Citation: *NS v Canada Employment Insurance Commission*, 2022 SST 354

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (447148) dated January 13, 2022 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Videoconference
Hearing date:	March 16, 2022
Hearing participants:	Appellant
Decision date:	April 11, 2022
File number:	GE-22-551

Decision

[1] I am allowing the Claimant's appeal. This decision explains why.

[2] The Claimant would have been available for work if he had not been in quarantine. His illness was the only thing stopping him from being available for work.

Overview

[3] The Claimant is an international student. He has a study permit to take a full-time computer science course in Canada. While studying, he works 20 hours a week as a security guard, as allowed under his study permit.

[4] On July 5, 2021, the Claimant stopped working because he was diagnosed with an illness that required him to quarantine, from that date until August 10, 2021. He filed a claim for Employment Insurance (EI) sickness benefits and received benefits from July 4, 2021, to August 10, 2021, to cover his period of quarantine.

[5] On November 16, 2022, the Canada Employment Insurance Commission told the Claimant that he had to repay his sickness benefits. It said he did not show that he was otherwise available for work because he would have been in school if he had not been sick and could not have accepted full-time work because of his study permit.

[6] The Claimant disagrees with the Commission. He says he would have been available for work as usual if he had not been in quarantine. He argues that he is not responsible for 20-hour limit on his working hours during term time under the rules of his study permit. He says his employer would otherwise have given him more hours.

Issue

[7] The Claimant was unable to work because he was in quarantine. But was being in quarantine the only thing stopping him from being available for work?

Post-hearing documents

[8] After the hearing, the Claimant submitted documents that I accepted as relevant to his appeal. I shared this information with the Commission, which responded with further submissions that dismissed his evidence and arguments.

Analysis

[9] If you are sick, injured or in quarantine, it is clear that you are not available for work. The law on EI sickness benefits reflects this reality. But the law says if you ask for sickness benefits, you must show that you are *otherwise* available for work.

[10] "Otherwise available" means you do not have to prove in the usual way that you are actually available for work and unable to find a suitable job.[1] But you have to show that you would have been able to meet all three factors of the availability test if not for your sickness, injury or quarantine.

[11] So, the Claimant has to prove that he met these factors to show that quarantine was the only reason he was not available for work.[2]

[12] But I first have to consider the presumption that full-time students are unavailable for work. Rebutting this presumption requires evidence of exceptional circumstances. A claimant can also show a history of working full time while in school full time.

[13] Although his work history was mainly part time. I find that the Claimant can still rebut the presumption of non-availability. I agree with the reasoning of the Tribunal's Appeal Division (AD) which looked at a similar fact situation.[3] I find that the part-time nature of the Claimant's previous job and his ability to maintain at least that level of employment while studying full time was an exceptional circumstance. This is what allows him to rebut the presumption of non-availability.

---

[1] See s 18(1)(b) of the *Employment Insurance Act* (EI Act). S 9.002 of the *Employment Insurance Regulations*, which defines suitable employment, does not apply to section 18(1)(b). It only applies to section 18(1)(a) of the EI Act..
[2] The Claimant has to prove this on a balance of probabilities. This means he has to show it is more likely than not that he would have been available for work if public health had not put him into quarantine.
[3] See *J. D. v Canada Employment Insurance Commission*, 2019 SST 438. I do not have to follow the decisions of the Tribunal's Appeal Decision but their logic often guides me, as in this case.

[14] I still need to look at whether the Claimant can meet the three factors of the availability test. Under this test, he has to show that

i) he wanted to go back to work as soon as he could;

ii) he was making efforts to find a suitable job; and

iii) he did not set personal conditions that might unduly limit his chances of returning to work.

The Claimant wanted to return to work

[15] The Claimant has shown that he would have wanted to return to work if he had not been in quarantine. He worked before his quarantine and he worked afterwards. Working was how he supported himself financially while studying.

[16] I accept the Claimant's testimony as credible because it was detailed, consistent, and supported by reliable evidence, including his Record of Employment and the letter from his employer.

[17] Before he got sick, the Claimant was working 20 hours a week under the rules of his study permit but I accept that he wanted to work more hours. The evidence shows that he worked full-time during a period when the restriction on international students' work hours was temporarily lifted. He was also able to work full-time on school breaks when the government allows international students to work more than 20 hours a week.

[18] I find that being willing to work more than 20 hours at his job whenever he could shows that the Claimant has a strong work ethic. Attitude and conduct are important in deciding availability.[4] This is why I find it more likely than not that he would have wanted to return to work if not for his quarantine.

The Claimant would have made efforts to find a suitable job

[19] The Claimant has shown by his past efforts that he would have made enough efforts to find a suitable job if he had not been sick (and if he had been unemployed).

---

[4] *Canada (Attorney General) v Whiffen*, A-1472-92; *Carpentier v Canada (Attorney General)*, A-474-97.

[20] The evidence shows that the Claimant already has a job. He only separated temporarily from this employment for a defined period of medical quarantine.

The Claimant had no personal conditions limiting his chances of returning to work

[21] When the Claimant became ill and had to quarantine, he could not work. But this was not a personal restriction. His quarantine was mandated under public health rules. The Commission does not argue that his quarantine was a personal condition.

[22] But the Commission says the Claimant's restriction on working more than 20 hours a week was a personal condition that would have unduly limited his chances of retuning to work. It says he had to show that he could have worked full time.

[23] Decisions by the AD do not give consistent guidance on whether conditions the government or other parties impose count as a claimant's personal condition.[5] I am not bound by AD decisions but I look to them for guidance.

[24] In this appeal, I rely on an AD decision that said a claimant who was barred by a contract from seeking employment with another employer did not set a personal condition limiting her job search.[6]

[25] Using the logic in that AD decision, the 20-hour limit in the Claimant's case was not a personal condition since he did not impose it. He does not have any control over the conditions of his study permit. If he does not meet its conditions, he is penalized. So, it is not a personal choice.

[26] As well, the test for availability does not say the Claimant cannot have *any* conditions. The condition must be *personal* and it must not *unduly* limit his chances of finding work.

---

[5] See, for example*, I. K. v Canada Employment Insurance Commission*, 2017 SSTADEI 337 and *Canada Employment Insurance Commission v KJ,* 2021 SST 413.
[6] *Canada Employment Insurance Commission v. L.L*. 2016 SSTADEI 449. See also *L.E. v Canada Employment Insurance Commission*, 2020 SST 83. That decision found that applying for a work permit for only one employer was not a personal condition since the claimant was not allowed to apply for a permit that would allow her to work for other employers.

[27] I find that the Claimant had no *personal* conditions such as class attendance, type of work, job location or pay. He could work during the day, overnight or at weekends. The only restriction was on the number of hours he could work each week, but the government imposed this condition, not him.

[28] I also find that the restriction on his work hours was not a condition that *unduly* limited his chances of returning to work. The fact that he already had a secure job to return to shows there was no undue limitation. A condition is not unduly restrictive if a claimant can show that employment is still possible.[7]

[29] The Commission says the Claimant had to be available for full-time hours. But I rely on a decision by the AD that found students need not be more available for work than they were in their previous jobs.[8] The EI Act does not say they must be prepared to work full time when they previously worked part time, as the Claimant did while in school.

[30] The Commission did not argue that the Claimant's course obligations limited his availability. But I acknowledge an AD decision finding that a student was unavailable for work in part because i) his course schedule was not flexible; ii) he could not adjust it to fit his work schedule; and iii) he did not look for another job.[9]

[31] The Claimant in this appeal had no such restrictions on his availability. His classes were recorded so he could watch them online at any time, he could accept shifts at any time of the day or night and he already had a job that he returned to right away.

[32] That is why I find that the Claimant did not have any *personal* conditions that *unduly* limited his chances of returning to the labour market.

[33] This means that the Claimant has met the requirements of all three factors of the availability test set out above.

---

[7] CUBs 17786, 10436. I am not bound by CUBs but can agree with their reasoning.
[8] See above, *J. D. v Canada Employment Insurance Commission*, 2019 SST 438.
[9] *Canada Employment Insurance Commission v AP*, 2021 SST 295.

– **So, was the Claimant *otherwise* available for work?**

[34] Yes. I find that the Claimant has shown that he was otherwise available for work during the weeks he was in quarantine. If he had not been ill and confined to his room, he would have continued working at the job where he already had an established employment relationship.

[35] Before closing, I note that the Claimant paid into EI believing he was insured for benefits in case of sickness, injury or quarantine. Making EI contributions does not guarantee that you will get benefits; you also have to meet the plan's conditions. But there would be no logic to international students paying into EI if they could *never* meet its availability conditions. That is why it is important to look at the circumstances of each claimant,[10] especially when considering a sickness benefit claim.

Conclusion

[36] The Claimant has shown that he would have been otherwise available for work if he had not been in quarantine. So, he is entitled to EI sickness benefits from July 4, 2021, to August 10, 2021.

[37] This means that I am allowing the Claimant's appeal.

Lilian Klein
Member, General Division – Employment Insurance Section

[10] CUB 11248.