Citation: *KP v Canada Employment Insurance Commission*, 2021 SST 736

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (426758) dated June 23, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	August 24, 2021
Hearing participant:	Appellant
Decision date:	August 31, 2021
File number:	GE-21-1265

Decision

[1] The appeal is allowed in part.

[2] The Claimant has shown that she was available for work within the meaning of the law from December 20, 2020 to May 30, 2021. Because of this, I find that the Claimant isn't disentitled from receiving Employment Insurance (EI) benefits from December 20, 2020 to May 30, 2021. So, the Claimant may be entitled to benefits.

[3] The Claimant hasn't shown that she was available for work within the meaning of the law from May 31, 2021. Because of this, I find that the Claimant can't receive EI benefits from May 31, 2021.

Overview

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from December 21, 2020 because 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.

[5] 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.

[6] The Commission says that the Claimant wasn't available because she was taking a training course on her own initiative and had not proven her availability for work. This decision meant the Claimant received EI benefits that she was not entitled to receive. As a result, the Claimant has an overpayment of EI benefits totalling $3,807

[7] The Claimant disagrees and states that she was not told that she had to be available for full-time work. She was working part-time while studying. She stopped working when a lockdown was put in place due to COVID-19. She returned to work once the lockdown was lifted. The Claimant said the Commission's delays in making

decisions on her claim meant that she was unable to apply for other benefits. This has cost her financially.

Issue

[8] Was the Claimant available for work from December 21, 2020?

Analysis

[9] 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.

[10] 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 that has to meet the criteria of both sections to get benefits.

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

[12] First, the EI Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job. 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.

[13] 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. 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. I will look at those factors below.

[14] 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. It also submitted that it "does no (sic) contest that the Claimant performed reasonable and customary efforts to look for work because there is no evidence; however, when the

aforementioned desire was not demonstrated, her job search was moot in the determination of availability."

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

[16] 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.

[17] 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. I can see no evidence that the Commission asked the Claimant about her job search activities. The appeal file shows that she was first asked about the course she was taking on April 16, 2021. She was not asked about her job search. In fact, the Commission's initial decision disentitled the Claimant because she was taking a training course on her own initiative and had not proven her availability for work.

[18] The Commission did not ask the Claimant about her job search activities during the reconsideration process. The Commission's reconsideration decision stated that it maintained its initial decision. 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.

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

[20] As the Claimant was a student during this period I have to consider the presumption that claimants who are attending school full time are unavailable for work.[1] I am going to start by looking at whether this presumption applies to the Claimant. Then, I will look at the law on availability.

Presumption that full-time students are not available for work

[21] I find the Claimant has rebutted in part the presumption that as a full-time student she was not available for work.

[22] 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[2] or by showing exceptional circumstances.[3]

[23] The Claimant testified that she was required to virtually attend two classes in the fall 2020 semester. She attended one class from 10:00 a.m. to 1:30 p.m. one day a week. The other class requiring her virtual attendance was from 5:00 p.m. to 7:00 p.m. one day a week. In the winter 2021 semester she was required to virtually attend one class from 8:00 a.m. to 10:00 a.m. one day a week and one class from Noon to 2:00 p.m. one day a week. The remaining four classes in her program in each semester were pre-recorded. She could choose when to watch those classes.

[24] The Claimant testified that the winter semester ended on April 23, 2021 and she started an unpaid internship on May 31, 2021. The internship requires that she work 40 hours a week during the days Monday to Friday. The unpaid internship was converted to a paid internship on July 5, 2021.

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

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[1] This presumption is set out in *Canada (Attorney General) v. Gagnon*, 2005 FCA 321. This is how I refer to the decisions of the court that have principles I must apply to the circumstances of this appeal.
[2] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[3] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[26] 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.

[27] I find the Claimant has rebutted the presumption that she is not available for work because she is a full-time student from December 21, 2020 to May 30, 2021. She has a history of working while enrolled in full-time studies. She spent no more than three and a half hours a week virtually attending class, and approximately six hours a week reviewing pre-recorded lectures, studying and working on assignments. She was required to attend one course three and one-half hours once a week in the fall 2020 semester and one course two hours once a week in the winter 2020 semester during day time hours. She testified that she worked in retail full-time during the summer 2020 break. When she returned to school in the fall 2020 semester and the winter 2021 semester she worked in the same retail position part-time between 10 and 15 hours a week. She would work from three to six hours during the day from Monday to Friday and would also work on weekends. The Claimant said that she was able to work once the winter semester finished. However, her work stopped when a lock down was imposed in response to the COVID-19 pandemic. Considering the evidence that the Claimant continued to work the same hours after December 21, 2020, as she worked before that date, I find the Claimant has rebutted the presumption that she was not available for work due to her full-time studies from December 21, 2020 to May 30, 2021.

[28] I find that from May 31, 2021, onward the Claimant has not rebutted the presumption that she was not available for work due to her full-time studies. The Claimant was required to complete an internship that required her to work 40 hours a week from Monday to Friday. She would not be able to work in her retail position as she had before, particularly during day time hours. This means that the Claimant has not rebutted the presumption that she was not available for work due to her full-time studies from May 31, 2021.

[29] The Claimant has rebutted in part the presumption that she is unavailable for work because she is a full time student. The Federal Court of Appeal has not yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I must still look at the sections of the law that apply in this appeal to decide if the Claimant is, in fact available, even though I have already found the Claimant is presumed to be available.

Capable of and available for work

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

[31] 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:[4]

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

[32] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[5]

– Wanting to go back to work

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

[34] The Claimant has worked at her retail position since July 2020. She worked full-time until she started her studies. She continued to work between 10 and 15 hours a

[4] 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.
[5] 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.

week while she was studying. The Claimant said that she experienced breaks in her employment due to lockdowns which closed the store. She kept in touch with her supervisor to make sure that she would be working once the lockdowns ended. She did return to work after each lockdown ended. The Claimant said that she works to pay for her tuition and living expenses like groceries and transit. This evidence tells me the Claimant has shown a desire to work.

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

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

[36] There is a list of job search activities to look at when deciding availability under a different section of the law.[6] 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.[7]

[37] There are nine job search activities in the list of 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.[8]

[38] Case law has said that when a claimant has good cause to believe that she will be recalled to work that she is entitled to a reasonable period to regard the promise of recall to work as the most probable means of obtaining employment.[9]

[39] The Claimant testified that she started working at the retail store in July 2020. Once she resumed her studies she started to work part-time. She would work 10 to 15 hours a week during days and evenings Monday to Friday and on weekends. The Claimant said there were lockdowns that resulted in her not working. She would keep in

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[6] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[7] 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.
[8] Section 9.001 of the EI Regulations.
[9] See Canada Umpire Benefits (CUBs) 14685, 14554, and 21160. Although I am not bound by CUBs, I am guided by the principles contained in these CUBs in reaching my decision.

touch with her supervisor throughout the lockdown to make sure she would have work when the lockdown ended. The Claimant has a resume. She has not posted her resume publicly. While she was studying she looked weekly on the Indeed website and the Job Bank for work. The Claimant testified that she applied for EI benefits because the lockdown resulted in the store where she worked being closed. She did return to work at the store once each lockdown ended. I find that the Claimant's best chance for suitable employment, for a reasonable period of 16 weeks, was to continue to be available for the retail store position once the lockdowns ended and she could return to work. In my opinion, the Claimant's job search efforts taken together with her anticipated return to her retail position once the lockdowns ended, demonstrates that she made efforts to find a suitable job.

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

[40] The Claimant did not set personal conditions that might have unduly limited her chances of going back to work from December 21, 2020 to May 30, 2021.

[41] The Claimant did set personal conditions that might have unduly limited her chances of going back to work from May 31, 2021.

[42] The Claimant has continued to live in the same city as when she was last employed. She has access to transportation to go to work and has a driver's license. She looked for work in her city that was consistent with her qualifications as a retail assistant. She has an undergraduate degree and is completing a post graduate certificate. She expects to earn minimum wage and is willing to accept a job that might require on the job training. There were no jobs that she could not do due to moral convictions or religious beliefs.

[43] The Commission says that the Claimant's school is a personal condition that unduly limited her chances of returning to work.

[44] The Claimant testified that she was required to virtually attend two classes in the winter 2021 semester. She was required to virtually attend one class from 8:00 a.m. to 10:00 a.m. one day a week and one class from Noon to 2:00 p.m. one day a week. The

remaining four classes in her program in the winter 2021 semester were pre-recorded. She could choose when to watch those classes.

[45] The Claimant said she would not be able to work while she was virtually attending classes. However, she worked part-time in the fall 2020 semester and continued to work part-time in the winter 2021 semester. She worked 10 to 15 hours a week in each semester and returned to that work once the lockdowns were lifted. She continued to work consistent with her past work history. This evidence tells me that the Claimant's studies from December 21, 2020 to May 30, 2020 did not limit her chances of going back to work from December 21, 2020 to May 30, 2021.

[46] The Claimant testified that her unpaid internship started on May 31, 2021. She was required to work 40 hours a week Monday to Friday. The unpaid internship was converted to a paid internship on July 5, 2021. She had to complete the internship to graduate. The Claimant has worked on weekends while she was completing the internship. This evidence tells me that the Claimant's internship interferes with her ability to return to work. The requirement that she work during the day from Monday to Friday means that she cannot work during days elsewhere or as she previously did at the retail store during those times. As a result, I find that the Claimant has set a personal condition from May 31, 2021 onward that might limit her chances of returning to work.

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

[47] Based on my findings on the three factors, I find that the Claimant has shown that she was capable of and available for work from December 21, 2020 to May 30, 2021.

[48] Based on my findings on the three factors, I find that the Claimant has not shown that she was capable of and available for work from May 31, 2021.

Conclusion

[49] The Claimant has shown that she available for work within the meaning of the law from December 21, 2020 to May 30, 2021. Because of this, I find that the Claimant isn't disentitled from receiving EI benefits from December 21, 2020 to May 30, 2021. So, the Claimant may be entitled to benefits.

[50] The Claimant hasn't shown that she was available for work within the meaning of the law from May 31, 2021. Because of this, I find that the Claimant can't receive EI benefits from May 31, 2021.

[51] This means that the appeal is allowed in part.

Raelene R. Thomas

Member, General Division – Employment Insurance Section