



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. L. v Canada Employment Insurance Commission*, 2019 SST 861

Tribunal File Numbers: GE-19-1376, GE-19-1377, GE-19-1378

BETWEEN:

**K. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Angela Ryan Bourgeois

HEARD ON: April 12, 2019

DATE OF DECISION: May 9, 2019

## **DECISION**

[1] The appeal is allowed. The Appellant (Claimant) has proven that she was available for work between September 5, 2018, and May 24, 2019, except for 12 weeks from January 9, 2019, when she was not capable of working as set out in her medical note. I find that the Claimant has proven her entitlement to sickness benefits for the 12-week period because she has proven that she was unable to work because of illness, and would have otherwise been available for work.

## **OVERVIEW**

[2] The Claimant was laid off from her job in August 2018. She then started the second year of a X course.

[3] The Claimant then found a job working in the evenings at a X, but she was laid off in October 2018, was called back to work again about a week later, and was laid off again in November 2018.

[4] She applied for regular benefits after being laid off in August 2018, and again in November 2018.

[5] Both times she applied for regular benefits the Canada Employment Insurance Commission (Commission) determined that she had not proven her availability as required under the *Employment Insurance Act* (Act) because she was taking a full-time course.

[6] Then, in December 2018, the Claimant had a car accident. She applied for sickness benefits under the Act. The Commission determined that she did not qualify for sickness benefits because she would not have been available for work if she were not sick because she was taking a full-time course.

[7] The Claimant has appealed these three decisions to the Tribunal. All three matters have common facts and questions of law. The Claimant did not object to me hearing the three matters together, and I found that the Commission would not be prejudiced by my doing so. As such, I

heard all three appeals at the same time.<sup>1</sup>

[8] The Commission determined that the Claimant was unavailable for work, and was not otherwise available for work during her illness, because she is taking a full-time course. I must decide if the Claimant has rebutted this presumption.

## **ISSUES**

### ***Regular Benefits***

[9] Is the Claimant presumed unavailable because she was attending a full-time course from September 5, 2018, to May 24, 2019?

[10] If not, has she proven her availability?

### ***Sickness Benefits***

[11] Was the Claimant unable to work because of her illness?

[12] Has the Claimant proven that she was otherwise available for work?

## **ANALYSIS**

### **REGULAR BENEFITS**

[13] To receive benefits for a working day in a benefit period, a claimant must prove,<sup>2</sup> not simply allege, that they were capable of and available for work and unable to obtain suitable work on that day.<sup>3</sup> A working day is any day of the week, except for Saturday and Sunday.<sup>4</sup>

[14] There is a rebuttable presumption that a claimant is not available for work when they are attending full-time studies.<sup>5</sup>

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<sup>1</sup> In such circumstances, I have the authority to hear all three matters together under s 13 of the *Social Security Tribunal Regulations*.

<sup>2</sup> To “prove” something means that you show that it is more likely than not.

<sup>3</sup> This is set out in s 18(1)(a) of the Act.

<sup>4</sup> This is set out in s 32 of the *Employment Insurance Regulations*.

<sup>5</sup> This presumption was described by the Federal Court of Appeal in the case of *Landry v Canada (Attorney General)*, A-719-91.

**Is the Claimant presumed unavailable because she is attending a full-time course?**

[15] No. I find that the Claimant has rebutted the presumption of non-availability while attending a full-time course by showing a history of working while attending her course.

[16] When a claimant is attending full-time studies, it is presumed, or considered, that they are not available for work, unless they prove exceptional circumstances.<sup>6</sup> Exceptional circumstances can include a history of working full-time while taking a full-time course.<sup>7</sup>

[17] I find that the Claimant is taking a full-time course. The Claimant reported that she is taking a two-year X course. She is in her second year. She testified that her course hours were the same in her first and second year, from 8:30 am to 3:30 pm, Monday to Thursday, and 8:30 am to 12:30 pm, on Friday.

[18] I find that the Claimant has proven that she could work full-time hours while taking a full-time course through her work history. The Claimant testified that during the first year of her course, she worked at X. She stopped working at X to accept a better summer position. When her summer position ended, she started working full-time hours at a X. She worked 30 hours a week, from 4 pm to 12 am, Monday to Friday, and sometimes on the weekends. If things were slow she was sent home early, and if required, she worked later. The Claimant testified that she was laid off in October 2018, called back for a week, and then laid off again on November 17, 2018.

[19] Because the Claimant worked full-time while taking her course, I find that she has rebutted the presumption of non-availability. I find that she has proven that she could work at a full-time job while taking her course.

**Has the Claimant proven her availability?**

[20] Yes. I find that the Claimant has proven her availability from September 5, 2018, to May 24, 2019, excluding the 12-week period from January 9, 2019, when she was unable to work because of sickness.

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<sup>6</sup> *Landry v Canada (Attorney General)*, A-719-91.

<sup>7</sup> *Canada (Attorney General) v Rideout*, 2004 FCA 304.

[21] To receive benefits, the Claimant must prove that it is more likely than not that she is capable of, available for work, and unable to obtain suitable employment for every working day for which she claims benefits.

[22] There is no dispute that the Claimant was capable of working, with the exception of the period of her illness. The issue arises with her availability.

[23] To be available for work, the Claimant must prove:

- a) she has a desire to return to the labour market as soon as suitable work is offered;
- b) she must indicate that desire by efforts to find suitable work; and
- c) she cannot have personal conditions that unduly limit her chances of finding work.<sup>8</sup>

***Desire to return to the labour market.***

[24] I find that the Claimant has proven that she had a desire to return to the labour market as soon as suitable work was offered. She testified that she wanted to find another job, and that she had no choice but to work because she could not solely rely on her parents. She testified that she had no money for food or for gas to get to school.

[25] While financial need alone does not prove a desire to return to work, it lends credibility to her statement that she had a desire to work.

***Job search efforts.***

[26] The Claimant must prove her desire to return to the labour market through her efforts to find suitable work. She must also prove that she is making reasonable and customary efforts to find suitable work.<sup>9</sup>

[27] I find that the Claimant's job search efforts prove that she had a desire to return to work as soon as a suitable job was offered because she was looking for work, had a resume prepared,

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<sup>8</sup> *Faucher v Canada Employment and Immigration Commission A-56-96.*

<sup>9</sup> This requirement is found in s 50(8) of the Act, and what it means to make "reasonable and customary efforts" is found in s 9.001 of the *Employment Insurance Regulations*.

and was applying for work. Further, I find that her efforts prove that she was making reasonable and customary efforts to find suitable work.

[28] The Claimant testified that she has a resume prepared, which she passes out with a cover letter, in an envelope. She reported that she is looking for any job, including at retail stores, fast food restaurants, call centres, and hospital cleaning. The Claimant testified that she applied for work at McDonalds, two call centres, two pizza places, Global Pet Foods, various retail stores in the mall, Walmart, Dollarama, and Sobeys. She stated that a few weeks before the hearing, she attended a job fair. She reported that she also asked around about work, and looked for jobs online on the Indeed and Jobs.ca websites. She is registered with Indeed, and gets job notifications. She got help to prepare her resume.

[29] She told the Commission that she could work until one am, Monday to Friday, and any time on the weekends. This is consistent with the hours she worked at the X.

[30] When she applied for benefits she reported that she had looked for work since starting her course and becoming unemployed.

[31] She testified that even when she was unable to work because of her illness, she continued to look for work.

[32] I find that these efforts show that she had a desire to return to work.

***Personal Conditions.***

[33] I find that the Claimant's attendance at her course from September 5, 2018, to May 24, 2019, has not unduly limited her chances of finding work because the type of work that the Claimant has worked in the past, and where she has work experience, is the type of work that happens in the evenings, outside of her class hours.

[34] The Claimant reported that she would only accept work after her school hours. The Commission argued that this means that she placed limitations on her job search that unduly limited her chances of finding work. In the abstract, I would agree with the Commission.

[35] However, in the Claimant's case, while her attendance at her course was a personal condition, I find that she has proven that it was not one that unduly limited her chances of finding work. Through her work history she demonstrated that she was able to find work with two different employers, in two very different lines of work, outside of her class hours.

[36] While the Claimant would not quit her course to accept full-time work, she has proven that she can work outside her school hours, and as such, it would not be necessary to leave her course. Further, she has proven that she would not allow her course to stop her from getting a suitable job because she missed three days of school to take the X training.

[37] The Claimant's work main experience is at X and X work. Given that most of these types of jobs are busiest in the evenings, I find that her daytime classes did not unduly limit her chances of finding full-time employment. Her work for the municipality was a daytime position for students. As such, this type of work would not have been available to the Claimant from September to May, whether or not she was taking her course.

[38] While the Commission's notes state that the Claimant stated that she could only accept part-time work, I prefer her action of accepting full-time hours at the X to the note.

[39] Considering the three availability factors, I find that the Claimant has proven that she was available for work from September 5, 2018, to May 24, 2019, excluding her 12-week period of illness from January 9, 2019. She had a desire to work, she demonstrated her desire to work through her job search efforts, and she did not have personal conditions that unduly limited her chances of finding work.

## **SICKNESS BENEFITS**

[40] Claimants for employment insurance benefits must prove that they are eligible for benefits.<sup>10</sup>

[41] Sickness benefits can only be paid to a claimant for a working day if they prove that on that day they:

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<sup>10</sup> *Canada (Attorney General) v Terrion*, 2013 FCA 97; *Canada (Attorney General) v Yeo*, 2011 FCA 26

- a) were unable to work because of an illness, injury or quarantine, and
- b) would otherwise have been available for work.<sup>11</sup>

[42] The burden of proof is on a balance of probabilities, which means that it must be more likely than not.

**Was the Claimant unable to work because of an illness?**

[43] Yes. The Claimant was unable to work for 12 weeks from January 9, 2019, as set out in her medical note.

[44] The onus is on the Claimant to prove that she was unable to work because of an illness<sup>12</sup> that rendered her incapable of performing the duties of her regular or usual employment or of other suitable employment.<sup>13</sup>

[45] The Claimant provided a note from her family doctor dated January 9, 2019, stating that she was unable to work because of medical reasons for a period of 12 weeks.

[46] The Commission has not disputed the medical evidence, and in their written submissions they state that the issue under appeal is whether the Claimant has otherwise proven her availability.

[47] I find that the medical evidence is reliable because it was given by her family doctor.

[48] The Claimant testified that although she was not able to work for 12 weeks, she was able to attend school because at school she was allowed to take breaks as often as needed, and had someone to help her with any required lifting. She stated that such accommodations would not be available in the workplace.

[49] Given the medical evidence, I accept the Claimant's testimony that she was unable to work during this time because of the symptoms of concussion and whiplash. I accept her reasoning that even though she was able to attend class, she would not have been able to work

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<sup>11</sup> S 18(1)(b) of the Act.

<sup>12</sup> S 49 of the Act.

<sup>13</sup> S 40 of the *Employment Insurance Regulations*.



because it is more likely than not that she would not have been able to take breaks, and would not have had a buddy to help her with lifting at work.

[50] I find that the Claimant has proven that it is more likely than not that she was unable to work because of illness that rendered her incapable of performing the duties of her regular, usual or other suitable work.

**Has the Claimant proven that she was otherwise available for work?**

[51] Yes. I find that the Claimant has proven that but for her illness she was otherwise available for work.

[52] The Act does not define “available” or “otherwise available”. Therefore, I have looked to how the courts have considered “available”. As stated above, I find that the Claimant has proven that she was available for work even though she was taking a X course.

[53] Since the Claimant was available for work both before and after her illness, I find that she has proven that it is more likely than not that she was “otherwise” available during the 12 weeks of her illness.

[54] When she applied for sickness benefits, the Claimant reported that had she not been sick, she would continue her course and return to her employment to the same extent that she did before her illness. Since the Claimant was not working directly before her illness, I find this means that if she could have, she would have returned to work at the same hours that she worked at the X, which was about 30 hours a week. I find that this supports her statement that she was otherwise available for work

**CONCLUSION**

[55] The appeal is allowed. The Claimant has rebutted the presumption that she is not available for work while attending a full-time course. She has proven her availability from September 5, 2018, to May 24, 2019, excluding the 12-week period of her illness starting on January 9, 2019, when she was unable to work because of her illness, but has proven that she was otherwise available for work.

Angela Ryan Bourgeois  
Member, General Division - Employment Insurance Section

HEARD ON:	April 12, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	K. L., Appellant