Citation: *VE v Canada Employment Insurance Commission*, 2021 SST 955

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (429457) dated August 6, 2021 (issued by Service Canada)

Tribunal member:	Angela Ryan Bourgeois
Type of hearing:	Videoconference
Hearing date:	September 21, 2021
Hearing participants:	Appellant
Decision date:	October 1, 2021
File number:	GE-21-1576

Decision

[1] I am allowing the appeal.

[2] The Claimant, V. E., has shown she was available for work while attending university full time. She is not disentitled from receiving regular Employment Insurance benefits.

Overview

[3] To receive regular employment insurance benefits (EI benefits) claimants have to be available for work. They must be actively looking for work. There is a presumption that if a claimant is taking a full-time course that they aren't available for work.

[4] The Claimant started receiving EI benefits in September 2020.

[5] In June 2021, the Canada Employment Insurance Commission (Commission) learned that the Claimant had been attending university.[1] The Commission decided that the Claimant was disentitled from being paid EI benefits from September 28, 2020, to April 28, 2021, because she was taking a training course on her own initiative and hadn't proven that she was available for work.[2]

[6] The Claimant is appealing the Commission's decision.[3] The Claimant says:

- She was always available for and looking for work.
- If it weren't for COVID-19, she wouldn't have lost her two part-time jobs, and would have been working full-time hours.

---

[1] In her application for benefits and biweekly reports, the Claimant said she wasn't taking a course or training program. See application form on page GD3-7, and biweekly reports starting on page GD3-20. At the hearing, she explained that she thought the question referred to training in trades, not university.
[2] See initial decision letter dated June 25, 2021, on page GD3-100. The Commission maintained this decision on reconsideration. See reconsideration decision letter dated August 6, 2021, on page GD3-110. The words "on her own initiative" are used by the Commission to show that it didn't refer the Claimant for her training. There are specific rules about availability in those cases.
[3] At the hearing, the Claimant confirmed that she is not appealing the disentitlement from September 7, 2021.

- This was the first time she applied for EI and didn't know she couldn't get it if she was attending university.
- She applied for CERB but was told she didn't qualify because she qualified for EI benefits. It is too late to get CERB benefits now.
- She was trying to find a job. She barely got by on the EI benefits.
- She can't afford to repay the EI benefits she received because she is still unemployed.

[7] I have to decide whether the Claimant has proven that she was 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 that she was available for work.

I accepted documents sent in after the hearing

[8] The Claimant told me about her job search efforts at the hearing. She said she had documents that showed her efforts. I decided to give the Claimant time to provide me with these documents. I accepted the documents (GD5) because they were sent in before the deadline I set. In fairness, I also accepted the Commission's response (GD6) to the Claimant's documents. I agree with the Commission that evidence of her job search efforts after the period of disentitlement is not relevant.

Issue

[9] Was the Claimant available for work while attending university full time?

Analysis

The disentitlement

[10] To decide if the Claimant has proven her availability, I have to consider which sections of the *Employment Insurance Act* (EI Act) the Commission used to disentitle the Claimant from receiving benefits.

[11] The Commission's initial and reconsideration decisions don't say which section of the EI Act it applied. In its written submissions, the Commission said it disentitled the

Claimant from receiving benefits under sections 18 and 50 of the EI Act and section 9.001 of the *Employment Insurance Regulations* (Regulations) for failing to prove her available for work while attending a course of instruction.

[12] Section 18 of the EI Act says that claimants have to prove that they are "capable of and available for work" but aren't able to find a suitable job.[4]

[13] Section 50 of the EI Act says that for a claimant to prove that they are available for, but unable to find, suitable work, the Commission may require them to prove that they are making reasonable and customary efforts to find suitable work. [5]

[14] Further, a new temporary section of the EI Act (section 153.161) says that claimants who attend a full-time course cannot receive benefits unless they prove that they are capable of and available for work.[6]

[15] I find that the Commission disentitled the Claimant under section 18 of the EI Act and not the other two sections. This is why:

- For section 50 of the EI Act to apply, the Commission has to have asked the Claimant to prove that they are making reasonable and customary efforts.[7] There is no evidence that the Commission asked the Claimant to prove this. At the hearing, the Claimant confirmed that the Commission had not talked to her about her job search efforts and hadn't asked her for a job search report.

- The Commission didn't mention section 153.161 of the EI Act in its decision letters, or in its written arguments.

[16] So, in this decision, I will only look at whether the Claimant was available to work under section 18 of the EI Act. To do this, I will consider what the Federal Court of

---

[4] See section 18(1)(a) of the EI Act.
[5] See section 50(8) of the EI Act. Section 9.001 of the *Employment Insurance Regulations* sets criteria for determining whether the efforts meet the reasonable and customary test.
[6] In March 2020, the EI Act was amended to allow the Minister to make interim orders to mitigate the economic effects of COVID-19 (section 153.3 of the EI Act). The Minister added section 153.161 to the EI Act, requiring claimants in school full time to prove that they are capable of and available for work, for each working day unless they were referred to the training.
[7] This requirement is explained in a decision made by the Social Security Tribunal Appeal Division called *L.D. v Canada Employment Insurance Commission*, 2020 SST 688.

Appeal has said about the presumption of non-availability, and the three factors that have to be considered when deciding about availability. I will start with the presumption.

Presuming full-time students aren't available for work

[17] Claimants who are in school full time are presumed to be unavailable for work.[8] This is called the "presumption of non-availability." It means we can assume that students aren't available for work when the evidence shows that they are in school full time. The presumption applies only to full-time students.

[18] The presumption applies to the Claimant because she was a full-time student. I find the Claimant was a full-time student because she says she was, and I see no evidence that would suggest otherwise.

[19] But the presumption that full-time students aren't available for work can be rebutted, or shown not to apply.[9]

[20] The Claimant can rebut the presumption in two ways:

- She can show that she has a history of working full time while also in school.[10]
- Or she can show that there are exceptional circumstances in her case.[11]

[21] The Claimant says that the presumption doesn't apply because she has a history of working two part-time jobs while attending university.

[22] I find the Claimant has a history of working full-time hours while attending university full time. This is what I considered:

- The Claimant attended university full time during the 2019-2020 school year.
- During this time, she worked two part-time jobs.[12]

---

[8] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[9] The onus is on the Claimant to rebut the presumption.
[10] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[11] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[12] She worked in a retail position and as an inclusion instructor for the City of Brampton.

- The hours from her two part-time jobs amounted to full-time hours. The Claimant provided a spreadsheet showing how many hours she worked.[13] The spreadsheet shows the Claimant worked 35 hours a week on average, from August 18, 2019, until January 2020. In one two-week period, she worked 107 hours.

- The Claimant didn't reduce her working hours because of her university course. I find she would have continued to work the same hours had the positions not ended. When the hours at one of her jobs dropped after Christmas, she picked up more shifts in her other position.

[23] The Commission says that the Claimant has to demonstrate by her actions that the course is of secondary importance and doesn't constitute an obstacle to seeking and accepting employment.[14] The Commission didn't provide any authority for this position. I find that the case law around this presumption is that the Claimant can rebut it by showing exceptional circumstances. She has done this through her work history.

[24] The Claimant has rebutted the presumption of non-availability. She has shown a history of working full-time hours while attending school full time.

[25] Rebutting the presumption means that the Claimant is not considered to be unavailable for work just because she was attending university full time. Now I have to decide whether the Claimant was actually available.

Capable of and available for work

[26] I have to consider whether the Claimant has proven that she was capable of and available for work but unable to find a suitable job.[15] To do this the Claimant has to prove three things:[16]

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

---

[13] See pages GD2-9 to GD2-10.
[14] See page GD4-3.
[15] See section 18(1)(a) of the Act.
[16] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A- 57-96. This decision paraphrases the three factors set out in *Faucher* for plain language.

- She made efforts to find a suitable job.
- She didn't set personal conditions that might have unduly limited her chances of going back to work.

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

– **Wanting to go back to work**

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

[29] The Claimant says she wanted to return to work and never stopped looking for work. She found it difficult to get by financially on just her EI benefits. While financial need doesn't necessarily mean that she had a desire to return to work, it lends credibility to her statement that she sincerely wanted to find work.

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

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

[31] The Claimant said she started actively looking for work around March break 2020, and has consistently continued to do so until now.[18] She says she maintained her job-search efforts even while attending university. She looked for jobs online. She used Google to search for jobs. She looked at websites for potential employers, including restaurants and every retailer she could think of. When COVID-19 restrictions allowed, she dropped off resumes, with cover letters, in person. She registered with job search websites, such as Smartr.me, Indeed and LinkedIn. She signed up for email notifications, which she reviews when they come in. She applied to jobs online. She talked to her friends to see if they knew of any jobs. She says she was actively looking for work about four times a week, for the entire period. She was looking for jobs where she had experience – retail, recreation, service, and food service.

---

[17] 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.
[18] To be clear, the only period I am considering in this decision is the period of disentitlement.

[32] I believed what the Claimant said. Her testimony was sincere and direct.

[33] I find that these efforts are enough, especially since there were few suitable jobs available during this time because of COVID-19 restrictions. I cannot think of anything else the Claimant could have done to find a job.

– **Not unduly limiting her chances of going back to work**

[34] The Claimant set some personal conditions. She would not miss class for work, and would not have quit university to accept a job.

[35] I find that these conditions wouldn't have unduly limited her chances of returning to the labour market. I was most persuaded by the fact that she worked full-time hours the previous year while maintaining a similar school schedule.

[36] **Her school requirements were slightly less in 2020-2021 than they were in 2019-2020, when she worked full-time hours.** At the hearing we reviewed her school requirements in detail. She looked up her class schedule for 2019-2020, when she was working full-time hours, and for 2020-2021, which is the period in question. I rely on the hours she provided at the hearing more than what she told the Commission's agent. This is because she didn't have her class schedule in front of her when she talked to the Commission's agent.

[37] During the 2020-2021 school year, she took fewer classes than in the 2019-2020 year, and the attendance requirements were less. This was because most classes were recorded. This allowed the Claimant to "attend" the class at her convenience. First term, she had to attend online class on Friday from 11:30 to 2:30, and second term she had to attend class one hour on Wednesday and Thursday mornings.

[38] Since the Claimant successfully worked full-time hours during the 2019-2020 school year, I find that her university schedule and course work would not have unduly limited her chances of finding a job during 2020-2021, when the demands were likely less, and certainly not more, than during the previous year. The fact that she found and successfully worked at not one, but two part-time jobs that together amounted to full-

time work hours, despite her 2019-2020 school schedule, is compelling evidence that she could have done the same in 2020-2021.

[39] **She was available for the same number of hours she worked before.** I considered that the Claimant told the Commission's agent that the most she could work was 28 hours a week. The Claimant said that she had been talking to the agent about another issue and wasn't prepared to talk about her availability. She didn't have her previous work or school schedules with her. The Commission's agent asked the Claimant to give a rough guess about what she could work, which she did. The Claimant explained that she didn't realize how many hours she had been working until she prepared the spreadsheet for the Tribunal. The Claimant said she was available to work the same hours, and more, than the year before. I find her explanation plausible, and I accept her statement that she was willing to work the same or more hours.

[40] **She didn't have unreasonable salary expectations.** I find the Claimant did not have personal conditions relating to salary. The Commission says she would only accept a job paying $18.00 per hour. I find she would have accepted any job paying at least minimum wage. This is what she said at the hearing, and it is supported by her acceptance of a babysitting job that paid around $15.00 per hour, and her applications for jobs paying less than $18 per hour.

[41] **Irregular hours doesn't mean she isn't available for work.** The Commission says that being available to work at irregular hours doesn't prove the Claimant's availability.[19] The Commission didn't provide any authority that says a Claimant has to be available to work "regular" work hours. Suggesting that a person is only available to work during "regular" work hours ignores the reality of the retail industry where the Claimant acquired many of the hours she needed to qualify for EI benefits.

[42] The Commission says that the Claimant hasn't proven her availability because she could only work outside her course schedule. The Commission relies on the Federal Court of Appeal cases of *Duquet v Canada (Attorney General),* 2008 FCA 313 and *Canada (Attorney General) v Gauthier*, 2006 FCA 40. In the *Duquet* decision, there

[19] See page GD4-4.

is no indication of exactly how the claimant limited his availability – just that he was only available at certain times on certain days because of his university courses. In the *Gauthier* decision, the claimant left a job to attend school, and was only available on weekends. The facts in these cases are very different than what is before me. In the case before me, the Claimant is available for the same full-time hours that she worked the year before when she was also attending university full time.

[43] Given these considerations, I find the Claimant didn't set personal conditions that would have unduly limited her chances of going back to work.

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

[44] Yes. The Claimant has rebutted the presumption that she wasn't available while attending university full time. Based on the three factors, I find she has shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[45] The Claimant has shown that she was available for work under section 18 of the EI Act. This means that the Claimant isn't disentitled from receiving benefits.

[46] The appeal is allowed.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section