[TRANSLATION]

Citation: *AP v Canada Employment Insurance Commission*, 2021 SST 502

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (420195) dated April 20, 2021 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	Teleconference
Hearing date:	June 7, 2021
Hearing participant:	A. P., Appellant
Decision date:	June 9, 2021
File number:	GE-21-708

Canada

Decision

[1] The appeal is allowed in part.

[2] The Appellant has shown that she was available for work from May 10, 2021. She is entitled to receive Employment Insurance (EI) benefits as of that time.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled to EI regular benefits as of September 28, 2020, because she was taking unauthorized training and wasn't available for work.

[4] The Appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[5] The Appellant has been a full-time university student since 2019. However, she says she is available for work despite her training, and she argues that she has previously worked and studied at the same time. She is claiming benefits from September 28, 2020.

[6] The Commission says that the Appellant wasn't available for work from September 28, 2020, because she is prioritizing her training, she didn't make sustained efforts to find a job, and she didn't intend to withdraw from her training if she were offered a full-time job.

[7] I have to decide whether the Appellant was available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[8] I have to decide whether the Appellant was available for work within the meaning of the *Employment Insurance Act* (Act) from September 28, 2020, and whether she can receive EI benefits as of that time.

Issue

[9] Was the Appellant available for work from September 28, 2020?

Analysis

[10] Two different sections of the law require claimants to show that they are available for work.

[11] The Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[1] Case law gives three things the claimant—the Appellant—has to prove to show that they are "available" in this sense.[2]

[12] I will consider those factors to determine whether the Appellant was available for work.

Capable of and available for work

[13] Case law sets out three factors for me to consider to determine whether a claimant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[3]

- She wanted to go back to work as soon as a suitable job was available.
- She made efforts to find a suitable job.
- She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[14] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[4]

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[1] See section 18(1)(a) of the *Employment Insurance Act* (Act).
[2] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[3] 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.
[4] Two decisions set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

– **Wanting to go back to work**

[15] The Appellant showed a desire to go back to work as soon as a suitable job was available.

[16] The Commission says that the Appellant didn't show that she wanted a job because she was prioritizing her training. It submits that, even though the Appellant mentioned some job search efforts she made, they aren't serious.

[17] On October 20, 2020, the Appellant told the Commission that she had made efforts to find a job but that, if she were offered a job, she would accept it only if she could delay the start date.

[18] On March 12, 2021, the Appellant told the Commission that she was available for work only on weekends and that she was planning to go back to her job as a server after the pandemic. She then said that she wasn't looking for a full-time job and that she would not withdraw from her training if she were offered a full-time job.[5] She mentioned that she was living with her parents during that period.

[19] At the hearing, the Appellant explained that she had always worked while studying, whether at CEGEP or university. Despite her March 12, 2021, statement to the Commission that she was planning to go back to her job with her employer after the pandemic, she said at the hearing that it wasn't so certain. For that reason, she has started looking for a job.

[20] I understand from the Appellant's explanations that she intended to go back to her job with her employer as soon as the health situation allowed it, if the employer called her back, but that she has started looking for a job. However, the Appellant also initially told the Commission that, if she were offered a job, she would accept it only if she could delay the start date.

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[5] GD3-27.

[21] The Appellant showed a desire to go back to work. So, I now have to determine whether she made efforts to find a suitable job.

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

[22] To be able to get EI benefits, the Appellant is responsible for actively looking for a suitable job.[6]

[23] The Commission says that the Appellant didn't make sustained efforts to find a suitable job and that she didn't intend to accept such a job as soon as it was available. It argues that the Appellant was taking training and that she didn't intend to withdraw from it to find a suitable job.

[24] The Appellant sent the Tribunal a list of her job search efforts from September 28, 2020. She says she signed up for job alerts from the following websites: Job Illico [*sic*], Indeed, LinkedIn, the Government of Canada's Job Bank, the Société des alcools du Québec [Quebec's alcohol corporation] (SAQ), and the job bank offered by the Université du Québec à Montréal [university of Quebec at Montréal].[7]

[25] She applied on the Je Contribue [I contribute] website to work in health care.

[26] The Appellant also applied to the following employers: X, X, and X. Additionally, she applied to X to work part time as a cashier.

[27] The Commission says that applying to six potential employers while taking unauthorized training isn't evidence of an active job search.

[28] I agree with the Commission. It isn't enough to list job search efforts; to be able to get benefits, you have to intend to accept the jobs you apply for.

[29] In other words, a claimant must not only be looking for a job but also intend to accept the jobs they apply for or say they applied for. A claimant's availability is

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[6] This principle is explained in the following decisions: *Cornelissen-O'Neil*, A-652-93; and *De Lamirande*, 2004 FCA 311.
[7] GD6-3 to GD6-8.

essentially a question of facts and, to be entitled to receive benefits, the Appellant must prove that she was available for work each working day of her benefit period, not just weekends.[8]

[30] I find that the Appellant has made some efforts to find a suitable job. I can't find that these efforts were significant for the period from September 28, 2020, to May 9, 2021, because the Appellant hasn't satisfied me that she intended to accept a suitable job as soon as it was available while she was taking training. However, the situation has been different since May 10, 2021, because the winter session was over.

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

[31] The Commission argues that the Appellant has failed to rebut the presumption of non-availability because she is taking a full-time training course and has said many times that she isn't looking for a full-time job. It submits that her first intention wasn't to find a job.

[32] On October 20, 2020, the Appellant told the Commission that she was taking full-time training at the Université du Québec à Montréal and that she was devoting more than 25 hours a week to it. She explained that the training would end in 2022. She then said that she could drop a course with refund before a certain deadline and that she would drop her classes only if she could delay the job's start date.

[33] The Appellant also told the Commission agent that she would choose to finish her program if she were offered a full-time job.

[34] When the Commission agent asked her what she would do if a potential job conflicted with her course, the Appellant said that she would not withdraw from her training. At the hearing, the Appellant explained that she would work but that she would participate in her course afterward and that she would adjust her schedule accordingly.

[8] This principle is explained in the following decision: *Landry*, A-719-91.

[35] I presume that the training the Appellant is enrolled in makes her unavailable for work within the meaning of the Act.

[36] This presumption of non-availability can be rebutted based on four principles related specifically to return-to-studies cases.[9]

[37] These principles are:[10]

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept employment
- whether the claimant has a history of being employed at irregular hours
- the existence of "**exceptional circumstances**" that would enable the claimant to work while taking their course

[38] On March 12, 2021, the Appellant told the Commission that she was enrolled full time in the Bachelor of Marketing at the Université du Québec à Montréal and that she was devoting more than 30 hours a week to her training, including the practical work she had to do.

[39] The Appellant has been taking this training since 2019. She took full-time classes from September 8, 2020, to December 16, 2020, and from January 15, 2021, to April 15, 2021. However, including exams, the winter session ended on May 9, 2021.

[40] At the hearing, the Appellant explained that she had previously studied full time while working part time. Even though she has shown she is able to work at irregular hours, she has to show that she intends to work first and then be able to combine it with full- or part-time training.

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[9] *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); *Floyd*, A-168-93.
[10] This principle is explained in the following decision: *Gagnon*, 2005 FCA 321 (CanLII).

[41] The Appellant said that she didn't intend to withdraw from her training. So, she initially told the Commission that she was available to work full time during her exam week and once the winter session was over.

[42] Although the Appellant testified that she was available for work, the fact is that she didn't intend to withdraw from her training to accept a job.

[43] The Appellant has shown that she has studied and worked at irregular hours before. She explained that she had previously studied full time while working part time on several occasions. This shows that she could do it again now. However, being able to combine studies and a job isn't the only thing that matters; the Appellant's attitude has to show that she prioritizes a potential job and that she is available for work each working day of her benefit period.

[44] This doesn't mean that the current situation isn't the best option for the Appellant—quite the opposite. It means that the current situation isn't among those that make it possible to get EI benefits.

[45] The Appellant is taking full-time undergraduate training that will end in 2022. Her first intention during the period in question is to attend her classes. Even though I understand that the Appellant can combine a certain work schedule with a class schedule, she has failed to rebut the presumption of non-availability.

[46] As the Commission stated: A claimant who is taking a training course without having been referred by a designated authority must prove that they are capable of and available for work and unable to find a suitable job and must meet the availability requirements the same as any other claimant who wants regular benefits.

[47] Of course, the Appellant made some job search efforts during her two university sessions, but intending to accept a job only at a date that suits her better for her studies is a choice that also limits her chances of going back to work as soon as a suitable job is available.

[48] The Appellant has failed to rebut the presumption that a person who is taking a training course on their own initiative isn't available for work.[11] The Appellant was taking full-time training, and the facts show that the personal conditions created by her participation in her classes limited her chances of going back to work during her two full-time sessions. However, after May 10, 2021, her classes were over; so, no personal conditions limited her chances of finding a suitable job as of that time.

– **So, was the Appellant capable of and available for work?**

[49] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether she can receive benefits as of September 28, 2020.

[50] The Appellant stopped working because of COVID-19. Although she may have worked between 25 and 30 hours for the employer at one point, she testified that this wasn't the expectation during her last week of work or the week after that. On October 20, 2020, the Appellant told the Commission that she would choose to finish her training if she were offered a full-time job.[12]

[51] I heard the Appellant's arguments that the Commission initially established a benefit period and that she finds it unfair she has to repay an overpayment of benefits that were initially granted to her. Depending on the information concerning the specific circumstances of each claimant, a benefit period can be reconsidered. The Commission explained that, on a form the Appellant sent on January 2, 2021, she said she wasn't making any job search efforts. While I understand the Appellant's good intentions in this situation, she can get EI benefits only if she is entitled to receive them.

[52] To be able to get EI benefits, the Appellant is responsible for making job search efforts each working day of her benefit period. She has shown that she made some job search efforts, but she hasn't shown that her intention was to accept one of those jobs if

[11] This principle is explained in the following decisions: *Landry*, A-719-91; *Lamonde*, 2006 FCA 44, *Gagnon*, 2005 FCA 321 (CanLII); and *Paxton*, 2002 FCA 360 (CanLII).
[12] GD3-20 and GD3-25.

she were offered a position and the schedule conflicted with her class schedule. During that period, the Appellant intended to continue her university training. I also point out that the same applies to the period from December 20, 2020, to December 26, 2020, when, according to her, she devoted only 10 hours to her classes. You have to make job search efforts with the intention of accepting the job you are applying for.

[53] However, the situation has been different since May 10, 2021, because the Appellant is available to accept a job and can devote herself to it full time, since her classes are over.

[54] For this reason, and based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work from May 10, 2021.

Conclusion

[55] The Appellant has shown that she was available for work within the meaning of the Act from May 10, 2021. Because of this, I find that she is entitled to receive benefits as of that time.

[56] This means that the appeal is allowed in part.

Josée Langlois
Member, General Division – Employment Insurance Section