[TRANSLATION]

Citation: *WP v Canada Employment Insurance Commission*, 2021 SST 803

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	W. P.
Representative:	Frédérick-Alexandre Yao
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (423642) dated June 9, 2021 (issued by Service Canada)

Tribunal member:	Charline Bourque
Type of hearing:	Videoconference
Hearing date:	August 19, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	September 3, 2021
File number:	GE-21-1213

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

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

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits as of October 5, 2020, since he wasn't available for work because he was taking training on his own initiative.

[4] 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 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.

[6] The Commission says that the Claimant wasn't available because he was taking training full-time.

[7] The Claimant disagrees and says that he was available for work every day. He explains that he stopped working because of the closure of non-essential businesses and that employment prospects were limited at the time.

[8] The Claimant says he made multiple efforts to find a job and went back to work for short periods until the employer had to shut down again in accordance with government-imposed measures.

[9] Lastly, the representative points out that the Commission waited several months before deciding that the Claimant wasn't available due to being in training when it had everything it needed to make such a decision from the start of the claim for benefits. For

this reason, the representative says that the Commission can't ask for repayment of the benefits because of the doctrine of promissory estoppel.

Issue

[10] Was the Claimant available for work while taking training?

Analysis

[11] 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, he has to meet the criteria of both sections to get benefits.

[12] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" means.[2] I will look at those criteria below.

[13] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

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

[15] In addition, the Federal Court of Appeal (Court) has said that claimants who are taking training full-time are presumed to be unavailable for work.[5] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are taking training full-time.

---

[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[16] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether he was available based on the two sections of the law on availability.

Presuming full-time students aren't available for work

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

– The Claimant is a full-time student

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

[19] There are two ways the Claimant can rebut the presumption. He can show that he has a history of working while also taking training.[6] Or, he can show that there are exceptional circumstances in his case.[7]

[20] Four principles related to returning to studies have to be considered to be able to rebut the presumption of non-availability. They are the attendance requirements of the course, the claimant's willingness to give up their studies to accept employment, whether the claimant has a history of being employed at irregular hours, and the existence of exceptional circumstances that would enable the claimant to work while taking their course.[8]

[21] The Claimant says he was available for work. He indicates that he lost his job because of the pandemic. He adds that the Commission had all the information relevant

---

[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[8] The Federal Court of Appeal established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.

to his training and that it should have informed him sooner if he wasn't entitled to EI benefits.

[22] The Commission says that the Claimant hasn't shown that he was available or rebutted the presumption of non-availability while taking a full-time course. To be considered available, the Claimant has to show that he meets the three criteria set out in the case law. The Commission acknowledges that the Claimant showed his desire to go back to work. But the Commission finds that the Claimant didn't express that desire through consistent efforts to find a suitable job and that he set personal conditions that unduly limited his chances of going back to work.

[23] I find that the Claimant has rebutted the presumption that he is unavailable for work.

[24] The evidence on file indicates that the Claimant had several periods of employment for the same employer, in the hotel business, while in school full-time.[9] The Claimant indicates that he has worked there since 2018 and works 30 hours a week on average. The Claimant studied full-time or part-time between August 26, 2019, and March 9, 2020, while in adult education.[10] He was in training full-time at X from September 28, 2020, to October 1, 2021.[11]

[25] I am persuaded by the Claimant's testimony about being able to work while taking training full-time. His testimony is also supported by evidence of his work-study history.

[26] The Court has confirmed that a claimant has rebutted the presumption of non-availability by showing that they have a work-study history and that they have looked for a job.[12]

---

[9] See the pay stubs (GD7).
[10] See the [translation] "Acknowledgment of school attendance – Adult education" (GD8-3 and GD9-4).
[11] See the [translation] "School attendance certificate" (GD3-22).
[12] See *Romero*, A-442-96.

[27] In addition, the Tribunal's Appeal Division has indicated that the law doesn't require that a claimant have a history of full-time employment while attending school to rebut the presumption that, as a full-time student, they are unavailable for work under the Act.[13]

[28] The Appeal Division found that the nature of the claimant's previous employment—part-time employment of 14 to 18 hours a week—and the fact she had shown her ability to maintain part-time employment over the long term, while simultaneously attending full-time studies, were an exceptional circumstance sufficient to rebut the presumption of the claimant's non-availability.[14]

[29] Another Appeal Division decision indicates that a claimant was able to rebut the presumption that he wasn't available for work by showing his history of part-time employment and full-time study. In that decision, the Appeal Division found that the student had given persuasive testimony about his consistent efforts to pick up as many shifts as possible during the school breaks, in addition to being able to work close to full-time hours.[15]

[30] Although I am not bound by the Tribunal's decisions, I consider its findings persuasive in showing that a person can rebut the presumption that they aren't available for work while taking training full-time, if the person can show that they have experience simultaneously studying full-time and working part-time (work-study history). As a result, I adopt the same approach in this case.

[31] I find that the Claimant has rebutted the presumption that a person enrolled in a full-time course is unavailable for work. The Claimant has a work-study history showing that he is able to balance part-time work with full-time studies.

---

[13] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[14] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[15] See the decision of the Tribunal's Appeal Division in *YA v Canada Employment Insurance Commission*, 2020 SST 238.

[32] I find that the Claimant has shown an exceptional circumstance that allows him to rebut the presumption that a person enrolled in training full-time is unavailable for work.

– **The presumption is rebutted**

[33] Rebutting the presumption means only that the Claimant isn't presumed unavailable. I still have to look at the two sections of the law that apply in this case and decide whether the Claimant was actually available.

Availability for work

[34] Two sections of the Act indicate that a claimant has to show that they are available for work.[16] Both sections deal with availability, but they involve two different disentitlements.

[35] First, 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.[17] Case law gives three things a claimant has to prove to show that they are "available" in this sense.

[36] Second, the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[18] The Regulations give criteria that help explain what "reasonable and customary efforts" means.[19]

Capable of and available for work

[37] I have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[20] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[21]

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

---

[16] See sections 18(1)(a) and 50(8) of the Act.
[17] See section 18(1)(a) of the Act.
[18] See section 50(8) of the Act.
[19] See section 9.001 of the Regulations.
[20] See section 18(1)(a) of the Act.
[21] 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.

b) He made efforts to find a suitable job.

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

[38] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[22]

– **Wanting to go back to work**

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

[40] In my view, despite the fact that he was taking training, the Claimant has shown his intention to continue working.

[41] The Claimant confirms that he stopped working because of the government-imposed closure of non-essential businesses due to the pandemic. He was supposed to go back to work as soon as businesses reopened, but the reopening [timeline] was extended.

[42] The Claimant confirms that he went back to his employer to perform duties other than his usual ones. He also found a job at [*sic*], then at the Société des alcools du Québec [Quebec's alcohol corporation] (SAQ).

[43] The Commission also finds that the Claimant showed his desire to go back to work.[23]

[44] I find that, even though the Claimant chose to take training full-time, this situation didn't affect his desire to go back to work as soon as a suitable job was available.

---

[22] 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.
[23] See the Commission's arguments (GD4-4).

– Making efforts to find a suitable job

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

[46] To determine whether a claimant is available for work, I have to consider the specific criteria set out in the Act for determining whether their efforts to find a suitable job are reasonable and customary. According to these criteria, the efforts must be sustained, directed toward finding a suitable job, and compatible with nine specific activities that can be used to help claimants get a suitable job.

[47] Some examples of those activities are assessing employment opportunities, registering for job search tools, contacting employers who may be hiring, and applying for jobs.[24] In addition, other criteria are used to determine what constitutes a suitable job, such as the claimant's health and physical capacity to work.[25]

[48] First, I find that the Claimant made efforts to find a suitable job, taking into account the fact that his usual employment while taking training full-time was part-time employment.

[49] Second, I find that the Claimant was entitled to a reasonable period to find a job that was different from the one he had, since he wasn't able to find another similar one, given the pandemic situation.

[50] The Claimant explains that he was laid off because of the government-imposed closure of non-essential businesses due to the pandemic. He remained unsure when his employer would reopen, with the government extending closures time and time again.[26]

[51] So, week after week, the Claimant expected his employer to reopen. As a result, he didn't look for a job during that time because he thought he would go back to work for his employer. The Claimant indicates that he contacted the employer several times

---

[24] See section 9.001 of the Regulations.
[25] See section 9.002 of the Regulations.
[26] See the employer's notices of closure (GD2-34 and 35 and GD2-91 and 92).

and went back to the employer when it asked for employees even though the proposed maintenance job didn't match the usual duties performed.

[52] The Claimant confirms that, after the business closures were extended, he made multiple efforts to find a job (Canac, grocery stores, Metro, SAQ, etc.). He also confirms that he found work at IGA,[27] then at the SAQ. In addition, he went back to work for his usual employer, with the hours it could offer him. The Claimant confirms that he had two or even three jobs during certain periods, on top of being in school full-time. He confirms that he is able to work more than 30 hours a week.

[53] Based on the characteristics set out in the Act to describe what constitutes a job that isn't suitable, I am of the view that a suitable job is, among other things, a job that is in the claimant's usual occupation (for example, same nature, earnings, and working conditions).[28]

[54] With this in mind, I find that working part-time in the hotel business for several years while in school full-time amounts to employment in the Claimant's usual occupation, since it is his usual employment.

[55] I note that several pay stubs show that the Claimant has had several periods of employment of up to 40 hours a week since 2018. The Claimant went back to his job in addition to having had two other jobs that were different in nature. He also agreed to perform maintenance duties for his employer even though this didn't match his usual employment.

[56] I consider that the Act doesn't specifically require a claimant to be available for full-time work. In addition, the Claimant's usual employment is part-time employment.

[57] I am also taking into account the period of uncertainty as to when the Claimant was to go back to work. This period of uncertainty was due to the situation created by

---

[27] See the assistant cashier's pay stub (GD2-47).
[28] See section 6 of the Act.

the government-imposed closure of non-essential businesses, which was extended several times.

[58] In my view, it is necessary to consider the unusual and unpredictable situation the Claimant faced when he had to stop working because of the pandemic.

[59] I also accept the explanation that he waited before looking for a job in a field other than the one he usually worked in. I find that neither the Claimant nor his employer could predict when the Claimant could go back to work. I am also of the view that the Claimant had every reason to believe that the employer would call him back to work as soon as the situation allowed it, which, incidentally, is what happened.

[60] I find that the situation created by the pandemic forced the Claimant to stop working in the hotel business, the field he had worked in for several years. His chances of finding another job in another similar establishment were also non-existent because the reason for the closure applied to all of those establishments.

[61] Given this situation, I am of the view that the Claimant was entitled to a reasonable period to assess how he would be able to go back to his job before making efforts to work in another field of employment.[29]

[62] I find that, taking into account the obstacles the Claimant faced because of COVID-19, his availability for work led to concrete and sustained efforts to find suitable employment with prospective employers. In addition, his efforts landed him two new jobs.

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

---

[29] See *MacDonald*, A-672-93.

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

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

[65] I find that the Claimant has shown an exceptional circumstance that allows him to rebut the presumption that a person enrolled in training full-time is unavailable for work.

[66] The Claimant confirms that he is available between 30 and 40 hours a week for a job.

[67] [94] [*sic*] I don't accept the Commission's argument that the Claimant hasn't proven his availability for work because he was restricting his availability for a job outside his training hours. The Claimant has worked at irregular hours for several years. In addition, the Act doesn't say anything about working only at "regular," daytime hours. This would have the effect of excluding many types of jobs that offer hours based on irregular schedules.

[68] In my view, the Claimant didn't unduly limit his chances of going back to work despite the demands of his training.

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

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

[70] 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.

Promissory estoppel

[71] Given that the Claimant has shown that he was capable of and available for work, I am of the view that I don't need to consider the representative's alternative argument.

Conclusion

[72] The Claimant has shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant is entitled to receive benefits as of October 5, 2020.

[73] This means that the appeal is allowed.

Charline Bourque

Member, General Division – Employment Insurance Section