Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *GO v Canada Employment Insurance Commission*, 2020 SST 970

Tribunal File Number: GE-20-1468

BETWEEN:

G. O.

Appellant/ Claimant

and

Canada Employment Insurance Commission

Respondent/ Commission

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Leanne Bourassa

HEARD ON: June 5, 2020

DATE OF DECISION: June 23, 2020

Canada

DECISION

[1] The appeal is dismissed. The Claimant has not proven that she was available for work while she was in full-time training. She is therefore disentitled from receiving regular EI benefits.

OVERVIEW

[2] The Claimant was dismissed from her job and applied for Employment Insurance (EI) benefits in April 2019. The Commission advised her that she was allowed 31 weeks of EI benefits. Although she checked her Service Canada account several times a week over many months, the Claimant's access consistently failed with a 'technical difficulty' message. Because of this she did not complete any bi-weekly reports. In August 2019, having had no communication from the Commission, the Claimant moved from X to X to begin a carpentry apprenticeship program. She finally spoke with the Commission in January 2020 and it was confirmed that there were technical problems with her account that had prevented her from doing the required bi-weekly reports. The Claimant also disclosed to the Commission that she was then in a full-time apprenticeship-training program.

[3] Following this disclosure, the Commission decided that they could not pay the Claimant EI benefits for two reasons: first, from April 28, 2019 to December 28, 2019 she could not receive benefits because her reports were not completed on time. Then, from December 29, 2019 until February 21, 2019, the Claimant was not entitled to benefits because she was taking a training course of her own initiative and had not proven her availability for work. The Commission later adjusted their position to say that the Claimant was disentitled from August 25, 2019 because of her full-time training program and failure to prove her availability for work.

[4] The Claimant asked for that decision to be reconsidered. Upon reconsideration, the Commission rescinded the disqualification related to the Claimant's delay in filing her reports. However, they still found that since she began her training in August 25, 2019, the Claimant had not proven her availability for full-time work. Since she had not proven her availability, the Claimant was not entitled to benefits.

[5] The Claimant is appealing this decision. She says she was mistreated by the Commission because they failed to pay her benefits and did not contact her for months. This led to significant stress. Her decision to move across the country and register for an apprenticeship program was a desperate attempt to improve her chances of finding work. She also maintains that she is entitled to receive EI benefits while she was doing apprenticeship training and the Commission abused and harassed her by demanding she prove her availability.

PRELIMINARY MATTERS

A – Type of hearing

[6] On her Notice of Appeal, the Claimant said that she did not have a preferred type of hearing. I scheduled a hearing by teleconference. The Claimant then wrote to the Tribunal saying she wanted a hearing by written questions and answers. Because this is an exceptional method of proceeding that often results in a long delay for a decision, I wrote to the Claimant asking her to explain why she would prefer that type of hearing. The services of an interpreter were offered to her if she was willing to proceed by teleconference.[1]

[7] The Claimant responded that she wanted a hearing by question and answer because her written and spoken English were imperfect and she was afraid that she would not be able to deliver her message properly if she became emotional on a teleconference. I understand from her message that she does not believe she has to go through the hardship of the appeal process because the EI benefit was not released in time through no fault of her own and after she had followed Service Canada's instructions. She cannot afford a lawyer, an interpreter would not be her representative as much as friends.[2] In a second message to the Tribunal, she said that she would not be normally effective with a teleconference hearing after having dealt with Service Canada for over a year. She understood she was not heard properly during phone conversations with Service Canada and that her straight-forward statement was edited somehow when she received their decision.[3]

[8] Having reviewed the Claimant's written correspondence, I was not convinced that the Claimant understood the legal test she had to meet to be successful in her claim. Also, since I found

[1] See Tribunal Letter of June 1, 2020 (GD6)
[2] Claimant's email message of June 1, 2020 (GD7)
[3] Claimant's second email message of June 1, 2020 (GD8)

that her written submissions were difficult to follow, I felt that a hearing over the phone would allow me to clarify the issues with the Claimant and to better understand her arguments. I wrote to the Claimant to confirm that the hearing would proceed by teleconference. I would bare in mind this was not her preferred type of hearing. I also advised the Claimant that after the hearing, if she felt that she had not been able to communicate properly, she could provide written comments within the 5 days following the hearing. She could also provide written testimony before the hearing. She was again offered the services of an interpreter and to be accompanied on the phone by a supporter.[4] She again wrote to the Tribunal to request a hearing by question and answers.[5] I chose to proceed with the teleconference, keeping the door open to further exchanges in writing.[6]

[9] On June 5, 2020, the Claimant joined the scheduled teleconference. She again indicated that she wanted a hearing by written question and answer. I acknowledged the Claimant's request but suggested we proceed with the hearing while we were on the phone and following the hearing we could exchange written questions and answers if she felt that was still necessary. The Claimant agreed to present her testimony to me on the phone. We spoke for over an hour and I feel that the Claimant expressed herself clearly and I was better able to understand her arguments.

[10] Following the teleconference, in order to ensure the Claimant had a full opportunity to provide relevant evidence, I wrote to the Claimant with specific questions. In this letter, I asked her to confirm certain statements she had made at the hearing. I also asked that she provide further details about her job search.[7] The questions asked were similar to those I would have asked in a written question and answer hearing, and to the questions I had raised during the teleconference hearing.

[11] The Claimant provided a written response to this letter.[8] However, in this response she did not directly answer the questions that were asked, saying that if I felt she had addressed them adequately during the hearing there was nothing more she could add. She questioned why this additional questionnaire was sent to her.

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[4] Tribunal letter of June 2, 2020 (GD9)
[5] Claimant's email message of June 4, 2020 (GD10)
[6] Tribunal letter of June 5, 2020 (GD11)
[7] Tribunal letter of June 8, 2020 (GD12)
[8] Claimant's email letter of June 13, 2020 (GD13)

[12] To answer the Claimant's question, the questions were sent to her to ensure that she had a full and fair opportunity to provide relevant evidence in a manner that she felt comfortable with. Given the Claimant's insistence on a hearing by written question and answers, I felt sending her certain key questions related to the legal test for availability would allow her to answer more precisely and fill in gaps in her evidence, should she choose to do so. Her answers to these questions were taken into consideration when reaching the decisions I make below.

B – Other issues

[13] As mentioned above, the Commission had previously disqualified the Claimant from receiving regular EI benefits, saying that she delayed in filing her bi-weekly reports. When the Claimant asked for reconsideration of that decision, the Commission rescinded that disentitlement. Because of that, the only question that is before me at this time is the question of whether the Claimant proved her availability to work, particularly while she was attending a training full-time training program.

ISSUE

[14] Was the Claimant available for work while taking apprenticeship training?

[15] To answer this question, I will need to consider the following points:

Regarding the Claimant's training

a) Was she referred to this training by the Commission?

b) Was she in full-time studies?

c) If she was in full-time studies, has she rebutted the presumption she was not available?

Regarding the Claimant's availability

a) Was the Claimant making reasonable and customary efforts to obtain suitable employment?

b) Did the Claimant have the desire to return to the labour market as soon as possible?

c) Did the Claimant express this desire through efforts to find a suitable job?

d) Did the Claimant set any personal conditions that might unduly limit the chances of returning to the labour market?

ANALYSIS

[16] Two different sections of the law require claimants to show that they are available for work;[9] the Commission disentitled the Claimant from being paid benefits under both. In addition, the Federal Court of Appeal has said that claimants who are attending school full time are presumed to be unavailable for work.[10] I am going to start by looking at whether the presumption applies to the Claimant. Then, I will look at the two sections of the law on availability.

Presumption that full-time students are not available for work

[17] The presumption applies only to students who are attending a full-time course or training without being referred to it by the Commission or an authority designated by the Commission.

[18] This presumptions does not apply to claimants who are referred to a course or training by the Commission or an authority that the Commission designates.[11] I will need to determine if the Claimant was referred to her course by the Commission or a designated authority and then, if she was attending her training full-time.

a) Was the Claimant referred to her course by an authority designated by the Commission?

[19] The Claimant argues that apprenticeship is eligible for EI while on a training period, so she should not be excluded from EI benefits during the period she was attending training.

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[9] Subsection 50(8) of the *Employment Insurance Act* (EIA) 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 EIA 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.

[10] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[11] Subsection 25(1) of the *Employment Insurance Act*.

[20] The Commission has not confirmed that the Claimant was referred to her apprenticeship training program. In fact, they mention that the Claimant was taking the carpentry trade program of her initiative.

[21] During the hearing, the Claimant said that she understood from the EI application form that she could get EI benefits while doing an apprenticeship program. When she had not received EI benefits or any communication from the Commission, she desperately found her carpentry apprenticeship program and registered on her own. She moved to X from X, to take the apprenticeship training, hoping to improve her chances of finding a job.

[22] In my written questions, I asked the Claimant if, other than that mention on the EI application, did she validate that her carpentry training program would be eligible for EI with anyone else, or if she asked her training provider about EI benefits. The Claimant did not directly answer this question, but I understand from her written comments that she feels it is wrong of the Commission to not confirm that she is eligible for EI during apprenticeship when the government of Canada indicates there is a support program.

[23] For a claimant on an apprenticeship program to be considered capable of and available for work during a period when they are attending training, they must have been referred to the program.[12] I acknowledge that the Claimant says that if she had the appropriate support and information from Service Canada she would not have been put in the position where she would have to register for this course. However, that does not mean that the Commission referred her to this training. Since I have not been provided with any evidence that the Claimant was referred to her carpentry program, I must conclude that she was not referred to the training. Because of this, she is subject to the presumption that if she is studying full-time, she is not available for work.

b) Was the Claimant in a full-time training course?

[24] The Claimant was in a full-time training course.

[25] The Commission's notes show that in previous discussions with the Claimant, they had asked her how much time she spends on her studies. The Claimant said she spent about 30 hours in

[12] While I am not bound by previous decision of the Social Security Tribunal, I find guidance for this matter in the Appeal Division's decision in *Canada Employment Insurance Commission v. K.L.*, 20013 SSTAD 8.

class and approximately 15 to 30 hours on studies, homework and assignments. She was in class Monday to Friday, 7:30 am to 2:30 pm for scheduled classes. A second agent of the Commission noted that the Claimant had again said she had 35 hours of training a week and spent 15 hours a week on her studies. Her educational institution considered the training to be full-time.

[26] The Claimant has not contested that she was in a full time program, but argues that she was available for a full-time position should there be one, even while she was in her training program. I find that she was I a full-time training course.

c) Has the Claimant rebutted the presumption she was not available for work while in full-time training?

[27] Since she was in a full-time training course, the legal presumption that she was not available for work applies to the Claimant. However, this presumption can be rebutted, which means that it would not apply. The Claimant can rebut the presumption that full-time students are not available for work by showing that she has a history of working full-time while also studying[13] or by showing exceptional circumstances.[14]

[28] I find that the Claimant has not rebutted the presumption that she was not available for work while in full-time training.

[29] Neither the Claimant nor the Commission has provided any evidence or arguments suggesting that the Claimant has a history of working full-time while also studying. I have also not seen any evidence of exceptional circumstances that would allow the Claimant to rebut the presumption she was unavailable for work while studying full-time.

[30] The Commission says that the Claimant has failed to rebut the presumption of non-availability because she failed to produce evidence that she had looked for full-time work. The Claimant argues that she would have spontaneously left the training if a full-time job similar to and in the line of her previous job within federal government was available. She further testified that

[13] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[14] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

she stopped attending her training program after speaking to the Commission in early 2020 to prove that she was available for work.

[31] The Commission has explained that when concluding that the Claimant was not available for work because of her training program, they considered the following facts:

- The Claimant provided several inconsistent statements regarding her desire to seek and accept full-time work and whether she would have given up her studies to accept immediate employment;
- The Claimant's own statement attested that it would have been a challenge to work full-time while enrolled in school due to the program demands;
- The cost of the program and the fact that the Claimant moved from X to X for the sole purpose of completing the training program meant it would not be reasonable for the Claimant to abandon her studies and accept immediate work.

[32] The Claimant explained at the hearing that after she spoke to the Commission in January of 2020, she stopped going to her training to be available for full-time work. In her written answer to my questions, she provided two different statements with respect to when she stopped going to her courses. She denies that she told the Commission that she would "consider changing her training schedule from now on".[15] She writes that what she told the Commission was that she would "stop going to training because you say I am not available for a full-time job when I clearly say there was no time I was not available for a full time job".[16] She later writes that she stopped going to training since December 2019.[17] Even if I accept that this was the case, she was still in full-time studies from August 26, 2019 until December 2019. The Claimant would also need to prove her availability for the period after she stopped going to her training.

[33] The Claimant also contests the Commission's statement that there were restrictions on her training because of her student loans. She says that she explained to the Commission that she had to

[15] The Commission notes that she said this on February 14, 2020, GD3-19.
[16] Claimant's written answers GD13-3.
[17] Claimant's written answers GD13-5.

start paying back her student loan since she was not attending her training to prove to them her availability and that is why she asked Service Canada to pay backdated EI benefits immediately.[18]

[34] In reviewing the evidence, I do not see any exceptional circumstances that would rebut the presumption that the Claimant was not available for work while in full-time training. Her training schedule did not allow her to work during regular business hours. She took on great financial obligations to move across the country to attend her training program. Although she stopped going to her training course in December 2019 or in early 2020, she has not shown that she applied for any new jobs. Because of this, I find that the Claimant is subject to the presumption that she was not available for work while she was in her full-time training program.

[35] The Federal Court of Appeal has not yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue on to decide the sections of the law dealing with availability, even though I have already found that the Claimant is presumed to be unavailable.

Was the Claimant available for work?

a) Did the Claimant make reasonable and customary efforts to find a job?

[36] The first section of the law that I am going to consider says that Claimants have to prove that their efforts to find a job were reasonable and customary.[19]

[37] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[20] I have to look at whether her 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.

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[18] Claimant's written answers GD13-3.
[19] Subsection 50(8) of the *Employment Insurance Act*.
[20] Section 9.001 of the *Employment Insurance Regulations*.

[38] The Commission says that the Claimant did not do enough to try to find a job and did not meet the availability requirements of all claimants who are requesting regular EI benefits. The Claimant says that she was prevented from a healthy yet balanced job search environment because she was left without income support when she had no way of communicating with Service Canada for so long. I find that the Claimant has not shown that she made reasonable and customary efforts to find a suitable job.

[39] The Claimant testified that when she was dismissed from her job, she was depressed from her wrongful dismissal and since the Commission had not released her EI benefits, she was exhausting her savings and could not plan with a calm and sane mindset. She explains that she did update her resume and began looking for jobs on the jobs.gc.ca website. She was basically looking for jobs within the federal government, but not exclusively. She looked for postings that she could do, knowing her ability and limitations. When asked what she believed would be a suitable job, she said a clerical or administration job, similar to what she had been doing before. She also explained that she did not have family in Canada and did not have friends other than previous co-workers so she was not able to network to find a new job.

[40] The Claimant was asked at the hearing to give examples of jobs she had considered or applied for since she had became unemployed. During the teleconference, she was not able to provide any examples. When I wrote to her after the hearing, I gave the Claimant another chance to provide more information about her job search by asking: "*Other than on the GC.ca website, what other activities did you engage in when trying to find a job? Please be specific and if possible, include company and department names, job titles and dates you may have applied for a job or had an interview*." No additional details were provided by the Claimant. Instead, she wrote that she expected assistance from Service Canada and that she was not told to keep logs of a job search.

[41] While I understand that the Claimant was expecting more help from Service Canada, I do not accept that she did not know that she was required to keep track of her job search. It is clear to me that the Claimant read the details of the application for benefits because she saw that EI benefits could be paid to people on apprenticeships. This application form also states under "Your responsibilities" that when requesting EI benefits, you must "*keep a detail record as proof of your*

job search efforts to find suitable employment as we may ask you to provide that proof at any time. Therefore you must keep your job search record for 6 years"[21]

[42] The Claimant has not provided any proof of what type of jobs she applied for or considered. Nor has she been able to tell me what jobs within the federal government she may have considered or applied for and when she may have made an application. Because of this, I am not able to determine if her efforts to find a job were sustained or if the jobs she may have considered or applied for were suitable. I cannot conclude that she was making reasonable and customary efforts to find a suitable job.

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

[43] Since I have found that the Claimant was presumed to be unavailable for work and that she had not been making reasonable and customary efforts to find a suitable job, the Claimant is disentitled from receiving EI benefits. Since the Claimant was also disentitled because she has not proven she was capable of and available for work, I will also consider the criteria for this legal requirement to receive EI benefits.[22]

[44] The Claimant has to prove three things to show she was available under this section:

- A desire to return to the labour market as soon as a suitable job was available
- That desire expressed through efforts to find a suitable job
- No personal conditions that might have unduly limited their chances of returning to the labour market[23]

[45] I have to consider each of these factors to decide the question of availability,[24] looking at the attitude and conduct of the Claimant.[25]

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

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[21] Application for benefits, see GD3-9.
[22] Paragraph 18(1)(a) of the *Employment Insurance Act*.
[23] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[24] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[25] *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[46] I find the Claimant has had a desire to return to the labour market as soon as a suitable job became available.

[47] Although the Commission has submitted that the Claimant has provided contradictory statements with respect to her willingness to abandon her training for a suitable job, I do note that their records show that the Claimant has always argued she wanted to work. In hearing her testimony, I believe her sincere desire was ideally to return to her old job and she was fighting her dismissal. She disagrees with her dismissal and wants to be working.

c) Did the Claimant make efforts to find a suitable job?

[48] It is not enough for a Claimant to be willing to work to meet this legal test. She must also demonstrate this desire to work by making efforts to find a suitable job.

[49] The Claimant did not make enough efforts to find a suitable job. 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. For the reasons explained above, the Claimant's efforts to find a new job included reactivating her account on jobs.gc.ca and looking for jobs in the federal government, similar to the job she had held before. She also argues that her desire to work is demonstrated by her desperate decision to move to another province to take the apprenticeship course and improve her job prospects.

[50] I find that these efforts were not enough to meet the requirements of this second factor because the Claimant has not provided any information about jobs she may have considered. She has also mot confirmed that she actually applied for any jobs before, during or after her training program.

[51] I understand that the Claimant feels that the Commission should be held responsible for the situation she is in because the lack of communication from them and failure to pay benefits prevented her from conducting a job search. However, although she was asked at the hearing and invited to explain in writing, she has not explained why her inability to speak to someone at Service Canada prevented her from looking for a job. She has argued both that the situation with Service Canada created stress for her and affected her mental health, but also that she was looking for jobs. Since she has not provided much information about what job search activities she did, I cannot

evaluate her job search and must conclude that it was not sufficient to demonstrate her desire to return to the job market as soon as a suitable job was found.

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

[52] I find the Claimant did set personal conditions that might have unduly limited her chances of returning to the labour market. The Claimant says she did not do this, because she was looking for suitable jobs. The Commission has not made any specific submission on this point. I find that the Claimant limited her chances of returning to the labour market by focusing her search primarily on jobs within the federal government.

[53] The Claimant explained that her job search was limited because she does not have control over government systems. She writes that her status within government has been changed from internal employee to general public and this has minimized her opportunities. She also writes that private sector and public sector differ from each other in many requirements, for example the software skills that are required. This is her first time applying for EI benefits and she expected assistance from Service Canada.

[54] The Claimant also clarified during the hearing that the reason she had not applied for jobs in the carpentry trade while she was in training was because she was not yet skilled in this trade. In her written answers, she explained that it was a health and safety concern. I agree with her that applying for jobs in the carpentry trade before she was properly trained would not have been suitable for her so I do not consider that this was a limitation on her job search.

[55] From listening to the Claimant at the hearing and from reviewing the documentation on file, I find that the Claimant was focusing her job search on clerical positions within the federal government. She says that she reactivated her account with "jobs.gc.ca" and would look on the site to see what she could apply for, anytime that she could. She also had an account with Indeed. She was looking for jobs online, within the line of the job she has done in the past.

[56] It is normal for a Claimant to look for jobs similar to jobs they had had in the past, to put their experience to work. However, in this case, I find the Claimant was limiting her job search essentially to federal government jobs. She has not provided any detail of jobs she may have

considered outside of the public sector and seems to say that the private sector requirement include software skills to decide qualifications, so this would not be suitable for her. This focus on seeking a job within the federal government limited the jobs that were available to her and limited her chances to return to the job market quickly.

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

[57] Considering my findings on each of the three factors together, I find that the Claimant did not show that she was capable of and available for work and unable to find suitable employment.[26] She has not demonstrated that she was looking for a job while she was in her training program and has suggested that any job search she did was restricted by her desire to return to work with the federal government.

[58] I acknowledge that the Claimant has argued strongly that her situation was caused by the Commission's failure to pay her EI benefits and provide her with information from May 2019. I understand the technical issues with her Service Canada account prevented her from making reports. Like many others, she was frustrated with the long wait to speak to Service Canada on the phone. However, in order to receive EI benefits, all claimants are required to show that they are available for work and looking for a job. This obligation would have applied to the Claimant even if she had not been in full-time training. Although she is offended about being asked to prove she was available for work, the Claimant is not being treated any differently than another other applicant for EI benefits. The burden is not on the Commission to find a claimant a job, it is on claimants to prove they are searching. The Claimant in this case has not proven this.

CONCLUSION

[59] I find that the Claimant is disentitled from receiving benefits. This means that the appeal is dismissed.

[26] Paragraph 18(1)(a) of the *Employment Insurance Act*.

Leanne Bourassa

Member, General Division - Employment Insurance Section

HEARD ON:	June 5, 2020
METHOD OF PROCEEDING:	Teleconference, Written Questions and Answers
APPEARANCES:	G. O., Appellant