



Citation: *FC v Canada Employment Insurance Commission*, 2024 SST 1324

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

Decision

Appellant: F. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (670666) dated August 9, 2024 (issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: Teleconference

Hearing date: October 9, 2024

Hearing participant: Appellant

Decision date: October 10, 2024

File number: GE-24-3014

Decision

Issue 1 (Allocation of Earnings)

[1] The appeal is dismissed.

[2] The Appellant received earnings. And the Canada Employment Insurance Commission (Commission) allocated (in other words, assigned) those earnings to the right weeks.

Issue 2 (Availability for Work)

[3] The Appellant hasn't shown that she was available for work from February 6, 2023. This means that she can't receive regular Employment Insurance (EI) benefits from February 6, 2023.

Overview

Issue 1

[4] The Appellant received Worker's Compensation benefits of \$101.15 per day (for seven days a week) starting October 19, 2022, for an indefinite period. The source of the payments was "CNESST" (Commission des normes, de l'équité, de la santé et de la sécurité du travail). The Commission decided the money was "earnings" under the law since the monies were paid because of the severance of the employment relationship.

[5] The law says that all earnings have to be allocated to certain weeks. What weeks earnings are allocated to depends on why you received the earnings.¹

[6] The Commission allocated the earnings starting the week of October 16, 2022, at an amount of \$708.00 per week. This is the week the Commission said the Appellant's incapacity had begun and the employment relationship effectively ended.

¹ See section 36 of the *Employment Insurance Regulations* (EI Regulations).

[7] The Appellant says she didn't know she was going to receive Worker's Compensation benefits when she applied for EI sickness benefits on October 4, 2022. She says she contacted the Commission when she received the Worker's Compensation monies in June 2023. The Appellant further says the Commission should have advised her that Worker's Compensation payments could be applied against her claim and create an overpayment.

Issue 2

[8] The Commission decided the Appellant was disentitled from receiving EI regular benefits from February 6, 2023, because she wasn't available for work. 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.

[9] I must decide whether the Appellant has proven that she was available for work. 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 available for work.

[10] The Commission says the Appellant wasn't available, because she clearly stated that she was unable to work and was never actively searching for employment as of February 5, 2023 (the first week in which she was receiving regular EI Benefits).

[11] The Appellant says she wasn't available for work starting February 6, 2023. She further says she was advised by Service Canada to convert her claim from sickness to regular benefits when the sickness benefits ended. She also says she was misled by Service Canada and "wrongly done by."

Issue 1 (Allocation of Earnings)

[12] I have to decide the following two issues:

- a) Is the money the Appellant received earnings?
- b) If the money is earnings, did the Commission allocate the earnings correctly?

Analysis

Is the money the Appellant received earnings?

[13] Yes, the Worker's Compensation monies the Appellant received of \$101.15 per day (seven days a week) starting October 19, 2022, were earnings (GD3-17 and GD3-18). Here are my reasons for deciding that the money is earnings.

[14] The law says that earnings are the entire income that you get from any employment.² The law defines both "income" and "employment."

[15] **Income** can be anything that you got or will get from an employer or any other person. It doesn't have to be money, but it often is.³ Case law says that severance pay is earnings.⁴

[16] **Employment** is any work that you did or will do under any kind of service or work agreement.⁵

[17] The law further says that in a situation where a claimant requested EI sickness benefits and was entitled to receive wage loss indemnity or paid sick leave from an employer (who has been granted a premium reduction from the Premium Reduction Program) the amount payable of wage loss indemnity or paid sick leave for a week of unemployment is **deducted at 100 percent for that week**. These provisions exist to ensure that an employer who was granted a premium reduction remains the first payer for these types of benefits.⁶

[18] The Commission decided the Worker's Compensation monies received by the Appellant were severance pay. So, it said the money was earnings under the law.

² See section 35(2) of the EI Regulations.

³ See section 35(1) of the EI Regulations.

⁴ See *Blais v Canada (Attorney General)*, 2011 FCA 320.

⁵ See section 35(1) of the EI Regulations.

⁶ See subsections **19(2), 21(3) and 22(5)** of the *Employment Insurance Act* (EI Act).

[19] The Appellant says the Commission should have advised her that Worker's Compensation monies could be applied against her claim for EI sickness benefits.

[20] The Appellant has to prove that the money is **not** earnings. The Appellant has to prove this on a balance of probabilities. This means she has to show that it is more likely than not that the money isn't earnings.

[21] I find the Worker's Compensation monies the Appellant received were earnings. I make this finding because the monies paid to the Appellant was owing to the severance of her employment relationship. I realize the Appellant testified the Commission should have properly advised her that Worker's Compensation monies could be allocated against her claim. However, the case law has consistently explained that regardless of misunderstanding neither the Commission or Tribunal can absolve a claimant from the application of the Employment Insurance Act and EI Regulations.⁷

[22] I further recognize the Appellant was displeased and frustrated with the allocation of Worker's Compensation payments against her claim for EI sickness benefits. Nevertheless, I must apply the law to the evidence before me. In other words, I cannot ignore or re-fashion the law even for compassionate reasons.⁸

Did the Commission allocate the earnings correctly?

[23] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depend on why you received the earnings.⁹

[24] The Appellant's earnings were paid because of the severance of the employment relationship.

[25] The law says that the earnings you get for being separated from your job have to be allocated starting the week you were separated from your job. It doesn't matter when

⁷ *Tjong v Canada (Attorney General)*, FCA A-672-95; *Romero v Canada (Attorney General)*, FCA A-815-96.

⁸ *Knee v Canada (Attorney General)*, 2011 FCA 301.

⁹ See section 36 of the EI Regulations.

you actually receive those earnings. The earnings have to be allocated starting the week your separation starts, even if you didn't get those earnings at that time.¹⁰

[26] The Appellant went on sick leave from her employer starting October 4, 2022. The Appellant explained she was supposed to return to her job but was later dismissed. The Appellant's Record of Employment indicated her last day paid as October 4, 2022 (Gd3-15). The Appellant established a claim for EI sickness benefits on October 8, 2022.

[27] The Commission submitted that the Appellant requested EI sickness benefits for the period from October 9, 2022, to February 4, 2023. The Commission also submitted the Appellant was entitled to receive Worker's Compensation benefits from the "CNEST" indefinitely from the start date of October 19, 2022 (GD-4). So, the Commission decided to allocate the Worker's Compensation benefits from **October 16, 2022**.

[28] The amount of money to be allocated starting the week of October 16, 2022, was \$708.00. This is because the payment amount from "CNEST" was \$101.15 per day (7 days) a week starting October 19, 2022 (GD3-17 and GD3-18).

[29] This means that starting the week of October 16, 2022, the amount of \$708.00 was allocated to each week.

[30] I was initially confused about why the Commission decided to allocate the Appellant's earnings from October 16, 2022. However, the information from "CNEST" indicated the Appellant would receive her Worker's Compensation payments starting October 19, 2022, because this was the start date of her incapacity(GD3-18). This means the Appellant's period of incapacity had begun on October 19, 2022, and the employment relationship had effectively ended at that time (GD3-15).

[31] In summary: I find the Commission correctly allocated the Appellant's earnings from October 16, 2022.

¹⁰ See section 36(9) of the EI Regulations.

Issue 2 (Availability for Work)

[32] Was the Appellant available for work from February 6, 2023?

Analysis

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

[34] First, the *Employment Insurance Act* (EI Act) says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.¹¹ The *Employment Insurance Regulations* (EI Regulations) give criteria that help explain what “reasonable and customary efforts” mean.¹² I will look at those criteria below.

[35] Second, the EI 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.¹³ Case law gives three things a claimant has to prove to show that they are “available” in this sense.¹⁴ I will look at those factors below.

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

[37] I will now consider these two sections myself to determine whether the Appellant was available for work.

Reasonable and customary efforts to find a job

[38] The law sets out criteria for me to consider when deciding whether the Appellant’s efforts were reasonable and customary.¹⁵ I have to look at whether her

¹¹ See section 50(8) of the EI Act).

¹² See section 9.001 of the EI Regulations.

¹³ See section 18(1)(a) of the EI Act.

¹⁴ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹⁵ See section 9.001 of the EI Regulations.

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.

[39] 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 activities are the following:¹⁶

- assessing employment opportunities
- preparing a résumé or cover letter
- contacting employers who may be hiring

[40] The Commission says the Appellant didn't do enough to try to find a job. Specifically, the Commission says the Appellant didn't provide any evidence that she was available for work or actively seeking employment.

[41] The Appellant confirmed she was recovering from her illness and wasn't available for work from February 6, 2023. She says that she was advised by Service Canada to convert her claim from sickness benefits to regular benefits. She also says she was "misled" by Service Canada and "wrongly done by."

[42] I find the Appellant wasn't making reasonable and customary efforts to find work. I make this finding because the Appellant was forthright in her testimony that she wasn't available for work owing to her health issues. I realize the Appellant testified that she was "misled" by Service Canada when an officer advised her to convert her claim from sickness benefits to regular benefits when her sickness benefits ended. However, the case law has explained that misinformation from the Commission was no basis for relief from the operation of the EI Act and EI Regulations.¹⁷

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

¹⁶ See section 9.001 of the EI Regulations.

¹⁷ *Shaw v Canada (Attorney General)*, 2002 FCA 325.

Capable of and available for work

[44] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:¹⁸

- a) She wanted to go back to work as soon as a suitable job was available.
- b) She had made efforts to find a suitable job.
- c) She didn't set personal conditions that might unduly (in other words, overly) limited her chances of going back to work.

[45] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.¹⁹

– Wanting to go back to work

[46] The Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available. As mentioned, the Appellant was forthright in her testimony that she wasn't available for work starting February 6, 2023, because of health issues.

– Making efforts to find a suitable job

[47] The Appellant hasn't made enough effort to find a suitable job.

[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.²⁰

[49] I explained these reasons above when looking at whether the Appellant had made reasonable and customary efforts to find a job. The Appellant didn't provide evidence that she made any efforts to find a job. So, this wasn't enough to meet the

¹⁸ 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.

¹⁹ 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.

²⁰ 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.

requirements of this second factor. As mentioned, the Appellant was forthright in her testimony that she wasn't available for work starting February 6, 2023.

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

[50] The Appellant did set personal conditions that might have unduly limited her chances of going back to work.

[51] The Appellant testified that owing to health issues she wasn't available for work starting February 6, 2023.

[52] The Commission says the Appellant clearly stated that she was unable to work and was never actively searching for employment as of February 5, 2023 (which was the first week in which she was receiving regular EI benefits).

[53] I find the Appellant unduly limited her chances of going back to work, because she testified she wasn't available for work owing to health issues.

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

[54] Based on my findings on the three factors, I find the Appellant hasn't shown that she was capable of and available for work but unable to find a suitable job from February 6, 2023.

The Appellant's Overpayment

[55] I recognize the allocation of earnings (along with the disentitlement for failing to prove her availability for work from February 6, 2023) has created an overpayment for the Appellant. However, I have no authority to write-off the Appellant's overpayment.²¹ But the Commission can decide to write off an overpayment in certain situations—for example, if paying it back would cause the Appellant undue hardship.

²¹ *Villeneuve v Canada (Attorney General)*, 2005 FCA 440; *Mosher v Canada (Attorney General)*, Canada, 2002 FCA 355; and *Filiatrault v Canada (Attorney General)*, A-874-97.

[56] So, the Appellant can ask the Commission to write-off her overpayment. Or, she can contact the Canada Revenue Agency (CRA) to discuss payment arrangements.

[57] Finally, I realize the Appellant testified that she had trusted Service Canada and was “wrongly done by.” However, I must apply the law to the evidence before me. In short, I cannot ignore or re-fashion the law even for compassionate reasons.²²

Conclusion

Issue 1 (Allocation of Earnings)

[58] The appeal is dismissed.

[59] The Appellant received earnings of \$101.15 per day (seven days a week) indefinitely starting October 19, 2022. These earnings are allocated starting the week of October 16, 2022, at 708.00 per week.

Issue 2 (Availability for Work)

[60] The Appellant hasn’t shown that she was available for work within the meaning of the law from February 6, 2023. Because of this, I find the Appellant can’t receive EI benefits from February 6, 2023.

[61] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section

²² *Knee v Canada (Attorney General)*, 2011 FCA 301.