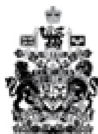

[TRANSLATION]

Citation: *CC v Canada Employment Insurance Commission*, 2021 SST 913

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (430013) dated August 20, 2021 (issued by Service Canada)

Tribunal member:	Manon Sauvé
Type of hearing:	Videoconference
Hearing date:	September 22, 2021
Hearing participant:	Appellant
Decision date:	October 18, 2021
File number:	GE-21-1544

Decision

[1] The appeal is allowed. The Claimant has shown that she was available for work while in school. This means that she is entitled to receive Employment Insurance (EI) benefits.

Overview

[2] The Claimant had been in food service for several years when she lost her job as a restaurant server because of the COVID-19 pandemic. She received the Canada Emergency Response Benefit, which ended on September 26, 2020.

[3] The Claimant applied for EI benefits. A benefit period was established effective September 27, 2020.

[4] On her application, she told the Canada Employment Insurance Commission (Commission) that she was taking training full-time in interior design. She would not withdraw from her training for a full-time job. She was available for work under the same conditions as she was before she started her training. She worked 30 hours a week on average.

[5] After checking, the Commission decided that the Claimant wasn’t entitled to EI benefits because she hadn’t shown that she was available for work. She was presumed to be unavailable for work while in school full-time.

[6] To be entitled to benefits, she can show that she is able to work full-time and study full-time or that there are exceptional circumstances.

[7] For her part, the Claimant says that she is in an exceptional situation because of the pandemic. She still worked, while receiving EI benefits.

Issue

[8] Was the Claimant available for work while in school?

Analysis

[9] 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, she has to meet the criteria of both sections to get benefits.

[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.[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.

[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.[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.

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

[13] In addition, the Federal Court of Appeal has said that claimants who are in school are 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 in school full-time.

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

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[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.

Presuming full-time students aren't available for work

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

[16] The Claimant agrees that she is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant is in school full-time. The presumption applies to the Claimant.

[17] But the presumption that full-time students aren't available for work can be rebutted. If the presumption were rebutted, it would 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.[6] Or, she can show that there are exceptional circumstances in her case.[7]

[19] I understand that the Claimant was working in food service while in school. Because of the pandemic, she lost her job. She claimed emergency benefits from March. Later, she applied to the Commission for benefits. Actually, she was referred to Service Canada.

[20] The Claimant says she hasn't changed her version of the facts. She was working and going to school at the same time. She would not have given up her studies, but that wasn't stopping her from working full-time.

[21] Because of the pandemic, the training centre was a lot more flexible about class attendance. So, adjustments were made between the time she completed the questionnaire and her class attendance.

[22] In addition, she has always worked while taking courses. Sometimes, she worked 30 hours a week.

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[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[23] I see that the Claimant worked during the pandemic. She also declared her income to the Commission. It was lower because of the situation in the food service industry. It is important to point out that she was working.

[24] Moreover, the Claimant looked for a job in her field of study, she was working, and she was taking training. Demand in her field of study was high. Her studies didn't stop her from making efforts to find a job or from working in two places in September, October, November, and December.

[25] The Claimant says that government services didn't properly refer her to the available programs to help her due to the loss of her job.

[26] The Claimant also says that "working day" doesn't imply specific hours. It can include evening hours. There are lots of jobs with atypical hours—for example, in nursing. In food service, the hours aren't regular.

[27] Furthermore, the COVID-19 pandemic is an exceptional circumstance. In her case, she would not have applied for benefits if there hadn't been a pandemic. At first, restaurants had to stay closed for 28 days. In early September 2020, her classes had to be in-person.

[28] But, starting in October 2020, classes were online. She worked in food service but with fewer hours. Before the pandemic, she worked in two restaurants. She was able to keep one of those jobs. She looked for a job in her field of study. She already had a part-time job, and she wanted to keep it because it gave her a basic income. By working part-time in her field of study, she could meet her needs.

[29] For its part, the Commission says that the Claimant changed her version of the facts after the initial decision denying her EI benefits. The Claimant's initial statements are more credible. She could not change her course schedule. She wanted to work only part-time. Her intention was to choose her studies, not a job.

[30] Moreover, she started looking for a job in November 2020. She was looking for a part-time job in her field of study. She was limiting her availability.

[31] Concerning the Claimant’s evidence of her job search in her field of study, the Commission says that she hasn’t rebutted the presumption that she is unavailable, because she is in school. On her job applications, she said she was looking for a part-time job. She was placing conditions on her availability.

[32] I find that the Claimant has rebutted the presumption of non-availability. In making my finding, I considered the evidence on file and the Claimant’s credible testimony. In my view, the Claimant’s explanations are plausible concerning the differences between the information gathered by the Commission and her later statements.

[33] The Claimant was studying interior design full-time. She was working at least 20 hours a week, in food service. She was working in two restaurants to earn a living.

[34] The COVID-19 pandemic affected how work was organized and how schools operated. When she completed her application in September 2020, she had to attend her classes in person. The situation changed because of the pandemic: She could attend her classes remotely. She worked fewer hours a week at the restaurant. Still, she earned an income while on unemployment. The fact is that she had a job with reduced hours.

[35] In the fall, she sent her résumé to work in design. She applied for part-time employment. It is important to remember that she was already working part-time.

[36] Despite the pandemic and her class hours, she remains available for work. She hasn’t reduced her availability with her class hours. The exceptional situation caused by the pandemic is what is affecting her classes and her work.

[37] In support of its submissions, the Commission cited two Federal Court of Appeal decisions.[8] I see that both decisions refer to students who were available only evenings and weekends or only weekends.

[38] In my view, this case is different from those decisions. To begin with, the Claimant hasn't reduced her availability because of her classes. She is working fewer hours because of the pandemic. This is an exceptional situation. She had to reduce her hours temporarily. But the temporary situation has become somewhat permanent because of the pandemic.

[39] Still, she continued to look for a job while working at the restaurant. Again, the decrease in hours of work has to do with the pandemic, not her classes.

[40] In the circumstances, I find that the Claimant has rebutted the presumption of non-availability because of an exceptional circumstance.

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

Reasonable and customary efforts to find a job

[42] 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 are/were [*sic*] reasonable and customary.[9]

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

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[8] *Duquet v Canada (Attorney General)*, 2008 FCA 313; and *Canada (Attorney General) v Gauthier*, 2006 FCA 40.
[9] See section 50(8) of the Act.
[10] See section 9.001 of the Regulations.

[44] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job search activities I have to consider. Some examples of those are the following:[11]

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job search tools or with online job banks or employment agencies

[45] The Commission says that the Claimant didn't do enough to try to find a job. She looked for a part-time job in her field of study.

[46] For her part, the Claimant says she already had a job. She was looking for another part-time job. If she hadn't lost her job because of the pandemic, her hours of work would not have decreased.

[47] I see that the Commission would have liked the Claimant to have a suitable job. In the Commission's view, she could have worked in a retail store. Stores reduced their business hours during the pandemic, and there were curfews. In addition, the Claimant already had a job.

[48] The Commission also says that a person who works less than 35 hours a week has a part-time job. A job of 30 hours a week isn't considered a full-time job.

[49] I don't accept the Commission's argument. Availability within the meaning of the Act isn't a matter of hours of work. You have to show that you are available each working day. There are 24 hours in a day. This isn't about having or looking for a nine-to-five job. You have to show that you could work each working day.

[11] See section 9.001 of the Regulations.

[50] In my view, the Claimant made reasonable and customary efforts in light of the pandemic. She was looking for a suitable job, that is, a job that doesn't pay less or have less favourable conditions.[12]

[51] It isn't like the Claimant didn't make efforts to find a job and was just attending her classes. She was working, and she made efforts to find a job.

Capable of and available for work

[52] I also have to consider whether the Claimant is/was [*sic*] capable of and available for work but unable to find a suitable job.[13] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[14]

a) He/She [*sic*] 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) limited her chances of going back to work.

[53] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[15]

– Wanting to go back to work

[54] In my view, the Claimant has shown that she wanted to go back to work as soon as a suitable job was available. She worked while on unemployment.

[12] Section 9.002(2).
[13] See section 18(1)(a) of the Act.
[14] 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.
[15] 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.

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

[55] I find that the Claimant made enough effort 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.[16]

[57] The Claimant's efforts to find a new job included already having a job. She also sent her résumé to get a job to cover the hours she wasn't working. I explained these reasons above when looking at whether the Claimant made reasonable and customary efforts to find a job.

[58] Those efforts were enough to meet the requirements of this second factor. She wasn't inactive. She worked in food service, and she wanted to work in design. It isn't reasonable to ask the Claimant to leave her job to find a new job.

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

[59] I am also of the view that the Claimant didn't set personal conditions that might have unduly limited her chances of going back to work.

[60] The Commission relied on the *Faucher* case[17] in deciding that the Claimant had unduly limited her chances of going back to work in wanting to work part-time as a student.

[61] I disagree with the Commission's argument. *Faucher* doesn't involve a student's availability. The Court established the notion of presumption of non-availability for full-time students in other, later decisions.[18] I addressed the Commission's argument in the first part of my decision.

[62] *Faucher* reiterated the importance of the three factors in deciding availability when it comes to workers. There was no mention of a presumption of non-availability.

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[16] 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.
[17] *Faucher v Canada (Attorney General)*, A-56-96.
[18] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

The workers had started a roofing business. The Commission claimed that they weren't available for work because they were looking for contracts for their business. But, in February, there is no work in roofing. So, the Court allowed the claimants' appeal.

[63] In the circumstances, I am of the view that the Claimant didn't unduly limit her chances of going back to work. She already had a job. She mentioned being prepared to work under the same or better conditions as she was before she lost her job.

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

[64] 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.

Conclusion

[65] I find that 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.

[66] This means that the appeal is allowed.

Manon Sauvé

Member, General Division – Employment Insurance Section