Citation: *OC v Canada Employment Insurance Commission*, 2021 SST 647

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (428181) dated July 9, 2021 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Videoconference
Hearing date:	August 26, 2021
Hearing participants:	Appellant
Decision date:	September 17, 2021
File number:	GE-21-1374

Decision

[1] I am dismissing the Claimant's appeal. This decision explains why.

[2] The Claimant has not shown that she was available for work while in school full time. This means that she is disentitled from receiving employment insurance (EI) regular benefits from January 15, 2021, to April 23, 2021.

Overview

[3] The Claimant attended a full-time course from September 9, 2020, to July 12, 2021. She made a renewal claim for EI regular benefits on January 6, 2021. Her appeal relates to that renewal claim.

[4] The Canada Employment Insurance Commission (Commission) disentitled the Claimant from receiving EI regular benefits from January 15, 2021, to April 23, 2021, after finding that she was not available for work. The disentitlement resulted in an overpayment of benefits.

[5] The Commission says the Claimant was not available for work because she did not look for full-time employment and would not have left her course to accept such work. It says you can only get regular benefits if you are available for work.

[6] The Claimant disagrees. She says she was available because most of her course was posted online, so she could follow her lectures at her own pace. She says she was available to work part-time, as she had done in her previous studies.

The issue I must decide

[7] Was the Claimant available for work while in school full time?

Post-hearing documents

[8] After the hearing, the Claimant submitted additional information about her school schedule. I accepted this submission as relevant to her appeal. I shared

the submission with the Commission and offered it the chance to respond but it made no further submissions.

Analysis

[9] The law requires claimants to show that they are available for work.[1] A new temporary section of the *Employment Insurance Act* (EI Act) says claimants who attend a full-time course cannot receive benefits unless they prove that they are capable of and available for work.[2] They have to show it is more likely than not that they are available.

Presuming that full-time students are not available for work

[10] The Federal Court of Appeal (FCA) says there is a presumption that claimants in school full time are unavailable for work.[3] I will start by looking at whether I can presume that the Claimant was not available for work. I will then look at whether she showed she was available.

[11] The presumption only applies to full-time students. The Claimant says her program was full time. I see no evidence to show otherwise, so I accept that she was a full-time student. As a result, the presumption applies to her.

[12] The presumption can be rebutted, which means it would not apply. I find that the Claimant can rebut the presumption because exceptional circumstances apply in her case.[4]

[13] The Commission argues that the Claimant cannot rebut this presumption because she had no experience of working full-time while attending school. It says she was not looking for full-time work.

S 18(1)(a) of the *Employment Insurance Act* (EI Act) says that claimants are not entitled to be paid benefits for a working day in a benefit period for which they fail to prove that on that day they were capable of and available for work and unable to obtain suitable employment. .

[2] In March 2020, the EI Act was amended to allow the Minister to make interim orders to mitigate the economic effects of COVID-19 (s 153.3 of the EI Act). The Minister added s153.161, requiring claimants in full-time school in non-referred training to prove they are capable of and available for work.

[3] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349

[4] *Cyrenne*, see above.

[14] The Claimant says she has a history of working part-time while studying full time.

[15] Sometimes, a history of working part time while studying full time is seen as an exceptional circumstance.[5]

[16] I rely on a decision by the Tribunal's Appeal Division (AD) to find that the part-time nature of the Claimant's former job and her demonstrated ability to maintain at least that level of employment while studying full time is an exceptional circumstance.[6]

[17] This exceptional circumstance allows the Claimant to rebut the presumption that she was not available for work. Moreover, the law does not specify that claimants in school must search for and accept full-time work where their work history shows part-time work.

[18] Although the Claimant has rebutted the presumption of non-availability, this only means I will not automatically assume that she was unavailable for work. I must still look at the law that applies in her case to decide whether she was available for work.

[19] The Commission says claimants must make "reasonable and customary" efforts to find work but it did not make submissions on whether the Claimant made those efforts. It did not ask her for more details about her efforts to find work or give her the chance to expand her job search before disentitling her to benefits.

[20] For that reason, I make no decision on a disentitlement under section 50 of the EI Act for failing to carry out a reasonable and customary job search.[7] I will only consider the following test for availability under sections 18(1)(a) and 153.161 of the EI Act.

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[5] See *J. D. v Canada Employment Insurance Commission*, 2019 SST 438. I do not have to follow the decisions of the Tribunal's Appeal Decision (AD) but their logic guides me in the AD decisions I cite in this decision.
[6] See *J. D. v Canada Employment Insurance Commission*, 2019 SST 438. I do not have to follow the decisions of the Tribunal's Appeal Decision (AD) but their logic guides me in the AD decisions I cite.
[7] If claimants do not comply with a request to prove they made "reasonable and customary" efforts to find work (s 50(8) of the EI Act), they may be disentitled under s 50(1). The Commission did not ask for a job search so the Claimant cannot be disentitled under that section of the law.

Was the Claimant available for work and unable to find a suitable job?

[21] To show she was available for work, the Claimant has to prove that

a) she wanted to return to the labour market as soon as a suitable job was available;

b) she expressed this wish through efforts to find work; *and*

c) she had no personal conditions that might unduly limit her chances of returning to the labour market.[8]

[22] I have to consider each of these three factors to decide the question of availability.[9] To do this, I must look at the Claimant's attitude and conduct.[10]

Did the Claimant want to go back to the labour market?

[23] I accept that the Claimant wanted to return to the labour market as soon as she could find a suitable job. Her employment history shows that working had been her goal.

Did the Claimant make efforts to find suitable employment?

[24] According to the evidence she provided, the Claimant made few efforts to find suitable work until May 2021. This is after the period of her disentitlement.

[25] The Commission says the Claimant was not available for work because she only wanted part-time work and did not look for full-time positions.

[26] The Claimant argues that her lectures were recorded and asynchronous so she had plenty of time to work. She had labs three times a week but says that course requirement never stopped her working before. She says her former employer accepted her availability because it needed employees part time outside a normal working week.

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[8] This is a plain language version of the three factors used to assess availability for work. It is called the *Faucher* test. See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[9] *Faucher*, see above.
[10] *Canada (Attorney General) v Whiffen*, A-1472-92; *Carpentier v Canada (Attorney General)*, A-474-97.

[27] The work schedule that the Claimant submitted shows her availability for work in December 2020. She argues that this shows she was available for work during the winter semester from January 15, 2021, to April 23, 2021. She was hoping to be recalled to her old job, which had always accommodated her course schedule.

[28] The Claimant says she checked the government's Job Bank and registered on Indeed, but found few suitable jobs to apply for. She reports that she updated her resume and "applied to a few different places."[11] She says she looked for jobs that were linked to her career goals and for work in retail and grocery stores. She also says her mother and her friend checked if there were supermarket vacancies nearby.

[29] The Claimant argues that she could not find anything suitable; either the jobs were full time or she did not have the right qualifications.

[30] I find that the Claimant did not show she was available for work from January 15, 2021, to April 23, 2021. This is because being willing to work and having the time to work is not the same under the law as being available for work.[12] Her availability while employed during December 2020, is not enough to show that she would have been available to work within other employers' schedules.

[31] The job search that the Claimant submitted showed only two jobs in the period of disentitlement (January 15, 2021, to April 23, 2021). I acknowledge the difficulties of finding work during the COVID-19 pandemic. However, claimants still have to show that they tried to find work even if it seems reasonable to them not to do so because of a difficult job market.[13]

[32] The Claimant's job search list does not show that she made serious efforts to find work, either jobs linked to her career goals or unrelated positions.

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[11] See GD2-5.
[12] *Canada (Attorney General) v Leblanc*, 2010 FCA 60..
[13] *De Lamirande* v *Canada (Attorney General),* 2004 FCA 311.

Did the Claimant set personal conditions that might have unduly limited her chances of returning to the labour market?

[33] The Claimant set no personal conditions based on preferred commute time, wages or type of job. She says she could commute from either Vaughan ON or Brampton ON, 30 minutes by car each way or 60 minutes via public transit. She says she was prepared to take any type of job at any salary point.

[34] The Claimant also says that she looked for work linked to her career goals. Preferring that type of work would be a personal condition. It was also unrealistic because, as the Claimant herself said, she did not yet have the qualifications for those positions. Waiting to return to her former job without showing that she tried to find other work was also a personal condition.

[35] The job search in the evidence shows that all but two of the Claimant's job applications were for Starbucks, which was accepting applications but had no vacancies. All but two of the applications were outside the period under review or were automatic renewals through the Starbucks vacancy management tool.

[36] One job application was inside the review period but it was for a summer position starting after the winter semester ended. The Claimant cannot use an application for work after the semester ended to show that she was available for work during the semester.

[37] For the above reasons, I give low weight to the Claimant`s argument that she looked for and would have accepted any job at any salary. She provided no job search to back up that statement. Her evidence shows that her job search efforts were very limited over the more than three months from January 15, 2021, to April 23, 2021. This suggests, on a balance or probabilities, that she set personal conditions on the type of job she would consider applying to.

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

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

[39] The Claimant says she should not have to repay the overpayment. She argues that the Commission should not have paid her the EI regular benefits if she was not eligible to receive them. She now finds it hard to repay the overpayment.

[40] I sympathize with the Claimant's situation but I cannot change the law, even in cases of financial hardship.[14] I have no power to remove an overpayment.[15]

[41] The Claimant has to repay the benefits she received because she did not show that she was available for work.[16] You can only get regular benefits if you can show you are available.

Conclusion

[42] The Claimant has not shown that she was capable of and available for work while studying full time from January 15, 2021, to April 23, 2021. For this reason, she is disentitled from receiving EI regular benefits and must repay the benefits the Commission paid her during that period.

[43] This means that I am dismissing the Claimant's appeal.

Lilian Klein
Member, General Division – Employment Insurance Section

[14] *Canada (Attorney General) v Knee*, 2011 FCA 301.
[15] Only the Federal Court of Canada can remove an overpayment.
[16] See ss 44 and 45 of the EI Act.