



[TRANSLATION]

Citation: *YL v Canada Employment Insurance Commission*, 2022 SST 465

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

## Decision

**Appellant:** Y. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (450731) dated January 18, 2022 (issued by Service Canada)

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**Tribunal member:** Charline Bourque

**Type of hearing:** Videoconference

**Hearing date:** February 28, 2022

**Hearing participant:** Appellant

**Decision date:** March 2, 2022

**File number:** GE-22-514

## **Decision**

[1] The appeal is dismissed.

[2] The Claimant hasn't shown that she was available for work while in school. This means that she can't receive Employment Insurance (EI) benefits.

## **Overview**

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from October 5, 2020, to April 30, 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 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.

[5] The Commission says that the Claimant wasn't available because she was in school full-time.

[6] The Claimant disagrees and says that the Commission was aware that she was a full-time student. The Claimant also says that she was looking for a job and that she, in fact, found a new job. Because of the delay, she hopes not to have to pay back the overpayment, since the Commission was aware of her situation when it granted her benefits.

## **Issue**

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

## Analysis

[8] 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, she has to meet the criteria of both sections to get benefits.

[9] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.<sup>1</sup> The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” means.<sup>2</sup>

[10] Second, the 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.<sup>3</sup> Case law gives three things a claimant has to prove to show that they are “available” in this sense.<sup>4</sup>

[11] Furthermore, with the introduction of EI emergency response benefits, the Act says that a claimant who attends a course, program of instruction or training to which the claimant isn’t referred isn’t entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that, on that day, they were capable of and available for work.<sup>5</sup>

[12] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.<sup>6</sup> This is called “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.

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<sup>1</sup> See section 50(8) of the *Employment Insurance Act* (Act).

<sup>2</sup> See section 9.001 of the *Employment Insurance Regulations*.

<sup>3</sup> See section 18(1)(a) of the Act.

<sup>4</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>5</sup> See section 153.161(1) of the Act.

<sup>6</sup> See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

## **Presuming full-time students aren't available for work**

[13] 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**

[14] 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.

[15] The presumption applies to the Claimant.

### **– The Claimant is a full-time student**

[16] 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.

[17] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working while also in school.<sup>7</sup> Or, she can show that there are exceptional circumstances in her case.<sup>8</sup>

[18] The Claimant says that she worked part-time while in school for a short period. She says that she had been working since September 2020 when her job ended because of the pandemic. She started her police technology training around that time. The Claimant confirms that her work schedule was arranged around her course schedule.

[19] The Commission argues that the Claimant has failed to rebut the presumption of non-availability while taking a full-time course because the facts show that her first intention is to prioritize her non-referred training course; she said this on a number of occasions. Moreover, after applying for benefits, the Claimant reported being in school full-time, that is, 25 hours per week, for the term beginning September 8, 2020, and

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<sup>7</sup> See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

<sup>8</sup> See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

around 15 hours per week as of September 7, 2021. Then, the Claimant herself said that she was available only part-time.

[20] I find that the Claimant hasn't rebutted the presumption that she is unavailable for work. Despite confirming that she would give up her studies for a full-time job in her field, like a customs job, the Claimant mentioned looking for a part-time job and arranging her schedule around her school schedule.

### **Capable of and available for work**

[21] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.<sup>9</sup> Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:<sup>10</sup>

- a) She wanted to go back to work as soon as a suitable job was available.
- b) She made efforts to find a suitable job.
- c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[22] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>11</sup>

#### **– Wanting to go back to work**

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

[24] The Claimant says that she made multiple efforts to find a job. Those efforts led to a part-time job.

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<sup>9</sup> See section 18(1)(a) of the Act.

<sup>10</sup> 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.

<sup>11</sup> See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[25] I take into account the Commission's argument about the Claimant's looking for a higher-paying job than the one she had. But, because of the Claimant's explanations, I don't accept that argument. She explained that she was looking for a part-time, minimum-wage job like the one she found.

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

[26] The Claimant made enough efforts to find a suitable job.

[27] The Claimant confirms that she found a part-time job.

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

[28] The Claimant has set personal conditions that might unduly limit her chances of going back to work.

[29] The Claimant is a full-time student. She is available to work part-time outside her school hours. She wants to finish her training unless she finds a full-time job in her field of study.

[30] Case law says that students aren't available for work when the evidence shows that they are in school full-time.

[31] For this reason, since the Claimant hasn't rebutted the presumption that she is unavailable for work because she is in school full-time, I am of the view that she has set personal conditions might limit her chances of going back to work.

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

[32] Based on my findings on the three factors, I find that the Claimant hasn't shown that she was capable of and available for work but unable to find a suitable job.

**Issue 2: Can the amount payable be written off?**

[33] The Claimant says that she doesn't want to pay back the overpayment, since the Commission had all the information before it when it granted her EI benefits. The

Claimant doesn't understand the Commission's delay in reversing its decision and asking her to repay an overpayment.

[34] First, I note that the Commission hasn't made a decision on the issue of writing off the overpayment, which would allow the Claimant to appeal this decision to the Federal Court if she wants.

[35] Second, I am of the view that I don't have jurisdiction to decide the issue of write-off.

[36] A party who is dissatisfied with a reconsideration decision of the Commission may appeal the decision to the Social Security Tribunal.<sup>12</sup>

[37] But a decision of the Commission made under the Regulations respecting the writing off of any penalty owing, amount payable, or interest accrued on any penalty owing or amount payable isn't subject to review.<sup>13</sup>

[38] So, I find that I don't have jurisdiction to make a decision on the issue of write-off, as requested by the Claimant, because the Act says that the issue of write-off isn't subject to review. This means that the Claimant has to appeal to the Federal Court, since it has jurisdiction to hear this issue.

[39] I understand the Claimant's confusion over the Commission's delay and the hardship it has caused. But my role is to apply the Act; I can't change it just to please the Claimant, who is dissatisfied. The Act sets out specific criteria a claimant has to meet to be entitled to benefits.<sup>14</sup>

[40] Lastly, I wonder why the Commission put a claimant in a financially difficult situation by asking her to pay back amounts that it awarded her when it had all the information it needed to make its decision.

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<sup>12</sup> See section 113 of the Act.

<sup>13</sup> See section 112.1 of the Act.

<sup>14</sup> See *Granger v Commission (CEIC)*, FCA, A-684-85.

[41] The Commission can reconsider its decision, but I find it difficult to understand why it took so long to do so when it had all the necessary information before it from the outset. This has major consequences for a claimant who finds herself having to repay a debt. In my view, the Commission has to consider these points when making its decision on the issue of write-off, which I encourage it to do.

## **Conclusion**

[42] The Claimant hasn't shown that she was available for work within the meaning of the law, since she hasn't rebutted the presumption that she is unavailable for work given that she is in school full-time. Because of this, I find that the Claimant can't receive EI benefits.

[43] In addition, I don't have jurisdiction to decide the issue of writing off the overpayment. But, I encourage the Commission to make a decision on this matter, taking into account the points mentioned earlier.

[44] This means that the appeal is dismissed.

Charline Bourque  
Member, General Division – Employment Insurance Section