[TRANSLATION]

Citation: *AL v Canada Employment Insurance Commission*, 2021 SST 882

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (426608) dated July 15, 2021 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	Videoconference
Hearing date:	December 14, 2021
Hearing participants:	Appellant Witness
Decision date:	December 17, 2021
File number:	GE-21-1421

Decision

[1] The appeal is allowed in part.

[2] The Appellant has shown that she was available for work within the meaning of the *Employment Insurance Act* (Act) from October 4, 2020, to March 29, 2021.

Overview

[3] The Appellant applied for benefits on July 28, 2020.

[4] On April 15, 2021, the Canada Employment Insurance Commission (Commission) decided that the Appellant voluntarily left her job without just cause on March 29, 2021, and it disqualified her from receiving benefits.

[5] The Commission also decided that the Appellant was disentitled to regular benefits as of October 4, 2020, because she was taking training on her own initiative and wasn't available for work.

This decision resulted in a benefit overpayment of $14,180 that the Appellant now has to repay.

[6] The Appellant disputes only the disentitlement for failing to prove her availability for work from October 4, 2020. She argues that there was a misunderstanding during her conversations with the Commission agent, and she says she was available for full-time work during that period. She explains that she made multiple efforts to find a job because she had to earn a living. In fact, she says that she found two jobs during that period and that she wasn't inactive.

[7] The Appellant has to be available for work to get Employment Insurance (EI) regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[8] I have to decide whether the Appellant was available for work within the meaning of the Act from October 4, 2020, and whether she can receive EI benefits as of that

time. The Appellant has to prove her availability 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.

Issue

[9] Was the Appellant available for work from October 4, 2020?

Analysis

Reasonable and customary efforts to find a job

[10] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[1] I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[11] I also have to consider the Appellant's efforts to find a job. The *Employment Insurance Regulations* (Regulations) list nine job search activities I have to consider. Some examples of those activities are the following:[2]

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job search tools or with online job banks or employment agencies
- contacting employers who may be hiring
- applying for jobs

[12] The Commission argues that the Appellant was limiting her job search efforts given that she was prioritizing her training and that she wasn't available to work more

[1] See section 9.001 of the *Employment Insurance Regulations* (Regulations) and section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the Regulations.

than 25 hours a week. For this reason, it finds that the Appellant hasn't shown that she made reasonable and customary efforts to find a job.

[13] The Appellant doesn't understand why the Commission agent interpreted that she wasn't available to work more than 25 hours a week. She argues that there was a misunderstanding, since she was actively looking for a job and wasn't limiting her work schedule. She says that she would have accepted all the hours an employer would have offered her, since she lives alone and has to earn a living.

[14] The Appellant explains that she approached the CIUSSS de la Capitale-Nationale [Capitale-Nationale integrated university health and social services centre] for a job as a special educator. Unfortunately, after all her efforts, she didn't get the job.

[15] She also applied for a job with the Ministère de l'Économie et de l'Innovation [Quebec's ministry of economy and innovation]. She got the job and started it in March 2021.

[16] Also, starting in the fall of 2020, the Appellant applied for jobs at X, at X, at X, at X, at X, and at X, as a caregiver-educator, and worked a few hours for that organization.[3]

[17] During the fall of 2020, when she was looking for a job as a special educator, she also applied for jobs in other sectors, for example, at X restaurant, at X, with the City of Québec, with the City of Lévis, at X, at X, and at a seniors' home. In addition, the Appellant applied for jobs as a French and math tutor, as a library clerk, and as a recreation manager.

[18] She registered with job banks, like student hiring programs, Jobboom, or Indeed, to get alerts.

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[3] See the Appellant's various job search efforts at GD3-49 to GD3-75.

[19] As she had told the Commission, she explained at the hearing that she was a student but that she had to work to earn a living.

[20] Despite the fact that many businesses were closed because of the COVID-19 pandemic, the Appellant has shown her availability for work to accept a job as soon as it was available. Not only did she make efforts to find a job in her field, as a special educator, but she also actively looked for jobs in other sectors, like food service or customer service.

[21] Although the transcripts of the conversations between the Appellant and the Commission agent show that the Appellant wasn't available for or interested in a job of over 25 hours a week and that she was limiting the types of jobs she was looking for, I give preference to what the Appellant said at the hearing, which is that she had to earn a living, that she would have accepted as many hours as possible from an employer, and that she would have even dropped a course to be able to accept a job.

[22] Moreover, the Commission admits that it made its reconsideration decision without talking to the Appellant, who mentioned at the hearing that she had been working, that she had reported all the hours worked to the Commission, and that she had tried to call the Commission agent back.[4] Contrary to the Commission's statement that the Appellant didn't call the agent back, the Appellant provided a copy of her calls on July 15, 2021, showing that she tried to contact the Commission agent a few times during the day. According to the email the agent sent, the Appellant was asked to contact the agent between 10 a.m. and 2 p.m. on July 15, 2021, which she did.[5]

[23] The Appellant looked for a job in her field and also looked for jobs in other sectors. Her efforts were reasonable and customary and directed toward accepting a job as soon as it was available. In fact, she started working for the organization X and for the Ministère de l'Économie et de l'Innovation in March 2021.

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[4] GD6-1.
[5] GD11-3 to GD11-5.

[24] But, since she voluntarily left her job on March 29, 2021, I can't find that she was available for work within the meaning of the Act as of that date.

[25] The Appellant kept trying to find a job between October 4, 2020, and March 29, 2021. I find that she has shown that she was available for work within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

Capable of and available for work

[26] Case law sets out three factors for me to consider when deciding whether a claimant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[6]

- She wanted to go back to work as soon as a suitable job was available.
- She made efforts to find a suitable job.
- She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[27] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[7]

– Wanting to go back to work

[28] The Commission says that the Appellant didn't show a desire to go back to work because she was focusing on her training, which she was taking full-time.

[29] As mentioned in the previous section, the Appellant made multiple efforts to find a job both in her field and in other sectors in the meantime. She indicates that she was actively looking for a job because she had to earn a living.

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[6] 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.
[7] Two decisions set out this requirement. Those decisions are *Attorney General of Canada v Whiffen*, A-1472-92; and *Carpentier v The Attorney General of Canada*, A-474-97.

[30] She explains that she was available for full-time work given that, because of the COVID-19 pandemic, she could attend her classes online using recordings and that she wasn't restricted to attending her classes according to a fixed schedule.

[31] I understand from the Appellant's explanations that she was studying full-time but that she was available for full-time work and was actively looking for a job.

[32] The Appellant showed a desire to go back to work as of October 4, 2020.

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

[33] To be able to get EI benefits, the Appellant is responsible for actively looking for a suitable job.[8]

[34] The Commission says that the Appellant hasn't shown she made reasonable and customary efforts to find a job and that she was prioritizing her training instead. It argues that her job search efforts were directed toward finding a job that wasn't suitable.[9]

[35] At the hearing, the Appellant said she didn't understand the Commission's statement that she wasn't available to work more than 25 hours a week because she was looking for a job, she worked during that period, and she would have accepted all the hours an employer would have offered her, since she had to earn a living.

[36] At the hearing, a witness who works in employability and who knew the Appellant during that time indicated that the Appellant's situation wasn't easy during the COVID-19 pandemic. According to her, the Appellant made many efforts to find a job because she was in a precarious economic situation and had to earn a living. She described the Appellant as someone who wanted to work and made efforts to that end.

[37] The Appellant confirmed the job search efforts she had made and reported to the Commission, and she mentioned other ones at the hearing. For example, she contacted

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[8] This principle is explained in the following decisions: *Cornelissen-O'Neill*, A-652-93; and *De Lamirande*, 2004 FCA 311.
[9] GD4-8.

the CIUSSS de la Capitale-Nationale about a job as a special educator. She also contacted the Ministère de l'Économie et de l'Innovation, and she worked for it until March 29, 2021.

[38] As mentioned, the Appellant made multiple efforts to find a job. She registered with several online job banks, and she applied for jobs with several employers. For example, here is a non-exhaustive list of efforts she made in her field: X, X, and X—she worked a few hours for that organization.

[39] In addition, as she continued in her efforts to work as a special educator, the Appellant applied for jobs in other sectors, for example, at X, at X, at X, and with the City of Québec.

[40] The Appellant has to be available for work to be able to get EI regular benefits. Availability is an ongoing requirement. This means that she has to be searching for a job.

[41] I find that the Appellant made efforts to find a suitable job. Between October 4, 2020, and March 29, 2021, the Appellant applied for jobs not only as a special educator but also in other sectors to find a job as soon as possible. She was even offered two of the jobs she had applied for: at X, an organization that offered her a few hours on an on-call basis, and with a ministry.

[42] Despite the challenges of finding a job during the COVID-19 pandemic because of the periodic closure of most stores and restaurants, she still made efforts, focusing on immediate job opportunities to get a job quickly.

[43] Even though the Commission argues that the Appellant made unsuitable job search efforts, I instead find that she didn't look for a job just in her field, special education. Her testimony has satisfied me that she was available to work more than 25 hours a week. On this point, the Appellant had to earn a living, and she could attend her classes using recordings available online whenever was most convenient for her, without having to restrict her work schedule.

[44] Of course, as the Commission points out, there is a difference between having worked and making efforts to find a job to prove your availability. In the Appellant's case, she has shown that she made attempts to find a job, and two were successful. She has shown that she kept trying to find a job with steady hours.

[45] However, on March 29, 2021, the Appellant voluntarily left her job with the Ministère de l'Économie et de l'Innovation. She attributes this to the hourly rate, which wasn't enough. She doesn't dispute the disqualification as of that date, and I also agree that she hasn't shown that she was available for work within the meaning of the Act as of that time.

[46] Given the Appellant's statements at the hearing, I find that she made efforts to find a suitable job from October 4, 2020, to March 29, 2021.

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

[47] The Commission says that the Appellant hasn't rebutted the presumption of non-availability while taking training full-time because she limited her search to jobs with flexible hours that worked with her training schedule.

[48] The Commission argues that the Appellant limited her availability for work [to] 25 hours a week, that she dedicated about 30 hours a week to her training, and that she was unwilling to withdraw from her training to accept a job.

[49] It also says that the Appellant left a job at the Montréal CIUSSS to focus on her courses.

[50] The Appellant said that she studied linguistics full-time at Université Laval in the city of Québec during the fall 2020 term and at Cégep Garneau during the winter 2021 term.

[51] I presume that the courses the Appellant is taking make her unavailable for work within the meaning of the Act.

[52] This presumption of non-availability can be rebutted based on four principles related specifically to return-to-studies cases.[10]

[53] These principles are:[11]

- 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
- the existence of "**exceptional circumstances**" that would enable the claimant to work while taking their course

[54] On November 7, 2020, the Appellant said that she was studying full-time at Université Laval during the fall 2020 term, which ran from August 31, 2020, to December 18, 2020. The Commission says that the Appellant had to attend her classes according to a specific schedule and could not change this schedule.

[55] On February 11, 2021, the Appellant said that she was in Cégep Garneau's library technology program full-time during the winter 2021 term, which ran from January 25, 2021, to May 14, 2021. She then said that she could not change her course schedule.

[56] At the hearing, the Appellant indicated that, despite taking training full-time, she was available to work more than 25 hours a week because she had to earn a living. Contrary to what the Commission says, she says that, if she had found a job, she would have withdrawn from her training, starting with one or two courses, and that she wanted to work as many hours as possible. But, she says that it was harder to find a steady job because of the pandemic.

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[10] *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); *Floyd*, A-168-93.
[11] This principle is explained in the following decision: *Gagnon*, 2005 FCA 321 (CanLII).

[57] She explains that she has previously completed training as a special educator, and even though this training was more demanding than the training she took during the fall 2020 and winter 2021 terms, she was working while in training.

[58] She argues that she was available for full-time work during her two terms given that her training didn't involve huge workloads for her and that, on top of that, she could attend her classes online during that time. So, she could watch the recordings of her classes whenever was most convenient for her, and she didn't have to restrict her work schedule.

[59] She also explains that she approached the CIUSSS de la Capitale-Nationale for a job but wasn't successful.

[60] Lastly, as she told the Commission, she says that she could work full-time and that she could have dropped one or two courses if necessary because her intention was to find a full-time job, which is why she was taking training.

[61] As the Commission says: A claimant who is taking a training course without having been referred by a designated authority must prove that they are capable of and available for work and unable to find a suitable job. The claimant must meet the availability requirements the same as any other claimant who wants regular benefits.[12]

[62] However, contrary to what the Commission says, the Appellant didn't necessarily have to attend her classes live, and she didn't have to restrict a future work schedule to attend her classes. As she explained at the hearing, her classes were recorded, and she could watch them whenever was most convenient for her.

[63] In my view, the Appellant has rebutted the presumption of non-availability while in school. She has shown a history of part-time employment while dedicating between 15 and 25 hours a week to her studies. She has also shown that she made active

[12] Section 153.161(1) of the Act.

efforts to find a job, and, until March 29, 2021, she didn't intend to restrict her work schedule.

[64] I find that the existence of "**exceptional circumstances**" enables the Appellant to work while taking training.

[65] The insurable hours of employment a claimant accumulates when working full-time aren't the only history that may be considered in establishing a benefit period. And, **employment history isn't the only basis on which the presumption of availability may be rebutted**.[13] The presumption of non-availability can be rebutted through proof of exceptional circumstances.[14]

[66] So, exceptional circumstances can be associated with a history of part-time employment.

[67] The Appellant took courses full-time between October 4, 2020, and March 29, 2021, but she has successfully rebutted the presumption that a person who is taking a full-time training course on their own initiative isn't available for work.[15]

[68] Exceptional circumstances related to the COVID-19 pandemic support the finding that the Appellant has rebutted the presumption of non-availability because she could attend her classes online without a specific schedule. And, she explained that she had previously worked part-time while studying full-time when she was taking training in special education. The Appellant has combined her work and study schedules for the past few years, and she has no choice but to do so because she has to earn a living.

[69] I find that no personal conditions unduly limited the Appellant's chances of finding a suitable job between October 5 [*sic*], 2020, and March 29, 2021. She has shown that she was available for work while studying full-time.

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[13] See the decision of the Tribunal's Appeal Division in *JD v Canada Employment Insurance Commission*, 2019 SST 438; and *Attorney General of Canada v Rideout*, 2004 FCA 304.
[14] *Attorney General of Canada v Wang*, 2008 FCA 112; and *Landry*, A-719-91.
[15] This principle is explained in the following decisions: *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); and *Paxton*, 2002 FCA 360 (CanLII).

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

[70] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether she can receive benefits as of October 4, 2020.

[71] To be entitled to receive benefits, the Appellant has to be available for work each working day of her benefit period, and she has to show that she made efforts to find a job each working day of her benefit period.

[72] The exceptional circumstances related to the COVID-19 pandemic support the finding that the Appellant was available for work while studying.

[73] The Appellant made efforts to find a job in her field and in other sectors.

[74] But, as mentioned, I can't find that the Appellant was available for work from March 29, 2021, because she voluntarily left her job.

[75] I find that the Appellant has shown that she was available for work from October 4, 2020, to March 29, 2021, within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

[76] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work.

Conclusion

[77] The appeal is allowed in part.

Josée Langlois

Member, General Division – Employment Insurance Section