



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *AP v Canada Employment Insurance Commission*, 2021 SST 296

Tribunal File Number: GE-21-200

BETWEEN:

**A. P.**

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: Teresa M. Day

HEARD ON: February 22, 2021

DATE OF DECISION: March 17, 2021

## **DECISION**

[1] The appeal is allowed.

[2] The Appellant has shown that he was otherwise available for work while on medical leave. This means that he is not disentitled to employment insurance (EI) sickness benefits.

## **OVERVIEW**

[3] The Appellant applied for EI sickness benefits while on an authorized medical leave of absence from his employment starting on October 5, 2020. He told the Commission that he was unable to work due to illness, but that he would be continuing with his full-time course of studies at York University while on medical leave. Once he recovered from his illness, his intention was to continue with his course and return to his employment at X to the same extent as he worked prior to his illness.

[4] In order to be paid sickness benefits, the Appellant must be otherwise available for work. In other words, the Appellant's illness has to be the only reason why he is not available to work. There is a presumption that a person who attends a full-time course of study is not available for work<sup>1</sup>. The Commission decided that the Appellant was not entitled to sickness benefits because he was enrolled in a full-time University program and did not prove he would have been available for full-time employment if he were not sick. The Appellant disagrees and says he has a history of working while in school and his course requirements do not prevent him from continuing to do so. He went back to his job at X when his medical leave ended.

[5] I must decide if, but for his illness, the Appellant has proven that he was otherwise available for work during the period for which he is seeking sickness benefits.

## **ISSUE**

[6] The Appellant was unable to work due to illness from October 5, 2020 to December 9, 2020. But was he otherwise available for work during this time?

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<sup>1</sup> *Canada (AG) v. Gagnon*, 2005 FCA 321

## ANALYSIS

[7] It is obvious that someone who is sick or injured is not actually available for work, and the law providing EI sickness benefits reflects this. However, the law requires that the person who is asking for sickness benefits otherwise be available for work. This means that the Appellant has to prove<sup>2</sup> that his illness is the only reason why he was not available for work.<sup>3</sup>

[8] To be entitled to sickness benefits from October 5, 2020 to December 9, 2020, the Appellant must prove that, apart from his illness, he was otherwise available for work.

[9] To demonstrate that he was available for work, the Appellant has to prove three things:

- a) a desire to return to the labour market as soon as a suitable job is available;
- b) that desire expressed through efforts to find a suitable job; and
- c) no personal conditions exist that might unduly limit his chances of returning to the labour market<sup>4</sup>.

[10] I must consider whether the Appellant would have been able to meet all three factors, had it not been for his medical leave. To succeed on his appeal, the Appellant has to show that his illness was the only thing stopping him from meeting each factor.

### **Issue 1: Has the Appellant satisfied the first 2 factors?**

[11] The Appellant testified that he started working at X on July 4, 2019 and still works for them today. He has always held the same part-time, hourly wage position in the distribution warehouse. He has always worked 24 hours per week when school is in session; and 40 hours (or more) per week when school is on a break. This arrangement has been in place from the outset of his employment, and continues to today. The only time he has been off work since starting with X in July 2019 was when he took medical leave from October 5, 2020 to December 9, 2020. He was struggling with his mental health after his mother died. But he returned to work immediately after that.

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<sup>2</sup> The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

<sup>3</sup> Paragraph 18(1)(b) of the *Employment Insurance Act*.

<sup>4</sup> *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96; the Court said that each of the factors must be considered when deciding availability.

[12] I accept the Appellant's testimony that he was "legitimately" unable to work while he was off on medical leave; and but for that, he would have continued working at his job at Agropur. I am satisfied he has proven he had a desire to return to the labour market as soon as he was able (since that is exactly what he did), and that he would have been working but for his incapacity.

[13] The Appellant further testified that:

- He had already completed 1 year of his 4-year kinesiology university degree program when he started working at Agropur on July 4, 2019.
- He worked full-time hours (40 - 48 hours/week) in July and August 2019.
- When school started in September 2019, he changed to part-time hours (24 hours/week). He continued to work part-time until April 2020, but picked up extra hours and worked full-time over the Christmas and New Year holiday period, and reading week.
- He took a course in May and June 2000, so he worked part-time during those months.
- But then he went to full-time hours in July and August 2020.
- When school started in September 2020, he changed back to part-time hours.
- He worked 24 hours/week right up until he took his sick leave. When his sick leave ended in December, he once again picked up extra hours and worked full-time over the Christmas and New Year holiday period.
- "On paper", his position is classified as part-time. But the "union agreement" requires him to be available for 40 hours of work per week when he's not in class<sup>5</sup>.
- This means he must work full-time hours between May – September, and will only be scheduled for part-time hours with proof of registration in a course.
- There are 3 shifts at the warehouse, and the employer is flexible about when he works.
- He has online classes for 10-16 hours/week, and spends another 20-25 hours/week on homework and studying.
- He has never had a problem putting in 24 hours/week at Agropur around his classes and school work, and he takes every opportunity to work full-time when school is on break.

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<sup>5</sup> The Appellant filed the relevant pages from the Collective Agreement at GD05. Part-time and student employees must be available at all times unless they are attending at an education institution (GD05-5); and are required to be available at all times during peak vacation periods (summer from May 1<sup>st</sup> to Labour Day), the week of Christmas, the week of New Years, and the March break (GD-05-3).

[14] I find that the Appellant's part-time position at X constitutes suitable employment in his circumstances. The *Employment Insurance Act* (EI Act) does not require that he be trying to find full-time employment. He has a continuous history of working at X while enrolled in his course of study, dating back to July 2019. The position is part-time and provides a steady 24-hours of work per-week during the school terms. Significantly, this position has the added bonus of automatically converting to full-time employment during the school breaks. The Appellant has wisely safeguarded this versatile employment to ensure he is never without work – part-time or full-time – while enrolled in his university program.

[15] I therefore find that the Appellant has satisfied the first two factors in the test.

[16] I will now turn to the third factor in the test.

**Issue 2: Was the Appellant's course a personal restriction that, but for his illness, unduly limited his chances of returning to suitable employment?**

[17] A claimant who attends a full-time educational course or training program<sup>6</sup> is generally not considered to be available for work and not entitled to EI benefits. To satisfy the third factor in *Faucher, supra*, the Appellant must overcome the presumption of non-availability while attending his full-time University course.

[18] To do this, he must demonstrate that his main intention is to immediately accept suitable employment, and that the course does not constitute an obstacle to seeking and accepting suitable employment. This is usually done by continuing to seek employment, and by showing that the course requirements have not placed restrictions on his availability that would unduly reduce the chances of finding employment.

[19] But in the Appellant's case, he had a job and was only temporarily separated from his employment because of a defined period of medical leave. He returned to his job as soon as his medical leave was over. I find that his on-going employment relationship with X, and his conduct in promptly returning to work, prove that it was his intention to immediately accept suitable employment.

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<sup>6</sup> To which they have not been referred by the Commission under an Employment or Skills Development program.

**Did the Appellant set personal conditions that restricted him from working?**

[20] The Appellant did not set personal conditions that might have unduly limited his chances of returning to the labour market as of October 5, 2019.

[21] The Commission submits that the Appellant has failed to rebut the presumption of non-availability while attending a full-time course because he declared that his intention was to continue with his program and only seek part-time employment if he were not ill<sup>7</sup>. I do not agree. Availability may exist outside of generally recognized business hours where the claimant has established a work history corresponding to those irregular hours<sup>8</sup>. And it is possible for a claimant to prove availability by demonstrating a history of full- or part-time employment outside of school hours<sup>9</sup>.

[22] I accept the Appellant's testimony in its entirety because it was detailed, consistent, and supported by both the Record of Employment and the Collective Agreement. His employment at Agropur was compatible with his hours of study. The course was never an obstacle to working at Agropur – either part-time or full-time hours. He has demonstrated a history of combining work and study that extended for over a year<sup>10</sup>. For the reasons set out in paragraph 14 above, I have found the Appellant's part-time position at X to be "suitable employment" for purposes of the test in *Faucher, supra*. I therefore find that neither his studies nor his part-time employment were restrictions which unduly limited his chances of returning to the labour market as of October 5, 2019. In the context of the Appellant's claim for sickness benefits, this means that neither his studies nor the part-time nature of his employment at Agropur unduly limited his chances of working during the period he seeks sickness benefits.

[23] I find that the Appellant has satisfied the third factor in *Faucher, supra* because attending his training course did not unduly limited his chances of working at Agropur. This means that the Appellant has proven he was otherwise available for work, but for his illness.

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<sup>7</sup> The Appellant actually said that he intended to continue in his job at X, in the same capacity as before his medical leave of absence. His job allowed him to work part-time while in school, but full-time when school was on a break during summer and other holiday periods.

<sup>8</sup> *CUBs 16859, 17934, and 14134*.

<sup>9</sup> *CUBs 14434, 10435, and C.E.I.C. v. K.S. 2016 SSTA DEI 178*

<sup>10</sup> A review of the case law shows that the history must persist for a minimum of a year.

**CONCLUSION**

[24] The Appellant has rebutted the presumption of non-availability while attending a full-time course.

[25] As a result, he has proven that – but for his illness, he was available for work between October 5, 2020 and December 9, 2020. This means he is not disentitled to sickness benefits during this period.

[26] The disentitlement imposed on his claim from October 5, 2020 to December 9, 2020 must be lifted.

[27] The appeal is allowed.

**Teresa M. Day**  
**Member, General Division - Employment Insurance Section**

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| HEARD ON:             | February 22, 2021 |
| METHOD OF PROCEEDING: | Teleconference    |
| APPEARANCES:          | A. P., Appellant  |