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## Unemployment Insurance: Policies and Principles of Disqualification and Disentitlement for Benefits

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### *I. Introduction*

Ever since the 1940 amendment to the *BNA Act*<sup>1</sup> which gave exclusive jurisdiction in relation to unemployment insurance to Parliament, the thrust of Canada's unemployment compensation system and the basis for its eligibility conditions has been that the claimant must be unemployed through no fault of his own.<sup>2</sup> The primary purpose of the *Unemployment Insurance Act*, 1971<sup>3</sup> was put succinctly in a recent decision of the Umpire:

. . . it is not the function of the Unemployment Insurance Act to provide public welfare, but rather to provide aid of a temporary nature to a claimant who is actively seeking work and capable of performing work of a nature which may be available and who through no fault of his own is unable to find it. CUB 3447<sup>4</sup>

Because of this limited legislative objective, unemployment insurance cannot be seen as a panacea for all the ills of economic disadvantage, but is only part of a broader spectrum of social

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This article is based on a paper prepared for credit in Professor Innis Christie's Employment Law Seminar in the Spring of 1975. It should be emphasized that this paper could not have been written without the assistance of the Halifax office of the Unemployment Insurance Commission. However, the views of the author are not necessarily those of the Commission and indeed, the Commission takes issue with certain of the author's assessments of the extent of the discretion and flexibility of action possessed by Commission officers.

1. Section 91 (2A) added by *British North American Act* 1940, 3-4 Geo. VI, c. 36 (U.K.); R.S.C. 1970 App. No. 27.

2. Involuntary unemployment has also been the basis for compensation in England and in the federally aided state administered programs in the United States: see for example, D. Packard, *Unemployment without Fault: Disqualifications of Unemployment Insurance Benefits* (1971-72), 17 Vill. L. Rev. 635.

3. S.C. 1970-71-72, c. 48.

4. All appeals from administrative decisions under the *Unemployment Insurance Act* are, in the first instance, to a Board of Referees (S.C. 1970-71-72, c. 48, s. 94 (1)) and thereafter a final appeal may be had under certain conditions (ss. 95 and 96) to a Federal Court Judge sitting as an Umpire. His decisions are reported by a CUB number and are final except insofar as there is a right to judicial review under the *Federal Court Act*, S.C. 1970-71-72, c. 1. (See s. 100 of the *Unemployment Insurance Act*.)

legislation, including worker's compensation, social assistance, old age pensions and disability relief programs. It is not surprising, therefore, that all the unemployment insurance acts since 1940 have had provisions restricting eligibility in such cases as: (1) voluntary separation<sup>5</sup>, (2) loss of employment through misconduct<sup>6</sup>; (3) unavailability for work<sup>7</sup>; and (4) refusal of suitable employment<sup>8</sup>. However, notwithstanding that the remedial intent of unemployment insurance is limited and imposes definite boundaries in relation to the classes of persons who will be compensated, there is also a compelling interest in having those boundaries determined fairly and in alleviating the economic hardship of claimants falling within them promptly and efficiently.<sup>9</sup>

Inasmuch as the Unemployment Insurance Commission is charged with the administration of the *Unemployment Insurance Act*,<sup>10</sup> the job of striking a balance between relieving against involuntary unemployment and protecting the integrity of a program falls squarely in its lap. Considering the veritable multitude of claims which the Commission must process,<sup>11</sup> the proper determination of eligibility in each case becomes no mean task. As a result administrative realities weigh heavily and in practice the enforcement of the eligibility provisions of the Act become, perforce, largely a matter of policy.

In these circumstances, it is plain that specific disqualification provisions such as those mentioned above<sup>12</sup> cannot properly be assessed as purely legal issues; if their real effect upon claimants is

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5. S.C. 1940, c. 44, s. 43; R.S.C. 1970, c. U-2, s. 60(1), (1955 Act); S.C. 1970-71-72, c. 48, s. 41(1).

6. *Id.*

7. S.C. 1940, c. 44, s. 29(1); R.S.C. 1970, c. U-2, s. 54(2) (a), (1955 Act); S.C. 1970-71-72, c. 48, s. 25 (a)

8. S.C. 1940, c. 44, s. 42; R.S.C. 1970, c. U-2, s. 59(1), (1955 Act); S.C. 1970-71-72, c. 48, s. 40(1).

9. See 33rd. Annual Report of the Unemployment Insurance Commission, at P. 3. This report covers the period from January 1, 1973 to December 31, 1973 to December 31, 1973 and was prepared in compliance with the *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48, s. 130(1).

10. S.C. 1970-71-72, c. 48, s. 6. Hereinafter the *Unemployment Insurance Act* will be referred to as the "Act" and citations will be given by section number only. Similarly, the Unemployment Insurance Commission will be referred to as the "Commission" or "UIC".

11. In 1973 the Commission paid out \$2,004 million in net benefit payments: 33rd. Annual Report, *supra*, note 9 at 11.

12. *Supra*, notes 5-8.

to be determined, they are better evaluated in their administrative, as well as their legal, dimension. Assuming the validity of this opinion, it is the purpose of this paper to analyse some of the major issues of eligibility on the basis of both UIC policy and legal principle as reflected in Umpire decisions. The discussion will center on those areas already enumerated, namely voluntary separation, misconduct, availability, and suitable employment. The equally important subjects of unemployment arising out of illness, labour disputes and pregnancy<sup>13</sup> are omitted for reasons of economy.

Before setting out each area individually, further discussion by way of introduction to the Unemployment Insurance Commission is in order. Here, the concern will be with what is known in UIC circles as the "Benefit Control Function".

## *II. The Benefit Control Function*

The UIC policy manual<sup>14</sup> describes the functional structure of the organization as consisting of a continuous spectrum of activities which fall into three segments in the Commission, namely: insurance, benefit control and special investigation. The boundary or limitations of the middle or benefit control group is defined by setting the limits of the insurance group and the special investigation group. The manual goes on to point out that, in actual practice, these limits or boundaries are not rigidly defined. Indeed, as far as working relationships are concerned, many of the benefit control officers' leads concerning deliberate abuse will arise through the observations or suspicions of insurance officers. Similarly, many of the leads for special investigators will come from benefit control officers' observations and findings.<sup>15</sup>

In stating its benefit control policy the Commission concedes that there is no known way of determining with 100% accuracy which claimants are deliberately abusing the unemployment insurance scheme. Consequently, the manual recognizes that benefit control investigation may be carried out in many cases where the claimant or employer is honestly fulfilling all his obligations under the Act.

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13. See ss. 25(b), 44 and 46 of the Act.

14. Canada Unemployment Insurance Commission, *Manuic 1: Policy Guidelines (amended)* (Ottawa: October, 1973). The Manuic series of manuals are used in the training of officers and for subsequent reference.

15. *Id.* at 2.16 and 2.14.

Accordingly, the Commission directs its employees to:

- (1) Select in such a way that the investigations cover areas of probable deliberate abuse;
- (2) Investigate in such a way that all facts are obtained without harassment, whether intentional or otherwise;
- (3) Record the results of the investigation objectively such that an Insurance Officer, A Board of Referees, or an Umpire can reach a correct decision.<sup>16</sup>

The methods to be used in selection of caseloads which are endorsed by the Commission are:

- (1) Random sampling.
- (2) Discriminate selection, i.e. where employment market information indicates that employment is potentially to be found, and hence indicates a high probability of abuse amongst long term claimants who qualify for such work.
- (3) Computer matching programs, e.g. monthly file match with Canada Pension Plan, the Adult Occupational Training Act file matching program, and the Local Initiatives Program (LIP) file match.
- (4) Leads from third parties and from labour market information and from insurance officers indicate claimants very likely to be abusing the program.

Policy states that priority is to be given to methods 3 and 4 since there is a strong indication that an abuse has been committed.<sup>17</sup>

It will be seen from the above that the benefit control function, as it relates to eligibility provisions, is selective in nature and does not purport to scrutinize every claim for possible disentitlement or disqualification. This policy (or administrative reality) by itself is probably more relevant to claimants than any substantive rule relating to eligibility. However, the admittedly imperfect system of abuse detection should not occasion a sense of security in would-be abusive claimants, for as will be seen in the discussion of the individual eligibility restrictions which follows, the benefit control function has other, more ongoing, facets which follow claims from application to termination.

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16. *Id.* at 5.16.

17. *Id.* at 6.16.

### III. *Voluntary Leaving and Misconduct*

The Act states:

s.41(1) A claimant is disqualified from receiving benefits . . . if he lost his employment by reason of his own misconduct or if he voluntary left his employment without just cause.

The duration of a period of disqualification under that section is three weeks running<sup>18</sup> consecutively with the two week waiting period<sup>19</sup> and benefits are deemed to have been paid during the disqualification.<sup>20</sup>

It is worth noting that a proposed amendment to the Act, introduced in 1973, would have disqualified a claimant from receiving benefits until he had eight or more weeks of insurable employment after the day he voluntarily left his employment or lost it through misconduct.<sup>21</sup> Even under the 1940 and 1955 acts the maximum period for disqualification was six weeks.<sup>22</sup>

From the basis of the general legislative purpose of only compensating those persons involuntarily unemployed through no fault of their own, several related theories have been suggested to explain the reasoning behind the specific disqualification for voluntary separation and misconduct. One American author, writing about similar provisions in the unemployment compensation schemes in her country, has proffered three: the penalty theory, the actuarial theory, and the causal theory.<sup>23</sup>

To the present writer, the differences among Ms. Kempfer's theories are more apparent than real, the only real grounds for differentiation being the placing of emphasis. While the penalty notion emphasizes the sanction aspect of disqualification, the

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18. Section 43(1).

19. Section 23.

20. Section 43(2).

21. Bill C-125, S. 10.. Introduced January 17, 1973 by Hon. Robert Andras, Minister of Manpower and Immigration, to the 1st Session, 29th Parliament, 21 Elizabeth II, 1973, House of Commons.

22. S.C. 1940, c. 44, s. 46(1) and R.S.C. 1970, c. U-2, s. 62.. Since this paper was written a proposed amendment to the Act which would *inter alia* extend the disqualification period of six weeks once again was introduced by the Minister of Manpower and Immigration as Bill C-69, s. 16; 1st Session, 30th Parliament, 23-24 Elizabeth II, 1974-75, House of Commons (First reading, July 8, 1975).

The main thrust of Bill C-69 is to alter the classes of persons eligible for benefits and it also contains other "housekeeping" amendments, none of which affect the areas dealt with in this paper other than as herein stated.

23. See K. Kempfer, *Disqualifications for Voluntary Leaving and Misconduct* (1945), 55 Yale L.J. 147.

actuarial theory is more concerned with the allocation of available funds to the most deserving (though not necessarily the neediest) claimants and excluding the least deserving. The causal theory, on the other hand, stresses the period of disqualification provided by the statute, calling it: “. . . the legislative judgment of how long the initial cause of the individual’s unemployment continues to be the dominating cause.”<sup>24</sup>

If there is any merit at all at all in theorizing about these disqualifications, it might be that it at least sheds some light on the proposed amendments to the disqualification period (*supra*). On the basis of the causal theory it could be argued that the adoption of either the eight week or six week requirement would be unduly harsh and contrary to the basic philosophy of the Act.

In other words, where a person is actively seeking work, unemployment for a period longer than is usually required for any change of jobs is more likely due to unfavourable labour market conditions than to separation from a previous job.<sup>25</sup> Therefore, refusal of benefits to such claimants amounts to a penalty which endures long after the voluntary separation or misconduct has ceased to be the proximate cause of the claimant’s unemployment. In this sense, the claimant is being denied compensation even though he is unemployed through no fault of his own. It is therefore submitted that after the disqualifying act has ceased to be the proximate cause of a claimant’s unemployment, his eligibility for benefits should be tested by the availability requirement (*infra*).<sup>26</sup>

Before turning to the substantive issues involved in voluntary separation and misconduct, a brief discussion of UIC policy in relation to those areas is in order.

In its policy guidelines, the Commission directs that the benefit control function will only become involved in the investigation of voluntary quits or misconducts where there is an obvious need for a more in depth investigation<sup>27</sup> as, for instance, when questioning

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24. *Id.* at 151.

25. *Id.*

26. Kempfer, *supra*, note 23, at 152, reaches the same conclusion. However, this reasoning notwithstanding, Bill C-69, if enacted, will increase the disqualification period, albeit not for as long as proposed in Bill C-125 but still, it is submitted, for an unduly long period.

27. The kind of further investigation contemplated and the type of questions asked are contained in UIC manuals, sample interview questions etc., which have been deleted from the published version of this paper at the behest of the Commission.

indicates withholding of information; where information obtained requires verification of records; where the circumstances give rise to doubt as to the claimant's past entitlement, etc . . . . Also, as a matter of caseload selection, the Commission places greater emphasis on the detection of claimants who separate voluntarily without just cause than on those who lose their employment through misconduct.<sup>28</sup>

In cases where grounds for disqualification have been established, the Commission directs that there is good and sufficient reason to require further proof of availability before allowing the claimant to serve his waiting period and commence receiving benefits. In addition, the guidelines state, there are also grounds for the Commission to require the claimant to prove that he is unable to obtain suitable employment.<sup>29</sup>

Even after a claimant has served his disqualification period under s. 43(1), he is still subject to special scrutiny by the Commission. For example, agents are directed to require a claimant who has voluntarily quit or has been discharged for misconduct to continue in the Active Job Search Program<sup>30</sup> for an indefinite period of time and to report to the District Office to discuss subsequent Job Search Statements at least once every four weeks.

As will be seen from the discussion of the availability provisions (*infra*), neither the Active Job Search nor the reporting requirement is always mandatory. That they should become compulsory for the duration of a claimant's eligibility because of an initial disqualification is perhaps sufficient to raise the inference that the unenacted provisions of Bill C-125, discussed above, are nevertheless being carried out to some extent by virtue of administrative edict. The argument used against the proposed legislative attempt to penalize claimants after their unemployment became *bona fide* applies *a fortiori* to an administrative attempt to do so.<sup>31</sup>

Let us now direct our attention to a more specific analysis of the elements of voluntary separation and misconduct:

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28. Canada Unemployment Insurance Commission, *Manuic 1: Policy Guidelines* (amended), *supra* note 14 at 2.9.

29. *Id.* at 1.9

30. The Active Job Search Program will be explained in connection with the availability requirement.

31. Of course, it can always be said on behalf of the Commission that the requirement of participating in an Active Job Search Program and reporting does not amount to a disqualification for benefits.



### 1. *Voluntary Separation*

For purposes of a disqualification for voluntary separation (and for misconduct) under s. 41(1), “employment” refers to the claimant’s last employment immediately prior to the time of his claim for benefits (s. 41(3)). However, under Reg. 174, if the last employment terminated more than thirteen weeks prior to the time of a claim for benefits it is not employment for purposes of s. 41(1) and no disqualification may be imposed for voluntary leaving in such circumstances. On the other hand, if the last employment prior to a claim for benefit is for a period of less than five days, then the employment immediately prior to that last employment may be deemed to be the last employment of the Claimant (Reg. 174(2)).

The “thirteenth week” regulation appears to take into account the causal theory of disqualification (*supra*) inasmuch as it does not seek to penalize a claimant for a voluntary separation which has ceased to be the dominating cause of his unemployment. By the same token, the “five day” provision ensures that a claimant cannot set up an intervening sham employment in order to avoid a disqualification which would otherwise be imposed by reason of voluntary separation.

Once it is determined whether the employment in question is one which the voluntary leaving therefrom will give rise to a disqualification, the threshold issues become whether there has been a “leaving” and, if so, whether it was “voluntary”.

It is clear that “leaving employment” refers only to the severance of the employment relationship and does not include a temporary interruption in the performance of services.<sup>32</sup> To properly be termed a “leaving”, a separation has to at least have as its objective a final separation of the relationship between employer and employee (CUB 760, CUB 1050).<sup>33</sup> Accordingly, where a claimant was on leave of absence for the purpose of taking care of her sick mother, it was held that she had not “left” her employment (although it was found that she was unavailable for work) (CUB 1781). On the other hand, where a claimant gave notice that she was taking a three week vacation to which she was not entitled and

32. See Kempfer, *supra*, note 23 at 154.

33. Most of the CUBs used in this paper are cited in: Canada Unemployment Insurance Commission, *Digest of Benefit Entitlement Principles: Technical Handbook Number 8 (Revision)* (Ottawa: Information Canada, 1973). Others are taken directly from the full reports of: *Decisions of the Umpire*, bound volumes of which are published yearly by UIC.

which caused her dismissal, such absence was held to be tantamount to voluntary leaving without just cause (CUB 895).

As to voluntariness, where the employer has taken the initiative the separation is not voluntary (CUB 2004). But where the claimant takes the initiative, he is deemed to have left voluntarily regardless of whether he would ordinarily have preferred to stay or not (CUB 1572). In other words, Umpire decisions have refused to regard the element of volition in voluntary leaving as anything but the other side of the coin from where the claimant has been discharged by the employer. This is in contradistinction to some American benefit decisions which have held that leaving was *involuntary* in cases where there was a definite risk to health or safety, an inability to obtain transportation, or an inability to secure adequate housing.<sup>34</sup>

But the fact that Canadian jurisprudence in relation to the meaning of the word "voluntary" is not so finely tuned as its American counterpart does not mean that the American decisions in that regard are inherently more favourable to claimants. Inasmuch as the ultimate issue in voluntary leaving cases is whether or not the claimant has quit for *good cause*, the same result is usually reached regardless of how one treats the voluntariness question. For example, in one of the American decisions just referred to, no disqualification was imposed on the grounds that leaving for health reasons was involuntary; Canadian decisions have consistently reached the same result on the basis that, while voluntary, leaving for health reasons can constitute good cause (CUB 775, CUB 1708, CUB 2171).

There may, however, be an extra evidentiary burden on claimants because of the narrow Canadian interpretation of voluntariness. This arises out of the fact that the onus of proving just cause for leaving is only placed on the claimant after the insurance officer establishes that the claimant voluntarily left his employment (CUB 1150). If the American position were followed there would at least be logical grounds for saying that no disqualification could be imposed until the insurance officer had proved that a claimant's leaving, where, say, health reasons are alleged, was voluntary; and only then after the claimant had been given adequate opportunity to show good cause.

While this incongruity between Canadian and American benefit decisions is interesting as a means of pointing out what a common

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34. Kempfer, *supra*, note 23 at 155. See also, Packard, *supra*, note 2 at 641.

lawyer might call the relative unsophistication of the former, it should be borne in mind that many of the American decisions find their way to the ordinary courts<sup>35</sup> whereas, as has already been noted, Canadian decisions virtually never are appealed beyond the Umpire.<sup>36</sup> The present writer does not suggest that the American jurisprudence should be emulated in this regard (or with regard to benefit decisions, generally, for that matter). Rather the importance of the comparison is that, as a matter of statutory construction, if voluntariness is not going to be given a wide and liberal interpretation, then "good cause" should be read so as to provide employees with a sufficient range of grounds for severing the employment relationship without being disqualified for benefits.

The actual range of voluntary leaving situations in which good cause can be proffered by claimants as a bar to disqualification includes situations in which their voluntary leaving arose out of circumstances such as: changes in, and existing conditions of, employment; changes in wages; changes in hours or days; changes in working conditions (including danger); illness in the family; housing problems; marriage religious objections; opportunities to take courses; employment contract fulfilled; transportation difficulties; and ill health or pregnancy.

In considering conditions of employment, there is a large area which overlaps the disqualification for refusal of suitable employment (*infra*). One would expect, for example, that a worker would not be disqualified for leaving work which he might have refused to accept on the ground of unsuitability.<sup>37</sup> But the authorities have held that the fact that the employment might be considered unsuitable if it were being offered to the claimant does not in itself create just cause for leaving if the claimant has either accepted the employment, knowing all the circumstances, or has continued in it for any lengthy period of time (CUB 781).

It is

. . . (a) basically important principle . . . that an employee who is dissatisfied with the existing condition of his employment is justified in leaving it only after he has made every effort to have the situation remedied, including the means provided by law, or after he has taken steps to obtain reasonable prospects of other work, unless the conditions of the employment are so

35. *Id.*

36. *Supra*, note 4.

37. This is the usual rule in American benefit decisions: see Kempfer, *supra*, note 23 at 157.

unsatisfactory that he has no alternative but to leave (CUB 1893).

On the other hand, a claimant will not be disqualified for leaving unsuitable employment where, on a trial basis, he had accepted that employment knowing that doubtful or less favourable conditions of work existed (CUB 490, CUB 781). For example, having given it a fair trial, an accountant had just cause to leave as unsuitable employment a job as a truck driver (CUB 2233).

The same reasoning applies to situations where there have been changes in an employment which had theretofore been suitable. In that case, the employee may not have just cause for leaving unless it is shown that the new employment is unsuitable, notwithstanding that the new duties are outside the original terms of the contract of service (CUB 844).

Similarly, changes in wages and hours or days of work do not automatically give an employee the right to leave his employment and become entitled to benefits. In keeping with the thrust of CUB 1893 (*supra*), an employee faced with such changes is expected to stay with the employment complained of until he can find something better or until the working conditions become intolerable (CUB 1471).

This policy in favour of continuity of employment, perhaps unconsciously, seems to inhibit the mobility of labour and tends to penalize the worker by effectively tying him to an employer who has changed the rules in the middle of the game. It is suggested that in no case where the worker would be justified in leaving on the basis of the terms of the relationship between himself and his employer should he be unable to show just cause.

Besides the possibility of being unable to show just cause for leaving for reasons directly related to the employment relationship, a claimant may also be entitled to leave his job without disqualification on more personal grounds. Hence, serious illness in the claimant's family, which necessitates his presence at home, is just cause for voluntarily leaving employment, provided that it can be established that the claimant's own presence at home is essential and that it is not feasible to arrange to leave of absence (CUB 727, CUB 3097).

Inability to procure accommodation and the lack of transportation facilities may also constitute just cause for leaving a job; but, in the case of housing, a claimant will normally be obliged to take separate lodgings for himself if the family can be accommodated elsewhere

(CUB 346, CUB 430) unless such an arrangement would cause a prolonged separation from his family (CUB 1102). Likewise, if an employee is faced with a lack of means of travelling from his home to the job, he will generally be required to take remedial action regarding his lack of transportation (CUB 543) or move nearer to his place of employment until other means of transportation can be obtained (CUB 346). However, it was held that there was just cause for leaving where the car owner had quit and the cost of boarding nearer the job was too high in relation to the wages (CUB 2410), or where the only alternative transportation would cost \$12 a day by taxi (CUB 2725) (although the appropriate question in such cases is whether the claimant can prove availability (CUB 2726).

Generally, leaving employment for the purpose of attending a course of instruction is not considered to be leaving with good cause (CUB 2491), but where a claimant does so only after being referred to the course by the Commission or Canada Manpower, good cause is shown (CUB 3370).

Benefit decisions relating to marriage share a common feature with many laws relating to that institution — a woman stands to gain pecuniary benefits by being treated unequally. Specifically, because a wife is deemed to have a legal and a moral obligation to live with her husband where he has established his domicile (CUB 612), she cannot be disqualified for benefits for leaving her job to accompany him, even if it is in a location where there are no reasonable opportunities of employment for the wife (CUB 640). While this realization will probably not daunt the efforts of those in the vanguard of the women's liberation movement, it may well compromise those whose zealotry is divided between a concern for emancipation and a desire to be in receipt of unemployment insurance benefits.

Religious objections, however, cut across all sex lines and any employee has the right to act in accordance with religious beliefs, honestly held; but a claimant is admonished "not to act too hastily before making himself acquainted with all the circumstances" (CUB 964).

Since the new Act (1971) persons who are forced to leave their jobs for reasons of illness or pregnancy have been entitled to benefits. Whereas it is not within the terms of reference of this paper to discuss these subjects,<sup>38</sup> it suffices to say that leaving for either

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38. Entitlement to sickness benefits has been dealt with quite extensively by: D.

reason constitutes just cause so long as adequate evidence is adduced.

## 2. *Misconduct*

The rationale for disqualification from receipt of benefits for becoming unemployed through misconduct is the same as for voluntary separation — the claimant is not unemployed through no fault of his own. Indeed, the misconduct and voluntary separation provisions are contained in the same section of the Act (s. 41(1)) and the same three week disqualification period is imposed for both (s. 43(1)). Therefore, much of the above discussion relating to voluntary separation, and especially the portion about the theories of disqualification, is equally applicable to the present analysis.

There is, however, one practical difference which must be reiterated. As was stated above the Commission has made a policy decision to de-emphasize the imposition of a disqualification on claimants whose claim statements indicate that they have been discharged for misconduct. Although no express rationalization was given for this policy, the present writer suggests that it stems from the difficult onus of proof and the consequent heavy investigative and adjudicative demands placed on the Commission in such cases.

Before he can impose a disqualification for misconduct an insurance officer must be satisfied that there is conclusive evidence on each issue involved. Therefore in all cases where misconduct is alleged, it can be said with authority that: (1) The act complained of must clearly be established as an act for which the claimant is personally responsible (CUB 1611, CUB 963). (2) It must be clearly established that the act amounts to misconduct (CUB 1079, CUB 1611). (3) It must be established that the claimant was discharged for the act in question and not for some previous conduct which has no immediate relation to the alleged reason for dismissal (CUB 25, CUB 1079). If we look briefly at each of these issues the reader will get some sense of what is involved in a finding of misconduct as well as an opportunity to decide for himself whether this writer's contention regarding the Commission's reason for its *laissez faire* policy re misconduct is well founded. Throughout this discussion it should be borne in mind that the UIC has jurisdiction to make a determination on misconduct for compensation purposes

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Risely, *An Introduction to the Position of the Sick Employee in Canada*, (unpublished manuscript, Dalhousie Law School, 1975.) See especially 21-28.

alone and its decision can have no effect on other tribunals which may deal with the matter for different reasons.<sup>39</sup>

A finding that the claimant did the act alleged, then, cannot be based on vague allegations by the employer, for to do so would be an abdication of jurisdiction by the deciding authority in favour of the employer (CUB 117, CUB 843, CUB 1079). Furthermore, when the evidence is conflicting or inconclusive, the benefit of a reasonable doubt must be given to the claimant (CUB 405, CUB 581, CUB 702, CUB 2013, CUB 2047) and hearsay evidence cannot be accepted as conclusive (CUB 748, CUB 1224). On the other hand, a judicial finding in court (but not the mere laying of the charge) may be proof that the claimant did the act alleged (CUB 101). Similarly, the decision of an arbitrator investigating an alleged breach of rules may be proof, although such decisions are not necessarily binding (CUB 1763, CUB 2040).

Once the claimant is found to be responsible for the act in question, the most difficult issue is to determine whether that act amounts to “misconduct” within the meaning of the Act. The range of possible acts which may amount to misconduct is somewhat narrowed by the fact that the term “misconduct” as used in the Act means misconduct in its industrial sense and is not to be confused with breaches of moral or ethical codes or of the criminal law as such.<sup>40</sup> The problem still remains, however, as to what standard is to be used to measure the claimant’s conduct.

The obvious answer, of course, is that the standard to be applied is that of the employment contract, express or implied, which fixes the employee’s duties in connection with his work.<sup>41</sup> Indeed, this test has been firmly adopted by the Umpire to the extent that a breach of rules and regulations is deemed to be misconduct, even if the particular rule in question is commonly broken (CUB 584, CUB 3117). For example, a factory worker who punched the time cards of some fellow employees was found to have lost his employment by reason of his own misconduct (CUB 3117).

However, in keeping with the Commission’s duty to make its own decisions as to what constitutes misconduct, a breach of

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39. Kempfer, *supra*, note 28 at 160.

40. Canada Unemployment Insurance Commission *Digest of Benefit Entitlement Principles: Technical Handbook Number 8 (Revision)*, *supra*, note 32 at para. 1.700.

41. The terms of the employment contract are also used in American decisions as a standard for determining misconduct: see Kempfer, *supra*, note 23 at 163.

employers' rules and regulations does not always amount to misconduct, as for instance when the rules or regulations impose undue restrictions or deal with matters outside the scope of the employee's employment and bear no relationship to his particular job. Hence, a machine molder who, while on leave of absence, engaged in picketing another employer's plant, was arrested for obstruction, fined and sentenced to seven days in jail, was not deemed to have committed misconduct in its industrial sense even though his employer had discharged him by virtue of a rule to the effect that an employee could be dismissed for serving a jail sentence (CUB 1044).

Even where an employer's rules, such as those applicable to the operation of railways, are made very strict in the interest of public safety, and its employees are subject to suspension or dismissal for causes which in other industries would not carry such severe penalties, it does not necessarily follow that a dismissal under those rules would amount to misconduct under the Act (CUB 963). Accordingly, while misconduct was found on the part of a conductor who failed to ensure that the minimum interval between trains was maintained as prescribed by the operating rules (CUB 1877); where there was no evidence of a mandatory rule requiring a fireman to control the speed of the train or to draw the engineman's attention to the restricted speed requirement, a disqualification was not upheld (CUB 2834).

Another major ground for disqualification, somewhat connected to the failure to obey rules and regulations, and which also helps to set out standards for misconduct is the failure or refusal to obey orders or instructions. In cases where an employee refuses or fails to obey instructions, the question as to whether or not the failure or refusal amounts to misconduct for compensation purposes depends upon whether the order or instruction was reasonable. If the order was not a reasonable one, there is no misconduct (CUB 159, CUB 1464). Hence, a driver salesman who refused to canvass for new customers was properly disqualified for benefits after being discharged by his employer (CUB 189). But query whether he would have been if calling upon established customers constituted a reasonably full workload.

Other common reasons for dismissal which raise the misconduct issue are: absence, tardiness, and drinking. Dismissal for being absent includes cases where the worker, having attended at the employer's works, goes home before time without permission, or



leaves work during working hours. As a general rule, in order to constitute misconduct absence from work must be both wilful and without permission (CUB 1417, CUB 1945). However, repeated absences without leave and after warnings, though not necessarily wilful, constitutes misconduct (CUB 521, CUB 973).

Ancillary to the employee's duty not to be wilfully absent is his responsibility to notify the employer as to the fact of and reasons for his absence (CUB 611). A failure to do so which leads to dismissal may also be grounds for disqualification for benefits even though there may be good reasons for the absence. The rationale in such cases is that the question is not whether there was just cause for the absence, but whether there was justification for not notifying the employer and asking permission for the absence (CUB 1703, CUB 1704, CUB 1706, CUB 1824).

An example covering both grounds of absence-related misconduct is that of a labourer who had notified his employer of his absence in respect of one day only on the alleged ground that his child was ill and who remained absent without leave on the next and the following days, on a further allegation that he was sick, thereby losing his employment by reason of his own misconduct, as he failed to show that notifying his employer was not required and that he was in fact sick (CUB 2330).

Tardiness, being analagous to absence, is dealt with on much the same basis and, consequently, it too may amount to misconduct when it is repeated after warning (CUB 1016, CUB 1830), unless a reasonable explanation is given (CUB 709).

The drinking of intoxicating liquor in the course of employment and taking liquor into an employer's premises, when forbidden, is misconduct (CUB 496, CUB 643). But a claimant was not disqualified by reason of misconduct where he had participated in the purchase two or three days before of the beer found on the premises, as there was no proof that he had either brought the beer, or intended that it should be brought there, or that he had partaken of any beer on the day in question, or that he was in actual possession of beer while on duty, or that he was in charge of discipline and order in such premises (CUB 1611).

By the same token, drunkenness outside working hours is generally considered not to be misconduct unless it affects the worker's usefulness to his employer or contravenes the employer's rule, provided that the rule is reasonable having regard to the employer's business and the employee's responsibilities (CUB 934,

CUB 1065). Indeed, in all cases where a claimant loses his employment on account of *any* offence which he has committed outside the scope of his employment, the test is whether the offence bears such a relationship to his particular kind of job as to render him unsuitable for it (CUB 569, CUB1044).

Even after a *prima facie* case of misconduct has been established, the claimant is always entitled to an opportunity to explain his conduct or to disprove the validity of the allegations (CUB 550). It has also been held that a plausible explanation by the claimant should be accepted (CUB 709, CUB 3124).

Finally, assuming that the claimant has not been able to rebut the *prima facie* case of misconduct, the Commission must prove that the established act of misconduct was the proximate cause of the claimant's dismissal. If a period of time has elapsed between the occurrence of the act or omission and the date of discharge an inference arises that misconduct was not the proximate cause of the dismissal (CUB 1224). Conversely, some previous conduct which has no immediate relation to the alleged reason for dismissal cannot be used in support of a disqualification for misconduct (CUB 1079). In summary, then, inasmuch as the proceedings leading to a possible disqualification for misconduct are highly adjudicative in nature, it is perhaps not surprising that the Commission, as an administrative agency, should decide to utilize its resources for more remunerative purposes and, specifically, to apply its benefit control personnel to functions for which they are better suited.

One function for which the resources of the UIC are better suited is the determination of claimants' availability for work.

#### *IV. Availability*

The primary section of the Act relating to availability reads as follows:

- s. 25 a claimant is not entitled to be paid benefit for any working day in an initial benefit period for which he fails to prove that he was either
  - (a) capable and available and unable to obtain suitable employment on that day, or
  - (b) incapable of work by reason of a prescribed illness, injury or quarantine on that day.

A claimant's entitlement for illness benefits under paragraph (b) (first provided for in the 1971 Act) only lasts during his initial

benefit period<sup>42</sup> and all subsequent benefits are payable only where the claimant is capable and available for work (ss. 33 (2) and 36(1)). This of course does not apply in the case of a female claimant who is unable to work by reason of pregnancy and who fulfills the provisions of s. 30(1) of the Act.

This recent concern with compensation for temporary illness and pregnancy has underscored the traditional meaning attributed to the notions of capability and availability for work. Clearly, a person who is sick is incapable of working and, for that reason, unavailable for work. Historically, on the other hand, before unemployment insurance concerned itself with compensation during illness or pregnancy, the relationship between capability and availability was most often articulated inversely; that is, availability for work necessarily demands that the claimants be capable of working. Indeed, this manner of stating the provision has become so firmly rooted in the jurisprudence and administration jargon of unemployment insurance that the Umpire decisions and UIC literature merely express it as the "availability requirement", thereby incorporating both terms into one phrase. Perhaps this little slice of history sufficiently explains the connotations which attach to "availability" so that the present writer will be excused from making future reference to "both arms" of the provision.

One further point about availability which is important to bear in mind from the outset is that in cases of unavailability a claimant is not disqualified for benefits for three weeks as he is in cases of voluntary separation and misconduct; rather he is merely disentitled to receipt of benefits for "any working day" (or number of days) for which he fails to prove that he was available for work. In this sense, availability is an ongoing requirement and one which, consequently, is continuously monitored by the Commission. Because of its continuity, the availability requirement is the one that most affects claimants; indeed, the question of availability has consistently been the basis for the largest number of denials of benefits.<sup>43</sup> This being the case, it is necessary to determine what the

42. The determination of the duration of a claimant's initial benefit period varies with the number of weeks of employment he had before separation. See ss. 17, 18, 19, 20, 21, and 22 of the Act and Canada Unemployment Insurance Commission, *Guide to the New Unemployment Insurance* (Ottawa: Information Canada, 1971) at 7-10. See also, Bill C-69, ss. 4 and 5, cls. 4 and 5, 1st Session, 30th Parliament, 23-24 Elizabeth II, 1974-75.

43. Although no statistics are available on this point, officials at the UIC District Office for Nova Scotia assured the present writer that this was the case. Also,

nature of the availability requirement is and how it is administered by the Commission.

Regulations under the Act state the availability requirement simply as follows:

. . . a claimant fails to prove that he is available for work and unable to obtain suitable employment on each working day in a period if he fails to prove that during that period he made *reasonable and customary efforts to obtain employment*. (Reg. 145(9), as amended by SOR/71-324; SOR/72-113; SOR 72-221; SOR/75-67.)

Further elucidation as to the nature of availability can be found in Umpire decisions. One of the most recent and informative of these decisions stated that:

According to the jurisprudence established in matters of unemployment insurance, it is generally considered that a person is available for work, according to the interpretation given to the terms of section 25(a) of the Act, if that person is prepared to accept without delay and undue restrictions any suitable employment that may be referred to him. This presupposes, among other things, that the person sincerely wants to work, that he has made personal effort to find work and that the conditions on which he is prepared to accept work are not so difficult from every point of view, having regard to the labour market and all the circumstances of his case, (transportation, hours of work, wages, etc.), that it becomes practically impossible to find him work or to find work himself (CUB 3173).

Three salient points come out of the authorities just quoted. The first is that the test as to whether a claimant is available for work is largely subjective in nature. Indeed, Umpire decisions have held that whether or not a claimant is available for work depends largely on his intentions and his mental attitude toward accepting immediately any employment for which he is suited (CUB 2966, CUB 3196).

Secondly, the onus of proving availability rests with the claimant. Again, Umpires have repeatedly stated that s. 25(a) places a statutory duty on claimants to prove that they are available for work (CUB 852, CUB 1515, CUB 2033, CUB 2338). One may well

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Canada Unemployment Insurance Commission, *Digest of Benefit Entitlement Principles: Technical Handbook Number 8*, *supra*, Note 33 and *Decisions of the Umpire*, *supra*, note 33 contain more cases on the issue of availability than on all other areas discussed in this paper combined. See also: L. Williams, *Eligibility for Benefits* (1955), 8 Vand. L. Rev. 286 at 292 for a statement that the same situation obtains in the United States.

wonder why such an evidentiary burden would be placed on the supposed beneficiaries of modern social legislation. Writing of this onus as it applies to American unemployment insurance schemes, one writer has remarked:

. . . courts have announced that a claimant has the burden of proving that he is entitled to benefits. The introduction of this legislation concept into a social program designed to alleviate, in some small measure, the distress of unemployed people, seems regrettable. Claimants in general not only do not understand the legal theory of burden of proof, they do not even understand the legal concept of availability.<sup>44</sup>

Thirdly, phrases like "reasonable and customary efforts" and "all the circumstances of his case" have traditionally been considered to be within the bailiwick of the common law courts; institutions which are accustomed to hearing a lot of high-priced barristers spend hours and days applying and distinguishing with care the nuances of such well-worn and precedent-laden tests. Of course, that is not to say that a Federal Court Judge sitting as an Umpire is not equally capable of properly administering these individualized standards. The real problem as far as this writer is concerned is how the UIC, which is essentially a bureaucratic institution, can fairly apply the same standards to a plethora of claimants in the first instance. Predictably, the answer has been, through bureaucratic means.

Since 1966 the National Employment Service has been under the jurisdiction of the Minister of Manpower and Immigration.<sup>45</sup> The purpose of the Service as stated in the 1971 Act is ". . . to assist workers to find suitable employment and employers to find suitable workers" (s. 140(1)). To enable this purpose to be carried out the Commission (in conjunction with Canada Manpower) has been given ample authority to: collect and analyse employment market information (s. 140(2), reg. 35); register and interview applicants for employment (s. 142, reg. 29); and require unemployment insurance claimants to register at, report to, and carry out any written directions of, any designated federal or provincial government agency (s. 40(1) (c), s. 140(2) (a), s. 58(j), reg. 145(7), as amended by SOR/75-67, reg. 29(c)).

This structure and authority, coupled with the above-mentioned burden on claimants to prove that they have made reasonable and

44. Williams, *supra*, note 43 at 295.

45. S.C. 1966, c. 25, S. 39.

customary efforts to find suitable employment (reg. 145(9), *supra.*), is the basis for the application of the Commission's benefit control policy to the availability requirement. Despite this seemingly adequate legislative mandate, at the time the Minister of Manpower and Immigration introduced Bill C-125, it was apparently felt in some quarters that there still existed a lacuna in the Commission's benefit control powers. Section 11 of that Bill, had it been enacted, would have amended the enabling section (s. 58) of the Act as follows:

The Commission may, with the approval of the Governor in Council, make regulations (*inter alia*): (c. 1) defining and determining when claimants are capable of and available for work, the suitability of employment offered or available to claimants and the circumstances and facts which may indicate capability and availability for work or suitability of employment

. . .

Considering that the bill was allowed to die with the 29th Parliament and that it has to date not been reintroduced, it will be of interest (at least to students of administrative law) to see if the Commission has ever felt itself restrained, for lack of legislative authority, in the formulation of benefit control policy relating to availability. After setting out the Commission's policy in this regard, we will return to a further consideration of this query.

### *1. Employment Market Advisory Services*

Employment market information is basic to the Commission's benefit control and related activities. As its policy manual says:

Practically all of the essentials of the entitlement determination process, the benefit control activity, and the action resulting from these activities are dependent on a rational appreciation of the community, the employment opportunities it provides and the extraordinarily variable circumstances that it presents in the determination of a claimant's initial and continuing eligibility for unemployment insurance benefits.<sup>46</sup>

Because of the importance of employment market information, "Employment Market Committees" have been established in each District Office. The scope of the Committees' duties insofar as it is relevant to this paper includes the providing of information on:

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46. Canada Unemployment Insurance Commission, *Manuic 1: Policy Guidelines (amended)*, *supra*, note 14 at 1.9.

- (1) Data in the form of occupationally coded vacancy lists of occupations or skills for which potential job vacancies exist in the community.<sup>47</sup>
- (2) Recommendations to the District Manager regarding who should receive Job Search Questionnaires or interviews on job search activities.
- (3) Information regarding the prevailing rates being paid by employers in the community in significant occupational categories.<sup>48</sup>
- (4) Union-hiring hall activities and practices in the community.
- (5) Recommendations to the District Manager regarding criteria to be used by Insurance Agents in adjudicating the reasonableness of job search activities by occupational code.
- (6) Working conditions in local industries regarding assessment of "suitable employment".<sup>49</sup>

It is clear from the above that employment market data has a pervasive influence over the shaping and administration of the Commission's benefit control policy. Its influence upon "job search activities" is of particular importance inasmuch as the Commission has developed concrete policies in this area. Collectively these policies are administered under what is known as the "Active Job Search Program". As will be seen, this program is aimed directly at enforcing the availability requirement. As far as claimants and their availability for work is concerned, therefore, it is the inter-relationship between employment market data and the Active Job Search program (and especially the former's influence on the latter), which will determine whether "reasonable and customary efforts to obtain suitable employment" have been made.

Let us enquire more specially, then, into what is involved in the Active Job Search Program.

## 2 *The Active Job Search Program*

The Commission uses the Active Job Search Program as a systematic procedure in support of claimants' requirement of

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47. See sample: Job Opportunity Survey, Appendix A.

48. *Id.*

49. Canada Unemployment Insurance Commission, *Manuic 1: Policy Guidelines (amended, supra, note 14, at 2.9 and 3.9.*

proving that they are available for work and unable to obtain suitable employment (s. 25(a), reg. 145(9)). More specifically, the policy manual states, the program is a formalization of the requirement to prove availability for work through the proof that reasonable and customary efforts to obtain employment have been carried out.<sup>50</sup> In short, the objective of the program is to ensure that claimants maintain an active participation in the labour market.

In the case of a particular claimant, then, what constitutes reasonable and customary efforts to obtain employment will be determined *a priori* by designating a specific job search program, calculated on the basis of employment market information. For example, if a weekly job opportunity survey (in the form of Appendix A) indicates that the claimant is not in a "demand occupation", one of two types of procedures will be adopted.

On the one hand, if the demand for the claimant's occupation is seasonal in nature or if for some other reason there is no employment available in the area where the claimant usually earns his livelihood, no personal job search might be required. In that case, the claimant will be deemed to have satisfied the availability requirement by simply signifying on bi-weekly reporting cards that he is available for work.<sup>51</sup>

Alternatively, if employment in the claimant's usual occupation is absolutely scarce or does not exist, or the claimant is limited in his search because of age, health, or other circumstances necessitating a change of occupation, he will be required to search immediately for work in other suitable employment. In other words, he will not wait for the lapsing of the period considered reasonable under normal circumstances but will commence immediately his search for work in another occupation and at a progressively reduced rate of wages.<sup>52</sup> To satisfy the availability requirement in these circumstances the claimant will usually be required to fulfill the terms of, and make an attestation to, an Active Job Search Statement in the form of Appendix B.

For those claimants in demand occupations, a similar job search program will be initiated from the time the claimant applies for benefits. However, unlike the claimant in a non-demand occupation or one who for some of the other reasons mentioned above is required to seek employment in another line of work, the claimant

50. *Id.* at 3.32

51. *Id.* at 2.32 and 4.32.

52. *Id.* at 3.32.



in a demand occupation will be permitted to restrict his search, during the initial phase of the program, to his usual occupation and usual rates of pay. After a reasonable period of time has elapsed (s. 40(3)), the claimant will be required to seek employment in other occupations and at progressively lower rates of pay. Commission policy on this matter is that an unskilled worker has three weeks to seek work in his usual occupation and at usual rates of pay. A skilled worker has three weeks plus one week for each year of employment in a skilled job to the maximum of thirteen weeks for a grand total of sixteen possible weeks.<sup>53</sup> This policy is illustrated graphically by the tables in Appendix D and is explained more fully by the rules attached thereto.

The specific requirements placed on all the above-mentioned types of claimants who are placed in active job search programs are measured in terms of “contacts” he makes with prospective employers. The number of contacts required depends upon the opportunities for employment in the area, the particular type of occupation, the specific conditions of employment, and the time of year, all of which, of course, are predetermined on the basis of employment market data. For example, if there happens to be only one employer in the area, it would be sufficient if the claimant “contacts” the employer once a week or maintains an active application. On the other hand, if there are 100 employers in the area employing workers in the claimant’s skill, he might be required to make more numerous and diversified contacts, possibly 3 to 5 a week.

One major substitute for the active job search program is the use of union hiring halls. Each District Manager is directed to seek special arrangements with hiring halls whereby, if the latter agrees to meet set criteria, it will be recognized by the Commission on that basis as an employment agency.<sup>54</sup> The set criteria are met when the hiring hall agrees to a system of providing information, known as “special control reporting”, to the Commission.<sup>55</sup> Thus, claimants who normally obtain their employment through a hiring hall with which special arrangements have been made are not required to participate in any UIC job search program whatsoever.

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53. *Id.* at 5.32.

54. *Id.* at 8.32.

55. According to the Nova Scotia District Manager, special control reporting arrangements have been made with 7 of the 14 Halifax-Dartmouth hiring halls representing the construction trades.

Even in cases where arrangements have been made, registration for employment at the union hiring hall will be considered a "reasonable" search for a limited time. On completion of such limited period, where potential job vacancies are identified outside the hiring hall, claimants will be required to carry out the active job search in addition to registration with the hiring hall.<sup>56</sup>

Other claimants who do not have to participate in an active job search program include:

- (1) Those referred to a job vacancy under the CMC/UIC Job Referral Program.
- (2) Those attending an occupational training course upon referral by an insurance agent.
- (3) Those subject to recall with their former employers within six weeks of their interruption of earnings
- (4) Those who have been disqualified, until the termination of the disqualification.<sup>57</sup>

Where a claimant is subject to an active job search program and fails to live up to its terms he may be disentitled from the receipt of benefits on any of the relevant grounds, such as failure to follow written directions or failure to report for an interview. The policy of the Commission is to have agents contact the claimant with a view to correcting the deficiency instead of imposing a disentitlement straight away.<sup>58</sup>

Reviewing the observations made above regarding the subjectivity, onus, and tests of the availability requirement in light of UIC benefit control policy relating thereto, it would seem that in all but the really contentious cases those three potentially sticky legal issues have largely been supplanted by an administrative regime designed to deal with large numbers of claimants on an objective basis and in accordance with employment market realities.

The interesting question from the lawyer's point of view is whether that administrative regime is full authorized under the Act. This of course brings us back to the query arising out of the death of Bill C-125 on the order paper. If section 11 of the Bill had been enacted, there probably could be no dispute as to the Commission's

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56. Canada Unemployment Insurance Commission, *Manuic 1: Policy Guidelines (amended)*, *supra*, note 14 at 8.32.

57. *Id.* at 9.32

58. *Id.* at 7.32.

authority in relation to the policies it has developed to govern the availability requirement. As it stands, however, there appears to have been at least one problem arising out of the practice adopted.

Section 40(3) of the Act provides *inter alia* that a claimant is obliged to accept employment of a kind other than employment in his usual occupation at a lower rate of earning if, after the lapse of a reasonable period of time, he is still unemployed. Nowhere else in the Act or Regulations is “a reasonable period of time” defined or given further elucidation. Quite naturally, therefore, in order to give its insurance agents some guidance in this regard, the Commission has developed the so-called “3 and 16 rule” elaborated upon in the tables and rules contained in Appendix D.

While both the District Manager and Chief Operations Officer of the local district UIC office have assured the present writer that the 3 and 16 rule is only used as a guideline and is not considered to be binding either on the Commission or on the claimants, in terms of legal theory it could still be considered as “secret law”.

In short, the point is that if BillC-125 had been enacted, the 3 and 16 rule would probably have been deemed to be a statutory instrument within the meaning of section 2(1)(d)(i) of the *Statutory Instruments Act*<sup>59</sup> and would thereby have been required to be published in the *Canada Gazette* pursuant to section 11(1). As it is, the rule is not only exempt from publication but is also most likely saved from invalidity under section 2(1)(d)(v) as being an instrument whose contents are limited to advice or information intended for use or assistance in the making of a decision.

The only area which remains to be discussed is that relating to disqualification for benefits for refusal of suitable employment.

#### *V Refusal of Suitable Employment*

Happily, a number of major issues touching refusal of suitable employment have already been dealt with both in connection with voluntary separation and misconduct and availability. Specifically, the rationale for denying benefits to claimants who refuse suitable work is the same as for voluntary separation or misconduct — the claimant is not deemed to be unemployed through no fault of his own. Moreover, the penalty for refusal of suitable employment is the same as for voluntary separation and misconduct, namely, a three week disqualification under section 43(1).

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59. S.C. 1970-71-72, c. 38.

More recently, in connection with the availability requirement, discussion was focused on the effect of the lapse of “a reasonable interval” (s. 40(3)) as it relates to the suitability of employment. The benefit control function<sup>60</sup> as explained in the “availability requirement” portion of the paper also applies with equal force to the claimant’s duty “to apply for a situation in suitable employment that is vacant. . . .” (s. 40(1)(a)).

Considering the overlap between topics, the present discussion will be limited to a consideration of the “offer” of employment and two of the basic labour standards protections given the claimant in this regard.

As a general rule, a claimant will be disqualified for benefits if he has been notified of a situation or if it has been offered to him. But notification of employment opportunities must be clearly stated. Hence, a disqualification was not upheld where the evidence regarding the notification or offer was incomplete (CUB 2019, CUB 2152). Similarly, the posting of a notice by an employer of possible work in another mine was held not to be a notification when it was vague in several respects (CUB 31). But word left by the employer’s messenger at the home with the claimant’s father was adequate notification (CUB 949).

Providing that it contains sufficient information to convey to the claimant particulars of the employment, notification may be communicated in various ways. For example, oral notification by an officer of the Commission, an officer of a Manpower Centre, or by an employer, is sufficient (CUB 899). Notification by telephone is also recognized as a proper means of communication (CUB 2072) and in cases where a claimant alleges that he did not receive a telephone message, a presumption arises that he was duly notified until his contention is borne out by satisfactory evidence (CUB 878).

In the case of offers or notifications sent by mail, under section 120(2) of the Act, the fact of mailing is evidence that it was received in the ordinary course of the mails (CUB 1898). Where a claimant fails to receive notification because of a change of address, he may be disentitled for failure to make his claim in the prescribed manner, as from the date that his change of address should have first been reported (CUB 1501, CUB 1669, CUB 1705). But a claimant had good cause for failing to apply for a situation when the letter of

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60. See exemption No. (1) illustrated in text accompanying note 57.

notification was received by him after the time set therein to apply for the position (CUB 1529).

However, in all cases, claimants should know that they are likely to receive a call for work and should so arrange their affairs that any communication is immediately brought to their attention (CUB 355, CUB 511).

Section 42 of the Act provides *inter alia* that no claimant is disqualified from receiving benefits by reason only for his refusing to accept employment if in accepting the employment he would lose the right to become a member of, to continue to be a member and to observe the lawful rules of, or to refrain from becoming a member of any association, organization or union of workers.

Another related protection is that a claimant need not accept employment arising in consequence of work attributable to a labour dispute (s. 40(2)(a)). For this section to apply, however, it must be established that there was an appreciable stoppage of work attributable to a labour dispute (CUB 1104). Also, it must be clear that the stoppage has not ceased and that the offer of employment did in fact arise in consequence of the stoppage. (CUB 1104).

## *VI Conclusion*

In this paper we have seen that the unemployment insurance scheme is based on the philosophy that compensation should only be paid to those persons who are unemployed through no fault of their own. Draconian application of this principle has, however, been mitigated by administrative realities which have obliged the Unemployment Insurance Commission to take a selective approach in the enforcement of disqualification and disentitlement provisions. The Commission has also found it necessary to de-emphasize disqualifications for misconduct because of proof problems.

In the area of availability, Commission policy reigns supreme. The large number of claimants and the dictates of labour market conditions have necessitated the crystalization of the legal tests of availability into an administrative regime operating under the style of the Active Job Search Program.

In terms of proposed amendments, Bill C-125 would have produced two significant changes, one desirable and one not. The desirable change would have been in the form of an addition to the enabling clause of the Act which would have given the Commission the authority and the duty to convert some of its directives into

regulations. The undesirable change would have been the extension of the disqualification period far beyond any other disqualification period in the history of the Canadian unemployment insurance system.<sup>61</sup>

Perhaps the most important general point which can be made about unemployment insurance, as far as the lawyer is concerned, is that on the whole it is an administrator's game and one which can most successfully be played by his rules.

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61. The presently proposed amendment, Bill C-69, s. 16, will if adopted, re-extend the disqualification period to the pre-1971 position of six weeks.

APPENDIX A  
**JOB OPPORTUNITY SURVEY - HALIFAX-DARTMOUTH LABOR MARKET**  
WEEK OF JAN 31. - FEB 6/75 w/c 476

Occ. Code	Occupation Group or Title	Contract Wage	Control Program	Newspaper	C.M.C.	N.S. C.S.C.	Union		P/T		Total Full Time Vac.	Cim. Load		Active Job Search Guidelines
		3					9	12	16	205				
		Prevailing Wage					10	Private Empl. Agency	Temp.	Student		217		
1	2	4	5	6	7	8	11	Private ER	14	Student	15	17	18	
1116	Inspectors & Regulatory Officers Govern	3				3	9		12		3	16	1	
		\$11,241- 14,324 Per/An.					10		13			2		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	
1119	Officials & Administrators	3				10	9		12		10	16	1	
		\$14,080- 21,877 Per/An.					10		13			2		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	
1132	Management Occupations Social Sciences Related	3		1			9		12		1	16	0	
		\$8,028- 9,756 Per/An.					10		13			1		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	
1133	Administrators in Teaching & Related Fields	3		3		2	9		12		5	16	0	
		\$10,000 Per/An.					10		13			1		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	
1137	Sales & Advertising Managers	3					9		12			16	0	
							10		13			1		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	
1137 118	Sales Manager	3		1			9		12		1	16	1	
							10		13			1		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	
1145	Management Occupations Construction	3					9		12			16	1	
							10		13			0		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	
1145 114	Construction Superintendent	3		1		1	9		12		2	16	2	
		\$12,000- 14,880 Per/An.					10		13			7		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	
1149	Other Managers & Administrators	3					9		12			16	0	
		\$8,000- 14,000 Per/An.					10		13			4		
		4					11		14			17		
1	2	4	5	6	7	8	11		14		15	17	18	

## Appendix 3

Unemployment Insurance  
CanadaAssurance-chômage  
CanadaACTIVE JOB SEARCH STATEMENT  
DECLARATION TOUCHANT LA RECHERCHE ACTIVE D'UN EMPLOI

S.I.N. — N.A.S.	
DISTRICT OFFICE — BUREAU DE DISTRICT	
DATE	OCC. — PROF.

THIS STATEMENT COVERS THE PERIOD  
LA PRÉSENTE DÉCLARATION VISE LA PÉRIODEFROM  
DE TO  
À

## INSTRUCTIONS

With some exceptions, all claimants are required to show that they are ready, able and willing to accept suitable employment. An Unemployment Insurance Regulation requires that a person provide evidence of his interest in becoming re-employed by actively seeking work. If there are job opportunities in your area, you must show that you are personally trying to get one of these jobs and you must also show that you are using all reasonable means of doing so.

## For example.

You may obtain work by registering or applying and maintaining contact with employment agencies, with employers, with your union in some circumstances and with your previous employer if there is a chance of returning to your old job.

You can make contact by telephone or by appearing in person or by writing a letter. The methods you use should be suited to the particular situation. Some employers will not hire a person who simply telephones.

To prove that you have conducted an active search you must show that you

- (1) have an up-to-date registration for work with a Canada or Provincial Manpower Centre;
- (2) have made serious efforts to find work.

## NOTE

Registration for work with a Canada or provincial manpower centre BY ITSELF IS NOT SUFFICIENT PROOF of your interest in becoming re-employed unless the Canada or provincial manpower centre in your area is your only way of finding a job.

If you wish to learn of ways to increase your ability to find work; or if you simply would like some help to determine the best ways to search, please come into the district office. Don't forget to bring this form with you.

Please retain this form for the period, specified, and enter on the form the contacts on the day they are made. When the period is completed, return this form as directed on the other side. FAILURE TO DO SO MAY RESULT IN DENIAL OF BENEFITS FROM THE BEGINNING OF THE WEEK COVERED BY THIS FORM.

## INSTRUCTIONS

À quelques exceptions près, tous les prestataires sont tenus de démontrer qu'ils sont prêts, aptes et disposés à accepter un emploi convenable. Un article des Règlements sur l'assurance-chômage stipule qu'un prestataire doit prouver qu'il est désireux de trouver du travail en cherchant activement un emploi. S'il existe des emplois vacants dans votre région, vous devez prouver que vous essayez personnellement d'en obtenir un et que vous utilisez tous les moyens raisonnables à cette fin.

## Par exemple.

Vous pouvez obtenir du travail en vous inscrivant auprès des bureaux de placement, d'employeurs, de votre syndicat, dans certains cas, et de votre ancien employeur, s'il est possible qu'il vous rembauche, et en communiquant régulièrement avec ces derniers.

Vous pouvez téléphoner, écrire ou vous présenter en personne. Le choix des moyens dépend de chaque situation. Certains employeurs n'embaucheront pas quelqu'un qui se contente de téléphoner.

Pour prouver que vous avez cherché activement du travail, vous devez établir:

- 1) que vous avez maintenu votre inscription à un centre de main-d'œuvre fédéral ou provincial;
- 2) que vous avez fait des démarches sérieuses pour trouver du travail.

## REMARQUE:

L'inscription à un centre de main-d'œuvre fédéral ou provincial NE CONSTITUE PAS À ELLE SEULE UNE PREUVE SUFFISANTE de votre désir de trouver du travail, à moins que ce ne soit le seul moyen pour vous d'obtenir un emploi.

Si vous voulez qu'on vous informe des moyens de mieux vous préparer à trouver du travail, qu'on vous renseigne sur les emplois vacants ou qu'on vous aide simplement à déterminer les meilleurs moyens à utiliser pour chercher un emploi, venez nous rencontrer au bureau de district et apportez avec vous la présente formule.

Veillez conserver la présente formule pendant la période indiquée, prendre soin d'y inscrire le jour et la date où vous avez fait ces démarches. À la fin de la période visée, retournez la présente formule conformément aux instructions données de l'autre côté. SI VOUS NE LE FAITES PAS, VOUS RISQUEZ DE VOUS VOIR REFUSER DES PRESTATIONS À COMPTER DU DÉBUT DE LA SEMAINE VISÉE PAR LA PRÉSENTE FORMULE.

If for any reason(s) you are not ready and able to work, check the appropriate box or outline briefly your reason(s) in the space provided. RETURN THIS FORM IMMEDIATELY to your local unemployment insurance district office.

Please use the enclosed self-addressed envelope provided for this purpose.

☐ Pregnancy  
Grossesse

☐ Sick or incapable  
Maladie ou incapacité

☐ Retired from Labour Force  
Retraite

☐ Attending a course of instruction  
Cours de formation

☐ Other (explain briefly)  
Autre raison (précisez brièvement)

☐ Found work  
Obtention d'un emploi

(Name and address of employer — Nom et adresse de l'employeur)

(Date started — Date de début de l'emploi)

REASONS  
RAISON(S)

Si, pour une raison quelconque, vous n'êtes pas prêt et apte à travailler, cochez la case appropriée ou exposez brièvement vos raisons dans la section prévue à cette fin, et RENVoyez IMMÉDIATEMENT LA PRÉSENTE FORMULE au bureau de district de la Commission d'assurance-chômage de votre localité.

Veillez utiliser l'enveloppe jointe à cette fin.

(OVER — VERSO)



**PART A: STATEMENT**

- During the period indicated on the other side, I was ready and able to work.
- Proof of my interest in becoming re-employed may be gathered from the nature of contacts I made.
- I understand that confirmation may be obtained from the persons or businesses whose names I have shown below.

## **PART B: CONTACTS**

- Please list all contacts made during the period indicated on other side of form.
- Use another sheet of paper if there is insufficient space.

IT IS NOT NECESSARY FOR YOU TO OBTAIN SIGNED STATEMENTS FROM PEOPLE YOU HAVE CONTACTED FOR WORK

**IMPORTANT:** Read the instructions on the other side of this form before filling in the following listing.

**PARTIE A: DÉCLARATION**

- Au cours de la période indiquée au recto, j'étais apte et disposé à travailler.

- Les démarches que j'ai faites prouvent mon désir de trouver du travail.

- Je sais que les personnes ou les établissements dont j'ai indiqué le nom ci-dessous peuvent être appelés à confirmer ma déclaration.

## ***PARTIE B: DÉMARCHES***

- Veuillez énumérer toutes les démarches que vous avez faites au cours de la période indiquée au recto de la formule.

- S'il n'y a pas assez d'espace ci-dessous, veuillez joindre une autre feuille.

**IL N'EST PAS NÉCESSAIRE QUE VOUS OBTENIEZ UNE DÉCLARATION ÉCRITE DES PERSONNES QUE VOUS AVEZ CONTACTÉES EN VUE DE TROUVER DU TRAVAIL.**

**IMPORTANT:** Veuillez lire les instructions au recto de la présente formule avant d'inscrire vos démarches ci-après.

[illegible]

### PART C: DECLARATION

I declare that the information entered on this form is true and given to prove my entitlement to unemployment insurance benefit.

### **PARTIE C: ATTESTATION**

*J'atteste que les renseignements fournis ci-dessus sont exacts et sont donnés en vue de prouver mon admissibilité aux prestations d'assurance-chômage.*

Téléphone

Date \_\_\_\_\_

Signature of claimant — Signature du prestataire

It is an offence under the **UNEMPLOYMENT INSURANCE ACT 1971**, to make false statements.

Aux termes de la LOI DE 1971 SUR L'ASSURANCE-CHÔMAGE, qui-  
conque fait une fausse déclaration commet une infraction.

THIS FORM MUST BE RETURNED TO THIS OFFICE ON  
VEUILLEZ NOUS RETOURNER LA PRÉSENTE FORMULE LE


The completed form should be mailed on the date shown above, unless you are directed to bring it with you to an interview at your local Canada Manpower Centre or Unemployment Insurance Commission District Office.

La formule remplie doit être mise à la poste à la date indiquée ci-dessus, à moins qu'on ne vous ait demandée de la porter avec vous à une entrevue au centre de main-d'œuvre du Canada ou au bureau de district de la Commission d'assurance-chômage de votre localité.

Appendix C

**NOTICE OF DISENTITLEMENT**  
 Under Sec. 25(a), 32(2) and 36(1) of the  
 Unemployment Insurance Act  
 and  
 Under Regulation 145(9) of the  
 Unemployment Insurance Regulations

10 A

 Unemployment Insurance Commission

Assurance chômage Canada

NAME \_\_\_\_\_

DISTRICT OFFICE \_\_\_\_\_

DATE \_\_\_\_\_

*Be sure to quote the above number on all correspondence regarding your claim and send all letters to the above office.*

Dear \_\_\_\_\_,

The information that you have presented to support your claim for benefit indicates that you have not met the requirements for entitlement under Sections 25(a), 33(2) and 36(1) of the Unemployment Insurance Act, and Section 145(9) of the Unemployment Insurance Regulations. The Act states that an insured person is not entitled to receive benefit for any day for which he cannot prove that he is capable of and available for work. Section 145(9) of the Regulations requires that an insured person prove that a reasonable and customary effort to obtain employment has been made. Benefits are not payable to you, therefore, for the period

\_\_\_\_\_ to \_\_\_\_\_ because you have not proven that you are available for work in that you have not made reasonable and customary efforts to obtain work as required by Section 145(9) of the regulations and Section 25(A) of the unemployment Insurance Act. Our records show that you have only made \_\_\_\_\_ attempts to obtain employment in the past month. It is known there are employers in your area where there are opportunities in your skills. Therefore, in order for you to prove entitlement to further benefits, you will be required to prove you have made sincere efforts to find work.

If you have further information or documentary evidence which might affect this decision, please forward this information to us without delay. If you disagree with our decision to stop paying you benefits, you have the right to appeal this decision to a Board of Referees. If you wish to do so, please read the instructions enclosed with this notice.

*It is in your interest to continue to complete and mail your report forms. If you do not, you risk losing any benefits to which you might otherwise be entitled. If you do appeal, and you are successful, we will require these report cards to be completed before we can pay you benefits for that period.*

Yours truly,

OVER

\_\_\_\_\_  
 (Name and Title)

UNEMPLOYMENT INSURANCE COMMISSION  
 UIC 13-03 (10-73)

(FRANÇAIS AU VERSO)

## Appendix D (Table 1), as amended, July, 1974

## "SUITABLE" RATE OF PAY

Skilled Occupation or Vocation - Potential Jobs Available

Assuming that \$100 is claimant's usual earnings and \$70 is the prevailing rate

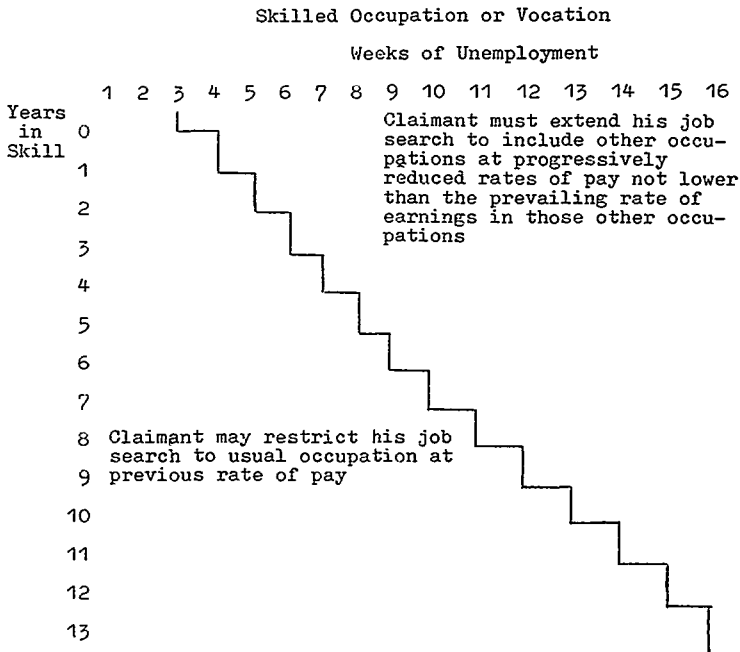
		Weeks of Unemployment																			
Years in Skill		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16				
		0	100	95	90	85	80	75	70												
1			100	95	90	85	80	75	70												
2				100	95	90	85	80	75	70											
3					100	95	90	85	80	75	70										
4						100	95	90	85	80	75	70									
5							100	95	90	85	80	75	70								
6								100	95	90	85	80	75	70							
7									100	95	90	85	80	75	70						
8										100	95	90	85	80	75	70					
9											100	95	90	85	80	75	70				
10												100	95	90	85	80	75	70			
11													100	95	90	85	80	75	70		
12														100	95	90	85	80	75	70	
13															100	95	90	85	80	75	70

Rules

- (1) A claimant must be given a "reasonable period of time" to find employment at his usual rate of pay.
- (2) Determination of a "reasonable period of time" would take into account:
  - (a) the years of experience in the skill
  - (b) the duration of unemployment excluding the period during which the claimant had withdrawn from the labour market for reasons beyond his control, e.g. illness, maternity, imprisonment etc.
  - (c) the opportunities of employment in his area
- (3) All skilled workers are allowed a 3 week basic period commencing with their unemployment to permit them to seek work at their usual rate of wages.
- (4) One week for each year of experience in his usual occupation is added to the basic 3 weeks up to a maximum of 13 weeks for a total of 16 weeks.
- (5) Following the reasonable period defined above, the claimant must be prepared to search for and accept employment at a wage rate progressively reduced by 5 per cent per week but never lower than the rate recognized by agreements or where there is no agreement, by good employers.

## Appendix D (Table 2), as amended, July, 1974

## "SUITABLE" WORK

Rules

- (1) A skilled worker must be given a "reasonable period of time" to find employment in his usual occupation before he is expected to look for work in another occupation or at a rate of wages lower than his usual earnings.
- (2) Determination of a "reasonable period of time" takes into account:
  - (a) the duration of the period of employment excluding the period during which the claimant had withdrawn from the labour market for reasons beyond his control.
  - (b) the opportunities of employment in the area.
  - (c) the extent of decrease in wages
- (3) All skilled workers are allowed a 3 week basic period commencing with their unemployment to permit them to seek work at their usual rate of wages.
- (4) One week for each year of experience in his usual occupation is added to the basic 3 weeks up to a maximum of 13 weeks, to a total of 16 weeks.
- (5) After a reasonable period of time as defined above has elapsed, employment in the claimant's usual occupation will be considered suitable even if it is at a rate of earnings lower than he made previously if:
  - (a) it is at a rate progressively reduced by 5 per cent per week.
  - (b) it is within the prevailing rate for that occupation.
  - (c) it is at conditions as favourable as those recognized by an agreement or where there is no agreement, by good employers.

Appendix D (Table 2), continued

- (6) Similarly, after a reasonable period, employment in another occupation and/or at a lower rate of earnings would nevertheless be suitable:
- (a) if the working conditions are as favourable as those recognized in agreements or where there is no agreement, by good employers.
  - (b) if the rate of earnings is within the going rate for that occupation.

Appendix D (Table 3), as amended, July, 1974

"SUITABLE" RATES OF PAYUnskilled Labour - Potential Jobs Available Within  
Reasonable Distance Within Capability of Claimant

<u>Week</u>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10</u>	<u>11</u>	<u>12</u>
	100	100	100	95	90	85	80	75	70	70	70	70

The Table assumes that \$100 is his usual wages and \$70 is the prevailing rate.

Rules

- (1) An unskilled worker must be given a "reasonable period of time" to find employment in his usual occupation before he is expected to look for work in another occupation or at a rate of wages lower than that he previously received.
- (2) A "reasonable period of time" excludes any period during which the claimant had withdrawn from the labour market for reasons beyond his control; e.g. illness, maternity, imprisonment etc.
- (3) All unskilled workers are allowed a 3 week basic period commencing with their unemployment to permit them to seek employment at their usual rate of wages. (This would exclude periods following separation in respect of which the claimant receives his usual remuneration.)
- (3) Following the reasonable period defined above, the claimant must be prepared to search for and accept employment at a wage rate progressively reduced from his previous wage by 5 per cent per week but never to a rate lower than the prevailing rate.

Note: Years spent in an unskilled occupation are not a consideration when determining the reasonable period of time.

Appendix D (Table 4), as amended, July, 1974

## "SUITABLE" WORK

Unskilled Occupation or Vocation - Potential Jobs  
Available Within Reasonable Distance In Occupation or Vocation

Years in Occupation	Weeks of Unemployment		
	1	2	3
0 - up	Claimant may restrict his job search to usual occupation at previous rate of pay.		Claimant must extend his job search to include other occupations at progressively reduced rates of pay not lower than the prevailing rate of earnings of those other occupations.

Rules

- (1) An unskilled worker must be given a "reasonable period of time" to find employment in his usual occupation before he is expected to look for work in another occupation or at a rate of wages lower than he previously received.
- (2) Determination of a "reasonable period of time" takes into account:
  - (a) the duration of the period of unemployment excluding the period during which the claimant had withdrawn from the labour market for reasons beyond his control.
  - (b) the opportunities of employment in the area.
  - (c) the extent of decrease in the wages.
- (3) All unskilled workers are allowed a 3 week basic period commencing with their unemployment to permit them to seek work at their usual rate of wages.
- (4) After a reasonable period of time as defined above has elapsed, employment in the claimant's usual occupation will be considered suitable even if it is at a rate of earnings lower than his usual earnings if:
  - (a) it is at a rate progressively reduced by 5 per cent per week.
  - (b) it is within the prevailing rate for that occupation.
  - (c) it is at conditions as favourable as those recognized by an agreement or where there is no agreement, by good employers.
- (5) Similarly, after a reasonable period, employment in another occupation and/or at a lower rate of earnings would nevertheless be suitable:
  - (a) if the working conditions are as favourable as those recognized by agreements or where there is no agreement, by good employers.
  - (b) if the rate of earnings is within the going rate for that occupation.