Citation: *JP v Canada Employment Insurance Commission*, 2022 SST 1686

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (513452) dated June 30, 2022 (issued by Service Canada)

Tribunal member:	Sylvie Charron
Type of hearing:	In person
Hearing date:	November 21, 2022
Hearing participant:	Appellant
Decision date:	December 29, 2022
File number:	GE-22-2513

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant wasn't able to work because of a broken toe. But the Appellant would not have been available for work anyway, even if he hadn't been injured.

[3] This means that the Appellant can't receive Employment Insurance (EI) sickness benefits.

Overview

[4] The Appellant wasn't able to work because of his broken toe. To be able to receive EI sickness benefits, the Appellant must "otherwise be available for work."[1] In other words, the Appellant's injury has to be the only reason why he wasn't available for work.

[5] The Canada Employment Insurance Commission (Commission) says that the Appellant would not have been available for work anyway because the Appellant refused to declare his vaccination status in accordance with his employer's vaccination policy.[2]

[6] The Appellant disagrees and states that he was injured while on vacation. When he returned to work, he was allowed to work sitting down, until he was suspended from his job because of his vaccination status.

Matter I have to consider first

[7] At the hearing, it was agreed that the Appellant would send in a document relevant to his job search while he was suspended from his regular job. The document was received and coded as GD5. It was considered as evidence in arriving at the present decision.

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[1] Section 18(1)(b) of the *Employment Insurance Act* (EI Act) sets out this rule and uses this wording.
[2] See Decision in file GE-22-2514

Issue

[8] The Appellant wasn't able to work standing up because of his injury. But was his injury the only thing stopping him from being available for work?

Analysis

[9] It is clear that, if you are sick or injured, you aren't available for work. The law for EI sickness benefits reflects this. However, the law says that, if you are asking for sickness benefits, you must **otherwise** be available for work. This means that the Appellant has to prove that his injury is the only reason why he wasn't available for work.[3]

[10] The Appellant 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 would have available for work if it hadn't been for his injury.

Available for work

[11] Case law sets out three factors for me to consider when deciding whether a Appellant is available for work. An Appellant has to prove the following three things:[4]

a) They want to go back to work as soon as a suitable job is available.

b) They are making efforts to find a suitable job.

c) They haven't set personal conditions that might unduly (in other words, overly) limit their chances of going back to work.

[12] The Appellant doesn't have to show that he is actually available. He has to show that he would have able to meet the requirements of all three factors if he hadn't been injured. In other words, the Appellant has to show that his injury was the only thing stopping him from meeting the requirements of each factor.

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[3] See section 18(1)(b) of the EI Act.
[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.

– **Wanting to go back to work**

[13] The Appellant has shown that he would have wanted to go back to work as soon as a suitable job was available.

[14] At the hearing, the Appellant testified that as soon as he was suspended from his job, he started looking for other employment. He was looking for jobs that did not require him to provide his vaccination status. He also could not work standing up or wearing safety shoes.

[15] The Appellant provided evidence of wanting to go back to work by actually looking for work and providing me with copies of job offers from potential employers. It is clear that his vaccination status was the deciding factor in not obtaining some of the jobs that were offered.

[16] I find that the Appellant testified in a credible manner; it is clear that he wanted to work.

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

[17] The Appellant has shown that he was making enough efforts to find a suitable job.

[18] At the hearing, the Appellant listed the employment websites that he consulted and applied to when looking for a suitable job. He says he did not get positive answers; no one was hiring because of his lack of vaccine.

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

[19] The Appellant has set personal conditions that would have unduly limited his chances of going back to work.

[20] The Appellant says that both his broken toe and his vaccination status prevented him from working; no one was hiring unless you could show proof of vaccination. The Appellant says that he could work if he were sitting down. The vaccination issue was still a problem.

[21] The Commission says that the Appellant was unable to work at manual jobs, because of his broken toe. The Commission also says that even if he had been cleared for work at sitting-down jobs, his vaccination status prevented employers from hiring him during the pandemic. This is a restriction on the Appellant's availability to return to work.

[22] I find that in this case, the Appellant was not available for work for a reason other than his injury. It is true that the Appellant testified having to refuse offers for two jobs because of an inability to wear safety shoes at the time. I note that at least one of these jobs was from a federal government department. This means that it was subject to a vaccination mandate at the time, and this would have prevented the Appellant from getting a final offer for the position at that time.

– **So, would the Appellant have been available for work?**

[23] Based on my findings on the three factors, I find that the Appellant hasn't shown that he would have been available for work.

[24] While I sympathize with the Appellant who clearly did not want to be unemployed, the fact that he refused to state his vaccination status severely limited his chances of finding suitable employment, especially as his field of expertise is mostly in records management in the federal sphere.

[25] I find that the Appellant still would not have met the requirements of all three factors, even if he hadn't been injured.

Conclusion

[26] The Appellant hasn't shown that he would have been available for work within the meaning of the law. Because of this, I find that the Appellant can't receive EI sickness benefits.

[27] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section