Citation: *AS v Canada Employment Insurance Commission*, 2022 SST 161

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. S.
Appellant's Witness:	A. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (436550) dated October 23, 2021 (issued by Service Canada)

Tribunal member:	Linda Bell
Type of hearing:	Videoconference
Hearing date:	December 17, 2021, and January 31, 2022
Hearing participants:	Appellant Appellant's witness
Decision date:	February 3, 2022
File number:	GE-21-2288

Decision

[1] I am allowing the appeal. I agree with the Appellant, A. S..

[2] The Appellant has shown that she meets the availability requirements while attending unapproved training. This means she is entitled to the regular Employment Insurance (EI) benefits she received from October 5, 2020, to August 28, 2021.

Overview

[3] The Appellant was working full-time when she started open study training courses in September 2019. She continued to work full-time while completing her courses. Then on March 20, 2020, her employer laid her off when it temporarily closed during the global COVID-19 pandemic.

[4] In March 2020, the government made amendments to the *Act,* in response to the COVID-19 pandemic.[1] The Minister made several orders to amend the *Act* that were effective March 15, 2020. One of the orders added a new temporary benefit called the EI Emergency Response Benefit (EI-ERB).[2]

[5] The Appellant collected the EI-ERB from March 22, 2020, until the EI-ERB ended. The Commission automatically setup up the Appellant's claim for regular EI benefits effective October 4, 2020.

[6] Throughout the period that she collected regular EI benefits (October 4, 2020, to August 28, 2021), the Appellant reported her earnings and training on her biweekly reports. She returned to work for her previous employer many times throughout the COVID-19 pandemic re-openings. Her employer wasn't able to give her the full-time hours she worked pre-COVID, so she started actively looking for other jobs. She was willing to work multiple part-time jobs or quit her current job if offered a full-time job elsewhere.

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[1] Subsection 153.5 of the *Act.*
[2] See Part VIII.4 of the *Act.*

[7] The Appellant completed her open study training courses on line and at her own pace. She remained available to work full-time on any day of the week, during regular business or evening hours. This is because she could complete her course work on-line, whenever she wasn't working.

[8] The Commission decided that the Appellant wasn't available for work while attending unapproved training. It imposed an indefinite retroactive stop payment (disentitlement) starting on October 5, 2020. This disentitlement results in a $21,549.00 overpayment of EI benefits.

[9] The Appellant disagrees with the Commission. She appeals to the Social Security Tribunal (Tribunal). She says she remained available to work full-time while completing her training courses, until the end of August 2021.

Matter I have to consider first

Clerical errors

[10] The documents on file show that the Commission made numerous errors in this case. Specifically, the Commission erred when recording the start date of the disentitlement as October 5, **2021.** It listed the incorrect date in the initial decision, reconsideration decision, and in its submissions to the Tribunal. It also listed incorrect sections of the *Employment Insurance Act* (Act), that don't exist.

[11] The Commission provided Supplementary Representations on December 20, 2021. It says that it imposed the indefinite disentitlement as of October 5, **2020.** The Commission also says it was relying on section 153.161 of the Act to conduct a review of the Appellant's availability.

[12] I don't agree that the errors on this file were simply clerical errors. Instead, I agree with the Appellant when she says the agents made other errors. Specifically, the agents didn't clarify the period under review, conduct a thorough interview, or document her responses accurately.

[13] Upon review of the documents on file, it is clear that the Commission's agents and the Appellant discussed the classes she was taking between July and December 2021. The Commission's agent issued the initial decision letter shortly after those conversations, stating the Appellant wasn't entitled to benefits as of October 5, **2021**.

[14] During the reconsideration process, the documents on file support that the Appellant tried to clarify how she was looking for work prior to and throughout her October 4, 2020, claim. She told the Commission she wasn't attending training full-time. She was looking for work and was available to work full-time hours. Despite her statements, it appears that the Commission didn't believe her or failed to consider her evidence as it related to the correct years.

[15] Upon review of the documents, it appears that the Commission documented her evidence, relating to her current courses from July to December 2021, as if it related to her October 2020 claim. The Commission maintained the disentitlement starting from October 5, **2021.** But it imposed the disentitlement on her October 4, 2020, benefit period, resulting in a $21,549.00 overpayment of benefits.

[16] The Commission continued to err in its interpretation of the Appellant's evidence when writing their submissions to the Tribunal.[3] It references the Appellant's course information from August to December 2021, listing it as if this was evidence from courses she took in 2020. It switches the years back and forth from 2020 to 2021, as if appearing to try to make the evidence fit into the correct period of disentitlement.

[17] It appears on the face of the record that the Commission's agent may have predetermined the Appellant didn't meet the availability requirements simply because she was attending unapproved training. Although previous law presumed that a full-time student doesn't meet the availability requirements, this is a rebuttable presumption. The presumption doesn't mean the Commission should predetermine that a claimant doesn't meet the availability requirements. Instead, the Commission needs to conduct appropriate fact finding and give proper consideration to the evidence before it.

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[3] See page GD4-2.

[18] It is truly unfortunate that the Commission made so many errors in this matter. Fortunately, appeals before the Tribunal are *de novo.* This means the adjudication of the Appellant's claim begins anew where she can present all relevant evidence. Accordingly, I will now consider the merits of the Appellant's appeal.

Issues

[19] Does the current law presume that the Appellant is unavailable for work while attending full-time training?

[20] Has the Appellant shown that she meets the availability requirements to receive regular EI benefits?

Analysis

[21] Two different sections of the law require Appellants to show that they are available for work.[4] The Commission says the Appellant was disentitled under both sections because she hasn't shown she was capable of and available for work and unable to find suitable employment while attending unapproved training.[5]

[22] The Commission also relies on a 2010 Federal Court of Appeal decision.[6] This decision says that claimants who are attending full-time training are presumed to be unavailable for work.[7]

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[4] Paragraph 18(1)(a) of the Act provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment. Subsection 50(8) of the Act provides that, for the purpose of proving that a Appellant is available for work and unable to obtain suitable employment, the Commission may require the Appellant to prove that he or she is making reasonable and customary efforts to obtain suitable employment.
[5] See the Commission's submissions on page GD4-1.
[6] See page GD4-2.
[7] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

Presumption of unavailability

[23] Recent changes to the Act created new provisions. As I read them, the new provisions displace the presumption of unavailability.[8] This is because the new provisions do not presume that a full-time student is unavailable. Instead, the new provision says that full-time students must prove their availability just like any other claimant.[9]

[24] I find the Appellant is a full-time student for the purposes of EI benefits. I acknowledge that the Appellant says she wasn't attending full-time training in 2020 because she wasn't approved for student funding, she was doing her courses on-line, and she had spread her courses out over three years instead of two.[10]

[25] Despite the Appellant's statements, I find the Appellant is a full-time student, for the purposes of EI benefits. I made this finding after reviewing the screen shot she provided of her actual course load in 2020. She completed four courses in the 2020 fall term while collecting EI benefits. It is standard practise to consider students who take a minimum of 3 courses per semester, as being full-time students.[11]

[26] Based on the above, I find that the new provisions apply to the Appellant.[12] So, I will now review the requirements of the Act and decide whether the Appellant has shown she meets the availability requirements for EI benefits.

Reasonable and customary efforts to find suitable employment

[27] In their submissions to the Tribunal, the Commission references a disentitlement under subsection 50(8) of the Act. This provision requires that the Appellant prove she

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[8] Section 153.161 of the Act states that a claimant who attends a course, program of instruction or training to which the claimant is not referred is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
[9] See section 153.161(1) of the Act.
[10] The Appellant provides a course listing at page GD5-8. This document states the recommended path for completing the program in two years as a full-time student.
[11] See page GD3-36.
[12] Section 153.161 came into effect on September 27, 2020. This was still in effect when the Appellant's benefit period started on October 4, 2020.

is making reasonable and customary efforts to obtain suitable employment by providing details of her job search.

[28] I make no findings relating to subsection 50(8) of the Act. This is because there is no evidence that the Commission made a decision on this issue.[13]

[29] In its October 4, 2021, decision letter, the Commission states that the Appellant is not entitled to benefits because she is taking a training course on her own initiative and hasn't proven her availability for work. The reconsideration decision dated October 23, 2021, only mentions the issue of availability for work.

[30] There is no evidence that the Commission asked the Appellant to submit evidence of her job search efforts. In addition, there is no indication that the Commission made a decision relating to reasonable and customary efforts to obtain suitable employment.[14] So I make no findings on subsection 50(8) of the Act.

Capable of and available for work and unable to find suitable employment

[31] I must consider whether the Appellant has shown she was capable of and available for work and unable to find suitable employment.[15] The Appellant has to prove three things to show she was available under this section:

a) A desire to return to the labour market as soon as a suitable job is available

b) That desire is expressed through efforts to find a suitable job

c) No personal conditions that might unduly limit their chances of returning to the labour market[16]

[13] Section 113 of the Act provides the Social Security Tribunal the authority to determine issues under appeal that the Commission determined and reconsidered.
[14] See section 50(8) of the Act.
[15] Paragraph 18(1)(a) of the Act.
[16] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[32] I have to consider each of these factors to decide the question of availability, looking at the attitude and conduct of the Appellant.[17]

– **Does the Appellant have a desire to return to the labour market as soon as a suitable job is available?**

[33] Yes. The Appellant has shown a desire to return to the labour market as soon as a suitable job is available.

[34] The Appellant consistently says that she was working full-time until the onset of the COVID-19 pandemic. Her employer reduced her hours based on operational needs during the COVID-19 pandemic closures. The Appellant continued to work every shift she could get but her employer could only offer her part-time hours. So she started looking for work elsewhere.

[35] The Appellant says that she was actively seeking full-time and part-time work. She was willing to work multiple part-time jobs because she needed full-time work to sustain herself and pay her bills. She also says that she would have quit her current job if another employer offered her a full-time job. So, I find that the Appellant has shown she has had a desire to return to the labour market as soon as a suitable job was available.

– **Has the Appellant made efforts to find a suitable job?**

[36] Yes. The Appellant has shown that she was making efforts to find a suitable job since May 2020.[18] This is shortly after her employer temporarily closed during the first wave of the global COVID-19 pandemic.

[37] The Appellant continued to look for work while completing her open study courses on-line.[19] While they are not binding when deciding this particular requirement,

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[17] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.
[18] See pages GD3-33 to GD3-36.
[19] Section 6 of the Act defines what type of employment is not suitable. Section 9.002 of the Regulations lists the criteria for determining suitable employment.

I have considered the list of job-search activities, outlined below, as guidance when deciding this second factor.

[38] The *Employment Insurance Regulations* (Regulations) lists nine job-search activities I have to consider. Some examples of those activities are[20]

- assessing employment opportunities
- registering for job-search tools or with on-line job banks or employment agencies
- Attending job fares
- applying for jobs.

[39] The Appellant says that she started looking for work as soon as her employer temporarily closed during the first wave of the COVID-19 pandemic. She did this by speaking with friends at different retail locations, attending job fares at local malls, registering on-line with Indeed and Glassdoor, and applying for several jobs. She says she also opened up her availability with her current employer and accepted all shifts they offered.

[40] I recognize that there is no formula to determine a reasonable period to allow a claimant to explore job opportunities. This means I must consider specific circumstances on a case-by-case basis.[21]

[41] In this case, the economic effects caused by the global COVID-19 pandemic and public health orders in the Appellant's Province are circumstances that I considered when determining the reasonable period to explore job opportunities.

[42] The Appellant consistently told the Commission that she remained available to work full-time while taking her training courses. In addition, there is evidence, as set out above, which supports that the Commission failed to document the Appellant's answers fully. For example, when the Claimant said she wouldn't quit her training, she also

[20] See section 9.001 of the Regulations.
[21] See section 10.4.1.4 of the Digest of Benefit Entitlement Principles.

clarified that there was no need for her to quit because she could accept a full-time job and do her training anytime she wasn't at work. The Commission didn't document her clarification. Instead it just documented that she said she wouldn't quit her training to accept a job.

[43] After consideration of the totality of the evidence before me, I find that the Appellant's efforts are enough to meet the requirements of this second factor. This is because she has shown that she was available for work on every workday during regular working hours. She has also shown that she was actively seeking suitable employment, working whatever shifts she could get, while attending full-time training.

– **Did the Appellant set personal conditions that might unduly limit her chances of returning to the labour market?**

[44] No. I find that the Appellant didn't set personal conditions that might have unduly limited her chances of returning to the labour market for the entire period she was collecting regular EI benefits. This period is from October 4, 2020, to August 28, 2021.

[45] The Commission submits that the Appellant can't prove her availability for work as of October 5, 2020. This is because it determined that she wasn't available for work when she told them she wouldn't leave her course to accept full-time work.

[46] I disagree with the Commission for two reasons. First, the law doesn't stipulate that the Appellant must be seeking full-time work. Rather, she has to prove she is available for and seeking suitable employment. Second, the law doesn't require that the Appellant quit her training to prove her availability. Instead, the law requires that she be available to work on every workday, Monday through Friday, during regular working hours, regardless of her full-time training.

[47] I find that the Appellant has shown she was available for work without setting conditions. I believe her when she says she was available for and actively seeking suitable employment the entire time that she was collecting regular EI benefits. This is supported by her documentary and oral evidence.

[48] At the hearing, the Appellant explained her circumstances in detail. I found her evidence regarding her course work, availability, and willingness to work multiple jobs, credible. This is because her evidence was consistent and plausible.

[49] The Appellant provided documentary evidence listing some of the job applications she submitted during 2020 and 2021. She says she was available to accept every shift offered by her current employer. She also sought out other part-time and full-time jobs because she needed to work full-time hours to sustain herself. She didn't need to quit her course work to be able to work full-time because she could complete her courses on-line anytime she wasn't working.

[50] The evidence, as set out above, supports a finding that the Appellant did not set personal conditions that unduly limited her chances of returning to the labour market while collecting EI benefits from October 4, 2020, to August 28, 2021.

Was the Appellant capable of and available for work and unable to find suitable employment?

[51] After considering my findings on each of the three factors together, I find that the Appellant has shown that she was capable of and available for work and unable to find suitable employment, from October 4, 2020, to August 28, 2021.[22]

[52] I accept that, even though she was completing courses for a full-time training program, the Appellant has shown she was available for work on every weekday, during normal business hours, and was actively seeking suitable employment. This is the period she was receiving regular EI benefits. So, the Appellant is not disentitled from EI benefits as of October 5, 2020.

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

Conclusion

[53] I am allowing the appeal.

[54] The Appellant has shown she meets the availability requirements for regular EI benefits. This means she isn't disentitled from regular EI benefits as of October 5, 2020.

Linda Bell
Member, General Division – Employment Insurance Section