Citation: *KM v Canada Employment Insurance Commission*, 2023 SST 1214

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (490208) dated July 15, 2022 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	Teleconference
Hearing date:	February 24, 2023
Hearing participants:	Appellant
Decision date:	March 2, 2023
File number:	GE-22-2500

Decision

[1] The appeal regarding Voluntary Leave of Absence is allowed however the appeal regarding Availability is dismissed.

Overview

[2] The Appellant, K. M., a worker in ON, was upon reconsideration by the Commission, notified that it was unable to pay her Employment Insurance regular benefits starting January 3, 2021 because she took a voluntarily leave of absence from her employment with the X on January 2, 2021 without just cause within the meaning of the Employment Insurance Act. The Commission is of the opinion that taking a voluntarily leave was not her only reasonable alternative. Additionally, the Appellant was notified that she had not proven her availability for work while attending a course of instruction. The Appellant asserts that she was not able to work while doing her school placement due to a government mandate preventing her from doing so. (GD3-63) The Tribunal must decide if the Appellant should be denied benefits due to her having voluntarily taken a leave of absence without just cause as per section 29 of the Act and whether a disentitlement should be imposed pursuant to sections 18 and 50 of the Act and sections 9.001 and 9.002 of the Employment Insurance Regulations (the Regulations) for failing to prove her availability for work while taking a full time course if instruction.

Issues

[3] Issue # 1: Did the Appellant take a voluntarily leave of absence from the X on January 2, 2021?

Issue #2: If so, was there just cause?

Issue # 3: Did the Appellant have a desire to return to the labour market as soon as suitable employment is offered?

Issue #4: Was she making reasonable and customary efforts to obtain work?

Issue #5: Did she set personal conditions that might unduly limit her chances of returning to the labour market?

Analysis

[4] The relevant legislative provisions are reproduced at GD4.

[5] A claimant is disqualified from receiving EI benefits if the claimant voluntarily takes a leave of absence without just cause (Employment Insurance Act (Act), subsection 32(1)). Just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances (Act, paragraph 29(c)).

[6] The Respondent has the burden to prove the leave was voluntary and, once established, the burden shifts to the Appellant to demonstrate he had just cause for taking the leave. To establish he had just cause, the Appellant must demonstrate he had no reasonable alternative to taking the leave, having regard to all of the circumstances **(Canada (Attorney General) v. White, 2011 FCA 190; Canada (Attorney General) v. Imran, 2008 FCA 17).** The term "burden" is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means it is "more likely than not" the events occurred as described.

[7] The test for determining whether a claimant had "just cause" under section 29 of the EI Act is whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to taking the leave from the employment (**White 2011 FCA 190; Macleod 2010 FCA 301; Imran 2008 FCA 17; Astronomo A-141-97).** A claimant who leaves his/her employment must show that he/she had no other alternative but to do so. **Tanguay (A-1458-84)**

[8] The relevant legislative provisions are reproduced at GD4.

[9] There is a presumption that a person enrolled in a course of full-time study is not available for work. This presumption of fact is rebuttable by proof of exceptional circumstances **(Cyrenne 2010 FCA 349**)

[10] This presumption applies to an individual is not available for work when she is taking a full-time course on her own initiative. To rebut this presumption, the Appellant must demonstrate that her main intention is to immediately accept suitable employment as evidenced by job search efforts, that she is prepared to make whatever arrangements may be required, or that she is prepared to abandon the course. She must demonstrate by her actions that the course is of secondary importance and does not constitute an obstacle to seeking and accepting suitable employment.

[11] A person who attends a full-time course without being referred by an authority designated by the Commission must demonstrate that she is capable of and available for work and unable to obtain suitable employment, and must meet the availability requirements of all claimants who are requesting regular employment insurance benefits. She must continue to seek employment and must show that course requirements have not placed restrictions on her availability which greatly reduce chances of finding employment.

[12] The following factors may be relevant to the determination regarding availability for work:

(a) the attendance requirements of the course;

(b) the claimant's willingness to give up her studies to accept employment;

(c) whether or not the claimant has a history of being employed at irregular hours;

(d) the existence of "exceptional circumstances" that would enable the claimant to work while taking courses;

(e) the financial cost of taking the course.

[13] In order to be found available for work, a claimant shall: 1. Have a desire to return to the labour market as soon as suitable employment is offered, 2. Express that desire through efforts to find a suitable employment and 3. Not set personal conditions that might unduly limit their chances of returning to the labour market. All three factors shall be considered in making a decision. **(Faucher A-56-96 & Faucher A-57-96)**

RE: Voluntary Leave of Absence

Issue 1: Did the Appellant take a voluntarily leave from her employment with the X on January 2, 2021?

[14] No.

[15] For the leave to be voluntary, it is the Appellant who must take the initiative in obtaining the leave.

[16] In this case the employer initiated the Appellant’s leave from this employment with the X on January 2, 2021. The Appellant gave affirmed testimony at her hearing that her employer informed her she, based on provincial regulations put in place by the government, could no longer continue to work there because she was doing practicum work at the hospital and working at two different healthcare facilities was not allowed. She was assured her job would be there upon completion of her program.

[17] Since the leave was not initiated by the Appellant, a requirement necessary to make a finding of voluntarily leave I must find that the Appellant did not take a voluntarily leave from her employment.

Issue 2: If so, was there just cause?

[18] Moot given the above.

Re: Availability

[19] In order to be found available for work, a claimant shall: 1. Have a desire to return to the labour market as soon as suitable employment is offered, 2. Express that desire through efforts to find a suitable employment and 3. Not set personal conditions that might unduly limit their chances of returning to the labour market. All three factors shall be considered in making a decision**. (Faucher A-56-96 & Faucher A-57-96)**

Issue 3: Did the Appellant have a desire to return to the labour market as soon as suitable employment is offered?

[20] No.

[21] In this case, by the Appellant's statements and submissions, she was not seeking any employment since her leave of absence began.

[22] I find there was no desire to return to the labour market as soon as suitable employment is offered as she was committed to completing her program of studies.

Issue 4: Was she making reasonable and customary efforts to obtain work?

[23] No.

[24] The Appellant's lack of any job search activity could not be considered a reasonable and customary job search as per section 9.001 of the Regulations.

[25] I find that the Appellant has, throughout the entire period of this process, not shown that she was making reasonable and customary efforts to obtain suitable employment.

[26] I find that these actions, or lack thereof, on the part of the Appellant, again, do not show a sincere desire to return to the labour market as soon as suitable employment is offered.

Issue 5: Did she set personal conditions that might unduly limit her chances of returning to the labour market?

[27] Yes.

[28] The Appellant's initial statement to Service Canada that she was not available must be seen as placing serious restrictions on her availability **(Duquet 2008 FCA 313) (Gauthier 2006 FCA 40).**

[29] I find that the Appellant in this case was following a course of study resulting from her personal decision places conditions on her finding suitable employment.

[30] She states she was not available for work around her practicum schedule as it would require being at a second healthcare facility.

[31] The Appellant stated that she would not abandon her course to accept full time employment.

[32] However, the school policy requires students to attend practicum shifts of up to 40 hours per week.

[33] The Appellant's initial statement to Service Canada that she was not available and had not sought full time employment must be seen as placing serious restrictions on her availability. (Du**quet 2008 FCA 313) (Gauthier 2006 FCA 40).**

[34] I find that the Appellant In this case was not following a course of instruction approved by an authority designated by the Commission. She was taking the course as a result of her personal decision to attend this program and thus be more eligible for full time employment or further education.

[35] If the claimant was not available for employment because of personal reasons, then it cannot be good cause to refuse suitable employment (**Bertrand A-613-81).**

[36] While this Member supports the Appellant's efforts to complete her education, I find that she has failed to present evidence of "exceptional circumstances" that would

rebut the presumption of non-availability while attending a full time course. She is therefore not eligible to receive benefits for the period in question.

[37] By itself, a mere statement of availability by the claimant is not enough to discharge the burden of proof. **CUBs 18828 and 33717**

[38] Neither the Tribunal or the Commission have any discretion or authority to override clear statutory provisions and conditions imposed by the Act or the Regulations on the basis of fairness, compassion, financial or extenuating circumstances.

RE: Write Off

[39] Regarding the Appellant’s request that the overpayment be waived, this is a decision that can only be made by the Commission, the Tribunal has no jurisdiction in this matter.

[40] It is the Commission who holds the authority to reduce or write-off an overpayment but this is not automatic, application must be made to the Commission. One must outline the details that having such a debt would have and is having on the claimant’s finances, stress related to the debt and what caused the debt.

[41] The Commissions decision regarding same is not appealable to the Tribunal. Only the Commission decision that caused the overpayment is subject to the reconsideration under section 112 of the Employment Insurance Act (the Act). The claimant’s responsibility to repay an overpayment and the interest charged on an overpayment is not subject to reconsideration because these are not decisions of the Commission, and the claimant’s liability is as a “debtor” as opposed to a “claimant”. The claimant’s recourse regarding these issues is to seek judicial review with the Federal Court of Canada.

[42] This process must be initiated by the Appellant, she must apply to the Commission to have the debt written off,

[43] I do not have the authority to reduce or write off the overpayment. The Tribunal does not have the jurisdiction to decide on matters relating to debt reduction or write off.

[44] The Appellant requests that the overpayment be erased. I agree with the stated position of the Commission and I note that the law states that their decision regarding writing off an amount owed can't be appealed to the Social Security Tribunal. This means that I cannot determine matters relating to a request for a write-off or reduction of an overpayment.

[45] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue. This means that if the Claimant wishes to pursue an appeal regarding her request to write off the overpayment, she needs to do so through the Federal Court of Canada.

[46] As a final matter, I cannot see any evidence in the file that the Commission advised the Appellant about the debt forgiveness program through Canada Revenue Agency (CRA). If immediate repayment of the overpayment pursuant to section 44 of the EI Act will cause her financial hardship, she can call the Debt Management Call Centre of CRA at 1-866-864-5823. She may be able to make alternative repayment arrangements based on her individual financial circumstances.

Conclusion

[47] Having given careful consideration to all the circumstances, I find that the Appellant has proven, on a balance of probabilities that she had no reasonable alternative to taking the leave of absence when she did, the appeal regarding voluntary leave of absence is allowed. Additionally, again I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that she was not available for work while attending a course of instruction. and as such the appeal regarding availability is dismissed.

John Noonan

Member, General Division – Employment Insurance Section