Citation: *BB v Canada Employment Insurance Commission*, 2022 SST 175

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision dated March 19, 2021 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	November 22, 2021
Hearing participant:	Appellant
Decision date:	January 31, 2022
File number:	GE-21-1769

Decision

[1] The appeal is dismissed.

[2] The Appellant has not proven he was available for work for purposes of regular EI benefits. This means he is disentitled to regular Employment Insurance (EI) benefits from November 16, 2020 and December 9, 2020.

[3] The Appellant has also not proven he was otherwise available for work for purposes of EI sickness benefits. This means he is disentitled to sickness benefits starting from December 10, 2020.

Overview

[4] The Appellant applied for EI sickness benefits on December 22, 2020. On his application, he said that his last day of work was November 17, 2020[1] and that he was *not* taking a course or training program[2].

[5] His claim was established[3], and he was paid sickness benefits starting from December 20, 2020[4].

[6] On January 15, 2021, he asked to antedate his claim so that he could be paid regular EI benefits starting from November 17, 2020, his last day of work at his

---

[1] See EI Application at GD3-7.

[2] See EI Application at GD3-11.

[3] Albeit without a verifiable Record of Employment (ROE) from his employer. The Commission relied on a provisional ROE prepared with information from the Appellant (see GD3-38). As the Commission noted in its submissions, the Appellant's last day of work was not confirmed prior to payment of benefits; and, as of April 14, 2021, the employer still had not filed an ROE with the Commission (see GD4-7).

[4] Subsection 10(1) of the *Employment Insurance Act* (EI Act) says that a benefit period starts on ***the later*** of (a) the Sunday of the week in which the interruption of earnings occurs, or (b) the Sunday of the week in which the initial claim for benefits is made. This means the Appellant's initial benefit period started from December 20, 2020. According to the Appellant's Notice of Appeal, he received a lump sum payment for 5 weeks of sickness benefits (covering December 20, 2020 to January 23, 2021) on February 9, 2021 (see GD2-9).

seasonal employment[5] (GD3-19). He said that he became unable to work due to a shoulder injury on December 10, 2020[6].

[7] On January 22, 2021, the Appellant reported that he was a student[7]. He also completed a training questionnaire[8], in which he reported that he was:

- A full-time student at Mount Royal University in Calgary.
- Spending 25 hours or more per week on his studies.
- Taking 5 courses, starting January 11, 2020 and ending April 30, 2021.
- Obligated to attend scheduled classes, Monday-Friday, in the morning and afternoon.
- If he were not injured, he would be available for work and capable of working.
- His intention once he recovered was to continue with his courses and return to his employment to the same extent he worked prior to his injury.
- The cost of his courses was $8,000.

[8] This caused the Commission to investigate whether the Appellant was available for work.

---

[5] See Application to Antedate Claim for Benefit at GD3-19.

[6] The Appellant said his doctor advised a 4-month medical leave of absence due to the injury. This roughly corresponds to the maximum number of weeks that sickness benefits can be paid, which is 15 weeks (paragraph 12(3)(c) EI Act). According to his Request for Reconsideration, the Appellant is seeking the maximum entitlement of 15 weeks of sickness benefits starting from December 10, 2020 (see GD3-47).

[7] See Claimant Report at GD3-26.

[8] At GD3-32 to GD3-37.

[9] To be entitled to sickness benefits, all claimants must show that their illness or injury is the ***only reason*** why they are not available for work[9]. And for regular EI benefits, all claimants must prove that they are capable of, and available for work, and unable to obtain suitable employment[10].

[10] When contacted by the Commission on February 17, 2021[11], the Appellant said he was in his 2nd year of a full-time bachelor degree program, and was required to attend lectures 5 days per week, Monday to Friday. He said he works year-round with X: about 80 hours per week in the summer, and in the winter he goes to school full-time and works part-time. The hours in the winter are significantly less, depending on whether there is snow to clear, but he does not look for other work to make up full-time hours. His focus is to complete school. He was not looking for other work between November 16, 2020 and December 10, 2020 because he was waiting to get called back to work by X. If not for his injury, he would be in school full-time and working part-time at X.

[11] The Commission decided the Appellant was limiting his availability by going to school and waiting to return to work for his pre-disability employer. Although the Commission granted the Appellant's antedate request, it decided he was not entitled to regular EI benefits or sickness benefits because he did not meet the availability requirements for either type of benefit.

[12] The Commission imposed a retroactive, indefinite disentitlement on his claim for sickness benefits from December 10, 2020[12]. As 5 weeks of sickness benefits had

---

[9] Paragraph 18(1)(b) of the EI Act.
[10] Paragraph 18(1)(a) of the EI Act.

[11] See Supplementary Records of Claim at GD3-41 to GD3-43.

[12] See decision letter at GD3-44.

already been paid to him, this created a $2,500 overpayment that he has been asked to repay[13].

[13] The Commission also imposed an indefinite disentitlement on his claim for regular EI benefits from November 16, 2020[14].

[14] The Appellant asked the Commission to reconsider both disentitlements. In his Request for Reconsideration, he said that his school schedule did not interfere with his ability to work[15], that he had a history of working while in school, and that he was not looking for work because he already had a job that he was on-call for in the event of snow[16]. The Commission was not persuaded[17], so he appealed[18] to the General Division of the Social Security Tribunal (Tribunal). When the General Division dismissed his appeal, he appealed to the Appeal Division of the Tribunal.

[15] The Appeal Division found that the General Division made errors in its analysis. It allowed the Appellant's appeal and returned the matter to the General Division for reconsideration, where it was assigned to a different Tribunal Member.

---

[13] See Notice of Debt at GD3-46. The $2,500 represents sickness benefits paid to the Appellant prior to the disentitlement (see payment history at GD3-40). No regular EI benefits were ever paid to the Appellant because the Commission decided he was not available for work.

[14] See decision letter at GD3-45.

[15] Although when subsequently interviewed by the Commission on March 10, 2021, he contradicted the information he provided on his training questionnaire and said that all of his classes were online due to the Covid-19 pandemic, and he only spent about 7 hours per week on his studies (see GD3-54).

[16] Although when subsequently interviewed by the Commission on March 10, 2021, he contradicted his statement that he was not looking for work and said he would have been seeking full-time work with other employers but for his injury (see GD3-54).

[17] A reconsideration decision letter maintaining the original disentitlements was issued on March 19, 2021 (at GD3-60 to GD3-61).

[18] The Appellant's Notice of Appeal included a detailed response to the reconsideration decision and additional supporting documents. I address these items in detail in the analysis section of this decision.

[16] I must decide whether the Appellant has proven his availability for work for purposes of receiving regular EI benefits from November 16, 2020 to December 9, 2020[19].

[17] I must also decide whether the Appellant has proven that, but for his injury, he was otherwise available for work starting from December 10, 2020 and continuing for the 15 weeks he is seeking EI sickness benefits for.

Preliminary Matters

a) Disentitled while outside of Canada

[18] On February 9, 2021, the Appellant was paid a lump sum for 5 weeks of sickness benefits covering the period December 20, 2020 to January 23, 2021[20].

[19] On February 17, 2021, he was disentitled to EI benefits from January 25, 2021 to January 29, 2021 because he was outside of Canada during this time[21].

[20] After that decision, he was retroactively disentitled to both regular and sickness benefits because he did not meet the availability requirements for either type of benefit[22].

[21] I see no evidence that the Appellant asked for a reconsideration of the disentitlement for being outside of Canada[23]. Therefore, that disentitlement is not before me on this appeal[24].

---

[19] The indefinite disentitlement is considered a definite disentitlement because the Appellant's claim for sickness benefits was antedated to December 10, 2020.

[20] See footnote 4 above.

[21] See decision letter at GD2-44.

[22] See decision letters issued February 19 and 23, 2021 respectively, at GD3-44 and GD3-45.

[23] See his Request for Reconsideration at GD3-47.

[24] Only decisions that have been reconsidered by the Commission can be appealed to the Tribunal (sections 112 and 113 of the EI Act).

[22] Unless that disentitlement was separately reconsidered and rescinded by the Commission, or overturned on a separate appeal to the Tribunal, the Appellant remains disentitled to EI benefits from January 25, 2021 to January 29, 2021 because he was outside of Canada. This is the case regardless of my findings regarding his availability for sickness benefits.

b) Indefinite disentitlement imposed on sickness benefits

[23] In its original decision, the Commission imposed an indefinite disentitlement on the Appellant's claim for sickness benefits starting as of December 10, 2020[25] (GD3-44).

[24] This decision was maintained on reconsideration (GD3-60), so this is the decision I have jurisdiction over on this appeal[26].

[25] In updated submissions filed for the new hearing before me, the Commission incorrectly referred to the start date of the indefinite disentitlement imposed on the Appellant's claim for sickness benefits as December 20, 2020[27]. This is an error. The Appellant was paid 5 weeks of sickness benefits covering the period from December 20, 2020 to January 23, 2021[28]. But the disentitlement imposed on his claim was always effective from **December 10, 2020**.

[26] It is that indefinite disentitlement on the Appellant's claim for sickness benefits – starting from December 10, 2020, that I must consider on this appeal.

---

[25]This decision, and the disentitlement imposed on the claim for regular EI benefits, were made in response to the Appellant's antedate request.

[26] See footnote 23 above.

[27] See RGD5-1.

[28] No sickness benefits were paid to the Appellant after January 23, 2021 because he was outside of Canada from January 25 – 29, 2021 and there was an indefinite disentitlement imposed on his claim from December 10, 2020.

c) Appellant's Record of Employment

[27] The new hearing was held on November 22, 2021. There was still no Record of Employment (ROE) on file for the Appellant[29], even though he testified that the employer told him it had been filed with the Commission.

[28] The Appellant asked for a chance to obtain a copy of his ROE or the equivalent information from the employer himself. He was given until December 8, 2021 to file copies of his pay-stubs for the 52-week period prior to November 17, 2020, or some other record from the employer showing his hours and earnings for each of the pay-periods in the 52 weeks prior to November 17, 2020[30].

[29] On December 22, 2021 he filed the ROE at RGD13-4.

[30] Although the Appellant filed this document after the deadline, I have decided to accept it as evidence in this appeal. This is because the original deadline was too short considering the difficulties and delays the Appellant likely experienced trying to get a copy of his ROE from the employer during the Covid-19 pandemic and so close to the holiday season.

[31] The Commission was provided with a copy of the ROE, and had no submissions in response.

Issues

[32] Should the Appellant be disentitled to regular EI benefits between November 16, 2020 and December 9, 2020 because he did not prove he was available for work?

---

[29] On November 23, 2021, the Commission sent a second request for an ROE to the employer (see Tribunal's Investigation and Report Request at RGD09 and Commissions Response at RGD11-1 to RGD11-6).

[30] See RGD12.

[33] Should the Appellant be indefinitely disentitled to EI sickness benefits from December 10, 2020 because he did not prove that, but for his injury, he was otherwise available for work?

[34] I will address these issues in chronological order.

Analysis

Issue 1: Regular EI benefits Nov.16 – Dec. 9, 2020

[35] To be considered available for work for purposes of regular EI benefits, the law says the Appellant must show that he is capable of, and available for work and unable to obtain suitable employment[31].

[36] There is no question of the Appellant's capability during this time. According to his antedate request, he become medically unable to work on December 10, 2020. I will therefore proceed directly to the availability analysis for purposes of his entitlement to regular EI benefits between November 16, 2020 and December 9, 2020.

[37] The Federal Court of Appeal has said that availability must be determined by analyzing 3 factors:

a) the desire to return to the labour market as soon as a suitable job is offered;

b) the expression of that desire through efforts to find a suitable job; ***and***

c) not setting personal conditions that might unduly limit the chances of returning to the labour market[32].

[31] Section 18(1)(a) of the *Employment Insurnace Act* (EI Act).

[32] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.

[38] These 3 factors are commonly referred to as the "*Faucher* factors", after the case in which they were first laid out by the court.

[39] The court has also said that:

a) availability is determined for **each working day** in a benefit period for which a claimant can prove that, on that day, they were capable of and available for work and unable to obtain suitable employment[33]; and

b) claimants who are in school full-time are presumed to be unavailable for work[34] (this is commonly referred to as the presumption of non-availability).

[40] The presumption that students are not available for work only applies to full-time students. The Appellant has proven he was a part-time student between November 16, 2020 and December 9, 2020, so the presumption does not apply during this period[35].

[41] This means he need only satisfy the *Faucher* factors to prove his availability for purposes of receiving regular EI benefits during this period.

First factor: Wanting to go back to work

[42] The Appellant had a desire to return to his usual winter employment during this period.

[43] I accept the Appellant's testimony that, between November 16, 2020 and December 9, 2020 he was on call to do snow removal work for his regular employer, X.

---

[33] See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73.

[34] See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349.

[35] In his updated submissions filed for the new hearing before me, the Appellant provided evidence from the University that he was only registered in 2 courses in the Fall 2020 semester (RGD6-3). I accept that this means he was a part-time student during the Fall 2020 semester. The presumption of non-availability only applies to full-time students: see *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349.

He waited for the employer to call him to work, but there was no snow, so there was no work.

[44] I also give significant weight to the Appellant's earliest statements to the Commission that he works year-round with X: about 80 hours per week in the summer, and in the winter he goes to school full-time and works part-time doing snow removal[36]. The Appellant gave these statements spontaneously and in response to questions about his availability from the Commission. They were also given prior to any negative decisions on his claim, which could have motivated the Appellant to change his story[37].

[45] And they are consistent with the ROE the employer issued after his last paid day of work on November 17, 2020. The employer reported that the reason for issuing the ROE was code "C", which is "Return to School"[38]. The fact that the employer issued the ROE with the Return to School code on January 1, 2021 – long after the Appellant's last day of work on November 17, 2020, is both telling and significant.

[46] As a part-time student during the period in question, the Appellant was potentially able to work more hours than if he had a full-time course load. But I do not find his testimony that he worked full-time hours in prior winters – and was waiting to do so again, to be credible[39].

[47] His initial statements that he worked full-time during the summer, and part-time during the winter while going to school, are consistent with his University course load in the prior year when he was a full-time student in both the Fall and Winter semesters[40].

---

[36] See GD3-41 to GD3-43.

[37] See footnotes 15 and 16 above.

[38] See Box 16 on ROE at RGD13-4. According to ESDC's website, Service Canada has started phasing out code "C – Return to School", and is asking employers to use code "E – Quit" and write "Return to School" in Box 18 under "Comments". In either case, the employer is required to report if the separation from employment is due to the employee returning to school.

[39] The credibility of this testimony is discussed in detail in paragraphs 109 to 123 below.

[40] The Appellant was registered for 5 courses in the fall semester of 2019 and 4 courses in the winter semester of 2020 (see RGD6-3).

[48] They are also consistent with the ROE reporting his first day of employment as April 6, 2020 (April being the last month of the winter 2020 semester); and the fact that he only earned $225 (roughly 10 hours of work[41]) in the first ***bi-monthly*** pay period of that month[42]. This, together with the fact that his earnings ramped up to $1,283.00 (roughly 60 hours of work[43]) immediately thereafter, is indicative of working part-time until he had completed his course requirements for that term. This is especially the case given that April is typically a very busy time for landscaping businesses.

[49] And his initial statements are consistent with the pay-stubs included with his Notice of Appeal[44]. The pay stub for the bi-monthly pay period immediately prior to the Appellant's last paid day of work showed he had year-to-date (i.e. from Jan. 1, 2020 to the end of his final pay-period on November 30, 2020) gross earnings of $20,427.50. The ROE reports that he had gross earnings of $17,929.80 between April 6, 2020[45] and his last paid day of work on November 17, 2020. The difference in those earnings ($20,427.50 - $17,929.80 = **$2,497.70**) could only have been earned between January 1, 2020 and April 5, 2020, when the Appellant was a full-time student[46]. At the Appellant's pay rate of $21/hour, this means the Appellant worked roughly 119 hours in the 3 winter months of 2020 (January – March), which comes out to approximately 40 hours/***month*** (or 10 hours/week). This is indicative of part-time employment while in school.

---

[41] Based on the $21/hour rate on the Appellant's pay stubs at GD2-41 to GD2-42.

[42] See Box 16 on the ROE at RGD13-4.

[43] See footnote 41 above.

[44] At GD2-41 to GD2-42.

[45] According to Box 10 on the ROE at RGD 13-4, this was the "First day worked (or first day worked since last ROE issued).

[46] The Appellant testified that he was taking 5 courses during the Winter 2021 semester, which started on January 11, 2021.

[50] For these reasons, I find that the Appellant had a desire to go back to work part-time with his regular employer between November 16, 2020 and December 9, 2020 – just as he told the Commission was his custom.

[51] But to satisfy the first *Faucher* factor, he must show that he wanted to go back to work *as soon as a suitable job was available*.

[52] That was not the case for the Appellant because he was specifically waiting to be called to work by X.

[53] The Appellant's job with JMC Landscaping was a manual labour job[47]. Generally, work in an occupation that is the same or similar to work previously done by a claimant would be considered suitable. Yet the Appellant never considered a manual labour position with a different employer prior to his shoulder injury – or afterward.

[54] The EI Act is not designed to provide benefits until a claimant gets the job they desire. Claimants may be permitted a reasonable time to restrict their search for work to employment within their *professional* field or a *skilled trade* in which they have been trained. But this is not usually the case for manual labour – and the Appellant wasn't looking for an alternative manual labour position in any event. And while I acknowledge that he had worked his way up to $21/hour, all claimants are expected to seek and accept suitable employment while claiming regular EI benefits – including employment with lower wages than initially desired or previously received[48].

[55] By deliberately waiting to be called to work by X, it cannot be said that the Appellant was willing to return to work as soon *as a suitable job was available*.

[56] This means he has not satisfied the first *Faucher* factor.

---

[47] This is based on two things: the medical certificate at GD2-17 refers to the Appellant's "snow-shovelling job"; and in his Leave to Appeal Application, he said that his shoulder injury did not allow him to do manual labour (at AD01).
[48] Although not less than the minimum wage in effect in the province or territory in which the work is offered.

Second factor: Making efforts to find a suitable job

[57] The Appellant's job search efforts are not sufficient to prove he intended to work.

[58] The Appellant has no evidence of ***any*** job search efforts between November 16, 2020 and December 9, 2020. He did not apply for any jobs or approach any other employers during this period.

[59] The Appellant testified at the hearing that he did not look for work during this period because he had a job: he was "on call" for snow removal and other winter tasks with X. He was waiting for the employer to call him to work, but there was no snow. He wants regular EI benefits for this period because he was on-call but did not work.

[60] The Appellant told the Commission that he works year round with X[49]. He said he works a lot more in the summer, usually 80 hours per week, and the hours are much less in the winter, depending on whether there is snow. During the winter he goes to school full-time and works part-time, and does not look for other work to make up full-time hours. For the reasons set out under the First factor above, I give significant weight to these statements. They are also are supported by the pay stubs at GD2-41 to GD2-42. As set out in paragraph 49 above, the pay stubs allow me to conclude that the Appellant worked and had earnings between January 1, 2020 and April 5, 2020 that were separate and apart from the earnings reported on the ROE for April 6, 2020 to November 17, 2020.

[61] I therefore accept that the Appellant had a year-round employment relationship with X.

[62] This means I must consider if the fact that the Appellant was waiting to be called to work by his regular employer means he is exempt for a reasonable period of time from having to show an active job search to prove his availability for work.

---

[49] See Supplementary Record of Claim at GD3-41.

[63] There are a few cases where the courts have held that a claimant on a temporary lay-off awaiting imminent recall should not be immediately disentitled on the grounds of not seeking other employment[50].

[64] I find that the Appellant does not meet this exception.

[65] First, the Appellant was ***not*** laid off after his last day of work on November 17, 2020. His ROE was issued because he returned to school. This is what the employer reported as the reason for the separation from employment. The Appellant testified at the hearing that he was communicating with his boss after November 17, 2020 to confirm he had not been laid off and was just waiting to be called in once it snowed.

[66] Second, there is no evidence the Appellant was going to be recalled to the position that had just ended, namely his full-time summer position – at any point between November 17, 2020 and December 9, 2020. His last day paid day was November 17, 2020. After that, he was only "on-call", and it was for work of an entirely different nature, namely winter snow removal – which was weather dependent and, as the Appellant told the Commission, meant far fewer hours than he worked in the summer.

[67] For the reasons set out under the First factor above, the ROE is more indicative of the Appellant's seasonal pattern of working as much as possible during the summer landscaping season (80 hours/week or more) and far fewer hours during the winter snow removal season – exactly as he described to the Commission. He would not have returned to full-time employment until the following April, after completing his course requirements. Waiting to be recalled to part-time work[51] (the winter work that would have been available at X between November 16, 2020 and December 9, 2020) after ceasing full-time employment is not the type of job recall contemplated by the exception.

---

[50] *Canada (A.G.) v. MacDonald* (May 31, 1994) A-672-93 (FCA), and *Carpentier v. Canada* (A.G.) (June 22, 1998) A-474-97 (FCA).

[51] In the prior winter (January to March 2020), the Appellant worked an average of approximately 40 hours *per month* (see paragraph 49 above).

[68] Third, there is little evidence the Appellant's recall was imminent. His last paid day of work was November 17, 2020. The ROE wasn't even issued until January 20, 2021, and reported the expected date of recall as "Unknown"[52]. And at that time, the employer gave the reason for issuing the ROE as "Return to School" – not because of a shortage of work, or the end of the season, or even anything related to illness or injury (despite the fact that the Appellant was medically unable to work as of December 10, 2021). If the Appellant was "on call" and in touch with the employer about work, but there was no work because of a lack of snow (as he testified), then the ROE would presumably have been issued for one of the latter reasons. But it was issued for the Appellant's return to school. This makes it reasonable to assume that the recall contemplated was sometime in April 2021 – approximately 5 months after the Appellant's last paid day of work. This is not considered imminent.

[69] More recently, the courts have said that waiting to be recalled to employment is not sufficient to prove availability[53]. Only claimants who are actively looking for employment can receive regular EI benefits. This is the case even if there is a possibility of recall or the period of unemployment is unknown or relatively short-term. A claimant's job search efforts must be sufficient to prove an active, on-going[54] and wide-ranging job search directed towards finding suitable employment.

[70] There are also more recent decisions from this Tribunal that have held that a claimant cannot look to recall as the best avenue to employment, even when the anticipated period of unemployment is short – where only a minimal job search is

---

[52] See Box 14 on ROE at RGD13-4.

[53] *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *D. B. v Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *DeLamirande v Canada (Attorney General)*, 2004 FCA 311; *CUB 76450; CUB 69221; CUB 64656; CUB 52936; CUB 35563.*

[54] The Claimant must be searching for work for ***every day of their benefit period***.

made[55]. In the Appellant's case, his failure to conduct any job search whatsoever shows that he was not really in the market for a job.

[71] I acknowledge that the Appellant liked working for X and wanted to continue the employment relationship. He appears to have had a flexible arrangement with the employer whereby he could pick up part-time work in the winter months[56]. But the courts have said that maintaining the employment tie and remaining part of the work force part-time while going to school does not necessarily make a person available for work[57].

[72] The *Employment Insurance Act* is designed so that only claimants who are genuinely unemployed and actively looking for work will receive EI benefits.

[73] I accept the Appellant's testimony that he was not looking for work between November 16, 2020 and December 9, 2020. And I agree with the Commission that, by waiting for X to call him when they had snow removal work for him, the Appellant was not doing to enough to find suitable employment between November 16, 2020 and December 9, 2020.

[74] This means he has not satisfied the second *Faucher* factor.

Third factor: Unduly limiting chances of going back to work

[75] The Appellant has proven that he was only taking 2 courses and that they were both offered entirely asynchronously[58]. He testified that he spent 6 hours per week, per course, for a total of 12 hours/week – which he was able to do on his own time, at his

---

[55] *J.S. v. C.E.I.C.*, 2019 SST 994; *T.O. v. C.E.I.C*., 2019 SST 671, and *C.E.I.C. v. G.S*. 2020 SST 1076.

[56] As evidenced by the year-to-date earnings on the pay stubs that show he worked prior to the reporting period on the ROE at RGD13 (see paragraph 49 above).

[57] *Canada (Attorney General) v. Gagnon*, 2005 FCA 321, *Canada (Attorney General) v. Loder*, 2004 FCA 18, *Canada (Attorney General) v. Rideout*, 2004 FCA, *Canada (Attorney General) v. Primard* (2003) 2003 FCA 349 (CanLII), 317 N.R. 359 (FCA), *Canada (Attorney General v. Bois*, 2001 FCA 175.

[58] Asynchronous learning allows students to learn on their own schedule within a certain timeframe.

own pace. I therefore find that his course requirements did not interfere with his ability to work between November 16, 2020 and December 9, 2020.

[76] However, I agree with the Commission that restricting himself to working for X was a personal condition that unduly limited his chances of returning to work.

[77] The Appellant testified that he started working for X in 2017. This employment relationship pre-dated the start of his 4-year Bachelor of Arts in Criminal Justice at Mount Royal University, starting in September 2019. He wanted to maintain his relationship with this employer.

[78] But the fact that he was limiting himself to working for this one employer made it difficult for him to return to the labour market when this employer had no work for him. This is especially the case given that the Appellant was limiting himself to this employer at this particular time of year – namely the winter season, when he told the Commission he worked far fewer hours and the work was dependant on snow.

[79] Regular EI benefits are not meant to top-up an employee's salary, if the employee isn't trying to get more work[59]. They are for workers who are trying to return to the labour market. By limiting himself to one employer, the Appellant set a personal condition that made it too difficult for him to do so.

[80] This means he has not satisfied the third *Faucher* factor.

So was the Claimant capable of and available for work for purposes of regular EI benefits?

[81] The Appellant must satisfy all 3 of the *Faucher* factors to prove his availability at law[60].

[82] I find that the Appellant wanted to work, but in a limited way: *only* when called to work for his previous employer and *not* as soon as a suitable job was available. I also

[59] I find *CUB 79273* persuasive on this point.

[60] Subsection 18(1) of the EI Act.

find that that he wasn't doing enough to find a job, and that he set a personal condition that made it too difficult for him to do so. Based on these findings, he has not satisfied any of the 3 *Faucher* factors.

[83] I therefore find he has not proven that he was capable of and available for work but unable to find a suitable job between November 16, 2020 and December 9, 2020.

[84] This means that the disentitlement imposed on his claim for regular EI benefits from November 16, 2020 to December 9, 2020 must remain.

Issue 2: Sickness benefits from Dec. 10, 2020

[85] The Appellant's medical certificate proves he was unable to work due to his shoulder injury.

[86] It's clear that if the Appellant was injured, he wasn't available for work. The law for EI sickness benefits reflects this. However, the law says that, if he is asking for sickness benefits, he must **otherwise** be available for work.

[87] This means that the Appellant has to prove that his injury was the ***only reason*** why he wasn't available for work starting from December 10, 2020.[61]

[88] He must prove this on a balance of probabilities, which means he has to show it is more likely than not that he would have been available for work if it weren't for his injury.

[89] As I explained under Issue 1 above, case law sets out 3 factors (known as the *Faucher* factors) for me to consider when deciding whether the Appellant is available for work. He must demonstrate the following three things:[62]

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

---

[61] Paragraph 18(1)(b) of the EI Act.

[62] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

b) He was making efforts to find a suitable job.

c) He did not have any personal conditions that might unduly limit his chances of going back to work.

[90] The Appellant doesn't have to show that he was *actually* available.

[91] He has to show that he ***would have been able*** to meet the requirements of all 3 factors ***if he hadn't been injured***.

[92] In other words, the Appellant has to show that his injury was the **only thing** stopping him from meeting the requirements of each *Faucher* factor.

First factor: Wanting to go back to work

[93] The Appellant has not shown that he *would have* wanted to return to work as soon as a suitable job was available *if he had not been injured.*

[94] As discussed for the first *Faucher* factor under Issue One above, the Appellant was determined to wait to be called for work by X after his last paid day on November 17, 2020. He intended to maintain the employment relationship he described to the Commission, namely working year-round with X: about 80 hours per week in the summer, and part-time in the winter while he goes to school. He was just waiting for snow.

[95] For the reasons set out under Issue One above, I have found that the Appellant had a limited desire to return to work: *only* for X and *not* as soon as a suitable job was available.

[96] This was the Appellant's mindset from his last paid day on November 17, 2020 right up until the time he injured his shoulder. There is no evidence his mindset changed because of his injury – or at any point after he became medically unable to work on December 10, 2020. Although his injury prevented him from doing manual labour, it did not prevent him from other forms of work that did not require heavy lifting or repetitive shoulder movement – which would have been considered suitable

employment[63]. But when interviewed by the Commission on February 17, 2021, he said that his intention once he recovered was to continue with his studies and return to work part-time at X[64]. In this way, he was excluding himself from jobs he still could have performed even with his injury.

[97] This is evidence that his desire to return to work remained limited to working for his previous employer and not as soon as suitable work became available. And since his recovery was expected to take the entire 15 weeks of his sickness benefits claim, it is also evidence that his mindset continued for the entire benefit period.

[98] I therefore find that the Appellant's injury was not the ***only*** thing stopping him from wanting to return to work as soon as a suitable job was available. He had another, pre-existing reason for not wanting to return to work as soon as a suitable job was available, namely his desire to maintain his employment relationship one particular employer, namely X.

[99] This means the Appellant has not satisfied the first *Faucher* factor.

Second factor: Making efforts to find a suitable job

[100] The Appellant has not shown that he *would have* made enough efforts to find a suitable job *if he had not been injured.*

[101] As discussed for the second *Faucher* factor under Issue One above, the Appellant made no efforts whatsoever to find another job while he waited to be called for work by X. As far as he was concerned, he had a job. He just wasn't getting any hours because there wasn't any snow. He intended to maintain the year-round employment relationship he had with X and was waiting for them to call him. He did not look for other suitable employment.

---

[63] The Appellant's medical certificate (at GD2-17) did not say he was incapable of any and all work. It only said that he had a shoulder injury that prevented him from doing his snow-shoveling job from December 2020 for at least 3-4 months.

[64] See Supplementary Record of Claim at GD3-43.

[102] For the reasons set out under Issue One above, I found that the Appellant wasn't doing enough to find a job after his last day of work on November 17, 2020.

[103] This was the Appellant's mindset from his last paid day on November 17, 2020 right up until the time he injured his shoulder. There is no evidence that his mindset changed because of his injury – or at any point after he became medically unable to work on December 10, 2020. As he told the Commission after his injury, he intended to continue with his studies and return to work part-time at X when he recovered[65]. This is evidence that he continued to have no intention of making any effort to look for suitable employment. And, as stated under the first factor above, it is also evidence that this intention continued throughout his entire benefit period.

[104] There is simply no evidence he *would have* conducted an appropriate job search for a suitable job, namely a job he still could have done with his shoulder injury, *if he had not been injured* on December 10, 2020.

[105] I therefore find that the Appellant's injury was not the ***only*** thing stopping him making efforts to find a suitable job. He had another, pre-existing reason for not looking for work, namely his desire to maintain his employment relationship with X.

[106] This means the Appellant has not satisfied the second *Faucher* factor.

Third factor: Unduly limiting chances of going back to work

[107] The Appellant set personal conditions that *would have* unduly limited his chances of going back to work *if he had not been injured*.

[108] These personal conditions were his university studies, and the fact that he was limiting himself to part-time employment with a single employer.

[109] I will deal with these conditions in turn.

A) Appellant's university studies

[65] See Supplementary Record of Claim at GD3-43.

[110] The Appellant was a part-time student in the Fall 2020 semester. His last day of classes was December 9, 2020[66]. The next semester (Winter 2021) did not start until January 11, 2021. He submits that he was not a student at all between December 9, 2020 and January 10, 2021, and was available for full-time work but for his injury[67].

[111] I agree that the Appellant's studies would not have interfered with his ability to work during this break between semesters.

[112] But this doesn't assist him in proving that he was otherwise available for work from December 10, 2020. This is because I have already found he has not satisfied the first 2 *Faucher* factors as they relate to his claim for sickness benefits – starting from December 10, 2020. Since the Appellant must show that he *would have* met all 3 *Faucher* factors *if he had not been injured*, he has not proven his availability for purposes of sickness benefits from December 10, 2020[68] – even if his school schedule did not interfere with his availability during this break or beyond.

[113] Nonetheless, to complete the analysis, I will consider whether the Appellant's university courses were a personal condition that *would have* unduly limited his chances of going back to work *if he had not been injured* – starting from the beginning of the winter semester on January 11, 2021.

[114] The Appellant testified that he was taking 5 courses in the Winter 2020 semester, which meant he was a full-time student.

[115] The presumption of non-availability applies to his claim for sickness benefits because the Appellant was a full-time student as of January 11, 2021.

---

[66] See RGD06-14.

[67] Although he had to submit final exams in his 2 courses on December 12, and 15, 2020 respectively (RGD6-14).

[68] See First and Second factors under Issue 2.

[116] The presumption of non-availability when going to school may be rebutted by proof of exceptional circumstances, such as a multi-year history of full-time employment while studying[69].

[117] The Appellant testified about his employment history as follows:

- In the Fall 2020 semester up to November 17, 2020, he was spending more time working for X than on his 2 university courses.
- In the summer season of 2020 he worked more than full-time hours, Mondays to Saturdays, from 7am to 5 or 6pm.
- For the winter snow removal season, he looks at his "total employment history" with X.
- He graduated from high school in June 2016. He started working for X in November 2017.
- He was not a student at that time. He worked and played hockey.
- He started his university program in September 2019.
- The annual snow removal season runs from late October/early November to late February/early March. The annual landscaping season runs from March to October.
- "Taking an average back to 2017" he estimates he typically worked 40-45 hours per week in snow removal season. His hours generally went from 5 or 6 am to 12 noon or 1pm, every day.

[69] *Rideout* 2004 FCA 304, *Boland* 2004 FCA 251, *Loder* 2004 FCA 18, *Primard* 2003 FCA 349 and *Landry* A-719-91.

- On days when there wasn't snow, he'd do "site checks, ice melts, eaves-trough checks, winter maintenance on irrigation systems" and other winter tasks. The employer also had them "cleaning up the yard" and "tried to keep us busy".

- He was also "on call" because the employer had snow removal contracts for commercial sites that had to be done in the middle of the night if it snowed.

- His hours were weather dependant. Some days it could be 5am to 5pm. On other days, if there was no snow and no winter maintenance work, he didn't work at all.

- But based on the snow removal seasons going back to when he started at X in November 2017, he estimates that he worked an average of 40-45 hours/week during the winter.

- In November 2020, it wasn't snowing and he wasn't getting any hours because there was no snowfall.

- He was waiting for it to snow and for things to get back to normal, which would mean working 40-45 hours/week.

- He wasn't looking for another job because he was waiting for snowy winter weather to start so he could return to his usual 40-45 hours/week of work.

- But then he reinjured his shoulder and his doctor said he couldn't work.

- Even with his 5 courses, he had the flexibility that he could have worked 40-45 hours/week just like he did in the prior 2 semesters (Fall 2019 and Winter 2020), when he was a full-time student and was attending classes in-person.

- It's important to him to maintain this employment relationship because it allows him to work year-round.

[118] I find that the Appellant has not proven a multi-year history of full-time employment while also a full-time student.

[119] First, he cannot rely on an "average going back to 2017" of his winter work hours. This is because the Appellant was not a student – full-time or part-time, during the 2017 or 2018 winter snow removal seasons. This means that the hours he may have worked during these 2 winter seasons are irrelevant for purposes of rebutting the presumption of non-availability, as they were not worked while he was student. Therefore, they cannot be evidence of full-time employment while in school.

[120] Second, he doesn't have a multi-year history of working full-time while also attending school full-time. There is only ***1*** winter season the Appellant worked while also carrying a full-time course load in his university program: the November 2019-March 2020 snow removal season. According to his transcript[70], he took 5 courses in the Fall 2019 semester and 4 in the Winter 2020 semester, which meant he was a full-time student during this ***1*** winter season. Therefore, this is not evidence of a multi-year history of full-time work while simultaneously attending school full-time.

[121] Third, I do not find his estimate that he worked 40-45 hours/week during this ***1*** winter season (November 2019 to March 2020) to be credible. If this were true, his final pay-stub for the pay-period ending November 30, 2020 would show year-to-date earnings far in excess of what it actually reports. Instead, as the analysis set out in paragraph 49 above clearly shows, the pay stub indicates that the Appellant worked closer to 10 hours/week between January and March 2020. This is not considered full-time employment.

[122] At the hearing, I explained to the Appellant that I would give him the opportunity to get evidence from his employer - either an ROE[71] or pay-stubs that would show he worked and was paid for 40-45 hours/week during the winter snow removal season. He filed the ROE at RGD13, but it doesn't even include the prior winter season (it covers the period from April 6, 2020 to November 17, 2020).

---

[70] At RGD6-2 to RGD6-3.

[71] As a general rule, ROEs are meant to show the earnings for the previous 52-week period unless the period of employment is shorter.

[123] For the all of the reasons set out in detail under Issue One above, I give the most weight to the Appellant's initial statements to the Commission that he works year-round with X: about 80 hours per week in the summer, and in the winter he goes to school full-time and works part-time. The hours in the winter are significantly less in the winter, depending on whether there is snow to clear, but he does not look for other work to make up full-time hours. His focus is to complete school. He was not looking for other work between November 16, 2020 and December 10, 2020 because he was waiting to get called back to work by X. If not for his injury, he would be in school full-time and working part-time at X.

[124] I therefore find that the Appellant worked part-time for X during the winter snow removal season. His hours may have increased during various school holidays or breaks when he had some extra time on his hands, but he has not proven a multi-year history of full-time employment while a full-time student. It is not enough for him to simply believe he would have been able to juggle both of these things.

[125] I therefore find there are no exceptional circumstances that could rebut the presumption of non-availability in the Appellant's case.

[126] In the absence of exceptional circumstances, the Appellant must rebut the presumption according to the other legal tests.

[127] A claimant who attends a full-time training course is presumed not to be available for work unless they can demonstrate that their ***main intention*** is to immediately accept suitable employment ***and*** that the course does not constitute an obstacle to seeking and ***accepting*** suitable employment[72]. To rebut the latter half of the general presumption, availability must be demonstrated during regular working hours for every working day. It cannot be restricted to irregular hours, such as evenings, nights, weekends and/or

[72] *Canada (Attorney General) v Gagnon*, 2005 FCA 321, *Canada (Attorney General) v Loder*, 2004 FCA 18; *Canada (Attorney General) v Rideout*, 2004 FCA 304; *Canada (Attorney General) v Primard* (2003), 2003 FCA 349 (CanLII), 317 N.R. 359 (F.C.A.); *Canada (Attorney General) v Bois*, 2001 FCA 175.

school holidays, in order to accommodate a course schedule that significantly limits availability[73].

[128] The Appellant testified he would not leave his university program for full-time employment. He said he would never have needed to do so because working for X while in school has never been a problem for him.

[129] From this statement, I conclude that full-time employment was ***not*** the Appellant's primary goal at any point during either period of the disentitlement. He asserts there was no potential for the requirements of his full-time studies to conflict with his ability to work - even up to the equivalent of full-time hours. But the inference in his response is that his priority was always to continue with his university program.

[130] The Appellant has not shown that his main intention *would have* been to immediately accept suitable employment *if he had not been injured*. He was very clear in his testimony that his primary focus is his studies and he would never leave his university program for full-time employment. He said he is on track to finish his 4-year "pre law" undergraduate degree in 4 years, and his goal is to attend Law School after that.

[131] I therefore find that the Appellant's course was ***not*** of secondary importance to accepting suitable employment. Although he had a flexible, year-round employment relationship with X, he was putting continuing with his university courses ahead of immediately accepting full-time employment. The courts have said that a claimant who is not willing to abandon their course if and when full-time employment is found is **not** available for work[74].

---

[73] *Bertrand (1982), 1982 Carswell Nat 466 (CA).* See also the recent decision of the Social Security Tribunal's Appeal Division in AD-21-107 *(issued June 24, 2021)*.

[74] *Floyd* A-168-93. See also the recent decision of the Social Security Tribunal's Appeal Division in AD-21-107 *(issued June 24, 2021)*.

[132] The Appellant has also not shown that he would *have been* available during regular working hours for every working day *if he had not been injured*.

[133] The Appellant submitted letters from his professors regarding the course requirements during the Winter 2021 semester. Of his 5 courses, 3 were delivered online and fully asynchronous[75]. The other 2 courses were also delivered online, but had synchronous requirements[76]:

a) GNED 1401/ENGL 1101: this class met for live lectures and discussions via Google Meet for just over 1 hour twice a week, on Tuesdays and Thursdays (GD3-57); and

b) CRJS 1003-001: this class had an on-line session every Friday from 1:00pm to 1:45 pm that every student was expected to attend (GD2-37).

[134] The Appellant testified that 2 of his courses were courses he had taken previously and was repeating. He said he was only spending 1-2 hours per week/per course on these ones. For the other 3 courses, he was spending about 18 hours/week combined. This meant he was spending a total of 20-22 hours/week on his studies. But he had flexibility to do nearly all of his schoolwork in the evenings and on his off days from work.

[135] The Appellant submits that his course work and studying took place outside of his working hours, which made it was possible for him to work weekdays and weekends effectively without restriction, even up to full-time hours.

[136] But just because something is theoretically possible doesn't mean it is feasible.

[137] The Appellant also said he was spending 20-22 hours per week on his studies. This is not an insignificant amount of time, and I cannot ignore the implications of this

---

[75] See letters at GD3-56 and GD3-58.

[76] Synchronous learning means that although students will be learning from a distance, they are required to virtually attend a learning event at a set time with their instructor and/or classmates.

commitment. A full-time job of 40 hours per week, on top of full-time university studies (even at 20-22 hours per week), is not realistic for most students. Having the theoretical potential to work full-time during regular business hours while also attending a full-time university course does not automatically translate into practice. This is why the law says that the presumption of non-availability when going to school may be rebutted by proof of ***exceptional circumstances***, such as a multi-year history of full-time employment while studying[77]. There is no evidence that such circumstances existed for the Appellant[78].

[138] For these reasons, I must conclude that the Appellant's university course *would have* been an obstacle to him accepting full-time employment *if he had not been injured*, and that he has failed to rebut the presumption of non-availability while attending his university course starting from January 11, 2021.

[139] This means the Appellant has not satisfied the third *Faucher* factor.

B) Limiting himself to one employer

[140] For the reasons set out under Issue One, I found that the Appellant was restricting himself to working for X, and that this was a personal condition that unduly limited his chances of returning to work.

[141] For the reasons set out under A) Appellant's university studies above, I found that the Appellant worked part-time during the winter snow removal season while he was in school.

[142] As of December 10, 2020, he was waiting to be recalled to the part-time work he did for X during the prior winter season. It was always his intention to return to this part-time work when he recovered from his injury. This job accommodated his course

---

[77] *Rideout* 2004 FCA 304, *Boland* 2004 FCA 251, *Loder* 2004 FCA 18, *Primard* 2003 FCA 349 and *Landry* A-719-91.

[78] A work pattern of part-time employment during the school term and full-time employment during the summer break is typical of any student and, accordingly, is not an exception*: Jean v. Canada,* A-787-88.

schedule and allowed him to focus on his studies; and it was a way of maintaining a year-round employment relationship that he valued. But by restricting himself to waiting to be called to work by X during the winter season, the Appellant set a personal condition that unduly limited his chances of returning to work.

[143] This was the Appellant's mindset from his last paid day of work on November 17, 2020 right up until the time he injured his shoulder. There is no evidence that his mindset changed because of his injury – or at any point after he became medically unable to work on December 10, 2020. As he told the Commission after his injury, he intended to continue with his studies and return to work part-time at X when he recovered[79]. This is evidence that he continued to restrict himself to part-time work during the winter for this one employer. And, as stated under the First factor above, it is evidence that this intention continued throughout his 15-week benefit period.

[144] I therefore find that the Appellant's condition that he would only work part-time during the winter for X *would have* been an obstacle to him accepting suitable employment *if he had not been injured*.

[145] This means the Appellant has not satisfied the third *Faucher* factor.

So was the Claimant otherwise available for work but for his injury?

[146] The Appellant must show that he *would have* satisfied all 3 of the *Faucher* factors *if he had not been injured*.

[147] I find that the Appellant has not proven that he *would have* wanted to return to work as soon as a suitable job was available, **or** that he would have been making enough efforts to find a suitable job, *if he had not been injured*. His injury was not the only thing stopping him from waiting to return to work or from trying to find a suitable job.

[79] See Supplementary Record of Claim at GD3-43.

[148] I also find that the Appellant has not rebutted the presumption of non-availability, and that his university studies, along with the fact that he was limiting himself to part-time employment with a single employer during the winter months, were personal conditions that *would have* unduly limited his chances of going back to work *if he had not been injured*.

[149] Based on these findings, the Appellant has not satisfied any of the 3 *Faucher* factors.

[150] I therefore find he has not proven that, but for his injury, he was otherwise available for work as of December 10, 2020.

[151] This means that the disentitlement imposed on his claim for EI sickness benefits from December 10, 2020 must remain.

Conclusion

[152] The Appellant has not proven he was available for work for purposes of regular EI benefits. This means he is disentitled to regular EI benefits from November 16, 2020 and December 9, 2020.

[153] The Appellant has also not proven he was otherwise available for work for purposes of EI sickness benefits. This means he is disentitled to sickness benefits starting from December 10, 2020.

[154] The appeal is dismissed.

Teresa M. Day

Member, General Division – Employment Insurance Section