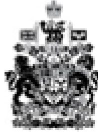

Citation: *DA v Canada Employment Insurance Commission*, 2022 SST 222

# Social Security Tribunal of Canada
## General Division – Employment Insurance Section

# Decision

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| **Appellant:** | D. A. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (442102) dated December 6, 2021 (issued by Service Canada) |

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| **Tribunal member:** | Amanda Pezzutto |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | February 16, 2022 |
| **Hearing participant:** | Appellant |
| **Decision date:** | February 25, 2022 |
| **File number:** | GE-22-151 |

# Decision

[1] D. A is the Claimant. The Canada Employment Insurance Commission (Commission) decided that he wasn't entitled to Employment Insurance (EI) benefits because he was a full-time student. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that he hasn't proven that he was available for work between October 5, 2020 and April 30, 2021.

# Overview

[3] The Claimant applied for EI benefits in October 2020. Several months later, the Commission reviewed the Claimant's entitlement to EI benefits. The Commission decided that the Claimant wasn't available for work from October 5, 2020 to April 30, 2021 because he was a full-time student. So, the Commission decided that the Claimant wasn't entitled to EI benefits.

[4] The Commission says the Claimant hasn't proven that he was available for work. The Commission says his class schedule unduly limited his chances of returning to the labour market. The Commission also says the Claimant's intention was to focus on his training instead of returning to the labour market.

[5] The Claimant agrees that he was a full-time student. But he says the presumption that full-time students aren't available for work shouldn't apply to him. He says he has a history of working and going to school.

# Matter I have to consider first

## I am only making a decision about the Claimant's availability between October 5, 2020 and April 30, 2021

[6] The Commission decided that the Claimant wasn't available for work between October 5, 2020 and April 30, 2021. According to the Commission's record of

conversation, the Commission also decided that he wasn't available for work starting September 13, 2021.[1]

[7] The Claimant asked the Commission to reconsider its decision about his availability between October 2020 and April 2021. His notice of appeal also refers specifically to this period. At the hearing, he restated that he was appealing the Commission's decision about his availability for work during this period.

[8] So, I will not look at the Commission's decision about the Claimant's availability for work starting September 13, 2021. This is for two reasons. First, the Commission's evidence isn't clear that it actually reconsidered any initial decisions about the Claimant's availability from September 13, 2021. Second, the Claimant didn't say that he was trying to appeal the Commission's decision about his availability for work in September 2021.

## Issue

[9] Was the Claimant available for work?

## Analysis

[10] There are two different sections of the law that say you have to prove that you are available for work.

[11] First, the Employment Insurance Act (Act) says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.[2] The Employment Insurance Regulations (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[3]

[12] Second, the Act says that you have to prove that you are "capable of and available for work" but aren't able to find a suitable job.[4] Case law gives three things a

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[1] GD3-18
[2] See section 50(8) of the *Employment Insurance Act*.
[3] See section 9.001 of the *Employment Insurance Regulations*.
[4] See section 18(1)(a) of the Act.

claimant has to prove to show that they are "available" in this sense.[5] Students have to prove their availability for work under this part of the law.[6]

[13] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

[14] The Commission says it used both sections of the law to refuse EI benefits. So, I will look at both sections of the law when I decide if the Claimant has proven his availability for work.

## Reasonable and customary efforts to find a job

[15] There is a section of the law that says that you have to prove that your efforts to find a job were reasonable and customary.[7]

[16] The Commission says it used this section of the law to disentitle the Claimant from receiving benefits.

[17] I disagree. I don't think the Commission has proven that it used this section of the law. I won't use this section of the law when I make my decision about the Claimant's availability for work.

[18] The Commission's first decision letter says that the Claimant hasn't proven his availability for work because he is a student. The letter doesn't say anything about the Claimant's job search efforts. There is no evidence showing that the Commission asked for a job search record. The Commission didn't warn the Claimant that his job search efforts weren't reasonable and customary.

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[5] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[6] Subsection 153.161(1) of the *Employment Insurance Act*.
[7] Section 50(8) of the *Employment Insurance Act* and section 9.001 of the *Employment Insurance Regulations*.

[19] The Appeal Division has a decision that says I should be careful when I am looking at this section of the law. The Appeal Division says that I should look for evidence showing that the Commission asked the Claimant for proof of reasonable and customary job search efforts. Also, I should look for evidence explaining whether the Commission ever told the Claimant it was using this section of the law to make a decision about his availability.[8]

[20] I am choosing to follow the Appeal Division's decision. This is because it is important for each Tribunal Member to make decisions that are consistent with other decisions from the Tribunal. Following Appeal Division decisions is one way to be sure the Tribunal makes consistent decisions. In this case, I think the Appeal Division decision is helpful. I don't think there is enough evidence showing that the Commission used this part of the law to disentitle the Claimant.

[21] I am not going to look at whether the Claimant made reasonable and customary efforts to find a job. I don't think the Commission has proven that it used this section of the law to disentitle the Claimant.

[22] This doesn't mean that I am allowing the Claimant's appeal. I still have to look at the other part of the law that talks about availability for work.

## Capable of and available for work

[23] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[24] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

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[8] *LD v Canada Employment Insurance Commission*, 2020 SST 688.

- You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;
- You must show that you made reasonable efforts to find a suitable job;
- You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.[9]

[25] Students have to prove that they are available for work, just like anyone else asking for EI benefits.[10]

– **Wanting to go back to work**

[26] The Commission says the Claimant hasn't proven that he wanted to return to work as soon as a suitable job was available.

[27] The Claimant disagrees. He says that he wanted to return to work.

[28] There is conflicting information about whether the Claimant had a desire to return to work. This means that I have to look at all the conflicting information and decide what is more likely. I have to make this decision on a balance of probabilities.[11]

[29] The Claimant spoke to a Commission agent in October 2021. He told the Commission that from September 2020 to April 2021, his intention was to focus on

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[9] In in *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.
[10] Section 153.161 of the *Employment Insurance Act*.
[11] The Federal Court of Appeal says that the standard of proof is the balance of probabilities for employment insurance matters in its decision *Canada (Attorney General) v. Corner*, A-18-93.

school and find a co-op placement for May 2021. He said these were his priorities over finding full-time work.

[30] But at the hearing, the Claimant said his intention was to work full-time at the same time he was going to school.

[31] I asked the Claimant to explain the contradictory statements. He said that he answered the Commission's questions to the best of his ability. He said he couldn't explain why he gave the Commission different information about his intentions. He also said he started to focus on school because employers weren't returning his calls.

[32] I choose to give more weight to the Claimant's statements to the Commission. I find the Commission's record of conversation more reliable than the Claimant's statements at the hearing. This is because the Claimant hasn't given me any convincing reasons to doubt his statements to the Commission. The Commission's record of conversation is thorough and detailed, and the Claimant made these statements closer in time to the period I am reviewing.

[33] So, I will rely on the Claimant's statements to the Commission when I look at this factor. The Claimant told the Commission that, between September 2020 and the end of April 2021, his intention was to focus on school and find a co-op placement for May 2021. I find that he hasn't shown that he wanted to return to work as soon as a suitable job was available.

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

[34] The Claimant says that he was trying to find a job. He says he was looking for full-time work at the same time he was looking for a co-op placement.

[35] The Commission disagrees. The Commission says the Claimant was only looking for a co-op placement to start in May 2021.

[36] Again, there is conflicting information about the Claimant's efforts to find a job. In October 2021, the Claimant told the Commission that his job search efforts were

directed at finding an internship or co-op placement to start in May 2021. He said his intention from September 2020 to the end of April 2021 was to focus on school.

[37] But at the hearing, the Claimant said he was looking for both a full-time job and a co-op placement.

[38] He provided a job search record to the Tribunal. According to his job search record, he applied for jobs in October, November, and December 2020, as well as in January, February, March and April 2021. However, his job search record doesn't make it clear whether these job search efforts were directed at finding a job to start right away, or a co-op placement.

[39] At the hearing, I asked the Claimant to explain the conflicting information about his job search efforts. I asked him why he didn't tell the Commission agent that he was looking both for a job to start right away and a co-op placement. The Claimant said he didn't know.

[40] The Claimant hasn't given me a convincing explanation of why there is conflicting information about his job search efforts. He hasn't given me a convincing reason to rely on his statements at the hearing over his statements to the Commission.

[41] Again, I note that the Commission's record of conversation is thorough and detailed. It is closer in time to the period I am reviewing. The Claimant hasn't given me any reason to doubt the reliability of the Commission's record of conversation.

[42] So, I choose to rely on the statements the Claimant made to the Commission. I find it likely that the Claimant's job search efforts were directed at finding a co-op placement to start in May 2021.

[43] The Claimant has to prove that he was making reasonable efforts to find a job. His job search efforts must demonstrate his desire to return to the labour market as soon as suitable job was available. But I find that his job search efforts were directed at finding a position for May 2021. I find that he didn't make efforts to find a job that would allow him to return to the labour market as soon as a job was available.

[44] So I find that the Claimant's job search efforts don't meet the requirements of this factor.

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

[45] The Commission says the Claimant's full-time studies were a personal condition that unduly limited his chances of returning to the labour market.

[46] The Claimant agrees that he was a full-time student. But he says that his class schedule didn't limit his chances of returning to work. He says that he has a history of balancing work and school

[47] At the hearing, the Claimant described his history of work and school. In the 2017 to 2018 school year, he said he was a full-time student and worked 15 to 20 hours a week. From September to December 2019, he worked about 30 hours a week and went to school full-time. For the month of September 2020, he worked 15 to 20 hours a week and went to school full-time.

[48] I give some weight to the Claimant's history of balancing work and school. But I am not convinced that this is enough to overcome the presumption that full-time students aren't available for work.[12] This is because I think it is likely that the Claimant had to attend scheduled classes Monday through Friday.

[49] The Claimant gave conflicting information about his attendance requirements. He told the Commission that he had lectures and labs Monday through Friday during daytime hours between September 2020 and the end of April 2021. He told the Commission that attendance was mandatory for all of his labs and for many of his lectures. He also told the Commission that he did, in fact, attend all of his lectures and labs at the scheduled times.

[12] There is a presumption that full-time students aren't available for work. Students can overcome this presumption if they have proof of exceptional circumstances or a history of balancing full-time work with full-time school. See *Canada (Attorney General) v Rideout*, 2004 FCA 304 and *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[50] But at the hearing, the Claimant said that he didn’t have to attend his lectures because the instructors recorded and posted the lectures online. He agreed that he had to attend his labs at the scheduled times.

[51] I asked the Claimant to explain the conflicting information about his class schedule and attendance expectations. He said that the way the Commission agent asked questions meant that the Claimant didn’t give him details about which classes had mandatory attendance. He said that the Commission agent probably recorded the Claimant’s information about attendance incorrectly.

[52] I don’t find the Claimant’s explanation convincing. Earlier in the hearing, the Claimant noted that the Commission agent correctly recorded the days and times of his lectures and labs for both semesters between September 2020 and the end of April 2021. I find it unlikely that the Commission agent would accurately record detailed information about the Claimant’s class schedule, but then incorrectly record the Claimant’s statements about whether attendance was mandatory. I find the Commission’s record of conversation more reliable than the Claimant’s statements at the hearing. I find it likely that the Claimant’s classes had attendance requirements. I also find it likely that he regularly attended his scheduled lectures and labs every weekday between September 2020 and the end of April 2021.

[53] The Claimant’s class schedule suggests that he spent a significant part of each weekday attending lectures and labs. I find that the Claimant’s class schedule was a personal condition that unduly limited his chances of returning to the labour market.

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

[54] I find that the Claimant hasn’t proven that he had a desire to return to the labour market. He hasn’t shown that he was making reasonable job search efforts, and his class schedule was a personal condition that unduly limited his chances of returning to the labour market. So, I find that the Claimant hasn’t proven that he was available for work from October 5, 2020 to April 30, 2021.

## Conclusion

[55] I am dismissing the Claimant's appeal. I find that he hasn't proven that he was available for work within the meaning of the law. This means that he isn't entitled to EI benefits from October 5, 2020 to April 30, 2021.

Amanda Pezzutto

Member, General Division – Employment Insurance Section