



Citation: *OK v Canada Employment Insurance Commission*, 2023 SST 1923

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

# **Decision**

**Appellant:** O. K.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (537868) dated August 24, 2022 (issued by Service Canada)

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**Tribunal member:** Teresa M. Day

**Type of hearing:** In person

**Hearing date:** November 24, 2022

**Hearing participant:** Appellant

**Decision date:** February 2, 2023

**File number:** GE-22-2848

## Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) doesn't qualify for employment insurance (EI) sickness benefits.

## Overview

[3] The Claimant was unable to work because of a serious health issue<sup>1</sup>. He established a claim for EI sickness benefits as of November 14, 2021<sup>2</sup>.

[4] The Claimant was in Canada on a study permit which was valid from October 2, 2020 to July 31, 2022. The study permit required him to be a full-time student and restricted the number of hours he could work per week<sup>3</sup>.

[5] The Claimant stopped going to school<sup>4</sup> for medical reasons in November 2021. The school granted him a compassionate withdrawal from his program at the end of the semester in December 2021.

[6] The Claimant told the Commission he hoped to return to school at the start of the semester in January 2023<sup>5</sup>.

[7] To be able to receive EI sickness benefits, the Claimant must "otherwise be available for work."<sup>6</sup> In other words, the Claimant's illness must be the only reason why he wasn't available for work.

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<sup>1</sup> The Claimant testified he experiences a host of debilitating symptoms stemming from severe migraine headaches.

<sup>2</sup> At first, the Commission was not satisfied with the medical evidence provided by the Claimant (see GD3-28), but this issue was resolved when he provided the medical certificate at GD3-30.

<sup>3</sup> The study permit restricted the Claimant to working 20 hours per week off campus and 40 hours per week on campus while school was in session. He could work full-time during school breaks.

<sup>4</sup> The Claimant attended "X" and was taking a business program.

<sup>5</sup> See GD3-40. The Claimant told the Commission that his semesters run from September to December, January to April, and May to August.

<sup>6</sup> Section 18(1)(b) of the *Employment Insurance Act* (EI Act) sets out this rule and uses this wording.

[8] The Claimant's study permit is only valid if he is in school<sup>7</sup>. When he stopped going to school in mid-November 2021 and withdrew from his program in December 2021, he was no longer a full-time student and was not allowed to work in Canada at all. The Respondent (Commission) therefore decided that his illness was not the only thing preventing him from working.

[9] The Commission imposed a disentitlement on his claim for EI sickness benefits from November 15, 2021. The Claimant appealed that decision to the Social Security Tribunal (Tribunal).

## Issue

[10] The Claimant wasn't able to work from November 15, 2021 because of his health issues. But was his illness the only thing stopping him from being available for work?

## Analysis

[11] It's clear that, if you are sick or injured, you aren't available for work. The law for EI sickness benefits reflects this. However, the law says that if you are asking for sickness benefits, you must **otherwise** be available for work. This means the Claimant has to prove that his illness is the **only reason** why he wasn't available for work.<sup>8</sup>

[12] The Claimant 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 would have been available for work if he weren't for his illness.

[13] Case law sets out 3 factors for me to consider when deciding whether a claimant is available for work. A claimant has to prove the following three things:<sup>9</sup>

- a) They want to go back to work as soon as a suitable job is available.

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<sup>7</sup> See GD3-40 to GD3-41.

<sup>8</sup> See section 18(1)(b) of the EI Act.

<sup>9</sup> 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.

- b) They are making efforts to find a suitable job.
- c) They haven't set personal conditions that might unduly (in other words, overly) limit their chances of going back to work.

[14] The Claimant doesn't have to show that he was actually available. He has to show that he would have been able to meet the requirements of all 3 factors if he hadn't been sick.

[15] In other words, the Claimant has to show that his illness was the **only thing** stopping him from meeting the requirements of each factor.

### **Evidence from the Claimant**

[16] At the hearing, the Claimant said:

- He withdrew from his full-time college program at the same time as he left his job in the middle of November<sup>10</sup>.
- He provided the school with a doctor's note saying he was unable to continue with work or school for medical reasons.
- His study permit requires him to be enrolled in full-time studies.
- As of mid-November 2021, he was no longer enrolled in full-time studies at the school.
- But the school didn't finalize the withdrawal paperwork until February 2022 – even though the withdrawal “was effective November 15, 2021”<sup>11</sup>.

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<sup>10</sup> According to the Claimant's Record of Employment, his last paid day of work was November 15, 2021 (see GD3-24).

<sup>11</sup> The Claimant initially testified that his withdrawal was at the end of the term. But he clarified that the withdrawal was effective from the date he submitted it in the middle of November. He later said the withdrawal “was effective as of November 15, 2021”.

- His withdrawal was only for Semester 1, which went from September to December 2021.
- But he didn't enroll in any classes in Semester 2, which started in January 2022. So that semester "just carries forward" for up to 1 year "from the original deferral".
- He is still considered to be registered in the program.
- It doesn't matter that his withdrawal was effective November 15, 2021. He wants the Commission to consider him to be a full-time student until February 2022, which was when the school issued the paperwork for the withdrawal.
- His study permit expired in July 2022.
- In October 2022, he sent in an explanation for why he let it expire and asked that his study permit be extended to December 2024.
- He has a letter from the school confirming he can resume his courses in January 2023.
- He is still waiting for a decision on whether his study permit will be renewed or extended.
- He had a 3-month "grace period" to apply to extend the study permit after it expired on July 31, 2022. He did that in October 2022 – so he was entitled to be in Canada the entire time.
- He got "implied status" when he filed his explanation and request to renew/extend in October 2022.
- The only reason he withdrew from the program in November 2021 was to save himself from "an academic penalty". He didn't want to have an "F" grade on his academic record.

[17] The Claimant argued that:

- He applied for EI sickness benefits because he was sick and unable to work or go to school.
- He was trying to get better so he could go back to work and school. Once he recovered, his school “would have kicked back in” and he would have been able to work. When he recovered, everything would have “been back as normal”.
- Yes, he stopped going to school in mid-November and had asked to withdraw from his full-time studies. But he didn’t get notification that his withdrawal request had been accepted until February 2022.
- Since the school did not process his withdrawal request until February 2022, it should mean that his status as a full-time student was still in effect up until the school issued the paperwork confirming his withdrawal.
- If he could be considered a full-time student from November 15, 2021 to end of February 2022, that would mean his study permit could be considered valid for the 15-week benefit period for his claim for sickness benefits – and he was not “technically” prevented from working in Canada.
- He has satisfied the Faucher factors because he needs to work, he has started looking for jobs, and it’s not him who imposed the restrictions on international students who are in Canada on study permits (so those restrictions should not be considered a *personal* condition under the *Faucher* factors).

[18] I will now consider whether the Claimant has proven he would have been able to meet the requirements of all 3 *Faucher* factors if he hadn’t been sick.

### **The first *Faucher* factor: Wanting to go back to work**

[19] The Claimant has shown that he *would have* wanted to go back to work as soon as a suitable job was available *if he were not ill*.

[20] The Claimant told the Commission that he worked part-time, up to a maximum of 20 hours per week off campus. On his application for EI benefits, he said he would be returning to work for his employer. And in his request for reconsideration, he explained that he was hoping to get used to new medications and attempt a return to work, but it didn't pan out. He told the Commission that his intention would have been to work full-time in summer, which was not his semester.

[21] The Claimant testified that he pays his own bills and supports himself, and has been unable to do so since his health issues prevented him from working in November 2021. I accept that he needs and wants to work. He also said he would accept suitable employment as soon as he was medically fit to work or could find a job that would accommodate him in accordance with his doctor's note. This is enough to show that he *would have* wanted to go back to work as soon as possible *if he were not ill*.

[22] The Claimant has satisfied the first *Faucher* factor.

### **The second *Faucher* factor: Making efforts to find a job**

[23] The Claimant hasn't shown that he *would have* made enough efforts to find a suitable job *if he were not ill*.

[24] It doesn't appear that the Claimant would have been able to return to work with his prior employer. The scheduling mix-up immediately after he went on medical leave (described in his request for reconsideration at GD3-33) appears to have closed the door on that. He testified at the hearing that the employer "removed" him from the employee roster in December 2021.

[25] He submitted some screen shots that he says are from job applications he submitted through the online job bank "Indeed" (GD06). These appear to cover the period between May 23, 2022 and June 7, 2022. He also submitted a doctor's note dated June 5, 2022 which sets out the accommodations he would need to work with his disability<sup>12</sup>.

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<sup>12</sup> See GD6-4 to GD6-5.

[26] The Claimant testified in detail about how his medical condition affects not only his ability to work but his ability to look for employment.

[27] Unfortunately, there is no evidence the Claimant *would have* conducted an appropriate job search for a suitable job if he were not ill, starting from November 14, 2021. The Claimant would have to show that his job search efforts *would have* been sufficient to prove an active, on-going<sup>13</sup> and wide-ranging job search directed towards finding suitable employment. I see nothing to show the Claimant *would have* made enough effort to find a suitable job *if he were not ill*. And I cannot ignore the Claimant's statement that he was not aware he would need to prove that he *would have* been able to meet the *Faucher* factors *but for his illness* until late September 2022<sup>14</sup>.

[28] The Claimant has not satisfied the second *Faucher* factor.

### **The third *Faucher* factor: Personal conditions that limited his chances of returning to work**

[29] The Claimant set a personal condition that *would have* unduly limited his chances of going back to work *if he were not ill*.

[30] The Claimant's withdrawal from his full-time studies on November 15, 2021 was a condition that prevented him from working.

[31] The Claimant asks me to overlook the terms and conditions of his study permit. He says that if he had recovered quickly, he could have returned to school. And if he returned to his full-time studies, he would have been entitled to work because his study permit did not expire until July 31, 2022.

[32] I cannot accept this argument. I must deal with the circumstances that existed during the time the Claimant applied for and asked to be paid EI sickness benefits<sup>15</sup>.

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<sup>13</sup> A claimant must be searching for work for ***every day of their benefit period***.

<sup>14</sup> See GD6-1.

<sup>15</sup> At the hearing, the Claimant confirmed he is asking for the 15-week maximum entitlement for sickness benefits starting from when he stopped working in November 2021.



[33] During that time period, the Claimant was medically unable to work and had withdrawn from his full-time studies. This means he was not entitled to work in Canada throughout the 15 weeks he is asking for EI sickness benefits, starting from November 14, 2021<sup>16</sup>.

[34] The Claimant stopped going to classes and filed a request to withdraw from his full-time studies on November 15, 2021. The school processed his withdrawal and confirmed it was effective as of November 15, 2021. It doesn't matter that he didn't get the withdrawal "paperwork" from the school until February 2022. For all intents and purposes, he withdrew from his full-time studies on November 15, 2021.

[35] It would be inappropriate for me to minimize the importance of the Claimant's true status (namely that he was no longer enrolled in full-time studies) or the fact that it prevented him from working in Canada<sup>17</sup>.

[36] This means there were two reasons why the Claimant was unavailable for work starting from November 15, 2021. His illness was one of the reasons why he couldn't work; and his withdrawal from full-time studies was the other. Since his illness was not **the only reason** why he was unavailable for work, he does not qualify for EI sickness benefits.

[37] I find that the Claimant restricted his ability to work when he withdrew from his full-time studies, and this *would have* unduly limited his chances of going back to work *if he were not ill*.

[38] The Claimant has not satisfied the third *Faucher* factor.

### **So, would the Claimant have been available for work?**

[39] Based on my findings on the 3 *Faucher* factors, the Claimant has not met all of the requirements to prove that he *would have* been available for work if he were not ill,

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<sup>16</sup> The Commission says the Claimant established a claim effective November 14, 2021, but is not entitled to EI sickness benefits on this claim. The start date of his benefit period is November 14, 2021.

<sup>17</sup> See also the decision of this Tribunal's Appeal Division in *CEIC v. GS*, 2022 SST 32.

starting from November 14, 2021<sup>18</sup>. This means that he is disentitled to EI sickness benefits from November 14, 2021.

[40] I acknowledge that the Claimant has had a difficult time with his health condition. I also acknowledge his disappointment at not being able to receive EI sickness benefits when he was medically unable to work and in need of financial support. However, it is not enough to be in financial need or to pay into the EI program. All claimants must meet the terms and conditions in the *Employment Insurance Act* to be paid benefits. And if a claimant cannot prove they would otherwise be available for work but for their illness, they will be disentitled to EI benefits regardless of their financial need or contributions to the EI program.

[41] As a final matter, I apologize to the Claimant for taking longer to issue this decision than originally anticipated. This was due to unforeseen circumstances and events beyond my control. I thank him for his patience.

[42] The Claimant contacted the Tribunal recently asking for an update on his appeal. The issuance of this decision is the Tribunal's response to his enquiry.

## **Conclusion**

[43] The Claimant hasn't proven that he *would have* been available for work *if he wasn't ill*, starting from November 14, 2021. This means he cannot receive EI sickness benefits.

[44] The appeal is dismissed.

**Teresa M. Day**  
**Member, General Division – Employment Insurance Section**

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<sup>18</sup> This is the start date of the Claimant's benefit period for the application for EI sickness benefits he filed on December 10, 2021. Availability must be proven from the start of the benefit period.