Citation: *JL v Canada Employment Insurance Commission*, 2021 SST 593

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (428216) dated July 13, 2021 (issued by Service Canada)

Tribunal member:	Amanda Pezzutto
Type of hearing:	Teleconference
Hearing date:	September 9, 2021
Hearing participant:	Appellant
Decision date:	September 14, 2021
File number:	GE-21-1414

Decision

[1] J. L. is the Claimant. The Canada Employment Insurance Commission (Commission) made decisions about her Employment Insurance (EI) benefits. The Claimant is appealing these decisions to the Social Security Tribunal (Tribunal).

[2] I am allowing the Claimant's appeal. I find that she has proven that she was available for work, even though she is a full-time student. I also find that she was available for work after her semester ended.

Overview

[3] The Claimant is a university student. She also works at a restaurant. The Commission decided that she wasn't available for work because she was a full-time student. The Commission also decided that she wasn't available for work after her semester ended because she wasn't looking for work with other employers. The Commission disentitled her from receiving EI benefits from December 14, 2020 to April 28, 2021. The Commission also decided that she wasn't entitled to EI benefits as of May 31, 2021.

[4] The Commission argues that the Claimant wasn't available for work. The Commission says she was a full-time student and wasn't willing to leave or change her classes in favour of a job. The Commission says this means that she hasn't proven that she was available for work. The Commission also says the Claimant wasn't doing enough to find a job because she was only waiting for her employer to recall her to work.

[5] The Claimant disagrees. She agrees that she was only available for part-time work, but she says she was working and going to school without any problems until restaurants had to close because of the pandemic. She says that she only wants EI benefits during the times her employer shut down.

Issue

[6] Was the Claimant available for work while in school? And, was she available for work after her semester ended?

Analysis

[7] There are two different sections of the law that say you have to be available for work. The Commission says that it used both of these sections to refuse benefits.

[8] Also, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[1] This is called a "presumption of non-availability." It means we can presume, or suppose, that students aren't available for work when they are in school full-time.

[9] I will start by looking at whether I can presume that the Claimant wasn't 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 aren't available for work

[10] The presumption that students aren't available for work applies only to full-time students.

[11] The Commission says that the Claimant was a full-time student. The Claimant agrees that she was a full-time student. Nothing in the file makes me doubt this. I accept that the Claimant was a full-time student. This means that the presumption of non-availability applies to her.

[12] The Claimant can rebut the presumption. If she rebuts the presumption, then it won't apply to her.

[13] 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.[2] Or, she can show that there are exceptional circumstances in her case.[3]

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[1] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[2] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[3] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[14] The Claimant says the presumption shouldn't apply to her. She says she always worked while she was in school. She says she only wants EI benefits for the few weeks that her workplace had to close down.

[15] The Commission disagrees. The Commission says that the Claimant hasn't overcome the presumption because she wasn't willing to look for or accept full-time work. The Commission says the Claimant wouldn't leave school in favour of a job.

[16] I agree with the Claimant. I think she has shown that her situation was exceptional. I find that she has rebutted the presumption that full-time students aren't available for work.

[17] At the hearing, the Claimant said she had worked for her employer for four years. She said her hours varied during the past four years, but she usually worked around 30 hours a week.

[18] In September 2020, she started a full-time university program. Her employer adjusted her hours, but at the hearing, both the Claimant and her boss agreed that she still worked about 26 to 32 hours a week. They said the Claimant worked evenings and weekends. The Claimant's boss said this worked well for his schedule because they were usually only busy at dinnertime.

[19] The Claimant said that she didn't want to leave school in favour of work. She agreed that she wasn't looking for full-time work. Even so, she found a way to balance work and school. But when restaurants closed in her province during the pandemic, the Claimant had no work at all. She said she returned to work as soon as the restaurant reopened, but there was no work at all in the restaurant industry during the shutdowns.

[20] I think the Claimant has shown that her situation was exceptional. Even though she doesn't have a history of balancing full-time work and full-time school, I think her schedule shows that she worked nearly full-time while going to school full-time. I give this a lot of weight. I also give a lot of weight to the fact that the Claimant worked for this employer for four years with a similar, part-time work schedule.

[21] I also think the Covid-19 pandemic and the shutdowns in the restaurant industry are exceptional circumstances. I believe the Claimant when she says that she only stopped working when the restaurant was closed. I also believe that she returned to work as soon as the restaurant reopened.

[22] Given the Claimant's history of work and school, her history of working 30 hours a week with this employer, and given the unusual circumstances of the pandemic and restaurant closures, I find that the Claimant has proven that her circumstances were exceptional. I find that she has rebutted the presumption that full-time students aren't available for work.

[23] Rebutting the presumption means only that I don't have to presume that the Claimant is unavailable. I still have to look at the sections of the law that talk about availability for work. The Claimant still has to prove that she is available for work, just like anyone else who is asking for EI benefits.

Reasonable and customary efforts to find a job[4]

[24] 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.[5]

[25] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[6] I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job.

[26] I also have to consider the Claimant's efforts to find a job. The law describes several different job-search activities I should consider. Here are some of the activities described in the law:[7]

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[4] The Commission hasn't made many arguments about how it applied this section of the law. I acknowledge that there are AD decisions that question whether the GD should consider this part of the law, particularly when the Commission hasn't provided clear evidence or submissions on this question. In this particular case, however, I choose to include an analysis of this question. I will include it because the Commission says it considered this question when it disentitled the Claimant. I am also including it in this analysis for the sake of clarity because I am allowing the Claimant's appeal

[5] See section 50(8) of the Act.

[6] See section 9.001 of the Regulations.

[7] See section 9.001 of the Regulations.

- assessing employment opportunities
- networking
- contacting employers who may be hiring

[27] The Commission says that the Claimant didn't do enough to try to find a job. The Commission says the Claimant agreed that she didn't look for work. The Commission says it isn't enough to wait for her employer to recall her to work.

[28] The Claimant disagrees. She says that she was "100% guaranteed" to get her job back once the restaurant reopened. She says that there weren't any restaurants hiring during the shutdowns because the public health orders closed them all.

[29] I agree with the Claimant. I find that her job search efforts were reasonable and customary in her circumstances.

[30] At the hearing, the Claimant and her boss said that they had a group chat for all employees. Her boss said he updated it every time he got new information about restaurant closures and public health orders.

[31] The Claimant agreed that she stayed in touch with her employer during the shutdowns. She said she was always ready to return to work as soon as they needed her. She knew that restaurants would reopen so she didn't look for other kinds of work. She would have started looking for different kinds of work if she found out that the restaurant wasn't going to reopen at all.

[32] I give a lot of weight to the fact that the Claimant always returned to work right away after the restaurant reopened. Her boss said they had three shutdowns: in March 2020, December 2020, and May 2021. He said the Claimant always returned to work right away when they reopened. He said she even came into work to help with yard work during the first shutdown in March 2020.

[33] I understand that the Claimant didn't apply to other jobs while her workplace was closed. But I think the Claimant has proven that she was making efforts to return to work that were reasonable and customary in her particular circumstances. I find that she was

directing her efforts at finding a suitable job because she already had a job. She remained in contact with her employer and she was ready to return to work as soon as they reopened. The only reason she wasn't working was because of restaurant shutdowns. She started working again as soon as she was allowed to work.

[34] Sometimes handing out resumes and applying to lots of jobs is the most reasonable and customary way to find a suitable job. But sometimes your best chance of finding a suitable job is waiting for your usual job to recall you to work. In those cases, I think that waiting for a recall by remaining in contact with your employer is the most reasonable and customary way to find a suitable job.[8]

[35] I find that the Claimant's efforts to find a job were reasonable and customary, given her circumstances.

Capable of and available for work

[36] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[9] The Claimant has to show that she meets all three of these factors to prove her availability for work:

1. She must show that she wanted to get back to work as soon as someone offered her a suitable job. Her attitude and actions should show that she wanted to get back to work as soon as she could;

2. She must have made reasonable efforts to find a suitable job;

3. She shouldn't have personal conditions that could have prevented her from finding a job. If she did set any limits on her job search, she has to prove that the limits were reasonable.[10]

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[8] I rely on *Carpentier v Canada (Attorney General)*, A-474-97, and *Canada (Attorney General) v MacDonald*, A-672-93.
[9] See section 18(1)(a) of the Act.
[10] In in *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to

[37] I will look at each factors as I decide whether the Claimant has proven that she was available for work.

– **Wanting to go back to work**

[38] I believe that the Claimant always wanted to go back to work. She has proven that she meets this factor.

[39] The Claimant said she worked and went to school from September 2020 until now. She worked during her summer break, and she is still working now. She has always said that she only stopped working when her workplace closed under public health orders. She has always said that she returned to work as soon as the restaurant reopened.

[40] At the hearing, the Claimant's boss agreed. He said the Claimant was always one of the first employees to return to work.

[41] I believe the Claimant and her boss. I find that the Claimant's attitude and actions show that she wanted to work as soon as a suitable job was available.

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

[42] I find that the Claimant made enough efforts to find a suitable job, given her circumstances.

[43] I have already explained why I think the Claimant was making reasonable and customary efforts to find a job. For the same reasons, I think she has proven that she was making enough efforts to find a suitable job.

[44] I understand that the Claimant didn't apply for new jobs while her workplace was closed. But, I find that she remained in regular contact with her usual employer. She was ready to return to work as soon as the restaurant reopened. She actually did return

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the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

to work every time the restaurant reopened. She said she would have started looking for other kinds of work if she found out that her workplace wasn't going to reopen.

[45] In the Claimant's situation, I find that it was reasonable to wait for her usual employer to recall her to work. This was the most reasonable way for her to return to work as quickly as possible.[11]

[46] I find that the Claimant's efforts to find a job were reasonable, in her situation. I find that she has met the requirements of this factor.

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

[47] The Claimant had personal conditions because she was in school. She limited herself to part-time work with her usual employer. But I find that her personal conditions didn't unduly limit her chances of returning to work.

[48] The Commission argues that the Claimant has too many personal conditions. The Commission says her school schedule and the fact that she only wanted to work part-time with her usual employer unreasonably restricted her chances of returning to work.

[49] The Claimant disagrees. She says that she balanced work and school in a way that let her do both. She only stopped working because of pandemic restaurant closures. She says she limited herself to part-time work with her usual employer because she always knew she would return to work when the restaurant reopened.

[50] At the hearing, the Claimant described her school schedule. She said she had classes Monday through Friday, during the day. She had to attend scheduled classes and she couldn't change her schedule or miss lectures. But she said she could work at the same time because she worked evenings and weekends. Her boss agreed and said that they were most busy during these times. They both said the Claimant worked between 26 and 32 hours a week even while she was a full-time student.

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[11] Again, I rely on *Carpentier v Canada (Attorney General)*, A-474-97, and *Canada (Attorney General) v MacDonald*, A-672-93.

[51] I have already explained why I think the Claimant has overcome the presumption that full-time students aren't available for work. For the same reasons, I think she has proven that her school schedule didn't limit her chances of returning to work.

[52] I give a lot of weight to the Claimant's history of working and going to school. The Claimant successfully balanced work and school, and she only stopped working when the restaurant closed under public health orders. I find that the Claimant has proven that her school schedule didn't unduly limit her chances of returning to work.

[53] The Claimant agreed that she limited herself to work with her usual employer. In the Claimant's situation, I find that this wasn't a condition that unduly limited her chances of returning to work.

[54] The Claimant's boss said that each shutdown was relatively short (no more than six weeks) and affected every restaurant in the area. Every time her employer reopened, the Claimant returned to work right away. I think this shows that it was reasonable for her to wait for her employer to recall her to work. This didn't put unreasonable limits on her chances of returning to work, because after each shutdown, she did return to work.

[55] The Claimant had a long history of working for her employer. She worked around 30 hours a week for most of her time with this employer. She always expected that the shutdown would end and she would return to work. And then, each time this is what happened.

[56] I think it was reasonable for the Claimant to limit herself to part-time work with her usual employer during the restaurant shutdowns. I don't think this unduly limited her chances of returning to work. In fact, it was probably the fastest way for her to start working again, given her circumstances.

[57] I find that the Claimant has met the requirements of this factor. Even though she put some limits on her job search, I find that these limits were reasonable.

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

[58] I find that the Claimant wanted to return to work. She made job search efforts that were reasonable, in her situation. She had some personal conditions because of her school schedule and because she wanted to work with her usual employer. But I find that these were reasonable limits for her circumstances.

[59] When I look at all three factors together, I find that the Claimant has proven that she was capable of and available for work and unable to find a suitable job. I find that she has proven her availability for the time she was in school (December 14, 2020 to April 28, 2021). I also find that she has proven her availability as of May 31, 2021, during the May and June 2021 shutdown.

Conclusion

[60] I am allowing the Claimant's appeal. I find that she has proven her availability for work.

Amanda Pezzutto

Member, General Division – Employment Insurance Section