Citation: *BM v Canada Employment Insurance Commission*, 2024 SST 534

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

# Decision

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| **Appellant:** | B. M. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (632214) dated December 1, 2023 (issued by Service Canada) |

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| **Tribunal member:** | Gary Conrad |
| **Type of hearing:** | Teleconference |
| **Hearing date:** | March 25, 2024 |
| **Hearing participant:** | Appellant |
| **Decision date:** | April 3, 2024 |
| **File number:** | GE-24-347 |

## Decision

[1] The appeal is 75% allowed.

[2] There were four major issues in this appeal. Three of them turn in the Appellant's favour.

[3] I have found that the Appellant was capable of working throughout the entire period of the disentitlement.

[4] I have found the Appellant did not knowingly provide false or misleading information. This means no penalty can be levied and no violation issued, so both of those are removed.

[5] However, on the final issue, I find the Appellant has only proven his availability for work from April 7 to May 31, 2023. After that date, he was failing to make sufficient efforts to find work and had a personal condition that overly limited his chances of returning to the labour market. This means the Appellant should be disentitled from benefits from June 1, 2023, to October 6, 2023.

## Overview

[6] The Appellant was in receipt of regular benefits.

[7] When his regular benefits were about to run out, he contacted the Commission in October 2023 to see if it was possible to get an extension to his benefits.

[8] He told the Commission that he had surgery in April 2023, and had been having some problems ever since. That is why he was looking for an extension to his benefits.

[9] This is where problems started to develop for the Appellant.

[10] The Appellant provided medical information as requested by the Commission.

[11] After talking to the Appellant, and looking through all the information, the Commission decided that the Appellant was not entitled to regular benefits from April 7,

2023, to October 6, 2023, because he was not capable of working due to his medical problems.

[12] The Commission also decided that since the Appellant had completed all his claimant reports and said that he was willing and capable of working, yet was not able to do so because of his medical problems, he had knowingly provided false information to them.

[13] The Commission issued a penalty and a violation against the Appellant.

[14] The Appellant says this is all a giant mistake by the Commission. He called in trying to get an extension to his benefits and the Commission employee decided that he could not work from April 7, 2023, and that he should have been on sickness benefits and changed his reports.

[15] The Appellant says that he started working in January 2024, and his condition now is the same as it was in April 2023 and every month thereafter, so if he can work now, he could have worked then.

## Matter I have to consider first

### 50(8) Disentitlement

[16] In their submissions the Commission states they disentitled the Appellant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

[17] In looking through the evidence, I do not see any requests from the Commission to the Appellant to prove his reasonable and customary efforts, or any explanations from the Commission to the Appellant about what kind of proof he would need to provide to prove his reasonable and customary efforts.

[18] While the Commission and Appellant did discuss his job search efforts, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11

persuasive, in that it is not enough for the Commission to discuss job search efforts with the Appellant, instead they must specifically ask for proof from the Appellant and explain to him what kind of proof would meet a “reasonable and customary” standard.

[19] I also do not see any discussion about reasonable and customary efforts during the reconsideration process or explicit mention of disentitling the Appellant under section 50(8) of the Act, or anything about the Appellant’s lack of reasonable and customary efforts, in the reconsideration decision.

[20] Based on the lack of evidence the Commission asked the Appellant to prove his reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Appellant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

## Issues

[21] Was the Appellant capable of work?

[22] Was the Appellant available for work?

[23] Did the Commission prove the Appellant knowingly provided false or misleading information on his claim reports?

[24] If so, then did the Commission act properly when issuing a penalty and violation?

## Analysis

### Capable of work

[25] In order to be considered available for work, one of the criteria is that the Appellant is capable of work. If he cannot work at all, then he clearly is not available for work.

**What the Commission says**

[26] The Commission says that the Appellant told them that he was not able to work and submitted a medical note that supported the Appellant was unable to work from April 7, 2023, to December 2023.[1]

[27] The Commission says the Appellant then changed his mind and said that his health deteriorated starting in October 2023, and that is when his doctor told him to refrain from work. They say this statement is partially supported by a new doctor's note submitted by the Appellant.[2]

[28] The Commission says that while the Appellant is now claiming he was available for work all along, the information he provided to them initially cannot simply be invalidated by him saying he was available. They say he would need substantial proof to show this.[3]

**What the Appellant says**

[29] The Appellant says that this is all the fault of the Commission employee he spoke with on the phone.

[30] He says that he called, looking to see if he could get an extension, and she led him down the garden path. He trusted her and followed her directions because he felt she was the expert.

[31] The Appellant says that his situation today is the same as it was back in April and every other month. He says that he started working in January 2024, being in the same condition he was back in April 2023, which proves that he was capable of working.

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[1] GD04-5
[2] GD04-5
[3] GD04-5

**My findings on capability**

[32] The Commission is correct that the Appellant's statements are all over the place regarding his ability to work.

[33] In his initial phone call with the Commission[4] he stated multiple versions of his ability to work:

- At 5:16 into the recording, he says that he was barely able to get off the couch for the first two months after the surgery.
- At 25:05 he says that he was not able to work for about 6 weeks.
- At 26:32 he says he was not capable for the whole time period.
- At 26:57 he says he has been unable to work for the whole time since the surgery.
- At 29:28 he says he guesses the benefits should be sickness since he has been unable to work.

[34] In his request for reconsideration he says that he was fine since the surgery, and it is only since October 2023, when the wound opened back up, that his doctor advised him to take time off of work.[5]

[35] In his testimony he argued that since he started working January 2024, and his condition then was unchanged from his condition in April 2023, he was always capable for working.

[36] Despite the Appellant's ever shifting statements on his medical condition, I find the Appellant's condition has not changed since his surgery on April 7, 2023, up to the time of the hearing.

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[4] See GD11A
[5] GD03-111 and 112

[37] I find as such because that it what all the notes from his doctor state, and I choose to place the greatest weight on the objective opinion of the doctor formed by his expertise and the information he has on the Appellant.[6]

[38] The October 20, 2023, November 16, 2023, and December 22, 2023, notes from his doctor all say the Appellant had surgery on April 7, 2023, and "He has been having persistent draining of mucus from the incision since the surgery with no improvement."

[39] The December 22, 2023, note says the Appellant is expected to see a specialist, hopefully at the end of February 2024, and the Appellant is advised to take time off work until February 29, 2024.[7]

[40] The notes are consistent that ever since the surgery, the Appellant's condition has not changed.

[41] I also find that the Appellant has returned to work as he has provided proof of his work starting on January 27, 2024.[8]

[42] So, I find, that since the doctor's notes show the Appellant's condition has not changed since the surgery, and the Appellant returned to work in January 2024 with no evidence of any change in his condition, he was fully capable of working since his surgery on April 7, 2023, since his condition then was the same as when he did start working in January 2024.

[43] This means he has proven he was capable of working throughout the entire period of the disentitlement (April 7, 2023, to October 6, 2023).

[44] However, just because he was capable of working, that does not mean he was available for work. That he what I need to determine next.

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[6] See GD03-97, October 20, 2023, note from his doctor; GD03-110, November 16, 2023, note from his doctor; GD10-4 December 22, 2023, note from his doctor.
[7] GD10-4
[8] See all of GD12, and specifically GD12-6

## Available for work

[45] Case law sets out three factors for me to consider when deciding whether the Appellant is available for work but unable to find a suitable job. The Appellant has to prove the following three things:[9]

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

b) He was making efforts to find a suitable job.

c) He did not set personal conditions that might have unduly (in other words, overly) limit his chances of going back to work.

[46] When I consider each of these factors, I have to look at the Appellant's attitude and conduct[10] for the entire period of the disentitlement (April 7 to October 6, 2023).[11]

– **Wanting to go back to work**

[47] I find the Appellant has proven he had a desire to work. I find his testimony credible that he wanted to work as I have no doubt he would have rather been working than laid off.

[48] The fact he said he would call around a couple of employers to see if they had any work also shows a desire to work as I would imagine that if someone had no desire to work, they would not bother to see if any is available.

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

[49] I find the Appellant was not making sufficient efforts to find a job for the entire period of the disentitlement.

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[9] 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.
[10] 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.
[11] GD04-4

[50] The Appellant says that he was not really looking for work, he was waiting for his previous employer to call him back to work. He had been laid off from his employer multiple times in the past and they always brought him back, so he was not concerned about having to look elsewhere for work.

[51] However, he says that he did also check in with his buddies at another employer about work, and this is the employer he eventually started working for in January 2024.

[52] The Appellant's witness, who was a superintendent at the Appellant's former employer, says that the Appellant had been laid off by the employer 8 times in the last 18 years and they always ended up calling the Appellant back to work.

[53] The Appellant's witness also says that the former employer was leading the Appellant on, telling him that yah, work was coming soon, but it never materialized.

[54] I can understand the Appellant wanting to return to his employer of 18 years. I can also understand his, not unreasonable, expectation that he would be called back to his job, since he says he was always called back in the past.

[55] Unfortunately for the Appellant, while the Federal Court of Appeal (FCA) has said that it can be reasonable to wait a little while to be called back to work,[12] they have also said that people claiming EI cannot simply wait indefinitely to be called back to work, they must be actively searching for a job.[13]

[56] I accept that the Appellant was not just sitting around waiting for a call. I can believe he was occasionally networking with his buddy at another employer to see if they had any work, and talking to other friends here and there, but this is not enough to show he was making sufficient efforts to find a job.

[57] A job search must be robust and ongoing. It needs to show a genuine effort to try and find work. EI benefits are only available to someone who is unemployed and unable to find suitable employment. If the Appellant is not making a good effort to find work,

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[12] *Page v Canada (Attorney General)*, 2023 FCA 169 at para 81.
[13] *De Lamirande v Canada (Attorney General)*, 2004 FCA 311

then he cannot prove that he is unable to find suitable employment, since he is barely looking.

[58] So, in consideration of FCA cases which state that it is reasonable for the Appellant wait a little while to be recalled, but that he cannot wait indefinitely, I find that two months is a reasonable period of time to wait for a recall. This means that from June 1, 2023, the Appellant was not making sufficient efforts to find work.

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

[59] I find the Appellant did have a personal condition that would have overly limited his chances of returning to the labour market, his decision to not make sufficient efforts to look for work.

[60] I find the Appellant's medical condition is not a personal condition that overly limited his chances of returning to the labour market. As I have already found, his condition was the same since his surgery, and he returned to work in that condition, so it did not limit his chances of returning to work.

[61] However, his decision to only network with a couple buddies while waiting for his employer to call him back to work was a personal condition that overly limited his chances of returning to the labour market.

[62] I find that choosing to not expand his job search efforts to searching for work in other ways, such as online job banks, would have overly limited his chances of returning to the labour market as it would have significantly reduced the employment opportunities available to him; a much smaller potential job pool means a lower possibility of returning to the labour market.

[63] However, as the FCA has said it is reasonable for the Appellant wait a little while to be recalled,[14] I find that two months is a reasonable period of time, so the Appellant's

[14] *Page v Canada (Attorney General)*, 2023 FCA 169 at para 81.

personal condition of limiting his job search was only overly limiting from June 1, 2023, onward.

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

[64] Based on my findings on the three factors, I find that the Appellant has shown that he is capable of and available for work but only from April 7, 2023, to May 31, 2023. After that time, he was not making sufficient efforts to find suitable employment, and he had a personal condition that was overly limiting his chances of returning to the labour market.

## Did the Appellant knowingly provide false or misleading information?

[65] To impose a penalty the Commission has to prove that the Appellant knowingly provided false or misleading information.[15]

[66] It is not enough that the information itself is false or misleading. To be subject to a penalty, the Commission has to show that it is more likely than not that the Appellant knowingly provided it. In other words, the Commission has to prove the Appellant knew the information he was providing was false or misleading.[16]

[67] If it is clear from the evidence the questions were simple and the Appellant answered incorrectly, then I can infer that the Appellant knew the information was false or misleading. Then, the Appellant must explain why he gave incorrect answers and show that he did not do it knowingly.[17] The Commission may impose a penalty, or warning letter, for each false or misleading statement knowingly made by the Appellant.

[68] I do not need to consider whether the Appellant intended to defraud or deceive the Commission when deciding whether he is subject to a penalty or warning letter.[18]

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[15] Sections 38 and 41.1 of the *Employment Insurance Act*.
[16] *Bajwa v Canada*, 2003 FCA 341; the Commission has to prove this on a balance of probabilities, which means it is more likely than not.
[17] *Nangle v Canada (Attorney General)*, 2003 FCA 210.
[18] *Canada (Attorney General) v Miller*, 2002 FCA 24.

[69] The Commission says that the Appellant declared himself available for work from April 7, 2023, to October 6, 2023, although he later admitted that he was unable to work due to health reasons.[19]

[70] The Commission says the questions on the claimant report are clear and leave little room for misinterpretation.[20]

[71] I find that the Appellant did not knowingly provide false or misleading information, and in fact, did not actually provide false or misleading information at all.

[72] As I have found above, all of the doctor notes sent in by the Appellant state that the Appellant's condition has been unchanged since his surgery on April 7, 2023.

[73] The October 20, 2023, November 16, 2023, and December 22, 2023, notes from his doctor all say the Appellant had surgery on April 7, 2023, and "He has been having persistent draining of mucus from the incision since the surgery with no improvement."

[74] The December 22, 2023, note also says the Appellant is expected to see a specialist and is advised to take time off work until February 29, 2024.[21]

[75] Despite this lack of change in his medical condition, he still returned to work on January 27, 2024.[22]

[76] So, as I have found above,[23] since the doctor's notes show the Appellant's condition has not changed since the surgery, yet he returned to work in January 2024 with no evidence of any change in his condition, he was fully capable of working since his surgery on April 7, 2023. This means that when he completed his reports and said he was ready, willing and capable of working he was not providing false information. He could have returned to work at that time if his employer had called him to return to work, so the answer he provided was true information.

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[19] GD04-6
[20] GD04-6
[21] GD10-4
[22] See all of GD12, and specifically GD12-6
[23] See paragraph 42

[77] It is true that the Appellant did tell the Commission that he was unable to work due to his surgery; however, the objective evidence (the doctor's attestations that the Appellant's condition has not changed since the surgery, and the fact he returned to work in that same condition) outweigh the subjective statement of the Appellant to the Commission.

## The penalty and violation

### Penalty

[78] In order for the Commission to be able to issue a penalty for making a false or misleading statement, the Appellant actually needs to have done so.[24]

[79] Since I have found the Appellant has not made a false or misleading statement, no penalty can be issued. This means the penalty is removed.

### Violation

[80] In order to issue a violation, a penalty needs to be imposed on the Appellant.[25] Since no penalty can be imposed because he did not make a false or misleading statement, this means no violation can be issued.

# Conclusion

[81] The appeal is 75% allowed.

[82] Of the four issues in the appeal (capability of working, availability for work, providing false or misleading information, and the penalty and violation) three go in the Appellant's favour.

[83] The Appellant has proven that he is capable of work for the entire period of the disentitlement.

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[24] Section 38 of the *Employment Insurance Act*
[25] Section 7.1(4) of the *Employment Insurance Act*

[84] I have also found that he did not provide false or misleading statements, so no penalty or violation can be issued.

[85] However, on the matter of availability, I find the Appellant has only proven his availability from April 7 to May 31, 2023. This means he will be disentitled from benefits for the period of June 1 to October 6, 2023.

Gary Conrad
Member, General Division – Employment Insurance Section