Citation: *DG v Canada Employment Insurance Commission*, 2021 SST 735

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. G.
Representative:	Nora MacIntosh
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (425713) dated June 21, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	August 20, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	August 27, 2021
File number:	GE-21-1229

Decision

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

[2] The Claimant has shown that he was available for work while in university. This means that he 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 5, 2020, to April 17, 2021 because he 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 have to decide whether the Claimant has proven that he was available for work. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

[5] The Commission says that the Claimant wasn't available because his study permit restricted him from working full-time while attending university.

[6] The Claimant disagrees and says that his study permit does not restrict him from working full-time. The study permit states that he cannot work more than twenty hours a week off campus. He says he can work any amount of hours on campus. The Claimant says that he has worked full-time hours in the past under study permits with the same conditions and he was available for work from October 5, 2020, to April 17, 2021.

Issue

[7] Was the Claimant available for work while attending university full-time?

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 that 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 *Employment Insurance Act* (EI Act). That is section 18(1)(a). My reasons for this finding follow.

[10] 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.

[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. 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.

[12] The Commission submitted that the Claimant was disentitled from receiving benefits because he 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 he 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.

[14] If a claimant does not comply with a section 50(8) request to prove that he has made reasonable and customary efforts, then he may be disentitled under section 50(1) of the EI Act. Section 50(1) says that a claimant is disentitled to receive benefits until he 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 his failure to comply with its request for his job search activities. I can see no evidence that the Commission asked the Claimant about his job search activities. The appeal file shows that he was asked about completing three training questionnaires and he offered to provide a list of his past jobs and where he had looked for work. In fact, the Commission's initial decision disentitled the Claimant because he was taking a training course on his own initiative and had not proven his availability for work.

[16] The Commission did not ask the Claimant about his job search activities during the reconsideration process. Its focus was on the Claimant's study permit and the conditions of the permit. The Commission's reconsideration decision stated that it maintained its initial decision and added that the Claimant's study permit restricted him from working full time while attending university. 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 him to be available for work and entitled to EI benefits.

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

[18] 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

[19] I find the Claimant has rebutted the presumption that as a full-time student he was not available for work.

[20] 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

[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.

that full-time students are unavailable for work by showing that he has a history of working full-time while also studying[2] or by showing exceptional circumstances.[3]

[21] The Claimant was enrolled in three courses in the fall 2020 and winter 2021 semesters. His university considered him to be a full-time student. He testified that he was not required to attend classes in person or virtually at set times. All three courses had pre-recorded lectures that he could listen to at times of his choosing. He said that he spent five to nine hours a week on his studies including time spent to view the pre-recorded lectures.

[22] I asked the Claimant why he told a Service Canada agent that he would not give up his studies if he was offered full-time employment. The Claimant said that there would be no need to give up his studies because of the way the courses were offered. He could schedule his viewing of the lectures at times that were convenient to him when and when he would not be working.

[23] The Claimant submitted to the Tribunal a list of the jobs that he has held and the hours that he has worked while enrolled in full-time studies. The information clearly shows that the Claimant has a history of working while studying full-time. In the fall 2020 semester he continued to work part-time. During the winter 2021 semester he worked from 15 to 30 hours a week.

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

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

[26] I find the Claimant has rebutted the presumption that he is not available for work because he is a full-time student. He has a history of working while enrolled in full-time

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

studies. He was not required to attend classes, in person or virtually, at a set time. He spent no more than nine hours a week reviewing pre-recorded lectures, studying and working on assignments. He was able to choose when to spend that time. He worked part-time throughout both semesters. Considering this evidence, I find the Claimant has rebutted the presumption that he is not available for work due to his full-time studies.

[27] The Claimant has rebutted the presumption that he is unavailable for work because he 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

[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: [4]

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

b) he made efforts to find a suitable job.

c) he did not set personal conditions that might have unduly (in other words, overly) limited his 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.[5]

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[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.

- **Wanting to go back to work**

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

[32] The Claimant has worked at a variety of jobs while he has been enrolled in university. He said that he wants to work to get experience for future jobs after he graduated. He also said that he needs to work for financial reasons. He is financing his education with some help from his parents. He needs to work to pay for a place to live and his groceries. The Claimant was employed part-time during the fall 2020 and winter 2021 semesters. This evidence tells me the Claimant has shown a desire to work.

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

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

[34] 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]

[35] 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]

[36] The Claimant testified that he worked as a research assistant and marker for the same professor since September 2017. He has worked 15 hours a week as a research assistant and 2.5 hours a week as a marker in the fall and winter semesters. During the

[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.

summer semesters he has worked 37.5 hours a week as a research assistant. There was no marking work during those semesters.

[37] The Claimant testified that once he started working as a research assistant and marker for the same professor he did not need to re-apply to continue working with the professor in those positions each semester. The job was his. Typically the research assistant job would start in October 2020. He would be continuing the research work that he had been doing in August 2020. The Claimant checked with the professor to see when the research assistant position would be starting. In mid-October 2020 he was told it was due to start in November 2020. In November the Claimant found out that the research assistant job was delayed until January 2021. The university required that it be advertised. He applied in December 2020 and got the job.

[38] While he was waiting for the research assistant job to start the Claimant continued to work part-time as a marker. The Claimant testified that he participated in job fairs from prospective employers in his field of study. The Claimant applied for jobs at some of the job fairs. He said that he participated in a Study and Stay program that helps students find jobs, write a resume, and learn other job skills. The Claimant has a resume that is posted on job search web sites. He looked for work online, including on his university's job advertising website. The Claimant testified he spoke to friends and relatives about available work in their cities and at their workplaces.

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

[40] The work history provided by the Claimant shows that he worked as a research assistant in the fall and winter semesters from 2017 to 2020. In the fall 2017, 2018 and 2019 semesters the work started in the last week of September or first week of October. This evidence supports the Claimant's testimony that he would be returning to work as a research assistant with the same professor he had been working with for the three

[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.

previous years. The Claimant testified that he did not have to apply for the job as it was his once it was set to restart. In my opinion, it was reasonable for the Claimant to believe that he would be recalled to work in October.

[41] I find that the Claimant's best chance for suitable employment, for a reasonable period of approximately 16 weeks, was to continue to work part-time as a marker and be available for the research assistant position once that position became available. The Claimant continued to look for work while he was waiting for the research position to become available. He did this by attending job fairs, applying for jobs with those employers, posting his resume online, looking at online job sites for work, and networking with relatives and friends for work. I find that the Claimant's job search activities, taken together with his anticipated return to the research assistant position, demonstrates that he made efforts to find a suitable job.

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

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

[43] The Commission says that the Claimant's study permit limited him to 20 hours of work a week. It says that it reviewed the regulations[10] governing the Claimant's study permit and the regulations do not mention anything about working more than 20 hours while attending school. The Commission says the regulations say that full-time work is only permitted during a regularly scheduled break between academic sessions. It says that even if the Claimant was able to work in excess of 20 hours a week on campus, it would be same as any other person who is restricted to working for only one employer and that does not meet the availability requirements of the EI Act. The Commission submits that as the Claimant has a study permit that does not allow him to work more

[10] The Claimant's study permit has three conditions. 1) Must leave Canada by a specific date 2) Not valid for employment in businesses related to the sex trade such as strip clubs, massage parlors or escort services. 3) May accept employment on or off campus if meeting eligibility criteria as per R186(F), (V) or (W) Must cease working if no longer meeting these criteria. "R" stands for Immigration and Refugee Protection Regulations (SOR/2002-227)

than 20 hours a week while in school he is unable to prove that he is available for work as per the requirements of the EI Act.

[44] The Claimant's Representative submitted that the regulations governing the Claimant's study permit contain three conditions but those conditions operate separately rather than together. The Claimant's Representative provided a Government of Canada website titled "Study permits: Off-campus work." The web site states, "This section contains policy, procedures, and guidance used by IRCC staff. It is posted on the department's website as a courtesy to stakeholders."[11]

[45] The website says eligible students can work off campus without a work permit (R186(v)). The eligibility requirements are holding a valid study permit, enrollment as a full-time student in a post-secondary program, which is at least six months long and leads to a degree.[12] The website says students eligible to work under paragraph R186(v) can work up to 20 hours a week during academic sessions and work full-time during regularly scheduled academic breaks.[13] The website says, "There are no restrictions on the number of hours students can work on campus [as per R186(f)] in addition to working off campus, provided they meet the applicable eligibility requirements."[14]

[46] The Claimant's Representative submitted that nowhere in the Regulations is there a restriction on the number of hours the Claimant may work on campus. She said that the second restriction on the study permit, R186(v), relates to working off-campus. The Claimant's Representative said that the Claimant is not limited to working for one employer. She noted that the website provides that an employer on campus includes the institution, a faculty, a student organization, self-employment, a private business or a private contractor providing services to the institution on campus.[15] The Claimant's

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[11] IRCC stands for Immigration, Refugees and Citizenship Canada. This information is on page GD6-6.
[12] This information is on page GD6-7. I have paraphrased the information on the website to reflect the Claimant's circumstances.
[13] This information is on page GD6-10
[14] This information is on pages GD6-10 and GD6-11
[15] This information is on page GD6-17

Representative said that the Claimant's resume shows that he has worked for more than one employer located on the campus and has worked off campus.

[47] Regulation 186 says, "A foreign national may work in Canada without a work permit

> (f) if they are a full-time student, on the campus of the university or college at which they are a full-time student, for the period for which they hold a study permit at that university or college;
>
> (v) if they are the holder of a study permit and
>
> > (i) they are a full-time student enrolled at a designated learning institution as defined in section 211.1,
> >
> > (ii) the program in which they are enrolled is a post-secondary academic … of a duration of six months or more that leads to a degree, … and
> >
> > (iii) although they are permitted to engage in full-time work during a regularly scheduled break between academic sessions, they work no more than 20 hours per week during a regular academic session;
>
> (w) if they are or were the holder of a study permit who has completed their program of study and
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> > (i) they meet the requirements set out in (v), and
> >
> > (ii) they applied for a work permit before the expiry of that study permit and a decision has not yet been made in respect of their application; or "[16]

[48] I agree with the Claimant that his study permit does not limit him to working 20 hours a week. Regulation 186 of the Immigration and Refugee Protection Regulations has 26 paragraphs. The use of the word "or" between the second last and last

[16] See https://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/page-39.html#h-688551. I have included sections relevant to the Claimant's circumstances

paragraphs means that a person may be subject to more than one paragraph but those regulations are not applied together to create a broader restriction than that which exists in the individual paragraphs.

[49] In my opinion, the Claimant could work on campus for any number of hours provided he held a valid study permit. His study permit only restricted his hours of work off campus. The preamble in Regulation 186 says a foreign national may work in Canada without a work permit. Taking the preamble together with Regulation 186(f) which says, if they are a full-time student, on the campus of the university or college at which they are a full-time student, for the period for which they hold a study permit at that university or college means there is no limit on the number of hours a full-time student who holds a study permit may work on their campus. This interpretation is supported by the information provided by Immigration, Refugees and Citizenship Canada through its website as quoted above.

[50] The conditions of the Claimant's study permit did not limit his hours of work because he was able to work over 20 hours a week at jobs on campus. As a result, I find that the Claimant's study permit is not a personal restriction that might limit his return to the labour market.

[51] In addition, as noted above the Claimant is not required to show he was available for full-time work while studying; there is no such requirement in the legislation. His obligation was to show he was available for work consistent with his past work history. The Claimant testified that his prior study permits form 2017 onward had the same terms and conditions as his current study permit.

[52] As I discussed above, the Claimant's school obligations did not limit his ability to work. He was able to choose when he viewed the pre-recorded lectures for his courses and when he studied. As a result, I find that the Claimant's studies are not a personal restriction that might limit his return to the labour market.

[53] The Claimant testified that he has always worked under the same conditions in the study permit that was in place from October 5, 2020 to April 17, 2021. He testified

that he has access to public transport that would allow him to commute to work. There are no distance restrictions on where he could commute to work. There are no times of the day that he could not work. He was willing to relocate for work as his studies were all online. The Claimant was willing to work for minimum wage and would take a position that required on the job training. This evidence tells me that Claimant has not set any personal conditions that might have limited his return to the labour market.

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

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

Conclusion

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

[56] This means the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section