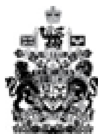

[TRANSLATION]

Citation: *EM v Canada Employment Insurance Commission*, 2021 SST 498

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	E. M.
Representative:	Samuel Landry
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (421101) dated May 14, 2021 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	July 22, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	August 31, 2021
File number:	GE-21-1031

Decision

[1] The appeal is allowed. I find that the Appellant has proven her availability for work for the period from October 12, 2020, to April 14, 2021, inclusive, during which she was taking training.[1] This means that she is entitled to receive Employment Insurance (EI) regular benefits for the period in question. So, she should not have to pay back the amount of money that the Commission is asking her to repay and that it refers to in the decision made in her case on May 14, 2021.[2]

Overview

[2] In the fall of 2019, the Appellant began full-time training at the Université de Montréal [university of Montréal]. The training leads to a bachelor's degree in Security and Police Studies. In 2020 and 2021, during her second year of study in the program, she completed her fall 2020 term, from September 2, 2020, to December 21, 2020,[3] and her winter 2021 term, from January 7, 2021, to April 29, 2021.[4]

[3] From June 22, 2020, to November 6, 2020, inclusive, the Appellant worked as a server for the employer X, a food service establishment, and she stopped working for that employer because of a shortage of work.[5] The Appellant says that she stopped working because the establishment closed due to the COVID-19 pandemic.[6]

[4] On November 3, 2020, the Appellant made an initial claim for EI benefits (regular benefits).[7] A benefit period was established effective October 11, 2020.[8]

[5] On March 22, 2021, the Canada Employment Insurance Commission (Commission) informed her that it could not pay her EI benefits as of November 2, 2020,

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[1] See section 18(1)(a) of the *Employment Insurance Act* (Act).
[2] See GD3-34 and GD3-35.
[3] See GD3-14, GD3-15, GD3-22, and GD3-31 to GD3-33.
[4] See GD3-19, GD3-20, GD3-22, and GD3-31 to GD3-33.
[5] See GD7-8.
[6] Coronavirus disease 2019.
[7] See GD3-3 to GD3-12.
[8] The benefit period was initially established effective November 1, 2020—GD4-1. In its arguments, the Canada Employment Insurance Commission explains that the Appellant requested an antedate so that her benefit period could start on October 11, 2020, and that her request was granted—GD4-3.

because she was taking a training course on her own initiative and had failed to prove that she was available for work.[9]

[6] On May 14, 2021, after a request for reconsideration, the Commission informed her that it was upholding the March 22, 2021, decision. However, the Commission clarified that she could not be paid benefits for the period from October 12, 2020, to April 14, 2021, because she was taking a training course on her own initiative, and she had failed to prove that she was available for full-time work.[10] The Commission also told her that she would receive a notice of debt and that the amount of money she owed could be deducted from her future benefits.[11]

[7] The Claimant submits that she was available for work during the period in question. She explains that, when she stopped working, the employer told her that it would call her back to work as soon as its establishment reopened. The Appellant says that she made many job search efforts during the period in question. She argues that she searched in fields other than food service because of the restaurant closures due to COVID-19. The Appellant also argues that she has previously worked while studying full-time. On June 17, 2021, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

Issues

[8] I have to decide whether the Appellant has proven her availability for work for the period from October 12, 2020, to April 14, 2021, during which she was taking training.[12]

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[9] See GD3-23.
[10] In its arguments, the Commission explains that the notice of decision dated May 14, 2021, contains a clerical error. According to the Commission, the document describes the disentitlement as beginning on November 2, 2020, when it should say: [translation] "We are unable to pay you Employment Insurance benefits from October 12, 2020, to April 14, 2021." The Commission says that this correction reflects the fact that it allowed the Appellant an antedate so that her benefit period could start on October 11, 2020. The Commission explains that, as a result, the disentitlement to benefits imposed on the Appellant should be adjusted to reflect the new start date of the benefit period—GD4-3.
[11] See GD2-10, GD2-11, GD3-34, and GD3-35.
[12] See section 18(1)(a) of the Act.

[9] To decide this, I have to answer the following questions:

- Did the Appellant show a desire to return to the labour market as soon as a suitable job was offered?
- Did the Appellant express that desire through efforts to find a suitable job?
- Did the Appellant set personal conditions that might have unduly limited the chances of returning to the labour market?
- Has the Appellant proven her availability for work based on the principles related to returning-to-studies cases—such as 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, and the existence of "exceptional circumstances"?

[10] I also have to decide whether the benefits that were paid to the Appellant and that the Commission is asking her to repay should be paid back.[13]

Analysis

Availability for work

[11] Two sections of the *Employment Insurance Act* (Act) indicate that a claimant has to prove that they are available for work.[14] Both sections deal with availability, but they involve two different disentitlements.

[12] First, a claimant is not entitled to receive benefits for a working day in a benefit period for which the claimant fails to prove that, on that day, the claimant was capable of and available for work and unable to find a suitable job.[15]

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[13] See sections 43, 44, and 52 of the Act.
[14] See sections 18(1)(a) and 50(8) of the Act.
[15] See section 18(1)(a) of the Act.

[13] Second, to prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to find a suitable job.[16]

[14] I point out that, in this case, I will not be looking specifically at whether the Commission required the Claimant to prove reasonable and customary efforts to find a suitable job.[17]

[15] In response to a request from the Tribunal, the Commission clarified that its decision mainly involved section 18(1)(a) of the Act.[18] It also indicated that the analysis under section 50(8) of the Act supported its finding that the Appellant was not available within the meaning of section 18 of the Act.[19]

[16] I find that the disentitlement to benefits imposed on the Appellant stems from the application of section 18 of the Act.

[17] To determine whether a claimant is available for work, I have to consider the specific criteria set out in the Act for determining whether their efforts to find a suitable job are reasonable and customary efforts.[20] According to these criteria, the efforts must be: 1) sustained, 2) directed toward finding a suitable job, and 3) compatible with nine specific activities that can be used to help claimants get a suitable job.[21] These activities include assessing employment opportunities, preparing a résumé, registering for job search tools or with online job banks or employment agencies, contacting prospective employers, and submitting job applications.[22]

[18] The criteria for determining what constitutes a suitable job are the following: 1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, 2) the hours of work are not incompatible with the

[16] See section 50(8) of the Act.
[17] See section 50(8) of the Act.
[18] See GD6-1.
[19] See GD6-1.
[20] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[21] See section 9.001 of the Regulations.
[22] See section 9.001 of the Regulations.

claimant's family obligations or religious beliefs, and 3) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.[23]

[19] The notion of "availability" is not defined in the Act. Federal Court of Appeal (Court) decisions have set out criteria for determining a person's availability for work and whether they are entitled to EI benefits.[24] These three criteria are:

- the desire to return to the labour market as soon as a suitable job is offered
- the expression of that desire through efforts to find a suitable job
- not setting personal conditions that might unduly limit the chances of returning to the labour market[25]

[20] The Court also tells us that a person who is in school full-time is presumed to be unavailable for work.[26] This is called "presumption of non-availability." It means we can suppose that this person is not available for work when the evidence shows that they are taking training full-time.

[21] In addition, the Court tells us that four principles related to returning-to-studies cases can rebut the presumption of non-availability.[27] These principles are:

- 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

[23] See section 9.002(1) of the Regulations.
[24] The Federal Court of Appeal (Court) established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[25] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[26] See the Court's decision in *Cyrenne*, 2010 FCA 349.
[27] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.

- the existence of “exceptional circumstances” that would enable the claimant to work while taking their course[28]

[22] Whether a person who is taking a full-time course is available for work is a question of fact that must be determined in light of the specific circumstances of each case but based on the criteria set out by the Court. The claimant’s attitude and conduct must be considered.[29]

[23] In this case, the Appellant has met the above criteria to prove that she was available for work during the period from October 12, 2020, to April 14, 2021. She has shown that her efforts to find a job during that period were reasonable and customary.

– **Issue 1: Did the Appellant show a desire to return to the labour market as soon as a suitable job was offered?**

[24] The Appellant showed her desire to return to the labour market as soon as a suitable job was offered during the period from October 12, 2020, to April 14, 2021. I find that, even though the Appellant was taking training during that period, her intention was also to stay in the labour market.

[25] The Appellant says that she was in full-time training from September 2, 2020, to December 21, 2020, for the fall 2020 term,[30] and from January 7, 2021, to April 29, 2021, for the winter 2021 term.[31]

[26] The Appellant indicates that she is ready and available to work.[32] She points out that she has been working since the age of 16 and that she has always worked while studying.[33]

[28] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.
[29] See the Court’s decisions in *Whiffen*, A-1472-92; and *Carpentier*, A-474-97.
[30] See GD3-14, GD3-15, GD3-22, and GD3-31 to GD3-33.
[31] See GD3-19, GD3-20, GD3-22, and GD3-31 to GD3-33.
[32] See GD3-21 and GD3-28.
[33] See GD3-28.

[27] In her statements to the Commission on November 16, 2020, January 23, 2021, and March 19, 2021, the Appellant said that she was available for work but that she could not work full-time because she was studying full-time.[34]

[28] At the hearing, in her reconsideration request, and in her statements to the Commission on May 14, 2021, the Appellant said that she was available for full-time work during her studies.[35]

[29] In her statement to the Commission on May 14, 2021, the Appellant explained that she had not thought to mention this to the Commission before because she usually attended or watched her classes according to the class schedule, but that, since the fall 2020 term (September 2020), her classes had been recorded, and she could take them whenever she wanted.[36]

[30] The Appellant explains that she started working for the employer X in May 2019.[37] She generally works 20 to 30 hours per week, but the employer is the one who decides the number of hours she can work. The Appellant says that, during her studies, she generally works evenings, but also the day shift. She indicates that, in the summer, she can work full-time and work 50 hours per week.[38]

[31] The Appellant indicates that she also worked part-time at X from August 27, 2019, to March 13, 2020, during her first year of study in university.[39]

[32] After she stopped working for that employer, the Appellant received the EI Emergency Response Benefit (EI ERB)[40] from March 15, 2020, to July 4, 2020.[41]

[34] See GD3-16, GD3-21, and GD3-22.
[35] See GD3-28 and GD3-31 to GD3-33.
[36] See GD3-31 to GD3-33.
[37] See GD3-10.
[38] See GD3-31 to GD3-33.
[39] See the Record of Employment the employer X issued on July 7, 2020—GD7-7. See also GD3-31 to GD3-33.
[40] This type of benefit is also referred to as the Canada Emergency Response Benefit (CERB).
[41] See GD3-30 to GD3-33.

[33] The Appellant’s representative argues that the Commission acknowledges that the Appellant showed a desire to go back to work as soon as possible.[42]

[34] I find that, after she was laid off on November 6, 2020, while working for X, the Appellant did not stop showing her desire to find work.

[35] I accept the Appellant’s explanation that she initially said she was not available for full-time work only to later say that she was, since she had to attend her classes or watch them as scheduled during her fall 2019 and winter 2020 terms, but she had failed to mention that this was no longer the case as of the fall 2020 term.[43]

[36] I have no reason to doubt that the Appellant wanted to work and stay in the labour market during the period from October 12, 2020, to April 14, 2021—the period for which the Commission disentitled her from receiving benefits.

[37] I note that, in its arguments, the Commission acknowledges that the Appellant expressed the desire to return to the labour market, since she said that she was willing to work during her studies.[44]

[38] I find that, even though the Appellant chose to take full-time training, this situation did not affect her desire to return to the labour market as soon as a suitable job was offered during the period in question.

– **Issue 2: Did the Appellant express that desire through efforts to find a suitable job?**

[39] I find that the Appellant expressed her desire to return to the labour market through efforts to find a suitable job during the period from October 12, 2020, to April 14, 2021.

[40] The Appellant explains that she spoke with the employer X in the fall of 2020 after losing her job, given the situation related to COVID-19 and the

[42] See GD4-5.
[43] See GD3-31 to GD3-33.
[44] See GD4-5.

government-imposed restaurant closures. The employer told her that it had no work for her because everything was closed (food and catering services). The Appellant explains that the employer told her that she would be able to go back to her job as soon as the COVID-19 situation changed in such a way that the establishment could reopen. She says that she expected to go back to work for that employer.[45]

[41] The Appellant argues that, because of the COVID-19 pandemic, it is a lot harder to find a job in her field, food service.[46] She points out that she lives in an area that was identified as a “red zone”[47] in October 2020.[48] The Appellant argues that the COVID-19 pandemic and the fact that she lives in a “red zone” are important factors to consider in her job search.[49]

[42] The Appellant explains that, in her statements to the Commission on January 23, 2021, and May 14, 2021,[50] she did not mention all her job search efforts, saying that she had not made any, because she did not send her résumé to the prospective employers she had contacted or applied to. She says that she summarized all her job search efforts and that they were reasonable efforts.

[43] The Appellant indicates that she made the following efforts:

a) Signed up for job search sites like Indeed, LinkedIn, and Emploi-Québec[51]

b) Signed up for a group on the Facebook social network concerning jobs related to her background[52]

c) Updated her résumé

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[45] See GD3-31 to GD3-33.
[46] See GD3-28.
[47] When an area is designated as being part of a “red zone,” this means that it is under the Maximum Alert level for COVID-19 (level 4) and subject to specific health measures from the Québec government (for example, restaurant closures).
[48] See GD3-28.
[49] See GD3-28.
[50] See GD3-21 and GD3-31 to GD3-33.
[51] See GD3-28.
[52] See GD3-28.

d) November 2020: Contacted the X beauty clinic, owned by the mother of the Appellant's partner, for a job as a receptionist or cleaner[53]

e) November 2020: Contacted the employer X—the Appellant worked for this employer in 2018[54]

f) November 11, 2020: Sent her résumé to the X integrated health and social services centre (CISSS)[55]

g) November 12, 2020: Contacted the employer X, owned by the father of the Appellant's partner, to do cleaning or office work[56]

h) Around January or February 2021: Contacted (phone conversation) a management agent from the X CISSS to find out about job opportunities with that employer. The hospital facility she could have worked in had only care support assistant positions on the floors with patients ([translation] "floor positions"). The Appellant was reluctant to work on the floors with the risk of infection that it involved, given that there were a lot of COVID-19 cases.

i) Early March 2021: Contacted the employer X to find out whether the establishment was going to open soon and to tell the employer that she was available to go back to her job any time

[53] See the letter from the employer X stating that the Appellant contacted it for a job in November 2020 but that there were no openings—GD7-4.
[54] See the letter from the employer X dated July 27, 2021, stating that the Appellant contacted the employer for a job in the winter of 2020, in November [2020]. The employer indicates that its establishment was closed during that period, that it did takeout only, and that its work team was already full—GD7-3.
[55] See GD7-6.
[56] See the letter from the employer X stating that the Appellant contacted it for a job on November 12, 2020, but that there were no openings—GD7-2.

[44] The Appellant explains that the employer X contacted her on April 7, 2021, to tell her that she would go back to work on April 15, 2021.[57] The Appellant says that she went back to work there on April 15, 2021, as planned, while in school.

[45] The Appellant explains that there are not many jobs for students that pay as well as her server job. She says that her pay varies between $25 and $30 per hour, including tips. The Appellant points out that her server job pays enough to cover the cost of her studies. She explains that, despite the Commission's criticism on this issue, she did not search for a job in retail (for example, work in a store)[58] because the pay is different than the pay she can get as a server.

[46] The representative argues that, even though the Commission submits that the Appellant was passive and did not look for a job,[59] her testimony indicates that she made reasonable and customary efforts to find work.[60]

[47] The representative argues that the assessment of the Appellant's efforts should take into account the context of the COVID-19 pandemic. He points out that, in the Appellant's case, her main qualifications are in food service, but because of a government order, restaurants were closed as a result of COVID-19.

[48] The representative explains that the employer X promised the Appellant that she would go back to her job. He indicates that the Appellant approached several prospective employers, used her family connections, signed up for job search sites, and updated her résumé.

[49] The representative explains that the Appellant's efforts to find a job were unsuccessful because of COVID-19 until the restaurant she worked at reopened. He points out that the Appellant started working there again as soon as she could.

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[57] See the letter from the employer X dated April 7, 2021, stating that the Appellant would go back to her job as a server on April 15, 2021—GD3-29.
[58] See GD4-6.
[59] See GD9-2.
[60] See section 9.001 of the Regulations.

[50] The representative argues that a suitable job is a job with conditions that are relatively similar or comparable to the job a person had.[61] In the Appellant's case, it was a server job that pays her $25 to $30 per hour. He points out that the Appellant's job was different from a job in a hospital facility where there are COVID-19 cases. The representative explains that the Appellant did not continue searching for a job in a hospital setting because she felt that this type of job had working conditions that worried her.

[51] According to the representative, the fact that the Appellant did not continue her efforts to work in that field is justified, since it was not suitable employment for her. He says that the same can be said about the Commission's request that the Appellant work in retail.[62] The representative points out that working minimum wage in a store is not comparable to the Appellant's work as a server.

[52] The representative argues that the Appellant still searched for a job in a field other than food service (for example, receptionist), which would have paid less than the job she had as a server. He points out that the Appellant did more than what the Act or the *Employment Insurance Regulations* (Regulations) required to get a suitable job.

[53] In this case, I find that the Appellant made "reasonable and customary efforts" in the "search for a suitable job"—that is, sustained efforts directed toward finding a suitable job and compatible with nine specific activities that can be used to help claimants get a suitable job.[63]

[54] In assessing the Appellant's availability for work and her efforts to find a suitable job, I am taking into account the fact that, for the past several years, the Appellant has been working part-time in food service while studying full-time. I find that her employment as a server is her usual employment.

[61] See section 6(4)(c) of the Act.
[62] See GD4-6.
[63] See section 9.001 of the Regulations.

[55] I find credible the Appellant's testimony that she has been working since the age of 16 and that she has always worked while studying.[64] Her statement is also supported by compelling evidence that, since she began her university studies in the fall of 2019, she has had periods of employment during her academic terms.[65]

[56] Although section 9.002(1) of the Regulations describes the criteria for determining what constitutes suitable employment,[66] it does not otherwise or more clearly define the expression "suitable employment."

[57] I point out that, in addition to those criteria,[67] the Act also sets out characteristics describing what constitutes employment that is "not suitable."[68] I find that the criteria set out in the Regulations[69] and these characteristics[70] have to be considered together to be able to determine what constitutes suitable employment based on a claimant's circumstances.

[58] These characteristics indicate, among other things, that employment is not suitable employment if it is not in the claimant's usual occupation.[71] Section 6(4)(c) of the Act also says that this employment in a different occupation, or that is not suitable, includes conditions less favourable or lower earnings than those that a claimant could reasonably expect to obtain, taking into account the conditions and earnings the claimant would have had if they had remained in their previous employment. Section 6(5) of the Act broadens the types of jobs that can be suitable, since the provisions of section 6(4)(c) of the Act no longer apply after a reasonable interval.

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[64] See GD3-28.
[65] See the Records of Employment indicating that the Appellant worked as a server for the employer X from August 27, 2019, to March 13, 2020, and for the employer X from June 22, 2020, to November 6, 2020—GD7-7 and GD7-8.
[66] The criteria are 1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, 2) the hours of work are not incompatible with the claimant's family obligations or religious beliefs, and 3) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.
[67] See section 9.002(1) of the Regulations.
[68] See sections 6(4) and 6(5) of the Act.
[69] See section 9.002(1) of the Regulations.
[70] See sections 6(4) and 6(5) of the Act.
[71] See section 6(4)(c) of the Act.

[59] Based on the characteristics set out in the Act to describe what constitutes employment that is not suitable,[72] I am of the view that suitable employment is, among other things, employment that is in the claimant's usual occupation (for example, same nature, earnings, and working conditions).[73]

[60] With this in mind, I find that the fact that, for at least the past two years, the Appellant has been working part-time as a server while studying full-time amounts to employment in her usual occupation, since it is her usual employment. It is similar to the employment she previously had and also continues to have, while she is taking training.

[61] The Court also tells us that the notion of suitable employment is defined in part with reference to the personal circumstances of the claimant.[74]

[62] So, in assessing the Appellant's availability for work, I am taking into account the specific characteristics of her case, namely that she is working part-time while studying full-time.

[63] I do not accept the Commission's argument that the Appellant has to show that she is willing to accept any type of work schedule, including full-time hours, to prove her availability for work.[75] The Commission also argues that the Appellant voluntarily kept herself in an unemployment situation by refusing to work full-time, which is contrary to the notion of availability.[76]

[64] On this point, I note that the Act does not specifically require a claimant to be available for full-time work. In addition, the Appellant's usual employment is part-time employment.

[65] In finding that the Appellant has proven her availability for work, I am also taking into account the fact that, when she was laid off on November 6, 2020, she went

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72 See sections 6(4) and 6(5) of the Act.
73 In English, sections 6(4)(b) and 6(4)(c) of the Act use the expression "claimant's usual occupation," which can also be translated as "*occupation habituelle d'un prestataire*."
74 The Court established this principle in *Whiffen*, A-1472-92.
75 See GD4-6 and GD4-7.
76 See GD4-7.

through a period of uncertainty as to when she would be going back to her job with X. This period of uncertainty was due to the situation related to the COVID-19 pandemic and the government's order to close restaurants indefinitely.

[66] In my view, it is necessary to consider the unusual and unpredictable situation the Appellant faced when she had to stop working on November 6, 2020.

[67] I find that the situation created by the pandemic forced the Appellant to stop working in food service. Her chances of finding another job in a food service establishment other than with the employer X were also non-existent because the reason for that restaurant's closure applied to all of those establishments. I note that this is also evidenced by the Appellant's attempt to find a job with another food service employer in November 2020.[77]

[68] Given the situation the Appellant faced because of the COVID-19 pandemic, I am of the view that she needed a period of time to assess how she would be able to go back to her job with the employer X before making efforts to work in another field of employment. There is every indication that the Appellant wanted to continue working there.

[69] As a result, I find that the Appellant needed a "reasonable interval" before accepting employment that was not in her usual occupation, as the Act states.[78]

[70] I also find that, after her discussions with the employer X when she was laid off and when she later contacted it in March 2021, the Appellant had every reason to believe that the employer would call her back to work as soon as the situation allowed it. Incidentally, this happened in April 2021.

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[77] See the letter from the employer X dated July 27, 2021, stating that the Appellant contacted the employer for a job in the winter of 2020, in November [2020]. The employer indicates that its establishment was closed during that period, that it did takeout only, and that its work team was already full—GD7-3.

[78] See sections 6(4) and 6(5) of the Act.

[71] The Court also tells us that a claimant who was waiting to be called back to work after being laid off—for a three-month period in that case—should not, especially without being told about it, have been disentitled from receiving benefits because they had not been available for work since the start of their benefit period.[79]

[72] I also note that the evidence on file shows that it was not until May 14, 2021, a month after the disentitlement to benefits imposed on the Appellant ended, that the Commission told her not to keep herself available for just one employer.[80]

[73] I find that, taking into account the obstacles the Appellant faced because of COVID-19 and the fact that she usually works in food service, her availability for work led to concrete and sustained efforts to find suitable employment with prospective employers.[81]

[74] I do not accept the Commission's argument that the Appellant has not shown that she made continuous efforts, because she made concrete efforts only in November 2020 and remained passive after that, which is not enough to prove her availability for work.[82]

[75] I find that the Appellant's testimony and evidence show that she did not make concrete efforts to find a job in November 2020 only. The Appellant says that she contacted a prospective employer in early 2021, and the employer X in March 2021 to find out when she would be able to go back to work.

[76] In addition, I find that the Appellant's efforts to register for job search tools (for example, job search sites like Indeed, LinkedIn, and Emploi-Québec), use networking (for example, signing up for a group on the Facebook social network), and prepare a

[79] See the Court's decision in *Carpentier*, A-474-97. In that case, the Court referred the matter back to a different Board of Referees to be decided again.
[80] See GD3-31 to GD3-33.
[81] See section 9.001 of the Regulations.
[82] See GD4-5, GD4-6, GD9-1, and GD9-2.

résumé also amount to sustained efforts that were in addition to her communication with prospective employers to find a suitable job.[83]

[77] I also find that, when looking for a job, the Appellant expanded the scope of her search to assess her employment prospects in a field other than food service. I find that the Appellant has shown that she was prepared to work as a receptionist or do cleaning or office work, and she has also shown that a job in health care was not suitable employment in her case based on the conditions offered.

[78] I do not accept the Commission's argument that the Appellant has not shown that she considered, for example, a job in an essential service such as a retail store, or how such a job would not be suitable in her situation.[84]

[79] In my view, the Appellant did not have to readily accept work that was not in her usual field of employment, whether in retail or health care.

[80] I find that, during the period from October 12, 2020, to April 14, 2021, the Appellant fulfilled her responsibility of actively seeking suitable employment to be able to receive EI benefits.

– **Issue 3: Did the Appellant set personal conditions that might have unduly limited the chances of returning to the labour market?**

[81] I find that the Appellant did not set "personal conditions" that unduly limited her chances of returning to the labour market during the period from October 12, 2020, to April 14, 2021. I find that the Appellant's decision to take full-time training did not hurt her job search.

[82] The Appellant's testimony and the evidence on file show that, for her fall 2020 (September 2, 2020, to December 21, 2020) and winter 2021 (January 7, 2021, to April 29, 2021) academic terms, she devoted 15 to 30 hours per week to her training, including assignments and studying (10 hours of classes per week for the 5 courses

[83] See section 9.001 of the Regulations.
[84] See GD4-6.

taken during the fall 2020 term and 8 hours of classes per week for the 4 courses taken during the winter 2021 term).[85]

[83] The Appellant also says that she did not get her training approved under an employment or skills development program. Her decision to take the training was a personal choice.[86]

[84] The Appellant indicates that she worked 20 to 30 hours per week while in school during her periods of employment.

[85] I find that, by choosing to take full-time training, the Appellant set personal conditions. However, I find that they are not conditions that unduly limit her chances of returning to the labour market.

[86] Objectively, despite taking full-time training, the Appellant made sustained efforts to stay in the labour market.

[87] I find that the Appellant expanded the scope of her search after she was laid off on November 6, 2020.

[88] I find that the Appellant did not limit her employment prospects after this layoff either. The Appellant looked for a job with conditions that would allow her to continue her training.

[89] I do not accept the Commission's argument that the Appellant's training is an obstacle to accepting suitable employment, since she is limiting her availability to part-time work because of her studies.[87]

[90] The fact is that the Appellant's usual employment is part-time employment as a server and is suitable employment in her case.

[85] See GD3-13, GD3-18, GD3-22, GD3-28, and GD3-31 to GD3-33.
[86] See GD3-13 and GD3-18.
[87] See GD4-7.

[91] In my view, the Appellant did not unduly limit her chances of returning to the labour market despite the demands of her training.

[92] I find that, during the period in question, the Appellant did not set personal conditions that unduly limited her chances of returning to the labour market.

– **Issue 4: Has the Appellant proven her availability for work based on the principles related to returning-to-studies cases—such as 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, and the existence of "exceptional circumstances"?**

[93] Among the principles related to returning-to-studies cases that can prove a claimant's availability for work while taking training, I note that the Appellant has a history of being employed at irregular hours while taking full-time training. I find that this is an exceptional circumstance that allows the Appellant to prove her availability for work during her training. I also note that the attendance requirements of the course also allow the Appellant to prove her availability for work during her training.

[94] The evidence on file shows that the Appellant had several periods of employment while attending university full-time.[88]

[95] The Appellant explains that, since the age of 16, she has always worked while studying.[89]

[96] I find that the Appellant has a work-study history showing that she is able to balance part-time work with her full-time studies.

[88] See the Records of Employment indicating that the Appellant worked as a server for the employer X from August 27, 2019, to March 13, 2020, and for the employer X from June 22, 2020, to November 6, 2020—GD7-7 and GD7-8.
[89] See GD3-28.

[97] I find persuasive the Appellant's testimony that she can work while taking full-time training. Her testimony is also supported by compelling evidence that she is able to do this.[90]

[98] A decision by the Tribunal's Appeal Division (Appeal Division) indicates that the law does not require that a claimant have a history of full-time employment while attending school to rebut the presumption that, as a full-time student, they are unavailable for work under the Act.[91]

[99] That decision was about a claimant (student) with a history of full-time study and part-time employment indicating that she was working approximately 14 to 18 hours per week and looking for a part-time job of 16 to 20 hours weekly.[92]

[100] In that decision, the Appeal Division found that the nature of the claimant's previous employment—part-time employment—and the fact she had shown her ability to maintain part-time employment over the long term, while simultaneously attending full-time studies, were an exceptional circumstance sufficient to rebut the presumption of the claimant's non-availability.[93]

[101] Another decision by the Appeal Division indicates that a claimant (student) was able to rebut the presumption that he was not available for work by showing his history of part-time employment and full-time study.[94]

[102] In that decision, the Appeal Division found that the student had given persuasive testimony about his consistent efforts to pick up as many shifts as possible during the school breaks, in addition to being able to work close to full-time hours.[95]

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[90] See the Records of Employment indicating that the Appellant worked as a server for the employer X from August 27, 2019, to March 13, 2020, and for the employer X from June 22, 2020, to November 6, 2020—GD7-7 and GD7-8.
[91] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[92] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[93] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[94] See the decision of the Tribunal's Appeal Division in *YA v Canada Employment Insurance Commission*, 2020 SST 238.
[95] See the decision of the Tribunal's Appeal Division in *YA v Canada Employment Insurance Commission*, 2020 SST 238.

[103] Although I am not bound by the Tribunal's decisions, I consider its findings persuasive in showing that a person can rebut the presumption that they are not available for work while taking full-time training, if the person can show that they have experience simultaneously studying full-time and working part-time (work-study history). As a result, I adopt the same approach in this case.

[104] In addition, I find that the Appellant has shown the attendance requirements of her courses were not an obstacle to accepting employment.

[105] The Appellant explains that, for her fall 2020 and winter 2021 terms, she did not have to take her classes in person. She took them online. Classes were recorded or asynchronous.[96] The Appellant could take them whenever she wanted using a communication platform (for example, Zoom)[97]. She points out that the Université de Montréal had a policy about this because of the COVID-19 pandemic.

[106] The Appellant argues that, because her study schedule allowed her to take her classes at her own pace and because she was not required to take them in person, this schedule could not conflict with a job. She explains that this is why she indicated in her claims for benefits and in her statements to the Commission that, if she had found full-time work but the job conflicted with her training, she would have finished her course or program.[98]

[107] The representative argues that the Appellant indicated that she was prioritizing her studies because she knew that she would not have to choose between them and a job. He points out that the Appellant has always been able to combine her studies with her work and that she would not have had to choose between them. He notes that, when the Appellant went back to work for the employer X in April 2021, she was also

[96] In an asynchronous course, students do not have to log into the course platform at the same time as the instructor. See also GD3-28 and GD3-31.
[97] See GD3-28 and GD3-31.
[98] See GD3-17, GD3-21, and GD3-22.

able to combine her last weeks of study with her job despite the deadlines and exams at the end of the winter 2021 term.

[108] In my view, the attendance requirements of the Appellant's courses did not affect her availability for work or her search for a suitable job. I find that the Appellant's situation is compatible with establishing her availability for work. With this in mind, I accept the Appellant's explanation that she was not prepared to give up her training given the flexibility she could have in taking her classes.

[109] So, I do not accept the Commission's argument that the Appellant has failed to rebut the presumption of non-availability for being in school full-time because she has imposed restrictions that limit her chances of working and has ruined her chances of doing so full-time.[99]

[110] I find that the Appellant has rebutted the presumption that a person enrolled in a full-time course is unavailable for work. The Appellant has a work-study history showing that she is able to balance part-time work with her full-time studies. The attendance requirements of her courses have not prevented her from working either.

[111] I find that the Appellant has shown exceptional circumstances that allow her to rebut the presumption that a person enrolled in a full-time training course is unavailable for work.

Liability to repay benefits paid

[112] Since I have found that the Appellant has proven her availability for work during her training, she should not have to pay back the benefits the Commission is asking her to repay. It is up to the Commission to resolve this matter with the Appellant in accordance with the provisions of the Act.[100]

[99] See GD4-9 and GD9-2.
[100] See sections 43, 44, and 52 of the Act.

Conclusion

[113] I find that the Appellant has shown that she was available for work within the meaning of the Act during the period from October 12, 2020, to April 14, 2021. The Appellant can receive EI benefits for that period. She should not have to pay back the benefits the Commission is asking her to repay for that period.

[114] This means that the appeal is allowed.

Normand Morin

Member, General Division – Employment Insurance Section