



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. D. v Canada Employment Insurance Commission*, 2020 SST 689

Tribunal File Number: GE-20-173

BETWEEN:

**L. D.**

Appellant/Claimant

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: Catherine Shaw

HEARD ON: March 2, 2020

DATE OF DECISION: March 17, 2020

## **Decision**

[1] I am dismissing the appeal. The Claimant has not proven he was available for work from September 3 to December 13, 2019.

## **Overview**

[2] Claimants have to be available for work to be paid regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job. The Commission decided that the Claimant was unable to be paid benefits from September 3 to December 13, 2019, because he was not available for work while he was attending school.

[3] I must decide whether the Claimant has proven that he was available for work.<sup>1</sup> The Commission says that the Claimant restricted his hours of work because he was attending a full-time course of studies. It also said he has not provided enough evidence to prove he was making job search efforts. The Claimant says he was actively trying to find work.

## **What I must decide**

[4] I must decide if the Claimant was available for work from September 3 to December 13, 2019. To do this, I have to see if he was making reasonable and customary efforts to find suitable employment as of that date. Then I must address if he was capable of and available for work.

## **Reasons for my decision**

### **Reasonable and customary efforts to find a job**

[5] Two different sections of the law require claimants to show that they are available for work;<sup>2</sup> the Commission disentitled the Claimant from being paid benefits under both. I will first

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<sup>1</sup> The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

<sup>2</sup> Subsection 50(8) provides that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment. Paragraph 18(1)(a) of the *Employment Insurance Act* provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

consider whether the Claimant has proven that his efforts to find a job were reasonable and customary.<sup>3</sup>

[6] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.<sup>4</sup> I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. I also have to consider the Claimant's efforts in the following job-search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.

[7] I find that the Claimant has not proven he was making reasonable and customary efforts from September 3, 2019. The reasons for my decision are set out below.

[8] The Claimant was laid off from his employment on August 22, 2019, and established a claim for EI benefits effective August 25, 2019. He is attending a training program starting September 3, 2019, and ending December 13, 2019.

[9] The Claimant says that he was actively seeking work since he was laid off. He prepared his resume before he lost his job. He registered for the online Job Bank and checked it daily for job postings. The Claimant testified that he was looking for trades jobs because he felt they were most suitable for him, given his previous work experience. He contacted five prospective employers by phone and in-person. He said he found these employers through postings on the job bank, as well as through family connections. He also worked several shifts for his former employer in September 2019, as that was the only time work was available.

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<sup>3</sup> Subsection 50(8) of the *Employment Insurance Act*.

<sup>4</sup> Section 9.001 of the *Employment Insurance Regulations*.

[10] The Claimant's testimony contradicts information that he previously provided to the Commission. He spoke to the Commission on November 26, 2019. At that time, he said that he was looking for work but had not applied for any jobs.<sup>5</sup>

[11] At the hearing, the Claimant explained that he was nervous during the phone calls with the Commission and may have mistakenly given incorrect information for that reason. I asked him to clarify what information he provided that was incorrect and he indicated that information about his availability and his course schedule were not accurately represented. While the Claimant did not speak directly to the contradictory statement about his job search, I find that the Claimant's testimony is more reliable than his previous statements to the Commission. This is because he gave his testimony under a sworn affirmation and was able to answer direct questions about his job search at the hearing.

[12] I accept the Claimant's testimony that he was seeking work by checking the online job bank and using family connections to find potential job opportunities. I also accept that the Claimant applied for jobs with five employers by giving the employers his name and telephone number.

[13] The Claimant's testimony shows that he engaged in several of the job-seeking activities listed in paragraph 6 above. However, his job search and applications were limited. He applied for five jobs in a period of four months. Such a limited search does not support that he made the broad and sustained search effort described in the *Employment Insurance Regulations*.

[14] The Claimant's representative submits the Claimant was not advised by the Commission to expand his job search prior to disentitling him from receiving EI benefits. In support of this position, he cites a Canadian Umpire Benefits (CUB) decision, which states that a claimant should be given a warning and a reasonable opportunity to establish their availability through an adequate job search before being cut off from benefits.<sup>6</sup>

[15] I have considered the Claimant's submissions in this regard; however, I find that it is not the scope of the Claimant's job search, but the total number of his job applications that support

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<sup>5</sup> The notes of this conversation are located starting on GD3-32 of the appeal file. The exchange that I note here is found at GD3-33.

<sup>6</sup> CUB decision 72689. CUB decisions are not binding on the Tribunal, though they may be persuasive.

he was not performing a sustained search for suitable employment. Further, I find the Claimant was given notice about his requirement to actively search for work on his initial application for benefits.<sup>7</sup>

[16] The Claimant's job search efforts and job applications were limited over the period in question. Therefore, I find the Claimant has not shown that he made reasonable and customary efforts to find a suitable job from September 3 to December 13, 2019.

### **Capable of and available for work and unable to find suitable employment**

[17] To be entitled to receive regular employment insurance benefits, claimants must show they were capable of and available for work and unable to obtain suitable employment for every working day they are seeking benefits.<sup>8</sup> A working day is any day of the week except Saturday and Sunday.<sup>9</sup>

### Presumption of non-availability while attending a course of studies

[18] There is a presumption that a claimant enrolled in full-time studies is not available for work. This presumption can be rebutted through proof of exceptional circumstances.<sup>10</sup>

[19] To determine if this presumption applies, I must decide if the Claimant was engaged in full-time studies.<sup>11</sup> At the hearing, the Claimant said that he attends class on Mondays, Tuesdays and Wednesdays from 9:00 to 10:15 AM and 1:00 to 3:00 PM; on Thursdays from 1:00 to 3:00 PM; and on Fridays from 9:00 AM to 12:00 PM. This means he is engaged in his courses for less than 15 hours per week. Based on the Claimant's testimony, I find his studies were on a part-time basis and so the presumption of non-availability does not apply.

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<sup>7</sup> The rights and responsibilities of an EI claimant are listed at the end of a claimant's initial application for benefits. In this case, it is located on GD3-19 of the appeal file.

<sup>8</sup> This is set out in section 18(1)(a) of the *Employment Insurance Act*. The Federal Court of Appeal has stated that claimants have to prove they are entitled to EI benefits, including meeting the availability requirements in *Canada (Attorney General) v. Picard*, 2014 FCA 46 and *Canada (Attorney General) v. Peterson*, A-370-95. The law requires me to apply the principles set by courts. I refer to other cases that explain the *Employment Insurance Act* and the *Employment Insurance Regulations* in this decision.

<sup>9</sup> This is stated at section 32 of the *Employment Insurance Regulations*

<sup>10</sup> *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349

<sup>11</sup> The rebuttable presumption of non-availability while attending full-time studies is stated in *Canada (Attorney General) v. Gagnon*, 2005 FCA 321

### **Availability for work**

[20] Now I will consider whether the Claimant has proven that he is available for work and unable to find suitable employment.<sup>12</sup> The Claimant has to prove three things to show he is available:

1. A desire to return to the labour market as soon as a suitable job is available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might unduly limit their chances of returning to the labour market<sup>13</sup>

[21] I have to consider each of these factors to decide the question of availability, looking at the attitude and conduct of the Claimant.<sup>14</sup> All three factors must be met to prove availability.

Did the Claimant have a desire to return to the labour market as soon as a suitable job was available?

[22] I find the Claimant had a desire to return to the labour market as soon as a suitable job was available.

[23] The evidence indicates the Claimant had a full-time job before his training program started. This job is largely seasonal and the employer has a regular slowdown every year. The Claimant resumed this employment for several weekend shifts in September 2019, as work became available. I find the Claimant's attitude and conduct indicate he was ready and willing to return to work.<sup>15</sup>

Did the Claimant make efforts to find a suitable job?

[24] The Claimant did not make enough efforts to find a suitable job from September 3 to December 13, 2019.

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<sup>12</sup> Section 18(1)(a) of the *Employment Insurance Act*.

<sup>13</sup> The factors to consider when determining whether a claimant is available for work are set out in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>14</sup> *Canada (Attorney General) v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

<sup>15</sup> *Canada (Attorney General) v Whiffen*, A-1472-92

[25] While they are not binding when deciding this particular requirement, I have considered the list of job-search activities outlined above in deciding this second factor for guidance. The Claimant's efforts to find a new job during the period in question consisted of assessing employment opportunities on the online job bank, contacting five employers for prospective employment and networking with friends and family. For the reasons explained above, these efforts are not enough to meet the requirements of this second factor because they do not demonstrate that he was making genuine efforts to find a suitable job.

Did the Claimant set personal conditions that might have unduly limited his chances of returning to the labour market?

[26] No, the Claimant did not set any personal conditions that might have unduly limited his chances of returning to the labour market.

[27] The Commission says the Claimant set a personal condition that limited his chances of returning to the labour market by attending a course of instruction. It argues this course restricted the Claimant's hours of availability to find full-time work.

[28] The Claimant says that his course does not restrict his available hours of work. His course schedule is minimal and the majority of the class materials are available online for him to review outside of class time.

[29] The Commission argued that the Claimant's later submissions regarding his course schedule are inconsistent with his initial statements and should therefore be given less weight. Specifically, it points to the Claimant's responses on his application for benefits in which he stated that he was obligated to attend class in the mornings and afternoons for 15-24 hours per week.

[30] The Claimant provided his course schedule at the hearing and clarified that he did not have his course schedule when he submitted his application for EI benefits. He provided an estimate of the hours involved based on information from the school's website.

[31] I find the Claimant's course obligations did not unduly limit his chances of returning to the labour market. I believe his testimony that he attended classes for less than 15 hours per week and that he could have completed the majority of his coursework online, as needed.

**Was the Claimant capable of and available for work and unable to find suitable employment?**

[32] As noted above, the Claimant had to meet all three factors to demonstrate his availability. Considering my findings on each of the three factors together, I find that the Claimant did not show that he was capable of and available for work and unable to find suitable employment from September 3 to December 13 2019.<sup>16</sup> The Claimant did not make enough efforts to find a suitable job during the period of time in question to meet this condition.

**Conclusion**

[33] The Claimant has not proven that he was available for work from September 3 to December 13, 2019. This means the appeal is dismissed.

Catherine Shaw

Member, General Division - Employment Insurance Section

HEARD ON:	March 2, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. D., Appellant Robert Morrissey, Representative for the Appellant

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<sup>16</sup> Paragraph 18(1)(a) of the *Employment Insurance Act*.