Citation: *KE v Canada Employment Insurance Commission*, 2021 SST 946

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. E.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (435345) dated September 24, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	November 16, 2021
Hearing participant:	Appellant
Decision date:	November 24, 2021
File number:	GE-21-1985

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Claimant has shown that she was available for work while in school. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits February 8, 2021 because she wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I have to decide whether the Claimant has proven that she is available for work. The Claimant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not she is available for work.

[5] The Commission says that the Claimant wasn't available because she was taking a training course on her own initiative.

[6] The Claimant disagrees and says that her courses were all on-line. She was not required to attend her classes at a set time and could choose when to review the classes and study. She says she was looking for work and was employed while in university.

Matter I have to consider first

I will accept the documents the Claimant sent in after the hearing

[7] At the hearing the Claimant referred to written advice from her employer regarding employment insurance when she was laid off. Her employer encouraged all staff to apply for EI. The Claimant asked to have this document admitted into evidence. I agreed to admit the document into evidence because it forms part of the Claimant's evidence in support of her position that she is entitled to EI benefits.

[8] At the hearing the Claimant also said that she made numerous applications to jobs through on-line job search websites. I asked if she had kept a record of her applications. The Claimant said she could produce a record. The Claimant submitted the record of her applications after the hearing. I agreed to submit the record into evidence because it relevant to the issue of whether the Claimant was available for work.

[9] The Commission was sent a copy of the documents. As of the date of writing this decision, the Commission has not made any additional representations.

Issue

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

Analysis

[11] 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, it says she has to meet the criteria of both sections to get benefits.

[12] However, I find that I only need to decide if the Claimant was available for work under one section of the *Employment Insurance Act* (EI Act). That is section 18(1)(a). My reasons for this finding follow.

[13] First, the EI Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job. This requirement is at section 50(8) of the EI Act. The *Employment Insurance Regulations* (EI Regulations) at section 9.001 give criteria that help explain what "reasonable and customary efforts" mean.

[14] Second, the EI 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. This requirement is at section 18(1)(a) of the EI Act. Case law says there are three things a claimant has to prove to show that they are "available" in this sense. I will look at those factors below.

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

[16] Under section 50(8) of the EI Act, the Commission may require a claimant to prove that she has made reasonable and customary efforts to obtain suitable employment in accordance with the criteria in section 9.001 of the EI Regulations. Section 9.001 states that its criteria are for the purpose of section 50(8) of the EI Act. Section 9.001 does not say that its criteria apply to determine availability under section 18(1)(a) of the EI Act.

[17] If a claimant does not comply with a section 50(8) request to prove that she has made reasonable and customary efforts, then she may be disentitled under section 50(1) of the EI Act. Section 50(1) says that a claimant is disentitled to receive benefits until she complies with a request under section 50(8) and supplies the required information.

[18] A review of the appeal file shows that the Commission did not disentitle the Claimant for her failure to comply with its request for her job search activities. In fact, the Commission's initial decision disentitled the Claimant because she was taking a training course on her own initiative.

[19] The Commission did ask the Claimant about her job search efforts before it made the initial decision and also asked her about her job search efforts as part of the reconsideration process.

[20] In both interviews, the Commission's focus was on job applications alone. It did not ask about, nor did it consider any of the remaining job search activities listed in section 9.001 of the EI Regulations. Further, the Commission's reconsideration decision maintained its initial decision with no additional reasons for disentitlement. As a result, I find I do not need to decide that the Claimant's job search activities satisfy the section 9.001 criteria to find her to be available for work and entitled to EI benefits.

[21] Accordingly, I only need to decide if the Claimant was available for work under paragraph 18(1)(a) of the EI Act.

[22] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[1] This is called the "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.

[23] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether she was available for work.

Presuming full-time students aren't available for work

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

– The Claimant doesn't dispute that she is a full-time student

[25] 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.

[26] The means the presumption applies to the Claimant.

– The Claimant is a full-time student

[27] The Claimant is a full-time student. 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.

[28] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working while also in school.[2] Or, she can show that there are exceptional circumstances in her case.[3]

[29] The Claimant testified that she began her current university program in September 2019. At that time, she was working approximately 20 hours a week delivering an after-school program to school aged children and on weekends for children's parties. She was taking five courses a semester from September 2019 and

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[1] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[2] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[3] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

continued to work 20 hours a week. She continued to work during each semester after that date.

[30] The Claimant was enrolled in five courses and working 20 hours a week when she was laid off in February 2021. The Claimant explained that she was able to do all her course work on-line. She was not required to attend any classes at a set time. If she was required to do group work, the group members had to agree on a time that was convenient to all because the members were located world-wide.

[31] The Claimant completed two training questionnaires: one on February 25, 2021 and one on May 22, 2021. In both questionnaires the Claimant indicated that she was available for work and capable of working under the same or better conditions as she was before she started her program. In both questionnaires the Claimant indicated that if she found full time work she would change her job schedule to accept the job.

[32] The Claimant noted that the Commission said she spent four hours a day at school, one hour a day on her job search and applied for two jobs. The Claimant said those figures were wrong. She testified that she looked for work following her layoff. She said she would spend approximately three hours a day on her job search. She was able to find 38 job applications that she had made following her layoff. She did get accepted for two jobs that she applied for. I find I prefer the evidence of the Claimant regarding the time she spent on her studies and her job search efforts as it was testimony that was given directly to me and is not filtered through another person's accounts of her statements.

[33] The Commission disentitled the Claimant because it says she was attending training full-time and therefore she was not available for work. Normally a claimant who attends classes from Monday to Friday during normal working hours is deemed to be unavailable. That is not the case here, where the Claimant was able to choose in each semester when she viewed the pre-recorded lectures and when she studied.

[34] The Commission also says the Claimant had to be available for full-time work while studying.

[35] I do not agree with the Commission that the Claimant had to show she was available for full-time work while studying; there is no such requirement in the legislation. Her obligation was to show she was available for work consistent with her past work history.

[36] I find the Claimant has rebutted the presumption that she is not available for work because she is a full-time student. She has a history of working while enrolled in full-time studies. She was not required to attend classes, in person or virtually, at a set time. She was able to choose when to spend time viewing pre-recorded lectures and studying. She looked for part-time and full-time work during this period as well. She returned to part-time work in July 2021. Considering this evidence, I find the Claimant has rebutted the presumption that she is not available for work due to her full-time studies.

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

Capable of and available for work

[38] I also have to consider whether the Claimant is capable of and available for work but unable to find a suitable job.[4] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[5]

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

b) She has made efforts to find a suitable job.

c) She did not set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[4] See section 18(1)(a) of the EI Act.
[5] 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.

[39] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[6]

– **Wanting to go back to work**

[40] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available.

[41] The Claimant testified that she wants to work to pay for her expenses. Prior to September 2019 she was enrolled in a university program that required her attendance from 9:00 a.m. to 5:00 p.m. Monday to Friday. She was unable to work while attending that program. The Claimant switched to her current program, in part because it would allow her to attend university and to work at the same time.

[42] The Claimant was working while she was attending university until she was laid off in February 2021. She said that she started to look for work right away and was able to get part-time work, with the promise of additional hours, in July 2021. This evidence tells me the Claimant has shown a desire to return to work.

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

[43] The Claimant has made enough effort to find a suitable job.

[44] There is a list of job search activities to look at when deciding availability under a different section of the law.[7] This other section does not apply in the Claimant's appeal. But, I am choosing look at that list for guidance to help me decide whether the Claimant made efforts to find a suitable job.[8]

[45] There are nine job search activities in the list of job search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops

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[6] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[7] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[8] 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.

or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.[9]

[46] The Claimant testified that she has a resume, she dropped off her resume to employers, registered with on-line job web sites, applied for jobs, attended interviews, networked with family and friends to see if work was available, and contacted her former employers to see if work was available. The Claimant said she spent approximately 3 hours a day on her job search.

[47] The Claimant explained that she had worked in recreation and in restaurants. She looked for work in those areas and also for work in her field of study. She obtained a part-time job in a bank and started training. Shortly after she started that job she was offered and accepted a job in a restaurant. She was told that the part-time hours she was working should increase. That the hours did not increase to full-time is not determinative of the matter. The Claimant has since returned to the same employment that she held prior to being laid off in February 2021.

[48] I am satisfied that the Claimant's job search efforts expressed her desire to return to the labour market as soon as a suitable job was available.

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

[49] The Claimant has not set personal conditions that might unduly limit her chances of going back to work.

[50] The Claimant testified that she has she has access to transportation to go to work and has a driver's license. She looked for work that was consistent with her experience working in a restaurant and recreation. She also looked for work that was related to her field of study. She is willing to accept a job that might require on the job training.

[51] The Claimant was attending a full-time school program when she stopped working. She previously worked while studying full-time. She testified that her classes

[9] Section 9.001 of the EI Act.

were online and that she could choose when she viewed the pre-recorded lectures and when she studied. She was seeking both part-time and full-time jobs while attending school and would be able to adjust her study schedule to suit the hours of any work she obtained. For these reasons, I find that her school program did not unduly limit her chances of going back to work.

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

[52] Based on my findings on the three factors, I find that the Claimant has shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[53] 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. So, the Claimant may be entitled to benefits.

[54] This means that the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section