



Citation: *XN v Canada Employment Insurance Commission*. 2022 SST 1263

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: X. N.
Representative: R. Z.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (452849) dated February 1, 2022
(issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Teleconference

Hearing date: April 7, 2022

Hearing participants: Appellant (Claimant)
Appellant's witness / representative
Interpreter

Decision date: April 11, 2022

File number: GE-22-648

Decision

[1] I am dismissing the appeal.

[2] The Claimant hasn't shown that she was available for work. This means she is not entitled to the regular Employment Insurance (EI) benefits she received from January 10, 2021, to August 7, 2021, for this reason.

[3] The Claimant is responsible (liable) to repay the regular EI benefits she was not entitled to receive from January 10, 2021, to August 7, 2021. This means I am not reducing or writing off the overpayment.

Overview

[4] When the global COVID-19 pandemic occurred, the Claimant's employer temporarily closed. She stopped working on March 14, 2020, due to a shortage of work.

[5] The Claimant applied for the Emergency Response Benefit. The Commission set up her claim for the EI Emergency Response Benefit (EI-ERB) starting March 15, 2020.¹

[6] When the Claimant's EI-ERB ended, the Commission automatically set up another claim for regular EI benefits starting September 27, 2020. The Claimant initially declared that she wasn't available for work and her benefits stopped. She went into the Service Canada office and learned that she had to declare that she was available for work to receive regular EI benefits. The Claimant collected 45 weeks of regular EI benefits for from September 27, 2020, to August 7, 2021.

[7] On July 8, 2021, the employer issued an amended Record of Employment (ROE). The reason listed for issuing the ROE is "D" for illness or injury.

¹ In March 2020, the Government of Canada created two types of emergency benefits in response to the COVID-19 pandemic. CRA administers the first benefit called the Canada Emergency Response Benefit (CERB). The Commission administers the second benefit called the Employment Insurance Emergency Response Benefit (EI-ERB). Not everyone who requests the CERB, EI-ERB, or regular EI benefits can receive benefits. This is because applicants still have to prove that they are entitled to receive the benefits.

[8] The Commission conducted a review. It decided that the Claimant was entitled to sickness EI benefits from September 27, 2020, to January 9, 2021.

[9] The Commission also determined that the Claimant wasn't entitled to the regular EI benefits she received from January 10, 2021, to August 7, 2021. This is because she wasn't capable of working while she was ill and undergoing cancer treatments. It imposed an indefinite retroactive stop payment (disentitlement) starting on January 10, 2021. This results in a \$15,000.00 overpayment of regular EI benefits.

[10] The Claimant appeals to the Social Security Tribunal (Tribunal). She says, "during this whole time she was always willing to work and was looking for work." This is because she needs money to support herself.

Matters I must consider first

English as a second language

[11] During the hearing, the Claimant presented her testimony through the assistance of an interpreter. Throughout the hearing, the interpreter translated my comments and questions when I was speaking directly with the Claimant.

[12] The Claimant explained that she could speak and understand English but that sometimes she can't express herself fully in English. She says this is why she preferred to speak through the interpreter at the hearing. She confirmed that she had reviewed the appeal documents with her son (representative / witness). She said she didn't need the interpreter to translate what her representative / witness was saying during the hearing.

[13] For clarity, the Claimant's representative / witness spoke fluently in English. He was fully responsive to everything that was said in English. He also said he fully understood what the interpreter was saying in Mandarin. He asked to present his evidence and arguments in English, without translation services. He said that he

reviewed his statements with the Claimant prior to the hearing. He also confirmed that he reviewed the appeal documents thoroughly with the Claimant.²

[14] Based on the foregoing, I am satisfied that despite English being the Claimant's second language, she had a full and fair opportunity to present her evidence and arguments during the hearing.

Issues

[15] Does the Claimant meet the availability requirements for regular EI benefits?

[16] Did the Commission conduct their review within the required time limit?

[17] Does the Claimant have to repay the overpayment of regular EI benefits?

Analysis

Availability

[18] 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 section 18 of the *Employment Insurance Act* (Act).³

[19] Section 18 of the 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.

Capable of and available for work and unable to find suitable employment

[20] I must consider whether the Claimant has shown she was capable of and available for work and unable to find suitable employment.⁴ The Claimant has to prove three things to show she was available under this section:

² See the GD2, GD3, and GD4 documents.

³ Section 18(1)(a) of the 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 Act.

- a) A desire to return to the labour market as soon as a suitable job is available
- b) That desire is expressed through efforts to find a suitable job
- c) No personal conditions that might unduly limit their chances of returning to the labour market⁵

[21] I have to consider each of these factors to decide the question of availability.⁶ When doing so, I have to look at the attitude and conduct of the Claimant.⁷

– **Desire to return to work**

[22] I find that the Claimant has shown she had a desire to return to the labour market as soon as a suitable job was available.

[23] The Claimant consistently says she has had a desire to return to work. This is because she has expenses to pay to support herself.

[24] Based on the above, I find that the Claimant presented enough evidence to prove she had a desire to return to the labour market.

– **Efforts to find a suitable job**

[25] The Claimant hasn't shown she has made enough efforts to find a suitable job from January 10, 2021, to December 1, 2021.

[26] I recognize that the Claimant's testimony at the hearing, contradicts her earlier statements to the Commission and the medical evidence on file. This raises doubts about the credibility of her statements.

[27] The Commission documents that on August 11, 2021, the Claimant said she was unable to work since her surgery on May 8, 2021.⁸ Then on August 13, 2021, the Commission documented that the Claimant said she hadn't looked for work since May

⁵ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁶ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁷ *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

⁸ See page GD3-17.

8, 2021, because she is not well enough to do so and was still unable to work due to her illness.⁹ This is consistent with what the Claimant told the Commission's investigator on August 24, 2021.¹⁰

[28] The Claimant submitted copies of two medical notes signed by her doctor. On June 23, 2021, her doctor wrote that she was, "unable to work at all due to chronic fatigue of ongoing chemo."¹¹ On October 7, 2021, the Claimant's doctor wrote that she recommends starting work, "Nov 1 and limit to 6 hr / shift for the first month and no night shifts for the first month. As of Dec 1, 2021 if she is doing well can progress to full hours / shifts."

[29] When asked about the inconsistencies in her statements, the Claimant said that she couldn't work night shifts due to her diabetes but she could work day shift. She says that when her employer called her to return to work in June 2021, she couldn't return to work because they were only offering her night shifts. She says she asked her doctor to complete the medical forms to say she wasn't capable of working night shifts. However, I can see that the June 23, 2021, medical note clearly states that she is "unable to work **at all** due to chronic fatigue of ongoing Chemo."¹²

[30] The Claimant admits that she didn't apply for any jobs since January 10, 2021. She says she wanted to apply at Kikuko for a day shift job. She spoke with someone who worked there but they didn't have any job vacancies.

[31] The Claimant says that she also spoke with her counsellor in France. She didn't state the date of this conversation but noted that she asked her counsellor to let her know of any jobs, but there were no results. She also updated her resume (curriculum vitae).

⁹ See page GD3-20

¹⁰ See GD3-25.

¹¹ See page GD2-12.

¹² See page GD3-23.

[32] While they are not binding when deciding this particular requirement, I have considered the list of job-search activities, outlined below, as guidance when deciding this second factor.

[33] The *Employment Insurance Regulations* (Regulations) lists nine job-search activities I have to consider. Some examples of those activities are¹³

- networking and dropping off a resume
- applying for a job

[34] I must consider specific circumstances on a case-by-case basis.¹⁴ So, I have considered the following when determining whether the Claimant has met this second criterion.

- English is the Claimant's second language. She says she can speak and understand English but she preferred to present her testimony through the interpreter.
- The Commission makes no mention of the fact that they had any trouble communicating with the Claimant in English. Nor is there any mention that the Claimant asked to have someone assist her during any of those conversations.
- I give more weight to the Claimant's initial statements because they are plausible and consistent with the medical evidence on file. That medical evidence clearly speaks to the Claimant's medical condition and inability to work until November 1, 2021.
- The Claimant didn't change her statements until after she learned of the Commission's decision, which results in the \$15,000.00 overpayment.

¹³ See section 9.001 of the Regulations.

¹⁴ See section 10.4.1.4 of the Digest of Benefit Entitlement Principles.

[35] I find that the Claimant hasn't shown that her efforts were enough to meet the requirements of this second factor, as of January 10, 2021. I make this finding after consideration of the totality of evidence, as set out above.

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

[36] I find that the Claimant's illness is a personal condition that limited her chances of going back to work from January 10, 2021, to December 1, 2021.

[37] The Commission says that the Claimant wasn't entitled to regular EI benefits since the start of her claim on September 27, 2020. This is because she wasn't capable of working since her surgery on May 8, 2020.

[38] The Commission amended the claims to pay the maximum 15 weeks of sickness EI benefits, from September 27, 2020, to January 9, 2021.¹⁵

[39] I recognize that the Claimant states she needed the money to support herself. However, I give more weight to the medical documents and her initial statements, as stated above. The Claimant's doctor clearly states on June 23, 2021, that she is, "unable to work at all due to chronic fatigue and ongoing chemo."¹⁶ The Claimant confirmed that she had surgery on May 8, 2021, and underwent chemotherapy every three weeks from June 2020 to July 2021.

[40] The October 7, 2021, medical assessment form is the only medical evidence that speaks to the Claimant's capacity to return to work. This document clearly states the Claimant may return to work gradually as of November 1, 2021. She is restricted to six-hour shifts and is unable to work night shifts. She is able to return to work full hours / shifts as of December 1, 2021, if she is doing well.¹⁷ This is the first time her doctor speaks to whether she can work night shifts.

¹⁵ Section 12(3)(c) of the Act says that 15 weeks is the maximum number of weeks that a claimant may receive on a claim, for sickness EI benefits.

¹⁶ See page GD3-23.

¹⁷ See page GD2-10.

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

[41] After considering my findings on each of the three factors together, I find that the Claimant wasn't capable of or available for work from January 10, 2021, to November 1, 2021.¹⁸

The Commission's time limit to review claims

[42] The law states that the Commission has 36 months after paying EI benefits, to reconsider a claim for benefits.¹⁹ This period is extended to 72 months in cases where, if in the opinion of the Commission, a false or misleading statement or representation has been made in connection to a claim.²⁰

[43] The Federal Court of Appeal recognizes that the Commission can't review changes to claims at the exact time they happen. It is precisely for that reason that the Act allows the Commission time to rescind or amend any decision given in any particular claim for EI benefits.²¹

[44] The Commission commenced its review of the claims after the employer issued the amended ROE on July 8, 2021. Five months later, on December 16, 2021, the Commission informed the Claimant in writing that she isn't entitled to the regular EI benefits she had received.

[45] This is truly an unfortunate situation. However, the Commission conducted its assessment in accordance with the law. This means the overpayment is valid.

Repayment of an overpayment

[46] The law states that a claimant is responsible (liable) to repay EI benefits that they are not entitled to receive.²²

¹⁸ See section 18(1)(a) of the Act.

¹⁹ Section 52 of the Act.

²⁰ See subsection 52(5) of the Act.

²¹ *Canada (Attorney General) v Landry*, A-532-98.

²² See section 43 of the Act.

[47] I don't have the authority to reduce or waive the overpayment.²³ That authority rests with the Commission.

[48] The Claimant believes she shouldn't have to repay the EI benefits because of her financial need. I sympathize with the Claimant given the circumstances she presented. However, Employment Insurance is not a need-based program. Claimants must prove their entitlement to receive benefits. Unfortunately, the Claimant hasn't proven that she is entitled to regular EI benefits from January 10, 2021, to November 1, 2021.

[49] This leaves the Claimant with two options. She can ask the Commission to consider writing off the overpayment because of undue hardship.²⁴ If she doesn't like the Commission's response, she can appeal to the Federal Court of Canada.

[50] The Claimant can also contact the Deb Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or for other debt relief.²⁵

Conclusion

[51] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

²³ See sections 112.1 and 113 of the Act.

²⁴ Section 56 of the Regulations gives the Commission broad powers to write off an overpayment when it would cause undue hardship for a claimant to repay it.

²⁵ The telephone number is found on the Notice of Debt and account statements sent to the Claimant for the overpayment.