Citation: *AM v Canada Employment Insurance Commission*, 2021 SST 752

# Social Security Tribunal of Canada
## General Division – Employment Insurance Section

# Decision

| | |
|---|---|
| **Appellant:** | A. M |
| **Representative:** | Nicole Fowlie |
| **Respondent:** | Canada Employment Insurance Commission |

---

| | |
|---|---|
| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (425812) dated July 8, 2021 (issued by Service Canada) |

---

| | |
|---|---|
| **Tribunal member:** | Charlotte McQuade |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | August 12, 2021 |
| **Hearing participants:** | Appellant<br>Appellant's representative |
| **Decision date:** | August 27, 2021 |
| **File number:** | GE-21-1295 |

## Decision

[1] The appeal is allowed. The Tribunal agrees with A. M. (the Claimant).

[2] The Claimant has shown that she was available for work from January 10, 2021. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits from January 10, 2021.

## Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from January 10, 2021 because she was attending university on her own initiative and had not proven her availability 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 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] There is a presumption in the law that full-time students are not available for work. The Commission says the Claimant has failed to rebut that presumption. The Commission says the Claimant was attending school full-time from 9 a.m. to 3 p.m. each day and she was unwilling to accept full-time employment that conflicted with her studies. The Commission also says that the Claimant has not proven her availability for work. The Commission maintains the Claimant did not express a desire to return to the labour market because she was asked to submit a job search record but was only able to describe two applications for part-time employment. The Commission says the Claimant also placed personal restrictions that unduly limited her chances of returning to the labour market as soon as a suitable job was available because she was unwilling to accept full-time work that conflicted with her studies, even when the school term ended and restricted herself to awaiting recall to her existing part-time employment.

[6] The Claimant disagrees. She says that she had been working 30 to 34 hours biweekly while attending university full-time. She was laid-off in January 2021 due to the pandemic. The Claimant says she remained available to work at the same level as she was working before being laid off. She says her classes were online and had no attendance requirements. The Claimant says she did not seek alternative work, with the exception of applying to two part-time jobs in May 2021, as she knew she would be recalled to her existing job once the lockdown was lifted. She says she did in fact return to work for periods between January 10, 2021 and June 10, 2021. The Claimant maintains that the circumstances of the pandemic have to be taken into account when determining her availability.

## Matters I have to consider first

### Post-hearing documentation

[7] The Claimant's representative requested an opportunity to submit documentation showing the Claimant's hours of work during the period of disentitlement. I permitted this. The documentation was submitted on August 17, 2021.[1] I have accepted this documentation into evidence as it relevant to the issue of the Claimant's availability for work. The documentation was provided to the Commission with an opportunity to reply by August 24, 2021 but no reply was received.

## Issue

[8] Was the Claimant available for work from January 10, 2021?

## Analysis

[9] Two different sections of the law require claimants to show that they are available for work. The Commission says it disentitled the Claimant under both sections.

[10] 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.[2] The

---

[1] GD5.
[2] See section 50(8) of the *Employment Insurance Act* (Act).

*Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[3]

[11] 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.[4] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[5] I will look at those factors below.

[12] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[6] This is called "presumption of non-availability." It means I can suppose that students aren't available for work when the evidence shows that they are in school full-time.

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

## Presuming full-time students aren't available for work

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

[15] The Claimant testified that she was in her second year of a four year Kinesiology degree at Brock University. The university considers the program to be full-time. The Claimant testified that from January 10, 2021 to April 24, 2024 she was taking five courses. After the term ended, she had no classes until school resumes in September, 2021. The Claimant estimates she was spent 30 hours a week in total on her schooling including viewing the lectures and studying and completing work. She explained all her classes were online. There were no attendance requirements and she could complete the work on her own schedule.

---

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

[16] I find the Claimant was a full-time student until April 24, 2021. In making this decision, I have considered that the university considers the program a full-time program. As well, the Claimant was taking a full course load of five courses. Further, the Claimant was spending 30 hours per week in total on her schooling which is and approximates a full work week which typically would be 37.5 hours.

[17] The Claimant is a full-time student so the presumption applies until April 24, 2021 but not thereafter as she was not taking classes after April 24, 2021. But the presumption that full-time students aren't available for work can be rebutted (that is, shown to 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.[7] Or, she can show that there are exceptional circumstances in her case.[8]

[19] The Commission says the Claimant has failed to rebut the presumption of non-availability because the attendance requirements of her program is a substantial restriction on the Claimant's ability to search for and accept suitable employment. The Commission says the Claimant told them that she attends school from 9 a.m. to 3 p.m. every weekday. [9] The Commission says the Claimant also told the Commission that she has only been looking for part-time employment while she waits to return to her previous employment. [10] The Commission also says that the Claimant declared she would be unwilling to accept full-time employment that conflicts with her studies.

[20] The Claimant testified that she had been working 30 to 34 hours biweekly while attending school full-time, prior to being laid off in January, 2021. She testified that in the retail environment where she worked, she could be scheduled as early as 7:30 a.m. before the store opened or work as late as 10 p.m. The Claimant testified that she would not have quit her program to work a full-time job but she could have worked a full-time job if the work hours were in the morning and evening. She said her flexible

---

[7] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[8] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[9] GD3-31.
[10] GD3-30 to GD3-32.

schedule allowed her to work with her existing employer. She did her school work whenever she was not working. The Claimant testified she did not reduce the hours she was available for work after being laid off from her job. She remained available to work 30 to 34 hours bi-weekly, as she had before being laid off. She says there were no days she was not available for work, except for a few hours during the four days in April, 2021 she had exams. The Claimant says in the summer she told the employer she was available any day. If she had been offered full-time hours in the summer, she would have taken it.

[21] The Claimant confirmed in her testimony she had not combined full-time work with full-time schooling.

[22] Since the Claimant has not worked full-time and attended school full-time she cannot rebut the presumption that way.

[23] However, I find that the Claimant has shown exceptional circumstances to rebut the presumption that she was not available for work while attending school full-time. I accept the Claimant's sworn testimony that all her course were online, there were no attendance requirements and she was able to work on the courses on her own schedule. So, she had the flexibility to work. While the Claimant had not combined full-time work with full-time school, she did have a history of combining school with working part-time for a sufficient amount of insurable hours to be able to establish a claim for benefits.

[24] While the Claimant said she could have accepted a full-time job if the hours were in the morning and evening, I don't find that was her intention. She testified that she remained available after the layoff to work 30 to 34 hours biweekly. This is consistent with her information to the Commission's reconsideration agent that she was not willing to open up her availability to full-time work. [11]

[25] However, even though the Claimant was not willing to accept full-time work while at school, I find it cannot be presumed that the Claimant was unavailable for suitable

[11] GD3-31.

work just because she has not made herself more available for work than she was before being laid off. The Act requires that a claimant be capable of and available for and unable to obtain "suitable employment". [12] Nowhere does it say that suitable work has to be full-time work.

[26] "Suitable employment" is defined as that which a claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, the hours are not incompatible with their family obligations or religious beliefs and the nature of the work is not contrary to the claimant's moral convictions or religious beliefs. [13]

[27] I am satisfied that the Claimant has shown exceptional circumstances to rebut the presumption that she is not available for work. Those circumstances include a flexible school schedule and a history of combining full-time school with part-time work of enough insurable hours to establish a claim for benefits. They also include the fact the Claimant did not reduce the hours or days she was available to work after being laid off. So, it cannot be presumed she is unavailable for work due to her full-time schooling which continued until April 24, 2021.

[28] I find the Claimant has rebutted the presumption that she was unavailable for work from January 10, 2021 to April 24, 2021. The presumption does not apply after that as she was not in school from April 24, 2021.

[29] Rebutting the presumption means only that the Claimant isn't presumed to be unavailable. I still have to decide whether the Claimant has proven she actually was available for work from January 10, 2021.

– **Reasonable and customary efforts to find a job**

[30] 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.[14]

---

[12] See section 18 of the Act.
[13] See subsection 9.002(1) of the EI Regulations.
[14] See section 50(8) of the Act.

[31] The law sets out criteria for me to consider when deciding whether a claimant's efforts were reasonable and customary.[15] A claimant's efforts have to be sustained and directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[32] The EI Regulations list nine job-search activities that are considered to be reasonable and customary efforts. Some examples include preparing a résumé or cover letter, registering for job-search tools or with online job banks or employment agencies, and applying for jobs.[16]

[33] If a claimant does not comply with a request to prove that the claimant has made reasonable and customary efforts, then the claimant may be disentitled [17] from benefits until the claimant complies with a request and supplies the requested information. In order to disentitle a claimant under this section, the Commission must first ask the claimant for proof and specify what kind of proof will satisfy its requirements.[18]

[34] The Commission says it disentitled the Claimant for failing to prove she made reasonable and customary efforts to obtain employment.

[35] I have to decide whether the Commission asked the Claimant for proof and told her what kind of proof would satisfy its requirements.

[36] The Commission says the Claimant was asked to provide a record of her job search efforts but she was unable to provide any supporting documentation. Rather, she described her applications for part-time employment at a coffee shop and dog kennel. The Commission says the Claimant maintained that she applied to around five employers a week but was unable to provide any specific details on who she applied to

---

[15] See section 9.001 of the Regulations.
[16] See subsection 9.002(1) of the EI Regulations.
[17] See section 50(1) of the Act
[18] See *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688. I am not bound to apply other decisions of the Tribunal. However, I find the reasoning in this decision persuasive and adopt it.

or when. The Commission says the Claimant has not proven her efforts were sustained or that she made enough of the required efforts to obtain suitable employment.

[37] The Claimant disagrees. She testified she was not asked by the Commission to provide a job search. She says that she did not look for other positions from January 2021 to May 2021 as she knew she had a part-time job that she would be recalled to as soon as the lockdown was over. She was told by the employer she would be recalled when the lockdowns were over. She says she was recalled for periods of work during after the first lay-off. She said after the last lay-off on April 23, 2021 she ended up getting recalled back to work on June 10, 2021. The Claimant says this lockdown was longer than the others so in May 2021 she applied for two part-time jobs, one at a coffee shop and one at a pet food store. She says as well, she would get alerts from Indeed and a Government of Canada site. The Claimant confirmed she only applied for the two jobs since January 10, 2021.

[38] I find that the Commission cannot disentitle the Claimant to benefits for failing to provide proof that she had made reasonable and customary efforts to obtain employment. [19]

[39] I accept that Commission's agent asked the Claimant for a job search. The agent's notes provide that the Claimant was asked for a "list of her job search efforts". [20] It is possible that the Claimant may not recall all the details of that conversation. I prefer the written documentation as to the specifics of the conversation.

[40] The notes provide further that the Claimant responded to the reconsideration agent's request by talking about the two jobs she had applied to. She also mentioned she had applied to some other jobs through Indeed but could not remember what they were. However, the Commission did not then explain the specific required job-search activities to the Claimant or tell her she had to provide proof of those activities. While it is true that applying for jobs is one of the required efforts, it is not the only effort and none of those other efforts were mentioned or addressed with the Claimant. So, I am

[19] Subsection 50(1) of the Act.
[20] GD3-31.

not satisfied that the Claimant was told what specific proof was needed to show proof of reasonable and customary efforts or was asked to provide that proof. Merely asking about a job search is not enough.

[41] Since the Commission did not specify what kind of proof would satisfy its requirements and then ask the Claimant to provide that proof, the Commission cannot disentitle the Claimant from benefits for failing to provide proof that she was making reasonable and customary efforts to obtain suitable employment.

## Capable of and available for work

[42] I also have to consider whether the Claimant has proven she was capable of and available for work but unable to find a suitable job.[21] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[22]

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) limit her chances of going back to work.

[43] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[23]

### – Wanting to go back to work

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

---

[21] See section 18(1)(a) of the Act.
[22] 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.
[23] 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.

[45] There is no evidence that the Claimant's existing job was not suitable for her, as that is defined. [24] She qualified for EI benefits based on hours she worked at this job. I am satisfied that her existing job was a suitable job.

[46] The Claimant says that she wanted to work. She says that she wanted to return to her existing part-time job and she did do so whenever she was recalled. The Claimant provided a post-hearing submission with documentation showing the periods she had worked since January 10, 2021. She says she tried to find another part-time job when the layoff in May, 2021 was more extended for a longer period than the prior layoffs.

[47] The Commission says while the Claimant has made statements that she was willing to return to full-time employment when her employer recalled her, she failed to express that desire as she only was able to describe two applications for part-time employment.

[48] But the Commission makes no mention of the Claimant's existing job or the fact she did return to work on multiple occasions during the period of disentitlement.

[49] I am satisfied that the Claimant wanted to go back to work as soon as a suitable job was available. She wanted to go back to her existing job, which, in my view, provided the best chance for her to obtain suitable employment, given the province wide lockdowns in the retail sector. Although the Claimant did not make any effort to obtain alternative employment between January 10, 2021 and April, 2021 and only applied to two part-time jobs from May 2021 the Claimant did remain available for her existing job. The Claimant's post-hearing documentation shows the Claimant accepted employment from her existing employer subsequent to January 10, 2021. [25]

[50] Specifically, the post-hearing documentation shows the Claimant's last pay period before she applied for EI benefits ended on January 9, 2021. She next worked during the pay period from February 7 to February 20, 2021 in which it is noted that she

---

[24] See section 9.002(2) of the EI Regulations.
[25] GD5.

worked 138.16 hours. The earnings for this period are noted as gross pay of $258.78. [26] However, I think likely the hours notation is incorrect. The Claimant's rate of pay on her pay stubs is $14.61 per hour so likely those hours were significantly lower for that biweekly pay period. Whatever the hours were, she did return to work.

[51] There are two differing sets of information for the period from February 21, 2021, to March 6, 2021. One document says the Claimant did not work between February 21, 2021 and March 6, 2021. [27] The other document says the Claimant worked 36.18 hours. [28] From March 7, 2020 to March 20, 2021 it is noted the Claimant worked 43.25 hours. [29] For the period from March 21, 2021 to April 3, 2021 there are two differing sets of information. One document says the Claimant worked 27.18 hours. [30] The other says she worked zero hours. [31] For the period from April 4, 2021 to April 17, 2021, two sets of information are provided. One says she worked 19.9 hours[32] and the other says she worked 5.5 hours. [33] For the period from April 18 to May 1, 2021, the Claimant is noted as working zero hours. [34]

[52] It is possible that the differing amounts of hours noted represent hours worked in each week of the two week period but I cannot conclude that as there has been no explanation provided for the differing amounts and the information refers to hours worked in biweekly periods.

[53] There are no further documents after May 2, 2021 until the period from May 30 to June 12, 2021 in which the Claimant worked 17.36 hours. [35] However, her pay stub for that period shows zero hours worked. From June 13, 2021 to June 26, 2021 the Claimant worked 59.45 hours. [36] This is consistent with the pay stub for this period. [37]

---

[26] GD5-18.
[27] GD5-17.
[28] GD5-16.
[29] GD5-15.
[30] GD5-14.
[31] GD5-13.
[32] GD5-11.
[33] GD5-12.
[34] GD5-10.
[35] GD5-9.
[36] GD5-8 and see also paystub at GD2-14.
[37] GD2-14.

From June 27, 2021 to July 10, 2021, the Claimant worked 52.42 hours. [38] This is consistent with her pay stub for this period. [39]From July 11, 2021 to July 24, 2021 the Claimant worked 44.29 hours. [40] This is also consistent with the pay stub for that period.[41]

[54] Although the pay documentation provided by the Claimant does contain some inconsistent information as to the hours worked, overall the paystubs show a pattern of the Claimant returning to work when work was available. I find this shows the Claimant's desire to return to the workforce as soon as a suitable job was available. She expressed her desire by remaining available for recall with her existing employer and actually returning to work there when she could.

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

[55] The Claimant has made enough efforts to find a suitable job.

[56] 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.[42]

[57] The Claimant's efforts to find a new job included waiting for recall with her existing employer and from May 2021 applying to two part-time jobs.

[58] The Commission says the Claimant did not do enough to find a job. The Commission says applying to only two part-time jobs is not enough. The Commission says a reasonable job search effort would include multiple job search efforts that increase one's chances of finding suitable employment.

[59] The question I have to decide is whether it was enough for the Claimant to await recall with her employer when she was on lay-off or whether she should have been

[38] GD5-7.
[39] GD2-13.
[40] GD5-4.
[41] GD5-2.
[42] 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.

looking for other suitable work during the periods of lay-off or the periods of reduced hours.

[60] The Claimant testified that before the lay-off period in January, 2021, she typically worked 30 to 34 hours biweekly. The Claimant testified after the layoff in January, 2021, she went back to work week of February 14, 2021. She says she worked until March 26, 2021 until the week of April 23, 2021 at which point she was laid off again until the week of June 10, 2021. So, the Claimant had a full layoff of a little over a month from the week of January 9, 2019 until returning to work on February 14, 2021. She then had a second full layoff of about a month and a half from April 23, 2021 to June 10, 2021.

[61] The jurisprudence surrounding temporary layoffs is such that where a claimant who has been laid off with the promise of being recalled on a particular date, that claimant is entitled, for a reasonable period, to regard the promised recall, as the best or most probable avenue to employment and to act accordingly. In that regard, the Tribunal takes note of the decision of the Federal Court of Appeal in *Canada (A.G.) v. MacDonald* (1994), Doc. No. A 672-93 affirming the Umpire's decision to not disentitle an individual for non-availability who was only willing to accept work from an employer with which she had been employed for some time but whose employment was only intermittent. In making this finding, the Umpire relied on the principle that when a claimant has good cause to believe that he or she will be called back to work by his former employer, he or she shall be granted a reasonable period before being disentitled to benefits.

[62] I find the Claimant had a reasonable belief that in each of the periods of complete layoff that she would be recalled to her existing employer. While she did not know specifically when, the periods of layoff were fairly brief, with the longest being approximately a month and a half. I find this was a reasonable period for the Claimant to await recall, given the pandemic and the closures of many businesses during the lockdown periods. Although the Claimant only made two job applications in May, 2021,

those efforts have to be considered in light of the fact that many retail outlets would have been closed or on reduced workforces such as her existing employer.

[63] I am satisfied, given the conditions in which the Claimant was laid off, that the most probable route to re-employment for the Claimant was to await recall.

[64] I am also satisfied that even in the periods the Claimant was working but had reduced hours, that she made sufficient efforts to find a suitable job by remaining available to her employer for hours that could be offered. Indeed by June, 2021, the Claimant's work hours exceeded the hours she had prior to the January 2021 layoff.

[65] I find the Claimant's efforts in awaiting recall and her two job applications in May 2021 were enough to prove she made efforts to find a suitable job from January 10, 2021.

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

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

[67] The Commission says the Claimant told them she attends school everyday from 9 a.m. to 3 p.m. The Commission says that the Claimant's school schedule is an undue restriction that greatly reduced the claimant's chances of returning to the labour market. The Commission says the Claimant's unwillingness to accept full-time work that conflicts with her school schedule is also a personal condition that unduly limits her chances of going back to work.

[68] The Claimant says that her school schedule was flexible. Attendance was not required and she could complete the online courses on her own schedule. The Claimant says she did not place undue restrictions on returning to the workforce as she already had a job, was awaiting recall to that job and did in fact return to that job after the layoffs.

[69] I note that, although the Claimant told the Commission that she attends school everyday from 9 a.m. to 3 p.m., she also told the Commission that her school schedule

is also flexible so she can accommodate work. She explained that due to the pandemic, her classes are online and although she chose to work on school from 9 a.m. to 3 p.m., she could modify the times if necessary. [43]

[70] Given the flexibility of the Claimant's school schedule, and given that the retail environment in which the Claimant was seeking work, typically does not operate solely on a 9 a.m. to 5 p.m. schedule, I the Claimant's schooling did not place an undue restriction on her ability to return to the workforce.

[71] The Claimant imposed a personal restriction of not seeking outside employment, with exception of two job applications. She instead waited for recall to her existing employer. It is true that her existing employment was not full-time employment. However, it was suitable employment, as I have determined above. As above, I find that awaiting recall to her existing suitable employment was the Claimant's most probable route to re-employment. Awaiting recall did not therefore pose an undue restriction on the Claimant's ability to return to the workforce. This is particularly the case in the face of a pandemic in which it is likely many retail organizations would have been in the same situation as the Claimant's employer.

[72] I find that the Claimant did not place any personal restrictions that unduly limited her return to the workforce.

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

[73] 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 from January 10, 2021.

[43] GD3-31.

## Conclusion

[74] The Claimant has shown that she was available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving benefits from January 10, 2021 for this reason.

[75] This means that the appeal is allowed.

Charlotte McQuade
Member, General Division – Employment Insurance Section