Citation: *ND v Canada Employment Insurance Commission*, 2022 SST 244

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Claimant:	N. D.
Commission:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (425872) dated June 24, 2021 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	March 1, 2022
Hearing participant:	
Decision date:	March 24, 2022
File number:	GE-21-2440

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant.

[2] The Claimant wasn't able to work because of a workplace injury. But she would not have been available for work anyway, even if she hadn't been injured. She also hasn't shown that she is available for work. This means that she can't receive Employment Insurance (EI) benefits.

Overview

[3] The Claimant wasn't able to work because of a workplace injury. To be able to receive EI sickness benefits, the Claimant must "otherwise be available for work."[1] In other words, the Claimant's injury has to be the only reason why she wasn't available for work.

[4] The Canada Employment Insurance Commission (Commission) says that the Claimant would not have been available for work anyway, because the Claimant is a full-time student. They say that even after her sickness benefits ended, the Claimant isn't available for work.

[5] 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.

[6] 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 that she is available for work.

[7] The Commission says that the Claimant wasn't otherwise available because she was in school full-time. They also say that she isn't available because she would only accept a job that would allow her to work virtually.

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[1] Section 18(1)(b) of the *Employment Insurance Act* (EI Act) sets out this rule and uses this wording.

[8] The Claimant disagrees and says that she was available for work.

Matters I have to consider first

The Claimant asked me to adjourn (that is, pause) the hearing

[9] The Claimant is appealing the Commission's reconsideration decision. She filed a notice of appeal to the General Division of the Social Security Tribunal (Tribunal) on September 10, 2021. The General Division made a decision that the Claimant appealed to the Appeal Division of the Tribunal.

[10] The Appeal Division decided that the Claimant did not have an opportunity to be heard. For this reason, they allowed the Claimant's appeal and returned it to the General Division. The Appeal Division recommended that the General Division consider the Claimant's preference for type of hearing.

[11] The Claimant originally asked to have her hearing by phone. However, the Tribunal sent her a letter on January 6, 2022, giving her an opportunity to participate in a hearing by questions and answers. The letter explained the process and invited the Claimant to identify any accommodation she needs. It also had a link to the Tribunal's website where the Claimant could get more information including information on how to find a representative. The Claimant did not reply to the Tribunal's letter.

[12] The Claimant had expressed concern about getting correspondence from the Tribunal that didn't have contact names or numbers. The Tribunal sent another letter to the Claimant on January 17, 2022. The letter identified that I would be the Tribunal Member to hear her appeal. It offered the Claimant an opportunity to speak with me to get more information about the hearing. This would include next steps and what she needed to prepare for her appeal. Again, the Claimant did not reply to the letter.

[13] The Tribunal has to conduct its proceedings as informally and quickly as the circumstances and considerations of natural justice permit.[2] The Claimant had not replied to the Tribunal's two letters. Because of this, I scheduled a hearing for March 1,

[2] Section 3(1)(a) of the *Social Security Tribunal Regulations*.

2022, by phone as the Claimant originally asked for. The notice sent to the Claimant on February 7, 2022 gives information on rescheduling or asking to adjourn the hearing.

[14] The Claimant replied on the same date. She said that she is unwell, attached three medical notes and said that she will not be prepared to proceed with the scheduled hearing. She added that she will notify the Tribunal when she can proceed. I am treating this as a request to adjourn the hearing.

[15] Two of the medical notes the Claimant attached to her email do not appear to relate to the current hearing before the General Division. One gives general information about her health. The other says that the Claimant would benefit from having more time and accommodation to file an application to a provincial tribunal. The note doesn't say how the Claimant should be accommodated.

[16] The last medical note is dated January 6, 2022. The Claimant had not previously sent it to the Tribunal. It states that she had a significant fall two weeks earlier. It continues that the Claimant could not type or sit for more than 15 minutes. The Claimant did not update or comment on her medical condition as described in this note. She only said that she is unwell and that she has provided "several" medical notes.

[17] If I were to grant an adjournment, it would be the first for this hearing. However, the Claimant is effectively asking for the hearing to be put off indefinitely. I accept that she has medical conditions. But the medical notes do not give enough detail to conclude that the Claimant is unable to participate in any way at present.

[18] The medical note that refers to the provincial tribunal does refer to an extension of time and an accommodation for that application. However, that note was written around two and a half months ago. And it does not give a timeline for extension or detail what accommodation may be required.

[19] The Claimant had said she needs information in plain language. She said that she does not understand the law, next steps, or how to prepare to speak to the issues in her appeal. However, the Claimant did not accept the offer of a call to talk about these concerns and to talk about her accommodation needs.

[20] The Claimant has not identified how long she needs for an adjournment. She has not identified any accommodation needs. I am not satisfied from the medical notes that her medical conditions prevent her from attending the hearing. For these reasons, the Claimant's request for adjournment is refused.

The Claimant wasn't at the hearing

[21] The Claimant wasn't at the hearing. A hearing can go ahead without the Claimant if the Claimant got the notice of hearing.[3] I think that the Claimant got the notice of hearing because she responded to the notice on the same day the Tribunal sent it. So, the hearing took place when it was scheduled, but without the Claimant.

Issue

[22] Is the Claimant available for work while in school?

Analysis

[23] 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.

[24] 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.[4] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[5] I will look at those criteria below.

[25] 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.[6] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[7] I will look at those factors below.

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[3] Section 12 of the *Social Security Tribunal Regulations* sets out this rule.
[4] See section 50(8) of the EI Act.
[5] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[6] See section 18(1)(a) of the EI Act.
[7] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

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

[27] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[8] 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.

[28] 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 based on the two sections of the law on availability.

Presuming full-time students aren't available for work

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

– Was the Claimant a full-time student?

[30] The Commission spoke to the Claimant about her training program. She said that she was taking an online program from October 21, 2020 to October 31, 2021. Her training was 30 hours a week and she spent 40 hours a week on her studies.

[31] The Claimant later gave the Commission more information about her studies in bi-weekly reports. She reported that for the weeks January 10, 2021 to March 6, 2021, she attended 35 hours of training per week.

[32] I find from the Claimant's statements to the Commission that she likely spent between 30 and 35 hours per week online, and an additional five to 10 hours on other school-related activities. I find the amount of time spent is consistent with full-time study. So, the presumption applies to the Claimant.

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

– The Claimant was a full-time student

[33] The Claimant was 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.

[34] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working full-time while also in school.[9] Or, she can show that there were exceptional circumstances in her case.[10]

[35] The Claimant says that she didn't know that going to school meant that she didn't qualify for EI benefits.

[36] The Commission says the Claimant said she wouldn't be available for work in the same way as before she started school if she wasn't sick. They add that she said wouldn't accept a full-time job if it conflicted with school.

[37] I find that the Claimant hasn't rebutted the presumption of non-availability. She didn't speak about a history of working while going to school. For this reason, I don't find that she has such a history.

[38] As the Commission submits, the Claimant told them that she wasn't available for the same kind of work or under the same conditions as before she started school. She also said that she wouldn't leave her course if it conflicted with a full-time job.

[39] I accept that the Claimant studied online. However, she didn't say, for example, that this would have allowed her to work at any time because of this. She did not say that the training days and hours were flexible. I do not have enough information to find that there are exceptional circumstances in the Claimant's case to rebut the presumption of non-availability.

[40] The Claimant hasn't rebutted the presumption that she was unavailable for work.

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[9] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[10] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

– **The presumption isn't rebutted**

[41] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue on to decide the sections of the law dealing with availability, even though I have already found that the Claimant is presumed to be unavailable.

Reasonable and customary efforts to find a job

[42] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job are reasonable and customary.[11]

[43] The law sets out criteria for me to consider when deciding whether the Claimant's efforts are reasonable and customary.[12] I have to look at whether her efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[44] The Commission says that the Claimant isn't doing enough to try to find a job.

[45] The Commission states that they disentitled the Claimant under section 50 of the Act along with sections 9.001 of the Regulations for failing to prove her availability for work. In their submissions, they say that showing availability requires a claimant to make reasonable and customary efforts to find suitable employment.

[46] The Commission's notes do not reflect that they asked the Claimant to prove her availability by sending them a detailed job search record.

[47] I find a decision of the Appeal Division on disentitlements under section 50 of the Act persuasive. The decision says the Commission can ask a claimant to prove that they have made reasonable and customary efforts to find a job. They can disentitle a claimant for failing to comply with this request. But they have to ask the claimant to

[11] See section 50(8) of the EI Act.
[12] See section 9.001 of the Regulations.

provide this proof and tell the claimant what kind of proof will satisfy their requirements.[13]

[48] I do not find that the Commission asked the Claimant to give them her job search record to prove her availability. For this reason, I do not find that she is disentitled under this part of the law.

Capable of and available for work

[49] It is clear that, if you are sick or injured, you aren't available for work. The law for EI sickness benefits reflects this. However, the law says that, if you are asking for sickness benefits, you must **otherwise** be available for work. This means that the Claimant has to prove that her injury is the only reason why she wasn't available for work.[14]

[50] 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 would have been available for work if it hadn't been for her injury.

[51] To receive EI regular benefits, I have to consider whether the Claimant is capable of and available for work but unable to find a suitable job.[15]

[52] Case law sets out three factors for me to consider when deciding if the Claimant is otherwise available for sickness benefits or available for regular benefits. The Claimant has to prove the following three things:[16]

a) She wants to go back to work as soon as a suitable job is available.

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

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[13] *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688
[14] See section 18(1)(b) of the EI Act.
[15] See section 18(1)(a) of the EI Act.
[16] 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.

c) She hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

[53] 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**

[54] The Claimant hasn't shown that she wants to go back to work as soon as a suitable job is available.

[55] Because the Claimant did not attend the hearing, there isn't much information to show if she wants to go back to work.

[56] When she completed her reports for the period January 10, 2021 to March 6, 2021, the Claimant said that she was not ready, willing and capable of working each day because she is sick. She added that she wasn't available for work due to COVID-19.

[57] In her notice of appeal, the Claimant says that she is available for work. She doesn't give any other details.

[58] The Claimant referred to autoimmune and heart conditions when she asked the Commission to reconsider their decision. She didn't support these statements with medical notes. However, I find this is consistent with her statement that she wasn't available to for work due to COVID-19. As a result, I give the latter statement a lot of weight.

[59] I understand why the Claimant would say she's not available for work because of COVID-19. But, I don't find that this is the attitude of someone who wants to go back to work as soon as a suitable job is available.

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[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.

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

[60] The Claimant hasn't made enough effort to find a suitable job.

[61] The Claimant told the Commission that she was looking for work. Again, she did not give any details. Without more details, I don't find that the Claimant has proven that she has made efforts to find a suitable job.

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

[62] The Claimant has set personal conditions that might have unduly limited her chances of going back to work while she was in school. As of October 30, 2021, this was not the case.

[63] The Commission says the Claimant didn't show she intended to return to work while she was in school. They also say that the Claimant restricted the kind of job she would do.

[64] I find that up to October 29, 2021, the Claimant has set personal conditions that might unduly limit her chances of going back to work. For the time she was in school, the Claimant said she wouldn't accept a job that conflicted with her studies. She said that she spent 40 hours a week on her studies. This was a non-referred program that the Claimant decided to take. So, I find that this might have limited her chances of going back to work if she wasn't sick as well as through the end of the program.

[65] The Claimant told the Commission that she could do a sit-down job that she could do at home. However, I find that this may have been because of her workplace injury. It may also be because of other medical conditions she may have. I find that those are personal conditions, but not ones the Claimant has set. As of October 30, 2021, I don't find that the Claimant set personal conditions that might unduly limit her chances of going back to work.

– **So, would the Claimant have been otherwise available for work, and after that, is she capable of and available for work?**

[66] Based on my findings on the three factors, I find that the Claimant hasn't shown that she would have been available for work. She has also not shown that she is capable of and available for work but unable to find a suitable job.

Conclusion

[67] The Claimant hasn't shown that she would have been otherwise available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI sickness benefits. She also hasn't shown that she is available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI regular benefits.

[68] This means that the appeal is dismissed with modification. To be clear, I don't find that the Claimant is disentitled under subsection section 50 of the EI Act. However, she is disentitled under sections 18(1)(a) and 18(1)(b) of the EI Act.

Audrey Mitchell

Member, General Division – Employment Insurance Section