



Citation: *DK v Canada Employment Insurance Commission*, 2022 SST 246

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

Decision

Appellant: D. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision dated September 28, 2020
(issued by Service Canada)

Tribunal member: Angela Ryan Bourgeois

Type of hearing: Teleconference

Hearing date: January 27, 2022

Hearing participant: Appellant

Decision date: April 13, 2022

File number: GE-21-2370

Decision

[1] The appeal is allowed, in part. I've decided the following:

- The Claimant was capable of, available for, and unable to find suitable employment from January 4, 2020, to February 9, 2020, except for the week of January 12, 2020, when he wasn't capable of working at any suitable work.
- The Claimant was incapable of doing any suitable employment from February 10, 2020, to April 16, 2020, but he was otherwise available for suitable employment.
- The Claimant was capable of, available for, and unable to find suitable employment from April 17, 2020, to June 14, 2020.

Overview

[2] This appeal is about the Claimant's entitlement to employment insurance benefits under the *Employment Insurance Act* (EI Act) between January 4, 2020, and June 14, 2020. The dispute is over the Claimant's capacity and availability for work since he injured his ankle in January 2020. The matter has been considered twice by the General Division and twice by the Appeal Division.

[3] When the matter was referred to me by the Appeal Division, I was tasked with deciding following:

- when the Claimant became incapable of performing the duties of his regular or usual employment or of other suitable employment
- if the Claimant became incapable between January 4, 2020, to mid-February 2020, when he exhausted his sickness benefits
- whether the Claimant was capable of and available for work from when he exhausted his sickness benefits to June 14, 2020.¹

¹ The Commission's decision was that the Claimant couldn't be paid benefits from March 23, 2020, because he was unable to work for health reasons and had used his 15 weeks of sickness benefits. See

[4] For the purposes of my decision, I've reviewed all documents in the file record, but I have not listened to recordings of the previous hearings. I held a new hearing, and have considered only the oral testimony from that hearing.

Issue

[5] From January 4, 2020, and June 14, 2020:

- For which weeks was the Claimant capable of, available for, and unable to find suitable employment?
- For which weeks was the Claimant unable to work because of his ankle injury, but was otherwise available for work?

Analysis

Regular benefits

– Claimants have to be available for work

[6] Claimants are only entitled to employment insurance regular benefits if they prove that they are capable of and available for work but unable to find a suitable job.² Availability has to be proven on a balance of probabilities. This means that it has to be more likely than not that the claimant was available for work.

[7] To prove his availability, the Commission can ask a claimant to show that they are making reasonable and customary efforts to find a suitable job.³

Sickness benefits

– Claimants have to be otherwise available

[8] If a claimant is incapable of working because of illness or injury, and is otherwise available for work, they may be able to receive employment insurance sickness

page GD3-119. The Claimant's sickness benefits expired in March 2020, because the Commission converted his benefits to sickness benefits in January 2020. The Claimant's disputes the conversion of his benefits to sickness benefits. This is why I have to look at the Claimant's capacity and availability for work before March 23, 2020.

² This is in section 18(1)(a) of the *Employment Insurance Act* (EI Act).

³ This rule is in section 50(8) of the EI Act. Claimants aren't entitled to benefits for as long as they fail to prove that they are making reasonable and customary efforts (section 50(1) of the EI Act).

benefits.⁴ The illness or injury is any illness or injury that makes a claimant incapable of performing the duties of their regular or usual employment, or of other suitable employment.⁵

The Claimant's usual work and other suitable jobs

[9] I find the following is the Claimant's regular or usual employment:

- a) Safety work. The Claimant's previous two jobs were in safety work. He testified that this is not physically demanding work. He has been trying to work more consistently at this type of employment for the past number of years because it is less physically demanding than what he did before.
- b) Unskilled, more physically demanding jobs. Examples of this type of work he has done in the past include fly-out labour work, unskilled work in crab plants, and wood working.

[10] The law says that for work to be suitable, it must meet these conditions:

- the commute and work performance must be within the claimant's health and physical capabilities
- the hours of work cannot be incompatible with the claimant's family obligations or religious beliefs
- the nature of the work cannot be contrary to the claimant's moral convictions or religious beliefs.⁶

[11] The law also says that the following is not suitable work:

- Work that comes from a labour dispute work stoppage;

⁴ See section 18(1)(b) of the EI Act. This section includes incapacity because of quarantine, but quarantine isn't relevant to this case.

⁵ See section 40(4) of the EI Regulations.

⁶ Section 9.001 of the EI Regulations.

- Work in the claimant's usual occupation but with lower pay or less favourable conditions than those recognized by good employers.
- Work not in the claimant's usual occupation and but with lower pay, or less favourable conditions than those of his usual occupation.⁷

[12] After a reasonable interval from becoming unemployed, suitable work includes work not in the claimant's usual occupation as long as the pay is not less and the conditions not less favourable than those recognized by good employers.⁸

[13] Besides his regular or usual job, I find that other suitable work for the Claimant includes less physical or sedentary work. The Claimant suggested that one suitable job for him would be working at a call centre because he has good communication skills. Other suitable work would be playing the piano. The Claimant says he could do these types of jobs. I see no reason why he couldn't.

[14] I see nothing in the file to suggest that the Claimant wouldn't usually be physically capable of doing this type of unskilled, sedentary job. There is nothing to suggest that this type of work would be incompatible with the Claimant's family obligations or contrary to his moral convictions or religious beliefs. I see nothing to suggest that this type of work would be unsuitable from a financial aspect.

The Claimant's testimony

[15] Overall, I find the Claimant's testimony is credible. His testimony was direct and he openly answered my questions. The Commission says that the Claimant talked in circles when he spoke to its agents. This wasn't so of his testimony.

[16] I have carefully reviewed the Commission's supplementary records of claims. I find that any inconsistencies between the Claimant's testimony and the Commission's supplementary records of claims are the result of the Claimant's misunderstanding the situation. In its representations, the Commission acknowledged that its agents made two incorrect statements.⁹ One incorrect statement was made to a Member of

⁷ Sections 6(4) and (5) of the EI Act.

⁸ See section 6(5) of the EI Act.

⁹ See pages GD4-4 and GD4-5.

Parliament's assistant who was trying to help the Claimant understand what was going on with his EI claim. Another incorrect statement was made to the Claimant himself. If the Commission's agents didn't understand the Claimant's situation well enough to provide correct information, it is understandable that the Claimant didn't understand what the Commission had decided and what he was being asked to prove.

[17] The Commission didn't believe the Claimant when he said he didn't understand about sickness benefits because he'd claimed sickness benefits before.¹⁰ I accept what the Claimant said about not understanding about sickness benefits. He clearly explained that in the past he reported when he couldn't work. His biweekly reports confirm this. He didn't provide a medical note or do anything special, and he was still paid benefits. The overpayment breakdown chart confirms this.¹¹ So, he didn't realize that he was getting a different type of benefit. The Claimant's understanding that he wasn't getting anything other than his usual benefit is understandable. It was a reasonable conclusion for him to draw. This doesn't call his credibility into question.

[18] I especially considered the statements recorded in supplementary record of claim dated July 14, 2020.¹² The Commission reported that the Claimant was in a cast until April 30, 2020, and likely wasn't "available" for many weeks after that. The statement isn't clear if the Claimant and writer were talking about the Claimant's availability overall, or only the capacity aspect of his availability. The Claimant's cast was removed on April 16, 2020, not April 30, 2020, so I find it likely he was speaking casually, without regard to the impact his off-the-cuff statements would have on his claims for benefits. I prefer his testimony because it was given under affirmation and after he better understood the importance of being accurate in his statements, and the impact his statements would have on his entitlement to benefits.

The Claimant was capable of working as of January 4, 2020

[19] I find that the Claimant was capable of performing the duties of his regular or usual employment, or of other suitable employment, between January 4, 2020, and

¹⁰ See page GD4-5.

¹¹ See page GD3-138

¹² See page GD3-109.

February 9, 2020. There is one exception. That is the week of January 12, 2020. The Claimant says he was incapable of working that week because of his diabetic symptoms. I accept his statement about this. I see no reason to doubt what he says about this.

[20] I find the Claimant injured his ankle on January 4, 2020. The Claimant isn't sure of the exact date, but the best evidence in the file about this is his original statements that the injury happened on January 4, 2020.

[21] The Claimant testified that he went about his business as usual until he learned his ankle was broken around February 15, 2020. He thought he had sprained his ankle. He says he was limping. But continued to take care of himself during this time. He continued to drive, went out to see friends, and got groceries. He lives alone. He continued his daily walks. He didn't walk much the first week (maybe 30 minutes daily), but after that continued to walk 30 to 90 minutes daily. He admits he wasn't feeling his best, but had worked with injuries before, and often works despite blood sugar issues.

[22] I find that although the Claimant may not have been able to do physical work as of January 4, 2020, he could have done other suitable work, such as working in a call centre.

[23] The Claimant's biweekly reports show that sometimes he reports that he isn't capable of working because of sickness. I asked the Claimant about this. He explained that sometimes he can't work because he feels sick due to his diabetes. He said he reported that he couldn't work the week of January 12, 2020, because of symptoms from his diabetes, not his ankle. I believe what the Claimant says about this. There is no reason for me to doubt what he says.

[24] As the Claimant reported that he was incapable of working the week of January 12, 2020, I find it likely that if he hadn't been able to work the week before or the weeks after, because of his ankle, that he would have so reported. It is unlikely that the Claimant would have reported being incapable of working because of his diabetes, and not because of his ankle.

[25] I see no evidence to suggest that the Claimant's condition worsened before February 10, 2020. The Claimant testified that he went to the doctor because his ankle hadn't improved—not because it was worse.

[26] This means that the Commission should not have converted the Claimant's regular benefits to sickness benefits as of January 5, 2020.¹³

The Claimant was available for work between January 4, 2020, and February 9, 2020

[27] I have considered the Claimant's availability for work during this period.¹⁴ But there doesn't appear to be much dispute about the Claimant's availability during this period. The Commission already paid the Claimant regular benefits.¹⁵ The Commission's later disentitlement for this period was because of his *capacity* to work, not because he wasn't available or making enough job search efforts.¹⁶

[28] The Claimant testified that he was always looking for work. He was constantly looking for work on job boards (union boards and Indeed), reviewing emails from Zip Recruiter, and talking to people. He was pursuing the possibility of doing more safety work, which he's been trying to get into for a number of years. He has a resume.

[29] I am satisfied that the Claimant's efforts during this month are enough to show that he had a desire to return to work and that he was doing enough to find a job. The Claimant didn't impose any personal conditions that might have unduly limited his chances of getting back to work.

[30] I find that his efforts were reasonable and customary. His testimony that he was always looking for work shows that his efforts were sustained. The Claimant was looking for suitable work, including work at call centre and safety work. This was

¹³ See the table below to see the relevant benefits as per my findings.

¹⁴ I considered the three factors set out in *Faucher v Canada Employment and Immigration Commission*, A-56-96: 1. A desire to return to the labour market as soon as a suitable job is offered; 2. The expression of that desire through efforts to find a suitable job; 3. Not setting personal conditions that might unduly limit the chances of returning to the labour market. I also considered whether he was making reasonable and customary efforts to find a job pursuant to section 50(8) of the EI Act and section 9.001 of the EI Regulations.

¹⁵ See page GD3-138.

¹⁶ The initial decision dated August 26, 2020, imposed a disentitlement about being unable to work due to health reasons as of March 23, 2020.

suitable work during this period because the Claimant couldn't have done more physically demanding work because of his ankle. He was limping, and couldn't have done physically demanding work.

The Claimant became incapable of all work on February 10, 2020

[31] There is no dispute that the Claimant wasn't capable of working from February 15, 2020, to April 16, 2020. After the Claimant's surgery on February 15, 2020, he couldn't put weight on his ankle.¹⁷ He testified that he couldn't drive during this time. So, I accept that the Claimant wasn't capable of working from February 15, 2020, to April 16, 2020.

[32] But I find that he became incapable of working at all occupations a few days before that - as of February 10, 2020. This is because the X-ray revealing the fracture and the seriousness of his injury was done on February 10, 2020.¹⁸ After that, he couldn't work because he was dealing with his medical condition and attending medical appointments. He was admitted to the hospital for surgery on February 13, 2020, and had surgery on February 15, 2020.¹⁹

[33] I find that from February 10, 2020, to April 16, 2020, the Claimant was otherwise available for work. The Claimant says he was available for work but for his injury. The Commission hasn't argued that the Claimant wasn't otherwise available for work. And I see nothing in the file to suggest that he wouldn't have been available for work if it hadn't been for his injury.

The Claimant was capable of working as of April 17, 2020

[34] The parties dispute when the Claimant could work after the removal of his cast. The Claimant says he could work right away. The Commission says the Claimant wasn't capable of working until June 15, 2020. It relies on an October 2020 doctor's note.

[35] I find that the Claimant was capable of working *after* his cast was removed on April 16, 2020. He couldn't work on the day his cast was removed as he was seeing the

¹⁷ See page GD3-125.

¹⁸ See the doctor's note on page GD3-118

¹⁹ See page GD3-125.

doctor and physiotherapist. But he was capable of working the next day, on April 17, 2020. This is why.

[36] The Claimant testified that he was capable of working after his cast was removed. He explained that within a week he was doing physical yard work, sawing down trees and hauling them to the beach. He could walk on uneven ground without any aid. He recalls doing this because of how happy he was to be back out in the yard again. He says he was careful not to reinjure his ankle, but he could have stood on his foot all day.

[37] The Claimant provided a physiotherapist report. The report shows that the Claimant's only limitation when his cast was removed on April 16, 2020, was slightly decreased range of motion. The Claimant reported doing well functionally, and opted for home exercises. This shows that the Claimant didn't have significant limitations, and certainly wasn't incapable of all suitable work.

[38] I am satisfied that even if the Claimant had a decreased range of motion, and his ankle may not have been back to full strength, he would have been able to do suitable work, such as call centre work. The Claimant's ankle may have prevented him from doing rigorous physical work (his yard work would have been done at his own pace), but it would not have prevented him from doing less physically demanding work.

– **The October 2020 medical note**

[39] The Commission relies on the note the Claimant obtained from his surgeon in October 2020. The note says that the Claimant was capable of returning to work on June 15, 2020. The Claimant explained that he thought the Commission was looking for a note that he could work in July and August 2020. The Claimant reported that on the advice of the Commission's agent, he reported that he was incapable of working in July and August 2020. He thought the Commission was looking for a medical note so these reports could be corrected. He made a special appointment with the surgeon for the note. He explained that he needed a note for July and August 2020. The surgeon asked him if June 15, 2020, would work. The Claimant said yes, and so the doctor gave him a note that he was capable of working as of June 15, 2020. The Claimant says this doesn't mean he wasn't capable before June 15, 2020.

[40] I prefer the evidence from the physiotherapist as to the Claimant's capacity from April 16, 2020, and June 14, 2020. This is why:

- I accept what the Claimant says about how the October 2020 medical note came about. I see no reason to doubt what he says about this. June 15, 2020, was a random date based on the Claimant's misunderstanding of what the Commission was asking him to prove.
- The physiotherapist saw the Claimant on April 16, 2020, and reported her physical findings on that date.
- The surgeon didn't see the Claimant between April and October 2020, so he has no direct knowledge of the Claimant's physical capabilities during that time.

[41] I considered that the Claimant told the Commission that he would have taken more sickness time if he had it. I'm not persuaded that this means he wasn't capable of working from April 17, 2020, to June 14, 2020. I have to look at the evidence as a whole. I can't focus on an off-the-cuff comment made by the Claimant. Further, the Commission's notes are not a transcript of the conversation, and don't necessarily convey what the Claimant meant.

The Claimant was available for work as of April 17, 2020

[42] I find that the Claimant was available for and unable to find a suitable job as of April 17, 2020.

[43] Claimants who want to prove their availability must prove three things:

- they want to go back to work as soon as a suitable job is available
- they are making efforts to find a suitable job
- they haven't set personal conditions that would unduly limit their chances of returning to work.²⁰

²⁰ These three factors are set out in a case called *Faucher v Canada Employment and Immigration Commission*, A-56-96.

[44] Despite the pandemic, the Claimant reported that he was looking for work. I find this shows he had a desire to return to work as soon as a suitable job was offered.

[45] The Claimant's job search efforts show that he was actively looking for work. Between April 2020, and June 2020, Canada was shutting down many industries, and travel was restricted. But the Claimant continued to look for work. He looked for work both locally and for fly-out jobs. He did this by looking at job banks, such as Indeed and the union boards. He reviewed emails from Zip Recruiter. He networked with people in the industry. Given the unusual job market during this period of time, this is enough to satisfy this second factor.

[46] The Claimant didn't have any restrictions that unduly limited his chances of returning to work. Any limitations in finding work from April 17, 2020, to June 14, 2020, were because of the pandemic, government closures, and travel restrictions (as he often works away). The Claimant didn't impose any personal conditions.

[47] I also have to consider if the Claimant was making reasonable and customary efforts to find a suitable job.²¹ To satisfy this condition, the job search efforts must be sustained and directed at finding suitable employment.

[48] The Claimant has a resume. He networked, looked for work online, including Indeed and the union board, and was registered with Zip Recruiter. He says he was always looking for work, so I find his efforts were consistent. He was looking for work similar to what he's done in the past, so I find his efforts were directed at finding suitable employment. Given the ongoing pandemic from mid-April 2020, to mid-June 2020, I find that the Claimant was making reasonable and customary efforts to find a suitable job.

Procedural matters

I will accept documents sent in after the hearing

[49] The Claimant argued that he was capable of working when his cast was removed on April 16, 2021. I gave him time to provide evidence to support his statement. Within

²¹ See section 9.001 of the EI Regulations to see what I have to consider.

the allotted time, he filed a letter from his physiotherapist and his own accounting about his capacity (RGDN2). The accounting was similar to his testimony. The documents were shared with the Commission, and the Commission was given time to provide a response. The Commission didn't object to the additional documents, and didn't provide any further submissions. As the documents were relevant, and their acceptance wouldn't cause any prejudice to the Commission, I accepted the documents as evidence.

Conclusion

[50] The appeal is allowed in part.

[51] Based on my findings about the Claimant's capability and availability for work, the Claimant's benefits are:

Week starting:	Week Code	Benefit	Comment
December 29, 2019	2219	Sickness (4th week) ²²	As per the Claimant's biweekly report
January 5, 2020	2220	Regular	
January 12, 2020	2221	Sickness (5th week)	As per the Claimant's biweekly report
January 19, 2020	2222	Regular	
January 26, 2020	2223	Regular	
February 2, 2020	2224	Regular	
February 9, 2020	2225	Sickness (6th week)	
February 16, 2020	2226	Sickness (7th week)	
February 23, 2020	2227	Sickness (8th week)	
March 1, 2020	2228	Sickness (9th week)	
March 8, 2020	2229	Sickness (10th week)	
March 15, 2020	2230	Sickness (11th week)	
March 22, 2020	2231	Sickness (12th week)	
March 29, 2020	2232	Sickness (13th week)	
April 5, 2020	2233	Sickness (14th week)	

²² The Claimant's first three weeks of sickness benefits were for weeks 2211, 2213, and 2216. See page GD3-138, and biweekly reports for these weeks (pages GD3-21, GD3-25, GD3-33).

April 12, 2020	2234	Sickness (15 th week) ²³ and Regular	Sickness on April 13, 14, 15 and 16, 2020. Regular on April 17, 2020.
April 19, 2020	2235	Regular	
April 26, 2020	2236	Regular	
May 3, 2020	2237	Regular	
May 10, 2020	2238	Regular	
May 17, 2020	2239	Regular	
May 24, 2020	2240	Regular	
May 31, 2020	2241	Regular	
June 7, 2020	2242	Regular	
June 14, 2020	2243	Regular	

Angela Ryan Bourgeois

Member, General Division–Employment Insurance Section

²³ This is the Claimant's 15th week of sickness benefits. He used four days from this week.