



Citation: *XW v Canada Employment Insurance Commission*, 2023 SST 880

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

Decision

Appellant: X. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (506894) dated August 5, 2022 (issued by Service Canada)

Tribunal member: Jillian Evans

Type of hearing: Teleconference

Hearing date: January 10, 2023

Hearing participant: Appellant

Decision date: April 6, 2023

File number: GE-22-2738

Decision

[1] The appeal is allowed.

[2] The Appellant has shown that he was available for work between October 10, 2021 and December 23, 2021. This means that he isn't disentitled from receiving Employment Insurance (EI) benefits during this time.

Overview

[3] The Appellant X. W. made a claim for regular benefits and a 52-week benefit period was established starting on January 24, 2021. He returned to employment in February, but then re-activated his claim in April 2021 when his employer reduced his hours.

[4] In June 2021, while still receiving regular benefits, X. W. was hospitalized. While hospitalized, his treating physician completed a Medical Certificate in support of a claim for EI sickness benefits. In that document, the doctor gave the opinion that X. W. would be incapable of working until December 23, 2021.

[5] His regular benefits stopped and beginning the week of June 20, 2021 he began to receive sickness benefits instead.

[6] After 15 weeks, X. W. had reached his maximum entitlement to sickness benefits. So, in October 2021, X. W. re-activated his claim for regular benefits and began receiving regular benefits starting the week of October 10, 2021 which he collected until his benefit period ended on January 22, 2022.

[7] The Canada Employment Insurance Commission (Commission) subsequently decided that the Appellant had been disentitled from receiving Employment Insurance (EI) regular benefits from October 10, 2021 to December 23, 2021 because he wasn't available for work during these 10 weeks. They determined that he had received an overpayment.

[8] I must decide whether X. W. has proven that he was available for work during these 10 weeks. 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 was available for work.

Matter I have to decide first

[9] When X. W. asked the Commission to reconsider their decision that he was not entitled to benefits between October 10, 2021 and January 22, 2022, he also told them that he felt that his benefit period ought to be extended beyond January 22, 2022.

[10] He suggested to the agent assessing his Request for Reconsideration that he had not drawn the maximum number of weeks to which he was entitled and that any overpayment should be offset against these unclaimed weeks.

[11] The agent denied his request for an extension.

[12] The Reconsideration Decision dated August 5, 2022 that is the subject of X. W.'s appeal only lists Availability for Work as the reason for his disentitlement. It does not address X. W.'s request for an extension of the benefit period, nor the agent's decision on that question.

[13] Nevertheless both X. W. and the Commission made written and/or oral submissions to this Tribunal on the question of X. W.'s benefit period. As such, I find that I have jurisdiction to address this issue as a preliminary matter in this decision.

[14] X. W. says that even if he was disentitled from receiving regular benefits between October 10, 2021 and December 23, 2021, he should still have been entitled to more regular benefits over many more subsequent weeks that should offset any overpayment.

[15] He says that claimants who establish a benefit entitlement are entitled to be paid a total of 50 weeks of benefits. His benefit period started on January 24, 2021 and by January 22, 2022 he had only been paid 23 weeks of regular benefits, not 50 weeks. X. W. says that once his benefit period was established on January 24, 2021, he was

entitled to receive 50 full weeks of regular benefits. He says that he was entitled to continue to receive these benefits until the 50 weeks were paid out.

[16] He says the total amount of regular benefits that he received “doesn't exceed the total regular benefits amount” that he was entitled to. Because of this, he says, he cannot have been “overpaid.”

[17] The Commission submits that claims have a 52-week benefit period, which in this case began January 24, 2021 when the claim was established and ended January 22, 2022. During this 52 week period, the Appellant would have been entitled to a maximum of 50 weeks of regular benefits.

[18] The Commission says that the Appellant is only entitled to regular benefits during the weeks that he meets the criteria for those benefits. The Commission says that in X. W.'s case, he did not meet the criteria for those benefits for many weeks of his benefit period: he was either sick or employed for many of the weeks.

[19] I agree with the Commission. X. W.'s benefit period ran from January 24, 2021 to January 22, 2022. There is no guarantee that a claimant will receive regular benefits for each and every week of their benefit period, nor is there any requirement under the EI Act that benefits continue to be paid after a benefit period ends.

[20] Benefit periods are extended only in limited circumstances.¹ None of those circumstances exist in this case.

[21] I disagree with X. W. that he is entitled to be paid for 50 weeks of regular benefits simply because he established a benefit period. That is not what the *Employment Insurance Act* says and is not how the regime works.

¹ See s. 10(10) of the Act.

Issue

[22] I will now move on to consider the question at issue in the Reconsideration Decision that is the subject of this appeal: Was the Appellant X. W. available for work between October 10, 2021 and December 23, 2021?

Analysis

The Appellant was available for work between October 10, 2021 and December 23, 2021

[23] Two different sections of the law require that claimants who are seeking regular benefits show that they are available for work. The Commission says that the Appellant is disentitled under both of these sections. So, X. W. has to meet the criteria of both sections to get benefits.

[24] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job during the period of time that they are asking for benefits.² The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.³ I will look at those criteria below.

[25] Second, 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.⁴ Case law gives three things a claimant has to prove to show that they are “available” in this sense.⁵

[26] The Commission says that the Appellant wasn’t available because X. W. had had filed a Medical Certificate completed by his treating physician that said he would not be capable of working between July 7, 2021 and December 23, 2021. A claimant has to be capable of working to get EI regular benefits. Availability is an ongoing requirement.

² See section 50(8) of the *Employment Insurance Act* (Act).

³ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁴ See section 18(1)(a) of the Act.

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

[27] X. W. collected his maximum 15 weeks entitlement of EI sickness benefits between June 20, 2021 and October 9, 2021.

[28] The Commission says that he was not entitled to receive any more sickness benefits after October 9, 2021. And he was not entitled to collect regular benefits until December 23, 2021 because his doctor's medical opinion was that he was not capable of (in other words available to) work until then.

[29] The Appellant disagrees and states that he was in fact available and looking for work between October 10, 2021 and December 23, 2021. He says that he recovered from his illness faster than his doctor had anticipated when the Medical Certificate had initially been completed.

[30] So, he began looking for work again by October 2021. He says that he was available but unable to find employment. As such, he re-activated his existing claim for regular benefits on October 18, 2021 and began alerting the Commission on a bi-weekly basis of his willingness and availability to work.

[31] I will now consider these two sections myself to determine whether X. W. was available for work between October 10, 2021 and December 23, 2021.

Reasonable and customary efforts to find a job

[32] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.⁶ I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, X. W. has to have kept trying to find a suitable job.

[33] I also have to consider the Appellant's efforts to find a job.

[34] The Appellant testified at his hearing that after being discharged from the hospital in Calgary, he moved back to New Brunswick where he had lived before. He continued to recuperate in New Brunswick.

⁶ See section 9.001 of the Regulations.

[35] X. W. testified at his appeal hearing that by October 2021 he was fully healed. This was earlier than the doctor who had treated him in the Calgary hospital had expected, but X. W. says that he was feeling better and that he started looking for jobs at that time. This is consistent with what he told the Commission when they first asked him about when he had resumed looking for work after his illness.⁷

[36] In its initial decision of May 20, 2022 determining that X. W. had not been entitled to receive benefits between October 10, 2021 and December 23, 2021, the Commission does not take the position that the Appellant had not been looking for work during this period.⁸

[37] X. W. advised me that when he started feeling better in October 2021 he began applying for jobs and was very much available to start working again. His job search efforts, however, were unsuccessful.

[38] The Commission acknowledges that X. W. was never asked any questions by the Commission about his efforts to find work between October 10, 2021 and December 23, 2021.⁹ They agree that he was never asked to prove the weekly attestations that he had made about looking for employment.¹⁰ And they agree that they have nothing to dispute or contradict X. W.'s assertion that he was applying for jobs and looking for work. They do not have any evidence that his efforts were inadequate or unreasonable.

[39] The only evidence I have about whether or not X. W. made reasonable and customary efforts to find employment between October 10, 2021 and December 23, 2021 are his statements that he began actively applying for jobs starting in early October.

⁷ GD3-21

⁸ GD3-21

⁹ GD4-3

¹⁰ GD4-3

[40] I found X. W.'s evidence on this question credible and consistent over time. I accept it. Given the evidence available to me, the Appellant has proven that his efforts to find a job were reasonable and customary.

Capable of and available for work

[41] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove all of the following three things:¹¹

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

[42] When I consider each of these factors, I have to look at the Appellant's attitude and actions.¹²

[43] With respect to the first two factors, as I have discussed above, the only evidence available to me is X. W.'s sworn testimony that he was willing to return to work and made efforts to find employment.

[44] At his hearing, he argued that he gave a truthful report to the Commission every two weeks about his availability to work and his active efforts to find a job. He denies lying in these online reports or misleading the Commission.

[45] The Commission did not gather and has not provided any evidence about X. W.'s efforts to obtain suitable employment between October 10, 2021 and December 23, 2021 beyond these online attestations. The Commission has not provided any

¹¹ 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.

¹² Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffe* With n, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

evidence that X. W.'s bi-weekly reports were inaccurate regarding either his desire or his efforts to find work.

[46] I accept X. W.'s evidence and find he wanted to go back to work as soon as a suitable job was available and that he made efforts to find a suitable job. I find that he has proven the first two factors.

[47] With respect to the Appellant's personal conditions during this 10 week period that might have limited his chances of going back to work, the Appellant and the Commission have put forward conflicting evidence about this third factor of the test.

[48] The Commission says that X. W.'s personal conditions did unduly limit his capacity to work during this period. They say:

- a) His Medical Certificate from July 7, 2021 said that he "is incapable of working until December 23, 2021"¹³
- b) X. W. did not file any revised or updated Medical Certificate altering or changing that date.¹⁴
- c) X. W. "agreed" with the Commission during a phone interview that "he was unavailable for health reasons from October 18, 2021 to December 23, 2021."¹⁵

[49] The Commission says that this proves that the Appellant was not capable of working between October 18, 2021 and December 23, 2021.

[50] X. W. says that his personal conditions did not limit his capacity to work during this period. He says:

- a) The Medical Certificate that his doctor completed on July 7, 2021 was an estimate, not a mandate. His doctor could not have known with certainty when

¹³ GD3-14

¹⁴ GD3-21

¹⁵ GD3-31

he would be able to return to work. He should be permitted to return to the workforce sooner if he wants.

- b) He was not asked by the Commission for a revised or updated Medical Certificate.
- c) He disputes ever telling the Commission at any time that he was unable to work for health reasons between October 18, 2021 and December 23, 2021 because it is untrue. The Appellant says that the documentation of such a discussion in the Commission's Reconsideration File is inaccurate and false.

[51] I find that X. W.'s evidence on this question is preferred. I agree that his Medical Certificate should not be interpreted as forbidding him to return to the workforce until December 23, 2021.

[52] I also find it more likely than not that the documentation of X. W.'s alleged statement that he was unable to work for health reasons is an inaccurate account of the discussion with the Commission representative.

[53] That is because that supposed statement by X. W. on August 5, 2022 is inconsistent with:

- a) His comment to the Commission in May of 2022 that "he had recovered" from his illness by October 10, 2021.¹⁶
- b) His statement in his Notice of Appeal that "by October 10, 2021...I believe I was ready for work"¹⁷
- c) His written submissions in response to the Commission's representations on this appeal that he "never indicated in anyway that I was not suitable for work"¹⁸ and

¹⁶ GD3-21

¹⁷ GD2-7

¹⁸ GD6-2

that “the Commission made false statement [sic] that I agreed to the unavailability for work.”¹⁹

- d) His sworn testimony at the hearing where he was insistant that he never told anyone at the Commission that his health prevented him from working between October 18, 2021 and December 23, 2021.

[54] I therefore find that the Appellant didn’t set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[55] Based on my findings on all of the factors above, I find that the Appellant has shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[56] Appeal allowed.

[57] The Appellant has shown that he was available for work within the meaning of the law between October 10, 2021 and December 23, 2021. Because of this, I find that the Appellant isn’t disentitled from receiving EI benefits for that period.

Jillian Evans
Member, General Division – Employment Insurance Section

¹⁹ GD8-2