



Citation: *JP v Canada Employment Insurance Commission*, 2021 SST 320

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: J. P.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (417273) dated March 3, 2021
(issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference
Hearing date: April 8, 2021
Hearing participant: Appellant
Decision date: April 9, 2021
File number: GE-21-423

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Claimant hasn't shown that he is available for work. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant is disentitled from receiving EI regular benefits as of September 28, 2020 because he wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I must decide whether the Claimant has proven that he is available for work. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he is available for work.

[5] The Commission says that the Claimant isn't available because he is attending training full time and hasn't made efforts to find work. The Claimant disagrees and states that he is available because he can work while attending school.

Matter I have to consider first

The Claimant is only disentitled under one section of law related to availability

[6] The Commission submitted that the Claimant is disentitled to benefits under sections 18 and 50 of the *Employment Insurance Act* because he had failed to prove his availability for work.

[7] These two sections of the law both have to do with availability for work. But, they have different requirements.

[8] Section 18 of the *Employment Insurance Act* says that a claimant has to be capable of and available for work and unable to find suitable employment for every working day they want to claim EI benefits.

[9] Section 50 says that the Commission may require a claimant to show that they made reasonable and customary efforts to find a suitable job.

[10] The Commission didn't require the Claimant to prove that he made reasonable and customary efforts. When the Commission decided that the Claimant was disentitled, it didn't discuss his job search efforts or ask him to prove that his efforts met certain criteria.¹ Rather, its focus was on the Claimant's attendance at his school program.

[11] The Commission must reconsider an issue before the Tribunal can make a decision about it.² In this case, there's no evidence that the Commission looked at whether the Claimant's efforts to find work were reasonable and customary. So, I would be exceeding my jurisdiction if I considered whether the Claimant had made reasonable and customary efforts to find a suitable job. In other words, I am not allowed to look at this factor.

[12] I will only look at whether the Claimant was capable of and available for work and unable to find suitable employment under section 18 of the *Employment Insurance Act*.

Issue

[13] Is the Claimant available for work?

Analysis

[14] The law requires claimants to show that they are available for work.³ In addition, the Federal Court of Appeal has said that there is a presumption that claimants who are

¹ Some criteria help explain what "reasonable and customary efforts" means. These are set out in section 9.002 of the *Employment Insurance Regulations*.

² Section 113 of the *Employment Insurance Act* says that I can't decide a issue if it has never been reconsidered by the Commission under section 112 of the EI Act

³ Section 18(1)(a) of the *Employment Insurance Act* says that a claimant is not entitled to be paid benefits for a working day in a benefit period for which they fail to prove that on that day they were capable of and available for work and unable to obtain suitable employment.

attending school full-time are unavailable for work.⁴ I am going to start by looking at whether the presumption applies to the Claimant. Then, I will look at the law on availability.

– **Presumption that full-time students are not available for work**

[15] The presumption applies only to full-time students. The Claimant agrees that he is studying full-time and I see no evidence that shows otherwise. So, I accept that the Claimant is in school full-time. The presumption applies to the Claimant.

[16] This presumption can be rebutted, which means that it would not apply. The Claimant can rebut the presumption that full-time students are unavailable for work by showing that he has a history of working while also studying⁵ or by showing exceptional circumstances.⁶

[17] The Claimant has a history of working while attending school. He testified that he was employed full-time at a restaurant while taking some continuing education courses in 2017 and 2018. He continued working full-time for the first semester of his four-year university program starting in September 2018. In June 2019, he started working part-time at another restaurant. He worked part-time while attending his full-time school program from September 2019 to March 2020.

[18] I accept that the Claimant's demonstrated ability to maintain employment over the long-term while attending school is an exceptional circumstance sufficient to rebut the presumption of non-availability.

[19] The Claimant has rebutted the presumption that he is unavailable for work. But, rebutting the presumption only means that the Claimant is not presumed to be unavailable. I must still look at the law that applies in this case and decide whether the Claimant is in fact available.

⁴ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

⁵ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁶ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

Capable of and available for work

[20] Case law sets out three factors for me to consider when deciding whether the Claimant is capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:⁷

- a) He wants to go back to work as soon as a suitable job is available.
- b) He has made efforts to find a suitable job.
- c) He hasn't set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

[21] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.⁸

– Wanting to go back to work

[22] The Claimant has shown that he wants to go back to work as soon as a suitable job is available.

[23] The Claimant works as a server in a restaurant. He says that he works part-time mostly in the evenings from 5 p.m. to closing, around 10 p.m. His employment has been interrupted several times due to COVID-19 restrictions on in-person dining. When the restaurant re-opens for dining, he gets some hours but the employer has reduced staffing needs due to the limitations on restaurant capacity.

[24] After being laid off in March 2020, the Claimant received the Canada Emergency Response Benefit (CERB) until his claim was automatically converted to EI benefits in September 2020. He had returned to work in June 2020 and continued working part-time at the restaurant until it closed for dining again in November 2020. He had a few days of employment in late March to early April 2021, as well.

⁷ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

⁸ Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[25] The Claimant says that he looked for other work through job alerts on the Job Bank, searching for jobs on the job database website Indeed and by posting his profile on LinkedIn.

[26] The Claimant says that he could balance a job and his school program because his course schedule is flexible. He testified that his classes are all being held online, so he doesn't have to attend the class at its scheduled time. This means that he can work, or accept a job, even if the hours conflicted with his course schedule.

[27] The Commission says that the Claimant hasn't sustained an active investment in securing a return to the labour market. It points to the Claimant's answers on two training questionnaires completed in September and December 2020. On these questionnaires, the Claimant said that he has not made efforts to find work since the start of his courses. He answered that he had not made efforts to look for work because he already has a job while in school.

[28] At the hearing, the Claimant explained that he thought the question was referring to applying for jobs. He confirmed that he hasn't applied for any jobs since September 28, 2020, because he hasn't found jobs that he was qualified to do. His only job experience is as a server in a restaurant, so that is the only type of job that he was looking to apply for. However, there are limited jobs in that role available in his area due to the COVID-19 restrictions.

[29] A desire to go back to work has to be sincere and demonstrated by looking at the Claimant's conduct. I note that the Claimant continued to work in his part-time job when pandemic restrictions lifted. His intention was to work whenever his employer had work available. He only stopped working due to COVID-19 restrictions that limited in-person dining in his area. I believe that the Claimant wanted to go back to work.

– **Making efforts to find a suitable job**

[30] The Claimant hasn't made enough effort to find a suitable job.

[31] The Claimant's efforts to find a job included working part-time while studying and looking for job opportunities online. He said at the hearing that he assessed new job postings on a daily basis on the Job Bank and Indeed websites. He also posted his profile and resume on LinkedIn with the aim of helping employers find him.

[32] The Claimant testified that finding another job with his limited experience and with the COVID-19 restrictions affecting all the restaurants in his area was challenging. He looked for job opportunities but didn't find any for which he was qualified. He said that he only had "front of the house" restaurant experience, so he couldn't apply for jobs at restaurants that were restricted to doing take-out or delivery service.

[33] The Claimant felt his best option for employment was to wait to be called back to his part-time job at the restaurant and take whatever hours they could offer him.

[34] It is up to the Claimant to prove he has made reasonable efforts to find work to establish his availability. I'm not satisfied that his job search expressed his desire to return to the labour market as soon as a suitable job could be offered.

[35] I understand that the Claimant wanted to maintain his relationship with his employer with the understanding that he would return to his part-time work at some point. But, claimants can't wait to be called in to work; they must look for a job in order to be entitled to benefits.⁹

[36] The Claimant said that he was looking for work, but there is no evidence that he applied for any jobs or approached any other employers from September 28, 2020. I accept that the Claimant was looking for work in some way, but he has not shown that he searched for work in a significant way. I understand that job opportunities for front of house staff in restaurants were limited. But, the Claimant could have broadened his job

⁹ See *De Lamirande v. Canada (Attorney General)*, A-598-03

search to consider jobs in other fields, even if he didn't have direct experience in those fields.

– **Unduly limiting chances of going back to work**

[37] The Claimant hasn't set personal conditions that might unduly limit his chances of going back to work.

[38] I accept the Claimants' statements that he was able to balance a job and his school program. He has demonstrated that he was able to maintain employment over the long-term while attending school. So, I find the Claimant's enrolment in a school program was not a personal condition that was likely to overly limit his chances of going back to work.

– **So, is the Claimant capable of and available for work?**

[39] Based on my findings on the three factors, I find that the Claimant hasn't shown that he is capable of and available for work but unable to find a suitable job because he wasn't making sufficient effort to find a suitable job.

Was the Commission obligated to review the Claimant's entitlement in a timely manner?

[40] The Claimant's principal argument was that the Commission should have reviewed his EI benefit claims in a timely manner.

[41] The Claimant was paid CERB until September 26, 2020. He received an email dated September 17, 2020 stating that his CERB would end soon and that they would automatically review his file and start a new claim for EI regular benefits if he qualified.

[42] He submitted his first EI claim report on September 24, 2020, and reported that he was attending school. He also submitted a training questionnaire and reported that he was attending a full-time school program.

[43] The Commission looked at the Claimant's availability for work in January 2021, four months after he submitted his first report. That's when it decided that the Claimant

hadn't proven he was available for work from September 28, 2020, and asked him to repay the EI benefits he had received since that date.

[44] The Claimant says the Commission had all of the information it needed to determine if he was available for work, and therefore entitled to receive EI benefits, in September 2020. He says the Commission's failure to review his entitlement to EI benefits in a timely manner prevented him from applying for the Canada Recovery Benefit (CRB) for which he may have been eligible. It is also unfair that he is being asked to repay money that he has already spent.

[45] While I understand that the Claimant may have benefited by the Commission reviewing his entitlement to benefits earlier, I find the Commission didn't have an obligation to review the Claimant's entitlement to his benefits sooner than it did.

[46] The Commission has the ability to review a claimant's entitlement to EI benefits up to a certain period of time (usually 36 months) and may reconsider their entitlement to benefits as warranted.¹⁰ I'm unaware of any authority that indicates the Commission **must** review a Claimant's entitlement to benefits within a certain period of time.

[47] By law, claimants who can't prove their availability for every working day in their benefit period are not entitled to receive EI benefits.¹¹ In most cases, the Commission learns that a claimant can't prove their availability after it has already paid the claimant benefits. So, while it may not comfort the Claimant, it is a common result that a claimant receives benefits and then must pay them back when they have been determined not to be available for work.¹²

[48] The Claimant may feel that this is an unfair result, but my decision is not based on fairness. My decision is based on the law and rules about employment insurance. I

¹⁰ See Section 52 of the *Employment Insurance Act*.

¹¹ See Section 18(1)(a) of the *Employment Insurance Act*.

¹² Section 44 of the *Employment Insurance Act* states that claimants must repay benefits to which they are not entitled.

am not allowed to grant exceptions or use my own discretion in the application of the law.¹³

Conclusion

[49] The Claimant hasn't shown that he is available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits.

[50] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section

¹³ *Canada (Attorney General) v. Knee*, 2011 FCA 301.