] I disagree. I don't think the Commission has proven that it used this section of the law. I won't use this section of the law when I make my decision about the Claimant's availability for work.

[15] The Commission spoke to the Claimant about her school schedule. During the reconsideration, the Commission didn't ask the Claimant about her job search efforts. The Commission didn't tell the Claimant that she wasn't making reasonable and customary job search efforts. In its submissions to the Tribunal, the Commission didn't explain why it decided that the Claimant wasn't making reasonable and customary efforts to find a job. Instead, the Commission made arguments about the Claimant's school and the presumption that full-time students aren't available for work.

[16] The Appeal Division has a decision that says I should be careful when I am looking at this section of the law. The Appeal Division says that I should look for evidence showing that the Commission asked the Claimant for proof of reasonable and customary job search efforts. Also, I should look for evidence explaining whether the Commission ever told the Claimant it was using this section of the law to make a decision about her availability.⁶

[17] I don't have to follow Appeal Division decisions. But in this case, I think the Appeal Division decision is helpful. I don't think there is enough evidence showing that the Commission used this part of the law to disentitle the Claimant.

[18] I am not going to look at whether the Claimant made reasonable and customary efforts to find a job. I don't think the Commission has proven that it used this section of the law to disentitle the Claimant.

[19] This doesn't mean that I am allowing the Claimant's appeal. I still have to look at the other part of the law that talks about availability for work.

⁶ *LD v Canada Employment Insurance Commission*, 2020 SST 688.

Capable of and available for work

[20] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[21] I have to look at three things to consider when I make this decision:

1. You must show that you want to get back to work as soon as someone offers you a suitable job. Your attitude and actions should show that you want to get back to work as soon as you can;
2. You must make reasonable efforts to find a suitable job;
3. You should not set limits that might prevent you from finding a job. If you do set any limits on your job search, the limits should be reasonable.⁷

[22] So, I will go through each of these three factors to decide if the Claimant has proven that she is available for work.

– Wanting to go back to work

[23] I find that the Claimant hasn't proven that she wants to return to the labour market during the times she stopped working or reduced her hours. This is because she decided to focus on her studies instead of returning to the labour market.

[24] The Claimant described her studies during the hearing. She is taking preparation courses. The courses are four months long and end with an exam. She has to attend one online class a week. The class is about 10 hours long. For the rest of the week, the

⁷ In *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

Claimant studies, does quizzes, and watches recorded lectures. She said she spends about 10 hours a day on her studies.

[25] The Claimant's first course started August 23, 2020 and ended December 31, 2020. The exam was January 13, 2021.

[26] The Claimant's EI benefit period started on December 20, 2021. At the hearing, she said she didn't want to work from December 20, 2020 until January 13, 2021. This is because she was studying and getting ready for her exam.

[27] So, I find that the Claimant hasn't shown that she had a desire to return to the labour market from December 20, 2020 to January 13, 2021.

[28] The Claimant started her next preparation course right away after her exam. But she said the exam wasn't until May 2021, so she had more time to work. She wanted to work after she finished her exam. She told her employer that she could work full-time. Her employer didn't have hours for her right away, but she returned to work full-time on February 14, 2021.

[29] The Claimant said she spent about 8 hours a day studying for the second course. At the same time, she was working full-time from February 14, 2021. She earned enough money to pay for her course and her family started to help her. She spoke to a Commission agent about her schedule in March 2021. The Commission agent told her that she could work part time and still collect EI benefits. The Claimant said she wanted more time to focus on her studies, so she started working part-time on March 1, 2021.

[30] The Claimant said she wanted to work after her exam. She worked full-time from February 14 to February 28, 2021. I think this shows that she had a desire to return to the labour market. I find that the Claimant has shown that she wanted to work from January 14 until February 28, 2021.

[31] The Claimant kept working after March 1, 2021, but she reduced her hours to part-time. She worked about 16 hours a week. The employer had full-time work available for her, but the Claimant only wanted to work part-time. She said she made

this decision because a Commission agent told her that she could work part-time. She wanted more time to study because she was getting closer to the next exam.

[32] The Claimant worked part-time and studied from March 1 until April 24, 2021. She said she spent about 10 hours a day studying.

[33] I find that the Claimant hasn't proven that she had a desire to return to the labour market from March 1 until April 24, 2021. This is because she could have worked full-time, but she deliberately decided not to. I think her actions and attitude – deliberately reducing her hours to part-time – show that she didn't have a desire to fully return to the labour market.

[34] The Claimant said that she started working full-time again on April 25, 2021. This is because the Commission decided that she wasn't available for work. The Claimant stopped her course and postponed the next exam. She worked full-time from April 25 until June 30, 2021. I think this shows that she had a desire to return to the labour market from April 25 until June 30, 2021.

[35] Then, on July 1, 2021, the Claimant took a leave of absence from her job. She started her next course and wanted to focus on her studies. The Claimant said she still isn't working because she is studying. Her next exam is on November 12, 2021.

[36] The Claimant hasn't shown a desire to work from July 1, 2021 onwards. This is because she deliberately stopped working to focus on her studies.

[37] Now I will summarize my findings. The Claimant's EI benefit period started on December 20, 2020. Her attitude and actions show that she didn't have a desire to return to the labour market for these periods:

- December 20, 2020 until January 13, 2021
- March 1 to April 24, 2021
- July 1, 2021 onwards

[38] The Claimant's attitude and actions show that she did want to work for these periods:

- January 14 to February 28, 2021
- April 25 to June 30, 2021.

– **Making efforts to find a suitable job**

[39] I find that the Claimant made enough efforts to find a suitable job.

[40] The Commission hasn't made any arguments about the Claimant's job search efforts. The Claimant said she wasn't looking for other work, but she already had a job.

[41] The Claimant worked for the same employer since 2018. She remained in contact with the employer while she was studying. She returned to work with the same employer when she wanted to work and took leave from the job when she wanted to focus on her studies. The Claimant's history of working with this employer and adjusting her schedule to match her studies makes me think it was easy for the Claimant to get work with this employer. In other words, it seems like the employer was ready to let the Claimant work as much as she wanted to work, whenever she was available for work.

[42] So, even though the Claimant didn't do anything to look for work with a different employer, I think it was reasonable for her to keep in contact with her usual employer. I think staying in contact with her usual employer was a reasonable job search activity, because it meant that she could return to work whenever she wanted to work.⁸

⁸ I rely on *Carpentier v Canada (Attorney General)*, A-474-97, and *Canada (Attorney General) v MacDonald*, A-672-93.

– **Unduly limiting chances of going back to work**

[43] I find that the Claimant set personal conditions that unduly limited her chances of returning to the labour market. She set these personal conditions during the times when she deliberately decided not to work so that she could focus on her studies.

[44] The Commission argues that the Claimant has too many personal conditions that unduly limit her chances of going back to work. The Commission says the Claimant is a full-time student and so there is a presumption that she isn't available for work.

[45] The Claimant agrees that she is in school. But she says that she worked full-time and went to school for part of her course. She also described a past history of working and going to school.

[46] Full-time students face a presumption that they aren't available for work. If they can show that they have a history of working while going to school, or if they can show that they have exceptional circumstances, they can overcome this presumption.⁹

[47] I find that the Claimant has shown that she has a history of working and going to school. At the hearing, she said she worked part-time while going to school from 2015 to 2017. She also worked full-time while she was in her current program in February 2021. I give the Claimant's history of balancing work and school some weight.

[48] But I also have to look at the Claimant's actions. She said she studies for about 10 hours a day. She decided to stop working because she wanted more time to focus on her studies. She stopped working because of her school responsibilities until she finished her exam on January 13, 2021. She reduced her full-time hours to part-time starting March 1, 2021 so she would have more time to study. She stopped working on July 1, 2021 so that she could focus on her course and get ready for her next exam.

[49] The Claimant's decisions to leave work or reduce her hours so she could focus on her studies mean that she set personal conditions that made it difficult for her to

⁹ *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

return to the labour market. She set these personal conditions during the following periods:

- December 20, 2020 until January 13, 2021;
- March 1 to April 24, 2021; and
- July 1, 2021 onwards.

[50] When she was ready to work full-time, I agree that her personal conditions didn't make it too hard for her to return to the labour market. She overcame the presumption that students aren't available for work because she was working. She has shown that she didn't have personal conditions that prevented her from working. She didn't have personal conditions that affected her availability for work from January 14 to February 28, 2021, and then again from April 25 to June 30, 2021.

– **So, is the Claimant capable of and available for work?**

[51] EI regular benefits are for workers who are unemployed for reasons outside of their control.¹⁰

[52] But the Claimant wasn't unemployed for reasons outside of her own control. She made her own decision to take herself out of the labour force to focus on her studies. Even though she made a reasonable job search effort for her situation, she set personal conditions because of her studies that made it too hard for her to return to the labour market. So, I find that the Claimant hasn't proven that she was available for work during the following periods:

- December 20, 2020 to January 13, 2021
- March 1 to April 24, 2021
- July 1, 2021 onwards

¹⁰ *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

[53] But the Claimant has shown that she wanted to work during the times she spoke to her employer about returning to work full-time. It was reasonable for her to look for work with her regular employer, since this was the fastest way for her to return to work. Even though she was still in school, I find that her studies didn't make it too difficult for her to work. I find that she has proven her availability for work for the following periods:

- January 14 to February 28, 2021
- April 25 to June 30, 2021.

[54] The Claimant might not be entitled to EI benefits during the periods when she was available for work. The Commission will still need to consider her earnings and other entitlement conditions.

The Claimant's overpayment and Commission misinformation

[55] At the hearing, the Claimant said that she disagreed with the Commission's decision because she had always been honest about her studies. She said Commission agents gave her misleading information about her entitlement to EI benefits.

[56] The Claimant's application shows that she gave the Commission clear and accurate information about her studies from the beginning. She explained her intention to focus on her studies. I believe her when she says that a Commission agent told her that she could reduce her hours to part-time and still collect EI benefits.

[57] At the hearing, the Claimant said she didn't know what kinds of benefits were available for people in her situation. She called the Commission to get advice and ask about government benefits. People rely on the Commission for accurate and reliable information about their entitlement to benefits. It was reasonable for the Claimant to follow the Commission's instructions.

[58] But even though the Claimant acted with good faith from the beginning, she has a large overpayment. At the hearing, she described how the stress from this situation has affected her. She said she had to take a break from her studies. She had a

miscarriage. The Commission's poor advice and delayed decision making caused the Claimant real harm and caused her significant hardship.

[59] I can't order the Commission to write off the overpayment, but I ask that the Commission carefully consider the Claimant's circumstances and consider writing off the overpayment. I note that paragraph 56(1)(f) of the Regulations gives the Commission broad powers to write off an overpayment when it would cause undue hardship for someone to repay.

Conclusion

[60] I am dismissing the Claimant's appeal, but I am making some changes to the Commission's decision. I find that she wasn't available for work within the meaning of the law for the periods from December 20, 2020 to January 13, 2021; March 1 to April 24, 2021; and from July 1, 2021 onwards.

Amanda Pezzutto
Member, General Division – Employment Insurance Section