Citation: *SW v Canada Employment Insurance Commission*, 2021 SST 529

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

# Decision

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| **Appellant:** | S. W. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (429498) dated August 3, 2021 (issued by Service Canada) |

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| **Tribunal member:** | Audrey Mitchell |
| **Type of hearing:** | Teleconference |
| **Hearing date:** | September 7, 2021 |
| **Hearing participant:** | Claimant |
| **Decision date:** | September 8, 2021 |
| **File number:** | GE-21-1465 |

## Decision

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

[2] The Claimant hasn't shown that she is available for work while in school. This means that she 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 from February 22, 2021 to March 31, 2022, because she isn'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 have to decide whether the Claimant has proven that she is available for work. 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 is available for work.

[5] The Commission says that the Claimant isn't available because she is in school full-time.

[6] The Claimant disagrees. She says she can register to find work related to her studies, but she doesn't have a car to get to the destination.

## Matter to consider first

[7] The Claimant she does not know how her claim transitioned from the Canada Emergency Response Benefit (CERB) to EI benefits. She wants to receive the Canada Recovery Benefit (CRB), but states no one told her to make the switch from the CERB. The Commission submits that the Claimant established a benefit period on October 4, 2021 based on an application she made on May 7, 2020. They state that her claim was established after the end of her Emergency Response Benefits.

[8] I take my jurisdiction to hear the Claimant's appeal from the Commission's reconsideration decision and the Claimant's notice of appeal. I do not have the authority to make decisions concerning the CERB and transition to the CRB. For this reason, I will only deal with the issue of availability.

## Issue

[9] Is the Claimant available for work while in school?

## Analysis

[10] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits.

[11] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[12] Second, 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.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[13] The Commission decided that the Claimant was disentitled from receiving benefits because she isn't available for work based on these two sections of the law.

[14] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[5] This is called "presumption of non-

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[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school full-time.

[15] I will start by looking at whether I can presume that the Claimant isn't available for work. Then, I will look at whether she is available based on the two sections of the law on availability.

## Presuming full-time students aren't available for work

[16] The presumption that students aren't available for work applies only to full-time students.

### – The Claimant doesn't dispute that she is a full-time student

[17] The Claimant agrees that she is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant is in school full-time.

[18] The presumption applies to the Claimant.

### – The Claimant is a full-time student

[19] The Claimant is a full-time student. But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[20] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working full-time while also in school.[6] Or, she can show that there are exceptional circumstances in his/her case.[7]

[21] The Claimant says that she was trying to find a job that she could do around her school obligations.

[22] The Commission says the Claimant is not willing to drop her course to accept full-time employment, and is only seeking work on Saturday and Sunday mornings.

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[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[23] I find that the Claimant has not rebutted the presumption of non-availability. She testified that she does not have a history of working full-time while in school. She also explained that she has experience as a medical office assistant, but work in that field requires work for eight hours a day, usually during the week. She says she cannot do this work while in school. The Claimant states that she can work as a health care aide, but needs a letter from her school to do so. She added that she doesn't have a car, so she wouldn't be able to do this job either.

[24] I find that the Claimant hasn't shown that she is available for work while going to school full-time. She said that because of her studies, she only gets about six hours of sleep. I find from this that the Claimant has limited time to work because of the amount of time she spends attending classes and doing homework. Her testimony that she can only work on the weekends supports this finding.

[25] The Claimant hasn't rebutted the presumption that she is unavailable for work.

### – The presumption isn't rebutted

[26] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue on to decide the sections of the law dealing with availability, even though I have already found that the Claimant is presumed to be unavailable.

## Reasonable and customary efforts to find a job

[27] 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.[8]

[28] The law sets out criteria for me to consider when deciding whether the Claimant's efforts are reasonable and customary.[9] I have to look at whether her efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

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[8] See section 50(8) of the Act.
[9] See section 9.001 of the Regulations.

[29] 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:[10]

- assessing employment opportunities
- contacting employers who may be hiring
- applying for jobs

[30] The Commission says that the Claimant isn't doing enough to try to find a job. They say she is not willing to drop her course to accept full-time employment.

[31] The Claimant disagrees. She says she looked for part-time and casual work. She says she did so on and off.

[32] In their submissions, the Commission refers to section 50(8) of the Act. They say that under this section, claimants have to make reasonable and customary efforts to obtain suitable employment to demonstrate availability.

[33] The Commission asked the Claimant what jobs she was looking for and whether they were full-time or part-time. They also asked when she started looking for work and if her efforts had been continuous. After the Claimant responded to their questions, they told her that they were disentitling her to benefits. They said that she should let them know if she expanded her job search efforts to include daytime and evening hours. The Commission did not ask the Claimant to prove her availability by sending them a detailed job search record.

[34] I find a decision of the Appeal Division on disentitlements under section 50 of the Act persuasive. The decision says the Commission can ask a claimant to prove that they have made reasonable and customary efforts to find a job. They can disentitle a claimant for failing to comply with this request. But they have to ask the claimant to provide this proof and tell the claimant what kind of proof will satisfy their requirements.[11]

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[10] See section 9.001 of the Regulations.
[11] *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688

[35] I do not find that the Commission asked the Claimant to give them her job search record to prove her availability. For this reason, and from their updated submissions, I do not find that she is disentitled under this part of the law.

## Capable of and available for work

[36] I also have to consider whether the Claimant is capable of and available for work but unable to find a suitable job.[12] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[13]

a) She wants to go back to work as soon as a suitable job is available.

b) She has made efforts to find a suitable job.

c) She hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

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

### – Wanting to go back to work

[38] The Claimant hasn't shown that she wants to go back to work as soon as a suitable job is available.

[39] The Claimant testified that she hasn't looked for work since starting school on October 5, 2020. She said that she worked in August 2021 as a medical office assistant covering for someone who was off. However, she also testified about the amount of time she spends on school and doing homework, which leaves her about six hours a night to sleep.

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[12] See section 18(1)(a) of the Act.
[13] 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.
[14] 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.

[40] I find that the Claimant may want to work. However I find that not looking for work since she started school is not the conduct of someone who wants to go back to work as soon as a suitable job is offered. I understand obstacles to work that the Claimant testified to, which I will analyse below. However, I don't find that it is enough for the Claimant to say that she wants to work without taking actions to show this is the case.

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

[41] The Claimant hasn't made any effort to find a suitable job.

[42] 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.[15]

[43] I asked the Claimant if she had made any efforts to find work since October 5, 2020. She said she has not. She also said that she hasn't applied for any jobs.

[44] I note that in her notice of appeal, the Claimant did not speak about looking for work. She only referred to the difficulty of finding work as a medical office assistant and as a health care aide. Although the Commission's notes reflect that the Claimant said she was looking for work, I accept her testimony under oath as fact. I find that she hasn't made any efforts to find a suitable job.

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

[45] The Claimant has set personal conditions that might unduly limit her chances of going back to work.

[46] The Claimant says that if she gets a letter as student in practical nursing, she can work as a health care aide. However, she says that there are no health care aide jobs in her area, and she does not have a car to do this job elsewhere.

[15] 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.

[47] The Claimant said that she has work experience as a medical office assistant. She said that 90% of those jobs require work on weekdays, mostly 8 hours from 9:00 a.m. to 5:00 p.m. Because of her school hours, she testified that she can't do this job either.

[48] I asked the Claimant what hours of the day and days of the week she was available to work. She testified that the only days she can work are on the weekends. I find that this is a personal condition set because she is in school. I find that this reduces the pool of jobs available to her. While understandable, I find that this might unduly limit her chances of returning to work.

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

[49] Based on my findings on the three factors, I find that the Claimant hasn't shown that she is capable of and available for work but unable to find a suitable job.

## Conclusion

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

[51] This means that the appeal is dismissed with modification. The modification is that the Claimant is disentitled under section 18 of the Act only.

Audrey Mitchell

Member, General Division – Employment Insurance Section