[TRANSLATION]

Citation: *AP v Canada Employment Insurance Commission*, 2021 SST 690

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. P.
Representative:	Pierre Céré
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (420195) dated April 20, 2021 (issued by Service Canada)

Tribunal member:	Charline Bourque
Type of hearing:	Teleconference
Hearing date:	November 10, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	November 10, 2021
File number:	GE-21-1804

Decision

[1] The appeal is allowed.

[2] The Claimant has shown that she was available for work while in school. This means that she is entitled to receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits as of September 28, 2020, since she wasn't available for work because of her training.

[4] I have to 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 she was in school full-time.

[6] The Claimant disagrees and says that she was available for full-time work. She explains that she stopped working because of the closure of non-essential businesses, even though she was available for full-time work. She explains that she has combined work and study for several years. She also adds that her classes were distance learning and recorded, which allowed her to take them whenever she wanted.

Matter I have to consider first

Back from the Appeal Division

[7] The Claimant was heard before the Tribunal's General Division, and a decision was made on June 9, 2021. The Claimant appealed that decision to the Tribunal's Appeal Division, and a decision was made on September 21, 2021. The decision included returning the file to the General Division for reconsideration.

[8] So, the issue before me is whether the Claimant was available as of September 28, 2020. I held a new hearing on this matter on November 10, 2021.

Issue

[9] Was the Claimant available for work as of September 28, 2020, while in school?

Analysis

[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* give criteria that help explain what "reasonable and customary efforts" mean.[2]

[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]

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

[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.

Capable of and available for work

[14] I have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[5] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[6]

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.

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

[15] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[7]

– **Wanting to go back to work**

[16] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available.

[17] The Commission is of the view that, based on her repeated statements about working between 25 and 29 hours per week for her last employer and about not wanting to work full-time because she was prioritizing her studies, and her statement that she would finish her course instead of accepting a full-time job that conflicted with it, the Claimant hasn't shown that her first intention was to quickly return to the job market to work in a full-time job.

[18] I disagree with that conclusion. The Claimant lost her job because of the government-imposed closure of non-essential businesses due to the pandemic. She mentioned working between 25 and 29 hours per week, but she says she was available

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[5] See section 18(1)(a) of the Act.
[6] 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.
[7] 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.

full-time for her employer. The Claimant explains that her classes were distance learning in addition to being recorded. So, she could take them whenever she wanted; the university has confirmed this.[8] She explains that she adjusted her course schedule based on her work schedules. So, as soon as the term started, she could change her course schedule based on the employer's needs. In addition, she indicates that she would not have refused to work because of a class, since she could take it whenever she wanted.

[19] I find that, even though the Claimant chose to take full-time training, this situation didn't affect her desire to return to the job market as soon as a suitable job was available.

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

[20] The Claimant made enough effort to find a suitable job.

[21] To be able to get EI benefits, a claimant is responsible for actively looking for a suitable job.[9]

[22] 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. According to these criteria, the efforts must be sustained, directed toward finding a suitable job, and compatible with nine specific activities that can be used to help claimants get a suitable job.

[23] Some examples of those activities are assessing employment opportunities, registering for job search tools, contacting employers who may be hiring, and applying for jobs.[10] In addition, other criteria are used to determine what constitutes a suitable job, such as the claimant's health and physical capacity to work.[11]

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[8] See the correspondence with the university (AD2-5/6).
[9] See *Cornelissen-O'Neil*, A-652-93; and *De Lamirande*, 2004 FCA 311.
[10] See section 9.001 of the Regulations.
[11] See section 9.002 of the Regulations.

[24] The Commission is of the view that the Claimant clearly said she wasn't looking for a full-time job because she was prioritizing her studies. It its opinion, the Claimant made [a] conflicting statement when she requested a reconsideration, saying she had always made efforts to find a job since the start of her claim for benefits and that she could watch her classes any time because they were recorded, when this was never mentioned before. The Commission finds that the first statements the Claimant made before the March 12, 2021, decision are more credible than the ones obtained once the initial decision had been made and the overpayment had been created.[12]

[25] The Commission adds that the Claimant has shown that she applied to six potential employers during her non-referred training course, so she hasn't shown an active job search. Concerning her meeting with Desjardins, the Claimant hasn't shown that she applied to the company, whether before or after December 7, 2020. Lastly, the Commission finds that working 32 hours outside her class hours the week of May 3 to 7, 2021, during exams isn't proof of availability. But her work schedule shows her working 35 hours per week as of May 10, 2021.

[26] Based on the characteristics set out in the Act to describe what constitutes a job that isn't suitable, I am of the view that a suitable job is, among other things, a job that is in the claimant's usual occupation (for example, same nature, earnings, and working conditions).[13]

[27] With this in mind, I am of the view that the Claimant made efforts to find a suitable job. I find that the Claimant searched for a job outside her usual field of work. I think that the situation created by the closure of non-essential businesses should not be ignored, especially since the Claimant's usual employment was in food service, which was hard hit by the closures.

[28] I also consider that the Act doesn't specifically require a claimant to be available for full-time work. The Claimant says she was available full-time for her employer. She

[12] See the Commission's arguments (GD4).
[13] See section 6 of the Act.

was looking for a job. She adds that she has started a full-time job despite the fact that she has continued studying full-time, in person, since the start of the fall 2021 term.[14]

[29] Unlike the Commission, I am of the view that the Claimant's job search efforts show that she was looking for work at a time when opportunities were limited.[15]

[30] I find that the Claimant's efforts were enough to meet the requirements of this second factor.

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

[31] The Claimant didn't set personal conditions that might have unduly limited her chances of going back to work.

[32] The Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[16] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school full-time.

[33] A claimant who attends a course, program of instruction, or training to which the claimant isn't referred under [*sic*] isn't entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that, on that day, they were capable of and available for work.[17]

[34] The Claimant agrees that she is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant is in school full-time. This means there is a presumption that the Claimant isn't available for work.

[14] See the information letter from the university (RGD4-7) and the letter from the employer (RGD4-8).
[15] See the Claimant's job search efforts (GD6).
[16] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[17] See section 153.161(1) of the Act.

[35] But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[36] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working while also in school.[18] Or, she can show that there are exceptional circumstances in her case.[19]

[37] Four principles related to studies have to be considered to be able to rebut the presumption of non-availability. They 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, and the existence of exceptional circumstances that would enable the claimant to work while taking their course.[20]

[38] The Commission finds that these facts show that the Claimant's first intention was to prioritize her non-referred training course, not to accept a full-time job to quickly return to the job market as the Act expects. In addition, the Commission points out that, given that the Claimant clearly mentioned being unwilling to work full-time or to drop her non-referred training course, there was no reason to consider a reasonable interval to make job search efforts, since we are dealing with an obvious state of unavailability; as a result, an indefinite disentitlement was imposed as of September 28, 2020.

[39] The Claimant says she was available for full-time work. She indicates that she has always worked while also in school. She adds that the fact that classes were distance learning and recorded meant that she could take them whenever she wanted. So, she could work even if she had a class and make it up when she was able to. The

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[18] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[19] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[20] 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.

Claimant was also used to working at irregular hours. She could change her course schedule at the start of the season to tailor it to her work schedules.

[40] I don't accept the Commission's argument that the Claimant hasn't proven her availability for work because she was restricting her availability for a job outside her class hours, especially since these classes were distance learning and recorded. The Claimant works at irregular hours. In addition, the Act doesn't say anything about working only at "regular," daytime hours. This would have the effect of excluding many types of jobs that offer hours based on irregular schedules.

[41] So, I am of the view that the Claimant has shown exceptional circumstances rebutting the presumption that she was unavailable for work. I find that the Claimant didn't set personal conditions that limited her chances of returning to the job market.

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

[42] 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 as of September 28, 2020.

Conclusion

[43] The Claimant has shown that she was available for work within the meaning of the law. Because of this, I find that the Claimant is entitled to receive benefits.

[44] This means that the appeal is allowed.

Charline Bourque

Member, General Division – Employment Insurance Section