Citation: *DT v Canada Employment Insurance Commission*, 2021 SST 642

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. T.
Representative:	T. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (423740) dated May 20, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	July 7, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	July 28, 2021
File number:	GE-21-990

Decision

[1] The appeal is allowed. I agree with the Claimant.

[2] The Claimant has shown that she was available for work. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from October 4, 2020 to April 26, 2021because she wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I 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 her job search efforts and her initial statements regarding her availability for part-time work while in a full-time training program did not reflect a sincere desire to return to the labour market as soon as possible.

[6] The Claimant disagrees and says that she was working part-time while looking for another part-time job to make up full-time hours or a full-time job to replace her part-time job. Her classes are all on-line such that she can work full-time and attend classes. She says that she has worked full-time in the past while attending school and currently has a full-time job.

Issue

[7] Was the Claimant available for work from October 4, 2020 to April 26, 2021?

Analysis

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

[9] However, I find that I only need to decide if the Claimant was available for work under one section of the EI Act. That is section 18(1)(a). My reasons for this finding follow.

[10] First, the *Employment Insurance Act* (EI Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] This requirement is at section 50(8) of the EI Act. The *Employment Insurance Regulations* (EI Regulations) at section 9.001 give criteria that help explain what "reasonable and customary efforts" mean.[2]

[11] Second, the EI Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] This requirement is at section 18(1)(a) of the EI Act. Case law says there are three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

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

[13] Under section 50(8) of the EI Act, the Commission may require a claimant to prove that she has made reasonable and customary efforts to obtain suitable employment in accordance with the criteria in section 9.001 of the EI Regulations. Section 9.001 states that its criteria are for the purpose of section 50(8) of the EI Act.

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[1] See section 50(8) of the *Employment Insurance Act* (EI Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (EI Regulations).
[3] See section 18(1)(a) of the EI Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This is how I refer to decisions from the courts that apply to the circumstances of this appeal.

Section 9.001 does not say that its criteria apply to determine availability under section 18(1)(a) of the EI Act.

[14] If a claimant does not comply with a section 50(8) request to prove that she has made reasonable and customary efforts, then she may be disentitled under section 50(1) of the EI Act. Section 50(1) says that a claimant is disentitled to receive benefits until she complies with a request under section 50(8) and supplies the required information.

[15] A review of the appeal file shows that the Commission did not disentitle the Claimant for her failure to comply with its request for her job search activities. In fact, the Commission's initial decisions disentitled the Claimant because she was taking a training course on her own initiative and it said she said she would work only part time. It was not until after the Claimant requested reconsideration that the Commission asked the Claimant for a record of her job search activities from October 4, 2020 to April 21, 2021. On May 20, 2021, the Claimant was asked to provide specific dates that she applied for jobs, the names of employers, their contact information, and the type of job applied for. The Claimant emailed the Commission a record of her job search activities on May 20, 2021. The Commission's focus was on job applications alone. It did not ask about, nor did it consider any of the remaining job search activities listed in section 9.001 of the EI Regulations. Further, the Commission's reconsideration decision maintained its initial decisions with no additional reasons for disentitlement. As a result, I find I do not need to decide that the Claimant's job search activities satisfy the section 9.001 criteria in order to find her to be available for work and entitled to EI benefits.

[16] Accordingly, I only need to decide if the Claimant was available for work under paragraph 18(1)(a) of the EI Act.

[17] Also, because the Claimant was a student during this period I have to consider that the Federal Court of Appeal has said that there is a presumption that claimants who are attending school full time are unavailable for work.[5] I am going to start by looking at

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

whether the presumption applies to the Claimant. Then, I will look at the law on availability.

Presumption that full-time students are not available for work

[18] The presumption applies only to full-time students. This presumption can be rebutted, which means that it would not apply. The Claimant can rebut the presumption that full-time students are unavailable for work by showing that she has a history of working full-time while also studying[6] or by showing exceptional circumstances.[7]

[19] The Claimant testified that she was a full-time student. She was enrolled in five courses during the fall 2020 semester and the winter 2021 semester. In each semester she had three courses which had pre-recorded lectures that she could watch on-line at any time. She said she would spend three hours watching the lectures and about 2 hours on study each week for these courses. She had two courses that did not have on-line lectures but required that she do certain activities and assignments at a time of her choosing. She would spend two hours a week total on these two courses. The Claimant testified that any group work she was involved in had the members work individually and then meet on weekends to finalize the work. This amounts to less than 10 hours a week spent in study at times of the Claimant's choosing.

[20] The Claimant is recorded as telling a Service Canada agent that she spent 34 hours a week on her schooling, including in-person classes, preparing for school and studying. She testified that she working at the home care position when she was contacted. She asked if she could answer the questions later and was told she had to answer the questions right away. The Claimant thought she was being asked about the coming school year. The Service Canada agent recorded that the Claimant spent time on in-class studies. That is not correct. The Claimant corrected the information when she spoke to a Service Canada agent about her reconsideration request. She said that all her classes were on-line and she was not required to attend any of her classes virtually. The evidence is clear that the Claimant was not required to spend specific

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

times attending classes, in-person or virtually. I find I prefer the evidence of the Claimant regarding the time she spent on her studies, as it was testimony that was given directly to me and is not filtered through another person's accounts of her statements.

[21] The Commission disentitled the Claimant because it says she was attending training full-time and therefore she was not available for work. It did not offer any evidence about the training other than the Claimant's statements. Normally a claimant who attends classes from Monday to Friday during normal working hours is deemed to be unavailable. That is not the case here, where the Claimant was able to choose in each semester when she viewed the three lecture courses and when she completed the assignments for the remaining two courses.

[22] The Commission also says the Claimant had to be available for full-time work while studying.

[23] I do not agree with the Commission that the Claimant had to show she was available for full-time work while studying; there is no such requirement in the legislation. Her obligation was to show she was available for work consistent with her past work history.

[24] The Claimant testified that she was used to working while she was attending school. She worked two to fours days a week and averaged 28 to 30 hours a week while in high school. She would attend class until 2:30 p.m. from Monday to Friday and work from 3:00 p.m. or 3:30 p.m. onward. This evidence tells me the Claimant has a history of working while enrolled in full-time studies. While in university she continued to work part-time at a retail store and looked for other work to supplement those hours, if the other work was part-time or to replace those hours if the other work was full-time.

[25] The Claimant told a Service Canada agent that she was looking for full-time work. She said she was willing to quit her part-time job for full-time work. In March 2021, while still in university, she applied for and accepted a job in home care that

promised her full-time hours. It is not determinative of the issue that the full-time hours did not materialize.

[26] The Claimant testified that had she found full-time work and had to give up her schooling she would. The Claimant's representative said that the Claimant considered not attending university from September 2020 to April 2021 because the instruction was on-line and she was concerned about the quality of education. The Claimant was disappointed that the Commission assumed she would not be available for full-time work because she was in school.

[27] I find the Claimant has rebutted the presumption that she is not available for work because she is a full-time student. She has a history of working while enrolled in full-time studies. She was not required to attend classes, in person or virtually, at a set time. She spent approximately 10 hours a week reviewing pre-recorded lectures, studying and working on assignments. She was able to choose when to spend that time. She worked part-time throughout the semesters and fulltime over the Christmas break. She looked for part-time and full-time work during this period as well. Considering this evidence, I find the Claimant has rebutted the presumption that she is not available for work due to her full-time studies.

Capable of and available for work

[28] As noted above, I only need to decide if the Claimant was available for work under paragraph 18(1)(a) of the EI Act.

[29] Case law sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:[8]

a) She wanted to go back to work as soon as a suitable job was available.

b) She made efforts to find a suitable job.

[8] 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.

c) She did not set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[30] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[9]

– **Wanting to go back to work**

[31] I find the Claimant has shown that she wanted to go back to work as soon as a suitable job was available.

[32] The Claimant has worked for approximately six years. She testified that she worked 28 to 30 hours a week while she was in high school. She had been working part-time in retail but had her hours reduced due to the COVID 19 pandemic. The Claimant has a car payment, and pays for her own car insurance, gas, cell phone and other expenses. She needs to work to pay those expenses.

[33] The Claimant testified that she checked the job bank daily, did monthly checks and applications to various fast food and retail hiring sites for work. She applied for several jobs as they came up on those sites. She had a part-time job while attending university and was looking for another job, part-time or full-time, to give her more hours. She was successful getting what was advertised as a full-time job providing home care, but the hours did not increase to full-time. She started that work in March 2021. She has been successful getting work with a crown corporation and is currently working the graveyard shift. She has had a resume since 2105 that she updates. The resume is posted on LinkedIn and Indeed. She gave her resume to the employers listed on her job search. She has posted on Facebook that she is looking for a job. She has asked friends and family if they know of any work. This evidence tells me the Claimant has shown a desire to return to work.

[9] 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.

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

[34] I find the Claimant has made efforts to find a suitable job.

[35] There is a list of job search activities to look at when deciding availability under a different section of the law.[10] This other section does not apply in the Claimant's appeal. But, I am choosing look at that list for guidance to help me decide whether the Claimant made efforts to find a suitable job.

[36] There are nine job search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.[11]

[37] The Claimant testified that she has a resume which she updates regularly. She looked for work from September 2020 onward. She was working part-time in a retail store but continued to look for other work. Most of the jobs that the Claimant listed in her job search list were part-time with hours that she could fit in around her existing part-time retail job. One restaurant job was full time. The Claimant testified that she did more to look for work than just apply for the jobs listed on the email she sent to the Commission.

[38] The Claimant also looked at the Job Bank website. She applied to a landscaping company and the crown corporation from that site. She has resume posted on Indeed and Linked that she updates regularly. She has given her resume to employers where she has applied for jobs. She was successful getting a job providing home care while in school. That job was advertised as full-time but the hours have not materialized. She checked her school's website for job opportunities but there were none. The Claimant asked friends and family if they knew of any available work. She posted on Facebook that she was looking for work. The Claimant said she looked at websites for three

[10] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[11] Section 9.001 of the EI Regulations.

national fast food chain restaurants that do monthly recruitments. The web sites list the locations where jobs are available and she applies for jobs that are close to her. She applied monthly. The same process applied for the current job she holds with the crown corporation. She registered for their website and got alerts when jobs were posted. As soon as a job was posted she had to apply. She is currently working the graveyard shift for that corporation. This evidence tells me the Claimant has made efforts to find a suitable job.

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

[39] I find the Claimant didn't set personal conditions that might have unduly limited her chances of going back to work.

[40] The Commission says the Claimant only wanted to work part-time when she was in school and was only available for full-time work during the summer when she was not in school.

[41] The Claimant says she has not set personal conditions because she does not have to attend classes at a set time. She was enrolled in five courses during the fall 2020 semester and the winter 2021 semester. In the each semester she had three courses which had pre-recorded lectures that she could watch on-line at any time. She would spend three hours watching the lectures and about 2 hours on study each week for these courses. She had two courses that did not have on-line lectures but required that she do certain activities and assignments. She would spend two hours a week total on these two courses. The Claimant testified that any group work she was involved in had the members work individually and then meet on weekends to finalize the work. This amounts to less than 10 hours a week spent in study at times of the Claimant's choosing. As a result, I find that the Claimant's studies are not a personal restriction that might limit her return to the labour market.

[42] The Claimant testified that she was working part-time in retail. She continued to work in that job while she attended school. The Claimant testified that during the Christmas break she worked full-time hours in the retail job. She still considered herself

to be a part-time employee. I find working full-time in retail job over the Christmas season is not a personal restriction.

[43] The Claimant testified that while she was working part-time in retail she continued to look for other work, both part-time and full-time. She expected that if she was hired in another part-time job that she would be able to continue working at her existing part-time retail job. The two part-time jobs would give her enough hours to be full-time. If hired for a full-time job she said she would stop attending school. The Claimant only stopped working at the part-time retail job when she was hired for the full-time home care job.

[44] The Claimant testified that she has a car and is able to commute up to 90 minutes for a job. She said there are no times of the day, week or year that she cannot work. She has a high school education and one year of undergraduate studies. Her experience is in retail. She expects to be paid minimum wage based on her experience and education and the work she sought.

[45] In my opinion, this evidence tells me the Claimant has not set any personal conditions that might have limited her return to the labour market.

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

[46] Based on my findings on the three factors, I find that the Claimant has shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[47] The Claimant has shown that she was available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving EI benefits. So, the Claimant may be entitled to benefits.

[48] This means that the appeal is allowed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section