



Citation: *MK v Canada Employment Insurance Commission*, 2021 SST 477

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

## Decision

**Appellant:** M. K.  
**Representative:** S. K.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (420304) dated April 14, 2021  
(issued by Service Canada)

---

**Tribunal member:** Paul Dusome

**Type of hearing:** Teleconference  
**Hearing date:** May 17, 2021  
**Hearing participant:** Appellant

**Decision date:** May 26, 2021  
**File number:** GE-21-699

## Decision

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

[2] The Claimant hasn't shown that she was available for work. This means that she can't receive Employment Insurance (EI) benefits.

## Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits as of December 28, 2020, because she was taking a training course on her own initiative, and had not proven that she was 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 must decide whether the Claimant has proven that she was 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 was available for work.

[5] The Commission says that the Claimant wasn't available because she was in a full-time education program not approved by the Commission. Her commitment to attending and completing that program meant that she was not available.

[6] The Claimant disagrees and states that her high school course commitment was significantly reduced due to COVID. Most of the course work was flexible as to when it could be done. She was available to take full-time work, and was looking for work. She should receive benefits.

## Issue

[7] Was the Claimant available for work?

## Analysis

[8] 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 one of these sections. So, she has to meet the criteria of only one of those sections to get benefits.

[9] 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.<sup>1</sup> The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.<sup>2</sup> This is the section that the Commission did not rely on. The commission stated in its Representations in this appeal that it “had no need to exercise their authority under subsection 50(8) of the Act and request a job search as this claimant had already made their intentions known.”

[10] 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.<sup>3</sup> Case law gives three things a claimant has to prove to show that they are “available” in this sense.<sup>4</sup> I will look at those factors below.

[11] The Commission decided that the Claimant was disentitled from receiving benefits because she wasn’t available for work based on the second section, 18(1)(a) of the *Employment Insurance Act*. I therefore do not need to rule on the first section, dealing with reasonable and customary efforts to find a suitable job.

### Capable of and available for work

[12] Case law states that availability is a question of fact. It also sets out three factors for me to consider when deciding whether the Claimant was capable of and available for

---

<sup>1</sup> See section 50(8) of the *Employment Insurance Act* (Act).

<sup>2</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

<sup>3</sup> See section 18(1)(a) of the Act.

<sup>4</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

work but unable to find a suitable job. The Claimant has to prove the following three things:<sup>5</sup>

- 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.

[13] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>6</sup>

[14] There is a presumption that a person enrolled in a full-time course of study is not available for work, though the presumption can be rebutted by proof of exceptional circumstances.<sup>7</sup> A history over several years of working full-time while studying may rebut the presumption.<sup>8</sup> A claimant was not available where, owing to his course load, he would only be available at certain times on certain days, which restricted his availability and limited his chances of finding employment.<sup>9</sup>

[15] There have been few examples of exceptional circumstances sufficient to rebut the presumption. In one, the claimant had applied for university in March. Her employment contract ended in early July. She applied for EI benefits on July 30, and started the university course in September when she had not been able to find work. She provided information to the Commission that she was willing to change her course schedule to accept work, or leave university if necessary. She provided a list of employers she had applied to. She did attend some job interviews, but was not offered a position. The Commission refused to pay her EI benefits. She appealed. The appeal board accepted her evidence that her first priority was to find and accept full-

---

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349.

<sup>8</sup> *Landry v. Canada (Attorney General) et al.*, A-719-91.

<sup>9</sup> *Duquet v. Canada (Employment Insurance Commission)*, 2008 FCA 313.

time work over her education, and that she had made serious efforts to find such employment but without success. The appeal board allowed her appeal, and that decision was upheld on further appeals.<sup>10</sup>

[16] Before considering the *Faucher* factors and the presumption that a full-time student is not available, I will review the conflicting evidence from both sides. The Commission recorded information obtained by telephone respecting the Claimant's answers to various questions. The Commission's Reconsideration File (GD3) provided to the Tribunal did not contain documents completed by the Claimant regarding her educational activities. There was no training questionnaire completed by the Claimant. The affirmed testimony by the Claimant differed substantially from what the Commission recorded about the telephone conversations. I have to decide what evidence to accept, in order to determine the facts. Once the facts are determined, then I can apply the law to those facts to reach a decision.

[17] The Commission's evidence is found in its Reconsideration File. The Claimant made her application on January 4, 2021 following a lay-off for a COVID lockdown. The Commission spoke to the Claimant on January 26, 2021, to obtain information. The Commission recorded the following. The Claimant was enrolled in high school, from September 14, 2020 to June 27, 2021. Her number of hours per week of training were 25, and total hours on studies were 35 per week. She was available for the same type of work and under the same conditions as before she started her course. She would not quit school if it conflicted with a full-time job. None of her scheduled classes or sessions were after 6pm Monday to Friday, or during the weekend. In her usual occupation, she did not normally work daytime hours Monday to Friday. She was to complete the Training Course Information form.

[18] The next contact with the Claimant was on March 3, 2021. The Commission obtained information for claimant's reports for the weeks of January 10 to February 20, 2021. The Claimant had no earnings, received no other money, did not start a full-time job, and was attending school. The hours attended for each week dropped from 24 to

---

<sup>10</sup> *Canada (Attorney General) v. Wang*, 2008 FCA 112.

15 over the period of the report. She was ready, willing and capable of working each day.

[19] The next contact with the Claimant was on March 17, 2021. The commission recorded the following. The Claimant was in high school, spends full-time hours on her studies, is not permitted to make changes to the course schedule and must attend scheduled classes. She is available for part-time work. She would not leave the course for full-time work. Her main intention is to focus on school and graduate with her Grade 12 diploma. The decision letter of March 17, 2021 followed, denying benefits because the Claimant was in a training course on her own initiative, and had not proven her availability for work.

[20] The next contact with the Claimant was on April 13, 2021. Her representative, her mother, spoke with the Commission as well. The Commission outlined the requirements of availability, actively looking for work, and the expectation of quitting school to take a full-time job. The Commission explained that full-time education is a condition that unduly limits the ability to look for work. The Commission obtained the following information. The Claimant is in a full-time high school program and would not leave school for a full-time job. She is looking for work, and is back to work with her employer. She is saving money for university.

[21] The Claimant's affirmed testimony dealt with the following matters: her schooling; her work; and her interaction with the Commission.

[22] The Claimant is in her final year of high school. It is a publically funded school, so she does not pay tuition. She plans to graduate with her Grade 12 diploma, then attend university in September 2021. For the 2020 – 2021 school year, she is taking five courses provided by the high school, and one private course not provided by the high school. The private course costs \$200.00, has no compulsory attendance requirements, and can be completed around her schedule. The normal high school schedule has been impacted by COVID and government directives relating to lockdowns and online learning. In the first semester from September 2020 to late January 2021, she testified that she had estimated that she spent 25 hours per week for

school in that semester. That was in response to the Commission's questions. At the hearing, she said that she had two classes that required in-person attendance. They were both from 8:55am to noon, on day 1 and day 2 of the schedule. In-person attendance ended in late October or early November 2020 due to COVID concerns. The two in-person courses moved online at the same days and times. The remainder of the course work was done online, or at home. This other online work was at a set time and date. It was two one-hour sessions per week. The at-home work could be done at her own pace, at the day and time she selected. In the first semester, she had four courses. Two were in the first quarter of the semester, and two were in the second quarter of the semester. In both quarters, the number of hours per week for school work were the same. The Claimant cannot change the days or times of in-person or any of the online classes. In the second semester, from early February to April 2021, she was demitted from school. That meant that she had no course work at all, other than the private course she was taking.

[23] The Claimant did not complete and submit the INS3141 Training Course Information form requested by the Commission. She testified that she had issues filling in the form. She asked her father for help with it. That did not work. The Commission told her that it was not really applicable to her.

[24] With respect to work history, the Claimant started working part-time at a Staples store in September 2019. She worked weekdays and weekends. During the school year, work on weekdays was after school into the evening. She continues to work there. Because of COVID, the employer had limited work hours to 8 to 14 per employee per week, to avoid lay-offs. She had been laid off because of COVID from March to June 2020, December 29, 2020 to March 6, 2021 and again from April 7, 2021. She was and is willing to work full-time in summer and while in school. She was working full-time hours in August 2020. She was willing to take a full-time job. She would not drop out of school, but would both work and complete her education. She was looking for work, as well as trying to increase her hours with Staples.

[25] The Claimant had some issues with her interaction with the Commission. She outlined these in her request for reconsideration, in her notice of appeal, and in her testimony. Overall, the Commission seemed to have reached its decision before talking to her the first time. The questions seemed to be focused on a normal school year, rather than the COVID school year. When she asked if the questions were focused on this year or the past year, the answer was “in general”. She found this misleading, so answered based on a normal school year with full in-person attendance. In the March 17, 2021, telephone conversation with the Commission, she was at work, and flustered by the call. The Commission agent commented that there were people who needed help more than the Claimant, a teenager living at home with her parents. The agent was telling her what the answers were. She panicked and said “yes” to them all. She wasn’t given a chance to explain.

[26] I will now review considerations affecting the reliability of evidence from both sides.

[27] The Claimant, in her reconsideration request reasons, dated March 26, 2021, refers to having two or four hours taken by school on some days, leaving her with plenty of time to work. That is inconsistent with her testimony that she had no courses in February to April 2021 (other than the private course). It is also inconsistent with her statement in the notice of appeal reasons that she was only taking the private online course, which did not interfere with work.

[28] The Claimant and her representative, her mother, participated in the conversation with the Commission on April 13, 2021 about the reconsideration request. The Commission outlined the requirement of availability for work, the time commitment for a full-time student unduly restricting ability to conduct a job search, and the expectation to leave school to take a job. They confirmed that the Claimant was in a full-time high school program, and would not leave school for a full-time job. Agreeing that she was in a full-time high school program may be inconsistent with the Claimant’s testimony that she was taking no courses from February to April, 2021. She also testified that she did not know whether the school classified her as full-time or part-time.



That is also inconsistent with her testimony that she was demitted from school. Agreeing that the Claimant would not leave school for a full-time job is consistent with her other statements and testimony.

[29] The Claimant testified that she was willing to take a full-time job. She would not quit school, but would do both. The willingness to take a full-time job is consistent with the willingness stated in her reasons for reconsideration that she was working weekdays 3 to 9pm and weekends, and was looking for more hours. It is also consistent with her reasons for appeal, where she stated she wanted to work as many hours as possible to live on her own and pay for university.

[30] There is no indication from the Commission's documents that it took into consideration what impact, if any, COVID might have on school attendance and work load, and how that might impact the issue of availability. Reduced in-person attendance and recorded lessons that could be viewed at any time could be factors in rebutting the presumption of non-availability of a student.

[31] On reviewing the above considerations, I am prepared to accept that the Claimant had a reduced in-person attendance, and a reduced work load outside school less than a normal full-time in-person attendance at school. While reduced, it was not eliminated. Up to the end of January 2021 she was taking two courses per quarter that required attendance at mandatory classes. Those classes were for three hours on two consecutive days, with two additional one-hour online classes. All those classes took place Monday to Friday during regular daytime business hours. During the February to April 2021 period she testified that she did not have any course work at the high school. I have difficulty accepting this. There are the inconsistencies on this topic outlined above in paragraphs [27] and [28]. In her report to the Commission on March 2, 2021, she reported 15 hours per week devoted to attending school in each of the weeks of February 7 and 13, 2021. In her conversation with the Commission on March 17, 2021, she reported spending full-time hours on her studies. In her conversation with the Commission on April 13, 2021, in which her mother participated, there is no mention of the Claimant spending no hours on school for the February to April quarter semester.

The absence of reporting zero hours for course work and classes, or zero attendance, when these conversations occurred during the February to April period, contradict the Claimant's testimony of no classes or hours during that period. The Tribunal in making findings of fact may be entitled to discount a claimant's later statements as compared to her earlier statements, particularly where the later statements raise new matters not mentioned in the earlier statements.<sup>11</sup> Based on this principle, and the inconsistencies, I cannot find that the Claimant has proven that she had no high school hours from February to April 2021.

[32] I find that she was willing to take on a full-time job, or work full-time hours with Staples. Her attitude and conduct support this. She worked full-time hours with Staples in August 2020. She asked for more hours. She worked on school days from 3 to 9pm. She worked weekends. She wanted to make money to support herself and pay for university. I find that she was prepared to both work full-time and complete her high school this year.

– **Wanting to go back to work**

[33] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available. She is willing to take full-time employment. She wanted to earn money to pay towards her university education. She continued working at Staples from 2019 onwards. She obtained more hours in the summer of 2020. She returned to work after the lockdowns in March and December 2020, and in March 2021. She had been looking for other work as well.

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

[34] The Claimant has made sufficient efforts to find a suitable job.

[35] The Claimant's efforts to find a full-time job included inquiring at Staples to increase her hours up to and including full-time. She was also looking for other available jobs since her lay-off in December 2020. While the evidence is thin, I do

---

<sup>11</sup>*Cundle v. Human Resources and Skills Development Canada*, 2007 FCA 364.

accept that she was looking for work. She was motivated by her desire to have the money to fund her post-secondary education, which was to start in September 2021.

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

[36] The Claimant has set personal conditions that have or might unduly limit her chances of going back to work. She has not rebutted the presumption that a person attending full-time school is not available.

[37] The Claimant says that her course of education does not prevent her from taking full-time work. She is available for work full-time.

[38] The Commission says the Claimant has unduly limited her chances of returning to full-time work. She is in a full-time course of education that was not approved by the Commission. She has not rebutted the presumption that a claimant is not available for work when taking a full-time course on her own initiative. The Commission relies on a number of factors in support of this position. These factors have been accepted for many years as proper in assessing whether a claimant has rebutted the presumption of non-availability due to school.

[39] I find that the Claimant hasn't rebutted the presumption that she is not available because she is in full-time education. While her course work may be reduced, she is still a full-time student in a full-time program. Her attendance in the course does unduly limit her chances of getting full-time work. The following reasons are structured around the factors the Commission has relied on to support its position.

[40] The first factor is the attendance requirements of the course. All the attendance was required during normal business hours from Monday to Friday. This creates a difficulty for the Claimant. She has to prove availability for each working day.<sup>12</sup> A working day is any day of the week except Saturday and Sunday.<sup>13</sup> A claimant who is only available two days of the week and weekends has a limitation on his availability for

---

<sup>12</sup> *Employment Insurance Act*, subsection 18(1).

<sup>13</sup> *Employment Insurance Regulations*, section 32.

full-time work.<sup>14</sup> The Claimant needs to show that she is available for full-time work during normal business hours Monday to Friday. She is not able to do that, because the in-person and online classes all take place during normal, daytime, business hours, Monday to Friday.

[41] The second factor is the Claimant's willingness to give up her studies to accept employment. The Claimant is clear that she will not give up her studies to take a full-time job. She will do both. A history of doing both full-time education and full-time work can rebut the presumption that a student is not available for work.<sup>15</sup> The Claimant does not have such a history. She therefore cannot rebut the presumption on this basis.

[42] The third factor is whether or not the Claimant has a history of being employed at irregular hours. This the Claimant does have, for the brief period of her 16-month employment history up to the time of her application for EI benefits. But that was not full-time employment. It therefore does not show the ability to do both full-time work and full-time school at the same time.

[43] The fourth factor is the existence of "exceptional circumstances" that would enable the Claimant to work while taking the course. The circumstances the Claimant relies on are the following. She has a reduced course load in school. She has been working part-time, and is willing to work full-time. She is motivated to both work and attend school full-time. Doing both will help her attain her goal of attending university in September 2021, and being able to pay towards that education. Are these, and the entire circumstances in the case, sufficiently strong to rebut the presumption? My conclusion is no. She is willing to work full-time, but cannot change her mandatory course attendances. She is not willing to give up her course to take a full-time job. Both of those restrict her from obtaining full-time jobs during regular daytime business hours, Monday to Friday. She does not have a history of both working and attending school full-time that could qualify as an exceptional circumstance.

---

<sup>14</sup> *Canada (Attorney General) v. Rideout*, 2004 FCA 304.

<sup>15</sup> *Landry v. Canada (Attorney General) et al.*, A-719-91.

[44] The fifth factor is the financial cost of taking the course. That is not applicable in this situation. There is no cost for the high school courses. Those are the courses the Claimant needs to complete to obtain her diploma. The private course is not required to obtain the diploma. This factor does not count against the Claimant. But it cannot overcome the weight of the other factors that show she has not rebutted the presumption against availability.

[45] The Claimant presents with very sympathetic circumstances. She is hard-working and focused on her goal of obtaining her high school diploma and a university education. However tempting as it may be in such cases, I am not permitted to re-write legislation or to interpret it in a manner that is contrary to its plain meaning.<sup>16</sup> The legal rules respecting the pursuit of education and the availability for work are clear, as set out in this decision. The Claimant has not rebutted the presumption that she is not available for work because of her school.

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

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

## **Conclusion**

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

[48] This means that the appeal is dismissed.

Paul Dusome  
Member, General Division – Employment Insurance Section

---

<sup>16</sup> *Canada (Attorney General) v. Knee*, 2011 FCA 301.