[TRANSLATION]

Citation: *KR v Canada Employment Insurance Commission*, 2021 SST 914

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. R.
Representative:	Michel Dubé
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (435798) dated October 13, 2021 (issued by Service Canada)

Tribunal member:	Manon Sauvé
Type of hearing:	Videoconference
Hearing date:	November 18, 2021
Hearing participants:	Appellant Representative
Decision date:	December 22, 2021
File number:	GE-21-2002

Decision

[1] The appeal is allowed in part. The Claimant has shown that she was available for work while in school from September 28, 2020, to April 27, 2021. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits.

[2] But she hasn't shown that she is entitled to receive EI benefits from August 30, 2021.

Overview

[3] The Claimant was working in food service. She was also taking university training in preschool education and primary education.

[4] Because of the COVID-19 pandemic, she lost her job in food service. She received the Canada Emergency Response Benefit from March 15, 2020, to September 26, 2020.

[5] On September 27, 2020, her file was transferred to the Employment Insurance Commission (Commission). She indicated that she was taking training full-time, that she was available for work, and that she would not give up her studies.

[6] After investigating, the Commission found that the Claimant wasn't entitled to EI benefits, since she wasn't available for work because she was a full-time student. It decided that the Claimant had to pay back the benefits paid between September 28, 2020, and April 27, 2021. It assessed an overpayment of $12,014.

[7] The Commission also found that she wasn't entitled to receive benefits from August 30, 2021, because she hadn't shown that she was available for work.

[8] The Claimant disagrees with the Commission's decision. She was available for work while in school.

Issue

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

Analysis

[10] 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.

[11] 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.

[12] 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.

[13] 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.

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

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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.

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

Presuming full-time students aren't available for work

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

[17] 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.

[18] This means that the presumption applies to the Claimant. 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. 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]

[20] I understand that the Claimant was studying teaching full-time. While in school, she worked in food service and in teaching. In 2017, she became a server in a X restaurant. Also, in 2019, she started working for a school board as a substitute.

[21] In March 2020, she lost her job because of COVID-19. She applied for EI benefits. At first, she received the Canada Emergency Response Benefit.

[22] In September 2020, she was transferred to the EI program. When completing her application, she indicated that she was enrolled in university full-time.

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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] She testified to having two jobs. She balanced both jobs while in school. Because of the pandemic, the restaurant closed down in March 2020. She lost her job and took advantage of emergency government measures.

[24] In October 2020, she completed her claims for EI benefits. Her file was deactivated. She got a call from an agent who asked her questions about her training. Soon after, her file was reactivated, and she received EI benefits.

[25] During the 2020–2021 school year, she worked in two places: at the restaurant and at the school.

[26] In July 2021, she went back to work at the restaurant. There were more closures after that. During the pandemic, she noticed a drop in traffic. Since she didn't have the most seniority, she wasn't called back.

[27] She decided to change jobs to make sure she had an income. She got a job at X and worked there the entire summer of 2021. It was a seasonal job.

[28] When that job ended, she made a new EI claim. And the Commission started its investigation after that. It saw that the Claimant had received EI benefits while in school.

[29] I understand that, since high school, she has always worked while going to school. In college, she worked several days a week, even if she had a schedule of eight courses per term. She has always combined work and study.

[30] She lost her job because of the pandemic. If there hadn't been a pandemic, she would have continued working and going to school.

[31] Concerning her university studies, she says that the term ended in March 2020. In the fall of 2020, classes were distance learning. She had modules to complete. Classes were asynchronous, meaning not in real-time. She had objectives to meet at her own pace. So, she could agree to substitute in schools without any problem.

[32] On September 14, 2021, the Commission contacted the Claimant for information. The Claimant said that she was available to work 15 hours a week. She would not give up her studies for a job.

[33] The Commission refused to pay her EI benefits, since she wasn't available for work. It is asking her to repay the benefits paid from September 2020.

[34] The Commission says that the Claimant hasn't rebutted the presumption of non-availability because of her studies. She would not have given up her studies for a time [*sic*] job. She didn't look for a full-time job.

[35] 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.

[36] In my view, this case is different from those decisions. To begin with, the Claimant didn't reduce 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.

[37] The Claimant, meanwhile, says that she has rebutted the presumption. For one thing, she has always worked while in school. Even during the pandemic, she worked during the fall of 2020 and the winter of 2021. She isn't to blame for the situation.

[38] I find that the Claimant has rebutted the presumption of non-availability for the period from September 28, 2020, to April 27, 2021. 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.

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[8] *Duquet v Canada (Attorney General)*, 2008 FCA 313; and *Canada (Attorney General) v Gauthier*, 2006 FCA 40.

[39] The Claimant was studying school teaching full-time. She started working part-time in high school. She always worked in food service: part-time during the school year and full-time in the summer.

[40] While studying teaching, she replaced teachers during the school year.

[41] In March 2020, the COVID-19 pandemic affected how work and schools were organized. In the fall of 2020, she didn't have to attend her classes in person anymore. She was self-reliant in her studies. So, she could work in food service and in teaching.

[42] She also declared earnings to the Commission during that period. She adapted to restrictions. Still, she earned an income while on unemployment. She wasn't less available than before the pandemic.

[43] She didn't reduce her availability because of her class hours. The exceptional situation caused by the pandemic is what affected her classes and her work. If there hadn't been a pandemic, she would have worked and attended her classes.

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

[45] Rebutting the presumption means only that the Claimant isn't presumed to be unavailable because of her studies. 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.

[46] I find that the Claimant hasn't shown that she was available for work from August 30, 2021. First, she left her job at X, which is unionized, for a seasonal job, and she had some seniority.

[47] Second, the pandemic situation has changed. The university is holding classes again. She said she didn't have to attend her classes. I understand, but the situation has improved. Restaurants are open, classes have resumed, and rules are less restrictive.

[48] Lastly, I don't accept *Gibbs*,[9] which the Claimant cites to show that a student who works part-time can be available for work. That case predates[10] *Cyrenne*.

[49] In addition, the situation isn't the same as in *Gibbs*. In that case, the claimant wasn't out of a job by choice. She stopped working because the employer had lost a major client. In this case, the Claimant chose a seasonal job.

[50] In the circumstances, I find that, from August 31, 2021, the Claimant was no longer in an exceptional situation and no longer had the same working conditions. This means that she hasn't rebutted the presumption.

Reasonable and customary efforts to find a job

[51] 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.[11]

[52] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[12] 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.

[53] 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:[13]

- assessing employment opportunities
- [attending] job search workshops or job fairs
- networking

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[9] *Canada v Gibbs*, 2004 FCA 400.
[10] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[11] See section 50(8) of the Act.
[12] See section 9.001 of the Regulations.
[13] See section 9.001 of the Regulations.

- contacting employers who may be hiring
- applying for jobs

[54] The Commission says that the Claimant made no effort to find a suitable job.

[55] The Claimant disagrees. She worked, and she had two jobs: at the school board and at the restaurant.

[56] 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. And that you would work in similar circumstances.

[57] For the period from September 28, 2020, to April 27, 2021, I find that the Claimant made reasonable and customary efforts in pandemic circumstances. She was looking for a suitable job, that is, a job that doesn't pay less or have less favourable conditions.[14]

[58] Concerning the claim for benefits effective August 31, 2021, I find that the Claimant hasn't shown that she has made reasonable and customary efforts to find a job.

Capable of and available for work

[59] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[15] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[16]

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

[14] Section 9.002(2) of the Regulations.
[15] See section 18(1)(a) of the Act.
[16] 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) 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.

[60] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[17]

– **Wanting to go back to work**

[61] 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 between September 28, 2020, and April 27, 2021.

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

[62] I find that the Claimant made enough efforts to find a suitable job.

[63] 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.[18]

[64] The Claimant's efforts to find a new job included already having two jobs and working hours at the restaurant and in teaching. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[65] Those efforts were enough to meet the requirements of this second factor. She wasn't inactive. She worked in food service and in her field of study: teaching. It isn't reasonable to ask the Claimant to leave her jobs to find a new job.

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[17] See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[18] 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.

– Unduly limiting chances of going back to work

[66] 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.

[67] The Commission relied on the *Faucher* case[19] in deciding that the Claimant had unduly limited her chances of going back to work in wanting to work part-time as a student.

[68] 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.[20] I addressed the Commission's argument in the first part of my decision.

[69] *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. In that case, 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.

[70] 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?

[71] 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 September 28, 2020, to April 27, 2021.

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

[72] I find that the Claimant hasn’t shown that she was available for work from August 31, 2021.

Conclusion

[73] 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 for the period from September 28, 2020, to April 27, 2021.

[74] The Claimant hasn’t shown that she was available for work within the meaning of the law from August 31, 2021. Because of this, I find that she is disentitled from receiving benefits.

[75] This means that the appeal is allowed in part.

Manon Sauvé
Member, General Division – Employment Insurance Section