



Citation: *MM v Canada Employment Insurance Commission*, 2021 SST 330

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

Decision

Appellant: M. M

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (422524) dated April 29, 2021 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: June 17, 2021

Hearing participant: Appellant

Decision date: June 24, 2021

File number: GE-21-897

Decision

[1] M. M. is the Claimant. The Canada Employment Insurance Commission (Commission) decided that she wasn't entitled to Employment Insurance (EI) benefits. She is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am allowing the Claimant's appeal. I find that she has proven her availability for work while she is in school.

Overview

[3] Claimants have to be available for work in order to get regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job. The Commission decided that the Claimant is disentitled from being paid EI benefits as of January 4, 2021, because she isn't available for work.

[4] I must decide whether the Claimant has proven¹ that she is available for work. The Commission says that the Claimant isn't available because she is a full-time student. The Claimant disagrees. She says that she is available for work even though she is a student. She says her classes are flexible and she has a history of working while going to school.

Issue

[5] Is the Claimant available for work while she is in school?

Analysis

[6] Two different sections of the law require claimants to show that they are available for work;² the Commission disentitled the Claimant from being paid benefits under both.

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

² 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.

In addition, the Federal Court of Appeal has said that claimants who are attending school full time are presumed to be unavailable for work.³ 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 aren't available for work

[7] The presumption applies only to full-time students. The Commission and the Claimant agree that she is a full-time student. There is no evidence that makes me think otherwise. I accept that the Claimant is a full-time student. This means that the presumption that she isn't available for work applies to the Claimant.

[8] The Claimant can rebut this presumption. Then it won't apply to her. She can rebut the presumption by showing that she has a history of working full-time while also studying.⁴ She can also rebut the presumption by showing that there are exceptional circumstances.⁵

[9] The Commission says that the Claimant hasn't rebutted the presumption that she isn't available for work. The Commission says she isn't looking for work. The Commission also says that her scheduled classes make it too hard for her to find a job.

[10] The Claimant says the presumption shouldn't apply to her. She says that she has a history of working and going to school. She says she doesn't have to attend scheduled classes.

[11] The Claimant gave conflicting information about her class schedule. She told the Commission that she spent 34 hours a week on classes and studying. At the hearing, she said she didn't know how to answer the question and guessed at how much time she spent. After she talked to the Commission, she kept track of the time she spent on her studies. She realized that she only spent about 10 hours a week on her studies. She said her lectures were all pre-recorded and she could watch them on her own time. She

³ *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

⁴ *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁵ *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

had to attend a class every Thursday for 75 minutes and a 3-hour class every other Tuesday.

[12] The Claimant said that she never had a work conflict with her scheduled classes. But she said her instructors were very flexible. Some of her classmates had conflicts and the instructors allowed them to make up class time online. She said she was sure that her instructors would let her do the same thing if she ever had a conflict.

[13] The Claimant said that her employer also looked at her school schedule when making her work schedule. She said she worked 30 to 35 hours a week as a lash technician. She worked Monday to Saturday between 9 a.m. and 6 p.m. She said she had appointments throughout the day and did schoolwork in between seeing clients.

[14] The Claimant said she started working part-time with her employer when she was in high school. She started working full-time in the summer and then started post-secondary school in September 2020. She said she planned to keep working full-time while she was in school, but her employer closed because of the pandemic.

[15] I believe the Claimant. At the hearing, she answered questions thoroughly and carefully. I think her explanation for the contradictory information about her class schedule is reasonable.

[16] I believe that the Claimant has some history of working full-time while going to school. I also believe that her courses are flexible enough to let her study on her own time. I also believe that her work is flexible enough to allow her to work around her scheduled classes.

[17] I think the Claimant has proven that her situation is exceptional. I find that she has a history of working full-time while going to school. I also find that her work and school schedule are both flexible enough to allow her balance full-time work with her classes. I find that the Claimant has overcome the presumption that she isn't available for work.

[18] Rebutting the presumption only means that I don't have to presume that the Claimant isn't available for work. I still have to look at the sections of the law that apply to this case. Now I have to decide whether the Claimant has proven her availability for work.

Reasonable and customary efforts to find a job

[19] 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 are reasonable and customary.⁶

[20] The Commission says it used this part of the law to disentitle the Claimant. I agree with the Commission. The Commission asked the Claimant about her job search, and so I agree that the Commission asked the Claimant if she was making reasonable and customary efforts to find a job.

[21] The law sets out criteria for me to consider when deciding whether the Claimant's efforts are reasonable and customary.⁷ I have to look at whether her efforts are sustained and whether they are directed toward finding a suitable job. I also have to consider the Claimant's efforts in the different kinds of job-search activities. For example, these are some of the activities described in the law: assessing employment opportunities, preparing a resume or cover letter, and registering for job search tools or with online job banks.

[22] The Commission says that the Claimant didn't do enough to try to find a job. The Claimant disagrees. She says that her efforts were reasonable and directed at finding a suitable job.

[23] I agree with the Claimant. I find that her efforts were reasonable and customary given her circumstances.

[24] The Claimant told the Commission that she didn't apply for other jobs. At the hearing, she said she looked at other jobs online, but there was nothing available in her

⁶ Subsection 50(8) of the *Employment Insurance Act*.

⁷ Section 9.001 of the *Employment Insurance Regulations*.

usual field. Everything was closed because of the pandemic. She has a license in her field and she considers herself a skilled worker. She said her usual job was the most suitable job for her. She expected to be recalled to her usual job once they reopened. She was ready to start looking for other kinds of work if the lockdown continued.

[25] In fact, the Claimant did return to work every time her employer reopened. She worked from August to December 2020. Then, her workplace closed until February 16, 2021. She returned to work for six weeks, and then stopped working again when they had another lockdown in April 2021.

[26] I understand that the Claimant didn't apply for other jobs while her employer was closed. But I think the Claimant was making efforts to return to work that were reasonable and customary in her particular circumstances. I think she was directing her efforts at finding a suitable job. She had a job. She remained in contact with her employer and she was prepared to return to work as soon as they reopened. The only reason she wasn't working was because of provincial shutdowns. She started working again as soon as she was allowed to work.

[27] Sometimes handing out resumes and applying to many jobs is the most reasonable and customary way to find a suitable job. But sometimes your best chance of finding a suitable job is waiting for your usual job to recall you to work. In those cases, waiting for the recall by remaining in contact with your employer is the most reasonable and customary way to find a suitable job.⁸

[28] I find that the Claimant's efforts to find a suitable job were reasonable and customary, given her particular circumstances.

⁸ I rely on *Carpentier v Canada (Attorney General)*, A-474-97, and *Canada (Attorney General) v MacDonald*, A-672-93.

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

[29] I must also consider whether the Claimant has proven that he/she is capable of and available for work and unable to find suitable employment.⁹ The Claimant has to prove three things to show she was available under this section:

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 market¹⁰

[30] I have to consider each of these factors to decide the question of availability,¹¹ looking at the attitude and conduct of the Claimant.¹²

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

[31] The Claimant has always said that she wanted to work. She returned to work whenever her employer was open. I believe her. I think her actions and attitude show that she has a desire to return to the labour market as soon as a suitable job was available.

Has the Claimant made efforts to find a suitable job?

[32] I find that the Claimant made enough efforts to find a suitable job, given her circumstances.

⁹ Paragraph 18(1)(a) of the *Employment Insurance Act*.

¹⁰ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹¹ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹² *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[33] I have already explained why I think the Claimant was making reasonable and customary efforts to find a job. For the same reasons, I think she has proven that she was making enough efforts to find a suitable job.

[34] I understand that the Claimant didn't apply for new jobs. But, I find that she remained in contact with her usual employer. She was ready to return to work as soon as her workplace reopened, and she actually did return to work as soon as she could.

[35] In the Claimant's situation, I find that it was reasonable to wait for her usual employer recall her to work. This was the most reasonable way for her to return to work as quickly as possible.¹³ I find that she made a reasonable effort to find a suitable job.

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

[36] The Claimant has personal conditions because she is in school. But I find that these personal conditions won't unduly limit her chances of returning to the labour market.

[37] The Commission argues that the Claimant has too many personal conditions because she is in school. The Commission says she has scheduled classes that unreasonably restrict her availability for work.

[38] The Claimant disagrees. She says most of her classes are flexible and she can watch recorded lectures on her own time. Even though she has some scheduled classes, her employer and her instructors are flexible. She says her studies don't affect her availability for work.

[39] I agree with the Claimant. I agree that she has some personal conditions because of her school schedule. But I find that these personal conditions won't unduly limit her chances of returning to the labour market.

¹³ Again, I rely on *Carpentier v Canada (Attorney General)*, A-474-97, and *Canada (Attorney General) v MacDonald*, A-672-93.

[40] At the hearing, the Claimant spoke about her school and work schedule. She said that most of her classes were pre-recorded lectures. She could watch them on her own time. She usually watched them during the evening or between clients while she was at work. She had two scheduled classes – every Tuesday and every other Thursday. She said she never had a conflict between work and her scheduled classes because she usually arranged her work schedule around her classes. But she said her instructors were flexible and had adjusted the requirements for her classmates. She expected that her instructors would do the same thing for her if she ever had a conflict.

[41] The Claimant said that she successfully worked 30 to 35 hours a week and attended classes when she was still working. She said she would have kept working if her workplace had stayed open.

[42] I believe the Claimant. I agree that she had some personal conditions that affect her availability for work because of her classes. But I believe that she had already found a way to balance her work and school obligations in a way that let her keep working full-time. I find that she has proven that her school obligations didn't unduly limit her chances of working because she already had experience with working at the same time she was going to school.

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

[43] I find that the Claimant had a desire to work. Her efforts to find work were reasonable, given her circumstances. She had personal conditions because she is in school, but I find that these conditions didn't unduly affect her chances of finding a job.

[44] When I look at all of these factors together, I find that the Claimant has proven that she is capable of and available for work and unable to find suitable employment.¹⁴

¹⁴ Paragraph 18(1)(a) of the *Employment Insurance Act*.

Conclusion

[45] I am allowing the Claimant's appeal. I find that she has proven her availability for work beginning January 4, 2021.

Amanda Pezzutto
Member, General Division – Employment Insurance Section