Citation: *EP v Canada Employment Insurance Commission*, 2021 SST 561

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	E. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (421279) dated April 26, 2021 (issued by Service Canada)

Tribunal member:	Solange Losier
Type of hearing:	Videoconference
Hearing date:	September 2, 2021
Hearing participant:	Appellant
Decision date:	September 7, 2021
File number:	GE-21-859

Decision

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

[2] The Claimant has shown that she was available for work while in school. This means that she is not disentitled from receiving Employment Insurance (EI) regular benefits.

[3] The Claimant was not able to work because of her injury. She would have been available for work if she had not been injured. Her injury was the only thing stopping her from being available for work. This means that the Claimant is not disentitled from receiving EI sickness benefits.

Overview

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits because she was not available for work while attending school.

[5] The Commission also decided that she was disentitled to EI sickness benefits because she has not proven if it were not for the illness, she would have been available for work. This resulted in an overpayment.

[6] The Claimant disagrees and states that she is looking employment. She also has a history of working and attending school. She also says that had she not been injured, she would have been able to work.

[7] I must decide whether the Claimant has proven that she was “available for work” and “otherwise available for work”.

Issues

Availability

[8] Was the Claimant available for work while in school, specifically the period from October 12, 2020 to December 18, 2020 + January 12, 2021 to February 16, 2021?

Otherwise available

[9] Was the Claimant otherwise available for work while she was injured, specifically for the period from March 1, 2020?

Analysis

Issue 1: Availability

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

[11] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[12] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[13] The Commission decided that the Claimant was disentitled from receiving benefits because she was not available for work based on these two sections of the law.

[14] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[5] This is called "presumption of non-availability." It means we can suppose that students are not available for work when the evidence shows that they are in school full-time.

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[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[15] I will start by looking at whether I can presume that the Claimant was not available for work. Then, I will look at whether she was available based on the two sections of the law on availability.

Presuming full-time students are not available for work

[16] The presumption that students are not available for work applies only to full-time students.

– The Claimant is a full-time student

[17] The Claimant is a full-time student. The presumption that full-time students are not available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[18] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working full-time while also in school.[6] Or, she can show that there are exceptional circumstances in her case.[7]

[19] I find that the Claimant has rebutted the presumption that she is unavailable for work. She has a history of working at Shopper's Drug Mart while attending school from September 2012 to April 2020. She worked a minimum of 28 hours per week or more while completing several college diplomas and a certificate program. She notes that Shopper's Drug Mart considers employees full-time when they work a minimum of 28 hours.

[20] More recently, she has worked at Reitman's while attending school. However, mall hours were limited because of the pandemic even though she was available to work more hours.

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

– **The presumption is rebutted**

[21] I am satisfied that the Claimant has rebutted the presumption in this case because she has a history of working full-time hours while in school.

[22] Rebutting the presumption means only that the Claimant is not presumed to be unavailable. I still have to look at the two sections of the law that apply in this case and decide whether the Claimant is actually available.

Reasonable and customary efforts to find a job

[23] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job were reasonable and customary.[8]

[24] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[9] I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[25] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:[10]

- assessing employment opportunities
- preparing a résumé 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
- applying for jobs
- attending interviews

[8] See section 50(8) of the Act.
[9] See section 9.001 of the Regulations.
[10] See section 9.001 of the Regulations.

[26] I find that the Claimant has proven she made reasonable and customary efforts to find employment for the following reasons.

[27] The Claimant's efforts were sustained and she applied for several jobs during the periods she was disentitled.

[28] A copy of her job applications was included as part of the file (GD9-2 to GD9-3). She updated her resume and cover letter for each job she applied to. She used online job tools such as "indeed", or company profiles to apply for jobs. She applied for retail work because it was suitable work given her experience.

[29] The Claimant had an interview with Reitman's on October 29, 2021 and accepted the job on November 1, 2021. She had another interview for an opportunity in January 2021, but it was self-employment and she was not qualified for the role.

[30] Therefore, I find that the Claimant has proven that her efforts to find a job were reasonable and customary. Her efforts were varied and directed at finding suitable employment.

Capable of and available for work

[31] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[11] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[12]

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

b) She has made efforts to find a suitable job.

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

[11] See section 18(1)(a) of the Act.
[12] 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.

[32] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[13]

– **Wanting to go back to work**

[33] I find that the Claimant has shown that she wanted to go back to work as soon as a suitable job was available. She testified that she is a student, she has bills to pay and needed to work.

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

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

[35] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.[14]

[36] The Claimant's efforts to find a new job included applying for jobs, interviewing, assessing opportunities, registering for job search tools such as indeed, preparing a cover letter and resume.

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

[37] I find that the Claimant's school was not a personal condition that might have unduly limited her chances of going back to work because she has a lengthy history of working irregular hours (afternoons, evenings and weekends) on a full-time basis while attending school. I also accept the Claimant's argument that 30 hours per week is commonly accepted as full-time hours (GD16-10).

[38] I note that the Claimant's hours at school were limited to a few hours in the morning during the week. All of her classes were virtual. I do not find that school unduly limited her chance of going back to work, but rather it was the pandemic that made it more difficult for retail workers with ongoing closures, limited hours and capacity. This

[13] 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.
[14] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

was not a personal condition that she imposed because she remained available for work.

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

[39] 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.

Issue 2: Otherwise available

[40] It is clear that, if you are sick or injured, you are not available for work. The law for EI sickness benefits reflects this. However, the law says that, if you are asking for sickness benefits, you must **otherwise** be available for work. This means that the Claimant has to prove that her injury is the only reason why she was available for work.[15]

[41] The Commission disentitled the Claimant to EI sickness benefits from March 1, 2020 because they decided she was not otherwise available for work.

[42] The Claimant broke her hand. She applied for EI sickness benefits from March 3, 2021. She had surgery on March 22, 2021. The cast was on for around 4 weeks and she was unable to work during this time. She acknowledges that she was still able to attend virtual classes, but had a special accommodation at school because she was able to do verbal tests or assignments.

[43] I find that the Claimant was otherwise available for work from March 1, 2021. The Claimant could not work in her retail job with a broken hand. If the Claimant had not broken her hand, she would have continued to work while attending school. It was her injury that stopped her from working. When she recovered, she was able to return to work.

[15] See section 18(1)(b) of the EI Act.

Conclusion

[44] The Claimant has shown that she was available for work and otherwise available within the meaning of the law. Because of this, I find that the Claimant is not disentitled from receiving EI benefits. So, the Claimant may be entitled to EI benefits.

[45] This means that the appeal is allowed.

Solange Losier
Member, General Division – Employment Insurance Section