



Citation: *MS v Canada Employment Insurance Commission*, 2021 SST 521

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

Decision

Appellant: M. S.
Representative: S. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (422313) dated May 19, 2021
(issued by Service Canada)

Tribunal member: Suzanne Graves
Type of hearing: Teleconference
Hearing date: July 21, 2021
Hearing participants: Appellant's representative

Decision date: July 30, 2021
File number: GE-21-1026

Decision

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

[2] The Claimant has not shown that she was available for work while enrolled full-time in school from September 27, 2020. This means that she cannot receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant is disentitled from receiving EI benefits as of September 27, 2020, because she wasn't available for work. A claimant has to be available for work to get EI regular benefits.¹ Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I have to decide whether the Claimant has proven that she was available for work while in full-time school. The Claimant 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. The Commission says that the Claimant wasn't available because she was in school full-time, and was not looking for a full-time job.

[5] The Claimant disagrees and says that she was always ready and willing to return to work. She says that she had a job to return to after the COVID-19 lockdown and she should not be expected to look for another job. She says that there were few jobs available at the time, and it would not be fair to her employer to look for another job.

Issue

[6] Was the Claimant available for work while enrolled full-time in secondary school from September 27, 2020?

¹ The Claimant received Employment Insurance Emergency Response Benefits until September 26, 2020. Effective September 27, 2020, her claim was transitioned to an EI regular benefits claim.

Analysis

[7] The law requires claimants to show that they are available for work.² A new temporary section of the *Employment Insurance Act* (EI Act) also requires full-time students to be looking for work.

[8] The courts have also said that there is a presumption that claimants in school full-time are unavailable for work.³ There is no case law to guide me on whether the presumption applies, given the new EI Act section.⁴ 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

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

[10] 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

[11] 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 full-time school for the same weekly hours that she worked to pay into the EI program.

[12] 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

² Section 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 *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

⁴ See 153.161 of the EI Act.

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

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

unavailable. I must still look at the law that applies in this case and decide whether the Claimant was in fact available.

[13] Three different sections of the EI Act apply to availability in this case. First, the EI Act says that a claimant has to prove they are making “reasonable and customary efforts” to find a suitable job.⁷ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.⁸ I will look at those criteria below.

[14] Second, the EI 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.⁹ Case law gives three things a claimant has to prove to show that they are “available” in this sense.¹⁰ I will look at those factors below.

[15] In addition, a new temporary section of the 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.¹¹

[16] The Commission decided that the Claimant was disentitled from receiving benefits because she wasn’t available for work based on these three sections of the law.

Reasonable and customary efforts to find a job

[17] 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.¹²

⁷ See section 50(8) of the EI Act.

⁸ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁹ See section 18(1)(a) of the EI Act.

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

¹¹ 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).

¹² See section 50(8) of the EI Act.

[18] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.¹³ I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[19] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:¹⁴

- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- networking
- applying for jobs

[20] The Commission says that the Claimant's focus was on her schooling, as she was preparing to continue her studies at university. It says that the Claimant made it clear that she had not been active in her job search, because she would be going back to her current employment after the COVID-19 lockdown.

[21] The Claimant says that she was always available for work. She already had a part-time job and should not have to look for a new job. She enquired with some contacts about other available work, and offered to work remotely for her employer from home. But she says there were few jobs available because of the lockdown order. She says that she was always available to work for her current employer. She argues that this should be enough to show that she was always available for work.

[22] I accept that the Claimant was available to work for her current employer. But the law requires that the Claimant must be looking for work. The Claimant does not dispute that she was not actively searching for any suitable work. So, even if she was available to her employer if needed, she has not shown that she was making reasonable and customary efforts to find work.

¹³ See section 9.001 of the Regulations.

¹⁴ See section 9.001 of the Regulations.

[23] The Claimant hasn't proven that her efforts to find a job were reasonable and customary.

Capable of and available for work and unable to find a suitable job

[24] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.¹⁵ 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.¹⁶ The parties agree that the Claimant is capable of working.

[25] Case law sets out three factors for me to consider when deciding this issue. The Claimant has to prove the following three things:¹⁷

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

[26] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁸

– Wanting to go back to work

[27] The Claimant has shown that she wanted to go back to work.

[28] The parties agree that the Claimant has a job with a gymnastics school. The evidence shows that she continued to work some hours for her current employer whenever shifts were offered to her.

¹⁵ See section 18(1)(a) of the EI Act.

¹⁶ Sections 18(1)(a) and 153.161 of the EI Act.

¹⁷ 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.

¹⁸ 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.

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

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

[30] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.¹⁹

[31] I have already found that the Claimant was not making active efforts to find work. The Claimant argued that she should not be required to look for work, since she already had a job as a gymnastics instructor to go back to. Also, there was little work available due to the lockdown order. The Claimant did not provide details of any job search activities. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[32] I have already accepted that the Claimant was willing to take work from her current employer. But the Claimant gave no evidence of any efforts to look for work. So, she does not meet the requirements of this second factor.

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

[33] The Claimant did set personal conditions that might have unduly limited her chances of going back to work.

[34] The Claimant says she set no personal conditions because she was always available to take work from her current employer. However, she says that her employer was not operating due to the lockdown order and the pandemic was an uncontrollable situation. She says she would have worked remotely, but her employer decided not to offer remote work. The Commission says that the Claimant has not shown that she is available for work because she isn't looking for a full-time job.

[35] The law does not require that the Claimant must be looking for a full-time job. But I find that the Claimant set personal conditions which might unduly limit her chances of getting work because she limited her availability to her current employer.

¹⁹ I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

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

[36] Based on my findings on the three factors, I find that the Claimant has not shown that she was capable of and available for work but unable to find a suitable job.

[37] The Claimant argues that she does not have the financial resources to repay the overpayment of benefits she received. I have no discretion to reduce or write off an overpayment of benefits. Only the Commission has the authority to waive an overpayment amount.²⁰ I have sympathy for the Claimant's financial situation, but I have to follow the law and I have no ability to make exceptions based on compassion.²¹

Conclusion

[38] The Claimant has not shown that she was available for work within the meaning of the law. Because of this, I find that the Claimant cannot receive EI benefits.

[39] This means that the appeal is dismissed.

Suzanne Graves

Member, General Division – Employment Insurance Section

²⁰ See section 43 of the Act (section 56 of the Regulations).

²¹ In *Canada (Attorney General) v Lévesque*, 2001 FCA 304, the Federal Court of Appeal held that the legislation has to be followed, regardless of the personal circumstances of the appellant (see also *Pannu v Canada (Attorney General)*, 2004 FCA 90).