Citation: *SH v Canada Employment Insurance Commission*, 2022 SST 251

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (446793) dated January 12, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	March 8, 2022
Hearing participant:	Appellant
Decision date:	March 9, 2022
File number:	GE-22-339

Decision

[1] The appeal is allowed.

[2] The Appellant has proven she was available for work while taking her training course. This means she is **not** disentitled to Employment Insurance (EI) benefits.

Overview

[3] The Appellant worked as a personal trainer at X. She started a claim for EI benefits as of April 18, 2021, after gyms were closed under the provincial Covid-19 lockdown that started April 3, 2021.

[4] On April 27, 2021, she started taking one (1) high school credit course at an adult continuing education centre. The Respondent (Commission) investigated whether she was available for work while attending this course.

[5] A claimant must be available for work in order to receive ***regular*** EI benefits. Availability is an ongoing requirement. This means that a claimant must be searching for full-time employment and cannot impose personal conditions that could unduly restrict their ability to return to work.

[6] The Commission decided that the Appellant could not receive EI benefits because she was taking a training course on her own initiative and did not prove her availability for work.

[7] The Appellant asked the Commission to reconsider. She said she was available for work because the course was completely online and she was able to work at her own pace, and because she was actually still working as a personal trainer. The Commission was not persuaded and maintained the disentitlement on her claim. The Appellant appealed to the Social Security Tribunal (Tribunal).

[8] I have to decide if the Appellant has proven that she was available for work while attending her training course. She must prove this on a balance of probabilities. This

means she has to show it is more likely than not that she was available for work while taking the course.

[9] The Commission says that the Appellant wasn't available because her main focus was the course and she was restricting her availability to part-time employment that would accommodate her course schedule.

[10] The Appellant says she was only taking one (1) course and it was a high school course – not a post-secondary course. It was also entirely online, and she was allowed her to work at her own pace. She was spending less than 10 hours/week on it, and she continued to work as a personal trainer. She was also making significant efforts to build up her client roster so she could fill up her schedule and work as much as possible.

[11] For the reasons set out below, I agree with the Appellant that she was available for work while she was in this course.

Preliminary Matters

a) Period of the Disentitlement

[12] The Commission imposed a disentitlement on the Appellant's claim from April 19, 2021 to June 24, 2021[1]. This was based on information the Appellant provided about the start and end dates of the course[2].

[13] At the start of the hearing, the Appellant explained that these dates were given from memory and were to the best of her recollection at the time when she was completing her reports or speaking with a Service Canada agent. However, she went back and verified the start and end dates of the course so she could provide accurate information at the hearing. She testified that the course started on April 27, 2021 and ended on June 22, 2021.

[1] See Reconsideration decision at GD3-24 to GD3-25.
[2] See Supplementary Record of Claim at GD3-23.

[14] I accepted the Appellant's testimony because I saw no reason to question these dates.

[15] I advised the Appellant that this was the period for which she must prove that she was available for work[3].

b) Presumption of Non-Availability

[16] The court has said that claimants who are in school full-time are presumed to be unavailable for work[4]. This is commonly referred to as the presumption of non-availability.

[17] The presumption of non-availability ***only applies to full-time students***.

[18] The Commission says the Appellant has failed to rebut the presumption of non-availability.

[19] The Appellant says she was not a full-time student.

[20] The Appellant testified as follows:

- When she left high school, she went into the labour market. She worked full-time as a fitness instructor and personal trainer at X in Vancouver for over a year, until gyms closed due to Covid in 2020. Then she went on CERB, then back to X when public health restrictions permitted.
- She moved back to Ontario in August 2020.
- She has been trying to complete some high school courses as part of a long-term goal of attending a post-secondary program.

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[3] There is no need for me to modify the start or end dates of the disentitlement because I have found in favour of the Appellant on this appeal. She has proven her availability and is not disentitled to EI benefits while she was taking this course.

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

- Between April 27, 2021 and June 22, 2021, she took one (1) high school credit course called “Families in Canada” at an adult learning centre.

- It ran for 8 weeks.

- The course was entirely online, and students worked at their own pace.

- There was no mandatory attendance. All that happened was that the adult learning centre checked to make sure the Appellant logged in to the online course at least once per day, Monday to Friday. She could do this anytime she wanted within a 24-hour period, and could stay logged in for as long or as little as she wanted.

- The adult learning centre recommended students spend 3 hours per day, Monday to Friday, per course. But this was just a recommendation.

- She found this course to be very easy compared to others she had taken previously, such as chemistry. Families in Canada was “a bird course”, and she was only spending 1-2 hours “max” per day, Monday to Friday, on it.

- Her best estimate is that she was spending an average of 1-9 hours per week on her studies.

- She did not consider herself to be a full-time student.

[21] I asked the Appellant why she told the Commission that the course she was taking was considered full-time by the educational institution[5] and that she was spending 15-24 hours per week on her studies[6]? She answered that she didn't know why she had given those answers, and she repeated the statements in paragraph 20 above.

[5] See training questionnaire completed June 19, 2021 at GD3-13.
[6] See training questionnaire completed June 19, 2021 at GD3-12.

[22] The Appellant was clearly careless with her answers on the June 19, 2021 training questionnaire[7], and this does raise a concern about her credibility.

[23] Nonetheless, taking one (1) high school credit – online, on her own time and at her own pace, is not considered a full-time course load. I therefore find that the Appellant was not a full-time student between April 27, 2021 and June 22, 2021.

[24] I am supported in this conclusion by the fact that the training was initially allowed by the Commission[8].

[25] I therefore find that the presumption of non-availability does not apply to the Appellant.

Issue

[26] Was the Appellant available for work while she was a student between April 27, 2021 and June 22, 2021,

Analysis

[27] To be considered available for work for purposes of regular EI benefits, the law says the Appellant must show that she is capable of, and available for work and unable to obtain suitable employment[9] .

[28] There is no question that the Appellant was ***capable*** of work during this time[10]. Therefore, I will proceed directly to the availability analysis to assess her entitlement to regular EI benefits between April 27, 2021 and June 22, 2021.

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

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[7] The Commission also referred to a training questionnaire completed on April 24, 2021 (see GD3-17), but failed to include this in the reconsideration file submitted to the Tribunal.
[8] See Supplementary Record of Claim at GD3-17, which refers to the training questionnaire of April 24, 2021 (not included in the reconsideration file as per footnote 7 above).
[9] Section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[10] There is no indication the Claimant was medically unable to work during this period.

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[11] .

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

[31] When I consider each of these factors, I have to look at the Appellant's attitude and conduct[12].

Issue 1: Wanting to go back to work

[32] For purposes of the first *Faucher*, the Appellant must prove that she wanted to go back to work as soon as suitable employment was available.

[33] The Appellant testified that:

- She was working full-time as a fitness instructor and personal trainer at X in Vancouver prior to the pandemic.
- After she moved to Ontario in August 2020, she began looking for full-time employment.
- She got a full-time job as a fitness instructor and personal trainer at X.
- She was working full-time at X when Ontario went into lockdown on April 3, 2021 and the gym closed.
- She continued working for X virtually during lockdown, training clients online and then adding outdoor fitness classes as restrictions were lifted. It wasn't full-time

[11] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.
[12] See *Canada (Attorney General) v. Wiffen*, A-1472-92.

during lockdown, but she was trying to supplement her X employment by "prospecting" for private personal training clients.

- She needs to work to pay her bills and survive.
- Yes, she is trying to upgrade her high school transcript so she can apply to a post-secondary program at some point in the future. But she has been doing that on the side, a course or two at a time.
- Her primary focus was – and is – to work full-time. She intended to do so by continuing to work for X as much as lockdown allowed, and by "prospecting" to find private personal training clients that she could work with online.

[34] The Appellant has shown that she wanted to go back to work as soon as suitable employment was available. She is an adult and needed to work to pay her bills and survive. She was not enrolled in a training *program*, but merely taking one (1) high school credit course. She worked full-time prior to the pandemic (at X) *and* prior to applying for EI benefits (at X). After that, she continued to work for X (within the limits of the Covid-19 public health restrictions), and looked for private clients to fill up her schedule while she was taking the course.

[35] I find that the Appellant has satisfied the first *Faucher* factor.

Issue 2: Making efforts to find a suitable job

[36] For the second *Faucher* factor, the Appellant must prove that she was looking for suitable employment for every day of her benefit period.

[37] The Appellant testified that:

- She is a certified personal trainer and fitness instructor.

- She began full-time employment at X on March 12, 2021. She started with personal training, and was preparing to lead group fitness classes as well[13].

- But on April 3, 2021, X shut down because the province went into lockdown for Covid.

- X pivoted to "virtual fitness". This meant she could do personal training with her one-on-one X clients online. But not all of them were interested in online sessions, and there were no group fitness classes offered during lockdown.

- Working as a personal trainer involves a lot of tasks beyond the time spent in a workout session with a client. There are initial client assessments and interviews, programs to develop and adjust, nutritional consultations and meal plans to prepare, coaching and responding to clients in between workouts, contracts to be drawn up, and travel time (for private, in-person training).

- But the "hours" reported by an employer or shown on a pay stub only reflect the time spent in the actual client training session, and not the time spent preparing, programming, and coaching. She still had to do all of this "other work", but the Commission's focus on the number of hours she was paid for doesn't reflect the number of hours she worked.

- On June 11, 2021, the lockdown moved to "phase 1", which allowed her to teach outdoor fitness classes for up to 10 people. But she was still only paid her hourly rate for the time she led the group class, and not the "other work" that went into preparing and programming for the classes, and coaching the participants before and after the classes.

- Her strategy between April 27, 2021 and June 22, 2021 was to continue working for X training clients online and outdoors, and to "prospect" for other, "private" personal training clients to fill up her schedule.

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[13] She was "shadowing" another instructor in anticipation of adding group fitness classes to her duties.

- When she talks about filling up her schedule, she is referring to working the equivalent of full-time hours, not working around her class schedule.

- As a personal trainer, her hours are "scattered" because clients tend to want to work out before they themselves go to work, or on their lunch breaks, or after work and in the evenings. "It's not 9 to 5." She was referring to filling openings between clients so that her schedule was "full".

- For example, if she had 12 personal training clients and they each had 2 sessions a week[14], she would have 24 hours/week of in-person workout sessions. But the preparing, programming, coaching and other work associated with each client would have her working well over 40 hours/week.

- A full-time personal training roster would be 12-15 clients[15] plus some group classes.

- It was difficult for her to try to explain to the Commission how many hours per week she was working or willing to work. She was trying to get to a full-time client roster and this would have meant working well over 40 hours/week.

- To find clients, she engaged in "prospecting". This is the work that she did to look for clients. It involved regular postings to social medial to promote herself, filming and uploading workout videos on a scheduled cycle, creating and uploading infographics about fitness "tips'n'tricks", soliciting and uploading testimonials, and reaching out to people who "liked" her postings. It also involved networking in the community and soliciting referrals.

- She worked at it every day, and estimates that she spent at least 15 hours per week on prospecting for new, private personal training clients.

- The Commission says she was only reporting about 4 hours/week of personal training for X, but that was just the actual in-person sessions. The work that was

[14] Which she said is common and usually the minimum commitment.
[15] Allowing for 1 or 2 workouts per week.

covered by her hourly rate actually took "many extra hours". It didn't mean she only worked 4 hours.

[38] The Appellant has shown that she was doing enough to find suitable employment. She continued to work for the employer who, but for the temporary lockdown, had full-time work for her; ***and*** she made active, on-going efforts to find additional, private clients throughout the period of the disentitlement. Her efforts were not directed to part-time employment, but towards a full-time personal training client roster. In this way, she was trying to find suitable employment for every working day during her benefit period.

[39] I give greatest weight to the Appellant's testimony at the hearing. This is because the particulars about the nature of her employment and what she was doing to find work were provided through active adjudication during the hearing. The Appellant expressed frustration about how the Commission only wanted to talk about the number of hours she reported being paid for, without taking into account that her hourly rate took into account all of the time spent on a client – and not just the time spent during the personal training session. She testified that she had difficulty explaining her situation to the Commission. I accept the Appellant's explanation for why her testimony at the hearing differed from her statements to the Commission.

[40] I find that the Appellant has satisfied the second *Faucher* factor.

Issue 3: Unduly limiting chances of going back to work.

[41] For the third *Faucher* factor, the Appellant must demonstrate availability during regular working hours for every working day. It cannot be restricted to irregular hours, such as evenings, nights, weekends and/or school holidays, in order to accommodate a course schedule that significantly limits availability[16].

[42] The Appellant's hours of school were limited to less than 10 hours per week. She was taking one (1) high school credit course. It was entirely online, and she was

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[16] *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).*

free to work at her own pace provided she logged in once every 24 hours. Given the minimal requirements of her course, I accept that the Appellant was available during regular working hours for every working day.

[43] I find that the course was not a personal condition that might have unduly limited her chances of going back to work.

[44] For the reasons set out under Issue 2 above, I also find that the Appellant was not limiting herself to part-time employment. By maintaining her employment tie with X during the temporary lockdown *and* trying to add her own private clients, the Appellant enhanced her chances of obtaining a full-time client roster during the period of the disentitlement.

[45] I find that the Appellant has satisfied the third *Faucher* factor.

So was the Appellant available for work?

[46] Based on my findings on the three *Faucher* factors, the Appellant has shown that she was available for work but unable to find a suitable job while she was taking the course.

Conclusion

[47] The Appellant has proven that she was available for work while taking one (1) high school credit course between April 27, 2021 and June 22, 2021. This means she is **not** disentitled to EI benefits during this period.

[48] The appeal is allowed.

Teresa M. Day

Member, General Division – Employment Insurance Section