



Citation: *SB v Canada Employment Insurance Commission*, 2021 SST 253

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

Decision

Appellant: S. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (418735) dated March 18, 2021 (issued by Service Canada)

Tribunal member: Suzanne Graves

Type of hearing: Teleconference

Hearing date: April 29, 2021

Hearing participant: Appellant

Decision date: May 25, 2021

File number: GE-21-587

Decision

[1] The appeal is allowed in part.

[2] The Appellant (Claimant) has not shown that she was available for work while in school until after February 27, 2021. This means that she is disentitled from receiving benefits from January 11, 2021, to February 27, 2021.

[3] The Claimant has shown that she was available for work while in school starting on February 28, 2021. This means that she is not disentitled from being paid benefits from February 28, 2021, to April 24, 2021.

Overview

[4] 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 was disentitled from being paid EI benefits from January 11, 2021, to April 24, 2021, because she was in school full-time, and did not show that she was available for full-time work.

[5] I must decide whether the Claimant has proved she was available for work.¹ The Commission says the Claimant was not available because she was in school full-time. The Claimant disagrees and says that she was capable of and available for work, and actively looking for a job. In addition, she currently has a part-time job in the hospitality industry, but is rarely called into work because of the ongoing COVID-19 pandemic.

Post-Hearing Documents

[6] After the hearing, the Claimant sent in documents related to her job search activities. I accepted the documents as evidence because they are relevant to the issue of whether she was available for work. The Commission made additional arguments in reply. I sent the Commission's reply to the Claimant and gave her time to respond.

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

Issue

[7] Was the Claimant available for work while taking a full-time course from January 11, 2021, to April 24, 2021?

Analysis

[8] The law requires claimants to show that they are available for work.² In addition, a new temporary section of the *Employment Insurance Act* (EI Act) says that a claimant who attends a full-time course cannot receive benefits unless they prove that they are capable of and available for work.³

[9] The courts have also said that there is a presumption that claimants in school full-time are unavailable for work.⁴ There is no case law to guide me on whether the presumption applies, given the new EI Act section. However, I will consider whether the Claimant has rebutted this presumption. Then, I will look at the law on availability.

Presumption that full-time students are not available for work

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

[11] 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 she has a history of working full-time while also studying⁵ or by showing exceptional circumstances.⁶

² Paragraph 18(1)(a) of the *Employment Insurance Act* (EI 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.

³ In March 2020, the EI Act was amended to allow the Minister to make interim orders to mitigate the economic effects of COVID-19 (section 153.3 of the EI Act). The Minister added section 153.161 to the EI Act, requiring claimants in school full-time to prove that they are capable of and available for work (unless they were referred to the course by the Commission - this does not apply to the Claimant).

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

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

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

[12] The Commission says that the Claimant was not allowed to work full-time under her work visa and she has not shown that she was willing to drop the course if her work hours conflicted with her program.

[13] The Claimant testified that her visa allows her to work up to 20 hours per week off campus while enrolled in her full-time program. She says she has been working 20 hours per week while at school since she started her course in 2018.

[14] She says that her program is currently taught online asynchronously due to COVID-19, so she has a flexible schedule and studies whenever she is free. She testified that she told the Commission she would not leave school if it conflicted with work, because her schedule is so flexible there would be no need to leave the course.

[15] The Claimant said that she could work any time between 7 a.m. and midnight as she has no classes or lectures to attend. Although her visa allows her to work full-time on campus while studying, the campus is currently closed because of COVID-19. When she is not in her course, her visa places no restrictions on her work hours.

[16] I find that the Claimant has rebutted the presumption of non-availability while at school. She has shown that she has consistently worked while she was enrolled in her course for the same weekly hours that she worked to pay into the EI program. These are the maximum hours she is legally able to work. This work permit restriction is a factor beyond the control of the Claimant.

[17] If the campus had been open, the Claimant could have legally worked full-time. But this was not possible because of closures due to COVID-19. Further, since her studies have moved online during the pandemic, her course hours place no limits on her work availability, and she is available any time between 7 a.m. and midnight. So, she has demonstrated that her circumstances are exceptional.

[18] The Claimant has rebutted the presumption that she 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.

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

[19] In order to be paid EI benefits, the law says that claimants have to be capable of and available for work and unable to find suitable employment.⁷ The parties agree that the Claimant is capable of working.

[20] The Claimant has to prove three things to show she was available:

- 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
- c) No personal conditions that might have unduly limited her chances of returning to the labour market⁸

[21] I have to consider each of these factors to decide the question of availability,⁹ looking at the attitude and conduct of the Claimant.¹⁰

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

[22] The Claimant has shown a desire to return to the labour market as soon as a suitable job is available. She testified that she wants and needs to work for financial reasons in order to pay rent and support herself.

[23] The parties agree that the Claimant currently has a job in a hotel spa, but has been called in very rarely over the past few months, since there is limited demand during the COVID-19 emergency. She testified that she has signed up on online job search engines, and regularly looks for job postings. Her attitude and conduct in looking for jobs show that she had a desire to return to the workforce as soon as possible.

⁷ Paragraph 18(1)(a) and section 153.161 of the EI Act.

⁸ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁹ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹⁰ *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

Has the Claimant made efforts to find a suitable job?

[24] The Commission says that the Claimant did not do enough to try to find a job. The Claimant disagrees. She says that the efforts she was making were enough to prove that she was available for work.

[25] There is a list of job search activities to look at when deciding availability under a different section of the law.¹¹ The Commission did not ask the Claimant for a job search record to show that she made reasonable and customary efforts to find work.¹² But I have considered that list of job search activities for guidance to help me decide whether the Claimant has proved that she made efforts to find a suitable job.

[26] There are nine activities: assessing employment opportunities, preparing a resumé 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.

[27] The Claimant testified that she began actively looking for work at the end of February 2021. She signed up for job alerts through Indeed and LinkedIn, and applies for appropriate jobs as they come up. She has also networked with her contacts and searched in person by visiting stores that may have openings. She has adapted her resumé for specific jobs and has applied to jobs in dining services, a retirement home, front desk work at a hotel, and as a restaurant host, and receptionist.

[28] After the hearing, the Claimant sent in documents related to her job search activities. She sent in copies of screenshots of her online Indeed and LinkedIn account profiles showing that she is available for work immediately, an application to a

¹¹ Section 9.001 of the *Employment Insurance Regulations*, which is for the purposes of subsection 50(8) of the EI Act.

¹² I agree with the reasoning in the Tribunal's Appeal Division's decision in *L.D. v Canada Employment Insurance Commission*, 2020 SST 688. In that decision, the Tribunal decided that the Commission cannot disentitle a claimant under section 50(8) of the EI Act without first requiring the Claimant to provide proof of reasonable and customary efforts to find work. So, I will make no finding under subsection 50(8) and will only look at whether the Claimant was available for work under s18(1)(a) and 153.161 of the EI Act.

restaurant, a list of three employers she visited to drop off her resumé, records of an online job review, records of networking activities, and copies of her resumé in three different styles, two of which are customized for specific job types.

[29] The Claimant testified in a sincere and straightforward manner. Her testimony was consistent with the answers she gave on her application for benefits, and the documents she filed after the hearing. I have put weight on her sworn testimony, supported by the documents she filed to show her job search activities, that she began actively looking for work at the end of February 2021.

[30] I find that the Claimant has proved that she made enough efforts to look for a suitable job starting on February 28, 2021. I find that she did not prove that she made enough efforts to look for work from January 11, 2021, to February 27, 2021.

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

[31] I find that the Claimant did not set personal conditions that might have unduly limited her chances of returning to the labour market.

[32] The Claimant says that she put no personal conditions on her job search. She says that she could work any time between 7 a.m. and midnight. Her visa allows her to work full-time on campus while studying, but campus is currently closed because of the COVID-19 pandemic.

[33] The Commission says that the Claimant set personal conditions on her job search because she was not willing or able to look for full-time work. Since her visa did not allow her to work full-time, this was a personal condition on her job search.

[34] The law does not specify that a claimant must be looking for full-time work. The Claimant was looking for the same type of part-time work she had while attending school prior to the pandemic. She was available for work any time between 7 a.m. and midnight. From February 28, 2021, she searched for work with the same number of weekly hours that she had consistently worked while at school before claiming benefits.

[35] The Claimant's restriction on her work hours is not a personal condition, as it is a factor beyond her control. She was searching for as much work as she was legally able to do under the terms of her visa. The Commission says that the Claimant was not aware that she could work on campus and had not considered that option. However, although her visa allows her to work full-time on campus while studying, it remains true that working on campus was not an option because of COVID-19 closures.

[36] The Claimant showed that she applied for jobs in a variety of different sectors, including retail, reception, and hospitality, and did not impose any personal conditions on the type of work she sought.

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

[37] Considering my findings on each of the three factors together, I find that the Claimant did not prove that she was capable of and available for work from January 11, 2021, to February 27, 2021. She did prove that she was capable of and available for work and unable to find suitable employment starting on February 28, 2021.¹³

Conclusion

[38] I find that the Claimant is disentitled from receiving benefits from January 11, 2021, to February 27, 2021.

[39] I find that the Claimant is not disentitled from receiving benefits from February 28, 2021, to April 24, 2021.

[40] This means the appeal is allowed in part.

Suzanne Graves
Member, General Division – Employment Insurance Section

¹³ Paragraph 18(1)(a) and section 153.161 of the EI Act.