Citation: *NK v Canada Employment Insurance Commission*, 2023 SST 1039

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	N. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (548002) dated October 27, 2022 (issued by Service Canada)

Tribunal member:	Edward Houlihan
Type of hearing:	Teleconference
Hearing date:	February 24, 2023
Hearing participant:	Appellant
Decision date:	March 13, 2023
File number:	GE-22-3886

Decision

[1] The appeal is dismissed. The Tribunal agrees with the Commission.

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

Overview

[3] After getting 15 weeks of sickness benefits, the Appellant applied for regular benefits. The Canada Employment Insurance Commission (Commission) decided that she was disentitled from receiving EI regular benefits from May 9, 2022, to June 30, 2022, since she hadn't provided a medical certificate to confirm her recovery. So, she hadn't proven that she was capable of and available for work.

[4] The Commission also decided that the Appellant wasn't entitled to receive EI regular benefits from May 9, 2022, to September 16, 2022. She hadn't proven her availability for work because she wasn't actively looking for work, wasn't able to provide a suitable job search list for that period and was taking a training course.

[5] A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[6] I have to decide whether the Appellant has proven that she was available for work between May 9, 2022, and September 16, 2022. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was able to work and available for work.

[7] The Appellant says that she was ready to try any job between May 9, 2022, and June 30, 2022, and would see whether she had recovered enough from her injury to continue. She also says that her training course didn't impede her working or looking for work.

Matter I have to consider first

The Appellant needed the hearing to be rescheduled

[8] The hearing was originally scheduled for February 22 at 9 a.m. At the beginning of the hearing, the Appellant said that she had to attend another call at 9:30 a.m. as part of a recovery program. That call could not be changed, and she could not miss it.

[9] I didn't think it would be fair to the Appellant to have to present her evidence in such a short amount of time. I agreed to reschedule the hearing to a day and time that worked for her.

[10] We agreed that the hearing would take place on February 24, 2022, at 1:30 p.m. The hearing went ahead at the rescheduled date and time.

Issue

[11] Was the Appellant capable of and available for work between May 9, 2022, and September 16, 2022?

Analysis

[12] The Appellant says she was injured at her previous job on January 7, 2022, and was let go on January 23, 2022. She received EI sickness benefits until May 8, 2022. She applied for regular benefits on May 9, 2022.

[13] The Commission says that she hasn't proven her availability for work between May 9, 2022, and September 16, 2022. She wasn't able to work until July 1, 2022; that is when she could return to full-time regular duties, based on a medical note she submitted.[1] She also mentioned not applying for jobs between May and September 2022 anyway. She said that she would look for work only when she finished her training course in September 2022.

[1] See Dr. Elena Ostapenko's medical note dated June 22, 2022, at GD3-23.

[14] The Appellant disagrees. She says she felt that she could have worked. If she had found a job, she would have tried it out to see whether she was able to do the work. But she never did work during that period.

[15] I find that the Appellant wasn't able to work from May 9, 2022, to June 30, 2022, based on the only medical information she provided.

[16] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits.

[17] 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.[2] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" means.[3] I will look at those criteria below.

[18] 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] I will look at those factors below.

[19] The Commission decided that the Appellant was disentitled from receiving benefits because she wasn't available for work based on these two sections of the law.

[20] In addition, the Federal Court of Appeal has said that claimants who are taking training full-time are presumed to be unavailable for work.[6] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are taking training full-time.

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[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.
[6] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[21] I will start by looking at whether I can presume that the Appellant wasn't available for work. Then, I will look at whether she was available based on the two sections of the law on availability.

Presuming full-time students aren't available for work

[22] The presumption that students aren't available for work applies only to full-time students.

The Appellant disputes that she was a full-time student

[23] The Appellant says that she was only a part-time student because her training was online and only 20 hours a week.

[24] The Commission disagrees and says that the training course and course work made her effectively a full-time student.

[25] I find that the Appellant was a part-time student.

[26] The Appellant's evidence shows that the training course was online and 4 hours a day, 5 days a week for a total of 20 hours a week. It was offered from 5 p.m. to 9 p.m., Monday to Friday. The homework or assignments were normally done during the lecture hours on Friday. If a student missed a session, they could get the materials by email or from the instructor.

[27] The Appellant wasn't a full-time student. So, the presumption doesn't apply to her.

[28] This means only that the Appellant isn't presumed to be unavailable for work. I still have to look at the two sections of the law that apply in this case and decide whether the Appellant was actually available.

Reasonable and customary efforts to find a job

[29] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job were reasonable and customary.[7]

[30] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[8] I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[31] I also have to consider the Appellant's efforts to find a job. The Regulations list nine job search activities I have to consider. Some examples of those are the following:[9]

- registering for job search tools or with online job banks or employment agencies
- networking
- contacting employers who may be hiring
- applying for jobs

[32] The Commission says that the Appellant didn't do enough to try to find a job. She made little effort to find work while taking her course. She said she had contacted a nearby corner store, a local gas station, and a school board. She contacted the school board in September 2022. She was focused on her training course, a pending arbitration case with her previous employer, and helping her sick mother. Also, she was homeless for a while until she moved in with a brother.

[33] The Appellant disagrees. She says that:

- she networked to find a job

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[7] See section 50(8) of the Act.
[8] See section 9.001 of the Regulations.
[9] See section 9.001 of the Regulations.

- she used several job portals like Indeed, Job to Me, and Zip Recruiter
- she contacted employers to see whether they were hiring
- she applied for jobs

[34] As part of her appeal, the Appellant provided a job search list of more than 50 jobs she had applied for in addition to the 3 already mentioned.[10] The list doesn't say when she applied or whether the jobs were full or part-time.

[35] At the hearing, the Appellant said that she had applied to maybe half of the jobs on the list between May and September 2022 and had told the Commission.

[36] However, the Appellant initially said that she hadn't applied for any jobs while taking her training course.

[37] She later said she had contacted a corner store, a local gas station, and a school board in September 2022. She applied to the corner store and the gas station because they were close to her home and her car wasn't working.

[38] She told the Commission more than once that these were the only employers she had contacted between May and September 2022.

[39] I don't find the Appellant's evidence about her job search to be credible. I believe it more likely that she contacted only three employers between May and September 2022, as she told the Commission several times.

[40] I find that the Appellant made little or no effort to find a suitable job between May 9, 2022, and September 16, 2022.

[41] The Appellant hasn't proven that her efforts to find a job were reasonable and customary.

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[10] See GD5-20 and GD5-21.

Capable of and available for work

[42] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[11] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[12]

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

b) She made efforts to find a suitable job.

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

[43] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[13]

– **Wanting to go back to work**

[44] The Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available.

[45] The Appellant said she was focused on her training course, her arbitration case, and helping her sick mother. Later, she said that her mother needed her help only with medical appointments and medication.

[46] The Appellant made little or no effort to find a suitable job until her training course was finished.

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

[47] The Appellant didn't make enough effort to find a suitable job.

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[11] See section 18(1)(a) of the Act.
[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.
[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.

[48] I have considered the list of job search activities given above in deciding this second factor. For this factor, that list is for guidance only.[14]

[49] The Appellant's efforts to find a new job between May 9, 2022, and September 16, 2022, were very limited. She says she contacted no more than three employers during that period. I explained this above when looking at whether the Appellant made reasonable and customary efforts to find a job.

[50] Those efforts weren't enough to meet the requirements of this second factor because they don't show that the Appellant was trying to find a suitable job.

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

[51] The Appellant didn't set personal conditions that might have unduly limited her chances of going back to work.

[52] The Appellant says she didn't do this because her training course was online and took place in the evening. If she missed a session, she could get the information in other ways. She says she would have quit the training program if she got a job.

[53] The Commission says that the Appellant said she would not quit the training program if a job interfered with the course. She later said she would have done both the course and her job.

[54] The course was expensive. It cost somewhere between $12,000 and $17,000. But the Appellant didn't pay for it; she received a grant from the Ontario Student Assistance Program. In the hearing she said she would have quit the training course if she could not take it and work at the same time. She could finish the course another time if needed.

[14] I am not bound by the list of job search activities in deciding this second factor. Here, I can use the list for guidance only.

[55] I find that the Appellant didn't unduly limit her chances of going back to work. She would have accepted full-time work and tried to continue with her training course. She would have quit the course if she found it too hard to do both.

– **So, was the Appellant capable of and available for work?**

[56] Based on my findings on all three factors, I find that the Appellant hasn't shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

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

[58] This means that the appeal is dismissed.

Edward Houlihan
Member, General Division – Employment Insurance Section