



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *TM v Canada Employment Insurance Commission*, 2021 SST 94

Tribunal File Number: GE-21-169

BETWEEN:

T. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: March 9, 2021

DATE OF DECISION: March 12, 2021

DECISION

[1] The appeal is allowed.

[2] The Claimant has proven good cause for the delay in reactivating his existing claim. He has also proven his availability during the period of the delay.

[3] This means the Claimant is not disentitled from receiving employment insurance (EI) benefits from May 1, 2019, to the end of his claim in December 2019.

OVERVIEW

[4] The Claimant became unemployed in December 2018. In November 2019, he applied for EI benefits requesting sickness benefits. The Commission allowed sickness benefits starting December 2018, to April 2019.

[5] The Claimant then requested regular EI benefits starting May 1, 2019. The Commission denied his request to backdate or antedate his renewal claim to May 1, 2019, because he had not proven he had good cause for the delay. He was further denied EI benefits because he did not prove he was capable of and available for work.

[6] The Claimant disagrees. He feels he has provided doctor's notes and proof that he was ready, willing and able to work as of May 2019. He has paid into the EI system and he needs it to survive.

JURISDICTION ISSUE

[7] I think it is important to provide a history of this claim. The Claimant applied for EI benefits on November 13, 2019, asking for sickness benefits. He was allowed sickness benefits backdated to December 18, 2018, until April 13, 2019. He received the maximum 15 weeks allowed under the law.

[8] On January 3, 2020, the Claimant requested regular EI benefits starting May 1, 2019. The Commission issued a decision letter dated January 24, 2020. This letter identifies two issues:

- His renewal claim for EI benefits cannot start earlier than May 1, 2019, because he did not file his application on time and he did not show good cause for being late.
- He was unable to be paid EI benefits from April 15, 2019. He told the Commission that he had recovered, but he had not given medical evidence to confirm this. Therefore, he had not proven he was able to work.

[9] The Claimant submitted a medical note dated February 6, 2020, and date stamped received by the Commission on February 10, 2020. This medical note indicated that the Claimant was not able to return to his previous job effective May 2019, and was seeking employment elsewhere during this time.

[10] The Claimant then submitted a medical certificate dated March 10, 2020, with his reconsideration request date stamped received on March 13, 2020. Before the Commission had an opportunity to respond to the reconsideration request, another decision letter dated March 18, 2020, was issued. This letter indicated that he could not be paid EI benefits from April 15, 2019, because he had not shown he was ready, willing, capable of and actively looking for suitable employment, which means he had not proven his availability for work.

[11] The Commission spoke to the Claimant on May 8, 2020. The Claimant confirmed he was requesting a formal reconsideration of his availability and antedate denials.

[12] On May 22, 2020, the Commission issued its reconsideration decision. It said that they were writing concerning his request for reconsideration received on March 13, 2020, against the EI decision dated January 24, 2020. The Commission maintained its previous decisions, but only identified the issue of “availability for work”.

[13] The Claimant appealed this decision. A different General Division member heard the Claimant’s appeal on the issue of availability only. On October 7, 2020, the General Division dismissed his appeal.

[14] The Claimant appealed the General Division's decision. The Appeal Division rendered its decision on January 25, 2021. The Appeal Division returned the matter to the General Division for reconsideration. I am charged with making a decision on this appeal.

[15] The Appeal Division did not provide instructions on how I should proceed. This means that I am to hear the appeal as though it was being heard for the first time.

[16] After careful review of the appeal docket, I recognized that a mistake had been made regarding the issues under appeal. I requested that the Commission confirm that the Claimant was refused the antedate or backdate request to May 1, 2019. And if so, I decided I had jurisdiction to hear the appeal on the antedate issue, and requested the Commission provide its representations and submissions.

[17] The Commission responded on February 24, 2021, and agreed that I had jurisdiction over both issues. It confirmed the Claimant was refused his antedate request and provided its representations. I explained this to the Claimant at the hearing. He agreed that he wanted both issues appealed.

[18] I further recognize that the decision letter dated January 4, 2020, identifies that the Claimant had not proven he was capable of work. It was not until March 18, 2020, that the Commission also decided he had not proven he was capable of and actively looking for work.

[19] I see no reason why I must limit my jurisdiction to decide only whether the Claimant was capable of working for the following reasons:

- Both the Claimant and the Commission agree that the Claimant has proven he was capable of working from May 1, 2019.
- The issue of availability as described in the law says that a claimant must be "capable of and available for work".
- Both the Commission and the Claimant provided arguments on the Claimant's availability.
- By refusing jurisdiction, it will complicate and prolong the process for both parties.

[20] I find that in the interest of natural justice, and the requirement to conduct proceedings as informally and quickly as the circumstances allow¹, the issue of availability is before me.

WHAT I MUST DECIDE

[21] There are two issues under appeal:

1. Can the Claimant's renewal claim for EI benefits be treated as if it had been made earlier, on May 1, 2019?
2. Was the Claimant capable of and actively seeking work for the period of May 1, 2019, to December 2019?

REASONS FOR MY DECISION

[22] Not everyone who stops working can be paid EI benefits. A claim for benefits must be made within the prescribed time² and claimants have to prove on the balance of probabilities³ that no circumstances or conditions exist that have the effect of disentitling or disqualifying the claimant from receiving benefits⁴.

Can the Claimant's renewal claim for EI benefits be treated as if it had been made earlier, on May 1, 2019?

[23] When a claim for EI benefits is made after the prescribed time, the Commission may start your claim on the earlier date. This is called an antedate.

[24] The Claimant has to prove that he had good cause for the delay during the whole period of the delay⁵.

Has the Claimant proven he had good cause for the delay?

¹ This is set out in s 3 of the *Social Security Tribunal Regulations*.

² This is set out in s 50(4) of the *Employment Insurance Act* (EI Act).

³ On the balance of probabilities means, it is more likely than not.

⁴ This is set out in s 49 of the EI Act.

⁵ This is set out in s 10(5) of the EI Act.

[25] Yes, I find the Claimant has proven, on the balance of probabilities, that he had good cause for the entire duration of the delay.

[26] Good cause is not the same as having a good reason, or a justification for the delay. In order to establish good cause, the Claimant must show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the law⁶.

[27] The Claimant has to show this for the entire period of the delay⁷. If the Claimant did not take these steps, he must show that there were exceptional circumstances that explain why he did not do so⁸.

[28] I find that the Claimant did not do what a reasonable person in his situation would have done to learn of his rights and obligations, but he has shown there were exceptional circumstances that explain why he behaved the way he did.

[29] The record of employment dated January 15, 2019, indicates that the Claimant's last day of work was September 24, 2019. However, the employer commented that the Claimant was in receipt of wage loss insurance from September 25, to December 25, 2018. He applied for EI benefits on November 13, 2019.

[30] I accept that the Claimant did not become separated from his employment until December 2018, despite his last day of work being September 24, 2019. This means that the period of delay for the Claimant is from December 26, 2018, to November 13, 2019. However, the Claimant received 15 weeks sickness benefits until April 13, 2019. This changes the period of delay from April 14, to November 13, 2019.

[31] During the hearing, the Claimant was very candid and forthright with me. He told me that he is a recovering alcoholic. His marriage broke up, and he entered treatment in 2016, and was sober for two years. Then life's circumstances took over, he lost his kids and he really crashed.

⁶ This is explained in the Federal Court of Appeal (FCA) decision *Canada (Attorney General) v. Albrecht*, A-172-85.

⁷ This is explained in the FCA *Canada (Attorney General) v. Burke*, 2012 FCA 139.

⁸ This is explained in the FCA *Canada (Attorney General) v. Somwaru*, 2010 FCA 336.

[32] The Claimant told me that he stopped working for his employer on September 24, 2018, and he re-entered treatment. At this time he was receiving wage loss insurance payments until December 25, 2018. He explained that he was unable to return to his previous employer because it was too much stress: running a computer all day with 15 people under him. His doctor advised him to not return to his previous employer. This is when he separated from his employment.

[33] At this point, he told me he was in recovery, and “couch surfing” because he did not have a place to live. He was regularly visiting with his family doctor and a therapist. He was previously diagnosed with an anxiety disorder but it was now out of control because he was not medicating with alcohol.

[34] The Claimant explained that he was finally able to get himself into a stable living environment in March 2019. He was still meeting with his therapist and his family doctor who cautioned him not to dive back into stressful environments because it had not been a substantial amount of time. His doctor gave him permission to return to work in May 2019, just not with his previous employer.

[35] The Claimant told me that before he re-entered treatment, he had almost lost his life. While this was a “wake-up call”, he felt he was unable to return to a job with a high level of stress. He said he would end up in the same boat, and he felt this was a life or death situation. He needed to put his health first, so he would be there for his kids.

[36] The evidence in the appeal docket shows that on December 18, 2019, the Claimant called the Commission to find out if his claim had been processed. He told the Commission that he is suffering from anxiety and depression. He has nightmares just to leave the house.

[37] I asked the Claimant about this comment to the Commission. He told me that this comment is true, it is sometimes difficult to leave the house, but he was working through that because he had to.

[38] I asked the Claimant about a comment he made to the previous General Division member. He told the previous member that he did experience depression but it did not prevent him from looking for work. He explained to me that depression was applying for jobs and getting

turned down, being alone, and losing his kids. He was depressed, it was a nightmare to leave his house, but he still had to do it.

[39] On January 3, 2020, the Commission asked the Claimant to explain why he did not make an application on the earlier date. The Claimant said that he was not medically able to and was not quite sure how to go about the application or the conversion and also he did not think he would be entitled to any benefits.

[40] On January 10, 2020, the Claimant contacted the Commission to clarify his statement. He said initially that he was not medically able to, but he wanted to clarify that he was able to work, but computers cause him anxiety which made him unable to submit his conversion request at that time.

[41] I asked the Claimant why he did not apply for EI benefits when his doctor cleared him to start looking for work in May 2019. He told me that he was receiving EI benefits in 2016. He was encouraged by an EI agent to take a course, so he did. Then he got a letter telling him that he owes \$16,000 because he took this course. He called Service Canada but he felt he was getting a different story from everyone he spoke to. He did not apply right away in May 2019, because he thought he was not entitled to any benefits because of this debt. And he was not prepared mentally or financially to deal with the debt he owed.

[42] The Claimant further told me that when he applied for EI benefits in 2016, his partner at the time helped him because she had a computer. When everything crashed down on him this time, he had one bag that contained all of his personal possessions. He said the Commission told him he owed \$16,000, he did not have a computer, or a phone, and all he thought was to get a job and get back on his feet.

[43] The Claimant told me that he was working at keeping himself stable and at this time, his thought was that he needed to get back to work, so he could get his kids back. He was taking things slow, "dipping his toe" and trying to figure it out. He was used to finding a job quickly. So, not getting any call-backs made him think he was not worth anything.

[44] I asked the Claimant what prompted him to apply for EI benefits when he did. He explained that he had continued to see his doctor and therapist, he was looking for work, and

something had to change. He spoke with his previous wage loss insurance counsellor from the previous year, and he went to social assistance. Both of these people counselled him to apply for EI benefits. He told me he applied for EI benefits shortly after he met with social assistance.

[45] I find that the Claimant did not take reasonably prompt steps to learn of his rights and obligations under the law. However, I find that the Claimant has proven exceptional circumstances existed at the time that explains why he did not apply for EI benefits on the earlier date.

[46] The Commission argued that the Claimant was not medically prevented from applying for EI benefits if he could accept work.

[47] I respect the Commission's argument. I also respect the Claimant's statement to me that he did not think he had to share his deeply personal life story with the Commission especially since his doctor said he was able to go to work.

[48] The Claimant was in recovery from alcohol addiction. He was also dealing with the anxiety disorder that was not controlled. He was homeless for a period of time. He did not own a computer or a phone. He continued to see his doctor and therapist, demonstrating that he was making efforts to successfully recover.

[49] Further, the Claimant's doctors told him to avoid stressful situations. The Claimant has convinced me that dealing with the debt he owed to Service Canada was a stressful situation that would have negatively impacted his health, and his recovery.

[50] Considering all of the circumstances at the time, including the Claimant's medical condition, his doctor's orders to avoid stressful situations, his homelessness and his lack of resources like a computer and a phone, the Claimant has proven good cause for the delay in applying to reactivate his claim for EI benefits.

Was the Claimant capable of and actively seeking work for the period of May 1, 2019, to December 2019?

[51] Two different sections of the law require claimants to show that they are available for work. The Commission disentitled the Claimant from being paid benefits under both.

[52] The Claimant has to show that he was making reasonable and customary effort to find suitable work⁹. He also has to prove he was capable of and available for work and unable to obtain suitable employment¹⁰.

Reasonable and customary efforts to find a suitable job

[53] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary¹¹. I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job.

[54] I also have to consider the Claimant's efforts to find a job. The law lists nine job-search activities I have to consider. Some examples of those activities are

- assessing employment opportunities;
- preparing a resume or cover letter;
- applying for jobs;
- networking, registering for job search tools or with online job banks or employment agencies.

[55] The Commission says that the Claimant has not shown that he has made attempts to find work. This is a requirement for all claimants who wish to receive regular EI benefits.

[56] The Claimant told me that he was asked to submit a job search record. At the time he was not keeping a log book because he did not know he had to, so he asked for time to gather that information. When he did gather the information, he tried to call to find out how he could submit it, but was unable to get through. When he finally did get through, he remembers the Commission's agent telling him his benefits were denied. Then she said, "Good luck finding a job without a phone," and hung up. He said he did have his doctor's office fax the information to the number he was given, and is surprised that this information was not in the file.

⁹ This is set out in section 50(8) of the EI Act.

¹⁰ This is set out in section 18(1)(a) of the EI Act.

¹¹ This is set out in section 9.001 of the *Employment Insurance Regulations* (Regulations).

[57] The Claimant told the previous General Division member that he accepted help to prepare a resume and cover letter. The same person also helped him with mock interviews. He registered for job-search sites like Indeed and Kijiji and was sending out his resume. He was going to construction sites, restaurants and manpower sites to find work. He was networking with previous employers, friends, and he even asked his mother to help by asking at her church. He stated in his first hearing that he was applying for 5 to 10 jobs a day every week.

[58] I asked the Claimant how he could apply for this many jobs a day when he said he did not have a computer, and computers cause him stress. He told me that he was eventually living with a roommate who had a computer. He did not feel comfortable using it, so he would send in a few resumes but then he would need to take a break from the computer. He would go for walks in his neighbourhood and see constructions sites, so he would ask if there was work for site clean up or other labour jobs.

[59] The Claimant explained that he was looking for work in restaurants because he used to be a line cook. He would go into restaurants and ask if they were hiring. He said he just wanted to get his foot in the door. Before I could ask, the Claimant explained that he recognizes restaurants are a stressful environment, but he was looking for work as a prep cook outside of the stressful time at a restaurant, or as a dishwasher.

[60] The Claimant took a course in carpentry in 2016. He told me that he is not a licenced carpenter, but he could work in carpentry. He said he had a friend in carpentry whom he would call on a regular basis hoping to find some work.

[61] The Claimant had worked previously as a foreman in landscaping, so he was applying for labour jobs with landscaping companies. He said he did not want the stress of being in charge, but he is not afraid of physical labour.

[62] From this, I find the Claimant has demonstrated that he made reasonable and customary efforts to find suitable employment, within the limitations caused by his medical condition. The Claimant prepared a resume and cover letter, and participated in mock interviews. He actively applied for jobs that he was qualified and sometimes over-qualified to do. He networked with

family and friends and attended job sites hoping to find work. This shows his efforts were sustained and were directed toward finding a suitable job.

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

[63] I must consider whether the Claimant has proven that he is capable of and available for work and unable to find suitable employment¹². The Claimant has to prove three things to show he was available for work under this section¹³:

1. A desire to return to the labour market as soon as a suitable job is available;
2. That desire expressed through efforts to find a suitable job;
3. No personal conditions that might have unduly limited his chances of returning to the labour market.

[64] I have to consider each of these factors to decide the question of availability, looking at the attitude and conduct of the Claimant¹⁴.

Was the Claimant capable of working?

[65] Yes, the Claimant has proven he was capable of working.

[66] The Commission says that the Claimant has provided medical information showing that he can accept work that is a different type of work than he had done in the past.

[67] I have looked at the Claimant's medical notes and agree with the Commission. The Claimant has proven he is capable of work.

Did the Claimant have a desire to return to the labour market as soon as a suitable job is available?

¹² This is set out in s 18(1)(a) of the EI Act.

¹³ This is explained in the FCA decision *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹⁴ This is explained in the FCA decisions *Canada (Attorney General) v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[68] Yes, the Claimant has shown a desire to return to the labour market as soon as a suitable job is available.

[69] The Claimant has repeatedly said that he wants to find a job and get back on his feet. He told me at the hearing that he is motivated to find work because he wants to get his kids back. He also wants to set a good example for his kids. From this, I find the Claimant's attitude and conduct show he had a desire to return to work.

Has the Claimant made efforts to find suitable employment?

[70] Yes, the Claimant has made efforts to find suitable employment.

[71] The Claimant's doctor reported that the Claimant cannot return to work with his previous employer because of the stress it caused him. His doctor was concerned that this would compromise his recovery and aggravate his medical condition that, at the time, was not fully under control.

[72] The Claimant relied on his previous work experience. He told me that he worked as a cook in a kitchen in the past, so he was looking for work in restaurants, but in a less stressful position. He told me he was a landscaping foreman in the past, so he looked for work as a labourer with landscaping companies. The Claimant took courses in carpentry. He admitted to me that he does not like working in carpentry, but he would do what it takes, so he was calling his friends who work in carpentry to find work. He canvassed construction sites, hoping to find general labour work.

[73] The Claimant also visited manpower locations. He explained that these are the sites where you show up in the morning and hope to get a cash job for the day. He said he had been maybe a total of three times. I asked him why he did not continue with this. He said these were cash jobs, and he felt the others who were looking for these jobs were addicts looking to get cash, so they could get high. He said it was not the best place for a recovering addict.

[74] The Claimant told the Commission he was looking to find a job teaching guitar. I asked him if he was qualified to teach guitar. He told me that he used to play in a band for years, and he might have a job teaching guitar in a music store in his neighbourhood.

[75] Given the above, I am convinced that the Claimant was actively looking for suitable employment within the limitations of his medical condition.

Did the Claimant set personal conditions that might have unduly limited his chances of returning to the labour market?

[76] No, the Claimant has not set personal conditions that might limit his chances of finding a job.

[77] It is documented in the file that the Claimant lost his driver's licence in 2016. This restricted his job search to employers that were within city limits and accessible by bus during the hours the buses were running. However, the Claimant told me that he had his driver's licence, as long as he could maintain a "blow box" in his car. This came at a cost of \$100 per month. After he left treatment in December 2018, he was unable to afford the blow box, insurance, and maintenance on his car. He told me that getting a car was not a priority, because he has other issues that he needed to deal with first, like finding a job. I do not consider it a personal condition that the Claimant cannot afford to maintain a car.

[78] The Claimant says he cannot work on a computer. He told me that he gets worked up and thinks he does it to himself. He says it is hard to focus now and he does not know how he did it before. He said he is not a savvy computer guy, and he would rather not work on a computer if he does not have to.

[79] The Commission documented that the Claimant would accept work on a quiet job site where there is no stress or people yelling. He explained to me that he would accept a job that did not cause him stress, meaning he did not want to be in a supervisory position. And when he said a quiet site, he meant he would not tolerate being yelled at and "treated like crap". He said he wants to succeed, so he would rather not put himself in stressful situations.

[80] The Commission documented that the Claimant would accept an afternoon shift because getting up early or staying up late causes him stress. The Claimant told me that this statement is documented incorrectly. He told the Commission that he had the afternoon shift at his last

employer and that was his preference. He did not mean he would not accept any other shift, because he needs to work.

[81] The Commission documented that the Claimant was looking for a job in a warehouse, but he had no transportation to warehouses at night outside of the bus schedule. The Claimant told me that he applied to several warehouses, but he was told he was overqualified. He said he would have found a way to make it work if he had been successful in getting a job.

[82] I do not consider it a personal condition when the Claimant limited his job search to employment that fits within his medical limitations. The Claimant was following doctor's orders to find a job that was not stressful. It is understandable that the Claimant would start slowly, ensuring that his physical and mental health remained stable. The Claimant has demonstrated that he used previous work experience and looked for suitable employment that stayed within the bounds authorized by his doctor.

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

[83] Considering my findings on each of the factors together, I find, on the balance of probabilities, that the Claimant has proven that he was capable of and available for work and unable to find suitable employment.

CONCLUSION

[84] The appeal is allowed. The Claimant has proven good cause for the delay in renewing his existing claim for EI benefits. The Claimant is not disentitled from receiving EI benefits for the period of May 1, 2019, to December 2019.

K. Wallocha

Member, General Division - Employment Insurance Section

HEARD ON:	March 9, 2021
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METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. M., Appellant