Citation: *JW v Canada Employment Insurance Commission*, 2023 SST 782

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (526028) dated September 15, 2022 (issued by Service Canada)

Tribunal member:	Jillian Evans
Type of hearing:	Teleconference
Hearing date:	November 17, 2022
Hearing participant:	Appellant
Decision date:	April 5, 2023
File number:	GE-22-3284

Decision

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

[2] The Appellant hasn't shown that he was available for work. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Appellant J. W. was dismissed from his job. His last day of work was November 26, 2021. He applied for regular benefits on December 23, 2021 and indicated in his application that he would be starting a year long training course on January 10, 2022 that would occupy approximately 8 to 10 hours of his time a day, every week, Monday through Saturday.

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits as of January 10, 2022 because he wasn't available for work. A claimant has to be available and looking for work to get EI regular benefits. Being available and seeking a job are ongoing requirements.

[5] The Commission says that the Appellant wasn't available because he had chosen to enrol himself in a program that would prevent him from maintaining paid employment. The Commission also says that J. W. did not look for work throughout his training program.

[6] J. W. agrees that he did not apply for new jobs after being dismissed by his former employer. But he says that he was awaiting a decision on a grievance, and that he should not be expected to look for a new job until a final decision had been made about his former job.

[7] J. W. also states that if his former employer had re-instated him, he would have left his training and returned to his old job. So he says that he was available for that work.

[8] I have to decide if J. W. has proven that he was available for work to be entitled to receive benefits.

Matter I had to consider first

I heard two appeals together.

[9] J. W. was terminated from his job on November 26, 2021 for not complying with his employer's COVID-19 policy. He applied for EI benefits on December 23, 2021 and listed the reason for his dismissal as being "due to a vaccine mandate policy."

[10] In the application for benefits, he also indicated that he had decided, of his own initiative, to start a year long training program not long after he lost his job. The program's courses ran Monday through Saturday and occupied most of the morning and afternoon. He indicated that he was only available for work in the evenings due to this school schedule.

[11] The Commission denied his application for benefits on April 1, 2022. They determined that J. W. had lost his job as a result of his own misconduct. He asked that the decision be reconsidered by the Commission, but they upheld their decision.

[12] They advised the Appellant of their decision on June 21, 2022 and he appealed that decision (the Misconduct Determination) to this Tribunal.

[13] The Commission also considered whether J. W. was available for work during the period of his claim.

[14] The Commission determined on June 22, 2022 that he was not – and had not been since January 10, 2022 - and that he was disentitled from receiving benefits for this reason.

[15] The Appellant disagreed with the Commission on this finding as well. He asked the Commission to reconsider that finding (the Availability Determination).

[16] The Commission upheld their decision on the Availability Determination and told J. W. in a letter September 15, 2022 that they were maintaining their position that he

was disentitled to benefits for being unavailable for work. He started another appeal with this Tribunal regarding this Availability Determination on October 7, 2022.

[17] The Appellant has appealed two different decisions about two different questions with the Tribunal. However, as the member assigned to both files, I ordered that the two appeals be heard together.

[18] The hearing for both appeals occurred on November 17, 2022.

Issue

[19] In these reasons, I am deciding the question in dispute in J. W.'s second appeal to the Tribunal: After he lost his job, was the Appellant available for work?

[20] I have prepared a separate decision in J. W.'s other appeal.

Analysis

[21] Two different sections of the law require claimants to show that they are available for work in order to be entitled to benefits. The burden of proof lies with the worker asking for the benefits.

[22] The Commission decided that J. W. was disentitled under both of these sections: section 18 and section 50. So J. W. has to prove that he does in fact meet the criteria of both sections to get benefits.

[23] First, s. 50(8) of the *Employment Insurance Act* (Act) says that to be entitled to benefits, a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).

[24] Second, section 18(1)(a) 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 despite their efforts.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[25] The Commission decided that the Appellant was disentitled from receiving benefits

a) because he was not making reasonable efforts to find a job, and

b) because he was not capable of and available for work.

[26] J. W. disagrees with the Commission. He agrees that he was not looking for work, but he says that he had good reasons. He also says that he has been contributing to the Canadian economy and to the Employment Insurance regime for three decades and should be entitled to collect benefits when he needs them.

[27] I will now consider these two sections of the Act myself to determine whether J. W. made himself available for work as required by the Act.

The Appellant did not make any efforts to find a job.

[28] The law sets out criteria for me to consider when deciding whether J. W. was making reasonable and customary efforts to find work after being let go from his employment.[5]

[29] The *Employment Insurance Act* is an insurance plan. Its purpose is to compensate workers who are unemployed for reasons beyond their control.

[30] Like other insurance policies, workers looking to collect benefits under the "policy" need to meet the specified conditions of the plan.[6] The Tribunal's role is to

[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See section 9.001 of the Regulations.
[6] See *Pannu v. Canada (Attorney General)* 2004 FCA 90

determine whether the Appellant – the person seeking payment of benefits under this insurance policy – meets the required conditions.

[31] One such required condition under the Act is that the Appellant has to keep trying to find a suitable job in order to receive benefits. For example, while unemployed, J. W. was required to contact employers who might be hiring, apply for jobs, attend interviews or register with online job banks. [7]

[32] There is no dispute between the parties on the question of whether the Appellant tried to find employment after being dismissed from his job. They both agree that J. W. did not make any efforts to find work after he was let go.

[33] In his original application for benefits J. W. indicated that he had not made any efforts to look for work since becoming unemployed.[8] He also confirmed that he would not be available for work because he "require[d] time to complete [his] program."

[34] The Commission has provided records of telephone conversations that their agents had with J. W. on June 21, 2022[9] and on September 15, 2022[10] where he confirmed that that continued to be the case: he told them again during both those phone calls that he had not been looking for work since beginning his training program on January 10, 2022.

[35] J. W. does not dispute this. At the hearing, he confirmed again that he made no efforts to inquire about, look for or apply to any new jobs once he started his course. In his written and oral submissions on this appeal to the Tribunal, he explained his reasons:

a) First, he says that he chose to devote 50 to 60 hours a week to his training so that he could improve his skills to better contribute to his industry. He could not work at a full-time job while engaging in full-time training.

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[7] See section 9.001 of the Regulations.
[8] GD3-18 and GD3-19
[9] GD3-29
[10] GD3-36

b) Second, he says that he did not want to mislead potential employers about his ability to work for them: he believes that it would be dishonest to enter a new employment contract until his grievances with his old employer were concluded as he would return to his old job if the grievance resolved in his favour.

[36] J. W. may have explanations for why he chose not to make any efforts to look for work. I accept that he had personal reasons for not applying to any jobs. But these reasons do not change the fact that he has not met a necessary condition of the regime: to prove that he is looking for suitable employment.

[37] A claimant cannot simply wait to be recalled to work but must actively seek employment in order to be entitled to benefits.[11]

[38] Given the undisputed evidence that the Appellant made no effort to look for any work after January 10, 2022, I agree with the Commission that J. W. has not proven that he made reasonable and customary efforts to find a job.

Capable of and available for work

[39] The Act says that the Appellant is not entitled to be paid benefits for any period of time unless he can prove that he was capable of and available for work but unable to find a suitable job during that period.

[40] So, to prove that he is entitled to benefits as of January 10, 2022 the Appellant has to prove the following three things:[12]

a) He wanted to go back to work as soon as a suitable job was available.

b) He made efforts to find a suitable job .

c) He didn't set personal conditions that unduly (in other words, overly) limited his chances of going back to work.

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

[12] 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.

[41] When I consider each of these factors, I have to look at J. W.'s attitude and conduct.[13]

1) Wanting to go back to work

[42] J. W. says that he always wanted to go *back* to his job: he was patiently awaiting the outcome of his grievances because he remained committed to returning to his original job if he were to be re-instated.

[43] The Commission says that J. W.'s actions as detailed above do not prove that he had a desire to return to work *as soon as* an opportunity arose. His choice not to apply for any jobs while engaging in year-long, full-time education is not consistent with a continuing desire to return to work.

[44] The Commission also says that not looking for a new job until his grievances against his former employer were resolved prove that the Appellant did not want to return to suitable employment, but instead to a specific job.

[45] I agree with the Commission. J. W. was determined to exhaust all opportunities to return to his former job. He is entitled to do so. However, desiring to return to a specific job is not the same as wanting to return to the labour market as soon as possible.

2) Making efforts to find a suitable job

[46] As I detailed above, it is uncontroversial that the Appellant made no efforts to search for employment beyond waiting for his grievance to be processed. This inaction does not satisfy this second factor I must consider when deciding if he was available for work.

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[13] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

3) Unduly limiting chances of going back to work

[47] Within weeks of being dismissed from his job, the Appellant enrolled in a year-long training program that occupied 8 to 10 hours a day, Monday through Saturday.[14]

[48] J. W. acknowledges that he cannot work at a job while engaged in 50 to 60 hours of training nearly every morning and afternoon of the week.

[49] The Appellant also told this Tribunal that he made the intentional decision not to apply for any jobs with any employers for as long as his grievance with his former employer was unresolved.

[50] He says that applying to another job would be dishonest as it would "undermine the legitimate contractual interests of a new employment contract with a new employer in bad faith."[15] He also believes that starting to work for a new employer would violate the good faith contract that he had entered into with his former employer, which in his view remains until his grievance is decided despite the fact that he was terminated.

[51] I find that by pursuing full time training and limiting his employment options exclusively to being re-instated to his previous job, the Appellant made choices that unduly limited his ability to return to work.

[52] Based on my findings on the three factors, I find that J. W. has not shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

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

[54] This means that the appeal is dismissed.

Jillian Evans

Member, General Division – Employment Insurance Section

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[14] GD3-28

[15] See the Appellant's Request for Reconsideration, GD3-33