



Citation: *AN v Canada Employment Insurance Commission*, 2021 SST 873

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (426759) dated July 8, 2021
(issued by Service Canada)

Tribunal member: Raelene R. Thomas
Type of hearing: Teleconference
Hearing date: October 27, 2021
Hearing participants: Appellant
Appellant's representative
Decision date: November 2, 2021
File number: GE-21-1437

Decision

[1] A. N. is the Claimant in this appeal.

[2] I am allowing his appeal. This means I agree with the Claimant.

[3] The Claimant has shown that he was available for work. This means that he isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to EI benefits.

Overview

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits from November 22, 2020, because he wasn't available for work. As a result, it says he must pay back \$10,500 in EI benefits.

[5] The law says a claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be capable of working and searching for a job.

[6] I must decide whether the Claimant has proven that he was available for work. The Claimant 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 was available for work.

[7] The Commission says that the Claimant wasn't available because he was receiving money for loss of earnings from the Workplace Safety and Insurance Board (WSIB). It says this means that he was not capable of working.

[8] The Claimant disagrees and says that he was capable of and available for work. The money he receives from WSIB is a permanent impairment award that will be paid to him until he is 65 years old whether he is working or not. When he was laid off he was sent to an outside agency to help him look for work. He did all the activities that were required for him to look for work. He returned to work with his employer during the week of April 18, 2021.

Matter I have to consider first

The hearing was adjourned

[9] This hearing started on September 17, 2021. At that hearing the Claimant explained that he had a learning disability and the papers he was sent about his appeal were difficult to read and understand. The Claimant's representative, his Mother, confirmed this was the case.

[10] I adjourned the hearing to let the Claimant get in touch with an organization that could help. We agreed that the hearing would continue on October 27, 2021.

[11] The Claimant did speak to an organization that helped him get ready for the hearing on October 27, 2021. The hearing continued on October 27, 2021.

Issue

[12] I have to decide if the Claimant available for work from November 22, 2020.

Analysis

[13] 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, it says he has to meet the criteria of both sections to get benefits.

[14] However, I find that I only need to decide if the Claimant was available for work under one section of the *Employment Insurance Act* (EI Act). That is section 18(1)(a). My reasons for this finding follow.

[15] First, the 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* (EI Regulations) at section 9.001 help explain what "reasonable and customary efforts" mean.

¹ This requirement is at section 50(8) of the EI Act.

[16] 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. This requirement is at section 18(1)(a) of the EI Act. Case law says there are three things a claimant has to prove to show that they are “available” in this sense. I will look at those factors below.

[17] The Commission said that the Claimant was disentitled from receiving benefits because he wasn’t available for work based on these two sections of the law. It said that he told them he was not looking for work. It also said that he was not capable of work and because of his incapability he was receiving benefits through the WSIB. The Commission argued that since the Claimant was not capable of work due to an involuntary restriction and he told them he was not looking for jobs, he was not available for work.

[18] Under section 50(8) of the EI Act, the Commission may ask a claimant to prove that he has made reasonable and customary efforts to obtain suitable employment in accordance with the criteria in section 9.001 of the EI Regulations. Section 9.001 states that its criteria are to be used when applying section 50(8) of the EI Act. Section 9.001 does not say that its criteria apply to determine availability under section 18(1)(a) of the EI Act.

[19] If a claimant does not comply with a section 50(8) request to prove that he has made reasonable and customary efforts, then he may be disentitled from receiving benefits under section 50(1) of the EI Act. Section 50(1) says that a claimant is disentitled to receive benefits until he complies with the Commission’s request under section 50(8) and supplies the required information.

[20] A review of the appeal file shows that the Commission did not disentitle the Claimant for his failure to comply with its request for his job search activities. The appeal file shows the Commission’s first decision disentitled the Claimant because he was receiving WSIB while receiving regular EI benefits.

[21] The Commission did not ask the Claimant about his job search activities during the reconsideration process.² The Commission recorded that the Claimant's WSIB benefits were due to a permanent disability that reduces his capability to work full time. The Commission could not decide to disentitle the Claimant for the reason that he did not comply with their request for job search activities because it did not ask him about his job search activities. As a result, I find I do not need to decide that the Claimant's job search activities satisfy the section 9.001 criteria in order to find him to be available for work and entitled to EI benefits.

[22] This means I only need to decide if the Claimant was capable and available for work under paragraph 18(1)(a) of the EI Act.

Suitable Employment

[23] To decide the Claimant's capability and availability, I must first define what is considered suitable employment for the Claimant. The law sets out the criteria I must consider when determining what constitutes suitable employment. Those criteria include whether:

- a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;
- b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and,
- c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.³

[24] The Claimant testified that he has worked for twenty years. Due to his learning disability he is not able to read well and cannot easily understand what he reads. He can understand instructions that are told to him.

² The Commission recorded a note that the Claimant told them on June 11, 2021 that WSIB him not to look work for work. The Claimant's explanation of this statement is later in the decision.

³ EI Regulations, subsection 9.002

[25] The Claimant testified that he was working with stone when he injured his back in 2018. He was referred to the WSIB. The doctor told him that he could not lift anything over 10 pounds, he could not walk long distances, stand for a long time or sit for a long time. He is not allowed to push or pull heavy things. The Claimant's former employer was able to accommodate him in a different job. He returned to work in May 2020 in the different job, which is driving a loader on the employer's worksite.

[26] The Claimant said in his old job he worked year round. That is because he was able to work outside in the spring, summer and fall and in the winter the employer moved the work inside. In his new job, driving a loader at the work site, there was no work once the snow came so he was laid off. He was laid off on November 13, 2020. He expected to be recalled to work when the snow melted.

[27] I find that the evidence shows suitable employment for the Claimant is employment that would not require that he lift more than 10 pounds, to sit or stand for a long time, or to walk for long distances. The employment would have to be no further from his home than his physical condition would allow him to commute. Suitable employment would also require that he not have to read complex documents, or if he needs to read, that he be given time to read and have documents that he does not understand explained to him.

Capable of and available for work

[28] The Commission says that the Claimant was not capable of work because he was receiving WSIB benefits. I do not agree with the Commission for two reasons. First, there is no evidence in the file that receiving benefits from WSIB in and of itself means that a claimant is not capable of work. Second, there is no evidence that this Claimant is not capable of full-time work despite receiving WSIB benefits.

[29] The Claimant testified he was referred to an external service provider by the WSIB when he stopped working in November 2020. The external service provider was hired by the WSIB to help the Claimant find a new job.

[30] The Claimant sent the Tribunal a copy of two reports completed by the external service provider. One report is called the “Job Placement Five Week Status Report” (I will call it the 5-week Report). The other report is called the “Job Placement Closure Report” (I will call it the Job Placement Report).

[31] The 5-week Report shows that the Claimant was referred to the service provider on November 23, 2020. In the 5-week Report under the heading “Suitable Occupation and NOC Code” is “Maintenance Equipment Operator, NOC 7522.” In the 5-week Report under the heading “Identify any challenges / flags presented by the worker impacting job placement” it is noted that “no challenges were presented by the worker.”

[32] The Closure Report shows that the external service provider’s services were first extended to March 26, 2021. There is a note that the services might be extended for another four weeks. The services ended on April 23, 2021. In the Job Placement Report under the heading “Identify any challenges / flags presented by the worker impacting job placement” it is noted that “no challenges were presented by the worker impacting job placement.”

[33] Throughout the period covered by the two reports, the service provider and the Claimant contacted potential employers. The external service provider discussed the Claimant’s abilities with employers and arranged for his resume to be sent to employers and for interviews.

[34] The external service provider stated there were no challenges or flags that would impact the Claimant’s job placement. The Claimant was referred to the external service provider by WSIB for help finding a job. There is no evidence that he could not work full-time. The services of the external service provider began when he was first laid off and then stopped when the Claimant was recalled to work as a loader operator. That work was and is full-time. As a result, I find that the Claimant was capable of work from November 13, 2020.

[35] 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:⁴

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

[36] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.⁵

– **Wanting to go back to work**

[37] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available.

[38] The Claimant testified that he has been working for over 20 years. He has worked mostly in physical labour jobs. He wants to work so he can earn money to pay his bills.

[39] The Claimant sent the Tribunal the 5-week Report and the Job Placement Report from the external service provider. He testified that he would talk to a placement worker every week. He would do job search activities (described below) each week. This evidence tells me that the Claimant wants to go back to work as soon as a suitable job is offered.

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

[40] The Claimant has made enough effort to find a suitable job.

⁴ 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.

⁵ Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[41] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.⁶

[42] The Commission submitted that when it asked the Claimant if he looked for work the Claimant told them he had not looked for work. The appeal record shows this to be the case, but the Claimant's evidence does not support this statement.

[43] The Claimant explained that he did not answer the Commission's question about looking for work correctly. He testified that at the same time when he was looking for work he also called his former employer. He knew that he would be returning to work once the snow was gone. He called his employer in April to ask when would they have work for him. The Claimant's boss told him it would be a while. The Claimant said he got a call the next week to say come back to work the following the week. The Claimant testified that when he told the external service provider that he was going back to work with his employer she told him to stop looking for work. That is what he meant when he answered the Commission's question about looking for work.

[44] I accept the Claimant's evidence that he did not answer the question correctly. The Claimant gave that evidence under affirmation and I was able to ask him questions about his evidence. The Job Placement Report confirms that the Claimant was in touch with his former employer and returned to work the following week.

[45] The Claimant's efforts to find a new job are well documented by the external service provider. The 5-week Report and the Job Placement Report cover the period November 23, 2020 to April 23, 2021, when he notified the service provider that he had gone back to work.

[46] The Claimant completed Job Search Training on December 11, 2020. Then he began his job search activities. The external service provider discussed searching within the hidden job market, completing cold calls and information interviews. They reviewed the local labour market, different job search websites, and created an

⁶ I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

employer list. In the following weeks the Claimant cold called employers, applied for jobs, searched job sites on the internet, and attended interviews. The Claimant also contacted his former employer to see when he could return to work. In addition, during this time the external service provider helped him create lists of potential employers, called employers to see if they were hiring, and followed up with employers on cold calls where the Claimant received a response to a cold call. In my opinion, the Claimant's job search efforts taken together with his belief that he would return to work with his former employer, demonstrates that he made efforts to find a suitable job.

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

[47] The Claimant has not set personal conditions that might have unduly limited his chances of going back to work.

[48] The Claimant testified that he has a driver's license and has access to transportation to allow him to commute to work. He can commute for 30 minutes to a neighbouring town to work. The Claimant said there are no times of the day, week or year that he cannot work. The Claimant said he was willing to take a job that required on the job training. With respect to a wage he said that he would like to earn what he had been earning prior to his injury, but that he did take a pay cut to work in the new job.

[49] The Claimant's physical limitations are not personal conditions that unduly limit his return to the workplace. A claimant is not required to be available for jobs unless the jobs are suitable. Any jobs that exceed a claimant's capabilities would not be suitable jobs.⁷ As stated above, the Claimant's physical limitations and learning disability restricts what is suitable employment for him. However, there is no evidence that the Claimant has set personal conditions outside of the ones imposed by his physical conditions.

⁷ I agree with the reasoning of the Tribunal's Appeal Division (AD) in *S.A. v Canada Employment Insurance Commission*, AD-20-390. The AD stated that a claimant who is unwilling to work at any job that would exceed his or her health and physical capabilities is not setting "personal conditions

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

[50] Based on my findings on the three factors, I find that the Claimant has shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[51] The Claimant has shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving EI benefits. So, the Claimant may be entitled to EI benefits.

[52] This means that the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section