



Citation: *GK v Canada Employment Insurance Commission*, 2022 SST 437

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

Decision

Appellant: G. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (439474) dated November 19, 2021 (issued by Service Canada)

Tribunal member: Gary Conrad

Type of hearing: Videoconference

Hearing date: January 27, 2022

Hearing participant: Appellant

Decision date: January 28, 2022

File number: GE-21-2555

Decision

[1] I find the Claimant has not proven his availability for work for both periods of disentitlement. This means the appeal is dismissed.

Overview

[2] Claimants have to be available for work in order to get regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job.

[3] The Commission decided that the Claimant was disentitled from being paid EI benefits from December 13, 2020, to April 30, 2021, and from September 8, 2021, onwards.¹

[4] The Claimant says that he has a job, working at the city pool, but he did not get any work while COVID restrictions closed down his workplace.

[5] The Claimant says he did not look for another job while he was waiting for his workplace to reopen as he really liked the job he had and did not have an interest in getting another one.

[6] The Claimant says his job also worked really well with his schooling as it was very accommodating to his school schedule.

[7] I must decide whether the Claimant has proven² that he was/is available for work.

Matter I have to consider first

[8] In their submissions the Commission states they disentitled the Claimant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

¹ See GD03-41 which upholds GD03-29

² The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

[9] In looking through the evidence, I did not see any requests from the Commission to the Claimant to prove his reasonable and customary efforts, or any claims from the Commission that if they did, his proof was insufficient.

[10] I further find the Commission did not make any detailed submissions on how the Claimant failed to prove to them that he was making reasonable and customary efforts; the Commission only summarized what the legislation says in regard to subsection 50(8) of the Act and what it says about reasonable and customary efforts.

[11] Based on the lack of evidence the Commission asked the Claimant to prove his reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Issue

[12] Was/Is the Claimant available for work?

Analysis

[13] The law requires claimants to show that they are available for work.³ In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.⁴

[14] The Commission disentitled the Claimant for two periods, from December 13, 2020, to April 30, 2021, and from September 8, 2021, onward, so I will be looking at the Claimant's availability in relation to both of those periods.

[15] In considering whether a student is available pursuant to section 18 of the Act, the Federal Court of Appeal, in 2010, pronounced that there is a presumption that claimants who are attending school full-time are unavailable for work.

³ Paragraph 18(1)(a) of the *Employment Insurance 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.

⁴ Paragraph 18(1)(a) of the *Employment Insurance Act*.

[16] The Act was recently changed and the new provisions apply to the Claimant.⁵ As I read the new provisions the presumption of unavailability has been displaced. A full-time student is not presumed to be unavailable, but rather must prove their availability just like any other claimant.

[17] In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.⁶ The Claimant has to prove three things to show he is available:

1. A desire to return to the labour market as soon as a suitable job was/is available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might unduly limit their chances of returning to the labour market⁷

[18] I have to consider each of these factors to decide the question of availability,⁸ looking at the attitude and conduct of the Claimant.⁹

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

[19] I find the Claimant has not shown he had a desire to return to the labour market as soon as a suitable job was available for either period of disentitlement.

[20] The Claimant testified that he did not look for other work when his workplace shut down due to COVID.

[21] The Claimant says that he has not resumed working when his workplace did reopen and he was in university as he is almost done school and he wants to get that

⁵ Subsection 153.161(1) of the *Employment Insurance Act*

⁶ Paragraph 18(1)(a) of the *Employment Insurance Act*.

⁷ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁸ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁹ *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

done so can he then get full-time work. The Claimant said the same thing in his Training Questionnaires.¹⁰

[22] I find the Claimant's decision to focus on school and not make efforts to return to work once his employer opened up again, or find alternative employment when his employer was closed due to COVID, shows that he did not, and does not, have a desire to return to the labour market for either period of disentanglement.

Has the Claimant made efforts to find a suitable job?

[23] The Claimant did not, and is not, making enough efforts to find a suitable job. This finding applies to both periods of disentanglement.

[24] I can understand the Claimant liked his job, as it easily worked around his school schedule, and did not want to look for another one, preferring to wait until his job started again once COVID restrictions were lifted, but he cannot wait to be recalled for work, he must seek employment.¹¹

[25] The Claimant also said that he was not working once his job reopened and he was in school as he was waiting to finish school so that he would be able to apply for a full-time position. But that desire does not exclude him from having to look for work. He needs to be actively searching for employment in order to be paid benefits.

[26] Even if the Claimant had resumed working part-time at his job around his school schedule, that does not mean he did not need to look for work, or that his efforts were sufficient in trying to find employment.

[27] The Claimant cannot decide to stay at a position and be subsidized by EI if it is not providing enough shifts or hours for him, due to the fact that he cannot, or will not, take full-time employment due to his schooling.

¹⁰ GD03-13 and in another questionnaire GD03-16.

¹¹ *De Lamirande v Canada (Attorney General)*, 2004 FCA 311

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

[28] I find the Claimant has set a personal condition, that personal condition being his decision to attend schooling, that might unduly limit his chances of returning to the labour market for both periods of disentitlement,

[29] The Claimant says that his schooling was, and is, all online, due to COVID.

[30] The Claimant says he did, and does, have classes Monday to Friday, and the times of those classes vary, but generally there is a class in the morning for a couple hours and a class in the afternoon for a couple hours.

[31] The Claimant says there is also homework, studying, and assignments that must be done outside of class time.

[32] The Claimant says this is the reason he loved his job and did not want to look for another one when his employer was shut down due to COVID, is that it was/is very accommodating to working around his school schedule.

[33] The Claimant also says he could not have worked full-time due to his university.

[34] The Claimant says that he wanted to wait until his schooling was done before returning to work, or looking for work, so that he could then apply for a full-time position and said as such in his Training Questionnaires.¹²

[35] I find the Claimant's testimony that the reason he liked his job so much was that it could easily be scheduled around his schooling, supports that his schooling was something that impacted his availability, thus unduly limiting his chances of returning to the labour market.

[36] I find, that the Claimant having to attend his classes at set times on set days, means that his availability is restricted to certain times on certain days, which would

¹² He said this in two Training Questionnaires, one on GD03-13 and in another questionnaire on GD03-16.

unduly limit his chances of finding employment¹³ as any job would have to work around that schedule.

[37] Further, the Claimant's decision to focus on his schooling at the expense of work, as per his testimony about wanting to wait until school is finished to apply for full-time work, also unduly limits his chances of returning to the labour market.

Was the Claimant capable of and available for work and unable to find suitable employment?

[38] Considering my findings on each of the three factors together, I find that the Claimant was not available for work for the periods of December 13, 2020, to April 30, 2021, and from September 8, 2021, onward.

[39] I understand the Claimant's argument that if the Commission had simply reviewed his application at the start and told him he did not qualify, instead of automatically approving it, none of this would have happened, and I agree that is correct.

[40] But, the Claimant was paid benefits, and is asking to keep those benefits by appealing the Commission's decision, so he still must meet the same availability requirements as any other claimant, regardless of whether this could have been avoided with an earlier review of his application by the Commission.

CONCLUSION

[41] The appeal is dismissed. The Claimant has not proven his availability for work for the periods of December 13, 2020, to April 30, 2021, and from September 8, 2021, onwards, so the disentitlement issued by the Commission for those periods is upheld.

Gary Conrad
Member, General Division – Employment Insurance Section

¹³ See *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313 which supports this.