



[TRANSLATION]

Citation: *CM v Canada Employment Insurance Commission*, 2021 SST 563

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

Decision

Appellant: C. M.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (427354) dated July 13, 2021 (issued by Service Canada)

Tribunal member: Josée Langlois
Type of hearing: Teleconference
Hearing date: September 7, 2021
Hearing participant: C. M.
Decision date: September 8, 2021
File number: GE-21-1350

Decision

[1] The appeal is allowed.

[2] The Appellant has shown that she was available for work from October 5, 2020, to May 13, 2021. She is entitled to benefits for that period.

Overview

[3] On May 31, 2021, the Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled to Employment Insurance (EI) regular benefits from October 5, 2020, to May 13, 2021, because she was taking training on her own initiative and wasn't available for work.

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

[5] The Appellant says that these benefits kept her going during the pandemic. She explains that, due to the pandemic, she stopped working at her part-time job because her position was cut.

[6] The Commission says that the Appellant wasn't available for work between October 5, 2020, and May 13, 2021, because she was available for only part-time work and because she was restricting her work schedule to focus on her training.

[7] I have to decide whether the Appellant was available for work within the meaning of the *Employment Insurance Act* (Act) between October 5, 2020, and May 13, 2021, and whether she can receive EI benefits for that period. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

Issue

[8] Was the Appellant available for work between October 5, 2020, and May 13, 2021?

Analysis

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

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

Capable of and available for work

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

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

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

– Wanting to go back to work

[13] The facts show that the Appellant has been taking training in social technology at the Cégep du Vieux Montréal [Cégep of Old Montréal] since the fall of 2018. She said that she was available for part-time work.

¹ See section 18(1)(a) of the *Employment Insurance Act* (Act).

² See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

³ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

⁴ Two decisions set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[14] At the hearing, she explained that she had been laid off by her employer, Air Transat, because of the pandemic and that, even though she wanted to go back to her job with her employer for a time, the employer quickly informed her that she would not be coming back to work because the department she worked for had closed down. She said that she had approached her employer for different positions in other departments and that her name was on waiting lists.

[15] The Appellant also says that she reviewed job opportunities on the Government of Canada's job site daily. She indicates that she got an employment contract after completing an internship at X. She got a three-month employment contract starting May 31, 2021.

[16] The Commission says that the Appellant was available for only part-time work during her studies.

[17] I note from the Appellant's explanations that she intended to go back to her job as soon as her employer called her back. Since her position was cut, she took steps to get another position at Air Transat. She intended to continue working.

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

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

[19] To be able to get EI benefits, the Appellant is responsible for actively looking for a suitable job.⁵

[20] The Commission's decision relies on the Appellant's non-availability due to the training she is taking full-time.

[21] The Commission says that the Appellant was available for only part-time work because of her training: one weekday and weekends, based on her course schedule. It

⁵ This principle is explained in the following decisions: *Cornelissen-O'Neil*, A-652-93; and *De Lamirande*, 2004 FCA 311.

says that the Appellant is restricting her availability, but it doesn't raise any arguments about the efforts made to find a suitable job.

[22] The Appellant said that she would have liked to keep her job, which helped her meet her needs and those of her daughter while in school. When the employer told her that her position had been cut, she approached her employer for different positions in other departments, and she made sure that her name was on different waiting lists.

[23] The Appellant's efforts to find a job also included reviewing job opportunities. However, she explained that jobs were limited because of the pandemic.

[24] The facts show that the Appellant was in full-time training from October 5, 2020, to May 23, 2021. Although she initially waited to be called back by her employer, who she normally worked for three days a week (one weekday and weekends), as soon as the employer told her that her position had been cut, she increased her efforts to get a position in another department.

[25] Efforts must be made with the goal of accepting a suitable job as soon as it is available. In this case, the Appellant focused her efforts on applying for a position in another department at Air Transat, but her job search efforts also included reviewing job opportunities.

[26] Given the facts presented, I find that the Appellant made some effort to find a suitable job. I will determine whether the Appellant had personal conditions that unduly limited her chances of finding a suitable job.

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

[27] The Commission argues that the Appellant has failed to rebut the presumption of non-availability because she is taking a full-time training course and is restricting her availability for work based on her course schedule.

[28] The Commission says that there are no exceptional circumstances to rebut the presumption of non-availability.

[29] The Appellant said that she was taking full-time training.

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

[31] This presumption of non-availability can be rebutted based on four principles related specifically to return-to-studies cases.⁶

[32] These principles are:⁷

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

[33] On June 1, 2021, the Appellant told the Commission that she was studying full-time during the fall term, which ran from August 27, 2020, to December 15, 2020, and the winter term from January 27, 2021, to May 23, 2021. During the winter term, the Appellant devoted around 25 to 28 hours, or four days per week, to an internship, and 3 hours to a course per week. She then said that she was available for part-time work.

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

⁶ *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); *Floyd*, A-168-93.

⁷ This principle is explained in the following decision: *Gagnon*, 2005 FCA 321 (CanLII).

[35] Waiting for a callback from an employer is a condition that unduly limits a claimant from finding a suitable job because it might limit the chances of going back to work as soon as a job is available.

[36] In this case, the employer quickly told the Appellant that the department she worked for would close down and that she would not be able to go back to her job. The Appellant then took steps to get a job in another department.

[37] Although she was available for part-time work, I am of the view that the Appellant has rebutted the presumption of non-availability while in school given that there are exceptional circumstances.

[38] As she explained at the hearing, she was laid off because of the COVID-19 pandemic. And, if it weren't for the pandemic, she would not have stopped working then. This means that she would have continued working one day per week and weekends at Air Transat, the job she had had since 2015.

[39] In addition to the pandemic situation, the employer closed down the department she worked for, and she could not go back to her job once the pandemic allowed it.

[40] The Appellant explained that she had been working since the age of 14 and that, before the pandemic, she had never used EI. She indicated that, one way or another, she had always worked part-time while studying. Since the age of 14, the Appellant has combined work and study to meet her needs.

[41] She also explained that she experienced spousal abuse during that period and that getting EI benefits was a great help that had kept her going during the pandemic.

[42] She said that, being a single mother, it was hard for her to find a full-time job during her training, but that she actively looked for a job with the same type of schedule she had with Air Transat. That is why she increased her efforts to stay with that employer, because it allowed her to work while studying.

[43] Despite her position being cut, she took steps to get on callback lists with her employer to work in other departments, and she regularly reviewed employment opportunities on job sites.

[44] In my view, the existence of “**exceptional circumstances**” enables the Appellant to work while taking training.

[45] The insurable hours of employment a claimant accumulates when working full-time aren’t the only history that may be considered in establishing a benefit period. And, **employment history isn’t the only basis on which the presumption of availability may be rebutted.**⁸ The presumption of non-availability can be rebutted through proof of exceptional circumstances.⁹

[46] So, exceptional circumstances can be associated with a history of part-time employment. The Appellant has been studying and working part-time since the age of 14, that is, since 2013. And, if it weren’t for the COVID-19 pandemic, she would have continued working part-time during her training. Unfortunately, during the pandemic, the employer reorganized the departments, and the Appellant lost her job.

[47] The Appellant is in full-time training, but she has successfully rebutted the presumption that a person who is taking a full-time training course on their own initiative isn’t available for work.¹⁰

[48] The Appellant was in full-time training, and the facts show that exceptional circumstances support the finding that, if it weren’t for the COVID-19 pandemic, the Appellant would have continued working part-time to meet her needs and those of her child, and she has shown that, for many years, she has been working part-time while studying full-time.

⁸ See the decision of the Tribunal’s Appeal Division in *JD v Canada Employment Insurance Commission*, 2019 SST 438; and *Attorney General of Canada v Rideout*, 2004 FCA 304.

⁹ *Attorney General of Canada v Wang*, 2008 FCA 112; and *Landry*, A-719-91.

¹⁰ This principle is explained in the following decisions: *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); and *Paxton*, 2002 FCA 360 (CanLII).

[49] I find that no personal conditions unduly limited the Appellant's chances of finding a suitable job between October 5, 2020, and May 13, 2021. The Appellant was working part-time, and she has shown, through her employment history, that she was available to work part-time while studying full-time.

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

[50] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether she can receive benefits for the period between October 5, 2020, and May 13, 2021.

[51] The Appellant made efforts to find a job, and she has successfully rebutted the presumption of non-availability despite being in full-time training during that period. The conditions that limited her from working are due to external circumstances, such as the pandemic or her position being cut, and she had no personal conditions that unduly limited her availability for work during that period. Even though she was looking for a part-time job, she tried to get a job in another department with the employer who had cut her position, and her work/study history shows that it is more likely than not that she was available for work during her training.

[52] Availability is a question of fact and, for the reasons mentioned, I find that the Appellant's circumstances are exceptional.¹¹

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

Conclusion

[54] The Appellant has shown that she was available for work within the meaning of the Act between October 5, 2020, and May 13, 2021. Because of this, I find that she is entitled to benefits for that period.

¹¹ *Landry v Deputy Attorney General of Canada*, A-719-91; and *Faucher v Attorney General of Canada*, A-56-96.

[55] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section